IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **NO P55 OF 2016**

ON APPEAL FROM THE COURT OF APPEAL
SUPREME COURT OF WESTERN AUSTRALIA

BETWEEN: **JOHN RIZEQ**
Appellant

AND: **THE STATE OF WESTERN AUSTRALIA**
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

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PART I FORM OF SUBMISSIONS

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

PART II BASIS FOR INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the Respondent.

PART IV LEGISLATIVE PROVISIONS

3. The applicable provisions are set out in the Annexure to the Appellant's submissions (**AS**).

PART V ARGUMENT

A. Summary

4. The Appellant was convicted of offences against s 6 of the *Misuse of Drugs Act 1981* (WA) (**WA *Drugs Act***) by majority verdict, as permitted by s 114(2) of the *Criminal Procedure Act 2004* (WA) (**WA *Criminal Procedure Act***). He contends that s 114(2) could not validly apply to his trial, because the trial was in federal jurisdiction and, as a consequence, s 80 of the Constitution required that the jury reach a unanimous verdict.

5. It is common ground that the Appellant's trial was in federal jurisdiction, because he was a resident of New South Wales at the time of his trial and the prosecuting entity was the State of Western Australia. The proceeding was therefore a matter "between a State and a resident of another State", within s 75(iv) of the Constitution.[1] It is also uncontroversial that s 80 of the Constitution, when it applies, requires that a jury reach a unanimous verdict.[2]

6. The Appellant's argument requires the acceptance of two propositions:[3]

   6.1. First, in a trial conducted in federal jurisdiction, the WA *Drugs Act* is converted into a "surrogate federal law" by s 79(1) of the *Judiciary Act*: AS, [28.3]-[28.4].

   6.2. Second, if the WA *Drugs Act* is converted into a surrogate federal law, then this has the consequence that an offence against that Act is an

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1 Reasons below, [136]. *Momcilovic v The Queen* (2011) 245 CLR 1 at 32-3 [9] (French CJ), 81 [136] (Gummow J), 225 [594] (Crennan and Kiefel JJ) (***Momcilovic***).

2 *Cheatle v The Queen* (1993) 177 CLR 541.

3 See also Respondent's submissions (**RS**), [3].

offence against a "law of the Commonwealth" for the purposes of s 80 of the Constitution: AS, [28.5].

7. Neither of those propositions is correct, and accordingly the appeal should be dismissed. In summary, the Commonwealth contends as follows.

8. **Contrary to the second proposition** set out above, s 80 of the Constitution only applies when the relevant offence is created by a Commonwealth law. Here, however, the offence was created by the WA *Drugs Act*, a State Act. The appellant, at the time he committed the relevant acts, did not commit an offence against a law of the Commonwealth and thus s 80 has no application to the trial of that offence.

9. Section 79(1) only applies once a court is exercising federal jurisdiction. However, the criminal offence existed independently of, and prior to the commencement of, court proceedings for enforcement of the criminal law. If s 79(1) had the effect urged by the Appellant, it would therefore be creating a retrospective federal criminal liability. There is nothing in s 79, or its context and purpose, to permit a construction with that effect.

10. **Contrary to the first proposition** set out above, s 79(1) of the *Judiciary Act* does not convert the WA *Drugs Act* into a law of the Commonwealth, such that an offence against the WA *Drugs Act* is now to be regarded as an offence against a Commonwealth law.

10.1. First, s 79 should not be construed as enacting new federal offences, even putting to one side the issue of retrospectivity. The Appellant's argument would subvert the scheme of Pt X of the *Judiciary Act*, which deals specifically with trials and convictions for offences against the laws of the Commonwealth.

10.2. Second, there is no general constitutional power for the Commonwealth, under the guise of s 79(1), to re-enact, as Commonwealth law, State criminal law (or all State substantive law more generally). Section 79(1) is supported in its application to State courts by s 77(iii) and 51(xxxix) of the Constitution, which authorise laws that regulate the exercise of federal jurisdiction. Although regulating the exercise of jurisdiction is not limited to matters of "procedure", it does not extend to laws creating the substantive rights and liabilities of the parties simply by virtue of the fact that the identity of the parties brings the matter within federal jurisdiction.

B. WA *Drugs Act* is not a "law of the Commonwealth" within s 80 Constitution

11. It is convenient to begin with the second proposition underpinning the Appellant's argument set out in [6.2] above; namely, that the conversion of the WA *Drugs Act* into a "surrogate federal law" (which the Commonwealth denies, in Part C below) has the consequence that the WA *Drugs Act* is a "law of the Commonwealth" for the purposes of s 80 of the Constitution.

B.1 Constitution, s 80: "law of the Commonwealth"

12. Section 80 of the Constitution provides that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury".

13. The reference to "law of the Commonwealth" in s 80 of the Constitution means "laws made under the legislative powers of the Commonwealth".[4] A law of the Commonwealth does not include the common law[5] or the Constitution.[6] Nor, self-evidently, does it include a law made by a State Parliament.

14. Rather, an offence is only an offence "against" a law of the Commonwealth if the offence is created by that Commonwealth law.[7]

B.2 A trial of a State offence is not a trial of an offence against a "law of the Commonwealth", even if the State law is applied by s 79 of the Judiciary Act

15. Plainly the WA *Drugs Act* was not "made under the legislative powers of the Commonwealth". It was made by the Parliament of Western Australia. Conversely, although s 79(1) of the *Judiciary Act* is made by the Commonwealth Parliament, a breach of the WA *Drugs Act* cannot constitute an offence "against" s 79(1). That is so even if s 79 had the effect of directing that the WA *Drugs Act* be applied in the Appellant's trial.

16. These points can be demonstrated by considering the chronological sequence of events in this case.

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4 See eg *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 397 [25] (Gleeson CJ and Gummow J, with Hayne J agreeing on this point) (***Re Colina***).

5 See *Western Australia v The Commonwealth (The Native Title Act Case)* (1995) 183 CLR 373 at 487 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

6 *Re Colina* (1999) 200 CLR 386 at 397 [25] (Gleeson CJ and Gummow J, with Hayne J agreeing on this point). See also *Sankey v Whitlam* (1978) 142 CLR 1 at 29-30 (Gibbs ACJ), 72-74 (Stephen J), 91-93 (Mason J), 104-105 (Aickin J).

On decided cases, a law of the Commonwealth Parliament made under s 122 of the Constitution is not a "law of the Commonwealth" for the purposes of s 80 of the Constitution: *R v Bernasconi* (1915) 19 CLR 629 at 635 (Griffiths CJ, with Gavan Duffy and Isaacs JJ agreeing), 637 (Isaacs J). *Bernasconi* has been criticised in later cases, but has not been overruled: see James Stellios, *The Federal Judicature: Chapter III of the Constitution* (2010) at [11.30].

7 See *Luff v McHarg* (1984) 3 FCR 305 at 309 (the Court): an offence against a section means an offence involving contravention of or a failure to comply with that section.

16.1. The WA *Drugs Act* was enacted by the Western Australian Parliament in 1981. It thereafter operated, and presently operates, in that State as a State law. There is no challenge to the validity of the WA *Drugs Act*.

16.2. The Appellant committed offences in July 2012,[8] in contravention of the norm of State law created by the WA *Drugs Act*. At that time he was a resident of New South Wales. However, his residency did not cause the WA *Drugs Act* to be or to become a "law of the Commonwealth" as at July 2012. It remained a law of the State.

16.3. The Appellant (and co-accused) were then charged with offences against the WA *Drugs Act*. These were offences against State law, not Commonwealth law. State authorities lodged in the District Court of Western Australia an indictment containing the charges (being charges for offences against the WA *Drugs Act*), in accordance with the WA *Criminal Procedure Act*.

16.4. In September and October 2013, the Appellant was tried and convicted in the District Court of offences against the WA *Drugs Act*.[9]

16.5. By reason of the Appellant's residence in New South Wales, the proceedings in the District Court were heard and determined in the exercise of federal jurisdiction.

16.6. In that context, the Appellant says that applicable State law — including the WA *Drugs Act* — was "picked up" by s 79 of the *Judiciary Act* and applied as "surrogate federal law". However, even if that proposition were to be accepted, s 79(1) of the *Judiciary Act* only operates once there is a court exercising federal jurisdiction.[10] Thus s 79(1) of the *Judiciary Act* only operated in these proceedings after the Appellant had committed the offence.

16.7. However, on the Appellant's argument, s 79(1) must be regarded as creating a Commonwealth criminal offence, retrospectively, after the Appellant has committed an offence and been charged with an offence against State law.[11]

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8 Reasons below, [10]-[13].

9 Reasons below, [2]-[3].

10 See *Solomons v District Court of New South Wales* (2002) 211 CLR 119 at 134 [23] (***Solomons***): s 79(1) only operates where there is already a court "exercising federal jurisdiction".

11 Thus the Appellant does not appear to contend that he was "immune" from the criminal laws of Western Australia: cf RS, [27]. Rather, he contends that those laws applied to him as federal law because his trial was in federal jurisdiction.

16.8. That analysis cannot be accepted. There is nothing in the text of s 79, or its context and purpose, to permit a construction with that effect.[12]

17. In summary, the reference in s 80 of the Constitution to offences "against the laws of the Commonwealth" means offences created by Commonwealth law. Even if the WA *Drugs Act* were "picked up" and applied at the Appellant's trial as surrogate federal law by s 79(1) of the *Judiciary Act* (contrary to the Commonwealth's submissions in Part C below), that State offence is not created by Commonwealth law. The Appellant did not commit an offence "against" s 79(1) of the *Judiciary Act* or any other Commonwealth law. Therefore, s 80 of the Constitution does not apply.

C. WA *Drugs Act* is not converted into a "surrogate federal law" by s 79(1) *Judiciary Act*

18. The other proposition underpinning the Appellant's argument is that, in a criminal trial conducted in federal jurisdiction, the law to be applied by the court (including the substantive offence) is converted into "surrogate federal law" by s 79(1) of the *Judiciary Act*. That proposition is also incorrect.

C.1 Identifying the applicable law in federal cases

19. Section 39 of the *Judiciary Act* confers federal jurisdiction on the District Court of Western Australia, subject to specific exceptions. That conferral of jurisdiction included the authority to try the Appellant in the exercise of s 75(iv) jurisdiction. By reason of s 39(1) and (2) of the *Judiciary Act*, the District Court could only determine this s 75(iv) matter in the exercise of federal jurisdiction.[13]

20. Here, the relevant "matter" is whether the Appellant has committed an offence against the WA *Drugs Act* and, if so, the appropriate sentence.[14] This matter includes within it the relevant substantive law required for its resolution. That is, even if the "matter" is in federal jurisdiction (by reason of diversity of the parties), no part of this matter involves the application of federal criminal law.

21. The Appellant invokes two principles in an attempt to explain why (on his argument) the *WA Drugs Act* is converted into federal law.

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[12] The Commonwealth has legislative power to create retrospective criminal laws; however, an intention to do so would need to be most clearly expressed: see eg *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459 at 478 [46]-[47] (the Court), referring to imposing offences by reference to a "statutory fiction".

[13] Section 39 excludes any concurrent State jurisdiction to determine matters coming within the description of matters in ss 75 and 76 of the Constitution: *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 325 ALR 168 at 180 [53]; cf RS, [35].

[14] See the "tripartite inquiry" from *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372 at 405-6 [62] (Gaudron and Gummow JJ).

22. First, he contends (correctly) that the States do not have any legislative power with respect to the exercise of federal judicial power:[15] AS, [36], [54]. For that reason, this Court has held that the State laws on which s 79(1) of the *Judiciary Act* operates do not apply of their own force to federal jurisdiction, but apply as federal law.[16] However, those statements do not determine what laws s 79 operates on, or what is meant by s 79 "picking up" or "applying" those laws.

23. Second, the Appellant observes (again correctly) that a Commonwealth law may create an offence against Commonwealth law by applying the text of a State law: see AS, [58]-[61]. However, it is necessary in each case to interpret the Commonwealth law to determine whether it does so.[17] In this case, it is necessary to construe s 79 to determine whether it operates in that way in relation to s 6 of the WA *Drugs Act* as applied to the Appellant.

24. The Commonwealth contends that s 79(1) did not convert s 6 of the WA *Drugs Act* into a surrogate federal law, for two reasons:

24.1. First, properly construed s 79 does not purport to re-enact the substantive law of the States as federal law.

24.2. Second, the Commonwealth does not have the legislative power to convert any and all substantive law creating rights and liabilities in a s 75(iv) matter into federal law.

C.2 Construction of s 79

25. Section 79(1) of the *Judiciary Act* provides:

> The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable. [emphasis added]

26. There are various statements in the authorities to the effect that s 79(1) of the *Judiciary Act* "picks up" State laws and applies them as Commonwealth laws. However, s 79 itself does not itself use the words "picks up" or "applies". Rather, it refers to State laws being "binding on" courts exercising federal jurisdiction. The terms "picks up" and "applies" are judicial language used to describe what s 79 does; but there is some ambiguity in what is meant by s 79 "picking up" and "applying" State laws.

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15 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 406 [230] (Gummow J); *Alqudsi v The Queen* (2016) 332 ALR 20 at 67 [171] (Nettle and Gordon JJ). Reasons below, [143].

16 See eg *Solomons* (2002) 211 CLR 119 at 134 [21] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ); *Gordon v Tolcher* (2006) 231 CLR 334 at 345 [30] (the Court). Reasons below, [145].

17 *Mok v Director of Public Prosecutions (NSW)* (2016) 330 ALR 201 at 214 [36] (French CJ and Bell J).

26.1. In some contexts, it appears that this language was intended to mean that s 79 re-enacted a State law as surrogate federal law.[18]

26.2. In other contexts, it appears that this language was intended to mean that s 79 directs the court to the applicable substantive law to be applied, without going so far as to "transmute" that law into surrogate federal law.[19]

27. The Appellant's argument can only succeed if the first of those approaches is correct, namely that s 79(1) operated in this case by re-enacting the offences against the WA *Drugs Act* as surrogate federal laws: see AS, [54].

28. The Commonwealth contends that the latter approach is to be preferred, both as a matter of statutory construction and as a matter of constitutional power. (This is on the assumption that s 79 operates on all laws in a proceeding, including the substantive law: see further C.4 below.) That is, as Gleeson CJ, Gaudron and Gummow JJ observed in *Edensor Nominees*, ss 79 and 80 of the *Judiciary Act* "direct where [a court exercising federal jurisdiction] shall go for the substantive law".[20] Section 79 provides for the "identification of the independently existing substantive law for the determination of the controversy".[21] It does not create — by enacting as surrogate federal law — the substantive law. It was in that context that their Honours stated that s 79 "operated to 'pick up' the laws of Victoria". Notably, their Honours did not describe the State laws in issue in that case as "surrogate federal laws".[22]

29. Consistently with that submission, in *Momcilovic* (which was also in s 75(iv) jurisdiction) various judges held that Ms Momcilovic was convicted and sentenced "under State law".[23] The statements in *Austral Pacific*[24] and *CSL*

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18 Eg *Austral Pacific Group Limited v Airservices Australia* (2000) 203 CLR 136 at 143 [15] (Gleeson CJ, Gummow and Hayne JJ) (***Austral Pacific***); *Ruhani v Director of Police* (2005) 222 CLR 489 at 499 [8] (Gleeson CJ).

19 Eg *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 586-8 [53]-[58] (Gleeson CJ, Gaudron and Gummow JJ, Hayne and Callinan JJ agreeing) (***Edensor Nominees***); *South Australia v Commonwealth* (1962) 108 CLR 130 at 140 (Dixon J).

20 *Edensor Nominees* (2001) 204 CLR 559 at 587 [57] (Gleeson CJ, Gaudron and Gummow JJ, Hayne and Callinan JJ agreeing); *South Australia v The Commonwealth* (1962) 108 CLR 130 at 140 (Dixon CJ).

21 *Edensor Nominees* (2001) 204 CLR 559 at 587 [57] (Gleeson CJ, Gaudron and Gummow JJ, Hayne and Callinan JJ agreeing).

22 *Edensor Nominees* (2001) 204 CLR 559 at 587-8 [58]; cf McHugh J, who did use that phrase and stated that the relevant sections of the State Corporations Law "applied as federal law": at 609-10 [130].

23 (2011) 245 CLR 1 at 122 [277] (Gummow J); see also 73-4 [109] (French CJ), 239-40 [656]-[657] (Crennan and Kiefel JJ). Reasons below, [149]-[151].

24 (2000) 203 CLR 136 at 154 [51]: McHugh J stated that ss 79 and 80 of the *Judiciary Act* facilitate the exercise of federal jurisdiction "by the application" of a coherent body of law consisting of the laws of the Commonwealth and, subject to the Constitution and contrary Commonwealth laws, the laws of the

Australia Pty Ltd v Formosa[25] cited at AS, [51] are consistent with, and should be understood by reference to, the remarks of the plurality in *Edensor Nominees*.

30. This is not to deny the capacity of the Commonwealth Parliament to adopt State offences as federal offences in areas within the Commonwealth Parliament's legislative competence. However, the Parliament is unlikely to have done so without a clear indication of that intention.[26]

10 31. There are two principal reasons that establish that, as a matter of construction, s 79(1) of the *Judiciary Act* does not purport to re-enact State criminal offences as surrogate federal law.

(a) Section 79(1) only operates once a court is exercising federal jurisdiction

32. The first reason is that s 79(1) of the *Judiciary Act* only operates once a court is seized of a matter in federal jurisdiction. As the majority in *Solomons*[27] observed, s 79 operates only where there is already a court "exercising federal jurisdiction", "exercising" being used in the present continuous tense. This manner of operation strongly indicates that s 79(1) does not pick up and apply as surrogate federal law State criminal offences, because the norms created by those criminal offences exist prior to, and independently of, the commencement of court proceedings.

(b) Appellant's argument would subvert the role of Part X of the *Judiciary Act*

33. The second reason is that the Appellant's argument would subvert the operation of Part X of the *Judiciary Act*, particularly s 68, which makes express provision for the trial and conviction on indictment for offences against the "laws of the Commonwealth".

33.1. Section 68(2) of the *Judiciary Act* confers "like jurisdiction" on State and Territory courts with respect to "the examination and commitment for trial on indictment", and the "trial and conviction on indictment", of persons charged with offences "against the laws of the Commonwealth". This "like

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States and Territories, and the common law of Australia as modified by the Constitution and by statutory law.

25 (2009) 261 ALR 441 at 447 [24]: the Court of Appeal stated that the law to be applied in the operation of federal jurisdiction may not be a law passed by the Commonwealth Parliament, but it will be a law (whether Commonwealth, State or general law) which operates in federal jurisdiction "by virtue of" a Commonwealth law; namely, either ss 79 or 80 of the *Judiciary Act*.

26 Lindell, *Cowen and Zines' Federal Jurisdiction in Australia* (4th ed, 2016) at 383.

27 (2002) 211 CLR 119 at 134 [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

jurisdiction" was expressly made subject to s 80 of the Constitution (albeit such express provision is of course strictly unnecessary).

33.2. Section 68(1) of the *Judiciary Act* relevantly applies "so far as they are applicable" State and Territory "procedure" for "examination and commitment for trial on indictment", and "trial and conviction on indictment" to persons charged with offences against the laws of the Commonwealth. Notably, s 68(1) does not purport to operate on State criminal offences.

33.3. In addition, s 69(1) of the *Judiciary Act* provides that indictable offences against the laws of the Commonwealth "shall be prosecuted by indictment in the name of the Attorney-General of the Commonwealth or of such other person as the Governor-General appoints in that behalf."

34. It is not possible to reconcile these specific provisions with the Appellant's contention that s 79(1) of the *Judiciary Act* converts State criminal offences in a s 75(iv) matter into surrogate federal laws.

35. The express conferral of jurisdiction by s 68(2), and application of State procedures by s 68(1), within a Part devoted to criminal jurisdiction, establishes that s 68 of the *Judiciary Act* is the primary provision dealing with the trial (including the trial on indictment) of offences against Commonwealth laws. Section 68 of the *Judiciary Act* is based on ss 2 and 3 of the *Punishment of Offences Act 1901* (Cth), which was a temporary (and self-contained) measure conferring federal jurisdiction in criminal matters on State courts and applying State laws of a procedural character to the trial on indictment of persons charged with offences against the laws of the Commonwealth.[28] This legislative history shows that ss 79 and 80 of the *Judiciary Act* have only a supplementary role in respect of the trial of offences against Commonwealth laws.[29]

36. It would be odd, to say the least, if:

36.1. jurisdiction was conferred on a State court by s 39(2) of the *Judiciary Act* by virtue of s 75(iv) of the Constitution;

36.2. then the State law was converted into a law of the Commonwealth by s 79 of the *Judiciary Act* (which is the Appellant's argument);

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[28] *R v LK* (2010) 241 CLR 177 at 188 [14] (French CJ); *R v Murphy* (1985) 158 CLR 596 at 617 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

[29] Although there is an overlap between the provisions, s 79(1) is not impliedly excluded by s 68(1) in federal criminal cases: see eg *R v Gee* (2003) 212 CLR 230 at 246 [28] (McHugh and Gummow JJ); *R v ONA* (2009) 24 VR 197 at 214 [82], 222 [112]-[113] (Neave JA); *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at 9 [15] (Allsop P). Similarly, s 68(2) of the *Judiciary Act* overlaps with, and does not exclude, the conferral of jurisdiction in s 39 of that Act: see eg *R v Bull* (1974) 131 CLR 203 at 258 (Gibbs J), 275 (Mason J).

36.3. then s 68(2) conferred jurisdiction on the State court, because the offence is now an offence against a law of the Commonwealth (even though jurisdiction had already been conferred by s 39(2)); and

36.4. then s 68(1) picked up and applied applicable State laws (even though applicable State laws had already been applied by s 79).

37. It would be equally odd if there were offences against a law of the Commonwealth (as a consequence of ss 39 and 79 of the *Judiciary Act*) that stood outside Part X.

38. Moreover, the *Judiciary Act*, as enacted in 1903, provided in s 69(1) for the mechanism by which a person would be prosecuted for an indictable offence against a Commonwealth law. As already noted, s 79(1) of the *Judiciary Act* only operates once a court is exercising federal jurisdiction, so the conversion of State offences into federal offences could only happen after a person had been charged. On the Applicant's argument, State indictable offences would, since 1903, have been converted into federal indictable offences. However, it would not have been possible to comply with s 69 of the *Judiciary Act* in respect of those offences because the charge would have been laid in accordance with State law before s 79(1) was engaged.[30] This anomaly also indicates that the Appellant's argument is incorrect as a matter of construction.

39. In short, it would subvert the scheme established by the *Judiciary Act* if s 79(1) were to convert all State offences that arose for determination in federal jurisdiction into offences against the laws of the Commonwealth. Either those Commonwealth offences would have to stand outside the specific regime for federal criminal jurisdiction for which Part X provides; or they would fall within Part X but anomalies would arise. The Commonwealth contends no such result was intended, reinforcing the proposition that s 79 is not to be construed as enacting Commonwealth criminal offences.

C.3 Constitutional limitations on s 79 re-enacting State substantive criminal laws

40. Even if it were open to construe s 79 of the *Judiciary Act* as converting substantive law into surrogate federal law, that construction would conflict with the limits on Commonwealth legislative power.

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[30] Section 69 has since been supplemented by the *Director of Public Prosecutions Act 1983* (Cth). The Commonwealth Director prosecutes offences on indictment in his or her own official name (s 9(1)), and can delegate their prosecutorial functions to "a person authorised by, or under, a law of a State ... to institute or conduct prosecutions for offences against the laws of the State ..." (s 31(1B)(c)). A delegated function of this kind is "deemed to have been performed or exercised by" the Commonwealth Director (s 31(2)). These provisions do not affect arguments concerning the construction of the *Judiciary Act* as a whole and by reference to its legislative history.

(a) Section 79(1) is supported by Constitution, ss 77 and 51(xxxix)

41. Section 79(1) of the *Judiciary Act* applies to every exercise of federal jurisdiction; that is, to all of the matters described in ss 75 and 76 of the Constitution.

41.1. With some categories of federal jurisdiction, the description of the relevant "matter" has a practical connection with the Commonwealth's heads of legislative power under ss 51, 52 and 122 of the Constitution that would support laws altering the substantive rights and liabilities of the parties. For example, if a matter arises under a Commonwealth law (s 76(ii)), then the Commonwealth Parliament will often have legislative power to alter the substantive rights in the proceeding. Similarly, if a matter is one to which the Commonwealth is a party (s 75(iii)), there will be a broad legislative power to determine the Commonwealth's rights and liabilities pursuant to ss 61 and 51(xxxix) of the Constitution.[31]

41.2. However, with other categories of federal jurisdiction, the description of the relevant "matter" may not have any connection with the Commonwealth's heads of legislative power under ss 51, 52 and 122. For example, the substantive rights and liabilities in a matter between a State and a resident of another State (s 75(iv)) will often be created by State law or the general law.[32] Any connection with the Commonwealth legislative power under ss 51, 52 and 122 of the Constitution in a given s 75(iv) matter would be only accidental.

42. Accordingly, the relevant heads of power to support s 79(1) of the *Judiciary Act* (in its application in State courts) are ss 77(iii) and 51(xxxix) of the Constitution.[33] These powers enable the Commonwealth to confer federal jurisdiction on State courts and to regulate the exercise of jurisdiction.[34] Section 79(1) of the *Judiciary Act* "implements, or at least is consistent with, what in any event would follow from the operation of Ch III and covering cl 5 of

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31 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 263 (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ): the Commonwealth Parliament "has full power to make laws governing the liability of the Commonwealth".

32 *Edensor Nominees* (2001) 204 CLR 559 at 586 [53] (Gleeson CJ, Gaudron and Gummow JJ, with Hayne and Callinan JJ agreeing on this point): in s 75(iii) and (iv) matters, the identity of the parties "may be a sufficient animating circumstance without any federal law supplying the substantive rights and liabilities which are tendered for adjudication."

33 *Edensor Nominees* (2001) 204 CLR 559 at 587 [57] (Gleeson CJ, Gaudron and Gummow JJ).

34 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151 (the Court): s 51(xxxix) gives the Commonwealth Parliament power to legislate in respect of some matters which are incidental to the exercise of federal jurisdiction. See also *Griffin v South Australia* (1924) 35 CLR 200 at 205 (Isaacs ACJ); *Commonwealth v Limerick Steamship Co and Kidman* (1924) 35 CLR 69 at 105 (Isaacs and Rich JJ).

the Constitution"[35] (although there is scope for the Commonwealth Parliament to select a different choice of law rule in appropriate cases).[36]

(b) Sections 77 and 51(xxxix) do not confer power to create the substantive rights and liabilities of the parties

43. However, the powers in ss 77(iii) and 51(xxxix) of the Constitution do not carry with them any general legislative power to create the substantive rights and liabilities of the parties, simply because a matter is in federal jurisdiction.[37]

10 43.1. The scope of ss 77 and 51(xxxix) does not correspond exactly with the difference between "substance" and "procedure"[38] – there may be some matters that can be regulated under s 51(xxxix) that might not strictly be "procedural", such as limitation periods on bringing a proceeding in federal jurisdiction.[39]

43.2. Nevertheless, the conferral and regulation of the exercise of federal jurisdiction is distinct from creating the substantive rights and liabilities that
20 are determined in the exercise of that jurisdiction. As noted by the plurality in *Edensor Nominees*,[40] there is a distinction between laws that (a) create a norm of legal liability (in this case, the offences against the WA *Drugs Act*); (b) create a remedy in respect of contravention of that norm; and (c)

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35 *Edensor Nominees* (2001) 204 CLR 559 at 587 [57] (Gleeson CJ, Gaudron and Gummow JJ).

36 Cf RS [44](a). Choice of law rules are supported by s 51(xxv): *Breavington v Godleman* (1989)
30 169 CLR 41 at 79 (Mason CJ). For example, the Commonwealth might select the applicable law for an action on the high seas: cf *Blunden v The Commonwealth* (2003) 218 CLR 330, or when the same subject-matter is claimed under the laws of different States: see Constitution, s 76(iv). Section 118 of the Constitution does not compel the direct application of State law (cf RS, [65]), because s 118 "does not require certainty and uniformity of legal outcomes in federal jurisdiction or otherwise": *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at 399 [20].

37 *Re Grinter; Ex parte Hall* (2004) 28 WAR 427 at 434 [16] (Malcolm CJ): "[i]t may be accepted that the Commonwealth lacks the constitutional power to enact the substantive law required to resolve all disputes arising in the Federal jurisdiction." See also P D Phillips, "Choice of Law in Federal Jurisdiction" (1961) 3 *Melbourne University Law Review* 170 at 187-188; Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (4th ed 2016) at 351-352.

40 38 Cf Reasons below, [145].

39 Justice McHugh held that s 79(1) could pick up (at least some) "substantive" laws, but cannot apply laws that go beyond what is necessary to facilitate the grant of federal judicial power: *Edensor Nominees* (2001) 204 CLR 559 at 612 [137]. Section 79(1) operates on laws that are "substantive" for some purposes, such as limitation periods (see eg *Bate v International Computers (Aust) Pty Ltd* (1984) 2 FCR 526; *Torrens Aloha v Citibank* (1997) 72 FCR 581); laws for pre-judgment interest (*Centrepoint Freeholds Pty Ltd v TN Lucas Pty Ltd* (1985) 6 FCR 133); laws providing for security for costs (*Cameron's Unit Services Pty Ltd v Kevin R Whelpton & Associates Pty Ltd* (1986) 13 FCR 46); remedies under the Corporations Law of a State (*Edensor Nominees* (2004) 204 CLR 559); laws for apportioning liability between defendants (cf *Latteria Holdings Pty Ltd v Corcoran Parker Pty Ltd* (2014) 224 FCR 519); and an order for sale of property under s 66G of the *Conveyancing Act 1903* (NSW)
50 (*Coshott v Prentice* (2014) 221 FCR 450). For a convenient list of the laws on which s 79(1) has been held to operate, see Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (4th ed 2016) at 362-363.

40 See (2001) 204 CLR 559 at 590 [66] (Gleeson CJ, Gaudron and Gummow JJ).

confer jurisdiction on a court to determine whether the norm has been contravened and, if so, what remedy should be awarded.

44. For those reasons, the rights and liabilities of the parties in a s 75(iv) matter are determined by applying "the independently existing substantive law" (as discussed at [28] above).[41]

45. The fact that the substantive law exists in federal cases independently of the operation of ss 79 and 80 of the *Judiciary Act* is further demonstrated by cases where the courts have found a constitutional inconsistency between Commonwealth and State criminal offences in a particular case (such as *Dickson v The Queen*[42]). The operation of s 109 of the Constitution is anterior to any commencement of a proceeding in a court[43] and so operates prior to the application of s 79, which applies only once proceedings have been commenced.

46. This argument can be put another way. Section 79(1) of the *Judiciary Act* (as an incidental measure to the exercise of federal jurisdiction) does not purport to transform the relevant "matter". The nature of that matter exists, separately from s 79(1).

46.1. In this s 75(iv) matter, the relevant "matter" is whether the Appellant has breached a State Act (the WA *Drugs Act*) and, if so, what penalty should be imposed: see [20] above.

46.2. However, if the Appellant were correct, then s 79(1) of the *Judiciary Act* would convert any offence under State law into an offence under a surrogate federal law where the matter is in federal jurisdiction. (In fact, it would seem to follow that, on the Appellant's argument, <u>any</u> substantive law would be converted by s 79(1) into surrogate federal law in a matter in federal jurisdiction.) Accordingly, the Appellant's argument would turn all federal cases, of whatever description, into matters arising under a Commonwealth law (and hence within the conferral of jurisdiction under s 76(ii)), because the substantive rights and liabilities would owe their

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41 *Edensor Nominees* (2001) 204 CLR 559 at 587 [55] (Gleeson CJ, Gaudron and Gummow JJ, with Hayne and Callinan JJ agreeing on this point); cf 609-10 [130]-[131] (McHugh J).

42 (2010) 241 CLR 491 (***Dickson***). *Dickson* held that the conspiracy offence in s 321 of the *Crimes Act 1958* (Vic) was inconsistent with the conspiracy offence in s 11.5 of the *Criminal Code Act 1995* (Cth).

43 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 271 [62] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ). It is not correct to say that the s 109 analysis in *Momcilovic* would have been misplaced if the Appellant was correct: contra RS, [77]. Section 79(1) does not pick up a State law that is inoperative by reason of s 109 inconsistency. Such a State law "would have ceased to be a law of a State within the meaning of s 79": *Agtrack* at 271 [61] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

existence to a Commonwealth law,[44] namely, s 79(1). It cannot be correct that s 79(1) of the *Judiciary Act* would transform the nature of the "matter" in this way.

47. Consistently with these arguments, it is well recognised in the United States that the fact that a case or controversy is in federal jurisdiction does not mean that the substantive rights and liabilities are determined by federal law. To the contrary, the premise underlying the "*Erie* doctrine"[45] is that the federal government does not have power to determine the substantive law in proceedings in diversity jurisdiction.[46] Although there are important differences between Australian and American law (including that diversity jurisdiction in the United States does not extend to criminal cases[47]), the American position to this extent supports the Commonwealth's argument that the conferral of federal jurisdiction, by itself, does not confer power also to create the substantive rights and liabilities of the parties.

(c) Cases relied on by the Appellant do not support his argument

48. The Commonwealth's arguments are not precluded by the cases referred to by the Appellant.

48.1. It has not been necessary to date for this Court to determine the universe of State laws that are applied by s 79(1) of the *Judiciary Act*. In particular, it has not been necessary for this Court to determine whether s 79(1) purports to apply *all* substantive State laws as surrogate federal laws. The cases cited at AS, [34] do not, and do not purport to, revolve that issue, and are consistent with the Commonwealth's position that s 79(1) would only apply as surrogate federal laws State laws that regulate the exercise of jurisdiction.[48]

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44 On the test for when a matter "arises under" a Commonwealth law, see eg *LNC Industries Ltd v BMW (Aust) Ltd* (1983) 151 CLR 575 at 581 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

45 *Erie Railroad Co v Tompkins* 304 US 64 (1938), overruling *Swift v Tyson* 41 US 1 (1842). *Erie* held that, when a case in federal jurisdiction requires ruling on a matter of "general" (ie non-federal) common law, the federal court is limited to applying or predicting the common law. See generally Erwin Chemerinsky, *Federal Jurisdiction* (7th ed 2016) at 347-365.

46 *Erie* 304 US 64 at 78 (1938): "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general'."

47 See eg *Chisholm v Georgia* 2 US 419 at 431-432 (1793); *Wisconsin v Pelican Insurance Co* 127 US 265 at 289-290, 298 (1888). However, that American position is not applicable to s 75(iv): *Momcilovic* (2011) 245 CLR 1 at 81 [137] (Gummow J). Four justices in *Momcilovic* held that the matter came within s 75(iv): at 32-3 [9] (French CJ), 81 [136] (Gummow J), 225 [594] (Crennan and Kiefel JJ).

A second important difference is that there are distinct federal and state common laws in the United States, but a single national common law in Australia: see *Lipohar v The Queen* (1999) 200 CLR 485 at 507-8 [51]-[52] (Gaudron, Gummow and Hayne JJ).

48 The Appellant cites two cases dealing with limitation periods (*Pedersen v Young* (1964) 110 CLR 162 and *John Robertson & Co Ltd (In Liq) v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 (***John***

48.2. Similarly, the cases cited in AS, [36][49] establish only that the Commonwealth has exclusive power with respect to the exercise of federal jurisdiction, as stated in [22] above. It does not follow that the Commonwealth has power to create the entirety of the substantive rights and liabilities at issue in any case in federal jurisdiction.

48.3. Equally, the cases referred to at AS, [51][50] are consistent with s 79 of the *Judiciary Act* simply directing where the courts are to go for the substantive law, without purporting to re-enact that substantive law as surrogate federal law.

49. This lack of legislative power in ss 77 and 51(xxxix) contrasts with the circumstances in *Pinkstone v The Queen*[51] and *Mok v Director of Public Prosecutions (NSW),*[52] cited by the Appellant at AS, [58]-[61]. In those cases a Commonwealth law (not s 79 of the *Judiciary Act*) had created a criminal offence by reference to the content of State criminal law. The statutory text and context were different from the present case. In addition, in each case the Commonwealth had clear legislative power to create the relevant offence, and State offences did not (and could not) apply of their own force. These cases do not suggest that s 79(1) of the *Judiciary Act* could validly re-enact any and all State criminal law as surrogate federal law.

50. *Pinkstone* concerned the operation of s 4(1) of the *Commonwealth Places (Application of Laws) Act 1970* (Cth) (***Commonwealth Places Act***). That section applied the law of the State to a Commonwealth place within the State. Gummow and McHugh JJ held that s 80 of the Constitution applies to a trial on

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Robertson)), and two cases dealing with a right to proceed against a government (*Bass v Permanent Trustee Pty Ltd* (1999) 198 CLR 334 at 352 [35] and *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 53-4 [44]). Those laws regulate the exercise of jurisdiction, and can validly by picked up by a Commonwealth law enacted under ss 77 and 51(xxxix) of the Constitution. The other case cited by the Appellant (*Solomons*) only stated that State laws "upon which s 79 operates" do not apply of their own force in federal jurisdiction.

[49] *Northern Territory v GPAO* (1999) 196 CLR 553 at 628 [195] (McHugh and Callinan JJ); *Austral Pacific* (2000) 203 CLR 136 at 154-5 [51]-[52] (McHugh J); *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 53-4 [44]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 364-5 [78], 367 [82] (McHugh J), 406 [230] (Gummow J); *Alqudsi v The Queen* (2016) 332 ALR 20 at 67 [169], [171] (Nettle and Gordon JJ).

The Appellant also cites *Edensor Nominees* (2001) 204 CLR 559 at 587 [57], 591-2 [68] (Gleeson CJ, Gaudron and Gummow JJ). However, those passages make a different point, that s 79 may make applicable to a federal court a State law that, on its terms, would only apply in a State court.

[50] *Austral Pacific* (2000) 203 CLR 136 at 154 [51]; and *CSL Australia Pty Ltd v Formosa* (2009) 261 ALR 441 at 447 [24]. See footnotes 24 and 25, above.

[51] (2004) 219 CLR 444.

[52] (2016) 330 ALR 201.

indictment for a State criminal offence as applied in a Commonwealth place by the *Commonwealth Places Act.*[53] However, several points may be noted.

50.1. First, the text of s 4(1) was in materially different terms from the text of s 79. Section 4(1) provided that the "provisions of the laws of a State ... apply, or shall be deemed to have applied" to each Commonwealth place within the State. The language of *application* is different from the language of s 79, which renders States laws "binding on Courts". Further, s 4(1) expressly contemplated that it may have a retrospective effect.

50.2. Second, the Commonwealth has legislative power with respect to Commonwealth places (Constitution, s 52(i)), so there was comprehensive legislative power for the Commonwealth to re-enact any and all State criminal offences as Commonwealth offences in respect of Commonwealth places. In contrast, and as discussed further in Part C.4, below, the Commonwealth does not have a general legislative power over criminal law in circumstances where the offender is resident in a different State from the prosecuting State.

50.3. Finally, it may be noted that the Commonwealth's legislative power was exclusive — State criminal laws cannot apply of their own force in a Commonwealth place. Thus if s 4(1) were not construed as re-enacting the content of State law as "surrogate federal law", there would be no relevant law and the purpose of s 4(1) would miscarry.

51. *Mok* concerned s 89(4) the *Service and Execution of Process Act 1992* (Cth) (**SEPA 1992**). That Act applied as a federal law State offences for escaping lawful custody to the interstate transfer of persons. Again, however, *Mok* does not require the conclusion that s 79 operates in the same way.

51.1. Again, the text of s 89(4) of SEPA 1992 was different from that of s 79. Section 89(4) provided that the law in force in the place of issue of a warrant, relating to the liability of a person who escapes lawful custody, "applies to a person being taken to the place of issue" in compliance with an order made under SEPA 1992. Again the language of *application* is different from the language in s 79.[54]

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53 *Pinkstone* (2004) 219 CLR 444 at 458-9 [38], [41].

54 See *Mok* (2016) 330 ALR 201 at 218 [56] (Kiefel and Keane JJ): authorities on s 79 were of "limited assistance" because of the difference in the language of the provisions in issue.

51.2. And again, the Commonwealth had ample legislative power to create a Commonwealth criminal offence in this situation, pursuant to s 51(xxiv) and (xxxix) of the Constitution.

51.3. Finally, s 8(4) of the SEPA 1992 expressly excluded any State law with respect to the service or execution in another State of a process to which SEPA 1992 applied, thus generating a s 109 inconsistency that rendered any State law invalid in so far as it purported to apply to the matters covered by SEPA 1992. So again, if s 89(4) did not enact the content of State law as a "surrogate federal law" there would be no relevant law and the scheme established by SEPA 1992 would miscarry.[55]

51.4. It may also be noted that Gordon J held that s 80 of the Constitution applied to an offence under s 89(4) of SEPA 1992. That conclusion is uncontroversial given that s 89(4) was regarded by the entire Court as enacting a Commonwealth offence, albeit one based on a text from another source, namely State law. It does not aid the Appellant.

C.4 Direct application of State criminal offences?

52. For the reasons set out in Pts C.2 and C.3 above, the Commonwealth contends that s 79(1) of the *Judiciary Act* did not convert the WA *Drugs Act* into a surrogate federal law. At most, the analysis in *Edensor Nominees* would suggest that ss 79(1) and 80 of the *Judiciary Act* direct the court where to go for the substantive law in a federal matter, without re-enacting that substantive law as federal law: see [28] above. That operation of ss 79(1) and 80 does not convert the WA *Drugs Act* into a "law of the Commonwealth" for the purposes of s 80 of the Constitution.

53. In the alternative to the above, the Commonwealth contends that s 79 of the *Judiciary Act* does not operate at all on those State and Territory laws that create the substantive rights and duties that underlie the matter. Rather, State criminal offences apply of their own force in federal diversity jurisdiction. Although this approach is analytically distinct, it leads to the same result in substance as the analysis in *Edensor Nominees*.

54. On this alternative analysis, s 79(1) of the *Judiciary Act* only operates on laws regulating the exercise of federal jurisdiction (and would re-enact those laws as surrogate federal law). Section 79(1) would not operate at all on the

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[55] It may also be noted that, in *Mok*, the escape took place in a Commonwealth place (Tullamarine Airport), so the Commonwealth had exclusive legislative power under s 52(i)).

substantive laws creating rights and liabilities of the parties, independent of the conferral of jurisdiction.

55. This alternative analysis is supported by the approach adverted to by French CJ in *Momcilovic*[56] (noting that his Honour did not express a concluded view, and that Gummow and Hayne JJ appear to have taken a different view.[57]) French CJ quoted Windeyer J in *Felton v Mulligan*[58] to the effect that the existence of federal jurisdiction "depends upon the grant of an authority to adjudicate rather than upon the law to be applied or the subject of adjudication".

56. In *Anderson v Eric Anderson Radio & TV Pty Ltd*,[59] Kitto J explained the consequences of a matter being determined in federal jurisdiction to similar effect:

> [A]ll that is meant by saying that a court has federal jurisdiction in a particular matter is that the court's authority to adjudicate upon the matter is a part of the judicial power of the federation. 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. The concept of federal jurisdiction does not imply the existence of a single body of law in force throughout the Commonwealth. The claim, that "matter" which the action brings before the State court, is necessarily a claim to enforce a right of action alleged to exist in the State.

57. Thus, French CJ observed, a "matter" between a State and a resident of another State is a matter of federal jurisdiction notwithstanding that it arises under a State law or the common law or both. "In that event the 'matter' may be said to be defined by reference to the rights or liabilities to be determined under the relevant State law and/or the common law."[60]

58. French CJ further observed that the position of a State court exercising diversity jurisdiction in a matter arising under a State law may be similar to the position of a court exercising federal jurisdiction as well as accrued jurisdiction. In such cases "non-federal law is part of the single, composite body of law applicable alike to cases determined in the exercise of federal jurisdiction and to cases determined in the exercise of non-federal jurisdiction."[61]

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56 (2011) 245 CLR 1.

57 *Momcilovic* (2011) 245 CLR 1 at 86 [146] (points (viii) and (xii)) (Gummow J), 123 [280] (Hayne J).

58 (1971) 124 CLR 367 at 393, approved in *Fencott v Muller* (1983) 152 CLR 570 at 606 (Mason, Murphy, Brennan and Deane JJ).

59 (1965) 114 CLR 20 at 30.

60 *Momcilovic* (2011) 245 CLR 1 at 69 [99].

61 *Momcilovic* (2011) 245 CLR 1 at 70 [100]. His Honour continued: "In the context of diversity jurisdiction ... the content of the jurisdiction of State courts remains the same, but the source is different and the

59. On this approach the WA District Court was applying State law when it convicted the Appellant. The *WA Drugs Act* was not "picked up" by s 79, but operated of its own force. There is no question of any offence against the law of the Commonwealth, and s 80 of the Constitution had no application.

60. The Commonwealth submits that French CJ's analysis is to be preferred; and further that his Honour's analysis must be correct if s 79(1) is construed as a provision that re-enacts as Commonwealth laws all those laws to which it applies.

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60.1. As noted in Part C.1 above, the Commonwealth has legislative power (and indeed exclusive power) to regulate the exercise of federal jurisdiction, but does not have a general power to determine any and all of the substantive rights of the parties in a s 75(iv) matter. Accordingly, if s 79(1) of the *Judiciary Act* operates by re-enacting State provisions as Commonwealth laws, then it must follow that it does not operate at all on laws creating substantive rights and liabilities.

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60.2. Although s 79(1) generally picks up State laws with their meaning unchanged,[62] s 79(1) does alter the meaning of State laws to the extent that s 79(1) permits State laws directed to State courts to be applied in and by federal courts.[63] In this respect, the effect of s 79(1) is to re-enact the content of State laws as Commonwealth laws.

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61. This analysis would apply to any court exercising federal jurisdiction, not just State courts.[64] For example, when a federal court determines State claims in the exercise of accrued jurisdiction,[65] the substantive State law creating rights and obligations applies of its own force as part of the relevant "matter". Equally, when a federal court hears a matter arising under the Constitution (s 76(i)) that raises claims under the general law or State law,[66] the substantive law creating rights and obligations applies of its own force. In each case, the fact that the

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conditions and regulations imposed by s 39(2) are attached", quoting Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia,* (3rd ed, 2002) at 90.

62 *Pedersen v Young* (1964) 110 CLR 162 at 165 (Kitto J).

63 See eg *John Robertson* (1973) 129 CLR 65 at 88 (Gibbs J), 95 (Mason J); *Edensor Nominees* (2001) 204 CLR 559 at 591-2 [68]-[69] (Gleeson CJ, Gaudron and Gummow JJ).

64 Hence the criticisms of French CJ by Will Bateman and James Stellios are misplaced, especially points 3-5: see "Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights" (2012) 36 *Melbourne University Law Review* 1 at 38-39.

65 See eg *Westpac Banking Corporation v Patterson* (1999) 95 FCR 59, concerning claims under both s 52 of the *Trade Practices Act 1974* (Cth) and the *Contracts Review Act 1980* (NSW).

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66 For example, the Federal Court would have jurisdiction under s 39B(1)(b) of the *Judiciary Act* to determine claims of the sort raised in *British American Tobacco* (2003) 217 CLR 30 (an action for moneys had and received to recover payments of an invalid tax).

federal court has jurisdiction (in the sense of authority to decide) to determine those claims does not mean that State laws creating substantive rights and liabilities must be applied as Commonwealth laws.

62. Thus here, the prosecution of the appellant for an offence against the WA *Drugs Act* gave rise to a distinct matter, namely the determination of the liability of the appellant under State law. That matter existed independently of the institution of the judicial proceedings and included within it the substantive law required for its resolution. That substantive law applied as State law in the proceeding to determine the matter, even though the matter was one determined in an exercise of federal jurisdiction. The fact that the matter was being determined in an exercise of federal jurisdiction did not transform the substantive law to be applied into federal law.

63. On that basis, s 79 did not pick up and apply the WA *Drugs Act* to the Appellant's trial, and thus s 80 of the Constitution had no application.

PART VI ESTIMATED TIME

64. The Commonwealth estimates that the presentation of its oral argument will take approximately 20 minutes.

Dated: 16 December 2016

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