IN THE HIGH COURT OF AUSTRALIA
PERTH OFFICE OF THE REGISTRY

No P55 of 2016

JOHN RIZEQ
Appellant

THE STATE OF WESTERN AUSTRALIA
Respondent

SUBMISSIONS ON BEHALF OF ATTORNEY GENERAL FOR THE STATE OF NEW SOUTH WALES, INTERVENING

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 for the State of New South Wales ("**NSW**") intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth) ("**Judiciary Act**").

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT PROVISIONS

4. The applicable constitutional and statutory provisions are set out in the Annexure to the Appellant's submissions.

PART V: SUBMISSIONS

5. Subject to the Commonwealth Constitution, the Parliament of the State of Western Australia has the power to make laws for the peace, order, and good government of that State: Constitution Act 1889 (WA) s 2; Commonwealth Constitution ss 106-107.

6. That power prima facie includes the power to prescribe norms of conduct for residents of States other than Western Australia who are situate in Western Australia.

Date of document: 16 December 2016
Filed for: Attorney General for the State of New South Wales, Intervening
Filed by: Lea Armstrong, Crown Solicitor
Level 5, 60-70 Elizabeth Street
SYDNEY NSW 2000
Telephone: (02) 9224 5247
Fax: (02) 9224 5255
Ref: 201603745 T01 Paolo Buchberger

7. Although – by reason of s 39 of the Judiciary Act and ss 75(iv) and 77 of the Commonwealth Constitution – federal (diversity) jurisdiction will inevitably be invoked when criminal proceedings in relation to an alleged offence against the law of Western Australia are commenced against a resident of another State, it does not follow from this that the otherwise plenary power of the Western Australian Parliament is withdrawn in relation to non-Western Australian residents or that Western Australian law ceases to have any relevant effect of its own force once federal diversity jurisdiction is invoked: cf Appellant's Submissions ("**AS**") at [57].

8. Rather, the correct view is that explained by Professor Zines in Cowen and Zines's Federal Jurisdiction in Australia (3rd ed, 2002) at 90 namely that when federal diversity jurisdiction is invoked in a State court:

> The *content* of the jurisdiction of the State courts remains the same, but the *source* is different and the conditions and regulations imposed by s 39(2) [of the Judiciary Act] are attached [emphasis in original].

This passage was quoted with approval by French CJ in Momcilovic v The Queen (2011) 245 CLR 1 at 69 [100].

9. In other words, although jurisdiction (in the sense of the authority to decide) will be provided by the Commonwealth Constitution and s 39 of the Judiciary Act in "diversity" matters, the law applicable to the determination of such matters does not change simply because federal jurisdiction rather than State jurisdiction is invoked.

10. As Kitto J put it in Anderson v Eric Anderson Radio & TV (1965) 114 CLR 20 at 30:

> 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.

11. The above analysis is not defeated by s 79 of the Judiciary Act.

12. That section is properly understood as being "supplementary" (see the heading to Part XI of the Judiciary Act) to laws, including State laws, which otherwise apply of their own force to matters in federal jurisdiction. Its principal operation is to fill gaps in the law which would otherwise exist in connection with the determination of a matter in federal jurisdiction so as to create a "coherent body of law": see Northern Territory v GPAO (1999) 196 CLR 553 at 588 [80] per Gleeson CJ and Gummow J.

13. Section 79 of the Judiciary Act should not be understood as purporting to disapply State laws which are capable of applying of their own force before picking those same laws up and applying them as "surrogate federal laws".

14. Adopting such a construction would be inconsistent with the text of s 79 which is focused on ensuring that State and Territory law is "binding" on courts exercising federal jurisdiction. Where a State law is already "binding" of its own force, there is no room for s 79 to operate further. Instead, in such circumstances, s 79 is properly seen as declaratory of the position that already ensues under the Commonwealth Constitution (see ASIC v Edensor (2001) 204 CLR 559 ("**Edensor**") at 587 [57]; Federated Sawmill v Alexander (1912) 15 CLR 308 at 313 per Griffith CJ) rather than as being intended to convert already binding State laws into binding surrogate federal laws.

15. Reading s 79 in this manner is also consistent with the constitutional division of legislative power between the Commonwealth and the States.

16. Section 79 of the Judiciary Act is principally supported by s 51(xxxix) of the Commonwealth Constitution: see Edensor at 587 [57]. That placitum empowers the Commonwealth Parliament to make laws with respect to "matters incidental to the execution of any power vested by [the Commonwealth] Constitution ... in the Federal Judicature".

17. Whatever the breadth of this head of power, it does not confer a plenary power on the Commonwealth Parliament to prescribe norms of conduct for residents of one State who are situate in other States or empower the Commonwealth Parliament to disapply laws of that nature when federal jurisdiction is invoked. Instead, s 51(xxxix) is focused on dealing with things "arising in the course of exercising judicial power, something attendant upon or incidental to the fulfilment of powers truly belonging to the judicature" (R v Federal Court of Bankruptcy (1938) 59 CLR 556 at 587 per Dixon and Evatt JJ) rather than on changing the nature of the pre-existing controversy that led to federal judicial power being invoked.

18. The cases relied on by the Appellant (see AS at [34]) do not support a different approach. In each of those cases, it was assumed, held or obvious that particular State laws could not relevantly apply of their own force in federal jurisdiction. For example:

    (a) in Pedersen v Young (1964) 110 CLR 162, it was regarded as "obvious that [a] Queensland enactment could not of its own force limit the time within which an action may be commenced in [the High] Court" (see Kitto J at 165) with the result that the Queensland limitation statute could only apply to proceedings commenced in the High Court if picked up and applied as a surrogate federal law under the Judiciary Act;

    (b) a similar result ensued in John Robertson & Co v Ferguson (1973) 129 CLR 65 ("**Ferguson**") in relation to a South Australian limitation statute (see Menzies J at 79, Walsh J at 84, Gibbs J at 87-88, Mason J at 93);

(c) Bass v Permanent Trustee (1999) 198 CLR 334 concerned a provision of the Crown Proceedings Act 1988 (NSW) which could not of its own force apply to proceedings in the Federal Court and which, in any event, was inconsistent with s 64 of the Judiciary Act (see Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 352 [33]-[36] citing Ferguson);

(d) Solomons v District Court (NSW) (2002) 211 CLR 119 concerned a NSW law relating to costs in criminal cases which did not purport to apply of its own force to Commonwealth offences: see 130 [9]). In considering whether that law was picked up in federal jurisdiction by s 79 of the Judiciary Act, five members of this Court observed (at [21]; emphasis added) that:

> It is well settled … that State laws upon which s 79 operates do not thereby apply of their own force in the exercise of federal jurisdiction.

While that much may be accepted, the quoted passage is not authority for the broader proposition relied upon by the Appellant (at [34]) to the effect that s 79 "operates" on all relevant State law including that which is capable of applying by its own force;

(e) in British American Tobacco v Western Australia (2003) 217 CLR 30, State law was not "engage[d]" "for the determination of the rights and liabilities" there in issue: see 54 [44].

19. In this way, none of the cases relied upon by the Appellant support the broad proposition that the Appellant advances in this Court (AS at [34]) as an essential element of his argument namely that State law cannot, in any circumstances, apply of its own force to matters being determined in federal jurisdiction.

20. The correct view is that expressed by Mason, Murphy, Brennan and Deane JJ in Fencott v Muller (1983) 152 CLR 570 at 607:

> Subject to any contrary provision made by federal law and subject to the limitation upon the capacity of non-federal laws to affect federal courts, 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.

21. The Misuse of Drugs Act 1981 (WA) applied of its own force to the Appellant when he was in Western Australia on 16 July 2012.

22. The justiciable controversy as to whether the Appellant committed an offence against that Act on that date did not transform into a different – federal law – controversy merely because criminal proceedings against the Appellant were commenced in federal jurisdiction.

23. Rather, the Appellant's trial remained a trial concerning whether he committed an offence against the Misuse of Drugs Act 1981 (WA).

24. It follows that the Appellant's trial was not a trial "of any offence against any law of the Commonwealth" within the meaning of s 80 of the Commonwealth Constitution with the result that that section did not apply to the Appellant's trial.

25. The Appellant's submissions to the contrary should be rejected. The appeal should be dismissed.

PART VI: TIME ESTIMATE

26. NSW estimates that no more than fifteen minutes will be required for the presentation of oral argument.

Date: 16 December 2016

M G Sexton SC SG
Ph: (02) 9231-9440
Fax: (02) 9231-9444
Michael_Sexton@agd.nsw.gov.au

Scott Robertson
Ph: (02) 8227-4402
Fax: (02) 9101-9495
chambers@scottrobertson.com.au