IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P55 of 2016

BETWEEN:

JOHN RIZEQ
Applicant

and

THE STATE OF WESTERN AUSTRALIA
Respondent

SUBMISSIONS FOR THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

PART I: Internet publication

1. This submission is in a form suitable for publication on the Internet.

PART II: Basis of intervention

2. The Attorney-General for the State of Queensland intervenes in these proceedings pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART III: Reasons why leave to intervene should be granted

3. Not applicable.

PART IV: Statutory provisions

4. The applicable constitutional and statutory provisions are reproduced in the Annexure to the appellant's submissions.

Intervener's submissions

Filed on behalf of the Attorney-General for the State of Queensland
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PART V: Submissions

Summary

5. The appellant, a resident of New South Wales, was tried for an offence against s 6(1) of the *Misuse of Drugs Act 2004* (WA) in the District Court of Western Australia. In accordance with s 114(2) of the *Criminal Procedure Act 2004* (WA), he was convicted by way of a majority verdict.

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6. Because the appellant was a resident of New South Wales, the District Court of Western Australia exercised federal jurisdiction when deciding the charge against him.[1]

7. This appeal turns on whether s 79 of the *Judiciary Act 1903* (Cth) operated to engage and apply s 114(2) of the *Criminal Procedure Act 2004* (WA) to the appellant's trial in the District Court of Western Australia, or whether s 80 of the *Constitution* 'otherwise provided' by requiring that the jury's verdict be unanimous.[2] Section 80 will have 'otherwise provided' only if the appellant was being tried for an offence against a 'law of the Commonwealth'.

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8. The appellant contends that he was tried for an offence against a 'law of the Commonwealth' within the meaning of s 80, because s 79 of the *Judiciary Act* operated to engage s 6(1) of the *Misuse of Drugs Act 2004* (WA) and apply it as federal law.

9. Respectfully, that contention should be rejected. Section 79 does not operate to apply, as federal law, State laws creating criminal norms of conduct.

10. The Attorney-General submits that s 79 is properly construed as having a 'dual operation', by which it:

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(a) converts into 'federal law' those State laws which relate to the court's 'authority to decide' (because State laws of that kind cannot otherwise apply to a court exercising federal jurisdiction); and

(b) in relation to other State laws, merely directs the Court to apply that independently existing body of statute law.

11. The second aspect of s 79's operation reflects what is, in any event, the effect of chapter III of the *Constitution*, by virtue of which the conferral of federal jurisdiction carries with it the authority to apply State laws creating norms of conduct.

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[1] This follows from s 75(iv) of the *Constitution*, s 39 of the *Judiciary Act 1903* (Cth) and *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*'), in which it was held that a criminal prosecution brought by a State against a resident of another State was a 'matter' of the kind referred to in s 75(iv) of the *Constitution*: at 32 [6] (French CJ), 80-82 [134]-[139] (Gummow J), 123 [208] (Hayne J), 225 [594] (Crennan and Kiefel JJ).

[2] *Cheatle v The Queen* (1993) 177 CLR 541, 562 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

12. The Attorney-General submits that this interpretation of s 79 follows from the following constitutional considerations:

(a) the Commonwealth's exclusive legislative power with respect to federal jurisdiction, found in ss 76, 77 and 51(xxxix), is limited to conferring, defining, investing and regulating federal jurisdiction;

(b) the Commonwealth must rely on its other, limited and generally non-exclusive, heads of legislative power to enact laws creating norms of conduct;

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(c) contrary to the appellant's submissions,[3] the exclusivity of Commonwealth legislative power with respect to federal jurisdiction therefore does not support the conclusion that the *Misuse of Drugs Act* cannot apply of its own force in federal jurisdiction; and

(d) chapter III of the *Constitution* requires that the grant of federal diversity jurisdiction to the Western Australian courts carried with it the authority to apply the *Misuse of Drugs Act* when determining the charge against the appellant.

20 ***Statement of argument***

(a) The scope of the Commonwealth's exclusive legislative power with respect to federal jurisdiction

13. The appellant contends that State laws, including State laws creating norms of conduct, do not apply of their own force to matters within federal jurisdiction because 'it is within the exclusive power of the Commonwealth Parliament to legislate for federal jurisdiction'.[4]

30 14. Respectfully, that submission misunderstands the scope of the Commonwealth's exclusive legislative powers in chapter III of the *Constitution*.

15. The Commonwealth's powers with respect to conferring, defining and investing federal jurisdiction are found in ss 76 and 77 of the *Constitution*. Those powers impliedly carry within them 'everything which is incidental to the main purpose of [the] power'.[5] Further, s 51(xxxix) expressly gives the Commonwealth the power to make laws with respect to 'matters incidental to the execution of any power vested by this Constitution in the Parliament or … in the Federal Judicature'.

40 16. Those legislative powers, which hinge upon the concept of 'jurisdiction', do not support the making of laws creating norms of conduct. That they do not do so is clear once attention is directed to the distinction between 'jurisdiction' and 'federal jurisdiction', on the one hand, and 'the law to be applied', on the other.

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[3] Appellant's submissions, 7-8 [35]-[37].
[4] Appellant's submissions, 7-8 [36].
[5] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 405-406 [228] (Gummow J) (*'APLA'*), quoting *Le Mesurier v Connor* (1929) 42 CLR 481, 497 (Knox CJ, Rich and Dixon JJ).

17. 'Jurisdiction' is a '"generic term" generally signifying authority to adjudicate'.[6] 'Federal jurisdiction' is 'the authority to adjudicate derived from the Commonwealth Constitution and laws', as opposed to State jurisdiction which is 'the authority which State Courts possess to adjudicate under the State Constitution and laws'.[7]

18. The authority of a court to adjudicate is to be distinguished from the subject matter of adjudication and the law to be applied in making that adjudication. In *Felton v Mulligan*, Windeyer J held that:[8]

> 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.

19. Sections 76 and 77, and in this connection, s 51(xxxix), are concerned with the grant of authority to decide and matters incidental to that grant.[9] They do not confer power to make the law to be applied.

20. It is uncontroversial that the legislative powers in ss 76 and 77, including their implied incidental aspect, are exclusive of State legislative power.[10] States cannot confer jurisdiction on a federal court, or withdraw federal jurisdiction from a State or federal court.

21. The exclusive character of ss 76 and 77 does not require the conclusion that s 51(xxxix) is also, in this regard, exclusive.[11] The reason State legislation cannot *regulate* the exercise of federal jurisdiction is that to do so would impermissibly deal with the exercise of the judicial power of another polity.[12] It is for that reason that State legislation may not 'limit the exercise of federal jurisdiction'[13] or 'control or regulate the exercise of federal jurisdiction.'[14] As Nettle and Gordon JJ held recently in *Alqudsi v The Queen*, 'it is for the Commonwealth Parliament to provide for and regulate the exercise of federal jurisdiction, not the States'.[15]

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[6] *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 570 [2] (Gleeson CJ, Gaudron and Gummow JJ) (*'Edensor'*), quoting *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142 (Isaacs J). See also *Lorenzo v Carey* (1921) 29 CLR 243, 251 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

[7] *Edensor* (2001) 204 CLR 559, 570 [3] (Gleeson CJ, Gaudron and Gummow JJ), quoting *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142 (Isaacs J).

[8] *Felton v Mulligan* (1971) 124 CLR 367, 393 (Windeyer J). As French CJ noted in *Momcilovic* (2011) 245 CLR 1, 69 [99], that passage was approved by a majority of this Court in *Fencott v Muller* (1983) 152 CLR 570, 606 (Mason, Murphy, Brennan and Deane JJ).

[9] *APLA* (2005) 224 CLR 322, 407 [233] (Gummow J).

[10] *APLA* (2005) 224 CLR 322, 406 [229] (Gummow J). See also *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 618 [20] (Gleeson CJ, Gummow and Hayne JJ); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 540 [3] (Gleeson CJ), 546 [26] (Gaudron J), 557-558 [58] (McHugh J), 575 [111] (Gummow and Hayne JJ).

[11] Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 32-35.

[12] Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 35. See also *R v Todoroski* (2010) 267 ALR 593, 594-595 [8] (Allsop P).

[13] *Edensor* (2001) 204 CLR 559, 588 [59] (Gleeson CJ, Gaudron and Gummow JJ).

[14] *R v Gee* (2003) 212 CLR 230, 265 [100] (Kirby J).

[15] *Alqudsi v The Queen* (2016) 332 ALR 20, 67 [171]; 90 ALJR 711, 749 [171] (Nettle and Gordon JJ).

22. Accordingly, State laws that are directed to regulating the exercise of State jurisdiction by State courts (such as s 114(2) of the *Criminal Procedure Act*) cannot apply of their own force where a State court is exercising federal jurisdiction. For this reason, and as explained below, s 79 of the *Judiciary Act* will engage laws of this kind and apply them 'as federal law',[16] unless 'otherwise provided by the Constitution or the laws of the Commonwealth'. In this sense, s 79 does 'prevent lacunae occurring'.[17]

23. The appellant submits that this Court 'has consistently stated that a State law cannot apply of its own force in federal jurisdiction'.[18] With respect, the authorities do not support a proposition of that breadth. Rather, the authorities he cites[19] reinforce the proposition that it is only those State laws relating to jurisdiction which cannot apply of their own force in federal jurisdiction.

24. *Pederson v Young*[20] and *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*[21] each concerned limitations periods which barred the remedy.[22] In *Pederson*, Kitto J said 'It is obvious that the Queensland enactment could not of its own force limit the time within which an action may be commenced in this Court',[23] which a number of judges reiterated in *John Robertson*.[24] Limitations periods of that kind are clearly related to the 'authority to decide', notwithstanding that they may be classed as 'substantive' in the context of questions about choice of law.[25]

25. *British American Tobacco Australia Ltd v Western Australia*[26] concerned s 6 of the *Crown Suits Act 1947* (WA), which provided that no right of action lay against the Crown unless the party proposing to take action gave written notice containing certain information within a specified time. Such a provision does, in some respects, go to the existence of 'rights'.[27] However, McHugh, Gummow and Hayne JJ held that limitation periods, including s 6, did not apply of their own force in federal jurisdiction because to do so would be inconsistent with the grant of federal jurisdiction.[28]

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[16] *Pederson v Young* (1964) 110 CLR 162, 165 (Kitto J); *Solomons v District Court (NSW)* (2002) 211 CLR 119, 134 [21] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ) ('*Solomons*').
[17] Cf Appellant's submissions, 10 [49].
[18] Appellant's submissions, 7 [34].
[19] Appellant's submissions, 7 [34].
[20] (1964) 110 CLR 162.
[21] (1973) 129 CLR 65.
[22] Cf Graeme Hill and Andrew Beech, '"Picking up" State and Territory laws under s 79 of the Judiciary Act – three questions' (2005) 27 *Australian Bar Review* 25, 30.
[23] *Pederson v Young* (1964) 110 CLR 162, 165 (Kitto J). See also at 167 (Menzies J).
[24] *John Robertson & Co Ltd (In liq) v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65, 79 (Menzies J), 84 (Walsh J), 87 (Gibbs J), 93 (Mason J).
[25] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 544 [100] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) ('the application of any limitation period … would be taken to be a question of substance not procedure'), 574 [193] (Callinan J). For application of this obiter in lower courts, see, for eg, *Garsec Pty Ltd v Sultan of Brunei* (2008) 250 ALR 682, 712 [142] (Campbell JA, Hodgson JA agreeing); *Fleming v Marshall* (2011) 279 ALR 737, 747 [46] (Macfarlan JA).
[26] (2003) 217 CLR 30.
[27] Cf *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265, 277 (Gummow J).
[28] *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 54 [44], 90 [172] (Callinan J agreeing). See also at 45-46 [15]-[16] (Gleeson CJ).

26. The conclusion in *Bass v Permanent Trustee Co Ltd*,[29] reached without explanation, that s 5(2) of the *Crown Proceedings Act 1988* (NSW), could not apply of its own force in federal jurisdiction, is consistent with the above analysis.

27. What these cases demonstrate, therefore, is that State laws which relate to the 'authority to decide', or which would regulate the exercise of jurisdiction, cannot operate of their own force in federal jurisdiction. Some laws of that kind will bear a double character and be 'substantive' in the sense of creating or extinguishing rights and liabilities.[30] The authorities do not suggest, however, that State laws creating criminal norms of conduct cannot apply of their own force in federal jurisdiction.

(b) Commonwealth laws creating criminal norms of conduct must be supported by another head of power

28. The exclusive legislative powers in ss 76, 77 and 51(xxxix) of the *Constitution* are concerned with conferring, defining, investing and regulating 'jurisdiction', not with 'the law to be applied'. They do not enable the Commonwealth to enact laws creating norms of conduct, unconnected to any other head of legislative power, 'whenever and merely' because a court exercised federal jurisdiction.[31]

29. Commonwealth legislation creating rights and liabilities, including criminal norms of conduct, must therefore be supported by another head of power. With certain exceptions, those other heads of legislative power are not exclusive.

30. The exclusivity of the Commonwealth's legislative power in relation to federal jurisdiction therefore does not support the appellant's contention that State criminal laws cannot apply of their own force in federal jurisdiction, but may apply only via the operation of a Commonwealth Act.[32] If it did, then in situations where there was no relevant Commonwealth head of legislative power, or simply no relevant Commonwealth Act, there would be *no* law that could be applied by a court exercising federal jurisdiction. That would have the absurd consequence that defendants would be able to escape criminal liability for certain State offences by moving interstate prior to a prosecution being commenced.

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[29] *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 352 [35] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[30] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 165 (Dixon J).

[31] Cf Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 352. See also Justice Bradley Selway, 'The Australian "Single Law Area"' (2003) 29 *Monash University Law Review* 30, 36-37; Graeme Hill and Andrew Beech, '"Picking up" State and Territory laws under s 79 of the Judiciary Act – three questions' (2005) 27 *Australian Bar Review* 25, 30-33.

[32] Cf Appellant's submissions, 7-8 [35]-[37].

(c) The appellant's reliance on *Pinkstone v The Queen*[33] and *Mok v Director of Public Prosecutions (NSW)*[34] is misplaced

31. For those reasons, there is no useful analogy to be drawn between ss 77 and 51(xxxix), and the Commonwealth's legislative power with respect to Commonwealth places in s 52(i) of the *Constitution*.[35] It is true that both legislative powers are exclusive. But unlike the chapter III powers, s 52(i) allows the Commonwealth to create rights and liabilities, including criminal norms of conduct. Those norms apply within a territorial area within which State law has no operation.[36]

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32. Hence in *Pinkstone*, the *Misuse of Drugs Act* did not apply of its own force to conduct in Perth Airport. Instead, the *Misuse of Drugs Act* was applied as a 'surrogate federal law' by s 4(1) of the *Commonwealth Places (Application of Laws) Act 1970* (Cth) ('*CPAL Act*'). By this mechanism, the Commonwealth *CPAL Act* provided the norm of conduct applying in the airport. The trial of a person for an offence against that norm was a trial for 'an offence against a law of the Commonwealth' for the purposes of s 80 of the *Constitution*.[37]

33. *Mok* also involved conduct in a Commonwealth place, being Tullamarine Airport in
20 Melbourne. That conduct was said to constitute an offence against s 310D of the *Crimes Act 1900* (NSW), of escaping from lawful custody. Because the conduct occurred in a Commonwealth place, s 310D could not operate of its own force.[38] Instead, it was applied by s 89(4) of the *Service and Execution of Process Act 1992* (Cth) ('*SEPA*'). Section 89(4) applied the law relating to the liability of a person escaping lawful custody, in force in the place where the warrant was issued (in the case of *Mok*, New South Wales), to a person being taken to that place under *SEPA*.[39] As in *Pinkstone*, the law creating the norm of conduct was a law of the Commonwealth Parliament (in this case, *SEPA*). Justice Gordon said that a consequence of a State criminal law being applied as a 'surrogate federal law' by *SEPA* was that a trial on
30 indictment for an offence must comply with s 80 of the *Constitution*.[40]

34. In contrast, the *Misuse of Drugs Act* can and did apply at the place where Mr Rizeq committed the offence of which he was convicted. The Act, as a State Act, provided the norm of conduct which Mr Rizeq was said to breach. It did not intrude into an area of exclusive Commonwealth legislative power. For the reasons outlined below, chapter III of the *Constitution* required that the Act apply of its own force in federal jurisdiction.

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[33] (2004) 219 CLR 444 ('*Pinkstone*').
[34] (2016) 330 ALR 201; 90 ALJR 506 ('*Mok*').
[35] Cf Appellant's submissions, 11 [57].
[36] *Pinkstone* (2004) 219 CLR 444, 457 [33] (McHugh and Gummow JJ).
[37] *Pinkstone* (2004) 219 CLR 444, 458 [38], 459 [41] (McHugh and Gummow JJ).
[38] *Mok* (2016) 330 ALR 201, 209 [19]; 90 ALJR 506, 514 [19] (French CJ and Bell J).
[39] Unlike in *Pinkstone*, Victorian law would not apply despite *CPAL*, as s 8(4) of *SEPA* expressly applied the law of the arresting State to the exclusion of the law of the State in which the offence of escaping from lawful custody took place.
[40] *Mok* (2016) 330 ALR 201, 225 [99]; 90 ALJR 506, 526 [99] (Gordon J).

35. In *Mok,* French CJ and Bell J referred to s 79 of the *Judiciary Act* as an example of a Commonwealth law giving effect to State laws 'as laws of the Commonwealth'.[41] Similarly, Gordon J referred to s 79 as creating 'surrogate federal law'.[42] By these references, however, their Honours said nothing about *which* laws s 79 will convert into federal law.[43]

(d) State laws creating norms of conduct apply of their own force in federal jurisdiction

36. The Attorney-General adopts the submissions of the respondent[44] to the effect that State laws apply directly to matters within federal diversity jurisdiction. The Attorney-General further submits that, for the following additional reasons, the grant of federal jurisdiction necessarily carries with it the authority to apply State law creating norms of conduct.

37. In the context of determining questions of jurisdiction, '[t]he central task is to identify the justiciable controversy'.[45]

38. Here, the Western Australian Parliament, by enacting the *Misuse of Drugs Act,* which provided for criminal offences related to the supply of certain drugs, created criminal norms of conduct applicable in Western Australia. Those criminal norms of conduct exist under Western Australian law both before, and independently of whether, a court is seized of jurisdiction to determine a matter concerning a breach of those laws.

39. As a result of the appellant's activities in Western Australia, a controversy arose regarding whether the appellant's activities infringed those norms of conduct. That controversy supplied 'an appropriate subject or "matter" upon which "judicial power" or "jurisdiction" may operate'.[46]

40. Because the appellant was a resident of New South Wales at the time proceedings were commenced, the matter was one of the kind identified in s 75(iv) of the *Constitution.* It was therefore a matter in relation to which the *Constitution* itself confers 'authority to decide' on the High Court. For that reason, and irrespective of any Commonwealth legislation (or the lack of any such legislation), the High Court had authority to quell the controversy as to whether the appellant had infringed s 6(1) of the *Misuse of Drugs Act.*

41. It follows that, absent s 79, if the proceeding had been commenced in the original jurisdiction of the High Court, this Court would have had authority to apply the *Misuse of Drugs Act* as a State law whilst exercising federal jurisdiction. It is submitted that

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[41] *Mok* (2016) 330 ALR 201, 214 [35]; 90 ALJR 506 [35] (French CJ and Bell J).
[42] *Mok* (2016) 330 ALR 201, 222-223 [84]; 90 ALJR 506, 524 [84] (Gordon J).
[43] Cf Appellant's submissions, 11-12 [57]-[61].
[44] Respondent's submissions, 4-6 [21]-[27].
[45] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 585 [139] (Gummow and Hayne JJ), quoted with approval in *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, 262 [29] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).
[46] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 166 (Dixon J).

that position could not be altered by any Commonwealth law, and would pertain irrespective of the place in which the matter was heard and decided.[47]

42. As the present facts show, it is inevitable that matters 'between States, or between residents of different States, or between a State and a resident of another State' will often involve only State law. The inclusion of s 75(iv) in the *Constitution* therefore requires the conclusion that courts exercising federal diversity jurisdiction will at times apply State law,[48] despite the fact that the authority to decide such matters derives from a federal source.

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43. Any other conclusion would allow the Commonwealth Parliament to stultify the High Court's diversity jurisdiction by failing to legislate to 'convert' the State law into a federal law. That would be contrary to the purpose of s 75, by virtue of which the *Constitution* itself grants to the High Court original jurisdiction over certain matters. Further, the conferral of jurisdiction in s 75(iv) itself would be futile in circumstances where the Commonwealth had no legislative power to give effect to such a 'conversion'.[49]

44. Accordingly, where the Parliament invests a State court with 'federal jurisdiction' in
20 relation to the matters mentioned in s 75(iv), that grant of jurisdiction necessarily carries with it the authority to apply State laws, directly and of their own force.[50] This is an implication which is 'logically [and] practically'[51] necessary and 'securely based'.[52]

45. The example of accrued jurisdiction suggests that the same result applies wherever federal jurisdiction is exercised, and not only in relation to diversity jurisdiction. A court may exercise accrued jurisdiction '[i]f the substratum of fact which gives rise to a matter in federal jurisdiction cannot be effectively disposed of without the application of State law'.[53] That jurisdiction accrues to the Court 'because there is a matter, in relation to which federal jurisdiction has been attracted, to be resolved.'[54] That is, the accrued
30 jurisdiction 'derives from the language in which Ch III of the Constitution defines the heads of federal jurisdiction'[55] – the constitutional mandate to determine 'matters' – and

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[47] *Commonwealth v Mewett* (1997) 191 CLR 471, 524-525 (Gaudron J).

[48] Section 44 of the *Judiciary Act*, providing for the High Court to remit 'matters' to federal and State courts, supports the conclusion that State courts have authority to apply State laws creating norms of conduct directly when exercising federal jurisdiction.

40 [49] Cf *Momcilovic* (2011) 245 CLR 1, 69 [100] (French CJ).

[50] Incidentally, this was the view taken by the drafters of the US equivalent of s 75(iv). See, for eg, John Marshall's remarks at the Virginia Convention: 3 Elliott's Debates 556, quoted in *Guaranty Trust Co v York*, 326 US 99, 104 fn 2 (Frankfurter J, for the Court) (1945).

[51] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).

[52] *APLA* (2005) 224 CLR 322, 453 [389] (Hayne J), quoting *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 134 (Mason CJ).

[53] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 562 [71] (McHugh J).

[54] *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 474 (Barwick CJ).

[55] *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2000) 96 FCR 491, 497 [10] (French J, as his Honour then was).

not from the legislature's grant of jurisdiction. Accordingly, as French CJ has suggested, State laws apply of their own force in accrued jurisdiction.[56]

(e) Construction of s 79 of the *Judiciary Act*

46. The appellant submits that s 79 'is not limited in its operation to the procedural laws of a State' and that 'in the appellant's trial, the Commonwealth Parliament provided the whole of the law to be applied'.[57]

47. Respectfully, that submission should not be accepted.

48. It is submitted that, properly construed against the background of the constitutional considerations identified above, s 79 has a dual operation.

49. First, s 79 'converts' into federal law those State laws which relate to the 'authority to decide' or are directed to the regulation of jurisdiction.[58] This prevents 'lacunae occurring' because, as explained above, State laws cannot, of their own force, regulate the exercise of federal jurisdiction.[59]

50. In this respect, it is significant that where s 79 does operate to 'convert' State laws into federal law, it does so only where there is already a court exercising federal jurisdiction, 'exercising being used in the present continuous tense'.[60] Section 79 is 'addressed to those courts', and not to other bodies or persons who may exercise statutory power.[61] In this way, unlike s 24 of the *Australian Courts Act 1828* (Imp), and statutes for the reception of English law in America which were also based on an 'adjectival formula',[62] s 79 has been 'taken literally'.[63] That literal construction suggests that s 79 operates to convert into federal laws those State laws that are incidental to the exercise of jurisdiction, but does not operate in that way on other State laws.[64] Were it otherwise,

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[56] *Momcilovic* (2011) 245 CLR 1, 69 [100] (French CJ), citing *Fencott v Muller* (1983) 152 CLR 570, 607 (Mason, Murphy, Brennan and Deane JJ).
[57] Appellant's submissions, 10 [50]-[51].
[58] *Pederson v Young* (1964) 110 CLR 162, 165 (Kitto J); *Solomons* (2002) 211 CLR 119, 134 [21] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).
[59] Cf Appellant's submissions, 10 [49].
[60] *Solomons* (2002) 211 CLR 119, 134 [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ), quoted with approval in *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, 271 [62] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).
[61] *Solomons* (2002) 211 CLR 119, 134 [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).
[62] Section 34 of *Judiciary Act*, 1 Stat 73, 92 (1789) adopted language of 'rules of decision', which phrase was in use from 1776 in various American reception statutes. Section 24 of the *Australian Courts Act 1828* (Imp) relevantly provided that 'all laws and statutes in force within the realm of England ... shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land'. Section 24 was interpreted as importing the whole of English law, so far as it was applicable within the colonies, and not only the law with respect to laws for the administration of justice.
[63] Cf BH McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2007) 337, 345; *Whicker v Hume* (1858) 7 HLC 124; 11 ER 50.
[64] In *Whicker v Hume* (1858) 7 HLC 124, 151-152; 11 ER 50, 61 (Lord Chelmsford LC), the House of Lords adopted the 'literal' interpretation of s 24 and held that s 24 was limited to laws for the administration of justice, including the laws applicable to the modes of proceeding in colonial courts. That view did not prevail. See, for

the law creating norms of conduct, being the 'law to be applied', would not exist prior to the invocation of the court's jurisdiction.

51. Second, and in contrast, s 79 does not operate on laws creating norms of conduct so as to 'convert' them into federal laws.[65] Rather, in relation to those laws, it is submitted that s 79 merely directs courts to the independently existing body of State law. As explained above, it follows from chapter III that courts exercising federal jurisdiction are bound to apply this body of law in any event.

52. This second aspect of the dual operation of s 79 is supported by the following considerations:

(a) First, if s 79 'converts' all State laws as the appellant contends, this would produce inconvenient and capricious results.[66] For example, in the absence of legislation validly cross-vesting prosecutorial functions, a State prosecuting authority would be prevented from continuing a prosecution once the court began to exercise federal jurisdiction.[67] This might occur as soon as proceedings were initiated (because of interstate residence) or at some later point (for example, because a defendant relied on a defence conferred by a Commonwealth statute, or raised a constitutional issue[68]).

(b) Second, s 79 is 'supported under s 51(xxxix) of the Constitution as a law with respect to matters incidental to the execution of powers vested by Ch III in th[e] Federal Judicature'.[69] In that aspect, and as it operates in relation to the legislative powers in chapter III, s 51(xxxix) does not support laws creating norms of conduct.

(c) Third, even if s 79 were also supported by other heads of power, it could not 'convert' all State criminal laws, but only those for which it had a head of power.[70] In a case such as the present, the Commonwealth does have some legislative power to enact similar criminal offences and has in fact done so in Chapter 9, Part 9.1 of the Commonwealth *Criminal Code*, pursuant to the Commonwealth's power to

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eg, *Delohery v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283, 285 (Griffith CJ, in response to argument based on *Whicker v Hume*); *Quan Yick v Hinds* (1905) 2 CLR 345, 359 (Griffith CJ).

[65] Cf Appellant's submissions, 11 [54]-[56].

[66] *Abebe v Commonwealth* (1999) 197 CLR 510, 532 [43] (Gleeson CJ and McHugh J), citing *Re Rouss*, 116 NE 782, 785 (Cardozo J) (1917) ('Consequences cannot alter statutes, but may help to fix their meaning'); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69], [97]-[98] (McHugh, Gummow, Kirby and Hayne JJ).

[67] See, for eg, in *Byrnes v The Queen* (1999) 199 CLR 1, 26 [52] (Gaudron, McHugh, Gummow and Callinan JJ), 37 [88] (Kirby J); *Bond v The Queen* (2000) 201 CLR 213, 223 [29] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *MacLeod v Australian Securities and Investments Commission* (2002) 211 CLR 287, 302 [43]-[44] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[68] *Felton v Mulligan* (1971) 124 CLR 367, 373 (Barwick CJ) (holding that there federal jurisdiction arose as a result of the defence raised); *Pioneer Express Pty Ltd v Hotchkiss* (1958) 101 CLR 536, 543-544 (Dixon CJ).

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

[70] Cf Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 352. The appellant's submission at 11 [55] that 'only federal statute law can operate in federal jurisdiction' would have the result that, where there was no Commonwealth head of power to create the State offence, there would be no law that could be applied by a court exercising federal jurisdiction.

legislate with respect to external affairs.[71] The Commonwealth's power to legislate under other heads of power will not however extend to the plenary power of State legislatures, and would not be capable of converting all State criminal laws into federal laws.

(d) Fourth, the above interpretation is consistent with authority to the effect that s 79 'direct[s]' courts to the 'independently existing substantive law' in a manner which 'reflects', 'implements' or 'is consistent with' the operation of chapter III of the *Constitution*.[72] It would go well beyond the operation of chapter III if s 79 had the effect of converting that independently existing substantive law into federal law.

(e) Fifth, the interpretation offered above is also consistent with the position in the US, that State laws apply of their own force in diversity jurisdiction irrespective of the American equivalent of s 79.[73] In this aspect of s 79's operation, an analogy might also be drawn to s 24 of the *Australian Courts Act 1828* (Imp), which 'confirmed' the introduction of the common law of England to New South Wales and Van Diemen's Land.[74] Section 24 did not convert the common law into statute; the common law so received retained its character as common law.[75]

53. The reasoning of Gummow J in *APLA* is consistent with the 'dual operation' explained above. His Honour there said:[76]

> … the exclusivity of the powers of the Parliament with respect to the conferring, defining and investing of federal jurisdiction (found in s 77 and supported by ss 78, 79 and 80) has the consequence, well recognised in the authorities that *the laws of a State* with respect to limitation of actions and other matters of substantive and procedural law *which are* "picked up" by s 79 of the *Judiciary Act, could not directly and of their own force operate in the exercise of federal jurisdiction*. This generally results from an absence of State legislative power rather than the operation of s 109 of the *Constitution* with respect to the exercise of concurrent powers.
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> (Footnotes omitted; emphasis added)

54. In other words, those State laws which are engaged by s 79 and converted into federal law are those State laws which 'could not' apply directly and of their own force in the exercise of federal jurisdiction. To similar effect is the statement of Gleeson CJ, Gummow, Gaudron, Hayne and Callinan JJ in *Solomons v District Court (NSW)*, that

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[71] See s 300.1(1) which states that the purpose of Part 9.1 is to 'give effect to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances'.
[72] *Edensor* (2001) 204 CLR 599, 587 [57] (Gleeson CJ, Gaudron and Gummow JJ), referring with approval to *South Australia v Commonwealth* (1962) 108 CLR 130, 140 (Dixon CJ).
[73] *Bank of Hamilton v Dudley's Lessee*, 27 US (2 Pet) 492, 525 (Marshall CJ, for the Court) (1829); *Hawkins v Barney's Lessee*, 30 US (5 Pet) 457, 464 (Johnson J, for the Court) (1831); *Mason v United States*, 260 US 545, 559 (Sutherland J, for the Court) (1923); *Erie Railway Co v Tompkins*, 304 US 64, 73 (Brandeis J, for the Court) (1938); *Guaranty Trust Co v York*, 326 US 99, 103-104 (Frankfurter J, for the Court) (1945); *Southern Pacific Transport Co v United States*, 462 F Supp 1193, 1198 (Chief Judge MacBride) (1978).
[74] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 38 (Brennan J).
[75] BH McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2007) 334.
[76] *APLA* (2005) 224 CLR 322, 406 [230] (Gummow J).

'State laws *upon which s 79 operates* do not *thereby* apply of their own force in the exercise of federal jurisdiction'.[77]

55. Justice Gummow's reference to 'matters of substantive and procedural law' should not be interpreted as indicating that his Honour considered that s 79 'converts' into federal law the entire body of State law. For the reasons discussed above,[78] laws which are 'substantive' may also relate to the authority to decide, and therefore fall within the category of laws which cannot apply of their own force to a court exercising federal jurisdiction.

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56. It is true that Gummow J in *Momcilovic* (with whom Hayne J agreed in this respect) appeared to conclude that s 79 engaged s 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) and converted it into federal law.[79] However, the implications of that proposition were not explored in argument,[80] and it was not a conclusion which was necessary for the disposal of the appeal. Other than French CJ (who left the point open), the other members of the Court did not consider the point.[81]

57. Similarly, in *Edensor* McHugh J held that s 79 'converted' s 615 of the *Corporations Law* (Vic) into a federal law, rather than s 615 operating of its own force.[82] Section 615
20 created a norm of conduct that shares in a company should not be acquired in certain circumstances. However, his Honour's conclusion was not necessary for the decision and did not have the benefit of argument from counsel.

58. Respectfully, for the reasons identified above, Gummow J's conclusion in *Momcilovic* and McHugh J's conclusion in *Edensor* on this point should not be followed.

PART VI: Time Estimate

30 59. The Attorney-General estimates that no more than 30 minutes will be required for the presentation of oral submissions.

Dated 16 December 2016.

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[77] *Solomons* (2002) 211 CLR 119, 134 [21] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ) (emphasis added).
[78] See above at 5 [24].
[79] *Momcilovic* (2011) 245 CLR 1, 86 [146(xii)] (Gummow J).
[80] *Momcilovic* (2011) 245 CLR 1, 69-70 [100] (French CJ).
[81] *Momcilovic* (2011) 245 CLR 1, 68-69 [99] (French CJ).
[82] *Edensor* (2001) 204 CLR 559, 609-610 [130] (McHugh J).