IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No P55 of 2016

BETWEEN:

JOHN RIZEQ
Appellant

and

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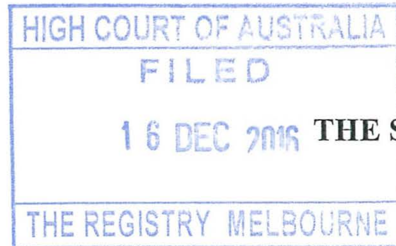
THE STATE OF WESTERN AUSTRALIA
Respondent



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

PART I: CERTIFICATION

1. These submissions are suitable for publication on the internet.

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PARTS II & III: INTERVENTION

2. The Attorney-General for Victoria intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) (***Judiciary Act***) in support of the respondent.

PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

3. The appellant has referred to the relevant legislative provisions in Pt VII of his submissions.

PART V: ARGUMENT

Summary of submissions

4. In summary, the Attorney-General for Victoria submits that:

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(a) The substantive law of a State is capable of direct application of its own force in proceedings in State courts in the exercise of federal diversity jurisdiction. Jurisdiction, in the sense of the authority of a court to adjudicate, is distinct from the substantive content of the law to be applied in the exercise of jurisdiction. The source of jurisdiction does not dictate the source or the character of the law to be applied in the exercise of that jurisdiction.

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(b) Statements to the contrary in some of the authorities in this Court are stated too broadly. State laws are incapable of direct application in federal jurisdiction only to the extent that they seek to regulate the exercise of that jurisdiction because such laws are within the exclusive power of the Commonwealth to confer, define and invest federal jurisdiction.

(c) Accordingly, s 6(1) of the *Misuse of Drugs Act 1981* (WA) applied to the appellant's trial in the District Court of Western Australia as a law of the State.

Submissions

5. Section 75(iv) of the Commonwealth Constitution confers original jurisdiction on the High Court in "all matters ... between a State and a resident of another State". It did not do so exclusively. The courts of the States continued to have the jurisdiction that they had prior to Federation in relation to such matters. However, it is now accepted that whatever State jurisdiction State courts may have had in respect of such matters was removed by s 39(1) of the *Judiciary Act* and re-invested as federal jurisdiction by s 39(2).[1] *Momcilovic v The Queen*[2] decided that a criminal prosecution by a State against a resident of another State for an offence against the criminal law of the prosecuting State is a matter of a kind referred to in s 75(iv) of the Constitution. A State court hearing such a prosecution is therefore exercising federal jurisdiction.[3]

6. These propositions are not in issue. The appellant's case, however, involves the further propositions that it necessarily follows from the fact that the District Court of Western Australia was exercising federal jurisdiction that:

(a) the *Misuse of Drugs Act 1981* (WA), a State Act, could not apply of its own force;

(b) that Act instead applied to the appellant's trial as Commonwealth law through the medium of s 79(1) of the *Judiciary Act*; and

(c) the appellant's trial thus attracted the operation of s 80 of the Constitution.

7. Those further propositions should not be accepted.

State law can apply of its own force in proceedings in federal jurisdiction

8. The crux of the appellant's argument is the proposition that, because the trial of the appellant in the District Court was a matter in federal jurisdiction, the *Misuse of Drugs Act 1981* (WA) could not apply of its own force because it is within the exclusive power of the Commonwealth Parliament to legislate for federal jurisdiction.[4] Although there are, in the cases referred to by the appellant, some statements to similar effect, those statements go beyond what was actually decided in those cases

[1] *Felton v Mulligan* (1971) 124 CLR 367.

[2] (2011) 245 CLR 1 (***Momcilovic***).

[3] *Momcilovic* (2011) 245 CLR 1 at 32 [6], 32-33 [9], 68 [99] (French CJ, agreeing with Gummow J), 80-82 [134]-[139] (Gummow J), 123 [280] (Hayne J, agreeing with Gummow J), 225 [594] (Crennan and Kiefel JJ).

[4] Appellant's submissions, paras 34, 36.

and in the cases relied upon in support of those statements. No case has decided that State law is incapable of applying of its own force to proceedings in a State court in the exercise of federal diversity jurisdiction. For the following reasons, the Court should now decide that the substantive law of a State is capable of applying of its own force in proceedings in a State court in the exercise of federal diversity jurisdiction.

9. First, in this context, the "jurisdiction" of a court refers to its "authority to adjudicate".[5] As Gleeson CJ, Gaudron and Gummow JJ said in *ASIC v Edensor*,[6] quoting Isaacs J in *Baxter v Commissioner of Taxation (NSW)*:[7]

> State jurisdiction may be described as "the authority which State Courts possess to adjudicate under the State Constitution and laws." Federal jurisdiction is "the authority to adjudicate derived from the Commonwealth Constitution and laws".

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10. Secondly, the jurisdiction of a court, in the sense of its authority to adjudicate, is distinct from the content of the law to be applied in the exercise of that jurisdiction in order to determine the rights and liabilities of the parties before it. As Windeyer J said in *Felton v Mulligan*:[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.

11. The jurisdiction conferred by s 75(iv) of the Constitution is perhaps the paradigm example of this distinction. Jurisdiction in respect of matters arising between a State and a resident of another State is attracted solely by the identity of the parties. Section 75(iv) thus necessarily recognises that the content of the law to be applied in the exercise of that jurisdiction would be derived – to put it on neutral terms – from some other source. The sources of the law to be applied in diversity matters includes the common law and Acts made by the State Parliaments including, so far as the latter is concerned, Acts relating to subject matters outside the legislative competence of the Commonwealth Parliament.

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12. Relatedly, original federal jurisdiction is conferred on the High Court by s 75(iv) in respect of matters between identified parties. There is a distinction between a "matter" and the proceedings brought for its determination. A "matter" is "a justiciable controversy identifiable independently of the proceeding brought for its determination" and logically must exist before the judicial process is engaged.[9] The controversy is to be determined "in accordance with the independently existing

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[5] *Australian Securities and Investments Commissions v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 (***ASIC v Edensor***) at 570 [2] (Gleeson CJ, Gaudron and Gummow JJ); *Northern Territory v GPAO* (1999) 196 CLR 553 (***GPAO***) at 589 [87] (Gleeson CJ and Gummow J).

[6] (2001) 204 CLR 559 at 570 [3]. See also *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 30 (Kitto J).

[7] *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.

[8] (1971) 124 CLR 367 at 393.

[9] *ASIC v Edensor* (2001) 204 CLR 559 at 586 [54] (Gleeson CJ, Gaudron and Gummow JJ), citing *Fencott v Muller* (1983) 152 CLR 570 at 603-606.

substantive law",[10] including the common law and any applicable statute law, Commonwealth or State, that will "supply the measure of the rights and liabilities which are at stake."[11] Thus, although the source of authority to hear and determine matters in federal jurisdiction must derive from the Constitution or Commonwealth law, the rights and liabilities of the parties may fall to be ascertained by reference to the independently existing substantive law of the State.

13. Moreover, once federal jurisdiction is attracted, the whole matter is one in federal jurisdiction.[12] This is so even though the claims made may include both federal claims and non-federal claims. This was recognised in *Fencott v Muller*.[13] Having quoted the passage from the judgment of Windeyer J in *Felton v Mulligan* quoted at paragraph 10 above, Mason, Murphy, Brennan and Deane JJ said:[14]

> 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.

14. The analogy between the "accrued jurisdiction" of courts exercising federal jurisdiction and the position of State courts exercising federal diversity jurisdiction was noted by French J in *Momcilovic*.[15]

15. Thirdly, subject to the Constitution, the State Parliaments have plenary legislative power.[16] The enforcement of the criminal law of the State has, and has always been, at the centre of State legislative power. State courts have always had jurisdiction to enforce the criminal laws of the State against foreigners who commit offences against those laws within the territorial limits of their jurisdiction, including residents of other States, whether that jurisdiction be State or federal.

16. It follows that the mere fact that the jurisdiction being exercised is federal does not prevent a State law from applying of its own force in the exercise of that jurisdiction. The source of jurisdiction does not dictate the source of the applicable law, the appellant's submissions elide this important distinction. The Constitution contemplates a composite body of law consisting of Commonwealth statute law, State

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[10] *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 205 (Deane and Gaudron JJ, quoted in *ASIC v Edensor* (2001) 204 CLR 559 at 586 [55] (Gleeson CJ, Gaudron and Gummow JJ).

[11] *ASIC v Edensor* (2001) 204 CLR 559 at 586 [55] (Gleeson CJ, Gaudron and Gummow JJ).

[12] *Felton v Mulligan* (1971) 124 CLR 367 at 373-374 (Barwick CJ), 411-413 (Walsh J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 583-588 [133]-[149] (Gummow and Hayne JJ); *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136 at 141-142 [10] (Gleeson CJ, Gummow and Hayne JJ), 153-154 [50] (McHugh J); *ASIC v Edensor* at 571 [7] (Gleeson CJ, Gaudron and Gummow JJ).

[13] (1983) 152 CLR 570.

[14] (1983) 152 CLR 570 at 606-607.

[15] (2011) 245 CLR 1 at 69 [100].

[16] *Union Steamship Co of Aust Pty Ltd v King* (1988) 166 CLR 1 at 9-10, 12-13; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 33-34 [45]-[48] (Gaudron, Gummow and Hayne JJ).

statute law and the common law that may be applicable to the resolution of a controversy. As Windeyer J said in *Felton v Mulligan*:[17]

> the law that a court must apply and administer, in the exercise of whatever jurisdiction pertains to it, may be derived from different sources, but ... it is still, so far as any particular case is concerned, a single though composite body of law. It is the law of the land, governing the parties in their relation to the case at hand. The law of the land for us ... is made up of inherited common law principles and equitable doctrine, Imperial statutes, Commonwealth statutes and State statutes and delegated legislation of various kinds.

10 17. The appellant submits that the inability of State law to apply of its own force in federal jurisdiction results from the exclusive power of the Commonwealth Parliament to legislate for federal jurisdiction.[18] That proposition cannot be accepted in those broad and unqualified terms; it significantly overstates the area of exclusive federal power. The Commonwealth Parliament has exclusive power to legislate for the conferral, definition and investment of federal jurisdiction. Beyond that, the paramountcy of federal law rests with s 109 of the Constitution.

18. It is therefore necessary to differentiate between laws that confer, invest or regulate the exercise of the jurisdiction of the courts and laws that provide for the substantive content of the law that is applied in the exercise of jurisdiction to determine the rights 20 and liabilities of the parties. The distinction between matters of procedure and matters of substantive law does not adequately capture the area of difference but provides a guide to the type of matters that fall in each. On any view, the offence provision in issue in this appeal is not a law that either conferred or regulated the exercise of jurisdiction by a court. It imposed a norm of conduct contravention of which would sound in the penalty prescribed by law. Whether the accused contravened s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA) was a relevant "matter". Jurisdiction to try the offence against a non-resident of Western Australia was vested in, amongst other courts, the District Court of Western Australia by s 39(2) of the *Judiciary Act*.

19. The area of exclusivity means that the Commonwealth Parliament must confer or 30 invest federal jurisdiction on State and federal courts and regulate the exercise of that jurisdiction. The power to regulate the exercise of jurisdiction may arise as an incident of, or flow necessarily from, the investiture of federal jurisdiction. The conferral of jurisdiction necessarily carries with it all the powers necessary for its effective exercise. In the case of federal courts, it does so through the *Judiciary Act* and the specific Acts providing for the relevant federal court. In the case of State courts exercising federal jurisdiction, it does so through ss 39, 68, 79 and 80 of the *Judiciary Act*. We are not here concerned with the provisions that establish State courts or which are necessary to establish or preserve the institutional integrity of State courts as repositories of federal judicial power.

40 20. The device of s 79 is to pick up State laws and apply them as federal laws. In effect it is a shorthand way of enacting the content of the relevant State provisions to which it applies. Once picked up, they apply as federal law.

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17 (1971) 124 CLR 367 at 392.

18 Appellant's submissions, para 36.

21. As a Commonwealth law having this operation, 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 the federal judicature[19] or as incidental to the power in s 77(iii) to invest State courts with federal jurisdiction.[20] Section 79 therefore clearly extends to "pick up" legislation that "regulates the exercise"[21] of federal jurisdiction.

22. However, s 79 does not apply to the laws which provide for the substantive law that is to be applied by the State court in the exercise of federal jurisdiction. That follows from the text and context of s 79.

23. First, the substantive law which charts the bounds of the rights and liabilities that fall to be determined by the court does not fall within the exclusive power of the Commonwealth and indeed may be beyond Commonwealth legislative power. Where a State court in the exercise of federal diversity jurisdiction applies a law passed by the Parliament of that State, none of these impediments to the State's power to legislate for the content of the substantive law to be applied is present. The State law applies of its own force. The sources of Commonwealth power referred to above would not support the extension of s 79 to "pick up" State legislation that creates substantive rights and liabilities.[22]

24. Secondly, this limitation is reflected in the text of s 79, in that it provides that the laws of each State and Territory shall be binding "on all Courts" exercising federal jurisdiction in that State or Territory. This suggests that, at least in relation to matters in federal diversity jurisdiction, s 79 should be construed so as to be limited to laws which regulate the invocation or exercise of the jurisdiction; for example, laws which would limit the jurisdiction of the court (such as limitation periods) or regulate the manner in which the court may exercise its jurisdiction. Laws of this type are binding on courts. Laws of a substantive kind are binding on the people of the States and Territories and the States and Territories themselves as bodies able to sue and be sued. The particular language of s 79, which refers to laws binding on a court, can be contrasted with the broader language of covering clause 5 of the Constitution, which refers to laws binding on "the courts, judges, and people of every State and of every part of the Commonwealth".

25. The function of s 79 (and s 80) of the *Judiciary Act* is therefore to ensure the application of a "single though composite"[23] body of law in the exercise of federal jurisdiction, not to transform the character of all applicable State law into federal law. As McHugh J said in *Austral Pacific Group Ltd (in liq) v Airservices Australia*:[24]

> Sections 79 and 80 "facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law". They provide a body of law consisting of the laws of the Commonwealth and, subject to certain limitations,

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

[20] Cf *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 405 [228] (Gummow J).

[21] G Hill and A Beech, "'Picking up' State and Territory laws under s 79 of the Judiciary Act – three questions" (2005) 27 *Australian Bar Rev* 25 at 30.

[22] Ibid at 33.

[23] *Felton v Mulligan* (1971) 124 CLR 367 at 392 (Windeyer J).

[24] (2000) 203 CLR 136 at 153 [51] (footnotes omitted).

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

26. There are statements in some cases to the effect that s 79 applies to substantive and procedural laws. For example, in *ASIC v Edensor*, Gleeson CJ, Gaudron and Gummow JJ said that "[i]t is well established from the decisions under s 79 of the *Judiciary Act*, most recently that in [*Austral Pacific Group Ltd (in liq) v Airservices Australia*], that a State statute may be applicable as a source of rights and remedies in federal jurisdiction".[25] These statements must be read in their context. *ASIC v Edensor* concerned the exercise by the Federal Court of powers to make orders granting remedies provided for by the State *Corporations Law* in proceedings commenced by the Australian Securities and Investments Commission. Those remedies were available where a contravention of another provision of the *Corporations Law* had been established and could be regarded as a necessary incident of the conferral of jurisdiction on the Federal Court in matters in which the Commonwealth (in the form of ASIC) was seeking an injunction or declaration.

27. Three further points should be made concerning the anomalous consequences that would flow from the appellant's submissions.

28. First, if the appellant is right that State law cannot apply of its own force in federal jurisdiction, it would have the consequence that, but for the enactment of s 79 of the *Judiciary Act*, the High Court would be unable to exercise the jurisdiction conferred on it by s 75(iv) of the Constitution.

29. Secondly, the appellant's submissions would have the further consequence that, but for ss 39(2) and 79 of the *Judiciary Act*, State courts would be unable to enforce the criminal law of the State against residents of other States.

30. Thirdly, there is a further anomaly that would flow from the acceptance of the appellant's submissions and it concerns s 109 of the Constitution. Where, in a proceeding, a contention is made that a State law is inconsistent with a Commonwealth law, the proceeding will be in federal jurisdiction as involving a matter arising under the Constitution. Were the appellant's logic to hold, once the proceeding is in federal jurisdiction all the laws applying in the proceeding would be laws of the Commonwealth and s 109 could not apply. Rather the question of conflict between the surrogate federal law and any other Commonwealth law would be resolved by considering the principles applicable to two conflicting statutes from the same source. As Gleeson CJ and Gummow J observed in *GPAO*, in such cases it is necessary "to resolve the problem that arises by conflict between conflicting statutes having the same source. The law of a State or Territory which is to operate as a surrogate law of the Commonwealth is to be measured beside other laws of the Commonwealth".[26] On the appellant's case, all conflict in federal jurisdiction would be resolved through this process and not through s 109 of the Constitution.

[25] (2001) 204 CLR 559 at 591 [68]. See also at 587 [57].

[26] (1999) 196 CLR 553 at 588 [80].

Limited effect of previous authority

31. It is necessary to address the authorities on which the appellant relies in support of the proposition that State law is incapable of applying of its own force in proceedings in federal jurisdiction. There are three cases where members of the Court have expressed the principle in similarly broad terms: *Bass v Permanent Trustee Co Ltd*,[27] *Solomons v District Court of New South* Wales[28] and *APLA Ltd v Legal Services Commissioner (NSW)*.[29] It is submitted, however, that, properly understood, these authorities do not support that proposition.

32. In *Bass*, participants in a housing assistance scheme in New South Wales had commenced proceedings in the Federal Court against the State of New South Wales for contraventions of ss 51AB and 52 of the *Trade Practices Act 1974* (Cth). It was held that the State was not a person within the meaning of the relevant provisions of that Act. That left the further question of whether s 5(2) of the *Crown Proceedings Act 1988* (NSW), which provided that the rights of the parties in civil proceedings against the Crown shall as nearly as possible be the same as in a case between subject and subject, applied the *Trade Practices Act 1974* (Cth) to the State. Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said:[30]

> Section 5(2) of the *Crown Proceedings Act* cannot apply of its own force in proceedings which invoke the judicial power of the Commonwealth. It can only apply if 'picked up' by s 79 of the *Judiciary Act.*

33. Their Honours went on to hold that s 5(2) was not picked up by s 79. It may be noted that the above statement is a statement about a specific State law, not about all State laws. Moreover, the authorities cited in the footnote to the first sentence of this passage do not support a proposition stated in such broad terms. They were *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*,[31] *Pedersen v Young*,[32] *Kruger v The Commonwealth*[33] and *The Commonwealth v Mewett*.[34]

34. In *John Robertson*,[35] the Court held that a South Australian limitations provision could not apply of its own force in proceedings commenced in the High Court, which could *only* be commenced in the High Court and under a Commonwealth Act. The reasoning of the Court was limited to the fact that the State limitations provisions could not of its own force prescribe a limit of time within which proceedings could be brought in the High Court[36] or within which proceedings based on a Commonwealth

[27] (1999) 198 CLR 334 (***Bass***).
[28] (2002) 211 CLR 119 (***Solomons***).
[29] (2005) 224 CLR 322 (***APLA***).
[30] (1999) 198 CLR 334 at 352 [35].
[31] (1973) 129 CLR 65 (***John Robertson***) at 79 (Menzies J), 84 (Walsh J), 87 (Gibbs J), 93 (Mason J).
[32] (1964) 110 CLR 162 at 165 (Kitto J), 167 (Menzies J).
[33] (1997) 190 CLR 1 (***Kruger***) at 135 (Gaudron J).
[34] (1997) 191 CLR 471 (***Mewett***) at 554.
[35] (1973) 129 CLR 65.
[36] (1973) 120 CLR 65 at 79-80 (Menzies J), 82 (Walsh J), 87 (Gibbs J), 93 (Mason J).

Act could be brought.[37] But none of the judgments went so far as to say that a State law could never apply of its own force in federal jurisdiction.

35. *Pedersen v Young*,[38] which preceded *John Robertson*, concerned whether the limitation period stated in s 5 of the *Law Reform (Limitation of Actions) Act 1956* (Qld) applied to an action in negligence commenced in the New South Wales registry of the High Court between residents of different States in respect of events which occurred in Queensland. The Queensland statute did not apply of its own force in the proceedings in the High Court because, as a limitation provision which barred the remedy not the right, it was treated as procedural in character and so applied only to the commencement of actions in Queensland.[39] As Kitto J said, "the Queensland enactment could not of its own force limit the time within which an action may be commenced *in this Court*" (emphasis added).[40]

36. Moreover, the statement of Kitto J that the State law applied as "federal law" was not expressed in unqualified terms. His Honour said:[41]

> It is, I think, in accordance with the received opinion as to the operation of ss 79 and 80 [of the *Judiciary Act*] to hold that, subject to the Constitution and to the laws of the Commonwealth, all Queensland laws must be treated as binding in this Court, as federal law if not by their own force, whenever the Court is exercising jurisdiction in Queensland.

37. This was a statement about the effect of ss 79 and 80 of the *Judiciary Act* in cases to which those provisions apply. It was not a statement about the anterior question, which arises in this appeal, as to whether those provisions apply or whether, instead, the State law was capable of applying of its own force. In *Pedersen v Young*, the State law, on its own terms, did not apply; s 79 applied and had the effect described by Kitto J.

38. In *Kruger*, Gaudron J said only that "it is well settled that State laws cannot apply of their own force to proceedings in this Court", citing *John Robertson*.[42] And in *Mewett*, Gummow and Kirby JJ said only that it was settled "that State laws cannot, of their own force, bar the causes of action alleged by [the plaintiffs] against the Commonwealth", again citing *John Robertson*.[43] Neither *Kruger* nor *Mewett* is relied upon by the appellant.

39. The second case in which a broad statement of principle similar to that for which the appellant contends was made is *Solomons*.[44] In that case, the appellant was charged with an offence under the *Customs Act 1901* (Cth) and tried in the District Court of New South Wales. The District Court was exercising federal jurisdiction invested in it

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[37] (1973) 120 CLR 65 at 84 (Walsh J).

[38] (1964) 110 CLR 162.

[39] (1964) 110 CLR 162 at 165-166 (Kitto J), 166-167 (Menzies J), 169-170 (Windeyer J).

[40] (1964) 110 CLR 162 at 165 (Kitto J). See also at 166-167 (Menzies J) and 169-170 (Windeyer J).

[41] (1964) 110 CLR 162 at 165.

[42] (1997) 190 CLR 1 at 135 (Gaudron J), citing *John Robertson* (1973) 129 CLR 65, 79, 87, 93.

[43] (1997) 191 CLR 471 at 553, citing *John Robertson* (1973) 129 CLR 65 at 79, 84, 87, 93.

[44] (2002) 211 CLR 119.

by s 68(2) of the *Judiciary Act*. The appellant was acquitted and applied for a certificate under s 2 of the *Costs in Criminal Cases Act 1967* (NSW) (***Costs Act***), which would have entitled him to a payment of the State Consolidated Revenue Fund for his costs incurred in the proceedings. The question was whether s 79 of the *Judiciary Act* applied s 2 of the *Costs Act* to the proceedings. The Court held that it did not. In coming to that conclusion, Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ observed that:[45]

> 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. The State laws apply, as Kitto J put it in *Pedersen v Young*,[46] as "federal law".

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40. That statement was confined to State laws "upon which s 79 operates". It is a statement about the effect of s 79 where it applies, not about the anterior question of whether a State law can apply of its own force in federal jurisdiction. That is apparent from the reliance on the words of Kitto J in *Pedersen v Young*.

41. Further, although the decision in *Solomons* proceeded on the basis that s 2 of the *Costs Act* did not apply of its own force, it does not foreclose the question in issue in this appeal of whether the substantive law of a State cannot apply of its own force in federal diversity jurisdiction. Section 2 of the *Costs Act* was not a law which defined the substantive criminal liability of the defendant. It was a part of a legislative scheme for payments out of the State Consolidated Fund in respect of certain concluded prosecutions and, as a matter of construction, did not apply to prosecutions for offences under a law of the Commonwealth.[47] In that sense, it was analogous to the construction of the State limitations provision in *Pedersen v Young*. As such, it could not apply to a prosecution for an offence against a Commonwealth law without the effect of s 79 of the *Judiciary Act*.

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42. The third case is *APLA*, in which Gummow J said:[48]

> [T]he 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[49] 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*,[50] 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.[51]

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[45] (2002) 211 CLR 119 at 134 [21].

[46] (1964) 110 CLR 162 at 165. See also *ASIC v Edensor* (2001) 204 CLR 559 at 610 [130].

[47] (2002) 211 CLR 119 at [9].

[48] (2005) 224 CLR 322 at 406 [230].

[49] *GPAO* (1999) 196 CLR 553 at 575 [33], 628 [195]; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 642 [21]; *Solomons* (2002) 211 CLR 119 at 134 [21].

[50] And by s 68: see *R v Gee* (2003) 212 CLR 230 at 255-256 [65]-[67].

[51] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 558 [58]; cf *Macloed v Australian Securities and Investments Commission* (2002) 211 CLR 287 at 297 [27].

43. It is submitted that the authorities referred to in the first footnote in this passage (*GPAO*, *Residual Assco Group Ltd v Spalvins* and *Solomons*) do not support this proposition in the broad terms in which it is stated:

(a) In *GPAO*, Gleeson CJ and Gummow J said that, were it not for a provision such as s 79 of the *Judiciary Act*, "a law of a State with respect to such matters as the limitation of actions could not directly and of its own force operate in relation to a claim arising *under a law of the Commonwealth*" (emphasis added).[52] McHugh and Callinan JJ, in a paragraph upon which the appellant also relies, said that "No State or territory can enact laws purporting to apply in proceedings *in a federal court*" (emphasis added).[53]

(b) The passage referred to from *Residual Assco Group Ltd v Spalvins* was to similar effect, that "Ch III of the Constitution forbids a State legislature to control or interfere with the *procedures* of *a federal court*" (emphasis added).[54]

(c) The passage referred to from *Solomons*[55] is that quoted above. For the reasons given above, it does not stand for the proposition for which it is quoted in *APLA*.

44. None of the other cases relied upon by the appellant support the proposition for which he contends. The statement of McHugh J in *Austral Pacific Group Ltd (in liq) v Airservices Australia*[56] upon which the appellant relies concerns only the effect of s 79 when that provision does apply.

45. The appellant also relies on two passages from the judgment of Gleeson CJ, Gaudron and Gummow JJ in *ASIC v Edensor*. The first, that ss 79 and 80 operate to identify "the independently existing substantive law for the determination of the controversy",[57] is consistent with Victoria's submissions. The second is that "a State statute may be applicable as a source of rights and remedies in federal jurisdiction even though, on its terms, that law identifies only the courts of the enacting State as the courts to provide those remedies."[58] This statement confirms only that, although on its ordinary construction a State statute may refer only to the courts of a State (which was the situation in *ASIC v Edensor*) or proceedings commenced in a State court (such as in *Pedersen v Young*), s 79 operates to translate those references to the federal sphere. Neither statement denies that, at least in relation to the exercise of federal diversity jurisdiction in State courts, State law defining the substantive rights in issue can apply of its own force.

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52 (1999) 196 CLR 553 at 575 [33].

53 (1999) 196 CLR 553 at 628 [195].

54 (2000) 202 CLR 629 at 642 [21] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

55 (2002) 211 CLR 119 at 134 [21].

56 (2000) 203 CLR 136.

57 (2001) 204 CLR 559 at 587 [57].

58 (2001) 204 CLR 559 at 591 [68]

46. In *British American Tobacco v Western Australia*, McHugh, Gummow and Hayne JJ said only that "the State statue law respecting limitation of actions could not apply directly in the exercise of federal jurisdiction."[59]

47. Finally, there are the recent decisions of *Alqudsi v The Queen*[60] and *Mok v Director of Public Prosecutions (NSW)*.[61] In *Alqudsi*, s 132 of the *Criminal Procedure Act 1978* (Cth), which permitted the trial of indictable offences by a judge alone, was held to be incapable of being applied by s 68 of the *Judiciary Act* to the trial on indictment of an accused in the New South Wales Supreme Court for offences under a Commonwealth law. The critical point was that the offences charged were offences against a law of the Commonwealth. A State law could not regulate the manner in which such a trial was conducted unless picked up and applied by a Commonwealth law. The inconsistency between s 132 of the State Act and s 80 of the Constitution prevented that. The passage upon which the appellant relies in the joint judgment of Nettle and Gordon JJ is that "it is for the Commonwealth Parliament to provide for and regulate the exercise of federal jurisdiction, not the States."[62] So much may be accepted. That is why s 79 has work to do in relation to State statutes regulating the exercise of federal jurisdiction. But the passage does not deny the ability of State law to provide the substantive content of the law to be applied in the exercise of federal diversity jurisdiction.

48. In *Mok*, s 310D of the *Crimes Act 1900* (NSW) was incapable of applying of its own force either because it was rendered inoperative by s 8(4) of the *Service and Execution of Process Act 1992* (Cth) (**SEPA**) and the operation of s 109 of the Constitution[63] or because the acts charged were committed in a Commonwealth place to which State law did not apply. The appellant therefore could not be charged with an offence against s 310D unless it applied to him by force of Commonwealth law. Section 89(4) of the SEPA performed that function.

Conclusion

49. The preceding analysis demonstrates, in Victoria's submission, that the relevant authorities establish that State law regulating the exercise of jurisdiction cannot apply of its own force to proceedings in federal jurisdiction. To the extent that there are broader statements in some of the authorities to the effect that State law cannot apply of its own force in federal jurisdiction, those statements go beyond what was actually decided in those cases and do not represent the law. In proceedings in State courts in the exercise of federal diversity jurisdiction, State law can apply of its own force to supply the substantive content of the rights and liabilities of the parties to the controversy in relation to which the court is to exercise its authority to adjudicate.

50. The fundamental premise of the appeal is a false one.

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[59] (2003) 217 CLR 30 at 54 [44].

[60] [2016] HCA 24; (2016) 90 ALJR 711 (***Alqudsi***).

[61] [2016] HCA 13; (2016) 90 ALJR 506 (***Mok***).

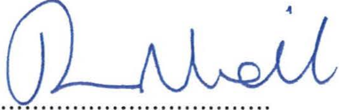
[62] [2016] HCA 24; (2016) 90 ALJR 711 at 749 [171].

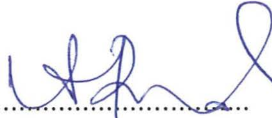
[63] [2016] HCA 13; (2016) 90 ALJR 506 at 513 [11], 515 [20] (French CJ).

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

51. Approximately 15 minutes is likely to be required for oral submissions.

Dated: 16 December 2016





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