

BETWEEN:

**JOHN RIZEQ**  
Appellant

and

**THE STATE OF WESTERN AUSTRALIA**  
Respondent



**APPELLANT'S SUBMISSIONS IN REPLY**

**Part I: Certification**

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

**Part II:**

**Subsection 79(1) of the *Judiciary Act* applies to all State laws<sup>1</sup>**

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2. Against the Appellant, it is contended (by various formulations) that:
    - 2.1. s.79(1) of the *Judiciary Act* applies to (only) some State laws; and
    - 2.2. those so applied are limited to laws which provide for, and regulate the extent of, the authority to adjudicate in federal jurisdiction; which is to be understood narrowly.
  3. There is nothing in the language of s.79(1) of the *Judiciary Act* that so limits its scope.<sup>2</sup>
  4. The limitation sought to be imposed on s.79(1) of the *Judiciary Act* is not consistent with authority such as: *Austral Pacific Group Limited (In Liq) v Airservices Australia*<sup>3</sup>, and *Australian Securities and Investments Commission v Edensor*<sup>4</sup>.

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<sup>1</sup> The proposition is subject to the matters in [7] below.

<sup>2</sup> See, eg, *British American Tobacco v Western Australia* (2003) 217 CLR 30 at 59 [65] per McHugh, Gummow and Hayne JJ.

<sup>3</sup> (2000) 203 CLR 136, where a statutory right to contribution was picked up by s.79(1) of the *Judiciary Act*: see Gleeson CJ, Gummow and Hayne JJ at [12]-[15], [25]-[28].

<sup>4</sup> (2001) 204 CLR 559 where the provisions applied by s.79(1) of the *Judiciary Act* included s.615 of the Corporations Law (Vic) which prescribed 'the relevant norm of conduct' as well as ss.737, 739 which provided remedies. See also in *Momcilovic v R*, where Gummow J (with Hayne J agreeing in this

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Filed on behalf of the Appellant by:  
Minter Ellison  
Level 4, 77 St Georges Terrace  
Perth WA 6000

Date of this document:  
Telephone: (08) 6189 7849  
Fax: (08) 6189 7999  
DX 255

Email: millie.richmond-scott@minterellison.com  
Ref: Millie Richmond-Scott MYR:KNS 1131251

5. The limitation is further inconsistent with clear statements made in this Court as to the purpose and operation of s.79(1) of the *Judiciary Act*<sup>5</sup>.
6. The limitation sought to be imposed is not capable of consistent and clear application. For example, it is now established that provisions, such as those prescribing limitations on the right to proceed, cannot be viewed as simply controlling the jurisdiction of the court to determine the cause of action.<sup>6</sup> To contend that such provisions are within limited notions of the “regulation” of jurisdiction or its “manner of exercise” is to give those expressions an elastic, ill-defined operation<sup>7</sup>.
7. In making these submissions, the Appellant accepts that the nature of some State laws will put them outside of the operation of s.79(1) of the *Judiciary Act*: Appellant’s Submissions at [53].

**The effect of s.79(1) of the *Judiciary Act***

8. Although there is an acceptance that s.79(1) of the *Judiciary Act* operates to *some* extent to “translate a State law into a new federal law”, it is variously said that because of the limits of the Commonwealth’s legislative power, s.79(1) of the *Judiciary Act* cannot enact liabilities.
9. The Appellant contends that the Commonwealth has power to enact as a Commonwealth law the unamended text of a State statute, relying on Chapter III and

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respect) concluded that the entire law of Victoria was “picked up” by s.79(1) of the *Judiciary Act* at 86 [146(viii)]; Hayne J agreed with these reasons at 123 [280].

<sup>5</sup> *Commissioner of Stamp Duties (NSW) v Owens [No.2]* (1953) 88 CLR 168 at 170. See also Dawson J in *Commonwealth v Mewett*, “[t]he effect of [ss.79(1) and 80 of the *Judiciary Act*] is to apply to each proceeding the whole body of law in the relevant State” (1997) 191 CLR 471 at 506 (emphasis added).

<sup>6</sup> See *British American Tobacco v Western Australia* (2003) 217 CLR 30, 56 [55] (McHugh, Gummow and Hayne JJ); *Austral Pacific Group Limited (In Liq) v Airservices* (2000) 203 CLR 136, 148-9 [32] (Gleeson CJ, Gummow and Hayne JJ). See also the Court in *John Pfeiffer Pty Limited v Rogerson*, which said such laws can affect the “existence, extent or enforceability of the rights or duties” (2000) 203 CLR 503, 543 [99].

<sup>7</sup> Further, provisions can operate simultaneously to create rights and duties on the one hand and confer jurisdiction and powers on courts to resolve a dispute about those right and duties on the other: *Australian Securities and Investments Commission v Edensor* (2001) 204 CLR 559, 590 [66]. See also McHugh J’s judgment in *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 140-44 [43]-[52].

s.51(xxxix)<sup>8</sup>. That would be within the limit of its incidental powers. The Commonwealth would (presumably) need to have a separate substantive head of power to enact an amended version of a State statute.

10. In addition to the authorities already cited to support the federalising effect of s.79 of the *Judiciary Act*<sup>9</sup>, McHugh J, in *Re Colina; Ex parte Torney*, said that where the Parliament picked up the provisions of a State statute “any breach of the terms of the State enactment is a breach of federal law, not State law”<sup>10</sup>.
11. The federalising effect of s.79(1) of the *Judiciary Act* is also supported by the Court’s approach to “otherwise provided” in s.79(1) of the *Judiciary Act*<sup>11</sup>.
- 10 12. To the extent that the incidental power is insufficient, then the federalising effect of s.79(1) of the *Judiciary Act* can be supported, case by case, by legislative powers in ss.51 and 52 of the *Constitution*. As Queensland suggests (Qld, [52]), the Commonwealth has legislative power to enact a criminal offence with the same elements as s.6 of the *Misuse of Drugs Act 1981* (WA): see also Cth [30]<sup>12</sup>.

#### **The timing of the federal offence**

13. The Appellant’s case does not deny the ability of Western Australia to pass the *Misuse of Drugs Act* which created a norm and an offence which applied, on its face, to residents and non-residents.
14. It is put against the Appellant, in various formulations, that he is contending for the  
20 creation of a federal offence retrospectively. It is said that the offence must have been created prior to, and independently of, the operation of s.79 of the *Judiciary Act*.

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<sup>8</sup> This is subject to the limitation recognized in [7] above.

<sup>9</sup> Appellant’s Submissions [54]-[56]; Cth [26.1].

<sup>10</sup> (1999) 200 CLR 386, 399 [38]; see also McHugh J in *Australian Securities and Investments Commission v Edensor* (2001) 204 CLR 559, 610 [130].

<sup>11</sup> As Gleeson CJ and Gummow J said in *Northern Territory v GPAO* (1999) 196 CLR 553, 588 [80]: “the notion of “inconsistency” involved ... is ... 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.”

<sup>12</sup> So much is evident from the analogue provisions in Division 302 of the *Criminal Code Act 1995* (Cth); see esp s.302.4.

15. At an abstract level, it may be accepted that a norm was created by State law prior to the prosecution being commenced. But that, of itself, does not answer the question of the offence's character *when* the non-resident is prosecuted (and there is only a matter of federal jurisdiction when the prosecution is commenced against the non-resident: Appellant's Submissions [30]).
16. However, it is possible to say that once the prosecution begins, it is a prosecution in federal jurisdiction and, on the Appellant's case, it is for a Commonwealth offence. And so, it is possible to say (before the prosecution begins) that the events have created a liability which may be prosecuted<sup>13</sup>.
- 10 17. It would be "only a half-truth" to say that the non-resident is liable for a Commonwealth offence which did not exist before the prosecution<sup>14</sup>.

#### **Section 80 of the *Constitution***

18. The submissions made against the Appellant in this respect essentially beg the question as to the scope and effect of s.79(1) of the *Judiciary Act*. In contending that there is no "law of the Commonwealth", an assumption is made that s.79(1) (obviously a law of the Commonwealth) is not effective as a mechanism which enacts the offence found in the *Misuse of Drugs Act* as a Commonwealth law.
19. The preferable view is that a "law of the Commonwealth", as that term is used in s.80 of the *Constitution*, includes the Commonwealth making law by adopting a text from a  
20 source other than the Commonwealth Parliament<sup>15</sup>.

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<sup>13</sup> This paraphrases the language used by Gibbs CJ, Mason, Wilson, Deane and Dawson JJ in *Commonwealth v Evans Deakin* (1986) 161 CLR 254 at 265-266.

<sup>14</sup> To further paraphrase: "[Section 79] does not have a retrospective operation. At all times before a [prosecution] is commenced, it can be known what the rights of the parties will be once the [prosecution] is commenced." *Commonwealth v Evans Deakin* at 266. These concepts as to the operation of s.64 of the *Judiciary Act* (the subject of *Evans Deakin*) were applied to s.79 of the *Judiciary Act* by Gleeson CJ, Gummow and Hayne JJ in *Austral Pacific v Airservices Australia* (2000) 203 CLR 136 at 142 [11].

<sup>15</sup> See *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 484-485. In *Mok v Director of Public Prosecutions (NSW)* (2016) 330 ALR 201, French CJ and Bell J referred to s.79(1) of the *Judiciary Act* as an example of "verbal formulae by which Commonwealth laws give effect

20. If s.79(1) of the *Judiciary Act* operates in the way contended by the Appellant, then s.80 of the *Constitution* is enlivened. It creates federal rights and obligations by reference to the content of State law. That is sufficient to trigger the operation of s.80 of the *Constitution* if the offence is tried on indictment<sup>16</sup>.

***Momcilovic***

21. It is contended that the analysis in *Momcilovic v R*<sup>17</sup> is against the Appellant. However, a s.109 of the *Constitution* analysis necessarily precedes a consideration as to whether s.79(1) of the *Judiciary Act* operates. In that analysis, the State provisions must be treated as having a State character.<sup>18</sup>

10 **Other provisions of the *Judiciary Act***

22. It is contended that the Appellant's approach leaves s.68(1) of the *Judiciary Act* no work to do, or would subvert the operation of Part X of the *Judiciary Act*. There is nothing in the terms or operation of the provisions that would necessarily preclude s.79(1) of the *Judiciary Act* from providing the trigger for the operation of s.68. Importantly, although there is overlap between s.68(1) and s.79(1) of the *Judiciary Act*, their respective scopes of operation are not coterminous.


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Matthew Howard  
Telephone: 08 9220 0457  
Email: [mdhoward@19fbc.com.au](mailto:mdhoward@19fbc.com.au)



PP James Stellios  
Telephone: (02) 9236 8600  
Email: [james.stellios@stjames.net.au](mailto:james.stellios@stjames.net.au)



Rachel Joseph  
Telephone: 08 9220 0318  
Email: [rjoseph@francisburt.com.au](mailto:rjoseph@francisburt.com.au)

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to State laws as laws of the Commonwealth” at 214 [35]. See also *Pinkstone v R* (2004) 219 CLR 444 at 457 [34], 458-459 [38]-[41].

<sup>16</sup> See *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 399 [38] per McHugh J.

<sup>17</sup> (2011) 245 CLR 1.

<sup>18</sup> *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 271 [62]. Once “passed” by s.109 of the *Constitution*, s.79(1) operates to transform the State provisions to federal provisions, at which point a different consideration applies as there is a consideration of two Commonwealth laws.