IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S246 of 2015

BETWEEN:

YAU MING MATHEW MOK
Appellant

10

AND

DIRECTOR OF PUBLIC PROSECUTIONS (NSW)
Respondent

RESPONDENT'S SUBMISSIONS

Part I: SUITABILITY FOR PUBLICATION

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

Part II: CONCISE STATEMENT OF ISSUES

20 2. This appeal raises the following issues for consideration:

(a) Is a State law relating to escape applied as "surrogate federal law" by s. 89(4) of ***Service and Execution of Process Act 1992*** (Cth) ("***SEPA***"), or does such State law apply of its own force?

(b) Is s. 310D of the ***Crimes Act 1900*** (NSW) ("***Crimes Act***") applied by s. 89(4) of ***SEPA*** in the way found by the New South Wales Court of Appeal?

(c) If not, at the time of his escape, was the appellant an "*inmate*" within the meaning of s. 310D of the ***Crimes Act***, as applied by s. 89(4) of ***SEPA***?

Part III: NOTICES UNDER S. 78B OF THE *JUDICIARY ACT* 1903 (CTH)

3. The respondent considers that notice pursuant to s. 78B of the ***Judiciary Act*** **1903** (Cth)
30 is not required.

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Part IV: STATEMENT OF CONTESTED MATERIAL FACTS

4. The respondent accepts the statement of material facts as set out in the appellant's written submissions ("AWS") at [7] – [12]. In addition to the matters contained therein, the respondent notes the following further details concerning the issue of the relevant warrants and the apprehension of the appellant.

5. The bench warrant issued by Freeman DCJ on 18 April 2006 (AWS at [7]) was entitled "*Bench warrant to apprehend a person committed for sentence*". It was directed to "*the Commissioner of Police for the State of New South Wales and to all Police Officers in the said State.*" After setting out details concerning the pleas of guilty that had been entered by the appellant, the warrant stated:

> "AND WHEREAS the said offender has not appeared at the said District Court on 13/04/2006 These are therefore to command you in her Majesty's name forthwith to apprehend the said offender and to bring him before me or some other Judge of the said Court or some other Justice or Justices of the Peace, in and for the said State to be dealt with according to law."

6. On 14 December 2011, the appellant was arrested in Victoria and charged with two Commonwealth offences (possessing a false Australian passport and money laundering). On 26 February 2013, the appellant was sentenced by a Victorian Magistrate to six months' imprisonment with respect to those two federal charges. As the appellant was leaving court after being sentenced for these charges, he was apprehended by a Victorian police officer pursuant to ss. 82(1) and 82(3) of ***SEPA***, which relevantly provide that a person "*named in a warrant issued in a State may be apprehended in another State ... by an officer of the police force of the State in which the person is found.*"

7. On 27 February 2013, the appellant was brought before a Victorian Magistrate pursuant to s. 83(1) of ***SEPA***. The Victorian Magistrate made orders under s. 83(8)(b) of ***SEPA*** directing the return of the appellant to NSW ("the SEPA orders") (AWS at [9]). Section 83(8)(b) of ***SEPA*** authorised the Victorian Magistrate to order "*that the person be taken, in such custody or otherwise as the magistrate specifies, to a specified place in the place of issue of the warrant.*"

8. The SEPA orders are contained in a document headed "*Service and Execution of*

Process Act 1992 Warrant to remand a person to another State". After setting out details of the New South Wales bench warrant, that document stated as follows:

> "I order that the defendant be returned to SYDNEY POLICE CENTRE in the State of NSW in which the warrant was issued, and for that purpose to be delivered into the custody of DET SGT ROBERT MCLENNAN the person bringing the said warrant, or of the Members of the Police force or persons to whom the warrant was originally directed, or any of them. These are therefore to command you DET SGT ROBERT MCLENNAN the person bringing the said warrant, and all members of the Police Force and persons to whom the warrant was originally directed, or any of you, to forthwith take the defendant and safely convey him to SYDNEY POLICE CENTRE in the State of NSW and take him before a Magistrate for the said State to answer the said charge and to be further dealt with according to law."

9. On 28 February 2013, Sergeant McLennan and another New South Wales detective attended the Melbourne Magistrate's Court and collected the appellant in accordance with the SEPA orders and conveyed him to Tullamarine Airport for his return to New South Wales. Tullamarine Airport is a Commonwealth place within the meaning of s. 52(i) of the ***Constitution***.

10. Shortly before boarding the plane at Tullamarine airport, the appellant escaped from the custody of both officers. The appellant was swiftly reapprehended by the officers and was then returned to New South Wales without further incident.

11. Upon his return to New South Wales, the appellant was charged with an offence of attempting to escape from lawful custody contrary to s. 310D of the ***Crimes Act***. (The correct description of the charge should have been s. 310D of the ***Crimes Act***, as applied by s. 89(4) of ***SEPA***, but nothing turns on this in the present appeal).

Part V: APPLICABLE LEGISLATIVE PROVISIONS

12. The respondent agrees with the appellant's list of applicable legislation.

Part VI: STATEMENT OF ARGUMENT

Overview

13. The facts in this matter have not been in dispute at any stage of these proceedings. Importantly, the appellant has never disputed that:

    (i) The SEPA orders were validly made under s. 83(8) of ***SEPA***;

    (ii) The appellant escaped lawful custody; and

    (iii) At the time of the escape, the appellant was being returned to New South Wales by New South Wales police officers pursuant to the SEPA orders.

14. It is common ground that because the appellant was being returned to New South Wales pursuant to the SEPA orders at the time of his escape, the identification of the law applicable to the appellant's escape is governed by s. 89(4) of ***SEPA***: AWS at [17]. Section 89(4) of ***SEPA*** provides that:

    "*(4) The law in force in the place of issue of a warrant, being the law relating to the liability of a person who escapes from lawful custody, applies to a person being taken to the place of issue in compliance with an order mentioned in subsection (1).*"

15. Subsection 89(1) refers to an order made under s. 83(8)(b) of ***SEPA***. The appellant accepts that the reference in s. 89(4) of ***SEPA*** to the "*law in force in the place of the warrant, being the law relating to the liability of a person who escapes from lawful custody*" is, in the present case, New South Wales law: AWS at [17]. Indeed, at no stage in the proceedings has the appellant ever suggested that any law other than New South Wales law applies to his escape.

16. Nonetheless, as the Court of Appeal observed, there were in fact two federal laws which were potentially capable of applying State laws to the appellant on 28 February 2013: ***SEPA*** and the ***Commonwealth Places (Application of Laws) Act 1970*** **(Cth)** ("the ***CPAL Act***"). The latter must be considered because the escape occurred within Tullamarine Airport, which is a "*Commonwealth place*" within the meaning of s. 52(i) of the ***Constitution***. State law does not apply of its own force in a Commonwealth place: ***Worthing v Rowell and Muston Pty Ltd*** [1970] HCA 19; 123 CLR 89 and ***R v Phillips*** [1970] HCA 50; 125 CLR 93. The effect of s. 4(1) of the ***CPAL Act*** is to pick

up State laws generally and apply them "*according to their tenor*" within the Commonwealth place in question.

17. However, because the appellant was in custody pursuant to SEPA orders at the time of his escape, his liability for that escape was governed by ***SEPA*** rather than the ***CPAL Act***.

18. As the Court of Appeal correctly observed, s. 4(2) of the ***CPAL Act*** provides that the ***CPAL Act*** does not apply a State provision if the provision would have been inoperative in its application in relation to the Commonwealth place otherwise than by reason of the operation of s. 52 of the ***Constitution***. Section 8(4) of ***SEPA*** provides that ***SEPA*** applies to the exclusion of State laws with respect to process to which ***SEPA*** applies. As s. 8(4) of ***SEPA*** and s. 109 of the ***Constitution*** rendered State laws inapplicable to escapes occurring during the course of the execution of orders made under ***SEPA***, s. 4(2) of the ***CPAL Act*** effectively disabled the operation of the ***CPAL Act*** in respect of those matters: ***Mok v Director of Public Prosecutions (NSW)*** [2015] NSWCA 98; 320 ALR 584 ("Court of Appeal judgment") at [31] – [36]. Moreover, as the later provision in time and the more specific provision in its application, s. 89(4) would prevail over s. 4(1) of the ***CPAL Act***, even in the absence of s. 4(2) of the ***CPAL Act***: Court of Appeal judgment at [32].

19. It may also be observed that s. 4(1) of the ***CPAL Act*** applies State law "*to each place in that State that is or was a Commonwealth place at that time*". Tullamarine Airport is within the State of Victoria. Accordingly, if the application of State law was effected by the ***CPAL Act***, rather than by ***SEPA***, the State law to be applied would be Victorian law and not New South Wales law. As outlined above, it has never been contended by the appellant that Victorian law is applicable in this case.

20. The issue that formed the basis of the dispute between the parties in the proceedings below was whether the elements of the offence under s. 310D of the ***Crimes Act*** could be established in this matter. The two relevant elements of the s. 310D offence were: (1) whether the appellant was an "*inmate*"; and (2) whether the appellant had escaped lawful custody. There being no issue between the parties that the appellant had escaped lawful custody, the only issue in dispute was whether the respondent could establish beyond reasonable doubt that the appellant was an "*inmate*" at the time of the escape.

The term "*inmate*" is relevantly defined to refer to a person who has been "*committed*" to a "*correctional centre*" by a "*court or other competent authority*".

21. At first instance, Buscombe LCM (as his Honour then was) accepted that the appellant had been committed to a correctional centre by the SEPA orders, but concluded that the appellant was not an "*inmate*" for the purposes of s. 310D of the ***Crimes Act*** because the "*court or other competent authority*" (namely, the Victorian Magistrate) that so committed the appellant was not a court or other competent authority "*in and of New South Wales*", as required by s. 12 of the ***Interpretation Act 1987*** (NSW) ("***Interpretation Act***"): ***Police v Yau Ming Mok*** (unreported, NSW Local Court, 1 July 2013) ("Local Court decision") at [36] - [46].

22. On appeal, Rothman J set aside the Local Court decision, finding that Buscombe LCM's determination that the Victorian Magistrate was not a "*court or competent authority*" within the meaning of s. 310D of the ***Crimes Act*** did not take account of the fact that s. 310D was applied as Commonwealth law by s. 89(4) of ***SEPA***: ***Director of Public Prosecutions (NSW) v Yau Ming Mok*** [2014] NSWSC 618; 296 FLR 1 ("Supreme Court judgment") at [57] – [58]; [63]; and [69].

23. The Court of Appeal found in favour of the respondent, albeit on a basis different to that contended for by the respondent. Like Rothman J, the Court of Appeal accepted that s. 310D of the ***Crimes Act*** was applied by s. 89(4) as "*surrogate federal law*": Court of Appeal judgment at [38]. However, the Court of Appeal concluded (at [51]) that it was not necessary for the prosecution to demonstrate that the appellant was an inmate, because the "*new federal offence created by s. 89(4) acting upon s. 310D applies to all person who are being taken to New South Wales in compliance with an order under* [s. 89(1) of SEPA]."

24. In view of the above, and accepting the correctness of the appellant's concessions as to the applicability of s. 89(4) of ***SEPA*** and s. 310D of the ***Crimes Act***, the questions in issue in these proceedings are:

    (a) Is a State law relating to escape applied as "surrogate federal law" by s. 89(4) of ***SEPA***, or does such State law apply of its own force?

    (b) Is s. 310D of the ***Crimes Act*** applied by s. 89(4) of ***SEPA*** in the way found by

the Court of Appeal?

(c) If not, at the time of his escape, was the appellant an "*inmate*" within the meaning of s. 310D of the ***Crimes Act*** as applied by s. 89(4) of ***SEPA***? (as alleged in the Notice of Contention).

25. For the reasons outlined below, the respondent contends that a State law relating to escape is applied as "surrogate federal law" by s. 89(4) of ***SEPA***. The respondent further contends that the elements of the offence under s. 310D as applied by s. 89(4) of ***SEPA*** are established in this matter, whether by reason of the basis upon which the Court of Appeal found in favour of the appellant, or the basis upon which the respondent contended in the Court of Appeal, and now relies on in the Notice of Contention, namely that the appellant was an "*inmate*" within the definition of s. 310D of the ***Crimes Act***, as applied by s. 89(4) of ***SEPA***.

(a) State law is applied as surrogate federal law by s. 89(4) of *SEPA*

26. Although it is common ground between the parties that s. 89(4) of ***SEPA*** is the operative provision in the identification of the law that is applicable to the appellant's liability for escape, the parties join issue as to how s. 89(4) in fact "applies" the State law in question.

27. In particular, the appellant argues that s. 89(4) does not create a "*surrogate federal law*", and, accordingly, that s. 89(4) does not create a new federal offence relating to the escape of a person being transferred pursuant to SEPA orders (AWS at [20] and [22]). Rather, the appellant argues that the effect of s. 89(4) is to ensure that New South Wales law applies of its own force, rather than as applied by ***SEPA***. That is, the appellant appears to argue that s. 89(4) of ***SEPA*** is a "carve out" provision, rather than an application provision.

28. The appellant's argument that s. 89(4) should be interpreted as a "carve out" provision should be rejected for the following reasons.

29. First, the appellant's argument is contrary to the language used in s. 89(4), which "*applies*" the State law of the place of issue to a person being taken to the place of issue in compliance with an order made under ss. 83(8) and 89(1) of ***SEPA***.

30. Second, the use of the word "*applies*" in s. 89(4) of ***SEPA*** echoes the language used in federal provisions such as ss. 68 and 79 of the ***Judiciary Act 1903*** (Cth), s. 4 of the ***CPAL Act*** and s. 74(2A) of the then ***Trade Practices Act 1974*** (Cth). It is well accepted that where a State law is "applied" by provisions of this nature, the applied law is federal law (also referred to as "*surrogate federal law*"): see for example, ***Insight Vacations Pty Ltd v Young*** [2011] HCA 16; 243 CLR 149 at [8], per French CJ, Gummow, Hayne, Kiefel and Bell JJ; ***R v Porter*** (2001) 53 NSWLR 354 at [41]; ***Solomons v District Court (NSW)*** [2002] HCA 47; 211 CLR 119 at 134 [20], per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ, and at 150 [74], per Kirby J; and ***Maguire v Simpson*** [1977] HCA 63; (1977) 139 CLR 362 at 408, per Murphy J.

31. Third, the purpose of s. 89(4) of ***SEPA*** is to impose the law of the place of the issue of the State warrant to any escape occurring immediately following the moment that the person is taken into custody pursuant to orders made under ***SEPA***. Section. 89(4) is predicated on the law of the place of issue of the warrant not applying of its own force to the escape. Such State law will be inapplicable both because the State law will not extend to an escape from custody where the custody originated from the order of a court of another State (particularly where the escape occurs in another State), and because of s. 8(4) of ***SEPA***, which applies ***SEPA*** to the exclusion of State laws relating to the execution of process to which the ***SEPA*** applies. In other words, s. 89(4) cannot operate as a "carve out" provision that permits a State law to operate of its own force, because a State statute relating to escape would not apply of its own force to an escape occurring in another State, particularly where the lawfulness of the custody is authorised by the law of the other State.

32. In view of the above, both the Court of Appeal and Rothman J correctly concluded that s. 310D was applied as surrogate federal law by s. 89(4) of ***SEPA***.

(b) The decision of the Court of Appeal

33. As outlined above, the appellant conceded in the Court of Appeal that:

    at the time of his escape, he was a "*person being taken to the place of issue of a warrant*" in compliance with s. 89(1) of ***SEPA***; and

    the "*law in force in the place of issue*", as that phrase is used in s. 89(4) of ***SEPA***,

encompasses s. 310D of the ***Crimes Act***.

34. The Court of Appeal correctly held that, in view of these two conceded matters, the appellant was guilty of an offence under s. 310D of the ***Crimes Act***, as applied by s. 89(4) of ***SEPA***.

35. The Court of Appeal also correctly held that s. 89(4) "*applies*" the law in force in the place of issue, s. 310D of the ***Crimes Act***, to any "*person*" being taken to New South Wales in compliance with orders made under ***SEPA***. In other words, the section identifies the subject of the law – namely the person being returned pursuant to SEPA orders – and applies the State law relating to escape to that person.

10 36. As the Court of Appeal observed, the text and structure of s. 89(4) is not subject to the "nuances" that are found in provisions such as ss. 68 and 79 of the ***Judiciary Act***: Court of Appeal judgment at [47]. Rather, by directing the application of State law to a specified person s. 89(4) contains an "*express provision which* [enables the court] *to alter the language of a State statute and apply it in altered form*": Court of Appeal judgment at [49], citing ***John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*** [1973] HCA 21; 129 CLR 65 at 95, per Mason J.

37. The Court of Appeal's interpretation of s. 89(4) accords with the text, purpose and the policy of the provision: ***Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*** (2009) 239 CLR 27 at 46-47 [47]. Specifically, the concern of ***SEPA*** is with
20 the return of the person to the issuing State. Section 89(4) of ***SEPA*** recognises that it is the issuing State (and not the Commonwealth, or the State in which the person is apprehended) that has the most interest in the person. It is within this context that the Court of Appeal correctly held that s. 89(4) "*applies*" State law.

38. The Court of Appeal ultimately found (at [47]) that:

> "*Subsection 89(4) takes a limited class of State laws: laws of the place of issue which relate to the liability of a person who escapes from lawful custody. Subsection 89(4) does not purport to apply that class of laws generally, or 'according to their tenor', or 'in all cases to which they are applicable'. Subsection 89(4) does something far more focussed. Its premise is that there is a*
30 *person being taken to the place of issue in compliance with an order made under the*

SEP Act. That order will at least ordinarily name the person. Subsection 89(4) applies that limited class of laws to that person – the person named in the order."

39. The effect of the Court of Appeal judgment is not to *remove* the element of the State offence that the appellant be an "*inmate*" when s. 89(4) of ***SEPA*** is applied to create the new surrogate federal law: cf AWS at [25]. Rather, the Court of Appeal held that the element that the appellant be an "inmate" as required by the State law was satisfied because that State law (regarding inmates) applied to the appellant by virtue of s. 89(4). As the Court observed at [51]: "*Section 89(4) requires putting to one side the carefully crafted definitions of "inmate", and applying the new federal offence to all persons being taken to the place of issue. Section 89(4) leaves no room for debate about whether or not Mr Mok is a person who, as an "inmate", is within the scope of s 310D in its ordinary operation as an offence under State law*".

40. In these circumstances, the Court of Appeal correctly went on to find that "[t]*he new federal offence created by s 89(4) acting upon s 310D applies to all persons who are being taken to New South Wales in compliance with an order under the SEP Act mentioned in s 89(1)*": Court of Appeal judgment at [51]. As the appellant was such a person, the Court of Appeal correctly dismissed the appellant's appeal.

(c) Notice of Contention – The appellant was an "*inmate*" within the meaning of s. 310D of the *Crimes Act*

41. Even if, contrary to the above, s. 310D of the ***Crimes Act*** is not directly applied to the appellant as a person who was being transferred pursuant to the SEPA orders, s. 310D nonetheless applies according to its terms, because the appellant was in any event an "*inmate*" within the meaning of s. 310D of the ***Crimes Act,*** as applied by s. 89(4) of ***SEPA,*** at the time of his escape.

42. Section 310A of the ***Crimes Act*** provides that the word "*inmate*" in s. 310D of the ***Crimes Act*** has the meaning prescribed in the ***Crimes (Administration of Sentences) Act* 1999** ("***CAS Act***").

43. Section 3 of the ***CAS Act*** provides that an "*inmate*" is a person to whom Part 2 of that Act applies. Section 4 of the ***CAS Act*** states that Part 2 of the ***CAS Act*** applies to persons relevantly including:

"*(d) any person the subject of a warrant or order by which a court has committed the person to a correctional centre on remand in connection with proceedings for an offence committed, or alleged to have been committed, by the person*"; and "*(e) any person the subject of a warrant or order by which a court or other competent authority has committed the person to a correctional centre otherwise than as referred to above.*"

44. In summary, as defined by ss. 3 and 4 of the ***CAS Act***, an "*inmate*" is a person who:

(a) is the subject of a warrant or order;

(b) where the warrant or order "*committed*" the person to a "*correctional centre*";
10 and

(c) the warrant or order was made by a "*court*" or "*other competent authority*".

45. In the present case, the appellant satisfied each of the above criteria:

46. **As to (a):** the appellant was the subject of orders validly made under s. 83 of ***SEPA***.

47. **As to (b):** the SEPA orders required that the appellant be "*returned to Sydney Police Centre in the State of New South Wales*". Section 3 of the ***CAS Act*** defines a "*correctional centre*" to include "*any police station ... in which an offender is held in custody in accordance with this or any other Act*". Accordingly, the Sydney Police Centre is a "*correctional centre*" within the meaning of the ***CAS Act*** (as both Buscombe LCM and Rothman J accepted: Local Court judgment at [40]; Supreme Court judgment
20 at [51]).

48. As Rothman J observed, the word "*committed*" in s. 4(e) of the ***CAS Act*** includes any order or warrant for the delivery of a person into the custody of a prison, "*whether pending further enquiry, for trial, or for punishment*": Supreme Court judgment at [66], citing ***Mullins v Surrey County Treasurer*** (1881) 7 App Cas 1 at [11], per Lord Watson. Accordingly, both Rothman J and Buscombe LCM correctly concluded that the SEPA orders "*committed*" the appellant to the Sydney Police Centre: Supreme Court judgment at [64] – [68]; Local Court judgment at [44].

49. **As to (c):** the SEPA orders were made by a Victorian Magistrate. A Magistrate is a

"*court*" or "*other competent authority*" within the meaning of s. 4 of the ***CAS Act***. The word "*court*" is defined in s. 3 of the ***CAS Act*** to mean one of a number of specified courts (including the Local Court) or "*any other court that, or person who, exercises criminal jurisdiction*" (emphasis added). The word "*person*" and the use of the word "*exercises*" (rather than "*exercised*") in s. 3 of the ***CAS Act*** extends the definition of "*court*" to include persons exercising administrative powers, provided that those persons also exercise criminal jurisdiction. As the Victorian Magistrate "*exercises*" criminal jurisdiction, she satisfied the definition of "*court*" even though she was exercising administrative powers in making the SEPA orders.

50. In any event, even if the Victorian Magistrate was not a "*court*" within the meaning of s. 4 of the ***CAS Act***, the Victorian Magistrate was nonetheless a "*competent authority*" within the meaning of that section. "*The expression 'competent authority' does not have a technical meaning at common law. Instead, the precise definition depends on the words of the particular statute*": ***Barnes v Kuser*** [2007] WASC 300; (2007) A Crim R 181 at [25]; see similarly ***Director General Security v Sultan*** (1998) 90 FCR 334 at 338F and ***In re Borovski v Weinbaum*** [1902] 2 KB 312 at 315. In ***Barnes***, it was held (at [19]) that a "*competent authority*" is "*a person or body who is invested by a written law to issue an order, direction or requirement to another person.*"

51. The "*competence*" referred to in the expression "*competent authority*" in s. 4 of the ***CAS Act*** relates to the competence of the authority to lawfully commit a person to a correctional centre. As the Victorian Magistrate was empowered by ss. 83(8) of ***SEPA*** to commit the appellant to a correctional centre, the Victorian Magistrate was a "*competent authority*" within the meaning of s. 4 of the ***CAS Act***, as applied by s. 89(4) of ***SEPA***.

52. As outlined above, at first instance, Buscombe LCM accepted that the SEPA orders committed the appellant to a correctional centre (elements (a) and (b)), but concluded that the appellant was not an inmate because the "*court or other competent authority*" (namely, the Victorian Magistrate) that so committed the appellant was not a court or other competent authority "*in and of New South Wales*", as required by s. 12 of the ***Interpretation Act***. In the Supreme Court, the Court of Appeal, and in the application for special leave in this Court, the appellant urged the Court to accept the approach adopted by Buscombe LCM.

53. Buscombe LCM's finding does not take account of the fact that the Victorian Magistrate was empowered by ***SEPA*** to commit the appellant to a correctional centre in New South Wales and that s. 310D was "*applied*" by the force of that same federal legislation.

54. The appellant acknowledges that the language employed by s. 79 of the ***Judiciary Act*** is "*quite similar*" to the language employed in s. 89(4) of ***SEPA***, and that this Court's authorities interpreting s. 79 "*are of assistance in the interpretation of s. 89(4) of SEPA*": AWS at [27]. Those authorities establish that a State law is "*picked up*" and applied in federal jurisdiction by s. 79 of the ***Judiciary Act*** even though the State statute is expressed as being limited in its operation to the courts of the State in question: ***John Robertson*** at 88, per Gibbs J, at 95, per Mason J; ***ASIC v Edensor Nominees Pty Ltd*** [2001] HCA 1; 204 CLR 559 at 593 [72], per Gleeson CJ, Gaudron and Gummow JJ, at 611 [134] – [135] and [141], per McHugh J; and ***Solomons v District Court of New South Wales*** [2002] HCA 47; 211 CLR 119 at 146 [58], per McHugh J.

55. It is well established that in the application of s. 79 it is necessary to apply the State law "*according to the hypothesis that federal courts do not necessarily lie outside their field of application*": ***John Robertson*** at 95, per Mason J; ***Edensor*** at 611 [134] – [135], per McHugh J. Under s. 89(4) of ***SEPA***, it is likewise necessary to apply the State or Territory law of the "*place of issue*" according to the hypothesis that an order made under ***SEPA*** does not lie outside the field of application of the State or Territory law.

56. Accepting the correctness of the Court of Appeal's observation that federal law may apply State law in different ways, and that the ultimate effect depends upon the terms of the particular federal law (Court of Appeal judgment at [40]), it may nonetheless be observed that in each context in which State law is applied as "surrogate federal law", it has been accepted that the State law cannot be held to be inapplicable only by reason that the literal terms of the State law apply to State courts. For example, when a State law conferring criminal jurisdiction is "picked up" and applied in federal jurisdiction by s. 68 of the ***Judiciary Act***, it has been said the adoption of the State law "*must proceed by analogy*": ***Rohde v Director of Public Prosecutions*** [1986] HCA 50; 161 CLR 119 at 124, per Gibbs CJ, Mason and Wilson JJ and ***Williams v The King [No 2]*** [1934] HCA 19; 50 CLR 551 at 561. Similarly, in ***Re Grinter; Ex Parte Hall*** [2004] WASCA 79; 28 WAR 427 at [56], the Western Australian Court of Appeal observed that where State laws are picked up by ss. 68 or 79 of the ***Judiciary Act***, "*subject to any contrary*

intention in Commonwealth legislation, the State legislation that is picked up should be interpreted and applied as if it had been enacted by the Parliament of the Commonwealth."

57. The entire purpose of s. 89(4) of ***SEPA*** would be rendered nugatory if Buscombe LCM's construction of the provision were accepted. As the Court of Appeal observed: "*The place of issue will often (as here) be different from the place where an escape takes place. The place of issue will always be different from the place where the order committing the person into custody is made (that is why the SEP Act has been invoked). And of course it would not be expected that one State will enact laws relating to the escape from lawful custody where a person is in custody by reason of an order or warrant made by another State's court or magistrate*": Court of Appeal judgment at [50].

58. That is, as observed at para 32 above, a State statute relating to escape would not apply of its own force to an escape occurring in another State, particularly where the lawfulness of the custody is authorised by the law of the other State. Even if s. 310D were only to require proof of escape from "*lawful custody*",[1] s. 12 of the ***Interpretation Act*** would, on the appellant's argument, require such "*lawful custody*" to be read as "*lawful custody ... in and of*" New South Wales. If, as further contended by the appellant, s. 89(4) is a "carve out" provision, or if s. 89(4) were to pick up s. 310D with its meaning entirely unchanged, s.89(4) could never apply such State law to an escape from lawful custody authorised by SEPA orders.

59. Section 89(4) of ***SEPA*** requires that the State or Territory law of the "*place of issue*" be applied on the basis that an order made under ***SEPA*** does not lie outside the field of application of the State or Territory law. Such an application does not involve the "*wholesale rewriting of the provision*" which the appellant contends is the vice of the Court of Appeal's decision (cf AWS at [32]). It merely requires that words such as "*court or competent authority*" (or "*lawful custody*") not be interpreted as being limited to a court or other competent authority (or lawful custody) "*in and of*" the State of the place of issue.

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[1] See, for example, ***Criminal Code 1899*** (Qld), s. 142 ("*A person who escapes from lawful custody is guilty of a crime*"); ***Criminal Law Consolidation Act 1935*** (SA), s. 254 ("*A person subject to lawful detention who escapes, or attempts to escape, from custody... is guilty of an offence.*"); ***Criminal Code*** (WA), s. 146 ("*A*

60. So construed, it is clear that the appellant is a person who was committed to a correctional centre by a court or competent authority. Accordingly, the appellant satisfies the definition of "*inmate*" in s. 310D of the ***Crimes Act***, as applied by s. 89(4) of ***SEPA***.

61. Furthermore, it is no answer to the above that the New South Wales bench warrant would not have rendered the appellant an "*inmate*" within the meaning of s. 310D of the ***Crimes Act*** (cf AWS at [16]). In contrast to the SEPA orders, the NSW bench warrant required the appellant to be delivered to a court rather than to a correctional centre. For this reason, it is accepted that if the appellant had escaped following apprehension pursuant to the bench warrant in New South Wales he would not have been an "*inmate*" within the definition of ss. 3 and 4 of the ***CAS Act*** and would not have been guilty of an offence under s. 310D of the ***Crimes Act*** (but would have committed a common law misdemeanour of escape).

62. The question of whether a person is an "*inmate*" for the purposes of s. 310D of the ***Crimes Act*** directs attention to the reason why the person is in "*lawful custody*". At the time that the appellant escaped, he was not in "*lawful custody*" pursuant to the New South Wales bench warrant. Rather, at the time of the escape, the appellant was in "*lawful custody*" pursuant to the SEPA orders.

63. The terms of those SEPA orders were very different to the NSW bench warrant. Unlike the NSW bench warrant, which only provided for the appellant's return to a NSW court, the SEPA orders expressly committed the appellant to a correctional centre, namely the Sydney Police Centre. That the SEPA orders were in different terms to the NSW bench warrant is unsurprising - at the time that the SEPA orders were made, the appellant had been in contravention of bail conditions imposed in New South Wales for a period in excess of 5 years, and required transportation to another State to answer the charges for which he had been bailed to appear. More importantly, in the time since the NSW bench warrant had been issued, the appellant had been convicted and sentenced to a term of imprisonment in respect of two federal offences. These matters – particularly the latter, meant that it was appropriate for the Victorian Magistrate to require that the appellant be conveyed to a correctional centre in NSW before being taken to a court to answer the

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person who escapes from lawful custody is guilty of a crime"); **Criminal Code** (Tas), s. 107 ("*A person who escapes from lawful custody is guilty of a crime*").

matters that had originally given rise to the bench warrant. As observed above, it has never been contended by the appellant that it was not open to the Victorian Magistrate to order that he be taken to a correctional centre in New South Wales.

64. The difference in the express terms and purpose of the SEPA orders as compared to the bench warrant are critical to the application of s. 310D of the ***Crimes Act*** in this case. Because the SEPA orders expressly committed the appellant to a correctional centre, the appellant fell within the definition of "*inmate*" in s. 310D of the ***Crimes Act*** when he escaped from custody that was authorised by the SEPA orders.

Conclusion

10 65. For the reasons outlined above, the decision of the Court of Appeal was correct.

66. In any event, even if the Court of Appeal erroneously concluded that it was not necessary for the prosecution to demonstrate that the appellant was an "*inmate*" within the meaning of s. 310D of the ***Crimes Act***, the Court of Appeal's decision dismissing the appellant's appeal should be affirmed because the appellant was an "*inmate*" within the meaning of s. 310D of the ***Crimes Act***, as applied by ***SEPA***.

Part VIII: ESTIMATE OF LENGTH OF ORAL ARGUMENT

67. The respondent estimates that he will require one hour to present his argument.

Dated: 24 December 2015

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