

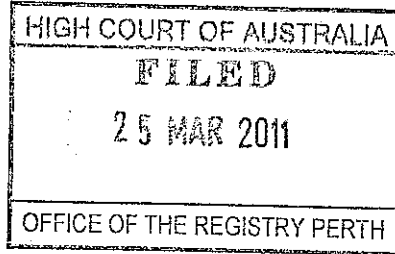
**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY**

No. M134 of 2010

BETWEEN:

10

VERA MOMCILOVIC



Appellant

AND

THE QUEEN

First Respondent

AND

**THE ATTORNEY-GENERAL FOR THE STATE
OF VICTORIA**

Second Respondent

20

AND

**THE VICTORIAN EQUAL OPPORTUNITY AND
HUMAN RIGHTS COMMISSION**

Third Respondent

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**INTERVENER'S SUPPLEMENTARY SUBMISSIONS ON QUESTION 5 OF
THE HIGH COURT'S LETTER DATED 1 MARCH 2011
ATTORNEY GENERAL FOR WESTERN AUSTRALIA**

Part I: SUITABILITY FOR PUBLICATION

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

Part II: SUBMISSIONS

2. These submissions are Western Australia's response to question 5 of the Court's questions contained in the letter from the Senior Registrar dated 1 March 2011.
3. Western Australia submits that the answer to question 5 is "yes", for the following reasons.
- 10 4. Under s. 75(iv) of the *Constitution*, the High Court has original jurisdiction in all matters between a State and a resident of another State. This conferral of jurisdiction is based on the identity of the parties.¹ Provided there is a "matter" between a State and a resident of another State, the suit will fall within the original jurisdiction of the High Court.
5. In *R v Kidman*² the Commonwealth Attorney General filed an indictment in this Court charging the defendants with conspiracy to defraud the Commonwealth. This Court held that those proceedings concerned a "matter" within the original jurisdiction of this Court notwithstanding the criminal nature of the proceedings.
- 20 6. Similarly, in *Re Judiciary and Navigation Acts*, the plurality recognised that a "matter" must involve "some right or privilege or protection given by law, or the *prevention, redress or punishment of some act inhibited by law*"³. As explained by Gummow J in *Truth About Motorways*⁴

"There is a disjunction drawn in this passage, removed from notions of mutuality or reciprocity, between what the law gives and what the law inhibits. That disjunction was inevitable, *given the nature of the*

¹ *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [86] per Gummow J.

² (1915) 20 CLR 425.

³ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ (emphasis added).

⁴ *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [124] (emphasis added).

criminal law and the proposition established by *R v Kidman*⁵ that, as Isaacs J put it, "[m]atters include all justiciable causes of suit, whether civil or criminal"

7. Later cases confirm that criminal proceedings may concern an adjudication of a "matter". In *Macleod v Australian Securities and Investment Commission*⁶ the Australian Securities Commission ("ASC") prosecuted Mr Macleod, a Western Australian resident, for offences under Western Australian legislation in the Court of Petty Sessions. In the joint judgment, the following observation was made:⁷

"The nine heads of 'matters' which fall within federal jurisdiction are identified in Ch III of the Constitution as to some by the source of the rights and liabilities in question or by the remedy sought. However, s75(iii) is attracted by the presence of the Commonwealth as a 'party' in a 'matter'; the rights or liabilities which supply content to the 'matter' in question; and the nature of the remedy sought are to be ascertained aliunde. In the proceeding in the Court of Petty Sessions, the identity of the ASC as the complainant attracted the exercise by that court of federal jurisdiction; the liability sought to be established in the proceeding, and the substantive content of the 'matter' within the head of s 75(iii) was the determination of liability for contravention of certain laws of Western Australia and the imposition of penalties if liability was established. It is accepted that, for the purposes of Ch III of the Constitution, in particular s 75(iii), the ASC is to be regarded as 'a party' which is 'the Commonwealth'."

8. Two points can be made from this passage:
- (a) First, the Court held a "matter" under s. 75(iii) includes the determination of criminal liability for contravention of certain laws in Western Australia and the imposition of penalties if liability was established.
- (b) Secondly, the Court recognised that it was sufficient to attract federal jurisdiction that the Commonwealth, as prosecutor, was a party to the proceedings. The original jurisdiction in s. 75(iii), like s. 75(iv), is based on the identity of the parties. If federal jurisdiction under s. 75 (iii) is attracted because the prosecuting authority is the Commonwealth, then by parity of reasoning, federal jurisdiction

⁵ (1915) 20 CLR 425 at 444.

⁶ (2002) 211 CLR 287.

⁷ (2002) 211 CLR 287 at [6] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

under s. 75(iv) is attracted because the prosecuting authority is the State⁸ and the defendant is a resident in another State.

9. Similarly, in *Re McBain; Ex parte Australian Catholic Bishops Conference*,⁹ Gaudron and Gummow JJ recognised that criminal prosecutions fall within the ambit of the term “matter” for the purposes of s. 75 of the *Constitution* when they said:

10 "More broadly, there is no general proposition respecting Ch III that the 'immediate right, duty or liability to be established by the determination of the Court' spoken of in *Re Judiciary and Navigation Acts*, must be a right, duty or liability in which the opposing parties have correlative interests. Thus, the prosecutor of an offence against a law of the Commonwealth and the defendant do not have correlative interests. Nevertheless, the proceeding seeks to vindicate and enforce the duty or liability of the defendant to observe the criminal law of the Commonwealth."

10. The decision of this Court in *Hogan v Hinch*¹⁰ provides a recent example of this Court exercising original jurisdiction in a State criminal matter, on removal under s. 40(1) of the *Judiciary Act 1903* (Cth).

11. In the present case both the County Court and the Court of Appeal were exercising federal jurisdiction in a matter between a State and a resident of another State. It follows, for the reasons explained at paragraphs 46-72 of Western Australia's principal written submissions, that the function of making a declaration of inconsistent interpretation could not validly be conferred on those State courts in the proceedings below.

Dated the 25th day of March 2011.



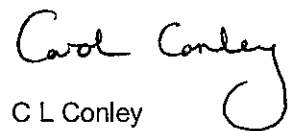
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⁸ The words “a State” in s. 75(iv) are wide enough to include an agency or instrumentality of a State: see *Crouch v Commissioner for Railways* (1985) 159 CLR 22 at 32 per Gibbs CJ. The joint judgment in *Crouch*, at 38, described the Commissioner for Railways as an instrumentality of the State “through which the executive government of the State discharges an important part of its governmental functions.” Clearly the Victorian ODPP is discharging an important part of governmental functions in prosecuting indictable offences. See also *Deputy Commissioner of Taxation v The State Bank of NSW* (1992) 174 CLR 219 at 230-231.

⁹ (2002) 209 CLR 372 at [67].

¹⁰ [2011] HCA 4.