IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M134 OF 2010**

On appeal from
the Court of Appeal of the Supreme Court of Victoria

BETWEEN: **VERA MOMCILOVIC**
Appellant

AND: **THE QUEEN**
First Respondent

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA
Second Respondent

THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION
Third Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in the interests of the First and Second Respondents to submit that:

   2.1. There is no inconsistency within the meaning of s 109 of the Constitution between the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (**DPCS Act**) and the Criminal Code contained in the Schedule to the *Criminal Code Act 1995* (Cth).

   2.2. Sections 32 and 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) do not infringe the principle associated with *Kable v Director of Public Prosecutions (NSW)*.[1]

   2.3. The High Court has jurisdiction pursuant to s 73 of the Constitution to set aside a declaration of inconsistent interpretation made pursuant to s 36 of the Charter in this matter.

3. The Commonwealth makes no submission on the construction of s 5 of the DPCS Act or the trial judge's direction to the jury.

PART III LEGISLATIVE PROVISIONS

4. The Commonwealth agrees with the statement of applicable constitutional and statutory provisions set out in the annexure to the Appellant's submissions and in the annexure to the Third Respondent's submissions.

PART IV ISSUES PRESENTED BY THE APPEAL

INCONSISTENCY

5. The Commonwealth submits that there is no inconsistency between ss 5 and 71AC of the DPCS Act and ss 13.1, 13.2 and 302.4 of the Criminal Code.

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1 (1996) 189 CLR 51.

6. The distinction between "direct" and "indirect" inconsistency is often analytically useful but is not mandated by s 109 of the Constitution and ought not be allowed to produce the rigid dichotomy for which the Appellant contends: Appellant's Submissions at [25]-[30].

7. Whether the allegation is that a State law "would alter, impair or detract from the operation" of a Commonwealth law or that a State law would be a "detraction from the full operation" of a Commonwealth law "intended as a complete statement of the of the law governing a particular matter or set of rights and duties", the critical starting point for the determination of whether or not there is inconsistency necessarily lies in the determination, as a matter of construction,[2] of the intended legal and practical[3] operation of the particular Commonwealth law. That is because the existence of inconsistency in either case ultimately depends on the extent, if at all, to which the Commonwealth law evinces an intention to express "completely, exhaustively or exclusively, what shall be the law governing [a] particular conduct or matter"[4] or, in other words, "to deal with that subject to the exclusion of any other law".[5]

8. That critical question of construction may, but need not, be left to be informed by what is to be implied having regard to the subject-matter, scope and purpose of the Commonwealth law.[6] The consideration that s 109 is important not only for the adjustment of the relations between the legislatures of the Commonwealth and State but also for the citizen upon whom concurrent and cumulative duties and liabilities may be imposed by those bodies[7] serves to emphasise the importance within the integrated system of Australian law established by the Constitution of the well-accepted capacity of the Commonwealth Parliament to inform the answer to such a question of construction by making express whether and if so to what extent a Commonwealth law is intended to operate either exclusively[8] or concurrently[9] with State law. Where it is supported by a head of Commonwealth legislative power[10] and is one that "the substantive provisions of the Act are capable of supporting",[11]

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2 *Dickson v The Queen* (2010) 84 ALJR 635 at 642-643 [32], [34] (the Court).

3 Eg: *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 at 336-337 (the Court); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 399-400 [203] (Gummow J).

4 *Ex parte McLean* (1930) 43 CLR 472 at 483 (Dixon J) explaining *Hume v Palmer* (1926) 38 CLR 441.

5 *The Queen v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 224 (Mason J) explaining *The Queen v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338.

6 *Dickson v The Queen* (2010) 84 ALJR 635 at 643 [34] (the Court).

7 *Dickson v The Queen* (2010) 84 ALJR 635 at 640 [19] (the Court).

8 Eg *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 627-629 [34]-[39] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); *New South Wales v Commonwealth (Work Choices case)* (2006) 229 CLR 1 at 167-169 [371]-[373] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

9 Eg *The Queen v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563 (Mason J).

10 Eg *Botany Municipal Council v Federal Airports Authority* (1992) 175 CLR 453 at 465 (the Court).

11 *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518 at 527 [20] (the Court).

such an expression of intention ought in principle be determinative of the proper construction of the Commonwealth law in question. It is the proper construction of the Commonwealth law that is then, in turn, determinative of whether or not s 109 is brought into play.[12]

9. Whereas in *Dickson v The Queen*[13] the potentially relevant concurrent operation provision was not located in the same Chapter of the Criminal Code as the conspiracy offence, and so was held to be incapable of shedding light on any intention to legislate to the exclusion of the States in relation to conspiracy to steal Commonwealth property,[14] here s 300.4(1) of the Criminal Code contains a "very clear" expression of legislative intention[15] that Part 9.1 of the Criminal Code is not intended to "exclude or limit" the concurrent operation of any State or Territory law. Without limiting subsection (1), subsection (2) operates where an act or omission is an offence against Part 9.1. In that case, Part 9.1 is not intended to exclude or limit the concurrent operation of a State or Territory law that makes that act or omission, or a similar act or omission, an offence. This makes explicit the capacity of the State or Territory to create an offence which is the same *or similar* to one contained in the Criminal Code. Because subsection (2) does not limit subsection (1), subsection (2) does not imply that subsection (1) has no operation where an act is an offence under a State or Territory law but not under Part 9.1 of the Criminal Code. That is, there is no inconsistency merely because a State or Territory renders criminal conduct not proscribed by Part 9.1. Section 300.4(3) provides that subsection (2) applies even if the State or Territory law imposes a different penalty; provides for a different fault element; or makes available different defences from those applicable to offences in the Criminal Code. Thus, subsection (3) demonstrates that differences between the Commonwealth and State offences are not to be regarded as intruding into areas of liberty left free by the Commonwealth.[16]

10. The extrinsic materials to the Criminal Code confirm that it was explicitly contemplated that State drug offences would continue to operate. The Explanatory Memorandum for the Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 states:[17]

> The purpose of proposed subsection 300.4 (1) is to ensure that State and Territory laws that create overlapping offences, or that regulate activities in relation to controlled substances and border controlled substances, will continue to operate alongside proposed Part 9.1. This approach of allowing overlapping federal, State and Territory offences to operate

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12 *Dickson v The Queen* (2010) 84 ALJR 635 at 642 [33] (the Court) and *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518 at 527-528 [21] (the Court) in each case quoting *The Queen v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563 (Mason J).

13 (2010) 84 ALJR 635.

14 *Dickson v The Queen* (2010) 84 ALJR 635 at 643 [36]-[37] (the Court).

15 Cf *The Queen v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-564 (Mason J).

16 Contrast *Dickson v The Queen* (2010) 84 ALJR 635 at 640 [22], 645 [25] (the Court).

17 Page 13; see also pp 1-2.

concurrently is consistent with Parliament's approach with other serious crimes, such as terrorism, serious harm, fraud, money laundering and sexual servitude offences.

11. In the second reading speech for that Bill, it was said that the offences would "operate alongside State and Territory offences to give more flexibility to law enforcement agencies" so as to "ensure there are no gaps between federal and State laws that can be exploited by drug cartels".[18] The very object of enacting the Commonwealth drug offences was therefore seen as aided by the co-existence of State and Territory offences.[19]

12. Indeed, the context in which Part 9.1 of the Criminal Code was enacted included a history of concurrent federal and State drug offences. Prior to the introduction of Part 9.1, the *Customs Act 1901* (Cth) contained import and export offences, and a number of possession offences, principally in s 233B.[20] The *Narcotic Drugs Act 1967* (Cth), which regulates the manufacture of substances defined as drugs for the purposes of the Single Convention on Narcotic Drugs 1961, contains a concurrent operation provision in s 7. The *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (Cth), which criminalises the international illicit drug trade, also contains a concurrent operation provision in s 5. There were also Commonwealth and State provisions for co-operation, and the concurrent operation of laws in relation to surveillance[21] and controlled operations.[22]

13. Arrangements were also in place between Commonwealth and State bodies for the concurrent prosecution of Commonwealth and State offences:[23] for example, officers of the Commonwealth Director of Public Prosecutions (**Commonwealth DPP**) could prosecute State offences on behalf of the Victorian Director of Public

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18 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 2005, p 6 (P Ruddock, Attorney-General).

19 See *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J).

20 The offence in s 233B was first inserted in the *Customs Act 1901* by the *Customs Act 1910*, s 11. Opium was first declared subject to s 233B by proclamation in 1910 (as then required for the section to operate): Commonwealth of Australia Gazette, No 80, 31 December 1910, pp 1930-1.

21 The *Surveillance Devices Act 2004* (Cth) is not intended to affect State laws: s 4(1); see also s 14 and the definition of "law enforcement officer" in s 6. The *Surveillance Devices Act 1999* (Vic) does not apply to certain Commonwealth agents (s 5) or the installation, use or maintenance of certain devices if done in accordance with a law of the Commonwealth (ss 6(2)(b), 7(2)(b), 8(2)(b), and 9(2)(b)); see also s 15(2) and the definition of "senior officer" in s 3(1). The *Telecommunications (Interception and Access) Act 1979* (Cth) applies to State and Territory police (see the definition of "authorised officer" and "enforcement agency" in s 5(1) and see s 39(2)(c)), at least where the police force has been declared to be an "agency" for the purposes of the Act under s 34).

22 Part 1AB of the *Crimes Act 1914 (Cth)* provides for controlled operations. Section 15GB provides for the concurrent operation of State and Territory laws. A controlled operation is one where a law enforcement offer (which includes a member of a police force of a State or Territory: s 3) is obtaining evidence for prosecution of a "Commonwealth offence or a serious State offence that has a federal aspect" (see s 15GD). Under Part 1AB, State police may apply for an authority to conduct a controlled operation (see s 15GH and the definition of "law enforcement agency" in s 15GC). As to the need for partnerships for serious crime investigations requiring complimentary rather than conflicting federal, State and Territory laws, see *Dowe v Commissioner of the NSW Crime Commission* [2006] NSWSC 1312 at [82]-[83], [131].

23 See *R v Dexter* (2002) A Crim R 276; [2002] QCA 540 at [6], [7], [29], [46] (McMurdo P).

Prosecutions[24] and staff of the office of the Victorian Director of Public Prosecutions were authorised by the Commonwealth DPP to sign indictments for and on behalf of the Commonwealth Director.[25] As a result, drug offences might be tried in a number of ways: for example, by a joint indictment in which federal and state offences are alleged;[26] or by two presentments preferred by different police forces.[27] The Commonwealth DPP prosecutes indictments containing Commonwealth offences alone, a combination of Commonwealth and State offences,[28] or State offences alone (at least where there is power under the Constitution to support the authority under the Commonwealth *Director of Public Prosecutions Act 1983* (Cth) to prosecute the State offences in question).[29] It is not uncommon for a prosecutor to be able to choose which offence to charge from a range of possible offences covered by particular conduct and no insuperable practical difficulty arises merely because some of those offences may be under a Commonwealth law and others under a State law.[30]

14. Section 4C(2) of the *Crimes Act 1914* (Cth), which ensures that double punishment does not arise where a Commonwealth and State offence cover the same conduct,[31] is another part of the context in which Part 9.1 of the Criminal Code was enacted. Section 4C(2) necessarily "proceeds in accordance with the principle that there is no prima facie presumption that a Commonwealth statute, by making it an offence to do a particular act, evinces an intention to deal with that act to the exclusion of any other law".[32]

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24 *Director of Public Prosecutions Act 1983* (Cth) s 6(1)(m), (ma), (n), s 17(1); *Director of Public Prosecutions Regulations 1984* (Cth), reg 3(1)(a)(iii) and (iv); and *Public Prosecutions Act 1994* (Vic) s 32(3).

25 Under the *Director of Public Prosecutions Act 1983* (Cth), s 9(2)(b); see also s 15(1)(da). See also *Public Prosecutions Act 1994* (Vic), ss 22(1)(cc) and 36(1)(ba).

26 See for example *R v Roberts and Urbanec* [2004] VSCA 1 (where offences under both the *Customs Act 1901* (Cth) and s 71 of the DPCS Act were alleged).

27 See for example, *R v Chhom Nor* [2005] VSC 46, in which Victoria Police had investigated, arrested and charged the accused with offences under the DPCS Act (in respect of which there was a State presentment) and the Australian Federal Police had investigated, arrested and charged the accused with DPCS Act offences, contained in another presentment.

28 *R v Dexter* [2002] QCA 540 at [25] and *R v Fukusato* [2002] QCA 20 at [4]-[9], [54]-[64], [85]-[92] and [148]-[150]; *Minehan v R* [2010] NSWCCA 140; *Fasciale v R* [2010] VSCA 337; *Shen v R* [2009] NSWCCA 251.

29 See *R v Hughes* (2000) 202 CLR 535 at 557-558 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *R v Holden* [2001] VSCA 63 at [21]-[31] (Chernov JA); *R v Kolaroff* (1997) 95 A Crim R 447; *R v Dexter* [2002] QCA 540 at [25], [43], [44], [45].

30 *R v El Helou* (2010) 267 ALR 734 at 740 [37] (Allsop P, Grove and Hislop JJ agreeing).

31 In *Dickson v The Queen* (2010) 84 ALJR 635 it was noted (at 640 [21] (the Court)) that s 4C of the *Crimes Act 1914* (Cth) does not resolve alleged inconsistency, as it is directed at the circumstance where there are two valid offences, one State and one Commonwealth. In that context, reliance was placed on *The Queen v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 347. In *Blacklock*, however, the relevant rule of conduct for the protection of Commonwealth property was found to evince an intention to deal with that subject to the exclusion of any other law.

32 *The Queen v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 224 (Mason J).

15. The Appellant's inconsistency argument relies on pointing to differences between the DPCS Act and the Criminal Code: Appellant's Submissions at [45]-[46]. But, unlike *Dickson*, where an examination of the differences between the elements of the conspiracy offence created by the Criminal Code and that created by s 321 of the Victorian *Crimes Act* was held to point up the existence in the conspiracy offence created by the Criminal Code of "areas of liberty designedly left",[33] the appellant here is unable to show differences between the elements of the drug offences. The Appellant is left to point instead to differences in penalties and procedures for trial.

16. The mere fact of differences in penalties does not establish inconsistency[34] and those differences, considered in the light of Part 9.1 as a whole, including s 300.4, do not demonstrate that the DPCS Act would alter, impair or detract from the operation of any relevant provision of the Criminal Code. Nor can the mere fact of differences concerning the method of proof establish inconsistency. Section 300.4 indicates that even more pronounced differences (such as a difference in fault elements: s 300.4(3)(b)) between Commonwealth and State offences do not mean that the Commonwealth offences operate to the exclusion of the State offence.

17. Different requirements in relation to jury trial were regarded by the Court in *Dickson* as strengthening (though not being determinative of) the case for direct inconsistency.[35] Under s 80 of the Constitution, the trial on indictment of any offence against any law of the Commonwealth shall be by jury. One of the essential features of a trial by jury required by s 80 is that the verdict be unanimous.[36] However, the Parliament may determine whether any particular offence shall be tried on indictment or summarily, and therefore whether the requirements of s 80 will apply to a particular offence.[37] It would be anomalous if the Commonwealth could determine whether a conviction for a Commonwealth offence must be by unanimous jury verdict (by specifying whether it is to be tried on indictment or not), but the Commonwealth could not allow a State offence (where a majority verdict was permissible) to operate concurrently with a Commonwealth indictable offence. In any event, the State procedures for majority verdicts[38] may not be engaged in

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33 *Dickson* (2010) 84 ALJR 635 at 640 [25] (the Court).

34 *Ex parte McLean* (1930) 43 CLR 472 at 483 (Dixon J); *McWaters v Day* (1989) 168 CLR 289 at 296 (the Court).

35 *Dickson v The Queen* (2010) 84 ALJR 635 at 640-641 [20], [22] (the Court). In *Hume v Palmer* (1926) 38 CLR 441 at 450-451 (Isaacs J) (referred to by the Court in *Dickson* at 640 [20]), the State offence was a summary offence, while the federal offence was indictable, thereby attracting trial by jury under s 80 of the Constitution. Thus, the relevant difference was the absence of a right to trial by jury in respect of the State offence and a federal offence to which s 80 attached. There were also different penalties imposed by the two regimes, which dealt with navigation offences.

36 *Cheatle v The Queen* (1993) 177 CLR 541.

37 *Kingswell v The Queen* (1985) 159 CLR 264 at 276-277 (Gibbs CJ, Wilson, Dawson JJ) and the cases there cited; *Cheng v The Queen* (2000) 203 CLR 248 at 295 [142]-[143], 299 [152], 306 [170] (McHugh J).

38 *Juries Act 2000* (Vic) s 46. Commonwealth offences are indictable if they are punishable by imprisonment for a period exceeding 12 months, unless the contrary intention appears: *Crimes Act 1914* (Cth), s 4G.

relation to drug offences,[39] and were not in fact engaged here (as is recognised by the Appellant: submissions [46](b)).

VALIDITY

18. In view of the fact that neither the Appellant, nor any of the Respondents, make any submission that ss 32 or 36 of the Charter are (or would on any construction be) invalid, the Commonwealth makes only brief written submissions which can be supplemented orally if and to the extent that may be of assistance to the Court.

19. A comparison of the reasoning of the Court of Appeal with the submissions of the Appellant and the Respondents reveals two quite distinct approaches to the operation and interaction of ss 7(2), 32(1) and 36 of the Charter. On the approach of the Court of Appeal, s 7(2) appears to have no application to the interpretive exercise required by s 32(1) but only to the subsequent question whether a declaration of inconsistent interpretation should be made under s 36(2).[40] On the approaches of the Appellant and the Respondents (while there are some differences between them), s 7(2) forms part of the interpretive exercise required by s 32(1), with the consequence that the making of a declaration of inconsistent interpretation under s 36(2) involves the formal expression of the outcome of that process.

20. The Commonwealth takes no position as to which of those approaches to the operation and interaction of ss 7(2), 32(1) and 36 of the Charter is to be preferred. The Commonwealth submits that, on either approach, the exercise required by s 32(1) and the order permitted by s 36(2) each involve the exercise of judicial power which is consistent with the principle associated with *Kable v Director of Public Prosecutions (NSW)*[41] and which is capable of being exercised in or in respect of a matter arising in federal jurisdiction.

Section 32(1)

21. On the approach of the Court of Appeal, s 32(1) is simply the statutory equivalent of the common law presumption of legality.[42] Application of such a presumption is an orthodox judicial function.

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39 In order to avoid undue complexity in jury trials where offences are alleged under State and Commonwealth legislation, the Commonwealth DPP may proffer an undertaking not to seek (or may oppose) a trial judge exercising the discretion to take a majority verdict as is permitted under the *Juries Act 2000* (Vic): see *Re Rozenes, Director of Public Prosecutions and Another; ex parte Burd* (1994) 120 ALR 193.

40 The methodology adopted by the Court of Appeal concerning justification has been largely adopted by Penfold J in *In the matter of an application for bail by Isa Islam* (2010) 4 ACTLR 235; [2010] ACTSC 147 at [141] in relation to ss 28 and 30 of the *Human Rights Act 2004* (ACT); contrast *R v Fearnside* [2009] ACTCA 3; (2009) 165 ACTR 22 at 42 [93]-[94] (Besanko J; Gray P and Penfold J agreeing at 24 [1], [2]).

41 (1996) 189 CLR 51.

42 See, for example, *Coco v R* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron, McHugh JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 271 [58] (French CJ, Gummow, Hayne, Crennan, Kiefel JJ).

22. On the approach of the Appellant and the Respondents, which incorporates s 7(2) into the process of interpretation, there is still nothing antithetical to the judicial function. Provided a standard or criterion is capable of judicial evaluation, there is no reason in principle why a legislature cannot express its intention in terms that a law (whenever enacted) is to be construed in a manner that is consistent with that standard or criterion.[43] The actual criteria set out in s 7(2) are readily capable of judicial evaluation.[44]

23. Even on the United Kingdom approach (for which the Third Respondent contends), s 32(1) should still be understood as involving an interpretative function in the same way as the rule of construction in a provision such as s 15A of the *Acts Interpretation Act 1901* (Cth)[45] may be applied where the "ordinary" meaning of a statutory provision may otherwise be unconstitutional. The courts in the United Kingdom do not conceive of s 3(1) of the *Human Rights Act 1998* (UK) as conferring legislative power.[46] As Lord Reid has observed, it is not accurate to speak of the process of statutory interpretation as a search for "the intention of Parliament".[47] Rather, courts "are seeking the meaning of the words which Parliament used."[48] The determination of that meaning must commence with the words used by Parliament and must also be informed by context and purpose,[49] including by "[t]he observance of statutory and judge-made rules of interpretation" which operate as "an aid to the discovery of the meaning of a legislative text".[50]

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43 Sir Anthony Mason AC KBE, "Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power" (Robin Cooke Lecture 2010, Wellington, New Zealand, 16 December 2010) [22] - [27].

44 See, for example, *Baker v R* (2004) 223 CLR 513 at 532 [42] (McHugh, Gummow, Hayne and Heydon JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at 331- 334 [20]-[28] (Gleeson CJ), 344-348 [71]-[82], 349-351 [88]-[92] (Gummow and Crennan JJ), 507 [596] (Callinan J); *Attorney-General (Commonwealth) v Alinta Ltd* (2008) 233 CLR 542 [14] (Gleeson CJ), [168]-[169] (Crennan and Kiefel JJ); contrast *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [21] (McHugh J).

45 Or s 6 of the *Interpretation of Legislation Act 1984* (Vic).

46 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 573 [33] (Lord Steyn), 583 [57] (Lord Millett), 597 [112] (Lord Rodger); *R v Lambert* [2002] 2 AC 545 at 585-586 [79], [81] (Lord Hope); *R v Shayler* [2003] 1 AC 247 at 279 [52] (Lord Hope); *R (Anderson) v Home Secretary* [2003] 1 AC 837 at 849 [30] (Lord Bingham), 858 [59] (Lord Steyn); *Bellinger v Bellinger* [2003] 2 AC 467 at 486 [67] (Lord Hope); *R v A (No 2)* [2002] 1 AC 45 at 86-87 [108] (Lord Hope); *In re S (Minors)(Care Order: Implementation of Care Order)* [2002] 2 AC 291 at 313 [39]-[40] (Lord Nicholls); *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at 72-73 [75]-[76] (Lord Woolf CJ).

47 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591 at 613.

48 [1975] AC 591 at 613. See also *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169 (Gummow J); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *R v Secretary of State for the Environment, Transport and the Regions; ex parte Spath Holme Ltd* [2001] 2 AC 349 at 396-397 (Lord Nicholls).

49 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

50 The Hon M Gleeson AC, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 PLR 26 at 29. See also *Saeed* (2010) 241 CLR 252 at 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Zheng v Cai* (2009) 209 CLR 446 at 455-456 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] (Gleeson CJ).

24. In Australia, the courts have been able to distinguish between interpretation and legislation in the application of the rule of construction in provisions such as s 15A of the *Acts Interpretation Act 1901* (Cth) and the operation of those provisions provide a partial analogy to the operation of s 32(1) of the Charter. Section 15A is no more than a rule of construction, "not an inexorable command."[51] Simply because it may result in the construction of a statutory provision in a manner which it would not otherwise bear, absent s 15A, does not mean that s 15A confers legislative power.

25. If, contrary to the submission of the Commonwealth, s 32(1) were to be regarded as conferring a legislative function, then the conferral of that function would contravene the *Kable* principle. Although the conferral of some discrete legislative functions on a court is undoubtedly permissible, such as the making of rules of court,[52] the conferral of this legislative function would stand in a different category because it would be inextricably intertwined or blended with the exercise by the court of its judicial functions to an extent sufficient to alter the nature of those functions and thereby to alter the character of the institution.

Section 36

26. On the approach of the Appellant and the Respondents, the making of a s 36 declaration reflects the result of the process of interpretation undertaken in accordance with s 32(1). A declaration made under s 36 of the Charter arises out of the proceedings in which the declaration is made and involves the formal expression of an essential step in the reasoning adopted by the Supreme Court in the resolution of the "matter" giving rise to those proceedings.

27. On the approach of the Court of Appeal, the application of s 7(2) in the process of determining whether or not to make a declaration under s 36 but not in the process of interpretation undertaken in accordance with s 32(1) means that the symmetry of functions would be less complete. Yet the criteria to be applied in the application of s 7(2) at the stage of making a declaration would still be capable of judicial application and the consideration given to the making of a declaration would still arise in respect of the "matter" giving rise to the proceedings in which the process of interpretation undertaken in accordance with s 32(1) was exercised.

28. Although the declaration does not affect the validity, operation or enforcement of the relevant statutory provision or create in any person any legal right or give rise to any civil cause of action (s 36(5)[53]), there is no relevant distinction between the Charter provisions and those allowing the giving of an opinion on a point of law arising from a criminal trial where that opinion does not affect the defendant's acquittal and it was not proposed to issue a fresh indictment. Such a procedure was held to involve the exercise of judicial power and so give rise to an appeal under s 73 of the

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51 *Pidoto v Victoria* (1943) 68 CLR 87 at 118 (Starke J).

52 *R v Davison* (1954) 90 CLR 353 at 368-370 (Dixon CJ, McTiernan J).

53 See also s 39(3) which provides that a person is not entitled to be awarded any damages because of a breach of the Charter.

Constitution in *Mellifont v Attorney-General (Qld)* (***Mellifont***).[54] The plurality in *Mellifont* emphasised the fact that the purpose of the reference procedure was to correct errors of law which occur in criminal trials.[55] It was the relationship between the question reserved and the trial which was critical to the Court's conclusion,[56] but there is no reason to confine the decision to that particular procedure.

29. Alternatively, if it is necessary that a declaration have some consequences in order to constitute an exercise of judicial power, the making of a s 36 declaration has both legal and practical binding consequences in the form of the requirements that the Attorney-General must give a copy to the Minister administering the relevant Act[57] (s 36(7)) and that the Minister must prepare a response which must be tabled in Parliament (s 37).[58] The declaration leaves no room for the exercise of discretion on the part of the Attorney-General.[59] The practical consequences of a declaration of inconsistent interpretation lie in its value as a form of relief or remedy. Just as the Court considered that to grant a declaration in *Ainsworth v Criminal Justice Commission*[60] that the appellant had been denied procedural fairness "may redress some of the harm done" to his reputation by the Commission's publication of its report,[61] so an unsuccessful litigant in a case in which ss 32 and 36 of the Charter are engaged may consider that an authoritative declaration by the Supreme Court that the statutory provision on which their claim or defence foundered was inconsistent with one or more of their human rights constitutes a form of redress or even vindication.

30. Alternatively, the making of a s 36 declaration could be regarded as the exercise of a power ancillary or incidental to the exercise of judicial power.[62] It arises out of and is closely connected to the determination of the parties' rights by the application of s 32(1).

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54 (1991) 173 CLR 289 at 305-306 (Mason CJ, Deane, Dawson, Gaudron, McHugh JJ).

55 (1991) 173 CLR 289 at 305 (Mason CJ, Deane, Dawson, Gaudron, McHugh JJ).

56 See *DPP (SA) v B* (1998) 194 CLR 566 at 576 [10] (Gaudron, Gummow, Hayne JJ).

57 Part I of the DPCS Act is administered jointly by the Minister for Health and the Minister for Mental Health: see *Administration of Acts General Order* (Vic) (20 April 2009) and *Administration of Acts General Order* (Vic) (8 December 2010).

58 In this respect, it is relevant, though not essential for validity, that the Attorney-General was a party to the proceedings before the Court of Appeal and was heard in relation to the compatibility of s 5 of the DPCS with s 25 of the Charter and the making of a declaration of inconsistent interpretation. By virtue of the notice provision in s 36(3), the Attorney will have that opportunity in every case, whether or not he or she chooses to exercise it by intervening in the proceeding.

59 Contrast *Victoria v The Australian Building Construction Employees' and Builders Labourers' Federation (No 2)* (1982) 152 CLR 179 at 183 (Gibbs CJ).

60 (1992) 175 CLR 564.

61 (1992) 175 CLR 564 at 581-582.

62 *Cominos v Cominos* (1972) 127 CLR 588 at 591 (McTiernan, Menzies JJ), 595 (Walsh J), 598-599 (Gibbs J), 605 (Stephen J), 608-609 (Mason J). See also, for example, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278 (Dixon CJ, McTiernan, Fullagar, Kitto JJ); and *Victoria v The Australian Building Construction Employees' and Builders Labourers' Federation (No 2)* (1982) 152 CLR 179 at 187 where Brennan J found that certification by the Court of a party's eligibility for costs was incidental to the exercise by the Court of its judicial power to determine the appeal.

31. If, contrary to the submission of the Commonwealth, s 36 were to be regarded as not involving the exercise of judicial power or a power incidental or ancillary to judicial power in a "matter", then s 36 would not be picked up and applied in federal jurisdiction by s 79 of the *Judiciary Act 1903* (Cth),[63] but it would not be invalid. Nothing about the exercise in which the Supreme Court must engage in order to make a s 36 declaration suggests that the Court is acting as the instrument of the legislature or the executive to procure a certain outcome[64] or is undertaking the exercise in conjunction with the legislature or the executive.[65] Indeed, quite the opposite. The terms of s 36(5) do not render what is otherwise an exercise in which courts are accustomed to engage "repugnant to or inconsistent with" the exercise by the Supreme Court of the judicial power of the Commonwealth[66] or "substantially inconsistent or incompatible with the continuing subsistence, in every aspect of its judicial role, of its defining characteristics as a court."[67] Not everything by way of decision-making denied to a federal judge is denied to a judge of a State.[68] A State Supreme Court may, for example, issue advisory opinions.[69]

SECTION 73 OF THE CONSTITUTION

32. Under s 73 of the Constitution, appeals lie to the High Court only from "judgments, decrees, orders, and sentences" made in the exercise of judicial power.[70] Whichever of the approaches to ss 7(2), 32(1) and 36(2) discussed above is adopted, for the reasons given above, the making of a declaration under s 36 involves an exercise of judicial power, or is incidental or ancillary to the exercise of judicial power, and at least in a case such as the present where the appeal is also against other orders of the Supreme Court, is capable of being the subject of an appeal to the High Court under s 73(ii) of the Constitution.

33. If it is necessary that a "judgment, decree, order or sentence" be made with respect to a "matter" for an appeal to be available under s 73, then for the reasons given

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63 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 593-594 [72]-[74] (Gleeson CJ, Gaudron and Gummow JJ); *Solomons v District Court of New South Wales* (2002) 211 CLR 119 at 134-136 [24] - [29] (Gleeson CJ, Gaudron, Gummow, Hayne, Callinan JJ).

64 Contrast *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 124 (McHugh J), 134 (Gummow J); *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 592 [19] (Gleeson CJ), 617 [100] (Gummow J); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ).

65 *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 602 [44] (McHugh J).

66 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 106.

67 *South Australia v Totani* (2010) 85 ALJR 19; 271 ALR 662; [2010] HCA 39 at [70] (French CJ).

68 *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at 655-656 [219] (Callinan and Heydon JJ), repeated in *South Australia v Totani* (2010) 85 ALJR 19; 271 ALR 662; [2010] HCA 39 at [145] (Gummow J).

69 Although arguably no appeal will lie to the High Court from such a decision: *Smith v Mann* (1932) 47 CLR 426, 445-446; *Saffron v The Queen* (1953) 88 CLR 523 at 527-528 (Dixon CJ), referred to in *Mellifont* at 301 (Mason CJ, Deane, Dawson, Gaudron, McHugh JJ). The overruling of the decision in *Saffron* in *Mellifont* at 305-306 arguably does not affect the correctness of this proposition.

70 *Mellifont* at 299-300, 305 (Mason CJ, Deane, Dawson, Gaudron, McHugh JJ).

above, a declaration under s 36 is made with respect to a "matter".[71] Further, the relationship between the interpretation of the statutory provision in question and the making of the declaration under s 36 affords a persuasive reason to find that an appeal from the declaration lies to the High Court.[72] Accordingly, a declaration made under s 36 may be set aside on appeal to this Court, at least (as is the case here) where the appeal is brought against both the declaration and the orders which determined the matter in which the declaration was made.

34. The questions of justification under s 7(2) and whether to make a s 36(2) declaration "*arise out of* the proceedings on the indictment and are a statutory extension of the proceedings [and are] made with respect to a 'matter' which was the subject matter of the legal proceedings at first instance and was not divorced from the ordinary administration of the law."[73]

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71 See *Mellifont* at 305 (Mason CJ, Deane, Dawson, Gaudron, McHugh JJ); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 142-143 (Gummow J).

72 *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 283 (Deane, Gaudron, McHugh JJ).

73 *Mellifont* at 304-305 (Mason CJ, Deane, Dawson, Gaudron, McHugh JJ, emphasis in original).