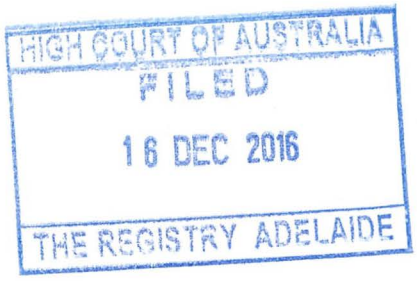
**IN THE HIGH COURT OF AUSTRALIA**
**PERTH REGISTRY**

**No. P55 of 2016**

BETWEEN:




**JOHN RIZEQ**
Appellant

and

**THE STATE OF WESTERN AUSTRALIA**
Respondent

# SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Crown Solicitor for the State of South Australia
Level 9, 45 Pirie Street
ADELAIDE SA 5000

Tel: 08 8207 1760
Fax: 08 8207 2013
Email: fiona.mcdonald3@sa.gov.au
Ref: Fiona McDonald; 161670

**Part I: Certification**

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

**Part II: Basis for intervention**

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) (***Judiciary Act***).

**Part III: Leave to intervene**

3. Not applicable.

**Part IV: Applicable legislative provisions**

4. South Australia accepts the statement by the appellant of the applicable legislative provisions.

**Part V: Submissions**

5. South Australia adopts the Statement of Issues by the respondent.[1] South Australia confines its submissions to whether the *Misuse of Drugs Act 1981* (WA) applied to the trial of the appellant of its own force or only through the operation of s 79(1) of the *Judiciary Act*. This is a question of construction which falls to be determined by reference to the provision's text, context and purpose.[2] That exercise in construction is informed by the constitutional landscape in which s 79(1) was enacted and continues to operate.[3]

6. In summary, South Australia submits:

   i. Consideration of the whole of the text of s 79(1) supports the view that the State laws it picks up and applies are only those which are directed to the conferral, definition and exercise of jurisdiction.

   ii. Other provisions of the *Judiciary Act* provide contextual confirmation that s 79(1) is concerned only with laws of such a nature.

   iii. The constitutional landscape provides an indispensable backdrop for an appreciation of the particular purpose to which s 79(1) is directed. The assumption upon which the Constitution proceeds – that State laws which are not directed to the curial context continue to apply of their own force once federal jurisdiction has been enlivened – denies any legislative motive for a federal

---

1 Written Submissions of the Respondent (**RS**) at [2]-[3].

2 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[70] (McHugh, Gummow, Kirby and Hayne JJ); *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings* (2012) 250 CLR 503 at [39] (the Court); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [23]-[24] (French CJ and Hayne J), [88]-[89] (Kiefel J).

3 See *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [91] (Kirby J).

enactment which does that work. In contrast, the negative implication arising from Ch III which precludes States competence to legislate for the conferral, definition or exercise of federal jurisdiction, discloses a narrow legislative imperative to which s 79(1) is addressed.

iv. The absence of Commonwealth legislative competence to support fully the construction and operation of s 79(1) advanced by the appellant, as well as the undesirable consequences necessarily flowing from such operation, provide further compelling reasons to so construe the provision.

**Text**

10 7. To suggest that the text of s 79(1) is sufficiently broad as to pick up and apply State laws creating criminal offences, such as s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA), is to focus on only part of the text, specifically, the reference to "*[t]he laws ... including ...*".

8. Consideration of the full text of s 79(1) provides robust indication that State laws so picked up are limited to those laws of the State that are *incidental to the authority to decide*; namely, those laws directed to the effective conferral, definition and exercise of jurisdiction by a court (hereafter referred to as "incidental" laws).

i. "Incidental" laws speak to the invocation or conferral of jurisdiction on a court or its exercise. These include procedural laws such as rules of pleading,[4] laws of evidence, and laws concerning the production of evidence,[5] along with laws
20 stipulating limitation periods[6] and provisions governing the orders a court may make.[7]

ii. Such "incidental" laws may be distinguished from those laws which regulate substantive rights and liabilities in the community independently of the invocation of any court's jurisdiction, and which in neither form nor substance can properly be characterised as laws which confer, invest, define, alter or interfere with a court's authority to adjudicate. The character of such laws, hereafter referred to as "substantive" laws, is not altered when they fall to be applied by a court. They simply supply a body of substantive law applicable by the relevant court in the exercise of its jurisdiction (federal or otherwise).

30 9. Adopting these characterisations, the word "including" in s 79(1) is capable of being read

---

4 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [39] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

5 *Northern Territory v GPAO* (1999) 196 CLR 553 at [93] (Gleeson CJ and Gummow J).

6 *Northern Territory v GPAO* (1999) 196 CLR 553 at [33] (Gleeson CJ and Gummow J); see also *Pederson v Young* (1964) 110 CLR 162 at 165 (Kitto J).

7 *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [58] (Gleeson CJ, Gaudron and Gummow JJ).

as illustrative of the adjectival nature of laws intended to be picked up, equivalent to "such as" or "for example", such that the categories then included would exemplify the "incidental" laws of each State.[8]

10. Secondly, that capability becomes textually likely when placed against the subsequent words which provide that such laws "shall ... be binding on all Courts exercising federal jurisdiction in that State or Territory". The section is expressed to bind courts in their exercise of federal jurisdiction; it does not purport to engage in normative prescription of the rights and liabilities of persons in a non-curial context.[9] The provision is only engaged once there is a court "exercising" federal jurisdiction, in the present continuous sense.[10] This provides a textual focus on "incidental" laws of the relevant State or Territory.

**Context**

11. Contextual considerations within the *Judiciary Act* similarly militate against a construction of s 79(1) which captures "substantive" State laws.

12. Subsections (2) to (4) of s 79 ensure the application by s 79(1) of certain State laws which regulate the exercise of jurisdiction in connection with a suit relating to the recovery of payments which were based on a purportedly invalid State tax.[11] Consistent with the construction of subs (1) posited above:

    i. subsections (2) to (4) of s 79 are directed to a court, and only in the context of a "suit" engaging the exercise of federal jurisdiction. Their scope of operation is limited to the invocation and regulation of the exercise of such jurisdiction;[12]

    ii. those subsections purport only to apply to certain State (or Territory) laws "covered by subsection (3)". Within subs (3), the relevant subset of State laws are described as "a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law doing any of the following [...]." Two observations follow:

        a. first, subss (2) and (3) in combination are suggestive of an assumption that it is only a *subset* of all State laws which become inapplicable to a suit

---

8 *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [198] (Kirby J).

9 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

10 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [62] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ); *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

11 Prior to the amendment to the *Judiciary Act* pursuant to which those subsections were inserted, certain State "incidental" laws were found by this Court to be incapable of application because ss 79 and 39(2) of the *Judiciary Act* "otherwise provided": *British American Tobacco Australia v WA* (2003) 217 CLR 30.

12 See also s 80A of the *Judiciary Act*.

involving federal jurisdiction;

b. second, subs (3) seeks to identify the types of State laws which are intended to be captured not by specific or exhaustive definition, but by setting out illustrative examples of an inclusive class.

13. Section 68 of the *Judiciary Act* provides a further contextual indicator that speaks against the proposition that s 79(1) operates to pick up and apply "substantive" State laws in cases to which they are applicable.

i. Section 68 lists categories of State laws that are expressed to *"apply"* ... "so far as they are applicable to *persons* who are charged with offences...". Section 79(1), by contrast, expresses the laws described therein to be "*binding on ... Courts* exercising federal jurisdiction".

ii. Some of those categories in s 68(1) are categories of procedural laws to be applied by Courts in the curial context. There is, therefore, an overlap with the binding of Courts by laws caught by s 79(1). However, the categories of laws applied to persons in s 68(1) extend, for example, to laws respecting the arrest and custody of offenders or persons charged with offences. That is, they extend to certain laws governing administrative action outside of the curial context.[13] Recognising that s 79(1) is limited to binding courts to the operation of "incidental" laws is to recognise a separate sphere of operation of s 68(1).

iii. A contextual reading of s 79(1), located as it is within the "Supplementary Provisions" of the Act, suggests that it complements s 68. Subject to any other Commonwealth enactment, s 79(1) binds the Courts of the relevant State or Territory (and indeed all courts) to *all* "incidental" laws (beyond the laws of only criminal procedure contemplated in s 68) in any exercise of federal jurisdiction.

iv. The interpretation of s 79(1) pressed by the appellant would render the further express reach of s 68(1) otiose.

14. Section 80 of the *Judiciary Act*, concerned with the application in federal jurisdiction of the common law in Australia (as modified), is not inconsistent with this construction of s 79(1).

**Purpose**

15. The task of construing s 79(1) typifies those occasions where "a separation of the

[13] This extended reach of s 68(1) is supported by s 51(xxxix) together with whichever head of power supports the relevant "substantive" offence-creating law of the Commonwealth. As to Commonwealth legislative power to create offences, see *R v Hughes* (2000) 202 CLR 535 at [40] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

Constitution and federal legislation is neither sensible nor desirable".[14] The purpose of s 79(1) cannot be properly considered absent an understanding of the constitutional framework in which it was enacted and operates.

16. The constitutional context reveals the work which s 79(1) *need not* perform, as well as the work State legislatures *cannot* perform. The Constitution contemplates that State courts may be invested with federal jurisdiction:[15] such investiture then invites federal legislative action of a particular compass. Section 79(1) is the acceptance of that invitation. It is tailored to the pursuit of a narrow legislative purpose.

"Substantive" State laws apply of their own force

17. State legislative power is plenary subject to any limitations imposed by the Constitution, any inconsistencies with federal law within the meaning of s 109 and, with respect to extraterritorial operation, there being a sufficient nexus with the legislating State.[16] Sections 106 and 107 expressly preserve this legislative power.

18. The "substantive" laws governing a particular relationship of persons in the community at any given time[17] will often include State and federal laws. Those persons are subject to the applicable laws despite no jurisdiction of any court having been invoked to adjudicate upon the relevant rights and liabilities. The legal relationships are antecedent; the invocation of a court's jurisdiction does not re-set those rights and liabilities. This is the distinction recognised by statements that "[t]he existence of federal jurisdiction depends upon the grant of an authority to adjudicate rather than upon the law to be applied or the subject of the adjudication".[18]

19. That distinction is reflected in the temporal difference between the operation of s 109 of the Constitution and s 79(1) of the *Judiciary Act*.[19] Section 109 applies to the "law of a State" where it is inconsistent with a "law of the Commonwealth", both of which operate (subject to validity and, in the case of the State law, inconsistency) at all times, independently of the invocation of the jurisdiction of a court. By contrast, s 79(1) (whatever its meaning) only operates upon a court that is already exercising federal

---

14 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [90] (Kirby J).
15 Constitution, s 77(iii).
16 See *Union Steamship Co of Australia Ltd v King* (1988) 166 CLR 1 at 12-13 (the Court).
17 That is, absent invocation of a court's jurisdiction to adjudicate some litigious dispute.
18 *Felton v Mulligan* (1971) 124 CLR 367 at 393 (Windeyer J), approved of in *Fencott v Muller* (1983) 152 CLR 570 at 606 (Mason, Murphy, Brennan and Deane JJ); *Momcilovic v The Queen* (2011) 245 CLR 1 at [99] (French CJ).
19 Section 79(1) will not pick up and apply State laws which are inoperative by virtue of s 109 of the Constitution: *Northern Territory v GPAO* (1999) 196 CLR 553 at [38] (Gleeson CJ and Gummow J); *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [61] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

jurisdiction, in the present continuous sense.[20] That temporal distinction renders it improbable that the "substantive" law to be applied by a court in adjudicating upon such relationships may differ from the "substantive" law which governed those same persons prior to approaching a court.

20. Section 109 further discounts the possibility that otherwise operative "substantive" State laws are disapplied to particular parties upon their invocation of federal jurisdiction, unless the Federal Parliament sees fit to enact a law which gives them application.[21] Section 109 assumes that, absent some inconsistency, the valid laws of a State and the valid laws of the Commonwealth will be effective in their terms.[22] It contemplates that the body of law applicable at any given time may be comprised of both State and Commonwealth laws, so far as they are not inconsistent.

21. On the appellant's contention, absent a federal enactment choosing to apply the relevant "substantive" State laws as federal laws, the concurrent application of non-inconsistent State and Commonwealth laws contemplated by s 109 would be denied in each case where federal jurisdiction is enlivened. This would unravel the concurrent force and effect of non-inconsistent State and Commonwealth laws recognised by s 109 in any case where a court comes to adjudicate such a matter. Section 109 would become both otiose and undermined whenever federal jurisdiction is engaged.

22. Sections 75 and 76 of the Constitution establish the concept of "federal jurisdiction" through the scope of the High Court's authority to adjudicate. That scope is defined variously by reference to the subject matter of the matter before the court,[23] the identity of the party or parties to the litigation,[24] the impact the matter may have on certain entities,[25] the laws which fall to be applied,[26] the relief sought[27] and the issues which may arise between the parties in the matter.[28] The occasions and features of a proceeding which may enliven federal jurisdiction are not limited to matters arising under laws made by the Commonwealth Parliament.

23. The exercise of federal jurisdiction is predicated on the continued operation and

---

[20] *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ); *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at [62] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

[21] On the appellant's contention, application *as federal laws*. Section 117 further discounts that possibility: see RS at [25].

[22] *Momcilovic v The Queen* (2011) 245 CLR 1 at [222] (Gummow J).

[23] Sections 75(i), 76(iv).

[24] Section 75(iii)-(iv).

[25] Section 75(ii).

[26] Section 76(ii).

[27] Section 75(v).

[28] Section 76(i).

application of "substantive" State laws. Sections 76(iv) and 77(i) and (iii) together illustrate this by contemplating the conferral of federal jurisdiction over matters where "substantive" State laws compete.

24. Similarly, the notion of accrued jurisdiction assumes the ongoing operation and application of "substantive" State laws (which retain their character as non-federal laws) in federal jurisdiction.[29]

25. Finally, to deny that State laws apply of their own force in a court's exercise of federal jurisdiction, is difficult, if not impossible, to reconcile with ss 106-107 of the Constitution. For example, the appellant's thesis would leave it to the choice of Federal Parliament whether or not a State's criminal laws could ever be enforced[30] against a resident of another State, or any person who raises an issue in their trial involving the interpretation of the Constitution. Such a circumstance cannot have been intended to flow from the characterisation of the authority to adjudicate in ss 75 and 76.

26. The cases relied upon by the appellant[31] to deny that *any* State laws can apply directly in federal jurisdiction do not advance the position. The comments of the plurality in *Solomons v District Court (NSW)*[32] do not assist the inquiry as to *which* laws s 79 operates upon. The remaining cases concern "incidental" State laws directed to the invocation of a court's jurisdiction, rather than laws which are "substantive" in the relevant sense.

27. The appellant's proposition that "only federal statute law can operate in federal jurisdiction"[33] must be rejected.

Relevant limitations on State legislative power

28. The exhaustive nature of ss 71, 75, 76 and 77 of the Constitution gives rise to a negative implication which acts to limit State legislative power, such that "incidental" State laws are unable to have direct application where a court is exercising federal jurisdiction.[34] State legislatures do not have power to make laws which invest federal courts with jurisdiction

---

29 *Fencott v Muller* (1983) 152 CLR 570 at 606 (Mason, Murphy, Brennan and Deane JJ), discussing the ratio decidendi of *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457.

30 Those criminal laws would, of course, still apply to the interstate resident at all times up until the jurisdiction of a court was engaged to prosecute the matter. That is, the interstate resident would still commit the offence as a matter of law, but the prosecution of that person for the offence would be precluded.

31 See Appellant's Submissions (**AS**) at [34].

32 (2002) 211 CLR 119 at [21] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

33 AS at [55].

34 *R v Gee* (2003) 212 CLR 230 at [100] (Kirby J); *Alqudsi v The Queen* (2016) 90 ALJR 711 at [171] (Nettle and Gordon JJ). See also *APLA Ltd v Legal Services Commission (NSW)* (2005) 224 CLR 322 at [78], [82] (McHugh J) regarding alteration or interference with the working of the federal judicial system.

(be it State or federal jurisdiction),[35] confer federal jurisdiction on State courts,[36] define the jurisdiction of any federal court,[37] or withdraw or limit a court's exercise of federal jurisdiction.[38] Legislative power of this nature is exclusively the province of the Commonwealth Parliament.[39]

29. Given the exclusivity of the Commonwealth's legislative power on these topics, it falls to that Parliament to enact the necessary "incidental" provisions addressed to the invocation and exercise of federal jurisdiction.

30. The scope of the negative implication to be derived from the exhaustive provisions within Chapter III only removes the legislative competence of a State to pass "incidental" laws affecting the exercise of federal jurisdiction. Neither the text nor structure[40] of Chapter III supports an implied limitation on the applicability of "substantive" State laws as part of the body of law to be applied in a given case by a court exercising federal jurisdiction.

Purposive inferences arising from this constitutional landscape

31. In view of each of these features discernible from the broader constitutional context in which s 79(1) both was enacted and continues to operate, the provision's purpose comes sharply into focus. It fills the legislative lacuna borne of the relevant boundaries of State legislative power in a manner which provides a neat and harmonious solution to the potential disruptions attending the practical execution of the "autochthonous expedient".[41]

32. That legislative lacuna is expanded by the enactment of ss 38 and 39 of the *Judiciary Act*. In the absence of ss 38 and 39, many matters in respect of which the High Court is invested with jurisdiction, either by the Constitution or the *Judiciary Act*, would be capable of adjudication by a State court in the exercise of State jurisdiction.[42] Sections 38 and 39(1) remove any concurrent State jurisdiction in such matters. Section 39(2) then confers federal jurisdiction on the Courts of the States in respect of certain of those

---

[35] *APLA Ltd v Legal Services Commission (NSW)* (2005) 224 CLR 322 at [77] (McHugh J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [58]-[59] (McHugh J), [111] (Gummow and Hayne JJ); *Gould v Brown* (1998) 193 CLR 346 at [118]-[130] (McHugh J); *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [8] (Gleeson CJ, Gaudron and Gummow JJ).

[36] *Alqudsi v The Queen* (2016) 90 ALJR 711 at [168] (Nettle and Gordon JJ); *APLA Ltd v Legal Services Commission (NSW)* (2005) 224 CLR 322 at [230] (Gummow J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [58]-[59] (McHugh J).

[37] *APLA Ltd v Legal Services Commission (NSW)* (2005) 224 CLR 322 at [230] (Gummow J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [58]-[59] (McHugh J).

[38] *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [59] (Gleeson CJ, Gaudron and Gummow JJ)

[39] *Alqudsi v The Queen* (2016) 90 ALJR 711 at [171] (Nettle and Gordon JJ); *APLA Ltd v Legal Services Commission (NSW)* (2005) 224 CLR 322 at [230] (Gummow J).

[40] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 134 (Mason CJ); *APLA Ltd v Legal Services Commission (NSW)* (2005) 224 CLR 322 at [385]-[389] (Hayne J).

[41] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

[42] For example, the jurisdiction contemplated by ss 75(iv) and 76(iv) of the Constitution.

matters.

33. Against the constitutional denial of State legislative power to regulate a court's exercise of federal jurisdiction, that two-step process necessarily denies "incidental" State laws any opportunity of operation in matters caught by s 39. By removing any concurrent State jurisdiction in such matters and rendering it exclusively federal, ss 38 and 39 necessarily expand the lacuna of "incidental" laws to laws that are necessary for the exercise of jurisdiction by a State court over such matters.

34. Section 79(1) repairs this lacuna by making the "incidental" laws of the relevant State applicable to any court exercising federal jurisdiction (subject to some other law of the Commonwealth stepping in). Sections 38 and 39 raise no equivalent issue as to the continued application of such "substantive" laws in matters where federal jurisdiction is invoked.

35. In the exercise of the Federal Parliament's exclusive legislative power on this topic, it would be open for the Parliament to enact different "incidental" laws to govern federal jurisdiction throughout the federation. However, the choice embodied in the terms of s 79(1) – to pick up and apply the "incidental" laws of the State or Territory in which the relevant court is exercising federal jurisdiction – has obvious attraction and utility. It gives coherence, continuity and consistency to judicial proceedings, as best as possible, in view (particularly) of the investiture of State courts with federal jurisdiction.

36. Some proceedings will be commenced in State jurisdiction but ultimately come to be conducted in federal jurisdiction.[43] The potential for significant disruption to such proceedings is obvious. However, the approach adopted in s 79(1) minimises that risk. For laws the application of which depends upon whether the jurisdiction being exercised is State or federal (those laws which must change when the jurisdiction shifts from one to the other), s 79(1) fastens its operative content to a feature of the proceeding that will be unlikely to change: namely, the location of the court. In so doing, the objective of s 79(1) – "to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law"[44] – is succinctly achieved.

37. Like s 68 of the *Judiciary Act*, s 79(1) seeks to ensure, as far as possible, that the conduct of federal jurisdiction in the courts within a State "closely mirrors" the conduct of non-federal jurisdiction.[45] That objective is grounded in economy of specific federal legislation, efficiency in the exercise of federal jurisdiction and consistency as far as possible for persons engaging the jurisdiction of a court regardless of whether that

---

[43] See *Felton v Mulligan* (1971) 124 CLR 367 at 373 (Barwick CJ), 402-404 (Walsh J).
[44] *Northern Territory v GPAO* (1999) 196 CLR 553 at [80] (Gleeson CJ and Gummow J).
[45] As to s 68, see *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [98] (Kirby J).

jurisdiction comes to be federal.[46]

38. A construction of s 79(1) which pursues the particular legislative objective invited by the constitutional landscape, and heightened by the legislative context, should be preferred to a construction that serves no apparent purpose. The preferable construction would see s 79(1) pick up and apply those State laws which are with respect to matters incidental to the execution of any power vested in the State judicature, except as otherwise provided by the Constitution or Commonwealth law, in all cases to which they are applicable.

**Difficulties with the appellant's construction**

10 Limitations on Commonwealth Legislative Power

39. The extent of Commonwealth legislative power with respect to federal jurisdiction and federal courts is exhaustively delineated by Ch III and s 51(xxxix).[47] The grants of power in Ch III carry with them everything incidental to the main purpose of the power, and "the extent of this incidental power 'will be affected by' the nature of the subject matter of the express grant which is in question".[48] For present purposes, the relevant express grant in Ch III is that in s 77 of the Constitution, along with the power conferred by s 51(xxxix).

40. These boundaries of Commonwealth legislative power preclude the operation of s 79(1) for which the appellant contends.[49]

41. The appellant seeks to overcome this fatal difficulty by characterising the "substantive"
20 laws which fall to be applied by a court exercising federal jurisdiction, as laws "for"[50] or "to do with"[51] federal jurisdiction. The appellant thereby contends not only that the Commonwealth Parliament is empowered by Ch III and s 51(xxxix) to legislate for the substantive rights and liabilities governing all proceedings which come to be litigated in federal jurisdiction, but that the States are precluded from so legislating.[52] Implicit in this contention is that, by virtue of Ch III and s 51(xxxix), the Commonwealth Parliament has plenary power to regulate, retrospectively, substantive rights and liabilities with respect to matters beyond the grants in ss 51 and 52 of the Constitution, whenever parties invoke

---

46 As to similar comments regarding s 68, see *Solomons v District Court (NSW)* (2002) 211 CLR 119 at [98] (Kirby J).

47 *Northern Territory v GPAO* (1999) 196 CLR 553 at [195] (McHugh and Callinan JJ) with respect to federal courts; see also Gould v Brown (1998) 193 CLR 346 at [130] (McHugh J).

48 *APLA Ltd v Legal Services Commission (NSW)* at [228] (Gummow J).

49 Such an operation would be beyond power. Of course, such a result provides further reason to reject the appellant's construction *Acts Interpretation Act 1901 (*Cth), s 15A.

50 See AS at [36], [55].

51 See AS at [37].

52 In light of the limitation on State legislative power identified at [28] above. See AS at [35].

the jurisdiction of a court and that jurisdiction comes to be federal.[53]

42. To so expand the scope of federal legislative power by cloaking the putative application of "substantive" State laws in federal jurisdiction as being "for federal jurisdiction" would be to rupture all accepted formulation of that which is capable of being legislated as incidental to the exercise of federal jurisdiction.[54] It would create a tenuous and artificial device that undermined even the least restrictive characterisation test for grants under ss 51 and 52 of the Constitution.

43. It would also deny States the legislative competence to enact enforceable laws regulating, for example, the legal relationships between residents of different States.[55] Perversely, States would retain legislative power with respect to those legal relationships until a court commenced exercising jurisdiction in relation to a matter concerning them. At that point, the "substantive" State law would cease to be within the scope of State legislative power as it would be a law with respect to federal jurisdiction. The result would be the valid creation of rights and liabilities[56] by State law, which would nevertheless be incapable of adjudication or enforcement in a court.

Consequences

44. The construction advanced by the appellant would create arbitrary inconsistencies. The "substantive" laws applicable to persons at a given time would be a matter of happenstance, depending upon the arbitrariness of whether a court's jurisdiction was, at the time, engaged in relation to those persons; if so, whether the jurisdiction so engaged was federal; and if it was, the location of the court exercising that federal jurisdiction.

45. Such an operation of s 79(1) would be liable to uncertainty and disruption. Not only could the "substantive" laws governing legal relationships alter depending on whether or not a court's jurisdiction is engaged, but such a shift would also, in some cases, occur midway through litigation already afoot in a State court.[57] The autochthonous expedient would cease to be expedient; instead creating uncertainty and inconsistency in the applicability of "substantive" laws.

46. The appellant's construction raises unsatisfactory consequences for the various courts, specifically:

---

[53] Which may arise by virtue of, for example, the identity of a party (s 75(iii)) or parties (s 75(iv)), the nature of the relief sought (s 75(v)), or even the nature of the arguments run by a party (s 76(i)); see also *ASIC v Edensor* (2001) 204 CLR 559 at [53] (Gleeson CJ, Gaudron and Gummow JJ).

[54] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 269-270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ)

[55] See s 75(iv) of the Constitution.

[56] Including criminal liability, such as in the present case.

[57] See, e.g., *Felton v Mulligan* (1971) 124 CLR 367 at 373 (Barwick CJ), 402-404 (Walsh J).

i. where the body of law applicable in proceedings to be heard by a State court includes "substantive" laws of another State (other than through the choice of law rules of the forum State). Should the matter fall into federal jurisdiction, the "substantive" interstate laws would cease to apply, changing the nature of the relationships to be adjudicated. Determination of the appropriate forum does not turn exclusively on the "substantive" State law to be applied;[58]

ii. the "substantive" law to be applied by the High Court in the exercise of its original jurisdiction would turn upon the State or Territory in which this Court were to hear the matter.[59]

47. For the same reason, South Australia does not adopt the submission of the respondent to the effect that s 79(1) is declaratory in relation to the operation of "substantive" State laws.[60]

48. The second of the above identified unpalatable effects caused Evatt and McTiernan JJ in *Musgrave v The Commonwealth* to reject a construction that s 79 directed the application of the law of the State in which the Court was sitting; that is, a 'choice of law' construction.[61] For example, should a prosecution for a State offence with no extraterritorial operation be brought in the original jurisdiction of this Court under s 75(iv), but this Court determined to hear the matter in Canberra, the consequence of s 79(1) acting as a choice of law provision and thereby mandating the application of ACT law would be that the State provision establishing the offence would be disapplied and the prosecution foredoomed to fail.

49. It would not, in any event, assist the appellant to argue that s 79(1) operates as a choice of law provision, that is, to say that it simply identifies pre-existing laws of the jurisdiction where the court happened to be sitting as the law to be applied in a given case. Such an interpretation may arguably be more readily characterised as within the legislative competence of the Commonwealth Parliament. Nonetheless, the difficulties arising from the underlying premise that all governing "substantive" laws may immediately shift beneath the feet of parties once a court begins exercising federal jurisdiction, remain the same.

50. Fundamentally, disruptive and arbitrary consequences derive from the essential

---

[58] *Voth v Manildra Flour Mills* (1990) 171 CLR 538 at 558-559, 564-565 (Mason CJ; Deane, Dawson and Gaudron JJ); *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 245 (Deane J).

[59] Cf. *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [57]-[58] (Gleeson CJ, Gaudron and Gummow JJ).

[60] RS at [44(a)], [48], [64].

[61] *Musgrave v The Commonwealth* (1937) 57 CLR 514 at 551 (Evatt and McTiernan JJ).

proposition – common to both the appellant's thesis and any choice of law construction of the provision – that the substantive rights and liabilities applicable to the community at large would be disapplied upon the invocation of federal jurisdiction and retrospectively replaced by new substantive rights and liabilities by the operation of federal law. For the reasons submitted, such a conception of the relationship between State laws and federal jurisdiction is neither supported by the constitutional framework nor favoured by an examination of the text, context and purpose of s 79(1).

**Conclusion**

51. Section 79(1) is concerned to address one of "the difficulties of federal jurisdiction … inherent in … the 'autochthonous expedient'".[62] There is no reason to construe it beyond that remit. In any event, the appellant's construction, to be universally applicable, would take the section beyond the competence of the Commonwealth Parliament.

**Part VI: Estimate of time for oral argument**

52. South Australia estimates that 20 minutes will be required for the presentation of oral argument.

Dated: 16 December 2016

C D Bleby SC
Solicitor-General for South Australia
T: 08 8204 2996
F: 08 8212 6161
E: chris.bleby@sa.gov.au

L K Byers
Counsel
T: (08) 8204 1141
F: (08) 8207 2520
E: lucinda.byers@sa.gov.au

[62] *Felton v Mulligan* (1971) 124 CLR 367 at 393 (Windeyer J).