HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

JOHN RIZEQ APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT

Rizeq v Western Australia
[2017] HCA 23
21 June 2017
P55/2016

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation

M D Howard SC with J S Stellios and R R Joseph for the appellant (instructed by Minter Ellison Lawyers)

P D Quinlan SC, Solicitor-General for the State of Western Australia with R Young for the respondent (instructed by State Solicitor (WA))

S P Donaghue QC, Solicitor-General of the Commonwealth with K L Walker QC and G A Hill for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with S Robertson for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

P J Dunning QC, Solicitor-General of the State of Queensland with F J Nagorcka for the Attorney-General of the State of Queensland, intervening (instructed by Crown Solicitor (Qld))

M E O'Farrell SC, Solicitor-General of the State of Tasmania with S K Kay for the Attorney-General of the State of Tasmania, intervening (instructed by Crown Solicitor for Tasmania)

R M Niall QC, Solicitor-General for the State of Victoria with S Gory for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

C D Bleby SC, Solicitor-General for the State of South Australia with L K Byers for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

CATCHWORDS

Rizeq v Western Australia

Constitutional law (Cth) – Courts – State courts – Federal jurisdiction – Diversity jurisdiction – Where appellant resident of New South Wales – Where appellant indicted for offence against law of Western Australia – Where matter between State and resident of another State within meaning of s 75(iv) of Constitution – Where District Court of Western Australia exercising federal jurisdiction – Whether provisions of State Act picked up and applied as Commonwealth law – Whether s 79 of *Judiciary Act* 1903 (Cth) operates in respect of s 6(1)(a) of *Misuse of Drugs Act* 1981 (WA) – Whether s 79 of *Judiciary Act* 1903 (Cth) operates in respect of s 114(2) of *Criminal Procedure Act* 2004 (WA).

Criminal law – Appeal against conviction – Where trial by jury in federal jurisdiction – Where majority verdict of guilty returned – Whether unanimous jury verdict required by s 80 of Constitution – Whether majority jury verdict permitted under s 114(2) of *Criminal Procedure Act* 2004 (WA).

Words and phrases – "accrued jurisdiction", "diversity jurisdiction", "Federal Judicature", "federal jurisdiction", "jurisdiction", "matter", "picked up and applied", "power", "State jurisdiction", "State legislative capacity", "trial by jury".

Constitution, ss 75(iv), 80.
Criminal Procedure Act 2004 (WA), s 114(2).
Judiciary Act 1903 (Cth), ss 39(2), 79, 80.
Misuse of Drugs Act 1981 (WA), s 6(1)(a).

1 KIEFEL CJ. The appellant was tried on indictment before a jury in the District Court of Western Australia for offences against s 6(1)(a) of the *Misuse of Drugs Act* 1981 (WA) ("the MDA"). The offences were alleged to have been committed in that State. At all relevant times the appellant was a resident of New South Wales.

2 The appellant was convicted by a majority verdict in accordance with s 114(2) of the *Criminal Procedure Act* 2004 (WA) ("the Criminal Procedure Act") and was sentenced to a term of imprisonment. An appeal against his conviction was dismissed[1]. He contends that his conviction was unlawful because s 80 of the Constitution requires that, on a trial on indictment of any offence against a law of the Commonwealth, the verdict of the jury be unanimous[2]. He argues that s 6(1)(a) of the MDA applied to his trial as a Commonwealth law, not as a law of Western Australia, because s 79 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") "picked up" and applied s 6(1)(a) as a Commonwealth law. Section 79 operated in this way because the District Court was exercising federal jurisdiction. The basic proposition for which the appellant contends is that, as a State law, s 6(1)(a) could not apply of its own force in federal jurisdiction.

Federal jurisdiction invested

3 The High Court is given original jurisdiction by s 75 of the Constitution with respect to certain matters. The matters referred to in s 75(iv), sometimes referred to as "federal diversity jurisdiction"[3], include a matter between a State and a resident of another State. The matter here in question between the State of Western Australia and the appellant is whether the appellant is guilty of the offences with which he is charged under the MDA, and, if so, the sentence which should be imposed on him.

4 Section 77(iii) of the Constitution provides that the Commonwealth Parliament may make laws investing any court of a State with federal jurisdiction. Section 39(2) of the Judiciary Act invests State courts with federal jurisdiction in all matters in which the High Court has original jurisdiction (or in which original jurisdiction can be conferred on it), within the limits of their respective jurisdictions and subject to certain conditions and restrictions not presently relevant.

---

1 *Hughes v Western Australia* (2015) 299 FLR 197.

2 *Cheatle v The Queen* (1993) 177 CLR 541; [1993] HCA 44.

3 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 518 [18]; [2000] HCA 36.

5 A State court invested with federal jurisdiction, while acting in that capacity, becomes part of the Federal Judicature[4]. Chapter III provides for an "integrated national court system"[5]. The lead provision of Ch III, s 71, vests the judicial power of the Commonwealth in the High Court, any other federal courts, and "such other courts as [Parliament] invests with federal jurisdiction".

6 Covering cl 5 of the Constitution provides that laws made by the Commonwealth Parliament are binding on the courts, judges and people of every State. The effect of s 39(1) of the Judiciary Act[6] is to withdraw from State courts the jurisdiction they would have had to apply federal laws by reason of covering cl 5 and s 39(2) of the Judiciary Act restores it as an invested federal jurisdiction[7].

7 A State court invested with federal jurisdiction may apply federal laws. It is well accepted that in federal jurisdiction State and federal courts can apply both Commonwealth and State laws, as the matter in question requires. Commonwealth and State laws, together with the common law of Australia, comprise a "single though composite body of law"[8] to be applied. A matter determined in federal diversity jurisdiction, to which s 75(iv) of the Constitution refers, may involve little, if any, Commonwealth law. The point presently to be made is that the investment of "federal jurisdiction" is not a direction as to the law to be applied. It is the investment of authority for a State court to adjudicate.

Federal jurisdiction – the authority to adjudicate

8 A legislative grant of federal jurisdiction simply means that authority is given to a court to hear and determine a matter[9]. In *Baxter v Commissioners of*

---

4 Zines, *Cowen and Zines's Federal Jurisdiction in Australia*, 3rd ed (2002) at 199-200.

5 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 138; [1996] HCA 24.

6 Section 39(1) of the *Judiciary Act* 1903 (Cth) provides that "[t]he jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section."

7 *Felton v Mulligan* (1971) 124 CLR 367 at 394 per Windeyer J; [1971] HCA 39.

8 *Felton v Mulligan* (1971) 124 CLR 367 at 392 per Windeyer J.

9 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087; [1907] HCA 76.

Taxation (NSW)[10], Isaacs J explained[11] that State jurisdiction is the authority to adjudicate which State courts possess under State laws; federal jurisdiction is the authority to adjudicate they derive from the Constitution and laws made under it.

9 Federal jurisdiction, understood as the authority conferred upon a court to adjudicate a matter, is to be distinguished from the law that that court applies in the exercise of that jurisdiction[12]. In *Anderson v Eric Anderson Radio & TV Pty Ltd*[13], Kitto J explained[14] that the conferral of federal jurisdiction merely provided a different basis for the authority of a court to enforce whatever law is applicable to the matter before it. It does not change the law the court enforces in adjudicating upon that matter. It follows that the fact that a court is exercising federal jurisdiction says nothing about the laws to be applied in a particular case.

10 In *Anderson v Eric Anderson Radio & TV Pty Ltd*[15] it was argued that "the essential nature of federal jurisdiction" could explain why the usual choice of law rules were inapplicable. In rejecting that argument, Kitto J said that, of itself, "federal jurisdiction" provided no answer at all "for all that is meant by saying that a court has federal jurisdiction in a particular matter is that the court's authority to adjudicate upon the matter is a part of the judicial power of the federation".

11 The federal jurisdiction that a State court is given to hear and determine a matter must also be distinguished from provisions made by statute which provide a court with powers it may exercise in the hearing and determination of a matter, and in otherwise regulating the proceedings before it.

Section 79 of the Judiciary Act

12 Section 51(xxxix) of the Constitution permits laws to be made by the Commonwealth Parliament which are incidental to the execution of any power vested in the Federal Judicature referred to in Ch III. The Federal Judicature is to be understood to include State courts exercising federal jurisdiction.

---

10 (1907) 4 CLR 1087.

11 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.

12 *Felton v Mulligan* (1971) 124 CLR 367 at 393.

13 (1965) 114 CLR 20; [1965] HCA 61.

14 *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 30.

15 (1965) 114 CLR 20 at 29-30.

13 The Commonwealth Parliament could make laws directed to those courts respecting the matters which might be commenced in them, the processes to be applied in hearing them and orders made in determination of them, provided those laws are otherwise within the limitations of s 51(xxxix) and Ch III. It would, however, be difficult to make provision for every conceivable proceeding brought before a State court in federal jurisdiction. The solution, or part of it, which has been adopted is the enactment of a general provision. Section 79(1) of the Judiciary Act provides:

> "The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

14 Section 80 of the Judiciary Act makes provision for the common law to apply in the exercise of federal jurisdiction but no question here arises as to its application. This case is concerned solely with statute law.

15 There is another, important, reason why s 79(1) was necessary and which explains both its purpose and its sphere of operation. State laws of the kind mentioned cannot apply of their own force to State courts exercising federal jurisdiction in that State[16]. State legislatures have no constitutional power to make such laws[17]. When an exercise of legislative power is directed to the judicial power of the Commonwealth, it must operate through, or in conformity with, Ch III of the Constitution[18].

16 Section 79 fills the gap created by any absence of Commonwealth laws which provide a court with powers necessary for the hearing and determination of a matter and the presence of State laws of this kind which cannot operate of their own force in federal jurisdiction. It operates by "picking up" State laws and applying them as Commonwealth law[19].

---

16 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134 [21]; [2002] HCA 47.

17 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 406 [230]; [2005] HCA 44.

18 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270; [1956] HCA 10.

19 *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168 at 170; [1953] HCA 62.

17 In *Commissioner of Stamp Duties (NSW) v Owens [No 2]*[20], the Court said[21] that when federal jurisdiction is exercised, the purpose of s 79 is to "adopt the law of the State … as the law by which ... the rights of the parties to the *lis* are to be ascertained and matters of procedure are to be regulated". It may be observed that the Court did not say that the law to be adopted is that which provides for the rights or liabilities of the parties to proceedings. It is important to an understanding of s 79 that, as that provision fills the gap created by a lack of Commonwealth law governing when and how a court exercising federal jurisdiction is to hear and determine a matter, its terms and its purpose are directed to courts.

18 It has been said[22] that the laws referred to in s 79 include substantive laws. Since that statement was made it has been recognised that there may be difficulties in applying traditional conceptions of whether a law is procedural or substantive, those regulating the mode and conduct of court proceedings generally being regarded as procedural and those concerning the existence or enforceability of rights or duties of the parties to proceedings as substantive[23]. Much may depend upon statutory context.

19 It is not a correct approach to an understanding of the operation of s 79 to determine its application to a law by reference to whether that law is "procedural" or "substantive". It is necessary to have regard to the purpose of s 79 in connection with the courts to which it is directed.

20 Section 79(1) is not directed to the rights and duties of persons. It is directed to courts exercising federal jurisdiction. Its purpose is to fill a gap in the laws which will regulate matters coming before those courts and to provide those courts with powers necessary for the hearing or determination of those matters. The laws upon which s 79 operates should be understood in this way.

21 The examples given in s 79(1) of laws relating to procedure and evidence are, clearly enough, laws necessary for the hearing of a matter. State laws which provide a court with powers to make particular orders[24], grant injunctive relief[25]

---

20 (1953) 88 CLR 168.

21 *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168 at 170.

22 *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323 at 330; [1957] HCA 18.

23 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 542-543 [97].

24 *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323.

25 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 586-587 [56]; [2001] HCA 1.

or impose a penalty[26] are necessary for the determination of a matter. These are not State laws which can operate of their own force upon courts exercising federal jurisdiction. It is necessary that s 79 operate upon them so that they may be "picked up" and applied.

22 Section 79 has been held to apply to laws which provide that contribution may be sought by a tortfeasor which has been held liable from another tortfeasor[27]. And it has been applied to statutes of limitations provisions[28]. State laws of this kind are also to be understood by reference to the purpose of s 79 rather than whether they are substantive laws because they affect rights. They may be understood as laws which define the circumstances in which a proceeding may, or may not, be brought in a court and which permit a court to determine that matter. Without s 79 they could not apply to courts exercising federal jurisdiction.

23 Section 79 clearly applies to s 114(2) of the Criminal Procedure Act. That provision regulates the manner in which the matter of a person's guilt or innocence is to be adjudicated and for that reason is directed to State courts. State laws concerning sentencing are necessarily directed to those courts. Such laws could not apply to State courts exercising federal jurisdiction unless s 79 operated upon them and picked them up.

Section 6(1)(a) of the MDA – a State law applying of its own force?

24 Section 6(1)(a) of the MDA is not a law of the kind referred to above and may be contrasted with s 114(2) of the Criminal Procedure Act. It is addressed to the conduct of individuals and renders them liable to prosecution for offences. It is not directed to State courts and their powers to hear and determine a matter.

25 A State court is invested with federal jurisdiction to hear and determine particular matters in accordance with "independently existing substantive law"[29]. This includes any applicable statute law, including that of a State. State laws are

---

26 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 90-91 [112]; [2006] HCA 44.

27 *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136; [2000] HCA 39.

28 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 83, 89; [1973] HCA 21.

29 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 586 [55], 587 [57].

preserved by the Constitution[30]. Subject to any question of inconsistency[31], there is no reason why a State statute creating an offence should not continue to apply where a State court is invested with federal jurisdiction.

26 The question raised in this appeal was addressed by French CJ in *Momcilovic v The Queen*[32]. In that case a resident of Queensland was convicted of an offence under the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic), which was committed in Victoria. It was accepted that the County Court and the Supreme Court of Victoria had exercised federal diversity jurisdiction. The question of the operation of s 79 of the Judiciary Act was not raised in argument. However, French CJ said that there was much to be said for the view that the State offence provisions applied directly and not by virtue of s 79[33]. His Honour observed that the position of a State court exercising federal diversity jurisdiction in a matter arising under State law may be thought to be similar to that of a federal court exercising an "accrued jurisdiction"[34], where the federal court is required to deal with a claim under State law because that claim forms part of the "matter" in respect of which it exercises federal jurisdiction[35]. In such cases, "non-federal law" is part of the "single, composite body of law applicable alike to cases determined in the exercise of federal jurisdiction and to cases determined in the exercise of non-federal jurisdiction"[36].

27 The appellant nevertheless submits that there are decisions of this Court which hold that a law such as s 6(1)(a) must be picked up by s 79 and applied as a Commonwealth law. The appellant relies on five decisions of this Court in support of this contention[37].

---

30 Constitution, ss 106, 107, 108.

31 Constitution, s 109.

32 (2011) 245 CLR 1; [2011] HCA 34.

33 *Momcilovic v The Queen* (2011) 245 CLR 1 at 68-69 [99].

34 Use of the term "accrued jurisdiction" has been criticised: *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 585-586 [52]-[53], 638-639 [218].

35 *Momcilovic v The Queen* (2011) 245 CLR 1 at 69 [100].

36 *Fencott v Muller* (1983) 152 CLR 570 at 607; [1983] HCA 12.

37 *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323; *Parker v The Commonwealth* (1965) 112 CLR 295; [1965] HCA 12; *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136; *Australian Securities and Investments*

(Footnote continues on next page)

28 The reasons why s 79 operated upon the State laws in three of the cases referred to by the appellant are explicable by reference to the purpose of s 79. They were laws directed to State courts and their powers. *Austral Pacific Group Ltd (In liq) v Airservices Australia*[38] concerned provisions relating to proceedings for contribution as between tortfeasors and the exercise of the power conferred on the court to determine the amount of contribution. Such provisions may be understood as directed to courts, as discussed above, and are therefore laws to which s 79 refers. Similarly, in *Parker v The Commonwealth*[39], the State law which Windeyer J identified as picked up by s 79 made provision for the assessment, by the court, of damages. In *R v Oregan; Ex parte Oregan*[40], Webb J said[41] that the laws referred to in s 79 include substantive laws, such as those dealing with the custody of infants. However, the provision which his Honour identified as applicable was one which directed the court making an order with respect to custody to consider the interests of the child as paramount. These cases have nothing to say about an offence provision such as s 6(1)(a) of the MDA.

29 In *Macleod v Australian Securities and Investments Commission*[42], there was no issue that the offence was one against a law of Western Australia and that the State courts were exercising federal jurisdiction[43]. The point of that case was that the appeal by the Australian Securities Commission (as it then was) was incompetent because its powers did not extend to taking that action[44].

30 The appellant places particular reliance on what was said in the remaining case, *Australian Securities and Investments Commission v Edensor Nominees*

Commission v Edensor Nominees Pty Ltd (2001) 204 CLR 559; *Macleod v Australian Securities and Investments Commission* (2002) 211 CLR 287; [2002] HCA 37.

38 (2000) 203 CLR 136.

39 (1965) 112 CLR 295.

40 (1957) 97 CLR 323.

41 *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323 at 330-331.

42 (2002) 211 CLR 287.

43 *Macleod v Australian Securities and Investments Commission* (2002) 211 CLR 287 at 290-291 [1], 293 [10].

44 *Macleod v Australian Securities and Investments Commission* (2002) 211 CLR 287 at 302 [44].

Pty Ltd[45]. One provision of the Corporations Law (Vic) created the offence in question; two others provided the basis for the Court to order injunctions. Clearly enough s 79 could pick up the latter two provisions. It does not appear to me that the joint reasons of Gleeson CJ, Gaudron and Gummow JJ suggested that the offence provision was also picked up.

31 In any event, if there are statements in these cases which are to be understood in the way for which the appellant contends, they cannot be regarded as concluding the question presently before the Court. The question whether s 79 of the Judiciary Act must pick up a provision like s 6(1)(a) of the MDA for it to have force and effect was neither argued nor discussed in those cases.

Conclusion

32 Section 79 of the Judiciary Act is directed to courts. Its purpose is to fill the gaps created by a lack of Commonwealth law governing when and how a court exercising federal jurisdiction is to hear and determine a matter and the inability of a State law to apply directly to that court whilst exercising federal jurisdiction. In such a case it is necessary that s 79 adopt the State provision and apply it. Section 114(2) of the Criminal Procedure Act is a provision of this kind. Section 6(1)(a) of the MDA is not. Its application was unaffected by the fact that the offence it created was tried in federal jurisdiction. It was not necessary for s 79 of the Judiciary Act to adopt it. Section 6(1)(a) of the MDA applied directly. It follows that s 80 of the Constitution was not engaged.

33 The appeal should be dismissed.

---

45 (2001) 204 CLR 559 at 587-588 [57]-[58].

BELL, GAGELER, KEANE, NETTLE AND GORDON JJ.

Introduction

34 This appeal raises questions of systemic significance about the sources of law in federal jurisdiction and about the operation of s 79 of the *Judiciary Act* 1903 (Cth).

35 The State of Western Australia, through its Director of Public Prosecutions, indicted Mr John Rizeq, a resident of New South Wales, in the District Court of Western Australia on two charges of offences against s 6(1)(a) of the *Misuse of Drugs Act* 1981 (WA). After a trial by a jury of 12 persons, the jury was unable to reach a unanimous verdict on either charge. The decisions of 11 of the 12 jurors were taken by the District Court to be verdicts of guilty under s 114(2) of the *Criminal Procedure Act* 2004 (WA). The District Court accordingly convicted Mr Rizeq of both offences.

36 Mr Rizeq sought leave to appeal against the convictions to the Court of Appeal of the Supreme Court of Western Australia under Pt 3 of the *Criminal Appeals Act* 2004 (WA). The Court of Appeal granted leave to appeal on two grounds but dismissed the appeal[46]. Mr Rizeq now appeals, by special leave, to this Court from the dismissal by the Court of Appeal of his appeal on one of those grounds.

37 Mr Rizeq's argument on the appeal proceeds from an uncontested premise. The premise is that the controversy as to his criminal liability which was the subject of his indictment by the State of Western Australia was a matter between a State and a resident of another State within the meaning of s 75(iv) of the Constitution, as a consequence of which the District Court was exercising federal jurisdiction under s 39(2) of the *Judiciary Act* in conducting the trial and entering the convictions[47].

38 The argument is that, because the District Court was exercising federal jurisdiction in the trial, Western Australian law was incapable of valid application to the determination of his criminal liability in that trial. Section 6(1)(a) of the *Misuse of Drugs Act* could not, and therefore did not, apply

---

46 *Hughes v Western Australia* (2015) 299 FLR 197.

47 See *Momcilovic v The Queen* (2011) 245 CLR 1 at 68-69 [99], 82 [139]; [2011] HCA 34.

as a law of Western Australia. Instead, so the argument goes, the text of s 6(1)(a) was picked up and applied as a law of the Commonwealth by s 79 of the *Judiciary Act*. The result was that the trial in the District Court was a trial on indictment of offences against a law of the Commonwealth to which s 80 of the Constitution applied to require the verdicts of the jury to be unanimous[48].

39 The argument provides an opportunity for this Court now to resolve some doubts, which must be acknowledged regrettably to have arisen[49], about the sources of law in federal jurisdiction and about the operation of s 79 of the *Judiciary Act*. The analysis adopted to resolve those doubts is consistent with that suggested by French CJ in *Momcilovic v The Queen*[50]. The analysis is in substance that for which the State of Western Australia as respondent to the appeal contends, with the support of the Attorneys-General of the Commonwealth and each of the other States, who intervene in the appeal.

40 The short answer to Mr Rizeq's argument is that s 6(1)(a) of the *Misuse of Drugs Act* applied to impose criminal liability on him as a law of Western Australia at the time of his offences and continued to apply to govern his criminal liability notwithstanding that the jurisdiction subsequently exercised by the District Court to resolve the controversy between him and the State of Western Australia about the existence and consequences of that criminal liability was federal jurisdiction.

41 Notwithstanding that the District Court was exercising federal jurisdiction in conducting the trial and entering the convictions, s 79 of the *Judiciary Act* was not needed, and was not engaged, to pick up and apply the text of s 6(1)(a) of the *Misuse of Drugs Act* as a law of the Commonwealth. The trial was of offences against a law of a State and not of offences against a law of the Commonwealth, and s 80 of the Constitution had no application.

42 That the District Court was exercising federal jurisdiction in conducting the trial did, in contrast, mean that s 79 of the *Judiciary Act* was needed, and was engaged, to pick up and apply the text of s 114(2) of the *Criminal Procedure Act*

---

48 See *Cheatle v The Queen* (1993) 177 CLR 541; [1993] HCA 44.

49 See Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 348-391; Hill and Beech, "'Picking up' State and Territory Laws under s 79 of the Judiciary Act – Three Questions", (2005) 27 *Australian Bar Review* 25.

50 (2011) 245 CLR 1 at 69-70 [100].

as a law of the Commonwealth. As a consequence, the decisions of 11 of the 12 jurors were properly taken by the District Court to be verdicts of guilty.

43 To explain that answer, it is necessary to start with some very basic observations about the structure of the Constitution before moving to the specific topic of the operation of the centrally relevant provisions of the *Judiciary Act*.

Constitution

Jurisdiction, law and legislative power

44 Making express what would otherwise be implicit in the nature of the Constitution as a written federal constitution, covering cl 5 of the Constitution provides in relevant part that the Constitution itself "and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State".

45 The powers of the Parliament of the Commonwealth to make laws are limited to those enumerated in Ch I of the Constitution, specifically in ss 51 and 52, and to those expressed or implied elsewhere in the Constitution, including in Ch III. The Parliament has specific power under s 51(xxxix) to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the "Federal Judicature". The "Federal Judicature" for that purpose is not limited to the High Court and other federal courts created by the Parliament of the Commonwealth. It includes, as a "component part"[51], State courts invested with federal jurisdiction.

46 The power conferred on the Parliament of the Commonwealth by s 51(xxxix) of the Constitution relevantly extends to authorise enactment of laws incidental to the exercise of a power of adjudication conferred or vested in a court by or under Ch III or necessary or proper to make the exercise of such a power of adjudication effective[52]. The Parliament has no power, express or implied, to impose liabilities or confer rights on persons who are parties to a

---

51 *Le Mesurier v Connor* (1929) 42 CLR 481 at 514; [1929] HCA 41. See Lindell, *Cowen and Zines's Federal Jurisdiction in Australia*, 4th ed (2016) at 257-258.

52 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 580 [122]; [1999] HCA 27. See also *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 587; [1938] HCA 10.

justiciable controversy merely because the adjudication of that controversy is or has come within the purview of Ch III.

47 The powers of the Parliaments of the States are addressed in Ch V of the Constitution. Subject to the Constitution, a State Parliament is sustained as part of the constitution of the State by s 106, and powers of a State Parliament to make laws are sustained by s 107 except to the extent powers to make laws are by the Constitution "exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State". The supremacy of laws made by the Parliament of the Commonwealth over laws made by the Parliaments of the States presaged in covering cl 5 is then secured by the prescription in s 109 that "[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid". "Of course s 109 is intended to operate and can operate only where the law of a State and the law of the Commonwealth with which it is inconsistent are laws which apart from the operation of s 109 are valid."[53] The operation of s 109, as has always been recognised, is to resolve an inconsistency between "a law of a State otherwise within its competency" and "a law of the Commonwealth ... also within the legislative competency of the Commonwealth"[54].

48 The overall result is that laws made by the Parliament of the Commonwealth and laws made by the Parliaments of the States form "a single though composite body of law"[55]. Before the *Australia Act* 1986 (Cth), that composite body of law included Imperial laws of paramount application. Since the enactment of the *Northern Territory (Self-Government) Act* 1978 (Cth) and the *Australian Capital Territory (Self-Government) Act* 1988 (Cth) under s 122 of the Constitution, that composite body of law has included laws made by the legislatures of self-governing Territories.

49 Chapter III of the Constitution makes provision for what has come aptly to be described as an "integrated national court system"[56] within which, since the

---

53 *R v Phillips* (1970) 125 CLR 93 at 126; [1970] HCA 50. See also at 109.

54 *D'Emden v Pedder* (1904) 1 CLR 91 at 111; [1904] HCA 1.

55 *Felton v Mulligan* (1971) 124 CLR 367 at 392; [1971] HCA 39. See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564; [1997] HCA 25.

56 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 138; [1996] HCA 24.

termination of appeals to the Privy Council by the *Australia Act*, the High Court alone has exercised ultimate appellate jurisdiction. Chapter III, in so doing, does nothing to undermine the singularity or integrity of the composite body of Commonwealth and State law for which Chs I and V and s 122 of the Constitution make principal provision. The distinction which Ch III draws between federal jurisdiction and State jurisdiction (the latter being the jurisdiction referred to in s 77(ii) as "jurisdiction … which belongs to … the courts of the States") is a distinction as to the available sources of authority to adjudicate controversies arising under that composite body of law.

50 Explaining the similarity and the difference between federal jurisdiction and State jurisdiction, Isaacs J said in *Baxter v Commissioners of Taxation (NSW)*[57]:

> "'Jurisdiction' is a generic term and signifies in this connection authority to adjudicate. State jurisdiction is the authority which State Courts possess to adjudicate under the State Constitution and laws; federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws.
>
> The first is that which 'belongs to' the State Courts within the meaning of sec 77; the latter must be 'vested in' them by Parliament."

51 Federal jurisdiction, which the Parliament of the Commonwealth is empowered to vest in a State court under s 77(iii) or to confer on a federal court other than the High Court under s 77(i), is authority to adjudicate on a matter within any of the five enumerated categories of matter in respect of which the High Court is given entrenched original jurisdiction by s 75, or within any of the four additional enumerated categories of matter in respect of which the Parliament is empowered to confer original jurisdiction on the High Court under s 76. The Parliament of the Commonwealth has additional specific power under s 77(ii) to define the extent to which the jurisdiction of any federal court, including the High Court[58], is to be exclusive of State jurisdiction.

52 The authority to adjudicate comprised in the conferral of federal jurisdiction is authority to exercise, within the limits permitted by or under s 75,

---

57 (1907) 4 CLR 1087 at 1142; [1907] HCA 76. See also *CGU Insurance Ltd v Blakeley* (2016) 90 ALJR 272 at 279 [24]; 327 ALR 564 at 570; [2016] HCA 2.

58 *Pirrie v McFarlane* (1925) 36 CLR 170 at 176; [1925] HCA 30.

s 76 or s 77, the judicial power of the Commonwealth, which s 71 provides is to be vested in the High Court, in such other federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction[59]. The essential character of judicial power, as has repeatedly been emphasised, stems from the unique and essential function that judicial power performs by quelling controversies about legal rights and legal obligations through ascertainment of facts, application of law and exercise, where appropriate, of judicial discretion[60].

53 The character of judicial power, as distinct from the source of the authority of a particular court to adjudicate a particular justiciable controversy, is unaffected by the source of the law that is to be applied to determine the legal rights and legal obligations in controversy. That fundamental point was articulated by Kitto J when he said in *Anderson v Eric Anderson Radio & TV Pty Ltd*[61]:

> "[A]ll that is meant by saying that a court has federal jurisdiction in a particular matter is that the court's authority to adjudicate upon the matter is a part of the judicial power of the federation. To confer federal jurisdiction in a class of matters upon a State court is therefore not, if no more be added, to change the law which the court is to enforce in adjudicating upon such matters; it is merely to provide a different basis of authority to enforce the same law."

54 The point made by Kitto J in *Anderson v Eric Anderson Radio & TV Pty Ltd* was reiterated by Windeyer J in *Felton v Mulligan*[62] when he said 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 adjudication". Having quoted that statement with approval, Mason, Murphy, Brennan and Deane JJ went on to state in *Fencott v Muller*[63]:

---

59 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603; [1905] HCA 22; *CGU Insurance Ltd v Blakeley* (2016) 90 ALJR 272 at 279 [24]; 327 ALR 564 at 571.

60 *Fencott v Muller* (1983) 152 CLR 570 at 608; [1983] HCA 12. See also *South Australia v Totani* (2010) 242 CLR 1 at 63 [131]; [2010] HCA 39.

61 (1965) 114 CLR 20 at 30; [1965] HCA 61.

62 (1971) 124 CLR 367 at 393.

63 (1983) 152 CLR 570 at 607.

> "Subject to any contrary provision made by federal law and subject to the limitation upon the capacity of non-federal laws to affect federal courts, non-federal law is part of the single, composite body of law applicable alike to cases determined in the exercise of federal jurisdiction and to cases determined in the exercise of non-federal jurisdiction".

55 Thus, it is commonplace that resolution of a matter within federal jurisdiction may involve application both of Commonwealth law and of State law. Indeed it can happen that a matter in federal jurisdiction is resolved entirely through the application of State law. Application of State law in federal jurisdiction came for a period to be described, "[f]or want of a better term", as "accrued jurisdiction"[64]. There is "no harm in the continued use of the term 'accrued jurisdiction' provided it be borne in mind ... there [is] but one 'matter'"[65]. However, the imprecision the term introduces into the word "jurisdiction" means that the term is best avoided. There is but one matter and that matter is entirely within federal jurisdiction, as distinct from State jurisdiction.

56 The simple constitutional truth is that State laws form part of the single composite body of federal and non-federal law that is applicable to cases determined in the exercise of federal jurisdiction in the same way, and for the same reason, as they form part of the same single composite body of law that is applicable to cases determined in the exercise of State jurisdiction – because they are laws.

57 The qualification concerning the limitation on the capacity of non-federal laws to affect federal courts, expressed in *Fencott v Muller*, was formulated in that case in the specific context of examining the sources of law applicable to the determination of a matter within the federal jurisdiction which had been conferred on a federal court under s 77(i) of the Constitution. The incapacity so identified in that context is a particular manifestation of a more general incapacity of any law enacted other than by the Parliament of the Commonwealth to affect the exercise of federal jurisdiction by any court. That more general incapacity manifests also in the incapacity of a State Parliament to affect the exercise of federal jurisdiction by a State court.

---

64 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 294; [1983] HCA 36.

65 *Houghton v Arms* (2006) 225 CLR 553 at 564 [26]-[27]; [2006] HCA 59.

Incapacity of State law to affect the exercise of federal jurisdiction

58 The incapacity of a State law to affect the exercise of federal jurisdiction by a State court is a manifestation of the general incapacity of any Parliament or legislature other than the Parliament of the Commonwealth to affect the exercise of federal jurisdiction conferred by or conferred or invested under Ch III of the Constitution. That general incapacity stems from the exclusory operation of Ch III explained in the *Boilermakers' Case*[66] and reinforced in *Re Wakim; Ex parte McNally*[67]. Having observed that, of the legislative powers enumerated in Ch I, s 51(xxxix) alone mentions the Federal Judicature, Dixon CJ, McTiernan, Fullagar and Kitto JJ said in the *Boilermakers' Case*[68]:

> "Section 51(xxxix) extends to furnishing courts with authorities incidental to the performance of the functions derived under or from Chap III and no doubt to dealing in other ways with matters incidental to the execution of the powers given by the Constitution to the federal judicature. But, except for this, when an exercise of legislative powers is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chap III."

59 Chapter III, according to that orthodox conception, is at once empowering and limiting. The Parliament of the Commonwealth alone has power to vest federal jurisdiction, but has no such power other than that conferred by ss 76 and 77 of the Constitution[69]. The Parliament of the Commonwealth alone has power to regulate the exercise of federal jurisdiction, but has no such power other than that conferred by s 51(xxxix) of the Constitution.

60 State Parliaments have been recognised to have no power to add to or detract from federal jurisdiction, whether that federal jurisdiction is conferred on

---

66 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270; [1956] HCA 10.

67 (1999) 198 CLR 511 at 575.

68 (1956) 94 CLR 254 at 269-270.

69 See *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 540; [1955] HCA 44.

the High Court by s 75 or under s 76 of the Constitution[70] or is conferred on another federal court under s 77(i) or invested in a State court under s 77(iii)[71]. In respect of federal jurisdiction conferred on a federal court under s 77(i) or invested in a State court under s 77(iii), the explanation sometimes given of that inability of a State Parliament to add to or detract from federal jurisdiction has been that it is the result of s 109 of the Constitution[72]. The better explanation, however, is that it is the result of an absence of State legislative power correlative to the exclusory operation of Ch III of the Constitution[73].

61 Just as State Parliaments have no power to add to or detract from federal jurisdiction, State Parliaments have no power to command a court as to the manner of exercise of federal jurisdiction conferred on or invested in that court[74]. To use the language of s 107 of the Constitution, the entire subject-matter of the conferral and exercise of federal jurisdiction is a subject-matter of legislative power that is, by Ch III of the Constitution, "exclusively vested in the Parliament of the Commonwealth".

62 The existence of that incapacity of a State Parliament to command a State court as to the manner of its exercise of federal jurisdiction is not contradicted by the frequent observation that the Parliament of the Commonwealth must take a State court as found when investing that court with federal jurisdiction under

---

70 Eg *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168 at 169; [1953] HCA 62; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 79, 84, 87-88, 93; [1973] HCA 21.

71 Eg *The Commonwealth v Rhind* (1966) 119 CLR 584 at 599; [1966] HCA 83; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 53-54 [44]-[45]; [2003] HCA 47.

72 Eg *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 35 [41]; [1998] HCA 30.

73 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 618 [20]; [2008] HCA 28, citing *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 405-406 [228]-[230]; [2005] HCA 44.

74 *Alqudsi v The Queen* (2016) 90 ALJR 711 at 749 [171]; 332 ALR 20 at 67; [2016] HCA 24; *R v Todoroski* (2010) 267 ALR 593 at 594-595 [8].

s 77(iii)[75]. Observations to that effect have not been directed to the incapacity of a State Parliament to regulate the exercise of federal jurisdiction by a State court. They have been directed to the incapacity of the Parliament of the Commonwealth to alter the character or constitution of a State court, invested with federal jurisdiction under s 77(iii), in the exercise of the power conferred by s 51(xxxix)[76].

63 The incapacity of a State Parliament to enact a law which governs the exercise of federal jurisdiction by a court, whether it be a federal court or a State court, explains the necessity for s 79 of the *Judiciary Act* and is the key to understanding the nature and extent of its operation. Section 79 is a law, enacted under s 51(xxxix) of the Constitution, which serves to ensure that the exercise of federal jurisdiction is effective. The section fills a gap in the law governing the actual exercise of federal jurisdiction which exists by reason of the absence of State legislative power. The section fills that gap by picking up the text of a State law governing the exercise of State jurisdiction and applying that text as a Commonwealth law to govern the manner of exercise of federal jurisdiction. The section has no broader operation.

64 To relate that narrow but important operation of s 79 of the *Judiciary Act* to the text of that section, it is appropriate now to turn to the context of that section and to the history of its interpretation.

Judiciary Act

Section 79 in context

65 The *Judiciary Act*, as enacted in 1903, made provision in Pt II for the constitution and operation of the High Court, in Pt IV in relation to its original jurisdiction, and in Pt V in relation to its appellate jurisdiction. Within Pt IV, s 30 conferred original jurisdiction on the High Court under s 76(i) of the Constitution in all matters arising under the Constitution or involving its interpretation. The High Court was not then, and has not since been, conferred with general original jurisdiction under s 76(ii) of the Constitution in matters arising under laws made by the Parliament of the Commonwealth.

---

75 Eg *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 37; [1943] HCA 13.

76 See generally *Russell v Russell* (1976) 134 CLR 495 at 516-518; [1976] HCA 23 and the cases there cited.

66 Part VI of the *Judiciary Act*, as enacted, did two things. Under s 77(ii) of the Constitution, it defined the extent to which the jurisdiction of the High Court was to be exclusive of State jurisdiction. Under s 77(iii) of the Constitution, it invested State courts with federal jurisdiction. The former it achieved by a combination of s 38 (providing for the jurisdiction of the High Court to be exclusive of the jurisdiction of State courts in specified categories of matters within the scope of, although not precisely aligning to, the categories of matters referred to in s 75 of the Constitution) and s 39(1) (providing that the jurisdiction of the High Court in matters not mentioned in s 38 was to be exclusive of the jurisdiction of State courts except as provided in s 39(2)). The latter it achieved by s 39(2), which provided that, except as provided in s 38 and subject to specified "conditions and restrictions", State courts were, "within the limits of their several jurisdictions", to be "invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it". Except for changes occasioned by the creation of the Federal Court of Australia, and for changes of drafting style and in the number and formulation of the conditions and restrictions specified in s 39(2), ss 38 and 39 have remained in the form in which they were originally enacted.

67 Section 39(2), insofar as it invests federal jurisdiction in State courts in matters in which the High Court does not have original jurisdiction (made exclusive by ss 38 and 39(1)) but in which original jurisdiction could be conferred on the High Court under s 76 of the Constitution, was considered in *Lorenzo v Carey*[77] to leave open to State courts capacity to exercise State jurisdiction in respect of those matters. That view of the operation of s 39(2) was subsequently doubted[78], and was ultimately rejected in *Felton v Mulligan*[79]. That rejection was not because it was considered to be constitutionally impermissible for a State court in which federal jurisdiction was invested to retain State jurisdiction with respect to the same matter, but because the attachment of conditions and restrictions to the investiture of federal jurisdiction by s 39(2) manifested a legislative intention to cover the field of jurisdiction with respect to matters within the categories of matters enumerated in s 76 of the Constitution to the exclusion of State jurisdiction. The settled view that has resulted is that, in a

---

77 (1921) 29 CLR 243 at 251-252; [1921] HCA 58.

78 *Ffrost v Stevenson* (1937) 58 CLR 528 at 573; [1937] HCA 41.

79 (1971) 124 CLR 367 at 412-413. See *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 479; [1980] HCA 32.

matter which would otherwise be within the jurisdiction of a State court which answers the description of a matter within s 75 or s 76 of the Constitution, the State court is invested with federal jurisdiction with respect to the matter under s 39(2) to the exclusion of State jurisdiction under s 109 of the Constitution[80].

68 Part XI of the *Judiciary Act*, as enacted, was headed "Supplementary Provisions". The Part contained s 79, together with ss 80 and 81, under the divisional heading "Application of Laws". Section 79 as enacted provided:

> "The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable."

Except that it was amended in 1979 to change "State" to "State or Territory"[81], and in 2008 to add provisions addressed specifically to State and Territory laws purporting to bind a court exercising federal jurisdiction in actions for recovery of amounts paid in connection with invalid State or Territory taxes[82], s 79 has not altered from the form in which it was so enacted in 1903.

Background to s 79 and early interpretation

69 The enacted text of s 79 had been a clause in the original form of the Bill for the *Judiciary Act*, which had been introduced into the House of Representatives in 1901[83]. The clause passed without comment during the protracted parliamentary debates which preceded the enactment of the Bill in final form in 1903.

70 The marginal note to the clause as introduced in 1901, and to the section as enacted in 1903, made reference to s 721 of the *United States Revised Statutes*,

---

80 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 21 [53]; [2015] HCA 36.

81 *Judiciary Amendment Act (No 2)* 1979 (Cth), s 14.

82 *Judiciary Amendment Act* 2008 (Cth), Sched 1, item 2.

83 Judiciary Bill 1901 (Cth), cl 72.

originally enacted as s 34 of the *Judiciary Act* 1789 (US). Section 721 of the *United States Revised Statutes* then provided:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

71 The interpretation of s 721 of the *United States Revised Statutes* has had a convoluted and controversial history. On the view of s 721 which prevailed in 1901, its reference to "[t]he laws of the several States" was interpreted as referring only to "state laws, strictly local". Beyond that narrow field of operation, the section was understood to leave open to federal courts the ability to develop and apply a federal common law[84]. That narrow interpretation of s 721, and correspondingly wide scope for the development by federal courts of a federal common law, would come ultimately to be abandoned by the Supreme Court of the United States in 1938 in *Erie Railroad Co v Tompkins*[85] on the basis in part that it had led to an "unconstitutional assumption of powers by courts of the United States" to formulate "substantive rules of common law" in areas beyond the legislative competence of Congress[86]. "The laws of the several States" were then and thereafter interpreted as including the decisions of State courts and the notion of a general federal common law was abandoned.

72 Despite a post-*Erie* suggestion that the section had been "deemed, consistently for over a hundred years, to be merely declaratory of what would in any event have governed the federal courts"[87], the question of precisely what s 721 of the *United States Revised Statutes* did in stating that the State laws to which it referred shall be "regarded as rules of decision" in federal courts does not appear by 1901 to have been squarely addressed in decisions of the Supreme Court. On one view, the section was "no more than a declaration of what the law would have been without it"[88]. On another, the section itself had the effect of

---

84 *Swift v Tyson* 41 US 1 at 18-19 (1842).

85 304 US 64 (1938).

86 304 US 64 at 78-79 (1938).

87 *Guaranty Trust Co v York* 326 US 99 at 103-104 (1945).

88 *Hawkins v Barney's Lessee* 30 US 457 at 464 (1831).

making State law within the scope of the section "binding" on a federal court sitting in the State[89].

73 Given that lack of clarity about how s 721 of the *United States Revised Statutes* operated, it is unsurprising that different views would emerge as to the operation of s 79 of the *Judiciary Act* when this Court first came to consider it in *Federated Sawmill, Timberyard and General Woodworkers' Employes' Association (Adelaide Branch) v Alexander*[90]. Griffith CJ described s 79 as a section "which expressly provides (perhaps only by way of declaration) that the laws of each State shall except as otherwise provided by the Constitution or the laws of the Commonwealth be binding on all Courts exercising federal jurisdiction in that State in all causes to which they are applicable"[91]. Barton J described s 79 rather differently, as a section "in comprehensive terms" under which "Courts exercising federal jurisdiction in any State are, except as otherwise provided by the Constitution or the laws of the Commonwealth, bound by the laws of that State ... in all cases to which such laws are applicable"[92]. Isaacs J referred to United States case law on s 721 as providing guidance as to the operation of s 79[93].

74 Nevertheless, as Dixon J pointed out more than a decade after *Erie*, in *Huddart Parker Ltd v The Ship Mill Hill*[94], s 79 of the *Judiciary Act* is expressed in different terms from s 721 of the *United States Revised Statutes*. Importantly, the reference in s 79 to State laws "binding on ... Courts" is not found in s 721, where the reference is to State laws operating as "rules of decision in ... courts". The language of s 79 is in that respect more tellingly compared, and contrasted in the relative narrowness of its focus, with the reference in covering cl 5 of the Constitution to laws "binding on the courts, judges, and people".

---

89 *Camden and Suburban Railway Company v Stetson* 177 US 172 at 174-175 (1900).

90 (1912) 15 CLR 308; [1912] HCA 42.

91 (1912) 15 CLR 308 at 313.

92 (1912) 15 CLR 308 at 316.

93 (1912) 15 CLR 308 at 321, referring to *Campbell v Haverhill* 155 US 610 (1895); see now *DelCostello v International Brotherhood of Teamsters* 462 US 151 at 160-161, 173 (1983).

94 (1950) 81 CLR 502 at 507; [1950] HCA 43.

75 Important also to the interpretation of s 79 of the *Judiciary Act* is that the constitutional and statutory setting within which it operates is quite different from that of s 721 of the *United States Revised Statutes*. Unlike s 721, the courts to which s 79 refers are not limited to federal courts including the High Court (which, despite earlier doubts having been expressed[95], Dixon J held in *Huddart Parker* to be a court to which s 79 applied[96]). The "autochthonous expedient"[97] adopted in s 77(iii) of the Constitution of conferring legislative power on the Parliament of the Commonwealth to invest federal jurisdiction in State courts, and the near comprehensive exercise of that power by the enactment of s 39(2) of the *Judiciary Act*, means that the courts to which s 79 refers include State courts at all levels of each State court system.

76 In *South Australia v The Commonwealth*[98], Dixon CJ described s 79 of the *Judiciary Act* as operating to "direct where this Court shall go for the substantive law". That somewhat Delphic statement is perhaps indicative of an inclination to read s 79 in a manner inspired by the *Erie* reading of s 721 of the *United States Revised Statutes*[99]. Although the statement has been quoted with approval in later cases[100], the potential reading of s 79 to which it points has not been taken up. Analogy to s 721 of the *United States Revised Statutes* has implicitly been treated as of little assistance in the interpretation of s 79.

77 The interpretation of s 79 of the *Judiciary Act* was instead to follow its own difficult path, its exposition plagued at various turns by metaphor and obscurity of language.

---

95 *Lady Carrington Steamship Co Ltd v The Commonwealth* (1921) 29 CLR 596 at 601; [1921] HCA 49.

96 (1950) 81 CLR 502 at 507-508.

97 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268.

98 (1962) 108 CLR 130 at 140; [1962] HCA 10.

99 Cf *Klaxon Co v Stentor Electric Manufacturing Co Inc* 313 US 487 at 496 (1941); *Griffin v McCoach* 313 US 498 at 503 (1941).

100 Eg *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 587 [57]; [2001] HCA 1.

Interpretative complications

78 The interpretation of the section was complicated in the long period before *Lange v Australian Broadcasting Corporation*[101] by failure to appreciate that "[t]here is but one common law in Australia which is declared by this Court as the final court of appeal" with the result that "[i]n contrast to the position in the United States, the common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to different authoritative interpretations". The consequence is that there was often a failure to recognise that the reference in s 79 to "[t]he laws of each State" can only meaningfully encompass the statutory laws of each State. There is no common law of a State on which the section could operate.

79 The interpretation of the section has been further complicated throughout its history by uncertainty about the relationship between ss 79 and 80 of the *Judiciary Act*. Different views emerged as to how s 80 operates and as to how s 79 operates in relation to s 80[102]. On occasions, the operation of the two sections has been treated as equivalent and on occasions they have been referred to interchangeably or conflated[103]. No question of the operation of s 80 arises in this appeal, no argument has been directed to s 80 by the parties and interveners, and it is neither necessary nor appropriate to refer further to s 80 in order to explain the operation of s 79 to the extent relevant to the determination of this appeal.

---

101 (1997) 189 CLR 520 at 563. See also *Lipohar v The Queen* (1999) 200 CLR 485 at 505 [43]; [1999] HCA 65.

102 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 492-493, 522, 525, 554-555; [1997] HCA 29. See also *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 529-532 [50]-[58]; [2000] HCA 36; *Blunden v The Commonwealth* (2003) 218 CLR 330 at 338-339 [16]-[18], 359-360 [91]; [2003] HCA 73; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 258 [8]-[11]; [2005] HCA 38; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at 402-403 [33]-[34]; [2006] HCA 8.

103 Eg *Musgrave v The Commonwealth* (1937) 57 CLR 514 at 531, 543, 547; [1937] HCA 87, as noted in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 531 [55].

Emergence of the modern interpretation

80 Despite the difficulty of its interpretation, an authoritative articulation of the purpose of s 79 of the *Judiciary Act* occurred in 1953 when, in *Commissioner of Stamp Duties (NSW) v Owens [No 2]* ("*Owens [No 2]*")[104], Dixon CJ, Williams, Webb, Fullagar and Kitto JJ identified that purpose as being "to adopt the law of the State where federal jurisdiction is exercised as the law by which, except as the Constitution or federal law may otherwise provide, the rights of the parties to the *lis* are to be ascertained and matters of procedure are to be regulated"[105]. What was meant by "adopt", and whether "the law of the State" was meant to refer to the whole or some part of the law of the State, were questions not explored in *Owens [No 2]*. Later cases were to address both of those questions.

81 From *Pedersen v Young*[106], *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*[107] and *Maguire v Simpson*[108], two aspects of how s 79 operates to "adopt" those State statutes to which it refers emerged with tolerable clarity. The two aspects are together captured in the statement of Kitto J in the earliest of those cases that s 79 "does not purport to do more than pick up State laws with their meaning unchanged"[109]. First, s 79 operates to take the text of State law and to apply that text as Commonwealth law[110]. The expression "surrogate federal law" has sometimes been used to describe the text as so "picked up"[111], but the adjective "surrogate" adds nothing to the analysis. Second, s 79 so operating does not alter the meaning of the text of the State law other than to make that text applicable to a federal court exercising jurisdiction in

---

104 (1953) 88 CLR 168.

105 (1953) 88 CLR 168 at 170.

106 (1964) 110 CLR 162; [1964] HCA 28.

107 (1973) 129 CLR 65.

108 (1977) 139 CLR 362; [1977] HCA 63.

109 *Pedersen v Young* (1964) 110 CLR 162 at 165.

110 Eg *Pedersen v Young* (1964) 110 CLR 162 at 165.

111 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134 [20]-[21]; [2002] HCA 47.

the State even though the State law on its proper construction applies only to a State court[112].

82 Just on which laws of a State the section will operate in that way to apply their text as a Commonwealth law was squarely addressed in *Solomons v District Court (NSW)*. Following on from *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* ("*Edensor*")[113], to the detail of which it will be necessary later to return, Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ drew attention in *Solomons* to a number of limitations explicit in the text of s 79[114]:

> "First, the section operates only where there is already a court 'exercising federal jurisdiction', 'exercising' being used in the present continuous tense. Secondly, s 79 is addressed to those courts; the laws in question 'shall ... be binding' upon them. The section is not, for example, directed to the rights and liabilities of those engaged in non-curial procedures under State laws. Thirdly, the compulsive effect of the laws in question is limited to those 'cases to which they are applicable'. To that it may be added, fourthly, the binding operation of the State laws is 'except as otherwise provided by the Constitution'."

Section 79 was held in *Solomons* to have no application to State laws which are not "binding" on State courts, and for that reason (amongst others) to be inapplicable in that case to apply as Commonwealth law provisions of State legislation which imposed obligations on the State and on State executive officers.

83 Quite what is encompassed within s 79's description of State laws that are "binding" on a court is to some extent elucidated by the section's express inclusion of "laws relating to procedure, evidence, and the competency of witnesses". It would be wrong, however, to seek to delimit the scope of the section's operation by invoking the difficult and sometimes elusive distinction

---

112 Eg *The Commonwealth v Mewett* (1997) 191 CLR 471 at 556; *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 143 [15]; [2000] HCA 39.

113 (2001) 204 CLR 559.

114 (2002) 211 CLR 119 at 134 [23]. See also *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 60 [68].

between "substance" and "procedure"[115]. It would also be wrong to seek to delimit the section's operation by conceiving of a statute that is binding on a court as a statute which cannot also be binding on a person whose rights or obligations are to be determined by that court. As Dixon J commented in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*[116], it "is not unusual to find that statutes impose liabilities, create obligations or otherwise affect substantive rights, although they are expressed only to give jurisdiction or authority, whether of a judicial or administrative nature".

84 More useful in delimiting the scope of operation of s 79 is the basic distinction between the "jurisdiction" of a court, in the precise and technical sense in which that term is used in Ch III in referring to federal jurisdiction and distinguishing it from State jurisdiction, and a "power" that a court is required or permitted to exercise in the execution of jurisdiction[117].

85 Drawing that distinction, in a passage later quoted with approval by Gleeson CJ, Gaudron and Gummow JJ in *Edensor*[118], Toohey J said in *Harris v Caladine*[119]:

> "The distinction between jurisdiction and power is often blurred, particularly in the context of 'inherent jurisdiction'. But the distinction may at times be important. Jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or impliedly conferred by the legislation governing the court and 'such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred'".

---

115 Cf *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 542-543 [97].

116 (1945) 70 CLR 141 at 165-166; [1945] HCA 50. See also *Hooper v Hooper* (1955) 91 CLR 529 at 535-536; [1955] HCA 15; *Mayne v Jaques* (1960) 101 CLR 169 at 171; [1960] HCA 23; *Byrnes v The Queen* (1999) 199 CLR 1 at 22-23 [37]-[38]; [1999] HCA 38.

117 *CGU Insurance Ltd v Blakeley* (2016) 90 ALJR 272 at 281 [31]; 327 ALR 564 at 573.

118 (2001) 204 CLR 559 at 590 [64].

119 (1991) 172 CLR 84 at 136; [1991] HCA 9.

86 Drawing the same distinction between "jurisdiction" and "power" in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd*[120], after referring to the primary signification of "inherent jurisdiction" as "the power inhering in a superior court of record administering law and equity to make orders of a particular description", French CJ, Kiefel, Bell, Gageler and Gordon JJ (with whom Keane and Nettle JJ agreed) pointed out that "[t]he question of the scope of the inherent power of [a] Supreme Court to make orders of a particular description is distinct from the question of whether or not the authority of the Supreme Court to adjudicate on a particular exercise of its inherent power is within the 'federal jurisdiction' invested in the Supreme Court by s 39(2) of the *Judiciary Act* or by another Commonwealth law enacted under s 77(iii) of the Constitution"[121]. Their Honours described the exercise of inherent power by the Supreme Court of Western Australia to make a freezing order in relation to a prospective judgment which would be registrable under the *Foreign Judgments Act* 1991 (Cth) as "regulated" by O 52A r 5 of the Rules of the Supreme Court 1971 (WA), which were made under the *Supreme Court Act* 1935 (WA) "and relevantly applied by s 79 of the *Judiciary Act*"[122].

87 "Characteristically an exercise of jurisdiction is attended by an exercise of power"[123]. By making State laws that are "binding" on courts also binding on courts exercising federal jurisdiction, s 79 of the *Judiciary Act* takes the text of State laws conferring or governing powers that State courts have when exercising State jurisdiction and applies that text as Commonwealth law to confer or govern powers that State courts and federal courts have when exercising federal jurisdiction.

88 *Forge v Australian Securities and Investments Commission*[124] is an example. That case concerned ss 232, 243ZE and 1317EA of the Corporations Law (NSW) as continued in force by s 1473 of the Corporations Law (NSW) and applied by s 7 of the *Corporations (New South Wales) Act* 1990 (NSW) as a law

---

120 (2015) 258 CLR 1 at 17-18 [38].

121 (2015) 258 CLR 1 at 18 [39]. See also at (2015) 258 CLR 1 at 22 [57].

122 (2015) 258 CLR 1 at 10 [2].

123 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 487; [1991] HCA 29; *Edensor* (2001) 204 CLR 559 at 590 [65].

124 (2006) 228 CLR 45 at 90-91 [112]; [2006] HCA 44.

of New South Wales. Sections 232 and 243ZE each prohibited certain conduct. Section 1317EA empowered the Supreme Court of New South Wales to make civil penalty orders if satisfied that a person had engaged in conduct which contravened either of those prohibitions. Citing *Edensor*, Gummow, Hayne and Crennan JJ (with whom Gleeson CJ, Callinan and Heydon JJ relevantly agreed)[125] explained s 79 of the *Judiciary Act* as operating to "pick up" and apply s 1317EA to the Supreme Court of New South Wales when exercising federal jurisdiction under s 39(2) of the *Judiciary Act*. Their Honours described s 1317EA in that context as a provision conferring a "power ... to grant remedies". Tellingly, their Honours did not suggest that s 79 was needed to, or did, operate to "pick up" either s 232 or s 243ZE.

89 Other examples derived from the cases of laws within the purview of s 79 of the *Judiciary Act* include laws: which regulate the procedure of the court[126]; which limit the court's powers to compel production of documents or disclosure of information[127]; which bar the court absolutely or conditionally by reason of effluxion of time from entertaining a claim[128]; which require or permit the court to stay a proceeding where there has been a submission to arbitration[129]; and which confer authority on the court in specified circumstances to make orders conferring or declaring or altering rights or status[130]. That list is indicative, not exhaustive.

---

125 (2006) 228 CLR 45 at 90-91 [112]. See also at 56 [4], 136 [237], 150 [278].

126 Eg *Bainbridge-Hawker v Minister of State for Trade and Customs* (1958) 99 CLR 521 at 536-537; [1958] HCA 60; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 265 [39]; *CGU Insurance Ltd v Blakely* (2016) 90 ALJR 272 at 277 [12]; 327 ALR 564 at 568.

127 Eg *Northern Territory v GPAO* (1999) 196 CLR 553 at 586-589 [76]-[85], 606 [135], 650 [254]; [1999] HCA 8.

128 Eg *Federated Sawmill, Timberyard and General Woodworkers' Employes' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308; *Bate v International Computers (Aust) Pty Ltd* (1984) 2 FCR 526.

129 Eg *Huddart Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 502 at 507-508.

130 Eg *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323 at 330; [1957] HCA 18; *Coshott v Prentice* (2014) 221 FCR 450 at 457 [20], 476 [116].

Confining the operation of s 79 to the area of incapacity of State law to affect the exercise of federal jurisdiction

90 Relating the purpose identified in *Owens [No 2]* to the limitation on State legislative power which arises from the exclusory operation of Ch III of the Constitution allows the class of State laws on which s 79 operates to be delineated with more precision[131]. The purpose is fulfilled by aligning s 79's description of State laws as "binding" on courts with the gap in the law governing the exercise of federal jurisdiction which exists absent other applicable Commonwealth law by reason of the absence of State legislative power to govern what a court does in the exercise of federal jurisdiction. That is how it should be read.

91 That alignment brings s 79 comfortably within the ambit of the legislative power conferred on the Parliament of the Commonwealth by s 51(xxxix) of the Constitution[132]. Filling the gap in which State law cannot govern the exercise of federal jurisdiction by a federal court or a State court, by doing no more than applying as Commonwealth law with its meaning unchanged the text of State law governing the exercise of State jurisdiction, s 79 goes no further than is reasonably necessary "to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements in which may comprise the laws of the State or Territory in which the jurisdiction is being exercised, together with the laws of the Commonwealth, but subject always to the overriding effect of the Constitution itself"[133]. Whether, and if so to what extent, s 51(xxxix) of the Constitution might extend to permit the whole or some part of that gap to be filled by a Commonwealth law having a different operation is a question which does not now arise for determination.

92 The resulting confinement of the operation of s 79 to an area in which there is an absence of State legislative power also provides a straightforward answer to the vexed question of the relationship between s 79 of the *Judiciary Act* and s 109 of the Constitution[134]. Within the field in which s 79 of the

---

131 Cf *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 406 [230].

132 *Edensor* (2001) 204 CLR 559 at 587 [57], 591 [68].

133 *Northern Territory v GPAO* (1999) 196 CLR 553 at 588 [80]; see also at 576 [38].

134 Cf *Northern Territory v GPAO* (1999) 196 CLR 553 at 576 [38], 586 [76]; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 271 [61]-[63].

Judiciary Act operates, State laws have no valid application and s 109 of the Constitution for that reason simply has no operation.

Some cases

93 Mr Rizeq relies on statements made in a number of High Court cases to support his argument. Some of those cases contain statements which, read in isolation, are capable of being interpreted as providing him with some support. On analysis, however, none of the cases on which he relies departs from the understanding of the constitutional structure or of the scope and operation of s 79 of the *Judiciary Act* that has been explained. The outcome of each, and the thrust of the reasoning in each, conforms to that explanation.

94 That proposition can be made good by examining the cases in chronological order.

95 *R v Oregan; Ex parte Oregan* was a custody suit between residents of different States commenced in the original jurisdiction of the High Court under s 75(iv) of the Constitution. The suit was heard by Webb J sitting in Victoria. His Honour referred to the effect of s 79 of the *Judiciary Act* as being that "the Victorian statute law relating to the custody of infants is binding on this Court when sitting in Victoria; but only in cases in which the laws of Victoria are applicable"[135]. The Victorian statute law which his Honour went on to identify and apply comprised provisions of the *Supreme Court Act* 1928 (Vic) and of the *Marriage Act* 1928 (Vic), all of which were directed to the powers of a State court to make orders concerning the welfare and custody of children.

96 *Parker v The Commonwealth*[136] was an action against the Commonwealth for compensation to relatives of a naval seaman who had been killed in a collision on the high seas. The action was commenced in the original jurisdiction of the High Court under s 76(iii) of the Constitution and was heard by Windeyer J sitting in Victoria. The parties were agreed that the law to be applied was to be found in the provisions of the *Wrongs Act* 1958 (Vic) corresponding to the *Fatal Accidents Act* 1846 (9 & 10 Vict c 93), which in its terms applied only to events having occurred in Victoria, on the basis that that was the result of the application either of the applicable common law choice of law rule or of s 80 of the *Judiciary Act*. The availability of either or both of those pathways to the

---

135 (1957) 97 CLR 323 at 330.

136 (1965) 112 CLR 295; [1965] HCA 12.

application of the *Wrongs Act* is not to the present point. What is to the point is that, the provisions of the *Wrongs Act* having been rendered applicable, s 79 of the *Judiciary Act* applied to govern the assessment and apportionment of compensation by the High Court in the manner set out in those provisions.

97 *Edensor*[137], to which reference has already been made, involved a number of applications to the High Court including for special leave to appeal from a decision of the Full Court of the Federal Court. The Federal Court at first instance had found on application by the Australian Securities and Investments Commission that certain conduct contravened the prohibition in s 615 of the Corporations Law (Vic), being the law applied by s 7 of the *Corporations (Victoria) Act* 1990 (Vic) as a law of Victoria. Having made declarations to that effect, the Federal Court at first instance had gone on to make remedial orders within the scope of the powers conferred on the Supreme Court of Victoria by ss 737 and 739 of the Corporations Law (Vic). The Full Court had held on appeal that those remedial orders were invalid for want of jurisdiction. Granting special leave to appeal to the Australian Securities and Investments Commission and allowing the appeal, the High Court by majority (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, Kirby J dissenting) held the application to the Federal Court by the Australian Securities and Investments Commission to have been within the federal jurisdiction conferred on the Federal Court under s 77(i) of the Constitution by s 39B(1A)(a) of the *Judiciary Act* and that the powers conferred on the Supreme Court of Victoria by ss 737 and 739 of the Corporations Law (Vic) were rendered applicable by force of s 79 of the *Judiciary Act* to the Federal Court in the exercise of that federal jurisdiction.

98 No part of the reasoning of the majority in *Edensor* was directed to the status of the prohibition in s 615 of the Corporations Law (Vic). The true position is that s 615 of the Corporations Law (Vic) was beyond the scope of s 79 of the *Judiciary Act*. Section 615 of the Corporations Law (Vic) applied to prohibited conduct as a law of Victoria and its status as a law of Victoria applicable to that conduct was unaffected by the invocation of federal jurisdiction under s 39B(1A)(a) of the *Judiciary Act*. The declaration of its contravention as a law of Victoria was within the power conferred on the Federal Court in the exercise of that federal jurisdiction by s 21 of the *Federal Court of Australia Act* 1976 (Cth).

---

137 (2001) 204 CLR 559.

99 *Austral Pacific Group Ltd (In liq) v Airservices Australia* was an appeal to the High Court from a decision of the Court of Appeal of the Supreme Court of Queensland. The Court of Appeal had held that a manufacturer of equipment who had been sued for damages in negligence and under the *Trade Practices Act* 1974 (Cth) in the District Court of Queensland was precluded by the operation of s 44(1) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) from having any right to claim contribution under ss 6 and 7 of the *Law Reform Act* 1995 (Q) from Airservices Australia, a body established under the *Air Services Act* 1995 (Cth), which was the successor to the assets and liabilities of the plaintiff's employer, the Civil Aviation Authority established under the *Civil Aviation Act* 1988 (Cth). The High Court dismissed the appeal, unanimously affirming the decision of the Court of Appeal. Noting that the contrary had not been argued, Gleeson CJ, Gummow and Hayne JJ stated that it was to be assumed that the District Court had been exercising federal jurisdiction conferred on it by s 39(2) of the *Judiciary Act* on the basis that the claim against the manufacturer was a matter arising under the *Trade Practices Act* within s 76(ii) of the Constitution and on the further basis that Airservices Australia answered the description of "the Commonwealth" so as to bring the matter, as a result of the manufacturer's claim for contribution against Airservices Australia, also within s 75(iii) of the Constitution[138]. Again noting that the contrary had not been argued, their Honours stated that it was to be assumed that s 79 of the *Judiciary Act* operated to apply ss 6 and 7 of the *Law Reform Act* in the exercise of the District Court's federal jurisdiction unless a law of the Commonwealth "otherwise provided"[139]. Section 44(1) of the *Safety, Rehabilitation and Compensation Act* was held to be such a law.

100 The right of a tortfeasor to recover contribution from another tortfeasor under s 6 of the *Law Reform Act* is a right to such amount of contribution as a court might find to be "just and equitable" in the exercise of the power conferred on the court by s 7 of the *Law Reform Act*. The s 6 right is inseparable from the s 7 power[140]. Neither is therefore capable of applying in federal jurisdiction as State law. Both are within the field of operation of s 79 of the *Judiciary Act*.

---

138 (2000) 203 CLR 136 at 141-142 [9]-[11].

139 (2000) 203 CLR 136 at 142-143 [12].

140 Cf *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 64 [22]-[24]; [1998] HCA 78.

101 *Macleod v Australian Securities and Investments Commission*[141] arose out of convictions entered by the Court of Petty Sessions at Perth for offences against provisions of the Corporations Law (WA), being the law applied by s 7 of the *Corporations (Western Australia) Act* 1990 (WA) as a law of Western Australia. The prosecution had been brought by the Australian Securities Commission established under the *Australian Securities Commission Act* 1989 (Cth). The convictions were set aside on appeal to a single justice of the Supreme Court under s 185 of the *Justices Act* 1902 (WA). The Australian Securities Commission, having been respondent to that appeal, applied for leave to appeal to the Full Court of the Supreme Court of Western Australia under s 206A of the *Justices Act*. The Full Court granted leave and allowed the appeal. The High Court unanimously allowed an appeal from the decision of the Full Court on the basis that the making of the application under s 206A of the *Justices Act* was beyond the power conferred on the Australian Securities Commission by s 49(2) of the *Australian Securities Commission Act* to "cause a prosecution ... to be begun and carried on". Accepting that the Australian Securities Commission answered the description of "the Commonwealth" so as to make the application under s 206A of the *Justices Act* a matter within s 75(iii) of the Constitution in respect of which the Supreme Court of Western Australia had federal jurisdiction under s 39(2) of the *Judiciary Act*, the High Court rejected a submission by the Commonwealth Director of Public Prosecutions that s 79 of the *Judiciary Act* supplied the deficiency in the statutory power of the Australian Securities Commission by "picking up" the full ambit of s 206A[142].

102 In *Macleod*, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ specifically referred to the offences in respect of which convictions had been entered by the Court of Petty Sessions as offences against the law of Western Australia[143]. That was so despite the Court of Petty Sessions, no less than the Supreme Court, having been exercising federal jurisdiction under s 39(2) of the *Judiciary Act*.

Conclusion

103 Within the limits of State legislative capacity, State laws apply in federal jurisdiction as valid State laws unless and to the extent that they are rendered

---

141 (2002) 211 CLR 287; [2002] HCA 37.

142 (2002) 211 CLR 287 at 302 [44].

143 (2002) 211 CLR 287 at 291 [1].

invalid by reason of inconsistency with Commonwealth laws. What State laws relevantly cannot do within the limits of State legislative capacity is govern the exercise by a court of federal jurisdiction. A State law can determine neither the powers that a court has in the exercise of federal jurisdiction nor how or in what circumstances those powers are to be exercised. A State law cannot in that sense "bind" a court in the exercise of federal jurisdiction, and that is the sense in which that word is used in s 79 of the *Judiciary Act*. The operation of s 79 is limited to making the text of the State laws of that nature apply as Commonwealth law to bind a court in the exercise of federal jurisdiction.

104 Section 114(2) of the *Criminal Procedure Act*, governing what is to be taken to be the verdict of a jury, is a useful illustration. Its application to a Western Australian court exercising federal jurisdiction is beyond the competence of the Parliament of Western Australia. Consistently with the prescription in s 7 of the *Interpretation Act* 1984 (WA) that every written law of Western Australia is to be construed "subject to the limits of the legislative power of the State", s 114(2) is properly interpreted as applying to a Western Australian court only when exercising Western Australian jurisdiction. The text of s 114(2) is applied, as Commonwealth law, to a Western Australian court when exercising federal jurisdiction through the operation of s 79 of the *Judiciary Act*, except as otherwise provided by the Constitution or by some other Commonwealth law. That is what occurred in the trial of Mr Rizeq, there being no provision of the Constitution or of other Commonwealth law preventing it.

105 Section 6(1)(a) of the *Misuse of Drugs Act*, in contrast, is a law having application independently of anything done by a court. It is squarely within State legislative competence and outside the operation of s 79 of the *Judiciary Act*. It applied in the trial of Mr Rizeq as Western Australian law just as it applied to him before any court was called upon to exercise jurisdiction in relation to the charges brought against him[144].

106 The appeal must be dismissed.

---

144 Cf *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134 [23].

EDELMAN J.

Introduction

107 The circumstances of, and background to, this appeal are described in the joint judgment. The central issue is the construction of s 79(1) of the *Judiciary Act* 1903 (Cth). The appellant was tried in Western Australia for two offences under s 6(1)(a) of the *Misuse of Drugs Act* 1981 (WA). Since he was not a resident of Western Australia, his trial, prosecuted by the State of Western Australia, was in federal jurisdiction[145]. He was convicted of each offence by a guilty verdict of 11 of the 12 jurors. The *Criminal Procedure Act* 2004 (WA) permitted a conviction without unanimity of the jurors. The appellant submitted that unanimity was required because s 80 of the Constitution requires a unanimous verdict in a trial of an "offence against any law of the Commonwealth"[146]. He submitted that his trial was for offences against a law of the Commonwealth because his trial was in federal jurisdiction, so s 6(1)(a) of the *Misuse of Drugs Act* could only apply if it was "picked up" as a law of the Commonwealth by s 79(1) of the *Judiciary Act*.

108 The Court of Appeal of the Supreme Court of Western Australia held that s 79(1) of the *Judiciary Act* did not "pick up" s 6(1)(a) of the *Misuse of Drugs Act*. The appellant submitted that this conclusion was an error. The appeal to this Court can only be allowed if the appellant's construction of s 79(1) is accepted.

109 The appellant's construction, which I describe as the first construction, has significant support in a number of decisions of this Court. However, none of those decisions explore any of the relevant alternative constructions of s 79(1). There are at least four possible constructions of s 79(1) of the *Judiciary Act*, two of which are viable alternatives to the first construction. In these reasons I describe these two viable alternatives as the second and third constructions. The difference between these alternatives was not explored in written or oral argument. Some of the submissions of the respondent and the interveners were more consistent with the second construction. Some were more consistent with the third.

110 Each of the first three constructions is based upon a different assumption. Those assumptions are broadly as follows. The first construction assumes that all laws in federal jurisdiction must be federal laws. The second construction assumes that all courts exercising federal jurisdiction are effectively federal courts. The third construction assumes only that all authority by which courts

---

145 Constitution, s 75(iv).

146 *Cheatle v The Queen* (1993) 177 CLR 541; [1993] HCA 44.

exercise federal jurisdiction is federal authority. Of these three constructions, the first requires s 79(1) to have the broadest operation and the third requires the narrowest operation.

111 It is not necessary in these reasons to reach a final conclusion about which of the second or third constructions should be preferred because, on balance, after taking into account the strength of authority in support of the first construction, I consider that each should be preferred to the first construction, which is the construction that the appellant advanced. However, in circumstances in which the reasons of the other members of the Court in this appeal adopt the second construction, I explain in these reasons why the second construction presents significant obstacles and, if submissions had been made on the point and it were necessary to decide, why I would adopt the third construction. In any event, all members of the Court have concluded that the appellant's construction cannot be accepted.

112 The appeal must be dismissed.

Four constructions of s 79(1) of the *Judiciary Act*

113 Section 79(1) of the *Judiciary Act* provides:

> "The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

114 With the exception of the addition of the reference to a Territory in 1979[147], s 79(1) has remained unamended over the 114 years of its existence. It has been relied upon in many cases in this Court. Yet, there still remains considerable doubt about what is meant by "[t]he laws of each State or Territory". It is well established that since there is only one common law of Australia, the "laws of each State or Territory" can refer only to statute law. There is no issue in this appeal concerning the application of State or Territory laws in federal courts by s 79(1). The focus of the appeal, and these reasons, is only upon the relationship between two of the types of jurisdiction or authority exercised by State courts, being State and federal jurisdiction. Other sources of jurisdiction, and the particular issues concerning Territory courts, can be put to one side. The issue in this appeal, and the doubt concerning the meaning of the "laws of each State or Territory", arises when s 79(1) is needed to apply State statutory laws to State courts exercising federal jurisdiction. There are, at least,

---

147 *Judiciary Amendment Act (No 2)* 1979 (Cth), s 14.

four possible constructions available. They are summarised in broad detail below.

The first construction

115 The first construction is that the laws to which s 79(1) refers are all the statutory laws of a State. This is the broadest construction available. On this construction, when a State court exercises federal jurisdiction, s 79(1) operates to make binding all the laws of that State, except as otherwise provided by the Constitution or the laws of the Commonwealth. Subject to that exception, all putative laws of that State become Commonwealth laws in federal jurisdiction. This first construction was advanced by the appellant. Unless the appellant can establish this construction the appeal cannot succeed. This Court unanimously rejects the first construction in this appeal.

The second construction

116 The second construction is that the laws to which s 79(1) refers are those statutory laws which confer powers on courts or which govern or regulate a court's powers. This is the construction adopted on this appeal in the other judgments of this Court.

117 As to the *conferral* of powers, the second construction assumes that in the absence of s 79(1) a State court has no operative powers when the source of its authority to decide is federal. Section 79(1) is needed, on the second construction, to confer every power upon the State court in such cases. Except as otherwise provided by the Constitution or the laws of the Commonwealth, s 79(1) would, on this construction, confer power upon a State court to make orders including the granting of declarations, the making of any interlocutory and final orders, and the imposition of penalties and sentences.

118 On this construction, s 79(1) would not be needed for a State law which created a duty or liability but did not confer any power on a State court. Hence, s 79(1) would not be needed for, and would not apply to, a State law which created an obligation not to traffick a drug of dependence. But there may be difficulties on this construction with the application of s 79(1) to a law, drafted as a single State law[148], which provides that a person is liable for 15 years' imprisonment for trafficking in a drug of dependence. Assuming, as this construction does, that the provision for a sentence of up to 15 years' imprisonment can be understood as a law binding on a court, the difficulty is that the single provision creates the duty not to traffick *and* confers a power for the court to impose the particular sentence. It may be that, on this construction, s 79(1) could not apply to the latter without application to the former. There

---

148 See *Momcilovic v The Queen* (2011) 245 CLR 1 at 34 [13]; [2011] HCA 34.

might also be difficulty even if the trafficking law and the power of the court are contained in separate provisions if those separate provisions are seen as practically "inseparable"[149]. Another difficulty that arises from the inclusion of conferral of powers in this construction is the applicable law for federal jurisdiction. This difficulty arises because this construction would mean that only legal obligations, but not applicable orders, could be imposed upon a litigant in one State court by the statute law of a different State.

119 As to the *governing* or *regulation* of powers, on the second construction s 79(1) applies to the statutory laws which govern or regulate the court's authorisation to exercise power. This includes laws regulating the territory, persons, and subject matter over which the power is exercised. Examples of laws concerning regulation of the exercise of authority over persons include laws concerning standing or the joinder of parties. Examples concerning the regulation of the court's authority over the subject matter are laws which bar the exercise of authority over that subject matter after the lapse of a period of time, or laws concerning procedure or evidence in the course of adjudicating over that subject matter.

The third construction

120 The third construction is that the laws to which s 79(1) refers are only those statutory laws which *govern* or *regulate* the powers that a court (in this case, a State court) exercises as part of its authority to decide. This construction recognises that an assumption underlying s 79(1) is that power is already vested in courts exercising federal jurisdiction. When the authority to exercise that power becomes federal then it is federal law which must regulate the exercise of that power. But the State court's power is not removed and replaced with a new federal power.

121 Authority to decide (ie jurisdiction) is an authorisation to exercise power. To be "exercising federal jurisdiction" is to be exercising power where the source of the authority to do so is federal. On the third construction, the power being exercised need not itself derive from a federal source, although the authority to exercise it would be federal. For instance, a source of power can be a combination of State laws which create duties and State laws which enable courts to enforce those duties. Laws which are "binding on ... Courts" that are "exercising" federal jurisdiction are laws concerned with the authorisation to exercise that existing power. They are laws which *govern* or *regulate* the exercise of existing power (including existing, but newly created, power). This

---

149 See [100] of the joint judgment, and *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136; [2000] HCA 39 discussed below at [178].

construction therefore draws a fundamental distinction between (i) laws which regulate the *authority* to decide of a court which has existing powers, and (ii) laws which are concerned with the *conferral* of powers that a court might exercise. The basic distinction is between jurisdiction, or authority to exercise power, and the power itself.

The fourth construction

122 The fourth possible construction is that the laws to which s 79(1) refers are laws concerning procedure rather than substantive laws. The fourth construction was adopted by the Court of Appeal of the Supreme Court of Western Australia in this case[150]. This construction had some support in early decisions of this Court. For example, in *Lady Carrington Steamship Co Ltd v The Commonwealth*[151], Higgins J interpreted s 79 as applying only to procedural laws, which led to his doubt "as to the applicability of sec 79 of the *Judiciary Act* to the High Court at all" because the procedure of the High Court was governed by the *High Court Procedure Act* 1903 (Cth). However, the view that s 79 should be confined to matters of procedure has subsequently been rejected[152]. The distinction introduces an unnecessary gloss upon the statutory language. On appeal to this Court, no party or intervener supported the fourth construction.

The methodology and structure of these reasons

123 As to the first three constructions, it is impossible to reconcile all of the reasoning in the various judgments in this Court in cases concerning s 79(1). It is possible to point to reasoning in this Court which supports any of them; although the majority of cases assume that the construction to be applied is the first construction. It is also difficult to identify any case which would be decided differently once, as I explain below, it is accepted that State laws which do not fall within s 79(1) will usually apply of their own force. Indeed, some decisions simply relied upon the relevant State law operating either by its own force *or* through the effect of s 79. In *Pedersen v Young*[153], Kitto J said that the "received opinion as to the operation of ss 79 and 80" was that "subject to the Constitution and to the laws of the Commonwealth, all Queensland laws must be treated as binding in this Court, as federal law *if not by their own force*" (emphasis added).

---

150 *Hughes v Western Australia* (2015) 299 FLR 197 at 218 [145].

151 (1921) 29 CLR 596 at 601; [1921] HCA 49.

152 *Maguire v Simpson* (1977) 139 CLR 362 at 370 per Barwick CJ; [1977] HCA 63; *Solomons v District Court of New South Wales* (2000) 49 NSWLR 321 at 324 [11] per Mason P, 344 [81] per Foster AJA.

153 (1964) 110 CLR 162 at 165; [1964] HCA 28.

Since the reasoning in most previous cases cannot be determinative, the issue in this appeal must be approached as a matter of principle and with an eye to consistency with the results of previous cases.

124 The remainder of these reasons is divided as follows:

A. The fundamental distinction between "jurisdiction" and "power"

125 The essence of the distinction between the second and third constructions of s 79(1) turns upon the fundamental distinction between "jurisdiction" and "power".

126 In 1824, Du Ponceau, whose writing was influential in the development of United States federal law jurisprudence, explained that the term "jurisdiction" has been used in a general sense to mean power as well as in a "more limited sense"[154]:

> "Jurisdiction, in its most general sense, is the power to make, declare, or apply the law; when confined to the judiciary department, it is

---

154 Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States*, (1824) at 21.

> what we denominate the *judicial power*. It is the right of administering justice through the laws, by the means which the laws have provided for that purpose. In its more limited sense, which is that in which we are now viewing it, it is still the judicial power; but considered in relation to its extent and to the subjects which it embraces or upon which it acts." (emphasis in original)

127 The first, "general", meaning to which Du Ponceau referred was the powers that a court might exercise. The second, "limited", meaning was the authority to adjudicate (and therefore authority to exercise those powers). The difference between these two central meanings of jurisdiction has been important in the development of Australian jurisprudence. The Constitution and the *Judiciary Act* generally use the word "jurisdiction" in its "more limited" sense, preferring the word "power" for the broader sense. As Isaacs J said in *Baxter v Commissioners of Taxation (NSW)*[155], speaking of the reference to "jurisdiction" in s 39 of the *Judiciary Act* and s 77(ii) of the Constitution, the word "signifies in this connection authority to adjudicate". Federal jurisdiction, as "jurisdiction derived from a federal source"[156], signifies the exercise of an authority to decide which has a federal source.

128 More than 80 years after Isaacs J enunciated this point in *Baxter v Commissioners of Taxation (NSW)*, in a now commonly quoted passage in *Harris v Caladine*[157], Toohey J described jurisdiction as the authority to decide the range of matters that can be litigated before a court, contrasting it with the powers that can be exercised in deciding such matters (the broader, general sense of jurisdiction). Hence, as Toohey J explained in *Jackson v Sterling Industries Ltd*[158], where the issue concerns "the power of the Court to make the orders it did" then the question is one of power, not jurisdiction.

129 Jurisdiction, in the sense of an authority to adjudicate, has a number of dimensions, as Du Ponceau recognised. It has a geographic dimension ("over which territory does the authority to exercise power extend?"); a personal dimension ("over which persons does the authority to exercise power extend?");

---

155 (1907) 4 CLR 1087 at 1142; [1907] HCA 76.

156 Dixon, "The Law and the Constitution", (1935) 51 *Law Quarterly Review* 590 at 607.

157 (1991) 172 CLR 84 at 136; [1991] HCA 9. Quoted with approval in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590 [64]; [2001] HCA 1.

158 (1987) 162 CLR 612 at 627-628; [1987] HCA 23.

and a subject matter dimension ("over which subject matters does the authority to exercise power extend?").

130 As for power, the power exercised within the authority to decide is the power "to make, declare, or apply the law"[159] by an act of the court. It is sometimes said that in federal jurisdiction an "immediate right, duty or liability" is established "by the determination of the Court"[160]. However, it will often be more accurate to say that the exercise of power *gives effect to* a right, duty or liability because in many cases the right, duty or liability exists before the determination of the court gives effect to it.

131 Jurisdiction, in the sense of an authority to decide, is related to power because power is usually exercised in the course of an authority to decide. The fundamental point is that, as French CJ, Gummow and Bell JJ said in *Osland v Secretary to Department of Justice [No 2]*[161], "[t]he distinction between jurisdiction and power has been made repeatedly in this Court".

132 The distinction between the authority to decide and the power to make orders in the exercise of that authority is consistent with the broad and general definition of judicial power given by Griffith CJ, 108 years ago, in *Huddart, Parker & Co Pty Ltd v Moorehead*[162] and cited on many occasions since. The Chief Justice said:

> "I am of opinion that the words 'judicial power' as used in sec 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

133 Jurisdiction is concerned with the subject matter, persons, and territory over which the "binding and authoritative decision" can be given. The exercise

---

159 Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States*, (1824) at 21.

160 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; [1921] HCA 20.

161 (2010) 241 CLR 320 at 332 [19] fn 49; [2010] HCA 24.

162 (1909) 8 CLR 330 at 357; [1909] HCA 36.

of judicial power about which Griffith CJ spoke involves not merely the making of orders but[163]:

> "involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist."

134 As I explain below, in ss 38, 39, and 79 of the *Judiciary Act*, the reference to jurisdiction is to its limited sense of authority to decide; it is not a reference to the powers a court may exercise. As Toohey J observed in *Kable v Director of Public Prosecutions (NSW)*[164], quoting from Professor Lane[165], the same distinction between jurisdiction and power is made in Ch III of the Constitution. For instance, s 71 of the Constitution speaks of the "judicial power of the Commonwealth" but ss 76 and 77 speak of the "jurisdiction" of the High Court and federal courts. The distinction can also be seen in a provision such as s 22 or s 23 of the *Federal Court of Australia Act* 1976 (Cth) which "arms the Court with power" but which "does not invest the Court with jurisdiction"[166].

B. The scheme of ss 38 and 39 of the *Judiciary Act*

135 Although ss 38 and 39 of the *Judiciary Act* have been amended in some respects, the scheme introduced by those sections remains the same as it was when they were enacted. It is convenient to consider ss 38 and 39 as they were initially enacted in order to understand the operation of s 79, which was enacted at the same time.

---

163 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 per Kitto J; [1970] HCA 8.

164 (1996) 189 CLR 51 at 95; [1996] HCA 24.

165 Lane, *The Australian Federal System*, 2nd ed (1979) at 446.

166 *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161; [1981] HCA 48.

136 Immediately prior to the enactment of the *Judiciary Act*, State Parliaments had plenary power to legislate in relation to some, but perhaps not all[167], of the matters contained within ss 75 and 76 of the Constitution[168]. Some of these matters, including s 75(iv), which is the reason for federal jurisdiction in this case, identified "controversies well known in the anterior body of general jurisprudence in the colonies"[169].

137 Section 38 of the *Judiciary Act* involved an exercise of a "power to exclude"[170] deriving from s 77(ii) of the Constitution. In relation to the five sub-sections of s 38, all of which fell within s 75 of the Constitution, the authority to decide these matters was made exclusive to the High Court[171]. Section 39(1) was also an exercise of the power to exclude deriving from s 77(ii) of the Constitution. Section 39(1) provided that the jurisdiction of the High Court in matters not mentioned in s 38 "shall be exclusive of the jurisdiction of the several Courts of the States". The exception to this exclusivity was s 39(2), which, relying upon the power in s 77(iii) of the Constitution, "invested" the courts of the States with "federal jurisdiction" in all matters in which the High Court has, or could have, original jurisdiction, other than those matters within s 38.

138 Four matters are clear about the investing of federal jurisdiction in State courts under s 39(2) of the *Judiciary Act*. First, the "jurisdiction" to which s 39(2) referred was the court's authority to decide[172] with the geographic, personal, and subject matter dimensions described above. It was not a vesting of power. That power already existed. The vesting of federal jurisdiction (authority to exercise the power) was expressed to be "within the limits of their several

---

167 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 620-621 [27]-[30]; [2008] HCA 28, referring to *Ex parte Goldring* (1903) 3 SR (NSW) 260. See also *Hannah v Drake* (1902) 8 ALR (CN) 69; *Hannah v Dalgarno* (1903) 1 CLR 1 at 8; [1903] HCA 1. Cf Constitution, covering cl 5.

168 Moore, *The Constitution of The Commonwealth of Australia*, 2nd ed (1910) at 212; Clark, *Studies in Australian Constitutional Law*, (1901) at 177-178.

169 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 619 [25].

170 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.

171 Later made subject to ss 39B and 44 of the *Judiciary Act*: see *Judiciary Amendment Act (No 2)* 1984 (Cth), s 5 and *Jurisdiction of Courts Legislation Amendment Act* 2000 (Cth), Sched 2, item 11.

172 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 619 [23].

jurisdictions, whether such limits are as to locality, subject-matter, or otherwise". Secondly, the vesting was subject to conditions, particularly the abolition of appeals to the Queen in Council. Thirdly, despite an early wrong turning[173], the "settled effect"[174] of s 39(2) was that it excluded the operation of any concurrent State authority to decide. It did this by operation of s 109 of the Constitution[175]. As I have explained, the pre-existing State authority to decide extended to exercising the powers of State Parliament over matters within ss 75 and 76 of the Constitution. Fourthly, the federal jurisdiction vested in State courts under s 39(2) was complemented by s 17 of the *Judiciary Act*, which provided, and still provides, that State Supreme Courts are invested with federal jurisdiction in any matter pending in the High Court which is not a matter in which the High Court has exclusive jurisdiction.

139 The focus in ss 38 and 39 upon jurisdiction rather than power illustrates that the concern was not to remove powers of State Parliaments, including powers conferred upon State courts by State Parliaments. Instead, it was to replace the source of authority for the exercise of the powers of State courts. To adapt the submission of Dixon KC in *Booth v Shelmerdine Bros Pty Ltd*[176], the "whole object" of provisions such as this "in taking away jurisdiction and then giving [new jurisdiction] back was to place conditions upon its exercise". Conditions were able to be placed by the Commonwealth Parliament upon the authority to decide because the "authority to exercise judicial power with regard to those matters springs from another source"[177].

140 The important point is that by changing the source of the authority to decide matters under s 39(2) of the *Judiciary Act*, ss 38 and 39 were concerned only with regulating that authority to decide (ie the authority to exercise existing power). State Parliaments retained their powers to pass laws for the population including empowering State courts to make orders to give effect to those laws. The only effect of making federal jurisdiction exclusive was that, due to the

---

173 *Lorenzo v Carey* (1921) 29 CLR 243 at 251-252; [1921] HCA 58.

174 *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 21 [53]; [2015] HCA 36.

175 *Felton v Mulligan* (1971) 124 CLR 367 at 412-413; [1971] HCA 39; *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 471, 479; [1980] HCA 32; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 571 [7]; *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1 at 21 [53].

176 [1924] VLR 276 at 278.

177 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1143.

operation of s 109 of the Constitution, the State courts had no operative State authority to exercise those existing powers in federal jurisdiction. As the authority to decide was no longer a State matter, the regulation of that authority to decide was also no longer a State matter.

141 There is another way to illustrate the point that the effect of ss 38 and 39 was not to remove any pre-existing or prospective State power. Section 107 of the Constitution provides for the continuation of "[e]very power" of a State Parliament unless, by the Constitution, the power is "exclusively vested" in the Commonwealth Parliament or withdrawn from the Parliament of the State. Various provisions of the Constitution expressly provide for the exclusive vesting of powers in the Commonwealth Parliament. Those provisions, such as ss 52 and 90, are expressed in clear terms providing that the "power" of the Commonwealth Parliament in those areas is exclusive. Section 77 of the Constitution is not such a provision for two reasons. First, s 77 is a power conferred upon the Commonwealth Parliament to define the extent to which the *jurisdiction* of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States. It speaks of the "jurisdiction" of the federal court, not the "power" of the federal court. Secondly, s 77 is not a provision in which anything is made exclusive "by the Constitution". In other words, with the exception of provisions such as s 52 or s 90, the Constitution did not deprive State Parliaments of their *powers* to make laws. The exclusive vesting of *jurisdiction* in any federal court did not affect State powers. Instead, it meant that the State Parliaments could not regulate that federal authority to decide, just as State Parliaments could not confer upon federal courts an effective authority to adjudicate upon those federal subject matters[178].

142 If ss 38 and 39 were to be construed as an attempt to make exclusive *both* jurisdiction and power, in the sense explained above, then there could be questions concerning whether those provisions were inconsistent with s 107 of the Constitution. It is one thing to make exclusive the authority to adjudicate upon the federal matters concerned to "provide for and regulate the exercise of federal jurisdiction"[179]. But it is quite another thing to make exclusive the federal subject matters in ss 75 and 76, and thereby deny the power of a State Parliament to make valid laws in relation to those subject matters including laws conferring powers on State courts in relation to those subject matters. In *Western Australia v The Commonwealth* (*Native Title Act Case*)[180], a joint judgment of six Justices said that if s 12 of the *Native Title Act* 1993 (Cth) were to result in the

---

178 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; [1999] HCA 27.

179 *Alqudsi v The Queen* (2016) 90 ALJR 711 at 749 [171]; 332 ALR 20 at 67; [2016] HCA 24.

180 (1995) 183 CLR 373 at 487-488; [1995] HCA 47.

withdrawal of legislative power from State Parliaments then it would have diminished the legislative power confirmed by s 107 of the Constitution. As the joint judgment concluded, "that it cannot do"[181].

143 In summary, ss 38 and 39 of the *Judiciary Act* did not convert State courts into federal courts. Nor did those sections withdraw a sphere of State legislative power. The power of State Parliaments to make laws in relation to federal subject matters in ss 75 and 76 of the *Judiciary Act* (including conferring powers on State courts in relation to those subject matters) was untouched. However, the effect of making the jurisdiction of the federal courts exclusive meant that the powers of State courts in relation to those matters could not be *exercised* without a grant to the State courts of authority to decide. As Windeyer J said in *Felton v Mulligan*[182], the jurisdiction to which s 39(2) referred depended upon "the grant of an authority to adjudicate rather than upon the law to be applied or the subject of adjudication". His Honour continued, describing a court to which a grant of jurisdiction has been made as "a court ... duly seised for adjudication of a matter".

C. The need for s 79(1) of the *Judiciary Act*

144 As I have explained, s 39(2) of the *Judiciary Act* did not remove the corpus of law upon which State courts could adjudicate. Nor did it remove the powers of State courts in the course of that adjudication. However, by making the source of the authority to decide matters into a federal authority, there remained a gap concerning the laws which would regulate the exercise of that federal authority. When the source of the authority to decide matters within s 39(2) of the *Judiciary Act* became federal, there needed to be laws that would regulate that federal authority to decide.

D. The text and context of s 79(1) of the *Judiciary Act*

145 There are three powerful textual indications that s 79(1) is concerned only with the regulation of a court's authority to decide (the third construction).

146 The first indication is the reference to the laws as "binding on ... Courts" rather than binding upon persons. That reference in s 79(1) is repeated in s 79(2). In a trivial sense, it could be said that *all* statutory laws are binding on courts. Courts must apply, and cannot ignore, statutory laws. But the history of s 79, to which I refer in the next section of these reasons, and the context of s 79, to which I refer immediately below, shows that the reference in s 79 to laws which

---

181 *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 488.

182 (1971) 124 CLR 367 at 393.

are "binding on ... Courts" was used in a more limited way, which contrasted with laws binding on people. In this more limited sense, laws which are binding on courts are those laws which regulate a court's authority to decide (ie authority to exercise power). The same cannot be said of laws which subject *persons* to duties or liabilities, or which create powers that a court can exercise against persons to give effect to those duties. These are laws binding on persons.

147 The contrast between the reference to laws "binding on ... Courts" and the language used in covering cl 5 of the Constitution is plain. Covering cl 5, which departed from the Supremacy Clause in Art VI(2) of the United States Constitution, refers to all laws made by the Parliament of the Commonwealth under the Constitution as "binding on the courts, judges, *and people* of every State and of every part of the Commonwealth" (emphasis added). In its focus upon laws binding on courts rather than laws to be applied by courts, s 79(1) may also be contrasted with s 24 of the *Australian Courts Act* 1828 (Imp), which provided that "all Laws and Statutes in force within the Realm of England ... shall be applied".

148 The second textual indication that s 79(1) is concerned only with laws which regulate the court's authority to decide is the specific examples in s 79(1) of laws relating to procedure, evidence, and the competency of witnesses. These examples need to be understood in context as well as in light of the history of s 79. The latter is the subject of the next section of these reasons. As to the context in which s 79 appeared in the *Judiciary Act*, the heading of the Part as well as the surrounding provisions all indicate a concern with subsidiary matters of regulation. Section 79 was included in Pt XI of the *Judiciary Act*, which was, and still is, entitled "Supplementary provisions". The first supplementary provision was, and remains, s 78, which corresponded loosely with s 35 of the United States *Judiciary Act* 1789. It provided, and still provides, for the manner in which parties may appear in the courts exercising federal jurisdiction.

149 As I have explained, s 79 was another "supplementary provision", which was needed to regulate the exercise of federal authority to decide. The federal court, in 1903, was the High Court. The *Judiciary Act* made detailed provision for the federal jurisdiction of the High Court as well as for laws to confer powers on the High Court. Part III was entitled, and concerned with, jurisdiction and powers of the High Court generally. But there remained matters involving the regulation of the jurisdiction of the High Court, that is, matters concerning the exercise of its existing powers, to which s 79 applied.

150 The importance of the examples of laws "relating to procedure, evidence, and the competency of witnesses" is further illuminated by the fact that seven years before the enactment of the *Judiciary Act*, Professor Dicey published his

magisterial treatise on conflict of laws[183]. Dicey explained the critical difference for the purposes of choice of law which then existed between matters of procedure and matters concerning the substance of a party's rights. Within the former he included matters such as "the whole field of practice" and "the whole law of evidence"[184]. Dicey distinguished those "procedural" matters from matters concerned with the substance of a party's rights[185]:

> "Whilst, however, it is certain that all matters which concern procedure are in an English Court governed by the law of England, it is equally clear that everything which goes to the substance of a party's rights and does not concern procedure is governed by the law appropriate to the case."

151 This is, emphatically, not to recognise a distinction within s 79(1) between substance and procedure. Instead, it is to recognise that in 1903 matters of procedure, evidence, and the competency of witnesses were matters widely seen as concerned with a court's authority to decide, and therefore governed by the law of the forum. That is, these three areas fell clearly within the dimensions of jurisdiction involving regulation of (i) the persons subject to the powers of the court, (ii) the subject matter over which powers are exercised, and (iii) the territory over which powers are exercised.

152 The third textual indication is the reference in s 79(1) to "all Courts *exercising* federal jurisdiction" (emphasis added). The *exercising* of federal jurisdiction involves the exercise of powers with federal authority. As five members of this Court explained in *Solomons v District Court (NSW)*[186], the provision "operates only where there is already a court 'exercising federal jurisdiction', 'exercising' being used in the present continuous tense". In other words, s 79(1) does not seek to apply laws concerning the subject matter upon which a court is already adjudicating, or to confer new powers upon a court already exercising powers. Rather, it seeks to regulate the dimensions within which those laws are applied and the powers exercised.

---

183 Dicey, *A Digest of the Law of England with reference to the Conflict of Laws*, (1896).

184 Dicey, *A Digest of the Law of England with reference to the Conflict of Laws*, (1896) at 712.

185 Dicey, *A Digest of the Law of England with reference to the Conflict of Laws*, (1896) at 712.

186 (2002) 211 CLR 119 at 134 [23] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ; [2002] HCA 47.

E. The history of s 79 of the *Judiciary Act*

153 When enacted, the marginal note to s 79 of the *Judiciary Act* made reference to its source being s 721 of the *United States Revised Statutes.* Section 721 provided:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

154 Section 721 of the *United States Revised Statutes* was the 1873 re-enactment of s 34 of the United States *Judiciary Act* 1789. Immediately after the enactment of s 34 of the *Judiciary Act*, Congress enacted the *Process Act* 1789, s 2 of which provided:

> "That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same."

155 There was a fundamental difference between the application of the *Process Act* and the application of s 34 of the *Judiciary Act.* The *Process Act*, and its successors until 1872, were interpreted to apply to the federal courts only statically. That is, they applied the forms of writs and executions and modes of process that existed in September 1789. On the other hand, s 34 of the *Judiciary Act* applied dynamically. Its reference to the laws of the States meant those laws as they existed from time to time[187].

156 There was another fundamental difference between these provisions in the *Judiciary Act* and in the *Process Act*. This difference was that although the *Process Act* was needed to apply State processes to federal courts, s 34 of the *Judiciary Act* was not a provision which was regarded as necessary. Although the scope of s 34 was sometimes disputed, including by a well-known United States Supreme Court decision relating to the expression "laws of a State" which was overruled in 1938[188], at the time of Australian Federation it was established that s 34 of the *Judiciary Act* was a provision which was merely declaratory of

---

187 *Wayman v Southard* 23 US 1 (1825).

188 *Swift v Tyson* 41 US 1 at 18-19 (1842). Overruled in *Erie Railroad Co v Tompkins* 304 US 64 (1938).

what would in any event have governed the federal courts[189]. In 1945, Frankfurter J observed that this view of the declaratory nature of the section was one which had been held consistently for over 100 years[190]. The lack of substantive operation of s 34 is perhaps unsurprising. As Professor Fletcher (later a Justice of the Ninth Circuit Court of Appeals) observed, s 34 had been added to the *Judiciary Act* as an afterthought, without any of the serious debate that might be expected for a provision with substantive effect[191]. John Marshall had expressed the same view, independently of the provision, at the Virginia Convention to ratify the Constitution[192].

157 Until 1872, when the *Process Act* was reformed by the *Conformity Act* 1872, the difference between the static effect of the *Process Act* and the dynamic effect of the United States *Judiciary Act* meant that it was important to determine whether a law fell within the terms of the *Process Act* or within the terms of s 34 of the *Judiciary Act*. In 1872, by s 5 of the *Conformity Act*, Congress provided for the federal courts to follow the procedures of the States in relation to the "practice, pleadings, and forms and modes of proceeding" from time to time other than in equity and admiralty and subject to the rules of evidence under the laws of the United States. Section 5 of the *Conformity Act* was the progenitor of s 914 of the *United States Revised Statutes*.

158 After 1872, it was no longer as important to determine whether a law was one which fell within the "rules of decision" or the "practice, pleadings, and forms and modes of proceeding". In the United States, the courts began to treat the two provisions together, considering the latter as having "enlarged" the former. For instance, in 1885, the United States Supreme Court in *Ex parte Fisk*[193] considered a case where a petitioner had refused to be examined in the federal court to which his case had been removed. A question before the Supreme Court was whether the New York laws concerning the examination of

---

189 *Ex parte Biddle* 3 F Cas 336 at 337 (1822); *Bank of Hamilton v Dudley* 27 US 492 at 525 (1829); *Hawkins v Barney's Lessee* 30 US 457 at 464 (1831), quoted in *Erie Railroad Co v Tompkins* 304 US 64 at 72 (1938); *Mason v United States* 260 US 545 at 559 (1923). See also Du Ponceau, *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States*, (1824) at 37.

190 *Guaranty Trust Co v York* 326 US 99 at 103-104 (1945).

191 Fletcher, "The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance", (1984) 97 *Harvard Law Review* 1513 at 1527.

192 *Guaranty Trust Co v York* 326 US 99 at 104 fn 2 (1945), citing 3 *Elliot's Debates* 556.

193 113 US 713 (1885).

the petitioner applied in the federal court. The Supreme Court held that they did. The Supreme Court relied upon s 914 of the *United States Revised Statutes* (deriving from the *Process Act* and the *Conformity Act*) rather than s 721 (deriving from the *Judiciary Act*). Delivering the opinion of the Supreme Court, Miller J conflated the two provisions, saying that s 721 of the *United States Revised Statutes* had been "enlarged in 1872 by the provision found in § 914 of the Revision"[194]. Ultimately, however, the State statute in that case did not apply because it was in conflict with a federal law.

159 The development of s 721 of the *United States Revised Statutes*, which took place before Australian Federation, culminated in the decision of the Supreme Court of the United States in *Camden and Suburban Railway Co v Stetson* ("*Camden*")[195]. That decision was cited by Dixon J in *Huddart Parker Ltd v The Ship Mill Hill*[196] as evidence of the "long and controversial history" of s 721. The decision in *Camden* was effectively the culmination of the process by which the merely declaratory s 34 (later s 721 of the *United States Revised Statutes*) had been effectively expanded to include the "practice, pleadings, and forms and modes of proceeding", an expression which included the laws of evidence.

160 The decision in *Camden* concerned whether a federal court could exercise a power conferred by State legislation to order a surgical examination of a plaintiff in a personal injury action. The decision of the majority was delivered by Peckham J. His Honour relied upon the decision in *Ex parte Fisk* in support of the application of State laws of evidence in the federal court. He applied s 721 of the *United States Revised Statutes* in the sense in which that section had been "enlarged" in *Ex parte Fisk*. His Honour held that the statute in question fell "within the principle of the decisions of this court holding a law of the State of such a nature binding upon Federal courts sitting within the State"[197]. The use of the expression "binding upon Federal courts" was important. The "nature" of the statute in question which was binding on federal courts was that it was one which "was intended to confer upon the courts of the United States the jurisdiction necessary to enable them to administer the laws of the States"[198].

---

194 *Ex parte Fisk* 113 US 713 at 719 (1885).

195 177 US 172 (1900).

196 (1950) 81 CLR 502 at 507; [1950] HCA 43.

197 *Camden* 177 US 172 at 174-175 (1900).

198 *Camden* 177 US 172 at 175 (1900). See also *United States v Reid* 53 US 361 at 363 (1851).

161 By 1900, therefore, the merely declaratory function of s 721 of the *United States Revised Statutes*, indicating that which would have been the law in any event, had been treated by combination with s 914 to give s 721 an expanded operation extending to the manner, or administration, of a court's authority to decide cases. In that sense, s 721 had progressed from being a merely declaratory provision, which referred to all State laws that were binding on the people, to a provision which applied to laws concerned with the authority to decide cases that were "binding on courts".

162 The decision in *Camden* was given shortly before the Bill containing what became s 79 the *Judiciary Act* was first drafted[199]. When s 79 was enacted its focus was upon the "expanded" sense of s 721 of the *United States Revised Statutes*, including the operation of s 914. It was not focussed upon those matters included in the merely declaratory s 721. As Dixon J observed in *Huddart Parker Ltd v The Ship Mill Hill*[200], s 79 was more widely expressed than the United States provision. Section 79 did not use the language of "rules of decision in trials", preferring instead to refer to laws which, in the language of the Supreme Court in *Camden*, were "binding on all Courts exercising federal jurisdiction" in cases where they apply.

163 As I have explained, specific reference was made in s 79 to the laws relating to procedure, evidence, and the competency of witnesses. As the United States jurisprudence had shown, the three examples given in s 79 are classic examples of laws which were concerned with the regulation of the exercise of a court's existing powers. They are laws concerned with the authority to decide. They are not concerned with, for instance, creating rights or duties, nor with creating the court's powers to give effect to those rights or duties.

F. Authorities supporting the first construction

164 A strong focus of the submissions in this appeal concerned five decisions of this Court which the appellant said were authorities that supported what I have defined as the first construction of s 79(1). The appellant said that these authorities applied s 79(1) to laws which "created norms or imposed liabilities". In chronological order, each of those authorities is considered below.

165 The first case upon which the appellant relied was *R v Oregan; Ex parte Oregan*[201], a decision of Webb J exercising the original jurisdiction of the High Court, sitting in Victoria. The claim was brought by a wife, who was resident in

---

199 Judiciary Bill 1901 (Cth), cl 72.

200 (1950) 81 CLR 502 at 507.

201 (1957) 97 CLR 323; [1957] HCA 18.

Victoria, for custody of her child, who was living with her estranged husband in Tasmania. The matter was in federal jurisdiction under s 75(iv) of the Constitution. The relevant law of Victoria was different from the law of Tasmania[202]. After setting out the facts of the case and the approach that he would take if the Victorian legislation would apply, his Honour turned to whether the applicable law was (i) the Victorian statute law, (ii) the Tasmanian statute law, or (iii) the common law.

166 The two relevant Victorian provisions were ss 136 and 145 of the *Marriage Act* 1928 (Vic)[203]. Section 136 was a norm creating provision. It was as follows:

> "Where in any proceeding before any Court (whether or not a Court within the meaning of this Part) the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof is in question, the Court in deciding that question shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father or any right at common law possessed by the father in respect of such custody upbringing administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

167 The second provision, s 145 of the *Marriage Act*, was different from the norm creating nature of s 136. Section 145 was concerned with orders that the Court might make. Unlike s 136, s 145 was replicated in the equivalent Tasmanian legislation (s 10 of the *Guardianship and Custody of Infants Act* 1934 (Tas)). In oral argument before Webb J[204], senior counsel for the wife submitted that s 145 was relevantly identical to the Tasmanian provision. This was not disputed by senior counsel for the husband, and Webb J described the provisions as corresponding[205]. The real argument concerned whether the norm creating Victorian provision, s 136, applied.

168 The ultimate result of the case was that the Victorian provisions, including s 136, were applicable due to the operation of s 80 of the *Judiciary Act*. However, the only reason why Webb J did not apply these provisions by relying upon s 79 of the *Judiciary Act* was that his Honour considered that the terms of

---

202 *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323 at 325.

203 Repealed by the *Marriage Act* 1958 (Vic).

204 High Court of Australia, Transcript, Melbourne (4 March 1957) at 3.

205 *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323 at 328.

the provisions did not extend to a person domiciled and residing in Tasmania who had the legal custody of the child in Tasmania[206]. The application of s 79 to the norm creating provision in s 136 of the Victorian legislation supports the first construction of s 79. However, the reasoning of Webb J concerning why s 79 would apply was sparse. The point does not appear to have been a matter of substantial argument. His Honour simply said that "[t]he laws referred to in s 79 include, I think, substantive laws, embracing those dealing with the custody of infants"[207].

169 The second authority upon which the appellant relied was *Parker v The Commonwealth*[208]. That case involved a claim against the Commonwealth of Australia by Mrs Parker, the wife of a seaman who died as a result of the collision on the high seas of HMAS *Melbourne* and HMAS *Voyager*. The action was heard by Windeyer J in the original jurisdiction of the High Court, sitting in Victoria.

170 The difficulty for the claim by Mrs Parker was that the common law gave her no cause of action for losses suffered as a result of the death of her husband. That omission of the common law had been filled in England by the *Fatal Accidents Act* 1846 ("Lord Campbell's Act"), legislation which had been replicated in the States and Territories in Australia. Justice Windeyer recognised that the matter was in federal jurisdiction and that the "solution" must be sought by asking whether federal law "attracts and adopts State law, making it for purposes of an action in this Court the *lex fori*"[209]. His Honour held that the combination of ss 79 and 80 of the *Judiciary Act* applied the law of Victoria. This meant that the law to be applied was the Victorian equivalent of Lord Campbell's Act, the *Wrongs Act* 1958 (Vic).

171 It must immediately be acknowledged that the Victorian legislation applied in *Parker v The Commonwealth* went beyond the laws contemplated by the second or third constructions of s 79 of the *Judiciary Act*. The *Wrongs Act* did not merely confer powers on the Court or govern the Court's powers. It created an entirely new cause of action which did not exist under the common law. As Windeyer J explained[210], quoting from *Commissioner of Stamp Duties*

---

206 *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323 at 330.

207 *R v Oregan; Ex parte Oregan* (1957) 97 CLR 323 at 330.

208 (1965) 112 CLR 295; [1965] HCA 12.

209 *Parker v The Commonwealth* (1965) 112 CLR 295 at 306.

210 *Parker v The Commonwealth* (1965) 112 CLR 295 at 307.

(NSW) v Owens [No 2][211], it concerned the law by which the "rights of the parties to the *lis* are to be ascertained".

172 Three points should be made about the conclusion of Windeyer J. These three points show that the case is weak authority for the first construction of s 79. First, there was no dispute in that case that the law of Victoria was the applicable law[212]. Secondly, the application of ss 79 and 80 to reach the conclusion that the law of Victoria applied was only an alternative approach suggested by Windeyer J. The first route that his Honour suggested was simply that common law choice of law rules would apply Victorian statute law to determine the rights arising from the high seas collision. Thirdly, the alternative approach was based on a combination of ss 79 and 80 of the *Judiciary Act*. Section 80, at that time, provided for the application of the common law of England, as modified by the Constitution and the statute law in force in Victoria (the State in which the Court was sitting). His Honour recognised that "constituting an entirely new right of action is not well described as a modification of the common law" but said that this would be "too narrow a view"[213].

173 The third authority upon which the appellant relied was *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* ("*Edensor*")[214]. In that case, the Australian Securities and Investments Commission ("ASIC") alleged that various companies had contravened s 615 of the Corporations Law (Vic) by entering into a shareholders agreement. The primary judge made orders under ss 737 and 739 of the Corporations Law (Vic), including declarations of contravention. The Full Court of the Federal Court held that the primary judge lacked jurisdiction to make those orders. A majority of the High Court held that the primary judge did have jurisdiction.

174 The High Court held that the matter was within federal jurisdiction, and within the authority of the Federal Court, because ASIC, which was the applicant for relief, fell within the scope of "the Commonwealth" in s 75(iii) of the Constitution and s 39B(1A)(a) of the *Judiciary Act*[215]. A joint judgment was given by Gleeson CJ, Gaudron and Gummow JJ, with whom Hayne and Callinan JJ generally agreed. The joint judgment of Gleeson CJ, Gaudron and Gummow JJ distinguished between three different types of laws: (i) those that

---

211 (1953) 88 CLR 168 at 170; [1953] HCA 62.

212 *Parker v The Commonwealth* (1965) 112 CLR 295 at 306.

213 *Parker v The Commonwealth* (1965) 112 CLR 295 at 307.

214 (2001) 204 CLR 559.

215 *Edensor* (2001) 204 CLR 559 at 580-581 [39]-[40].

create a norm of legal liability, (ii) those that confer a remedy, and (iii) those that provide a curial forum to administer the remedy[216].

175 In relation to this taxonomy of laws, s 615 of the Corporations Law (Vic) created a norm of legal liability. However, the focus of the decision was not upon s 615, because the submissions had been directed to the question of whether the orders made by the primary judge, under ss 737 and 739, were valid. Nevertheless, their Honours contemplated, without deciding, that if the action had been commenced in a different State where s 615 did not apply then s 79 of the *Judiciary Act* might have denied the applicability of s 615[217]. Their assumption in posing this hypothetical scenario was that s 79 of the *Judiciary Act* was needed to apply s 615 of the Victorian law. In a separate judgment, McHugh J was explicit. His Honour held that s 615 was applied as a Commonwealth law by s 79[218]. All members of the Court, apart from Kirby J, held that ss 737 and 739 were applied as Commonwealth laws by s 79 of the *Judiciary Act*[219].

176 Two points should be made about the decision in *Edensor*. First, although the Court's reasoning was consistent with the first construction of s 79, as submitted by the appellant, it was not argued in that case that any of ss 615, 737, or 739 applied of its own force. Secondly, unlike the appeal in this case, *Edensor* was heard in the Federal Court. Different issues arise when the question, such as that in *Edensor*, concerns the powers of federal courts in the application of State laws.

177 Although the present appeal does not concern the question of State laws operating in a federal court, I agree with the conclusion of the other members of this Court in this appeal that s 615 of the Corporations Law (Vic) applied of its own force in the Federal Court in a case in which the Federal Court had authority to decide. Section 615 provided the "case for relief"[220]. As for the relief under ss 737 and 739, those sections could be given effect by s 23 of the *Federal Court of Australia Act*, which provides that "[t]he Court has power, in relation to

---

216 *Edensor* (2001) 204 CLR 559 at 590 [66].

217 *Edensor* (2001) 204 CLR 559 at 587-588 [58].

218 *Edensor* (2001) 204 CLR 559 at 609 [130].

219 *Edensor* (2001) 204 CLR 559 at 587 [58] per Gleeson CJ, Gaudron and Gummow JJ, 600 [102], 609 [130], 614-615 [146]-[147] per McHugh J, 639 [219] per Hayne and Callinan JJ.

220 *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161.

matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate". This is a "broad power"[221]. Sections 737 and 739 of the Corporations Law (Vic) could apply not as State laws which conferred new powers on the Federal Court but as circumstances where the Federal Court thinks it "appropriate" to make orders that would otherwise be made if the matter were in State jurisdiction. In other words, unlike State laws which can confer new powers on State courts, or Commonwealth laws which can confer new powers on federal courts, the State laws in ss 737 and 739 could only regulate the existing powers of the Federal Court, by drawing new "boundaries"[222] around federal powers. That regulation of power by ss 737 and 739 would require those laws to be applied, as Commonwealth laws, by s 79 of the *Judiciary Act*. Only to that extent would s 79 be required. As Dixon J said in *Musgrave v The Commonwealth*[223], s 79 applies "only where otherwise Federal law itself is insufficient".

178 The fourth authority upon which the appellant relied was *Austral Pacific Group Ltd (In liq) v Airservices Australia*[224]. In that case, Austral Pacific was sued by Mr Crockford in the District Court of Queensland. It was assumed that the matter arose in federal jurisdiction either because the claim arose under a law made by the Commonwealth Parliament or because Airservices was the Commonwealth. Austral Pacific claimed contribution from Airservices. The issue was whether s 79 of the *Judiciary Act* applied to the contribution legislation in Queensland. That contribution legislation gave Austral Pacific a right to proceed against Airservices[225] as well as providing for the manner in which contribution would be calculated[226]. It was assumed by the parties that absent s 79, Austral Pacific had no right to contribution from Airservices. The High Court assumed that s 79 applied to both the law concerning the right to proceed and the law concerning the manner in which contribution would be calculated. Again, although this assumption affirmed the first construction, the matter was not the subject of any argument, nor were competing constructions considered. The third construction would have recognised, by application of their own force,

---

221 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 622.

222 *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161.

223 (1937) 57 CLR 514 at 547; [1937] HCA 87.

224 (2000) 203 CLR 136.

225 *Law Reform Act* 1995 (Q), s 6.

226 *Law Reform Act* 1995 (Q), s 7.

the law giving a right to proceed and the law providing for the manner in which contribution would be calculated.

179 The fifth authority upon which the appellant relied was *Macleod v Australian Securities and Investments Commission* ("*Macleod*")[227]. Mr Macleod was charged with offences under the Corporations Law (WA). The proceedings were instituted by ASIC (as it was later entitled). As ASIC was, relevantly, the Commonwealth, the proceedings were in federal jurisdiction. Mr Macleod was convicted of one count in the Court of Petty Sessions. His appeal to the Supreme Court of Western Australia was heard by a Commissioner. The appeal was allowed and his conviction was quashed. ASIC brought a further appeal to the Full Court of the Supreme Court of Western Australia, where the conviction was reinstated. The question before the High Court was whether ASIC had the power to bring that appeal. One alleged source of power was s 206A(2) of the *Justices Act* 1902 (WA), which permitted a party to an appeal to bring an application for leave to appeal to the Full Court of the Supreme Court. The High Court held that s 206A(2) did not fall within the ambit of s 79 of the *Judiciary Act* because the *Australian Securities Commission Act* 1989 (Cth) "otherwise provided". Therefore, ASIC had no power to appeal under that provision.

180 On this appeal, the focus of the appellant's submissions regarding *Macleod* concerned an apparently unqualified reference in the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ to s 79 operating to "pick up" all State laws. The opening paragraph of the joint judgment commenced by describing the offences charged as being "offences against the law of Western Australia"[228]. Since the laws were made by the Parliament of Western Australia, not the Parliament of the Commonwealth of Australia, they were not laws to which s 68(2) of the *Judiciary Act* applied[229]. However, soon after explaining this point, their Honours said, without qualification, that s 79 of the *Judiciary Act* operated to "pick up" the State law of Western Australia[230]. This is yet another indication of support for the first construction of s 79. Again, however, the other constructions were not the subject of argument.

---

227 (2002) 211 CLR 287; [2002] HCA 37.

228 *Macleod* (2002) 211 CLR 287 at 291 [1].

229 *Macleod* (2002) 211 CLR 287 at 292 [8].

230 *Macleod* (2002) 211 CLR 287 at 293 [10].

G. Reasons to prefer the third construction

181 The above discussion demonstrates that there is a dominant strand of authority in this Court which supports the appellant's construction (the first construction). In *Commissioner of Stamp Duties (NSW) v Owens [No 2]*[231], a joint judgment of this Court said that the purpose of s 79 was, subject to the Constitution or federal law, to adopt the law of the State by which "the rights of the parties to the *lis* are to be ascertained and matters of procedure are to be regulated". In *Pedersen v Young*[232], Windeyer J said of s 79 that the law "binding upon courts" has been held to be "the whole body of the law of the State including the rules of private international law". In combination, the five authorities upon which the appellant relied support the conclusion that the dominant approach of this Court for decades has been to apply the first, and broadest, construction of s 79(1). The step that this Court takes today departs from those authorities.

182 However, the second and third constructions are not wholly new conceptions. Statements in some decisions of this Court can be marshalled in support of either or both of those constructions[233]. More fundamentally, I am not aware of, and no counsel cited, any case where argument was directed to the distinction between the competing constructions of s 79(1) which are relevant in this appeal. As I have explained above, the result of each of the five cases relied upon by the appellant would be no different if the second or third construction were adopted. Apart from *Edensor*, in each case the laws which were applied as Commonwealth laws by s 79 would still have applied in federal jurisdiction, on the third construction, of their own force. In *Edensor*, the operation of ss 737 and 739 of the Corporations Law (Vic) would be given effect by s 23 of the *Federal Court of Australia Act*.

The text, context, and purpose of s 79(1) support the third construction

183 The considerations of the text, context, and purpose of s 79(1) have been discussed above. Those matters all point against the first construction of s 79(1), by which s 79(1) applies to all State laws, irrespective of content. In my view, those considerations also favour the third, more narrow, construction over the second.

---

231 (1953) 88 CLR 168 at 170.

232 (1964) 110 CLR 162 at 169-170.

233 *Musgrave v The Commonwealth* (1937) 57 CLR 514 at 551; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20; [1965] HCA 61; *Felton v Mulligan* (1971) 124 CLR 367 at 393; *Momcilovic v The Queen* (2011) 245 CLR 1 at 69-70 [100].

184 First, ss 38 and 39 of the *Judiciary Act* did not remove the powers of State Parliaments to pass laws for the population, including the power that they had conferred, and could confer, upon courts to make orders to create new rights or duties or to give effect to pre-existing rights or duties. Those powers of State Parliaments remained unaltered although the source of authority to adjudicate became federal. The need for s 79 was confined to laws which regulated the authority to decide.

185 Secondly, the first and second constructions assume an operation of s 79(1) which goes beyond those laws which are binding on courts such as laws concerning procedure, evidence, and the competency of witnesses. The first and second constructions include laws which confer, or had conferred, any powers on courts to make orders, in the broad sense which includes decrees and pronouncements. These were matters which fell within the merely declaratory aspect of s 721 of the *United States Revised Statutes*.

186 Thirdly, the second construction assumes that laws can be neatly divided into (i) those which are the norm or source of liability, and (ii) those which permit a sanction to be imposed or orders made as a consequence of that liability. There is little support textually for this division. Moreover, as *Austral Pacific Group Ltd (In liq) v Airservices Australia* illustrates, those two components are not easily separated. The nature, and coherence, of such a division was controversial in 1903. But, as Dixon J observed in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett*[234], a common, but controversial, 19th century drafting technique was for a person's rights or duties to be expressed "to hinge upon the act of a court or other authority". The close association between the court order and the substantive liability reflected a dominant view, albeit powerfully criticised by Bentham[235], that in many cases, orders that the court makes merely replicate the source of rights or liability. This is what Blackstone meant by his description of a common order which depends "not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice"[236]. In the language of Dr Zakrzewski, the rights which flow from court orders often "replicate substantive rights"[237].

187 Fourthly, the second construction awkwardly requires laws which empower orders that a court might make against a person to be construed as laws

---

234 (1945) 70 CLR 141 at 166; [1945] HCA 50.

235 Bentham, *A Comment on the Commentaries: A Criticism of William Blackstone's Commentaries on the Laws of England*, (1828) at 87.

236 Blackstone, *Commentaries on the Laws of England*, (1768), bk 3, ch 24 at 396.

237 Zakrzewski, *Remedies Reclassified*, (2005) at 78.

"binding on all Courts" rather than laws binding upon persons. An example is the law considered in *Momcilovic v The Queen*[238]. That law was s 71AC of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic), which provided that:

> "A person who, without being authorized by or licensed under this Act or the regulations to do so, trafficks or attempts to traffick in a drug of dependence is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum)."

Even assuming that the liability for imprisonment should be divorced from the offence upon which it was based although it is formally within the same law as the offence creating provision (s 71AC), the liability to a maximum of 15 years' imprisonment is a law which is better seen as binding upon a person by creating a liability to which that person is subject, rather than being a law which is binding on a court, within the dichotomy assumed in s 79(1).

Constitutional restrictions on power favour the third construction

188 Another reason why the third construction of s 79(1) is preferable to the first is that, as the respondent submitted, the first construction of s 79(1) would take it beyond the legislative power of the Commonwealth Parliament. It is not necessary to consider whether the second construction is within power. This was not the subject of submissions on this appeal. It suffices to say that I do not consider that the first construction would be within the power of the Commonwealth Parliament.

189 The first construction would permit the Commonwealth Parliament to legislate, without limit, to create any laws in relation to the subject matters in s 75 or s 76 of the Constitution. In *Edensor*[239], McHugh J expressed the view that, at least where the Commonwealth or a State was a party to the proceedings, "there would seem to be no limit to the State laws that the Parliament can make applicable in those proceedings". But neither s 75 nor s 76 of the Constitution is a conferral of general power on the Commonwealth Parliament to legislate with respect to the subject matters in those sections.

190 The strongest submission in support of the validity of s 79(1) on the first construction is that s 79(1) does not purport to rely upon a general power to legislate with respect to any subject matter in federal jurisdiction because it only operates to "pick up" the text of a State statute, and is designed only to ensure consistency between cases where courts exercise authority with a federal source and cases where courts exercise authority from other sources. However,

---

238 (2011) 245 CLR 1.

239 (2001) 204 CLR 559 at 610 [130].

underlying this submission is the misleading metaphor of s 79(1) only "picking up" a State law. The assumption of the first construction, and the need for s 79(1) on that construction, is that the State law is otherwise inoperative. The State statute merely supplies the (inoperative) text which becomes the Commonwealth law.

191 The appellant submitted that the source of power for the Commonwealth Parliament to apply, as Commonwealth law, inoperative State laws on almost unlimited subjects is the provisions of Ch III of the Constitution generally, combined with the power in s 51(xxxix) concerning matters incidental to the execution of powers of the Federal Judicature. It can be accepted that this is the source of power for s 79(1)[240]. But there is no express conferral of power in Ch III of the breadth required for the first construction of s 79(1) of the *Judiciary Act*. As for the incidental power, the constitutional question is whether this power is "necessary or proper" to render effective the exercise of federal authority[241]. Section 51(xxxix) gives the Commonwealth Parliament power to make laws incidental to the *execution* of any power vested by the Constitution in the Federal Judicature. Writing in 1901, Quick and Garran observed that under the incidental power "the Parliament can legislate with respect to the practice and procedure of the Courts, the conduct of appeals, the admission and status of legal practitioners in the courts of federal jurisdiction, and so forth"[242]. These are obvious examples of incidental power. Other instances concerning the regulation of authority to decide would be included. But s 51(xxxix) does not confer an almost unlimited legislative power including the power to legislate upon many matters beyond the existing subject matter of Commonwealth legislative power.

Applicable law principles favour the third construction

192 It is clear from the wording of s 79(1) that the laws which the provision applies as Commonwealth law are the laws "binding on all Courts exercising federal jurisdiction in *that* State or Territory" (emphasis added) in which the court is sitting[243]. One immediate difficulty with the first construction of s 79(1) is that, when read with s 80, it would create an applicable law rule which had the effect that, whenever a State or federal court adjudicated upon a matter within federal jurisdiction, the applicable statute law would be the statute law of the

---

240 *Burton v Honan* (1952) 86 CLR 169 at 177-178; [1952] HCA 30.

241 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 579 [118].

242 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 723.

243 See, eg, *Pedersen v Young* (1964) 110 CLR 162 at 165.

State in which the matter was heard[244]. In the United States, even after *Erie Railroad Co v Tompkins*[245], it was very quickly noticed that there were areas where the application of State law was "singularly inappropriate" and would "lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states"[246]. In the Australian context, the first construction of s 79(1) could mean that the High Court could hear appeals involving identical facts which occurred in the identical place, but reach different conclusions if the trials had been heard in different States.

193 The second and third constructions are not generally subject to these vagaries. There are, however, difficulties in the second construction of s 79(1). On the assumption underlying the second construction, that laws conferring powers on State courts are not operative in federal jurisdiction, the rule of conduct provided by an applicable inter-State statute could be operative but no orders could be made. In other words, if the applicable State law is not the law of the State where the matter is heard then the only powers that the court could exercise would be created by the potentially different statute law of the State where the matter is heard. This surprising conclusion also sits uncomfortably with the reference in s 80 of the *Judiciary Act* to the "statute law in force" in a State, which would need to be construed as excluding any powers to make orders under inter-State statutes even if the obligations under those statutes could be in force.

194 An example can be given which illustrates this difficulty with the second construction. Suppose a matter concerning a tort claim in federal jurisdiction were heard in a court in New South Wales based upon a tort committed in Western Australia. The terms of the *Civil Liability Acts*, including provisions concerning the court's power to award damages, differ between those States[247]. Assuming that the applicable law is the statute law of Western Australia then, on the assumption underlying the second construction of s 79(1), three possibilities arise. One unlikely possibility is that s 79(1) would apply the damages provisions from the New South Wales Act as the remedy for breach of the

---

244 The potential conflict of statutes was not considered in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [2000] HCA 36. See at 515 [3]. But the joint judgment in that case appeared to assume the application of the first construction of s 79(1) if the matter had been in federal jurisdiction: see at 532 [58].

245 304 US 64 (1938).

246 *Clearfield Trust Co v United States* 318 US 363 at 367 (1943) limiting the reach of *Erie Railroad Co v Tompkins* 304 US 64 (1938).

247 Compare *Civil Liability Act* 2002 (NSW), Pt 2 with *Civil Liability Act* 2002 (WA), Pt 2.

different provisions of the Western Australian Act. It is difficult to see how the New South Wales Act provisions concerning damages could be "applicable" within s 79(1). A second possibility is that the Western Australian law would apply but that the court could not make any orders under that legislation, because (i) the court is sitting in New South Wales so s 79(1) could not apply the laws of Western Australia, and (ii) on the second construction, the Western Australian laws conferring powers on courts could not apply in federal jurisdiction. A third possibility is that some rule, external to s 79(1), would operate to allow the court to apply the damages provisions in the Western Australian legislation. One such rule might be said to arise from s 118 of the Constitution, which requires that full faith and credit be given in New South Wales to the Western Australian law. But that conclusion would substantially undermine the assumption of the second construction that those State laws do not apply in federal jurisdiction.

195 This difficulty is further exacerbated by the possibility that a State court might move from exercising State jurisdiction to exercising federal jurisdiction during the course of adjudicating upon a matter[248]. This might occur, for example, if a constitutional issue were raised during the hearing of the matter. If the applicable law were the law of a different State from the State in which the matter is being heard then the second construction might have the effect that a change of authority from State to federal would mean that the State court could no longer make any orders under the applicable statute.

196 The third construction provides a simple answer to these scenarios and an explanation for why a remittal from the High Court would not always have to be to the State whose law applied[249]. In the example above, the statute law of Western Australia would apply, including the orders that the court can make. In *Anderson v Eric Anderson Radio & TV Pty Ltd*[250], an action for damages arising from negligence which occurred in the Australian Capital Territory was brought in the District Court of New South Wales. The scenario did not involve different statutes in the Territory and State, and a majority of the High Court held that the matter was not in federal jurisdiction. However, the case illustrates the context in which these questions might arise. In the course of discussing a submission that the source of the jurisdiction being federal could affect the applicable law, Kitto J said[251]:

---

248 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 262 [29]; [2005] HCA 38.

249 *Johnstone v The Commonwealth* (1979) 143 CLR 398; [1979] HCA 13. See especially *Pozniak v Smith* (1982) 151 CLR 38 at 54; [1982] HCA 39.

250 (1965) 114 CLR 20.

251 *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 30.

> "[A]ll that is meant by saying that a court has federal jurisdiction in a particular matter is that the court's authority to adjudicate upon the matter is a part of the judicial power of the federation. To confer federal jurisdiction in a class of matters upon a State court is therefore not, if no more be added, to change the law which the court is to enforce in adjudicating upon such matters; it is merely to provide a different basis of authority to enforce the same law."

197 The same approach was taken by Evatt and McTiernan JJ in *Musgrave v The Commonwealth*[252], where a libel action was heard in the original jurisdiction of the High Court, sitting in New South Wales. The defendant relied upon a defence of privilege in s 377 of the *Criminal Code* (Q). The primary judge, Latham CJ, held that s 79 of the *Judiciary Act* required the law of New South Wales to be applied. On appeal, Rich and Dixon JJ did not need to decide whether s 79 required the application of the law of New South Wales[253]. However, Evatt and McTiernan JJ held that s 79 did not require the application of the laws of New South Wales. It did not "introduce, for the purpose of determining the lawfulness of the publication complained of, the general body of New South Wales law, merely because the action, being instituted in the High Court, happens to have been heard at Sydney"[254].

Conclusion

198 Although it is not necessary to express a final opinion, my view is that the third construction of s 79(1) of the *Judiciary Act* should be adopted. I do not express a final opinion because no party, and no intervener, drew a clear distinction between the second and third constructions. It suffices to say that of the two better constructions (the second and third constructions) there are reasons of history, text, context, and purpose to prefer the third construction. The third construction also aligns with the fundamental distinction between jurisdiction and power.

199 The third construction is that the laws to which s 79(1) refers are only those laws which, in the language used by the Attorney-General of the State of Queensland intervening, "are directed to the regulation of jurisdiction [in the sense of the authority to decide]". Section 79(1) is only needed, and only applies, for laws which regulate the exercise of the court's existing powers, including the manner and conditions upon which those powers can be exercised.

---

252 (1937) 57 CLR 514 at 551.

253 *Musgrave v The Commonwealth* (1937) 57 CLR 514 at 543, 547-548.

254 *Musgrave v The Commonwealth* (1937) 57 CLR 514 at 551.

200 The submissions on this appeal did not need to, and did not, address a number of difficult issues which still remain in relation to the operation of s 79(1). One issue is the extent to which s 79(1) can apply the text of a State statute with a changed meaning. Another issue is the boundaries of laws which regulate an authority to decide. It will not always be a simple exercise to determine whether a State law is one which is binding on a court, involving the regulation of the court's authority to decide (ie regulation of the court's exercise of existing powers), or whether the law is one which is binding on a person or persons. However, at the core, some simple examples can be given. Laws concerning procedure, evidence, and the competency of witnesses all regulate the general manner of the court's authority to decide over its subject matter. In relation to State courts, they are laws which explain *how* State courts' powers should be exercised. They are not concerned with the rights or duties of persons. Section 114(2) of the *Criminal Procedure Act* 2004 (WA), which permitted the jury in the appellant's trial to return a verdict upon which 10 or more jurors were agreed, is one such law. Without s 79(1) of the *Judiciary Act*, the State court exercising federal jurisdiction would not be regulated by this law.

201 Another example of a law which regulates the subject matter of a court's authority to decide is a law which limits the time within which an action can be brought. These laws were described in 1893 by the United States Supreme Court[255] as the laws which had been the most "steadfastly" and often recognised as falling within s 721 of the *United States Revised Statutes*. These laws are expressly recognised in s 79(3)(a) of the *Judiciary Act*. And the High Court of Australia has given regular recognition of laws which limit the time in which an action can be brought as laws which can fall within s 79(1) of the *Judiciary Act*[256].

202 Laws which limit the time in which an action can be brought are an example of laws which concern when a court can adjudicate upon rights falling within a particular subject matter. The limitation laws do not "bar" a person's rights. Instead, they provide a defence which precludes an effective adjudication upon those rights. Although this is no longer the case[257], at the time of the enactment of the *Judiciary Act*, it was "not to be questioned that laws limiting the

---

255 *Bauserman v Blunt* 147 US 647 at 652 (1893).

256 *Federated Sawmill, Timberyard and General Woodworkers' Employes' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308 at 321; [1912] HCA 42; *Cohen v Cohen* (1929) 42 CLR 91 at 99; [1929] HCA 15; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 80-81, 83, 88; [1973] HCA 21.

257 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

time of bringing suit constitute a part of the *lex fori* of every country"[258]. The reason why such limitation provisions were considered to be part of the *lex fori* was that they regulated the subject matter upon which the court would adjudicate. In the language of the United States Supreme Court in the decade before the enactment of the *Judiciary Act* in 1903, limitation laws concern the "means which the law provides for prosecuting [a] claim"[259]. They were described in 1878 as "laws for administering justice; one of the most sacred and important of sovereign rights"[260]. This was then seen as a matter for the law of the forum.

203 Apart from laws which regulate the subject matter dimension of the court's authority to decide, s 79(1) will also apply to laws which regulate the personal dimension of the authority to decide such as laws which determine the persons who can appear before the court. So, in *Macleod* for instance, s 79 was needed to engage the operation of s 206A(2) of the *Justices Act* 1902 (WA). Section 206A(2) was a law concerned with the persons who could bring an appeal. Similarly, laws giving a court the power to stay proceedings are laws which regulate the authority to decide over the persons before the court[261].

204 On the other hand, laws which regulate a court's authority to decide will *not* usually include the general corpus of law which establishes the rights, privileges, powers, immunities, duties, disabilities, and liabilities of persons. This includes orders of a court, which usually give effect to these rights and duties. Section 6(1)(a) of the *Misuse of Drugs Act* 1981 (WA), upon which the appellant was convicted, is a law which created the duty to which he was subject. The provision in s 6(1)(a) that a person commits a crime if the person "with intent to sell or supply it to another, has in his [or her] possession ... a prohibited drug" is not concerned with the regulation of a court's authority to decide. It is a law binding on persons, not a law binding on courts. The same is true of s 34(1) of the *Misuse of Drugs Act*, which provides for the penalty for contravention of s 6(1)(a) of a fine not exceeding $100,000 or a term of imprisonment not exceeding 25 years or both. Since s 79(1) did not apply to these provisions, the appellant's trial was not for offences against a law of the Commonwealth.

---

258 *Bauserman v Blunt* 147 US 647 at 654 (1893), quoting *Amy v Dubuque* 98 US 470 at 470 (1878).

259 *Bauserman v Blunt* 147 US 647 at 659 (1893), quoting *Amy v Watertown (No 2)* 130 US 320 at 325 (1889).

260 *Amy v Dubuque* 98 US 470 at 470-471 (1878), quoting *Hawkins v Barney's Lessee* 30 US 457 at 466 (1831).

261 *Huddart Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 502 at 507-508; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 88.

Section 80 of the Constitution was not engaged and conviction by a unanimous jury was not required.

205 The appeal must be dismissed.