

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

NO M134 OF 2010

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

BETWEEN:

VERA MOMCILOVIC

Appellant

AND:

THE QUEEN

First Respondent

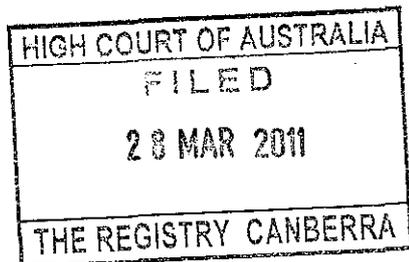
**ATTORNEY-GENERAL FOR THE STATE OF
VICTORIA**

Second Respondent

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

Third Respondent

**SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)
ON QUESTION 5 OF THE HIGH COURT'S LETTER DATED 1 MARCH 2011**



Filed on behalf of the Attorney-General of the Commonwealth
(Intervening) by:

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PART I FORM OF SUBMISSIONS

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

PART II QUESTION 5 RAISED IN THE COURT'S LETTER OF 1 MARCH 2011

2. These submissions are filed in response to Question 5 asked by the High Court in its letter of 1 March 2011. The Commonwealth Attorney-General (the Commonwealth) does not seek to make any submissions on Question 4.

Question 5: Does s 75(iv) confer original jurisdiction on the High Court in criminal proceedings brought by a State against a resident of another State? Does *R v Kidman* (1915) 20 CLR 425 at 438 (per Griffith CJ) and 444 (per Isaacs J) have any bearing on the answer to the question?

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3. The Commonwealth repeats the submission made in its Supplementary Submissions¹ that a criminal prosecution between a State and a resident of another State is a matter of the kind specified in s 75(iv) of the Constitution. It is sufficient that the diversity condition in s 75(iv) is fulfilled at the time the jurisdiction of the court is invoked, that is when the proceedings are commenced not when the acts giving rise to the proceedings occurred.²

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4. The words "a State" in s 75(iv) should be given as broad an interpretation as the words "the Commonwealth" in s 75(iii) notwithstanding the differences in language between the two provisions.³ Section 75(iv) embraces a criminal proceeding between Victoria and a resident of another State. Indictable offences in Victoria are instituted by the Director of Public Prosecutions "in the name of the Crown".⁴ While s 75(iv) speaks of a matter between States or between a State and a resident of another State rather than identifying the Crown in any capacity,⁵ that does not prevent s 75(iv) from extending to criminal prosecutions. To the contrary, the concept of a "matter" in s 75(iv) (and elsewhere in Ch III) comprehends matters arising under the criminal law.⁶ So much necessarily follows from the references in s 73 of the Constitution to appeals against "sentences" of federal courts or courts exercising federal jurisdiction and to the inclusion of s 80, which applies to the trial

¹ Commonwealth's Supplementary Submissions dated 3 March 2011, paragraph 2.

² *Watson v Marshall & Cade* (1971) 124 CLR 621, 623-624 (Walsh J). See also *Dahms v Brandsch* (1911) 13 CLR 336, 337 (Griffiths CJ) and *Dzikowski v Mazgay* (unreported, 7 July 1965, Windeyer J, noted in (1967) 40 ALJ 361.

³ *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22 at 32-33 (Gibbs CJ), 37-43 (Mason, Wilson, Brennan, Deane and Dawson JJ).

⁴ *Public Prosecutions Act 1994* (Vic), s 22.

⁵ *Commonwealth v Mewett* (1997) 191 CLR 471 at 546 (Gummow and Kirby JJ). See also, for example, *Commonwealth v Western Australia* (1999) 196 CLR 392 at 410 [33] (Gleeson CJ and Gaudron J), 431 [109] (Gummow JJ).

⁶ See, for example, *The King v Kidman* (1915) 20 CLR 425 at 438 (Griffith CJ), 444 (Isaacs J).

on indictment of any offence against any "law of the Commonwealth".⁷ Section 75(iv) confers jurisdiction on this Court which is at the apex of a national integrated court system.⁸ Accordingly, s 75(iv) is not limited by conceptions drawn from private international law respecting the enforcement of the penal laws of one country by the courts of another country.⁹ Also, those conceptions are irrelevant where, as here, a court of a State exercises jurisdiction with respect to an offence against a law of that State.¹⁰

- 10 5. As Dixon J stated in *The Bank Nationalisation Case*,¹¹ the Constitution "sweeps aside any difficulties which might be thought to arise from the traditional distinction between, on the one hand the position of the Sovereign as the representative of the State in a monarchy, and the other hand the State as a legal person in other forms of government ... and goes directly to the conceptions of ordinary life." Thus, the question whether a matter is one "between a State and a resident of another State" is to be determined "by reference to the substantial subject matter of the controversy".¹²
- 20 6. Despite the presence of the words "or any person suing or being sued on behalf of the Commonwealth" in s 75(iii), and the absence of any corresponding words in s 75(iv), neither "the Commonwealth" in s 75(iii) nor "a State" in s 75(iv) is to be given any narrow or technical meaning.¹³ So, in *Crouch v Commissioner for Railways (Qld)*,¹⁴ the Commissioner was held to constitute the State of Queensland for the purposes of s 75(iv) because, among other reasons, the subject-matter of the proceeding arose from "the discharge of traditional governmental functions of the State."¹⁵ It was that consideration which led Griffith CJ and Isaacs J in *The King v*

⁷ Since the earliest days of this Court, it has been accepted that a criminal prosecution involves a "matter": see, for example, *Ah Yick v Lehmert* (1905) 2 CLR 593 at 605 (Griffith CJ).

⁸ See *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 at 524 [34], 530 [52] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁹ Cf Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, 1901, p 778.

¹⁰ In such a case, if the trial is of a resident of another state, s 39(2) of the *Judiciary Act 1903* (Cth), enacted pursuant to s 77(iii) of the Constitution, invests the State Court with federal jurisdiction within the limits of its jurisdiction. See also *Lipohar v The Queen* (1999) 200 CLR 485 at 526-528 [104]-[108] (Gaudron, Gummow and Hayne JJ).

¹¹ *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 363. See also *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 282-283 (McHugh and Gummow JJ); *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 229-230 (the Court).

¹² *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22 at 37 (Mason, Wilson, Brennan, Deane and Dawson JJ).

¹³ *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22 at 39 (Mason, Wilson, Brennan, Deane and Dawson JJ). Section 75(iii), for example, is not limited to cases in which the Commonwealth itself is named as a party on the record of the proceedings. In *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 362-267 (Dixon J) and in *Crouch* (1985) 159 CLR 22 at 40-41 (Mason, Wilson, Brennan, Deane and Dawson JJ), s 75(iii) is contrasted with Article III, s 2 of the United States Constitution, upon which s 75(iii) was based and the reasons for the differing interpretations of those provisions are discussed.

¹⁴ (1985) 159 CLR 22.

¹⁵ *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22 at 39 (Mason, Wilson, Brennan, Deane and Dawson JJ). See also *State Bank of NSW v Commonwealth Savings Bank of*

*Kidman*¹⁶ to hold that the conferral of original jurisdiction on the High Court in s 75(iii) of the Constitution included matters in which the Crown in right of the Commonwealth invoked the judicial power of the Commonwealth for the punishment of offences against laws of the Commonwealth.¹⁷ The prosecution of offences against the laws of a State is a function of the executive government of the State. In “the conceptions of ordinary life”, such prosecutions are brought by the State itself. The determination of criminal guilt is an inherently judicial power.¹⁸ Proceedings for indictable offences against the laws of a State alleged to have been committed by a resident of another State therefore lie at the very centre of the range of matters embraced by s 75(iv) of the Constitution.

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Australia (1986) 161 CLR 639 at 651 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

¹⁶ *The King v Kidman* (1915) 20 CLR 425 at 438 (Griffith CJ), 444 (Isaacs J) (Higgins, Gavan Duffy, Powers and Rich JJ not deciding).

¹⁷ See also *Commonwealth v Westwood* (2007) 163 FCR 71 at 82 [53] (Sackville J), where the Commonwealth Director of Military Prosecutions was held to be “the Commonwealth” for the purposes of s 39B(1A)(a) of the *Judiciary Act*:

¹⁸ See, for example, *Sue v Hill* (1999) 199 CLR 462 at 515-516 [132] (Gaudron J) and the cases cited there.