

**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

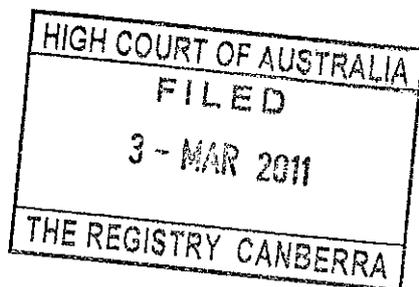
AND:

THE QUEEN
First Respondent

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

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

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



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

Australian Government Solicitor
50 Blackall Street Barton ACT 2600
DX5678 Canberra

Date of this document: 3 March 2011

Contact: David Lewis

File ref: 10057106

Telephone: 02 6253 7541

Facsimile: 02 6253 7303

E-mail: david.lewis@ags.gov.au

B1566674

1. The Attorney-General of the Commonwealth (**Commonwealth**) makes these supplementary submissions pursuant to leave granted by the Court on 10 February 2011.¹ The Commonwealth's submissions are limited to the question of the operation of s 32 and s 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) in federal jurisdiction.
2. The Commonwealth submits that a criminal prosecution between the Crown in right of a State² and a resident of another State is a matter of the kind specified in s 75(iv) of the Constitution.³ Federal jurisdiction with respect to such a matter was conferred on the County Court of Victoria and the Court of Appeal of the Supreme Court of Victoria by s 39(2) of the *Judiciary Act 1903* (Cth).
3. Section 32, which concerns the interpretation of Victorian legislation and is addressed to the world at large, applies to proceedings in federal jurisdiction just as it applies to proceedings in state jurisdiction.⁴
4. State laws, such as ss 36(1)-(5) of the Charter, which are directed at courts cannot apply of their own force to confer power or impose restrictions on a court exercising federal jurisdiction.⁵ The application of ss 36(1)-(5) of the Charter to the proceedings in the Court of Appeal depended upon whether they were capable of being "picked up" and applied in federal jurisdiction as a "surrogate Commonwealth law"⁶ by operation of s 79 of the *Judiciary Act*.

¹ See [2011] HCATrans 017, 10 February 2011, p 254.

² The Commonwealth Director of Military Prosecutions has been held to be "the Commonwealth" for the purposes of s 39B(1A)(a) of the *Judiciary Act*. *Commonwealth v Westwood* (2007) 163 FCR 71 at 82 [53] (Sackville J).

³ Cf *The King v Kidman* (1915) 20 CLR 425 at 438 (Griffith CJ), 444 (Isaacs J); *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 362-363 (Dixon J). See also *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22 at 28-29, 32-33 (Gibbs CJ), 37-43 (Mason, Wilson, Brennan, Deane and Dawson JJ); *State Bank of NSW v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639.

⁴ *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 587 [57] (Gleeson CJ, Gaudron and Gummow JJ).

⁵ *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 571 [7], 587 [57], 588 [59] (Gleeson CJ, Gaudron and Gummow JJ); *British American Tobacco Australia Ltd v WA* (2003) 217 CLR 30 at 53-54 [44], 59 [63] (McHugh, Gummow and Hayne JJ, Callinan J agreeing); see also at 41 [3] (Gleeson CJ), 69 [99], 87 [155] (Kirby J); *Bass v Permanent Trustee Company Limited* (1999) 198 CLR 334 at 352 [35] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Hilli v The Queen* (2010) 85 ALJR 195 at 200-201 [21] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁶ *Pederson v Young* (1964) 110 CLR 162 at 165 (Kitto J), 167 (Menzies J); *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 79 (Menzies J), 84 (Walsh J), 87 (Gibbs J) and 93 (Mason J); *The Commonwealth v Mewett* (1997) 191 CLR 471 at 552-553 (Gummow and Kirby JJ); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 352 [35] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Solomons v District Court of New South Wales* (2002) 211 CLR 119 at 134 [21] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ); *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 41 [3] (Gleeson CJ) and 53-54 [44]-[45] (McHugh, Gummow and Hayne JJ, Callinan J agreeing); *Agtrack (NT) Pty Ltd (t/as Spring Air) v Hatfield* (2005) 223 CLR 251 at 270 [58] (Kirby J).

5. None of the limitations on s 79 noted in *Solomons v District Court (NSW) (Solomons)*⁷ operates to prevent ss 36(1)-(5) of the Charter being picked up and applied in federal jurisdiction. For the reasons given in the Commonwealth's written submissions⁸ and in oral argument,⁹ the making of a declaration under s 36(2) having the limited effect spelt out in s 36(5) constitutes an exercise of judicial power. The making of the declaration is not "insusceptible of exercise as part of the judicial power of the Commonwealth".¹⁰
- 10 6. The exercise of federal jurisdiction comes to an end with the making of final orders including the declaration of inconsistent interpretation¹¹ and ss 36(6)-(7) and 37 lie outside the scope of s 79.
7. The decision in *Solomons* that provisions of the State Act there in issue did not operate because a certificate would have been granted by operation of federal law (that is, s 79 of the *Judiciary Act*) and not "pursuant to" the State Act¹² does not require that ss 36(6)-(7) and 37 of the Charter be construed so that they do not apply when a declaration is made in an exercise of federal jurisdiction. In each case, it is a question of construction of the State Act. Provisions of a State Act picked up by s 79 of the *Judiciary Act* will often contain "signpost" references to other provisions of the State Act and the operation of s 79 must generally allow for those references to extend to provisions as picked up and applied in federal jurisdiction, or the operation of s 79 would not be effective.¹³ For instance, the decision in *Solomons* does not prevent the references to a "declaration of inconsistent interpretation" (which is defined in s 3(1) to mean "a declaration made by the Supreme Court under section 36(2)") in ss 36(6)-(7) and 37 from including a declaration made in the exercise of federal jurisdiction under s 36(2) as picked up and applied by s 79 of the *Judiciary Act*.
- 20 8. If on their proper construction, ss 36(6)-(7) and 37 purport to operate of their own force as State laws where a declaration of inconsistent interpretation is made in the exercise of federal jurisdiction, there is no constitutional impediment to their valid operation. In so operating, they do not alter, detract from or impair the operation of the declaration of inconsistent interpretation made under s 36(2) of the Charter as
- 30

⁷ (2002) 211 CLR 119 at 134 [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

⁸ Submissions of the Attorney-General for the Commonwealth (Intervening) dated 31 January 2010, at pars 26-28.

⁹ [2011] HCATrans 017, 10 February 2011, pp 202-203.

¹⁰ *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 593-594 [73] (Gleeson CJ, Gaudron and Gummow JJ).

¹¹ See, by analogy *Wong v The Queen* (2001) 207 CLR 584 at 615-616 [84], [88].

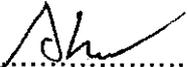
¹² (2002) 211 CLR 119 at 136 [26] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

¹³ For similar reasons a reference to a State court may extend to a federal court (see *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, especially at 591-592 [68] (Gleeson CJ, Gaudron and Gummow JJ)) and a reference to an "Act" in State legislation may include a federal statute (see *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 265 [39] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ)).

picked up and applied in federal jurisdiction by s 79. Nor are they inconsistent with any other Commonwealth law or incompatible with Chapter III of the Constitution.¹⁴

- 10 9. If, on their proper construction, ss 36(6)-(7) and 37 do not purport to operate of their own force as State laws where a declaration of inconsistent interpretation is made in the exercise of federal jurisdiction (or even if they could not validly do so), there is still no reason why ss 36(1)-(5) ought not be picked up and applied by s 79 of the *Judiciary Act*. In *Solomons*, the conclusions that s 4 of the *Costs in Criminal Cases Act 1967* (NSW) did not operate upon a certificate made in federal jurisdiction¹⁵ and was not capable of being picked up by s 79 of the *Judiciary Act*¹⁶ were not themselves fatal to the application of s 2 in federal jurisdiction. The critical factor in the joint reasons was that s 2, divorced from s 4, was “productive of a futility”.¹⁷ The same cannot be said of ss 36(1)-(5) of the Charter as picked up by s 79. A declaration of inconsistent interpretation can stand alone as an exercise of judicial power with its meaning unchanged.¹⁸

Date of filing: 3 March 2011

.....

.....
Stephen J Gageler SC
Solicitor-General of the Commonwealth
Telephone: (02) 6141 4145
Facsimile: (02) 6161 4099
Email: stephen.gageler@ag.gov.au

.....
Rachel Doyle SC
Telephone: (03) 9225 6839
Facsimile: (03) 9225 7293
Email: worka@vicbar.com.au

.....
Alistair Pound
Telephone: (03) 9640 3257
Facsimile: (03) 9225 8395
Email: alistair.pound@vicbar.com.au

Counsel for the Attorney-General of the Commonwealth

¹⁴ Cf *Re Macks; Ex parte Saint* (2000) 204 CLR 158; *P v P* (1994) 181 CLR 583.

¹⁵ (2002) 211 CLR 119 at 136 [26] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

¹⁶ (2002) 211 CLR 119 at 136 [27] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

¹⁷ (2002) 211 CLR 119 at 136 [27] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

¹⁸ Cf *Solomons* (2002) 211 CLR 119 at 146-147 [60]-[61] (McHugh J).