



## Express law fast track information for clients

13 September 2011

### Inconsistency of Commonwealth and State laws

**In a 6:1 decision, the High Court has held that a Victorian drug trafficking offence was not inconsistent with a similar Commonwealth offence and therefore was not invalid under s 109 of the Constitution.**

#### *Momcilovic v The Queen*

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[2011] HCA 34 (8 September 2011)

Ms Momcilovic argued that the Victorian offence of trafficking in a drug of dependence under s 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (Drugs Act) was inconsistent with s 302.4 of the *Criminal Code* (Cth) which created an offence of trafficking in a controlled drug. Ms Momcilovic sought to challenge her conviction for the Victorian offence.

In this decision, a 6:1 majority of the High Court held that the Victorian trafficking offence was not inconsistent with the Commonwealth offence, and was therefore not invalid under s 109 of the Constitution (French CJ, [109]-[112]; Gummow J, [276]-[277]; Heydon J [481], [486]; Crennan and Kiefel JJ, [657]; Bell J, [660]; Hayne J (dissenting), [280], [366]). However, Ms Momcilovic's conviction was quashed on other grounds (concerning the misapplication at trial of a reverse onus provision to the offence under the Drugs Act) and a new trial ordered.

Section 300.4 of the *Criminal Code* (Cth) provided that it was not intended to exclude or limit the concurrent operation of any law of a State or Territory. This provision was held to be relevant to inconsistency but not determinative ([111], [272], [316], [320], [654], [660]). The provision required the Commonwealth law to be construed as not exhaustive or exclusive of State law ([111], [272], [472], [486], [654], [660]). Analysis of the other provisions of the Commonwealth and Victorian law (in light of s 300.4) was still required to determine that there was no inconsistency (see [104]-[110], [275]-[277], [479]-[480], [639], [648]-[652], [655], [660]).

#### *Previous decision – Dickson v R*

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In a previous decision, *Dickson v R* (2010) 241 CLR 491, the High Court had held that a State conspiracy offence was inconsistent with a similar Commonwealth offence. This was because differences between the substantive provisions of the Commonwealth and State offences indicated that the Commonwealth law had designedly left areas of liberty into which the State law could not intrude (at 505 [25]).

However, in *Momcilovic*, the Court found that State and Commonwealth drug trafficking laws were not inconsistent, although there were differences in the maximum penalties, sentencing regimes, and the need for jury unanimity.

### ***Judicial power***

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The decision in *Momcilovic* also dealt with a number of issues relating to the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), including its effect on the interpretation of Victorian statutory provisions and whether it involved the exercise of judicial power.

### ***Implications in relation to s 109 of the Constitution***

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This decision reinforces the need to consider the whole of the relevant Commonwealth and State laws to determine if there is an inconsistency between them. This includes, but in all the circumstances of a particular operation of Commonwealth and State laws might extend beyond, any Commonwealth provision that indicates that the Commonwealth law is not intended to limit or exclude the concurrent operation of State or Territory laws.

*Text of the decision is available at:*

<http://www.austlii.edu.au/au/cases/cth/HCA/2011/34.html>

AGS (David Bennett QC, David Lewis and Niamh Lenagh-Maguire) instructed the Solicitor-General and other counsel for the Commonwealth Attorney-General who intervened in this case in the High Court.

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