When are state laws 'picked up' by s 79 of the Judiciary Act?

Nicolas Kirby reports on *Rizeq v Western Australia* [2017] HCA 23.

Introduction

The High Court has considered when a state law will be 'picked up' pursuant to s 79 of the *Judiciary Act 1903* (Cth) and applied as a federal law when a state court is exercising federal jurisdiction pursuant to s 39 of the Judiciary Act. The appropriate approach is to assess the distinction between the jurisdiction of the state court and the power that the court is permitted or required to exercise in the exercise of that jurisdiction.

Background

Section 75(iv) of the Constitution provides that the High Court has original jurisdiction in certain matters including a matter between a state and a resident of another state.
Pursuant to s 77(iii) of the Constitution, the Commonwealth Parliament may invest other courts with federal jurisdiction. Section 39(2) of the *Judiciary Act 1903* (Cth) does just that: investing state courts with federal jurisdiction in relation to matters in which the High Court has original jurisdiction.
When a state court exercises federal jurisdiction, certain state laws are 'picked up' and applied as federal laws pursuant to s 79 of the Judiciary Act. 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.

The issue

Rizeq was a NSW resident charged with offences against s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA) (MDA). After a trial in the District Court of Western Australia, he was convicted by majority verdict in accordance with s 114(2) of the *Criminal Procedure Act 2004* (WA) (CPA).
It was not in issue that the District Court was exercising federal jurisdiction under s 39(2) of the Judiciary Act.
The appellant argued that because the District Court was exercising federal jurisdiction, s 6(1)(a) of the MDA was picked up and applied as a law of the Commonwealth up by s 79 of the Judiciary Act. The effect, so the argument went, was that the trial was a trial on indictment of an offence against a law of the Commonwealth to which s 80 of the Constitution applied. That provision requires the verdict of the jury to be *unanimous*,[1] contrary to the operation of s 114(2) of the CPA, which allows for majority verdicts.
The State of Western Australia, with each of the Commonwealth and other state attorneys- general intervening, argued that s 6(1)(a) of the MDA was not picked up by s 79 of the Judiciary Act.

The judgments

The appeal was unanimously dismissed. The primary judgment comprised the joint reasons of Bell, Gageler, Keane, Nettle and Gordon JJ. Kiefel CJ and Edelman J delivered separate concurring reasons.
Bell, Gageler, Keane, Nettle and Gordon JJ held that the MDA imposed criminal liability as a law of Western Australia and it 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.[2]
Therefore, although the District Court was exercising federal jurisdiction, 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 MDA 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.[3]
Their Honours referred to the fact that the words used in s 79 of the Judiciary Act, namely, 'laws relating to procedure, evidence, and the competency of witnesses' to some extent elucidates what is encompassed within the description in s 79 of state laws that are 'binding' on a court. That, however, does not invite an excursion into the 'difficult and sometimes elusive distinction between 'substance' and 'procedure''.[4]
Rather, Bell, Gageler, Keane, Nettle and Gordon JJ considered that the appropriate way in which to consider which laws s 79 of the Judiciary Act will 'pick up' is the distinction between the 'jurisdiction' of a court (in the Chapter III sense) and the 'power' that the court is permitted or required to exercise in the exercise of that jurisdiction. Their Honours said:

> 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.[5]

Kiefel CJ concluded that s 79 of the Judiciary Act was directed to courts and that its purpose was 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.[6]
Accordingly, by that reasoning, s 114(2) of the CPA was such a provision as it regulated the manner in which a person's guilt or innocence was to be determined by a court. However, s 6(1)(a) of the MDA was not such a provision. It created an offence and applied directly, of its own force. There was therefore no need for it to be 'picked up' by s 79 as its

application was unaffected by the fact that the court deciding the matter was exercising federal jurisdiction. Therefore, s 80 of the Constitution was not engaged.[7]

Edelman J outlined four possible constructions of s 79 of the Judiciary Act:[8]

> First, that s 79 refers to all statutory laws of a state and thus all state laws become federal laws in a court exercising federal jurisdiction. This was the broadest construction and the only one which would, if accepted, have yielded success for the appellant.
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> Secondly, that s 79 refers to statutory laws that confer powers on courts or that govern or regulate a court's powers. Edelman J said that this was the construction adopted by the other two judgments.
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> Thirdly, that s 79 refers to only those statutory laws that govern or regulate the powers that a court exercises as part of its authority to decide. This was the construction that Edelman J preferred.
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> Fourthly, that s 79 refers to laws concerning procedure rather than substance. Edelman J said that this was the construction adopted by the WA Court of Appeal. Edelman J acknowledged that this construction found some support in early High Court decisions but had been since rejected and was not supported by any party or intervener. The other judgments also rejected the notion that the laws referred to by s 79 are informed by the substantive/procedural dichotomy.

His Honour found that the appellant's construction had 'significant support' in some High Court decisions.[9] His Honour examined each of those authorities in detail and concluded that the result in each would be maintained if the second or third construction were adopted. In Edelman J's view, the third construction best accorded with the history, text, context and purpose of the section.[10]

ENDNOTES

1 *Cheatle v The Queen* (1993) 177 CLR 541; [1993] HCA 44.
2 [2017] HCA 23 at [40].
3 [2017] HCA 23 at [41].
4 [2017] HCA 23 at [83].
5 [2017] HCA 23 at [87].
6 [2017] HCA 23 at [32].
7 Ibid.
8 [2017] HCA 23 at [115]–[122].
9 [2017] HCA 23 at [109].
10 [2017] HCA 23 at [181]–[197].

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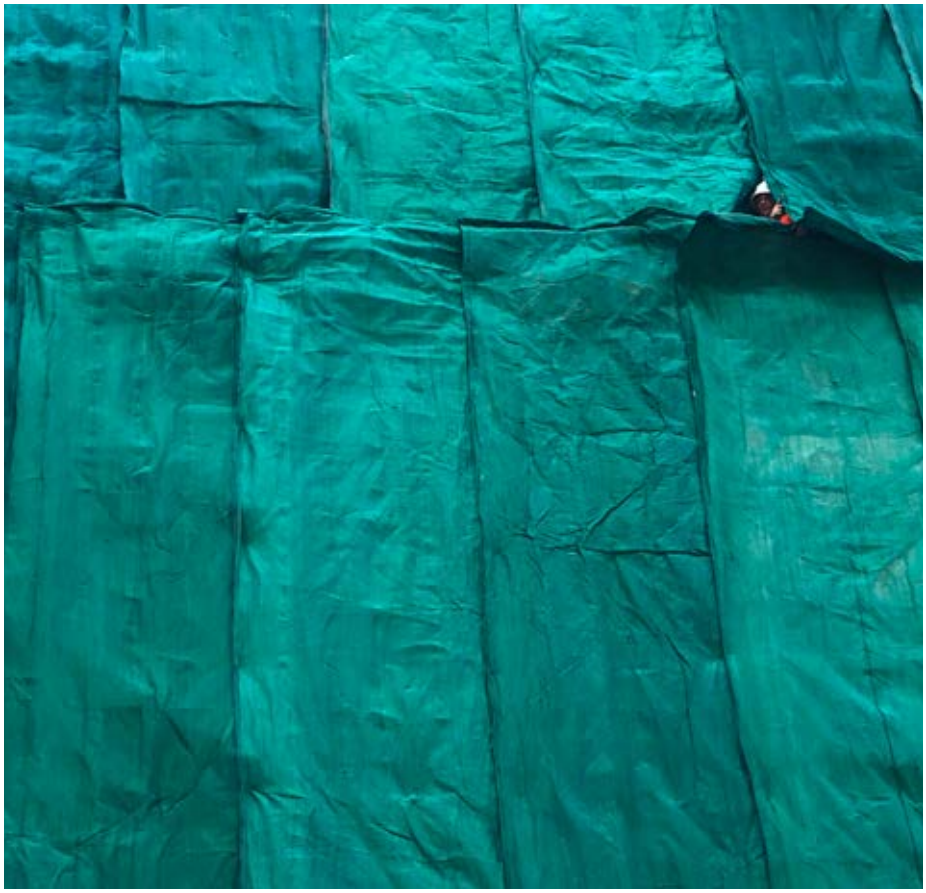

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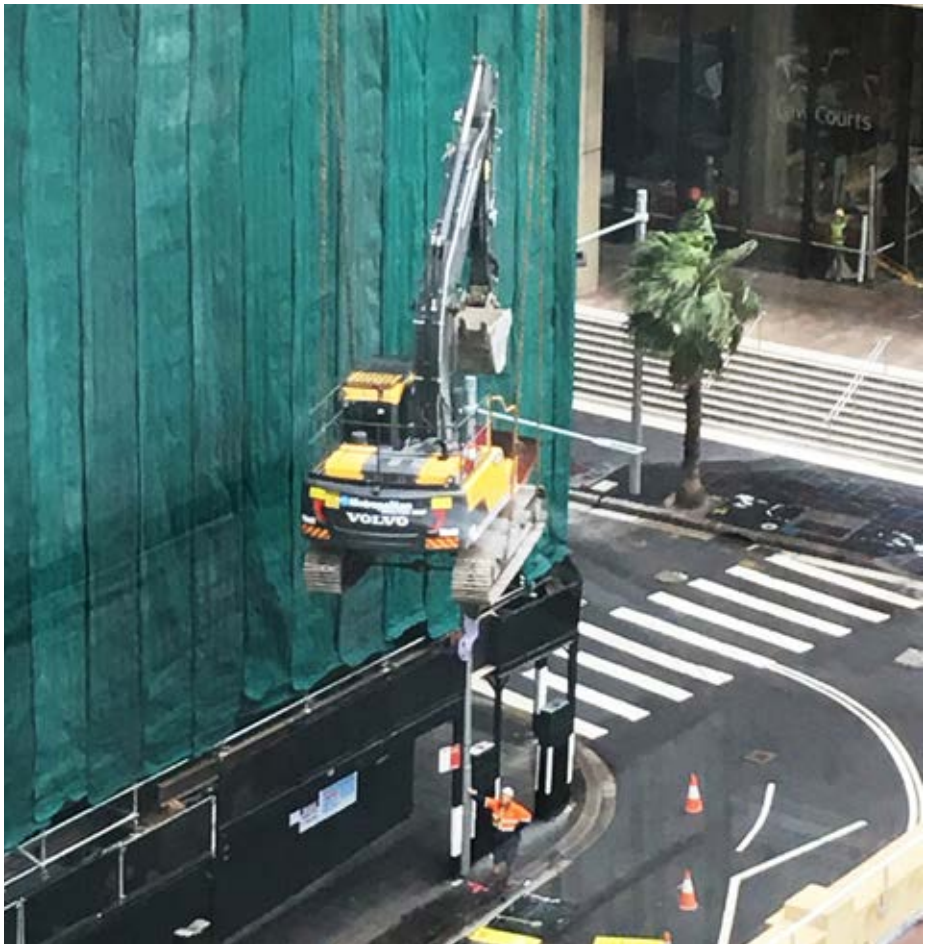

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