

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M 134 of 2010

BETWEEN:

VERA MOMCILOVIC

Appellant

and

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THE QUEEN

First Respondent

and

ATTORNEY-GENERAL FOR VICTORIA

Second Respondent

and

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**VICTORIAN EQUAL OPPORTUNITY
AND HUMAN RIGHTS COMMISSION**

Third Respondent

**HUMAN RIGHTS LAW RESOURCE CENTRE'S
SUPPLEMENTARY WRITTEN SUBMISSIONS**

1. These submissions are in a form suitable for publication on the internet.
2. These supplementary submissions address only the fourth question raised by the Court in its letter of 1 March 2011:¹

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Question: Does s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) assist in resolving the question whether s 5 of the Drugs Act applies to "possession for sale" in the definition of "traffick" in s 70 and thereby to the offence created by s 71AC?

Answer: Yes. Section 32 of the Charter, which applies to the interpretation of all statutory provisions, requires the expression "possession for sale" (or "have in possession for sale") in s 70(1) to be interpreted in a way that best promotes the right to be presumed innocent. Accordingly, the interpretation which does not pick up the deeming provision in s 5 is to be preferred.

ORIGINAL

¹ The Centre does not seek to have the case re-entered for further oral argument.

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3. The question whether s 5 of the Drugs Act applies to that part of the definition of “traffick” in s 70 that refers to “possession for sale” is a question of statutory construction. That being the case, s 32 of the Charter, which enjoins a method of construction applicable to all statutory provisions, must apply.

4. The assistance its application provides can be seen in the statement of interpretative choice: does the use of the word “possession” in the phrase “possession for sale” in s 70(1) involve the application of the deeming provision in s 5 of the Drugs Act?

5. There are several steps in the argument.

(a) The phrase “possession for sale” in s 70(1) of the Drugs Act is a composite expression that must be construed as a whole; it is a phrase whose meaning involves more than the sum of its parts (assuming it can be divided into parts).² The phrase ought not be given a meaning that splits up the expression in a way that is contrived.³

(b) Section 5 is not a definitional provision; it is a deeming provision. That being so, s 39 of the *Interpretation of Legislation Act 1984* is of limited utility. Further, the meaning and application of a deeming provision is subject to the fundamental rule of construction that “the hypothetical must not be allowed to oust the real further than obedience to the statute compels”.⁴

(c) The composite expression “possession for sale” involves possession for a particular purpose. It is a contrivance to divide the expression into “possession” (in respect of which s 5 may operate) and “for sale” (which imports a mental element required to be proved by the prosecution beyond reasonable doubt and in respect of which s 5 does not apply). To adopt the contrivance leads to the very problem adverted to by the Supreme Court of South Australia in *R v Billick*: “how can a jury apply a reverse onus to one fact in a chain of reasoning and yet apply the ordinary criminal onus to the final conclusion? I think that the process involves a mental gymnastic which

² Bennion, *Statutory Interpretation* (5th ed, 2008) at 1193; *Mersey Docks and Harbour Board v Henderson Brothers* (1888) 13 App Cas 595 at 599 (“It certainly is not a satisfactory method of arriving at the meaning of a compound phrase to sever it into several parts, and to construe it by the separate meaning of each of such parts when severed”); *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645 at 660 (Dixon CJ).

³ *Dunnachie v Kingston upon Hull City Council* [2005] 1 AC 226 at 251 [26].

⁴ *Polydor Ltd and RSO Records Inc v Harlequin Record Shops Ltd and Simons Records Ltd* [1980] 1 CMLR 669 at 673.

would be quite beyond a jury and which would not be attempted by any sensible person unless constrained by law to make the attempt.”⁵

- (d) The mental gymnastics involved reveal a deeper problem. Section 71AC creates a particular type of offence which, relevantly, is based on a particular form of trafficking *viz* possession for a particular purpose. The deeming provision in s 5 says nothing about that purpose and to import it into s 71AC would import with it the reverse onus it enacts in relation to part (but not all) of the composite expression, in a way that undermines the presumption of innocence otherwise preserved by the section.

10 28 March 2011

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R v Billick & Starke (1984) 36 SASR 321 at 331. *Contra R v Tragear* (2003) 9 VR 107 at 116 [40].