IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. 134 of 2010

BETWEEN:

VERA MOMCILOVIC

Appellant

and

THE QUEEN

First Respondent

and

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA

Second Respondent

and

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Third Respondent

APPELLANT'S REPLY

A. ADOPTION OF SUBMISSIONS OF OTHER PARTIES

1. The appellant adopts paragraphs 7-68 of the written submissions of the third respondent and paragraphs 8-58 of the written submissions of the Attorney-General for the Australian Capital Territory.

B. GROUND 3: THE SECTION 109 ISSUE

The effect of s 300.4 of the *Criminal Code* (Cth)

2. The second respondent contends that s 300.4 of the *Criminal Code* (Cth) ("the Code") is relevant to the question of whether there is a direct inconsistency. However, in addition to relying on s 300.2 of the Code, the appellant also relies upon ss 13.1 and 13.2 of the Code as the basis for the asserted inconsistency. Those sections appear in Chapter 2, which does not contain a provision equivalent to s 300.4, as this Court observed in *Dickson v The Queen*.[1]

---

1 (2010) 270 ALR 1 at 11[37].

HIGH COURT OF AUSTRALIA
FILED
- 3 FEB 2011
THE REGISTRY MELBOURNE

Date of document: 3 February 2011
Filed on behalf of: The Appellant
Filed by: Melasecca, Kelly & Zayler, Barristers & Solicitors
Level 11, 488 Bourke Street, Melbourne Vic 3000
Tel: (03) 9670 5211 Fax: (03) 9642 4119
Contact: Mr Rob Melasecca

3. Pursuant to its express terms, s 300.4 operates in relation to Part 9.1; it sheds no light on the Commonwealth Parliament's intention in enacting any other Part of the Code. Thus s 300.4 is of no assistance to the first and second respondents in relation to the effect of ss 13.1 and 13.2. As in *Dickson*, the presence of s 300.4 could not displace or avoid a direct inconsistency with ss 13.1 and 13.2.[2]

The relevance of *McWaters v Day*

4. The second respondent relies upon argument put in *McWaters v Day*,[3] a case where this Court found no inconsistency between a Commonwealth law and a State law regulating (broadly) similar conduct. Section 40(2) of the *Defence Force Discipline Act 1982* (Cth) made it an offence to drive a vehicle on service land while under the influence of intoxicating liquor to such an extent as to be unable to control the vehicle. Section 16(1)(a) of the *Traffic Act 1949* (Qld) made it an offence to drive a motor vehicle under the influence of liquor.

5. The appellant makes three points in relation to *McWaters*:

   (a) First, *McWaters* concerned military law, which is constitutionally limited and restricted in scope. This was one of the reasons why this Court in *McWaters* distinguished *R v Loewenthal; Ex parte Blacklock*.[4] For the same reason, *McWaters* should be distinguished here.

   (b) Secondly, this Court in *McWaters* concluded that, because of the nature of the Commonwealth law as military law, it "did not deal with the same subject-matter or serve the same purpose as laws forming part of the ordinary criminal law", and thus there was no inconsistency. The same cannot be said in this case, where ss 13.1, 13.2 and 300.4 of the Code are part of the ordinary criminal law and thus both "deal with the same subject matter" and "serve the same purpose as the ordinary criminal law".

   (c) Thirdly, *McWaters* concerned "covering the field" or indirect inconsistency; and this Court found no such inconsistency. However, direct inconsistency, as explained in *Dickson*, was not the subject of consideration in the judgments in *McWaters*.

6. For these reasons the appellant contends that *McWaters* should be distinguished; and *Dickson*, which is a much closer analogy, ought to be followed.

The Commonwealth Parliament's deliberate decision not to include a presumption of possession in the Code

7. The appellant submits that the Commonwealth Parliament deliberately decided not to include a presumption of possession in the Code, and that this is apparent from the extrinsic materials relating to the introduction of Part 9 of the Code.[5] In response, the first respondent contends that the extrinsic materials reveal that no such presumption was included because the Model Criminal Code did not contain an offence of

---

2 (2010) 270 ALR 1 at 11[37].

3 (1989) 168 CLR 289 at 292, referred to in *Dickson v The Queen* (2010) 270 ALR 1 at 9.

4 (1974) 131 CLR 338 – distinguished in *McWaters v Day* (1989) 168 CLR 289 at 296.

5 See the appellant's written submissions at footnote 41.

possession *simpliciter* but that Parliament later decided to include an offence of possession; and thus the exclusion of a presumption of possession was not a "deliberate exclusion".

8. The appellant makes two points in response to the first respondent's contention:

(a) First, the ultimate inclusion of the offence of *possession* in the Code says nothing about Parliament's intention as to a presumption of possession in relation to the offence of *trafficking*. It is clear from the extrinsic materials that a presumption of possession in relation to *trafficking* was considered "inappropriate and illogical".[6] Nothing in the relevant provisions as enacted, the Parliamentary debates or the Explanatory Memorandum for the amending legislation suggests any departure from that view.

(b) Secondly, notwithstanding the introduction of an offence of possession, Parliament decided not to include a presumption of possession (whether generally or in relation to that offence). That decision should be regarded as deliberate, particularly as Parliament clearly turned its mind to issues of reverse onus even where the *Report of the Model Criminal Code Officers* ("the MCCO Report") had not recommended one. For example, Parliament included a reverse onus for intention to sell in relation to trafficking (s 302.5), even though the MCCO Report recommended against such a reverse onus, recommending only a presumption arising from possession of a traffickable quantity.[7]

9. The only available conclusion to be drawn from the extrinsic materials is that the decision by Parliament not to include a presumption of possession in the Code equivalent to s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ("the DPCS Act") was deliberate.

C. GROUND 1: THE CONSTRUCTION OF s 32 OF THE *CHARTER*

10. The second respondent contends (and the Court of Appeal held) that s 32 of the *Charter of Human Rights and Responsibilities 2006* (Vic) ("the Charter") should not be understood as a "special" rule of construction; rather, it is part of the ordinary process of statutory construction. The appellant submits that this argument is contrary to the intention of Parliament in enacting the Charter and should not be accepted.

11. In this context, a "special" rule of statutory interpretation is one that authorises a court to interpret legislation in a manner that preserves the compatibility of the legislation with human rights even where, on occasion, this requires a departure from the meaning that would be arrived at by the ordinary rules of statutory interpretation ("the ordinary meaning"). In this sense, s 32 of the Charter should be viewed as analogous to s 15A of the *Acts Interpretation Act 1901* (Cth), or s 6 of the *Interpretation of Legislation Act 1984* (Vic), which permit the "reading down" or "reading in" of words into a statutory provision if that is necessary to preserve the validity of a statutory provision. While s 15A and s 6 are directed to preserving the constitutionality of a

---

6 Chapter 6 of the *Report of the Model Criminal Code Officers* (1998) ('MCCOC Report') at 43.

7 Chapter 6 of the MCCOC Report at 79-80.

law, s 32 is directed, in a similar fashion, to ensuring consistency with an external standard.[8]

12. The Court of Appeal held that s 32 was not intended to reflect the special rule of statutory interpretation contained in s 3 of the *Human Rights Act 1998* (UK). It erroneously construed s 32 as no more than a statutory confirmation of the ordinary principles of statutory interpretation, including the common law principle of legality.[9] In doing so, the Court of Appeal misunderstood the legislative history leading to the enactment of the Charter.[10]

13. The Court of Appeal failed properly to distinguish between a direction from the legislature that departure from the ordinary meaning of a statutory provision may be permitted (where otherwise there would be an incompatibility with human rights) and the limits of what that departure might be. The reference in s 32 to arriving at an interpretation that is "consistent with the purpose of the provision" constrains the limits of permissible interpretation; but it does not prohibit departure from the ordinary meaning.

14. With respect to the interpretation of legislation enacted before the Charter (as here), and as an illustration of the general principle of "reading down" or "reading in" to ensure consistency with an external standard, s 32 relies upon the analytical technique of implied amendment. In doing so, it demands fidelity to the legislative intention not only of the enacting Parliament but also the legislative intention of the (later) Parliament that enacted the interpretive direction in s 32. The Court of Appeal failed to appreciate that it could only respect the legislative intention of s 32 if it engaged in the interpretive exercise to which it was directed – an exercise which might involve reading a statutory provision as being impliedly amended by the Charter.[11] The refusal to do so was a failure to respect the intention of Parliament.

15. The purpose behind s 32 is to direct that the meaning of legislation in Victoria be ascertained by reference to both the settled understanding of the words at the time of the enactment together with the requirement that the words be read compatibly with any relevant human rights. The latter may involve a modification of the former and s 32, in that sense, is a special rule of construction. But such an exercise, far from being unfaithful to legislative intention, strives to carry out the legislative intention of both the enacting Parliament and the Parliamentary directive in s 32, to arrive at the combined legal meaning.[12] To give effect to the former alone is to flout the latter legislative intention. The intention of both Parliaments must be respected.

---

8 See Sir Anthony Mason, "Human Rights — Issues to be Resolved" (Speech delivered at the Law Institute Victoria Conference, Melbourne, 21 August 2009) at [54].

9 *R v Momcilovic* at [69]-[104].

10 See, e.g., Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (November 2005), 82-83, 117; Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2004, 1290-1293. See also Explanatory Memorandum for the Charter of Human Rights and Responsibilities Bill 2006 (Vic) at 1 & 23.

11 As to implied amendment, see Bennion, *Statutory Interpretation* (5th edn, 2008) at 293; Pearce & Geddes, *Statutory Interpretation in Australia* (6th edn, 2009) at 252-253[7.9].

12 See, eg, *Sheldrake v DPP; Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264 at 314[53].

16. Finally, as observed above, s 32 was intended to do more than simply codify the common law principle of "legality". It is plain from the extrinsic materials[13] that the constraint of "purpose" was included in s 32 to reflect the position articulated in *Ghaidan v Godin-Mendoza*[14] that a court ought not to adopt an interpretation that would go against "the grain of the legislation."[15] It was not intended to reduce the interpretive direction to a statutory equivalent of existing common law rules. As Sir Anthony Mason observed in a recent speech:[16]

> It is accepted that the special interpretive obligation only comes into play when the application of the common law principle of legality does not bring the legislation in question into conformity with the Charter or the HRA as the case may be ... [A]ccording to the principle of legality, legislative provisions will not be construed so as to abrogate or curtail human rights unless there is "a clear expression of an unmistakable and unambiguous intention so to do". In many cases, resort to the principle of legality or justification under s 7(2) of the Charter results in conformity without the need to resort to the special interpretive obligation. ... In those cases where conformity does not result, the special interpretive obligation requires the courts to go further.

D. GROUND 2: *R v TRAGEAR* and *R v GEORGIOU*

17. The effect of the first respondent's submissions under this ground is that the reasoning in *R v Tragear* and *R v Georgiou* should not be followed despite the fact that in no case since (including the present case) has the Court of Appeal questioned the correctness of the proposition for which those authorities stand. The first respondent's submission should not be accepted. Sections 5 and 73(2) of the DPCS Act do not alter the burden and standard of proof with respect to the offence of trafficking. Irrespective of whether s 5 casts an evidential or a legal onus of disproof of possession, an accused cannot have a drug in possession for sale (and therefore cannot be guilty of trafficking on that basis) unless it is proved beyond reasonable doubt that he or she was aware of the presence of the drug. Contrary to the first respondent's submission, so to say does not mean that a jury would not be entitled to convict of trafficking where ss 5 and 73(2) apply and there is an absence of "evidence to the contrary". Rather, it simply means that, if there is a reasonable doubt about whether the accused was aware of the drugs, the accused cannot be convicted of trafficking based on possession for sale because one cannot have something in possession for sale if one is not aware of it.

Dated: 3 February 2011

Michael J. Croucher	Kristen L. Walker	Catherine A. Boston
Tel: (03) 9225 7025	Tel: (03) 9640 3281	Tel: (03) 9225 7222
Fax: (03) 9225 6464	Fax: (03) 9640 3108	Fax: (03) 9225 8485
michaelcroucher@vicbar.com.au		

---

13 See fn 10, above, especially Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (November 2005) at 82-83.

14 [2004] 2 AC 557.

15 [2004] 2 AC 557 at 601 [121] (Lord Rodger).

16 Sir Anthony Mason, "Human Rights – Issues to be Resolved" (Speech delivered at the Law Institute Victoria Conference, Melbourne, 21 August 2009) at [44].