IN THE HIGH COURT OF AUSTRALIA **No. M134 of 2010**

MELBOURNE OFFICE

OF THE REGISTRY

ORIGINAL

APPEAL FROM THE SUPREME COURT OF VICTORIA, COURT OF APPEAL

BETWEEN

VERA MOMCILOVIC

Appellant

- and -

THE QUEEN

First Respondent

THE ATTORNEY GENERAL FOR THE STATE OF VICTORIA

Second Respondent

THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Third Respondent

FIRST RESPONDENT'S RESPONSE TO APPELLANT'S ADDITIONAL WRITTEN SUBMISSIONS

1. The First Respondent relies upon the oral submissions it made on 9th February 2011 in relation to the six questions formulated by the Court.

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2. As regards the additional written submissions filed and served by the Appellant on 17th February 2012, the First Respondent submits that, even if the DPP & Crown Prosecutors are public authorities under the Charter of Human Rights and Responsibilities Act 2006 ("the Charter"), the Chief Crown Prosecutor, who signed the Presentment in this case, did not act unlawfully under s38 of the Charter by proceeding with the charge of trafficking under the *Drugs Poisons & Controlled Substances Act 1981* ("the Act") rather than the equivalent charge under the *Commonwealth Criminal Code* ("the Code").

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3. Before descending into the detail of the argument, it is important to recall that the Charter is not constitutionally entrenched: a statutory provision which a court finds is incompatible with a Charter right (and incapable of re-interpretation under s32 of the Charter) is not thereby rendered invalid[1]. But that would be the defacto result if courts were to stay trials because a prosecution was launched under a State provision that had a more draconian operation than its Commonwealth counterpart.

4. If the courts are not permitted to invalidate statutory provisions that are
20 incompatible with human rights, how can the Charter be interpreted so as to oblige prosecutors to eschew incompatible State laws if a less draconian Commonwealth charge is available? Such an obligation would also erode the balance struck by the Commonwealth Constitution between Federal and State Parliaments, a result that can hardly have been intended by the Victorian Parliament when enacting the Charter.

5. Turning now to the case at hand, both the Act and the Code limit the presumption of innocence in trafficking prosecutions based on possession for sale. The Act does so in s5 by deeming common law possession to
30 exist in certain circumstances, unless the accused satisfies the court to the contrary. The Code does so in s302.5 by effectively deeming possession of a traffickable quantity to be possession for sale, unless the accused proves otherwise. As prosecuting vehicles, the State scheme might be described as "front wheel drive" and the Commonwealth "rear wheel drive". Which works to the greater disadvantage of the accused depends on the type of defence which is <u>ultimately</u> placed before the jury.

6. Even where the defence takes a certain line at the outset of the trial (eg, "I did not know of the drugs"), the defence is not, and cannot be, shut out
40 from taking a different line in its closing address (eg, "I did know of the drugs but I had them there for my own use"). The Chief Crown Prosecutor could not have known for certain when signing the Presentment what Vera Momcilovic's ultimate submission to the jury would be. She was never shut out from arguing, for instance, that although she knew of the drugs, they were her boyfriend's drugs, that she did not want them in the apartment but that she was ignored or overborne by her boyfriend. Indeed, such an argument might have been more attractive to the jury.

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[1] See s32(3) of the Charter

7. Is a Crown Prosecutor in a trafficking case based on possession for sale required to take at face value the defence line (as set out, say, in pre trial disclosure documents) and opt for the trafficking charge which most favours that defence? Or should the Crown Prosecutor analyse the evidence and decide, independently, what appears to him or her to be the most "attractive" defence and then choose the charge accordingly? Either way, what is suggested is unreasonable. Furthermore, given the large number of Presentments which are signed annually[2], the impracticality of the appellant's contention highlights its unreasonableness.

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8. It is submitted that the Chief Crown Prosecutor could not reasonably have made a different decision in this case and, consequently, having regard to s38(2) of the Charter, was not acting illegally.

9. Even if the contrary view were taken, the Charter does not confer a free standing right to seek relief or remedy in legal proceedings. Pursuant to s39 of the Charter, such relief or remedy may only be sought if the aggrieved party has a cause of action independent of the Charter.

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10. In *Maxwell v The Queen*[3], the following appears in the joint judgement of Gaudron and Gummow JJ at p534:

> "It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions ....as to the particular charge to be laid or prosecuted. The integrity of the judicial process – particularly its independence & impartiality and the public perception thereof – would be compromised if the courts were to decide or to be in any way concerned with decisions as to who is to be prosecuted and for what."

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11. There was no basis independent of the Charter on which the Appellant could have sought a stay of her trial and, therefore, she was never entitled to seek a stay under the Charter.

G. J.C. Silbert SC

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C. W. Beale

B. L. Sonnet

Counsel for the First Respondent

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[2] According to records maintained by the Victorian OPP, the average number of Presentments over the last three full financial years is 2803.

[3] (1996) 184 CLR 501 at 534