

BETWEEN:

VERA MOMCILOVIC

Appellant

and

THE QUEEN

First Respondent

and

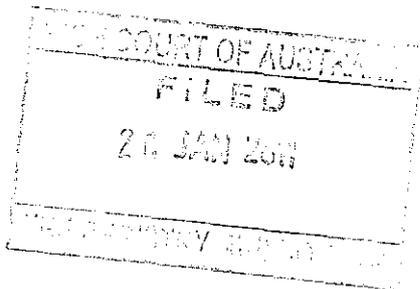
**ATTORNEY-GENERAL FOR THE STATE OF
VICTORIA**

Second Respondent

and

**VICTORIAN EQUAL OPPORTUNITY AND
HUMAN RIGHTS COMMISSION**

Third Respondent



APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF ISSUES

2. This appeal raises the following issues:
 - (a) Are ss 5 and/or 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ("the DPCS Act"), in their application to the appellant, inconsistent with ss 13.1, 13.2 and 302.4 of the *Criminal Code* (Cth) ("the Code") and so invalid to the extent of the inconsistency by reason of s 109 of the Constitution?

Date of document:
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Filed by:

17 January 2010
The Appellant
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- (b) Where drugs are found on premises occupied by an accused, does s 5 of the DPCS Act impose on the accused a legal burden of disproving, on the balance of probabilities, possession of the drugs in order to avoid deemed possession (“a legal burden”), or does s 5 impose on an the accused merely an evidential burden of adducing or pointing to evidence capable of raising a reasonable doubt about possession (“an evidential burden”)?
- 10 3. (c) Did s 5 of the DPCS Act operate in this case so as to relieve the prosecution of the burden of proving beyond reasonable doubt that the appellant was aware of the drugs found on her premises in order to prove a charge of trafficking in a drug of dependence by way of possession for sale under s 71AC of the DPCS Act?
4. The second of those issues raises a number of sub-issues, as follows:
- (a) What is the proper construction of s 32 of the *Charter of Human Rights and Responsibilities 2006* (Vic) (“the Charter”)?
 - 20 • (b) Is s 32 of the Charter, properly construed, invalid by reason of the fact that it confers on the Supreme Court of Victoria a legislative power so as to interfere with or impair the institutional integrity of that Court as a repository of federal judicial power, contrary to Chapter III of the Constitution?
 - (c) Does s 5 of the DPCS Act, construed according to ordinary principles of statutory construction and without reference to the Charter, impose on an accused a legal burden of disproof of possession or merely an evidential burden?
 - (d) Does s 5 of the DPCS Act, construed according to ordinary principles of statutory construction and with reference to the Charter, impose on an accused a 30 legal burden of disproof of possession or merely an evidential burden?
5. In addition, the Attorney-General for Victoria (the second respondent), in his submissions on the application for special leave to appeal, indicated that if the appellant’s appeal is successful this Court will be invited to set aside the declaration of inconsistent operation made by the Court of Appeal under s 36(2) of the Charter.¹ This raises two additional issues:
- 40 • (a) Do ss 36(2) and 36(5) of the Charter confer a non-judicial power on the Supreme Court of Victoria that interferes with or impairs the institutional integrity of that Court as a repository of federal judicial power, contrary to Chapter III of the Constitution?
 - (b) Does the High Court, in the exercise of its appellate jurisdiction under s 73 of the Constitution, have the power to set aside a declaration of inconsistent operation made by the Supreme Court?

¹ See *Momcilovic v The Queen* [2010] HCATrans 227; the declaration is contained in the Notification of Result of Application (AB 351-2).

6. The appellant does not seek to make submissions in relation to the constitutional issues concerning the declaration of inconsistent operation as that declaration has no effect on her rights, duties or liabilities.

PART III: SECTION 78B NOTICES

7. On 21 September 2010, s 78B notices were issued by the second respondent.² Further s 78B notices were issued by the appellant on 29 November 2010. The appellant considers that no further s 78B notices are necessary.

PART IV: REPORTED REASONS FOR JUDGMENT OF COURT BELOW

8. The reasons for judgment of the Court of Appeal are reported as *R v Momcilovic* (2010) 265 ALR 751. The trial judge's directions and sentencing remarks are not reported or available on the internet but are contained in the Appeal Book.³

PART V: RELEVANT FACTS

9. On 14 January 2006, police found powder containing methylamphetamine at a Melbourne apartment owned and occupied by the appellant. The appellant's partner Velimir Markovski owned another apartment in the building but mostly lived with the appellant in her apartment.⁴
10. On 21 July 2008, a presentment was filed in the County Court of Victoria alleging against the appellant one count of trafficking in a drug of dependence, namely methylamphetamine, contrary to s 71AC of the DPCS Act.⁵ The appellant pleaded not guilty and a jury was empanelled.⁶
11. The prosecution case was that the appellant was guilty of trafficking the methylamphetamine found at the premises solely on the basis that she had those drugs in her "possession for sale"⁷ pursuant to one of the extended meanings of "traffick" in s 70(1) of the DPCS Act.
12. Mr Markovski gave sworn evidence admitting that the drugs were in his possession for sale but denying that the appellant was aware of the presence of the drugs or of his drug trafficking activities. The appellant gave sworn evidence denying knowledge of the drugs and of Markovski's drug trafficking.⁸ There was no forensic or surveillance

² AB 357.

³ Charge at T 182-210 (AB 175-201); Sentencing Remarks at T 260-270 (AB 203-214).

⁴ See, e.g., *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [4] (AB 272).

⁵ The presentment was filed over an earlier presentment. See the presentment and the notations thereon (AB 1-4).

⁶ See the notations on the presentment (AB 3).

⁷ See, e.g., Charge at T 193.23-24 (AB 186).

⁸ See, e.g., *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [4] (AB 272).

evidence linking the appellant to the drugs. The appellant, a legal practitioner, also elicited evidence that she had no prior convictions and that she was of good character.⁹

13. The prosecution relied on s 5 of the DPCS Act,¹⁰ which provides as follows:

Without restricting the meaning of the word possession, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary.

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14. The case, both in the evidence led and in counsel's final addresses, was conducted by the parties on the footing that, since the appellant was in occupation of the premises, in order to be acquitted, the appellant had to satisfy the jury on the balance of probabilities that she did not know of the drugs.¹¹

15. The trial judge directed the jury that, by operation of s 5 of the DPCS Act, once the appellant's occupation of the premises was proved by the prosecution, the appellant would be in possession of the drugs unless she proved on the balance of probabilities that she did not know of their presence.¹²

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16. On 23 July 2008, the appellant was found guilty¹³ and was taken into custody.

17. On 20 August 2008, the judge sentenced the appellant to be imprisoned for 27 months with a non-parole period of 18 months.¹⁴

18. On 29 August 2008, the appellant filed applications for leave to appeal to the Court of Appeal against conviction and sentence.¹⁵

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19. On 12 September 2008, the Court of Appeal (Maxwell P and Weinberg JA) granted the appellant's application for bail pending appeal.¹⁶

20. On 22 and 23 July 2009, the Court of Appeal (Maxwell P, Ashley and Neave JJA) heard the appellant's applications for leave to appeal against conviction and sentence.¹⁷

⁹ See, e.g., Charge at T 189.14-190.27 & 209 (AB 182).

¹⁰ Since the amount of methylamphetamine found (about 394 grams of powder containing between 16 and 50 percent methylamphetamine) exceeded the applicable "traffickable quantity" (six grams), the prosecution also relied on s 73(2) of the DPCS Act, which provides that, "[w]here a person has in his possession, without being authorized by or licensed under this Act or the regulations to do so, a drug of dependence in a quantity that is not less than the traffickable quantity applicable to that drug of dependence, the possession of that drug of dependence in that quantity is prima facie evidence of trafficking by that person in that drug of dependence".

¹¹ See, e.g., *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [161]-[162] (AB 334-5).

¹² Charge at T 185.20-186.2 (AB 178-9), 195.19-196.14 (AB 188-9), 200.25-201.6 (AB 193-4), 204.13-19 (AB 197) & 205.16-18 (AB 198); Written Directions (AB 170).

¹³ T 212 (AB 202).

¹⁴ T 270 [38] (AB 214).

¹⁵ AB 215.

¹⁶ *Re Momcilovic* [2008] VSCA 183.

¹⁷ *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 (AB 269).

21. On 17 March 2010, in a joint judgment, the Court of Appeal refused the appellant's application for leave to appeal against conviction.¹⁸ The Court allowed the sentence appeal and re-sentenced the appellant to 18 months' imprisonment with all but the 52 days she had previously spent in custody suspended for 16 months.¹⁹
22. On 25 March 2010, the Court of Appeal declared, pursuant to s 36(2) of the Charter, that s 5 of the DPCS Act cannot be interpreted consistently with the presumption of innocence under s 25(1) of the Charter.²⁰

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PART VI: APPELLANT'S ARGUMENT

Proposed Ground 3: Section 109 inconsistency

23. The appellant seeks special leave to raise, and leave to amend the Notice of Appeal so as to include, the following additional ground of appeal:

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Ground 3: The Court of Appeal erred in not holding that ss 5 and/or 71AC of the DPCS Act were, in their application to the appellant, inconsistent with ss 13.1, 13.2 and 302.4 of the *Criminal Code* (Cth) and thus invalid.

24. While this issue was not raised at trial or in the Court of Appeal, it is a constitutional point going to whether the appellant was charged with an offence known to law and may be taken for the first time on appeal to this Court.²¹ The point has come late as a consequence of this Court's recent decision in *Dickson v The Queen*,²² judgment in which was handed down after special leave was granted in the present matter.

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Section 109: Relevant principles

25. Section 109 of the Constitution operates to render invalid (in the sense of "inoperative"²³) a State law that is inconsistent with a law of the Commonwealth. It is well accepted that there are two forms of inconsistency: direct and indirect.²⁴

¹⁸ *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [187] (AB 342); Notification of Result (AB 351-2).

¹⁹ *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [200] (AB 346); Notification of Result (AB 351-2).

²⁰ *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [155]-[157] (AB 329-30); Notification of Result (AB 351-2).

²¹ *Dickson v The Queen* (2010) 270 ALR 1 at [8].

²² (2010) 270 ALR 1.

²³ See, e.g., *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 286 (Windeyer J); *Western Australia v Commonwealth ('Native Title Act Case')* (1995) 183 CLR 373 at 464-465 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ).

²⁴ *Dickson v The Queen* (2010) 270 ALR 1 at [14], [22] & [30]-[32]; *Wallis v Downard-Pickforth (North Queensland) Pty Ltd* (1994) 179 CLR 388 at 397 (Toohey and Gaudron JJ, with whom Deane and Dawson JJ and McHugh J agreed on this issue); *University of Wollongong v Metwally* (1984) 158 CLR 447 at 455-456 (Gibbs CJ).

- (a) A direct inconsistency occurs where a State law “impairs, alters or detracts from” the operation of a law of the Commonwealth.²⁵
- (b) An indirect inconsistency occurs where, notwithstanding that there is no direct inconsistency, the Commonwealth law evinces an intention to “cover the field” in which it operates so as to leave no room for the operation of any State law in that field.²⁶

10 26. While the Commonwealth cannot, through legislation, override s 109, in some
 11 circumstances the Commonwealth may legislate so as to ensure that the occasion for
 12 the application of s 109 does not arise. As Mason J observed in *R v Credit Tribunal;*
 13 *Ex parte General Motors Acceptance Corporation*,²⁷ recently quoted with approval in
 14 *John Holland Pty Ltd v Victorian WorkCover Authority*²⁸ and in *Dickson v The*
 15 *Queen*:²⁹

16 [A]lthough a provision in a Commonwealth statute which attempts to deny
 17 operational validity to a State law cannot of its own force achieve that object, it may
 18 nevertheless validly evince an intention on the part of the statute to make exhaustive
 19 or exclusive provision on the subject with which it deals, thereby bringing s 109 into
 20 play. **Equally a Commonwealth law may provide that it is not intended to make
 21 exhaustive or exclusive provision with respect to the subject with which it deals,
 22 thereby enabling State laws, not inconsistent with Commonwealth law, to have
 23 an operation.** Here again the Commonwealth law does not of its own force give
 24 State law a valid operation. All that it does is to make it clear that the Commonwealth
 25 law is not intended to cover the field, thereby **leaving room for the operation of
 26 such State laws as do not conflict with Commonwealth law.**

27 27. Thus a law of the Commonwealth may avoid an *indirect* inconsistency under s 109 by
 28 expressly providing for the concurrent operation of State law. Such a provision may
 29 evince an intention³⁰ on the part of a Commonwealth Act not to cover the field in
 30 question. In those circumstances, so long as there is no direct inconsistency, the State
 31 law will not be rendered invalid by s 109.

28. This is consistent with the remarks of the Court in *John Holland*³¹ that the section
 there in issue did not “purport to do what it could not do, and operate directly upon
 State law. That is left to the operation of s 109 of the Constitution”. The Court went
 on to state that a law that expresses the intention of the Commonwealth Parliament to
 cover a particular field or to refrain from doing so “assists in the resolution, as a
 matter of statutory construction, of the question of the existence of such an intention”.

²⁵ *Dickson v The Queen* (2010) 270 ALR 1 at [13]-[14]; *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J).

²⁶ *Dickson v The Queen* (2010) 270 ALR 1 at [13]-[14].

²⁷ (1977) 137 CLR 545 at 563 (Barwick CJ, Gibbs, Stephen and Jacobs JJ agreeing). The same point was made by Gibbs CJ in *University of Wollongong v Metwally* (1984) 158 CLR 447 at 455-456.

²⁸ (2009) 239 CLR 518 at 527-528[21].

²⁹ (2010) 270 ALR 1 at [33].

³⁰ In the sense discussed in *Dickson v The Queen* (2010) 270 ALR 1 at [32]-[33].

³¹ (2009) 239 CLR 518 at 527[19]-[20].

29. However, where a law of a State is *directly* inconsistent with a law of the Commonwealth, the Commonwealth has no power to render the State law operative through legislative provision.³² Mason J went on to make just that point in *R v Credit Tribunal*.³³

10 It is of course by now well established that a provision in a Commonwealth statute evincing an intention that the statute is not intended to cover the field cannot avoid or eliminate a case of direct inconsistency or collision, of the kind which arises, for example, when Commonwealth and State laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed. In *R v Loewenthal; Ex parte Blacklock*,³⁴ I pointed out that such a provision in a Commonwealth law cannot displace the operation of s 109 in rendering the State law inoperative.

30. If in their mutual operation and effect a State law and a Commonwealth law are inconsistent, the State law is inoperative to that extent by virtue not of the Commonwealth law but of the Constitution. It does not matter that the Commonwealth Parliament expressed an intention that the State law should remain operative. That intention must yield to s 109.³⁵

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Relevant provisions of the DPCS Act

31. Trafficking in methylamphetamine is regulated by both the Commonwealth and the State of Victoria.
32. In Victoria, s 71AC of the DPCS Act makes it a criminal offence to “traffick” in a drug of dependence.³⁶ Methylamphetamine is a drug of dependence.³⁷
- 30 33. The extended meaning of “traffick” in s 70(1) of the DPCS Act includes having a drug of dependence in “possession for sale”.
34. Section 73(2) of the DPCS Act provides that, where a person has in his or her possession a drug of dependence in a quantity not less than the “traffickable quantity” for that drug, then the possession of that drug in that quantity is *prima facie* evidence of trafficking in the drug.
35. Section 5 of the DPCS Act is a reverse-onus provision that has potential application to possession-based drug offences – such as possession of a drug of dependence contrary to s 73 of the DPCS Act or trafficking based on possession for sale contrary to s 71AC – where, as in the present case, drugs are found on premises occupied by an accused.
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³² *Wallis v Downard-Pickforth (North Queensland) Pty Ltd* (1994) 179 CLR 388 at 397 (Toohey and Gaudron JJ, with whom Deane and Dawson JJ agreed on this issue).

³³ *R v Credit Tribunal* (1976) 137 CLR 545 at 563.

³⁴ (1974) 131 CLR 338 at 346-347.

³⁵ See the argument put by M H McLelland QC in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1976) 137 CLR 545 at 548-549.

³⁶ The relevant provisions of the DPCS Act and the Code are set out in the appellant’s annexure.

³⁷ See the definition of “drug of dependence” in s 4(1) and the reference to “methylamphetamine” in Column 1 of Part 3 of Schedule 11 of the DPCS Act.

Section 5 has been construed as meaning that, where an accused occupies premises on which drugs are found, without more, the accused will be deemed to be in possession of the drugs unless he or she proves on the balance of probabilities that he or she was not in possession (for example, by proving an absence of knowledge of the drugs).³⁸

- 10 36. In this case, since there was no dispute that the appellant was in occupation of the premises on which the drugs were found, the appellant was deemed to be in possession of the drugs unless she “satisfie[d] the court to the contrary”. In view of the directions given by the judge and the issues raised at trial, the verdict implies that the appellant failed to satisfy the jury on the balance of probabilities that she was not aware of the drugs. The conduct giving rise to her conviction was thus her occupation of premises upon which the drugs were found.

Relevant provisions of the Code

37. Section 302.4 makes it a criminal offence to “traffic” in a substance that is a controlled drug. The definition of “controlled drug” includes “methamphetamine” (see ss 300.2 and 314.1 of the Code), which is the same substance as methylamphetamine.
- 20 38. Section 302.1(e) of the Code relevantly provides that a person “traffics” in a substance if “the person possesses the substance with the intention of selling any of it”.
39. Section 300.2 of the Code provides that “*possession* of a thing includes ... (a) receiving or obtaining possession of the thing; (b) having control over the disposition of the thing (whether or not the thing is in the custody of the person); (c) having joint possession of the thing”.
40. Section 302.5(1)(d) of the Code provides that, where a person possessed a “trafficable quantity” of a substance, then he or she is taken to have had the necessary intention or belief concerning the sale of the substance to have been trafficking in the substance.
- 30 41. Chapter 2 of the Code contains provisions concerning general principles of criminal responsibility. In particular, s 13.1 provides that the prosecution has the burden of proof in relation to every element of an offence and s 13.2 provides that the standard of proof imposed on the prosecution is beyond reasonable doubt.
42. Thus, under s 302.4, a person *could be* guilty of trafficking in a controlled drug in circumstances where he or she is in occupation of premises on which methylamphetamine is found. However, there is no equivalent in the Code to s 5 of the DPCS Act. Under s 302.4, the conduct of being in occupation of premises upon which methylamphetamine is found is not sufficient of itself to constitute the commission of the offence of trafficking or to supply the deemed element of possession. Rather, the prosecution would need to prove an act of trafficking, such as possessing the substance with an intention to sell it.³⁹ While the intention to sell may
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³⁸ See, e.g., *R v Clarke & Johnstone* [1986] VR 643 at 647-648 & 658-659; *R v Tragear* (2003) 9 VR 107 at [43]; *R v Georgiou* [2009] VSCA 57 at [3] & [30].

³⁹ Notably, trafficking by possession is different from trafficking by other methods. As noted in the Explanatory Memorandum to the Law And Justice Legislation Amendment (Serious Drug Offences And Other Measures) Bill 2005 (Cth) at 22, “where trafficking is by possession, the person themselves must be shown to have the intention to sell: the more restrictive fault element in this kind of trafficking reflects the more passive and

be deemed as a consequence of s 302.5, in order to prove *possession* of the substance based on finding the substance on premises occupied by a person, the prosecution would have the onus of proving beyond reasonable that the person was aware of the presence of the substance on the premises before there could be any conviction for the offence of trafficking under s 302.4.⁴⁰

43. Section 300.4(1) of the Code provides that Part 9.1 of the Code (in which s 302.4 is found) “is not intended to exclude or limit the concurrent operation of any law of a State or Territory”. Section 300.4(2) more particularly provides that Part 9.1 “is not intended to exclude or limit the concurrent operation of a law of a State or Territory that makes an act or omission that is an offence against a provision of this Part, or a similar act or omission, an offence against the law of the State or Territory”. Section 300.4(3) provides that s 300.4(2) applies “even if the law of the State or Territory does any one or more of the following”:
- 10
- (a) provides for a penalty for the offence that differs from the penalty provided for in this Part;
 - (b) provides for a fault element in relation to the offence that differs from the fault elements applicable to the offence under this Part;
 - (c) provides for a defence in relation to the offence that differs from the defences applicable to the offence under this Part.
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Application of s 109 in this case

44. It is submitted, for the reasons that follow, that ss 5 and 71AC (read with the extended meaning of ‘traffick’ in s 70(1)) (“the Victorian provisions”) were, in their application to the appellant, directly inconsistent with ss 13.1, 13.2 and 302.4 (“the Code provisions”).
45. The Victorian provisions together render criminal conduct not caught by, and indeed deliberately excluded from,⁴¹ the conduct rendered criminal by s 302.4. In the absence of the operation of s 109 of the Constitution, ss 5 and 71AC will alter, impair or detract from the operation of the federal law by imposing on the appellant a standard of criminal liability, and adjudication thereof, different from that imposed by the federal law.
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preliminary nature of the conduct of the accused who merely possesses a controlled drug”.

⁴⁰ Since possession of a substance with the intention of selling it is, for the purposes of s 4.1 of the Code, the physical element of “conduct” or “a state of affairs”, the requisite fault element must be intention, which requires that an accused “means to engage in that conduct” (see s 5.2(1)), which in turn requires proof of awareness of the substance. Since s 302.4(2) provides that the fault element for paragraph (1)(b) is recklessness, the prosecution would have to prove additionally that the accused was aware of a substantial risk, and that having regard to the circumstances known to him or her, that it was unjustifiable to take the risk, that the substance contained a controlled drug.

⁴¹ Chapter 6 of the *Report of the Model Criminal Code Officers* (1998) at 43 expressly stated that the Model Criminal Code contained no provision providing for a presumption of possession from proof of ownership or occupation of property. The Report stated that, in the context of trafficking offences, it would be “inappropriate and illogical to make possession itself the subject of a presumption”. It is clear that s 302.4, inserted into the Code in 2005 by the Law And Justice Legislation Amendment (Serious Drug Offences And Other Measures) Bill 2005 (Cth) (“the Bill”), was based on Chapter 6 of the *Report of the Model Criminal Code Officers*: see the Explanatory Memorandum to the Bill at 1. The failure to include an equivalent of s 5 of the DPCS Act reflects a deliberate legislative choice influenced by the work of the Model Criminal Code Officers Committee: see *Dickson v The Queen* (2010) 270 ALR 1 at [24] and *R v LK* (2010) 266 ALR 399 at 419.

46. The material differences between the Victorian provisions and the Code provisions are several:

- 10
 - (a) First, as set out above, in a case like the present, s 71AC must be read with s 5 of the DPCS Act, which, when engaged, operates to deem a person to be in possession of drugs where the drugs are found upon premises occupied by that person, unless the person satisfies the court to the contrary. This provision, whether interpreted as imposing on an accused a legal or an evidential onus of disproof, departs from the ordinary principle of the criminal law that the onus rests with the prosecution to prove beyond reasonable doubt each of the elements of the offence. In contrast, the Code contains no such provision, s 302.4 (read with ss 13.1 and 13.2) requiring instead that the prosecution prove beyond reasonable doubt that a person was in fact in possession of the substance in question. Thus the Commonwealth offence applies only where possession of the substance (including awareness of its presence on premises, where relevant) is proved beyond reasonable doubt by the prosecution. In contrast, the State offence can apply merely by virtue of a person's being in occupation of premises on which the substance was found. Under Commonwealth law there are significant "areas of liberty designedly left", namely mere occupation of premises on which drugs are found, "which should not be closed up".⁴²
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 - (b) Second, different methods of trial are stipulated for the two offences, particularly as s 80 of the Constitution would be brought into operation in relation to the Commonwealth offence. In relation to the Victorian offence, the jury trial provided for by s 46 of the *Juries Act 2000* (Vic) did not require a unanimous verdict. In contrast, a prosecution under s 302.4, which by reason of s 4G of the *Crimes Act 1914* (Cth) is triable on indictment, would have required a unanimous verdict by reason of s 80 of the Constitution.⁴³ (It is not to the point that the provisions of s 46 of the *Juries Act* were not invoked in relation to the trial of the appellant.⁴⁴)
- 30
 - (c) Third, the maximum penalty imposed by s 71AC (15 years' imprisonment) is greater than the penalty imposed by s 302.4 (10 years' imprisonment or 2000 penalty units). While a difference in penalty will not always demonstrate inconsistency between two laws,⁴⁵ it is a factor that may be considered in determining whether there is a direct inconsistency between them.⁴⁶

⁴² *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 120 (Dixon J), quoted in *Dickson v The Queen* (2010) 270 ALR 1 at [25].

⁴³ *Dickson v The Queen* (2010) 270 ALR 1 at [20]; *Hume v Palmer* (1926) 38 CLR 441 at 450-451 (Isaacs J).

⁴⁴ *Dickson v The Queen* (2010) 270 ALR 1 at [2].

⁴⁵ *Viskauskas v Niland* (1983) 153 CLR 280.

⁴⁶ See discussion in *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 347 (Mason J); and see *Hume v Palmer* (1926) 38 CLR 441 at 448 (Knox CJ), 451 (Isaacs J) & 462 (Starke J). Cf *R v Helou* (2010) 267 ALR 734, where a challenge was made to the validity of s 25(2) of the *Drug Misuse and Trafficking Act 1985* (NSW) on the basis of inconsistency with s 306.2 of the *Code*. The challenge was said by the appellant in that case to result solely from the different penalties under the two laws (see (2010) 267 ALR 734 at 738 [27]) and was rejected by the NSW Court of Criminal Appeal.

47. In the present case, as in *Dickson v The Queen*, “the State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law”.⁴⁷ There is no room for the State law to attach to the crime of trafficking in a drug of dependence “more stringent criteria and a different mode of trial by jury” than those imposed by the Commonwealth law.⁴⁸
- 10 48. The result is that, in their concurrent field of operation, in the appellant’s case, ss 5 and 71AC attach criminal liability to conduct that falls outside s 302.4 of the Code and provide for a different mode of trial by jury. In that sense, ss 5 and 71AC alter, impair or detract from the operation of the federal legislation and so directly collide with it.⁴⁹ The case is one of “direct collision” because the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law.⁵⁰
- 20 49. Although s 300.4 of the Code purports to leave room for the concurrent operation of State laws dealing with acts or omissions that constitute an offence against a provision of Part 9.1, this section cannot override s 109 of the Constitution and remedy or remove a *direct* inconsistency between the Commonwealth and State laws. Its operation is confined to avoiding a conclusion that Part 9.1 of the Code is intended to cover the field, so as to avoid an *indirect* inconsistency.
50. Thus ss 5 and/or 71AC were, at all relevant times, invalid and of no effect in their application to the appellant. As a result, as in *Dickson v The Queen*,⁵¹ the presentment preferred against the appellant and her conviction should be quashed and the sentence imposed by the Court of Appeal on 17 March 2010 should be set aside.

Ground 1: Interpretation of s 5 of the DPCS Act

- 30 51. If, contrary to the foregoing, ss 5 and 71AC validly applied to the appellant, it is submitted that the Court of Appeal erred in construing s 5 as imposing on the appellant a legal burden of disproof of possession rather than merely an evidential burden.
52. The construction of legislation in Victoria is now subject to s 32 of the Charter, which requires that legislative provisions be interpreted in a way that is compatible with the human rights protected by the Charter so far as it is possible to do so consistently with the purpose of the provision.⁵²

⁴⁷ *Dickson v The Queen* (2010) 270 ALR 1 at [22].

⁴⁸ *Dickson v The Queen* (2010) 270 ALR 1 at [22].

⁴⁹ See *Dickson v The Queen* (2010) 270 ALR 1 at [30].

⁵⁰ See *Dickson v The Queen* (2010) 270 ALR 1 at [22].

⁵¹ See *Dickson v The Queen* (2010) 270 ALR 1 at [38].

⁵² Whilst the Charter did not commence operation until 1 January 2007 and s 32 did not commence until 1 January 2008 (see s 2 of the Charter), i.e. after the appellant’s alleged offence on 14 January 2006, the Charter’s provisions apply to the appellant’s trial as a result of the transitional provisions in s 49. Section 49(1) provides that the Charter extends and applies to all Acts, whether passed before or after the commencement of Part 2 of the Charter. Further, whilst s 49(2) provides that the Charter does not affect any proceedings commenced or

53. Before turning to the application of s 32 in this case, it is necessary to consider the construction and validity of s 32.

Construction of s 32 of the Charter

54. It is submitted that the Court of Appeal erred in its construction of s 32. In particular, the Court of Appeal erred in concluding that:

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- (a) section 7(2) of the Charter is not taken into account in the interpretive exercise required by s 32(1) of the Charter; and
 - (b) under s 32, when determining what is “possible” consistently with the purpose of the provision in question, the court is constrained by the ordinary principles of statutory construction.

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55. The Court of Appeal’s approach to s 32 departed fundamentally from the intended meaning of the provision as reflected in the words of the section read in light of the Charter as a whole and as reflected in relevant extrinsic materials.⁵³ In particular, the extrinsic materials make plain that s 32 was intended to enact a strong rule of construction akin to that found in the *Human Rights Act 1998* (UK), and not merely to codify the common law principle of legality.⁵⁴

56. It is submitted that s 32 ought to be interpreted as requiring the following steps:⁵⁵

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- (a) Step 1: Ascertain the meaning of the statute in accordance with ordinary principles of statutory construction (“the ordinary meaning”).
 - (b) Step 2: Ascertain whether the ordinary meaning is apparently incompatible with a relevant right or freedom.
 - (c) Step 3: If apparent incompatibility is found at Step 2, ascertain whether that incompatibility is nevertheless a justified limit on the right in terms of s 7(2). If the apparent incompatibility is a justified limit, then the legislation is not incompatible with human rights and the ordinary meaning, ascertained in Step 1, prevails.

concluded before the commencement of Part 2, the relevant proceeding in the appellant’s case – her trial – commenced with the filing over of the presentment on 21 July 2008, i.e. after the commencement of all provisions of the Charter.

⁵³ See, e.g., Victoria, *Parliamentary Debates*, Legislative Assembly, 27 May 2004 at 1556 (Attorney-General, Mr Hulls) – Ministerial Statement to the Legislative Assembly; Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2004 at 1290-1293 (Attorney-General, Mr Hulls); Government of Victoria, *Attorney-General’s Justice Statement: New Directions for the Victorian Justice System 2004-2014* (May 2004) at 54; Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (November 2005) at 83 & 117-119; Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) at 1 & 23.

⁵⁴ See especially Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (November 2005) at 82-83.

⁵⁵ Adapted from *R v Hansen* [2007] 3 NZLR 1 at 36-37.

- (d) Step 4: If the ordinary meaning involves an unjustified limit on the right, the court must, pursuant to s 32, strive to construe the legislation in a way that is compatible, or less incompatible, with the right in question if it is reasonably possible, consistently with the purpose of the legislation, to do so.
- (e) Step 5: If it is not reasonably possible to find a compatible (or less incompatible) meaning, the ordinary meaning must be adopted (and, where proceedings are in the Supreme Court, that court may make a declaration of inconsistent operation under s 36 of the Charter).

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Validity of s 32 so construed

57. For reasons that follow, it is submitted that, construed in the foregoing way, s 32 is valid.
58. First, s 32 does not confer on the Supreme Court of Victoria a legislative power. Rather, s 32 is analogous to those provisions in legislation that direct a court to interpret legislation so as to be constitutionally valid.⁵⁶ Such provisions may require a court to sever provisions or to read down general words in a statute in such a way as to depart from their ordinary meaning⁵⁷ and to impose an “entirely artificial construction” upon them.⁵⁸ But such provisions are not regarded as conferring on courts a legislative power⁵⁹ (although it is acknowledged that there are limits on the effect of such provisions, at least at the federal level: they cannot authorise the court to “separate the wool from the warp and manufacture a new web”⁶⁰).
59. Alternatively, if the power or function conferred by s 32 is legislative in nature, it is not a conferral of power that interferes with or impairs the institutional integrity of the Supreme Court as a repository of federal judicial power contrary to Chapter III of the Constitution so as to attract the operation of the doctrine in *Kable v Director of Public Prosecutions (NSW)*⁶¹ and later cases⁶² (“the *Kable* doctrine”). The Court remains independent of the executive and legislative branches of government and continues to discharge its functions as a court in an impartial manner.

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Step 1: The “ordinary meaning” of s 5 of the DPCS Act

60. Step 1, set out above, requires the construction of s 5 of the DPCS Act according to ordinary principles of statutory construction, without recourse to the Charter. It is

⁵⁶ For example, *Interpretation of Legislation Act 1984* (Vic), s 6; *Acts Interpretation Act 1901* (Cth), s 15A.

⁵⁷ So, for example, the term “person” may be read down to mean “all persons except persons who are justices of a federal court”, notwithstanding that that is manifestly not the ordinary meaning of the word person, nor the meaning intended by Parliament: see *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

⁵⁸ *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652.

⁵⁹ See, e.g., *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111.

⁶⁰ *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 386.

⁶¹ (1996) 189 CLR 51; *Bank Nationalisation Case* (1948) 76 CLR 1 at 372.

⁶² *South Australia v Totani* [2010] HCA 39; *International Finance Trust Limited v New South Wales Crime Commission* (2009) 240 CLR 319; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

submitted that, for reasons that follow, the Court of Appeal erred in rejecting the submission that, on ordinary principles of construction, s 5 should be construed as casting on an accused only an evidential onus of disproof of possession.⁶³

61. First, whilst the concluding words of s 5 – “unless the person satisfies the court to the contrary” – impose an onus of disproof on an accused, they do not expressly or impliedly require that such an onus can be discharged only *on the balance of probabilities*. It would have been a simple matter for the legislature to insert those words had there been an intention that the accused could discharge the onus only by persuasion on the balance of probabilities.
62. Second, that very course has been taken by the legislature in related provisions in the DPCS Act. For example, s 73(1) of the DPCS Act, which creates the offence of possession of a drug of dependence, provides that “where the court is satisfied on the balance of probabilities” of certain matters, a lesser penalty will apply. Likewise, s 72C of the DPCS Act provides a particular defence to offences involving cultivation of cannabis “where *the person charged* with the offence adduces evidence which *satisfies the court on the balance of probabilities*” of certain matters. These provisions stand in stark contrast to s 5. This is a powerful contextual matter that compels a different construction of s 5. Contrary to the Court of Appeal’s view, it is not “immaterial”.⁶⁴ In those circumstances, the Court of Appeal should not have read into s 5 the words “on the balance of probabilities”.
63. Third, if construed as casting only an evidential onus, s 5 would remain consistent with its purpose (of facilitating proof of possession) because it would allow the prosecution to establish possession simply by proof of occupation of premises on which drugs are found; and it still would place an onus on an accused to adduce evidence that he or she was not in possession. Where no such evidence is adduced, the accused will be deemed to be in possession. But, importantly, this construction (unlike the Court of Appeal’s construction) would ensure that, if an accused does adduce evidence that raises a reasonable doubt about possession, he or she would not be convicted of the possession-based offences such as possession of drugs or trafficking drugs based on “possession for sale”.
64. Fourth, to treat s 5 as casting on an accused a legal onus of disproving possession on the balance of probabilities, instead of an evidential onus of adducing evidence to the contrary, would create the anomalous situation that, whilst an accused could not be convicted of other forms of trafficking – such as preparing, manufacturing, selling or exchanging drugs – absent the prosecution proving beyond reasonable doubt that the accused was aware of the drugs in question, such a gap in proof would not avail an accused on whose premises drugs were found and who was charged with trafficking based on “possession for sale”.
65. Fifth, to read s 5 as imposing on an accused a legal onus of disproof is inconsistent with developments in the law concerning other drug trafficking offences. For example, the offences of trafficking in a commercial or a large commercial quantity of a drug of

⁶³ *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [16]-[22] (AB 275-8).

⁶⁴ *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [17] & [22] (AB 276, 277-8).

dependence⁶⁵ require proof beyond reasonable doubt *inter alia* that the accused had an intention to traffick in an amount of the drug above the applicable threshold.⁶⁶ Such an intention, in a case based on possession for sale of drugs found on premises, requires proof beyond reasonable doubt that the occupier/accused had an awareness that he or she had in possession for sale drugs in an amount exceeding the applicable threshold. It would be a nonsense, and only apt to mislead a jury, to require an accused to prove on the balance of probabilities that he or she was not aware of the presence of the drugs when the prosecution must prove beyond reasonable doubt an intention to possess drugs for the purpose of sale, and therefore an awareness of their presence, in an amount exceeding the applicable threshold.

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66. Sixth, to treat s 5 as casting on an accused a legal onus of disproving possession is inconsistent with the proposition, which will be considered under cover of Ground 2, below, that, at least where knowledge of the presence of the drugs is in issue, despite s 5, a person cannot be guilty of *trafficking* (as distinct from possession) unless the prosecution prove beyond reasonable doubt that the accused is aware of the existence of the drugs in question.

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67. Finally, the foregoing arguments are reinforced by the “principle of legality”⁶⁷ — the principle that legislation should be interpreted so as not to abrogate or curtail fundamental common law rights unless an intention to do so is made manifestly clear.⁶⁸ Given the ambiguous language of s 5, in contrast with other provisions of the DPCS Act, it cannot be said that such intention has been made manifestly clear.

Effect of the Charter on the construction of s 5

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68. If, contrary to the foregoing, ordinary principles of construction do not lead to a conclusion that s 5 imposes only an evidential burden of disproof on the accused, the appellant contends that such a construction is required by operation of s 32 of the Charter and that the Court of Appeal erred in failing so to find.

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69. In particular, if Step 1 of the methodology outlined above is applied so as to conclude that s 5 places a legal burden of disproof on the accused, then the appellant submits that the remaining steps are to be applied as follows:

- (a) Step 2: The ordinary construction of s 5 limits the presumption of innocence protected by s 25(1) of the Charter⁶⁹ (and the Court of Appeal correctly so held⁷⁰).
- (b) Step 3: The limitation on the presumption of innocence does not, within the meaning of s 7(2) of the Charter, place a reasonable limit on that right (and the Court of Appeal correctly so held⁷¹).

⁶⁵ See ss 71 and 71AA of the DPCS Act.

⁶⁶ *DPP Reference No 1 of 2004; R v Nguyen* (2005) 12 VR 299 at [37].

⁶⁷ *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309 at 329[21] (Gleeson CJ); *K-Generation Pty Limited v Liquor Licensing Court* (2008) 237 CLR 501 at 520[47] (French CJ).

⁶⁸ *Coco v The Queen* (1993) 179 CLR 427 at 437.

⁶⁹ Section 25(1) provides that “[a] person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law”.

⁷⁰ *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [122]-[136] (AB 318-323).

- (c) Step 4: Section 32 requires the Court to strive to construe s 5 so that it is compatible with, or less incompatible with, the presumption of innocence. In this case, it is possible, consistently with the purpose of s 5, to construe that section so as to impose only an evidential burden of disproof on the accused. Thus that construction must be adopted.

70. The Court of Appeal's error was in its conclusion that the alternative construction was not "possible, consistently with the purpose of" s 5.⁷²

71. The appellant submits that to construe s 5 as imposing an evidential burden of disproof on the appellant is "possible" consistently with the purpose of that section for the reasons given above.⁷³ A "possible" construction need not be the only construction open.

72. Further, there are additional reasons for construing s 5 in this way, namely:

- (a) the concession by the first respondent that a change to an evidential onus would not make any demonstrable difference to trafficking prosecutions;⁷⁴
- (b) the terms of s 7(2)(e) of the Charter; and
- (c) persuasive comparative authority on the construction of reverse-onus provisions such as s 5 in the context of human rights regimes analogous to the Charter.

73. The purpose of s 5 is to facilitate the prosecution of possession-based drug offences by deeming a person to be in possession of drugs in certain circumstances. In the Court of Appeal, the first respondent conceded that, were s 5 to be interpreted as imposing an evidential onus rather than a legal onus, this would not make any demonstrable difference to drug trafficking prosecutions.⁷⁵ Thus it is apparent that the purpose of s 5 can be achieved by interpreting it as casting only an evidential onus of disproof on an accused. That is, a reverse-onus provision of some kind will achieve the purpose of the provision; it need not be an onus to be discharged on the balance of probabilities.

74. In addition, as indicated above, if s 5 were interpreted as placing only an evidential onus of disproof on the accused, it would still allow the prosecution to establish possession merely by proof of the accused's occupation of premises on which drugs were found, such that the evident purpose of the provision would be preserved.⁷⁶ But it would not do so in disproportionate diminution of the presumption of innocence or by risking conviction of serious possession-based drug offences despite a lack of

⁷¹ *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [137]-[154] (AB 323-329).

⁷² *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [155]-[157] (AB 329-330).

⁷³ See paragraphs [59]-[66], above.

⁷⁴ *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [145] & [153] (AB 326-7, 329).

⁷⁵ *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [145] & [153] (AB 326-7, 329).

⁷⁶ Further, where "traffickable" quantities of drugs are involved, the prosecution still have the added tool of s 73(2) of the DPCS Act to assist in proof of trafficking.

satisfaction beyond reasonable doubt of possession. Rather, to employ the words of s 7(2)(e) of the Charter, such an approach would be “a less restrictive means reasonably available to achieve the purpose that the limitation [in s 5 of the DPCS Act] seeks to achieve”. Yet the Court of Appeal did not appear to have regard to s 7(2)(e) in considering its interpretive obligation under s 32(1). The Court erred in this regard.

75. Finally, to construe s 5 as imposing an evidential onus of disproof is consistent with the way in which similar reverse-onus provisions have been dealt with in several jurisdictions with similar human rights instruments, to which recourse may be had pursuant to s 32(2) of the Charter. The following courts were all prepared to read reverse-onus provisions concerning drug offences as casting on accused persons only an evidential onus of proof because, in each case, to read the provision as casting a legal onus to be discharged on the balance of probabilities would interfere disproportionately with the presumption of innocence or violate the notion that persons should not be convicted of offences of that nature where reasonable doubt exists as to guilt.⁷⁷
- (a) the House of Lords in *R v Lambert*;⁷⁸
 - (b) the Hong Kong Court of Final Appeal in *HKSAR v Lam Kwong Wai*;⁷⁹
 - (c) the Supreme Court of Canada in *R v Oakes*;⁸⁰ and
 - (d) the Irish Court of Criminal Appeal in *DPP v Smyth & Smyth*.⁸¹
76. The reasoning of those courts is equally applicable to s 5 of the DPCS Act, interpreted in light of ss 32 and 25(1) of the Charter.⁸²
77. If, whether because of the ordinary rules of statutory construction or the operation of ss 25(1) and 32 of the Charter, the Court accepts the submission that s 5 casts only an evidential burden of disproof on an accused, the appeal must be allowed and the appellant’s conviction must be quashed. Whilst the usual order following success on a ground of this type would be to direct a retrial, the following factors compel an acquittal:

⁷⁷ On the other hand, in *R v Hansen* [2007] 3 NZLR 1, the Supreme Court of New Zealand held that, while a reverse-onus provision in s 6(6) of the *Misuse of Drugs Act 1975* (NZ) was inconsistent with the presumption of innocence affirmed in s 25(c) of the *Bill of Rights Act 1990* (NZ) and that that limitation was not justified or proportionate, the expression “until the contrary is proved” could not, even in light of s 6 of the *Bill of Rights Act*, be interpreted to mean that the onus on the defence was discharged by evidence which would raise a reasonable doubt as to the matter in issue.

⁷⁸ [2002] 2 AC 545.

⁷⁹ (2009) 9 HKCFAR 574 (Sir Anthony Mason NPJ).

⁸⁰ [1986] 1 SCR 103.

⁸¹ [2010] IECCA 34.

⁸² Only very recently, in *Webster v The Queen* [2010] EWCA Crim 2819, the Court of Appeal of England and Wales, pursuant to s 3 of the *Human Rights Act 1998* (UK), reinterpreted the words “unless the contrary is proved” in a criminal corruption provision as imposing on an accused an evidential, rather than a legal, burden of disproof of a corrupt purpose in order that the provision would be compatible with the presumption of innocence in Article 6.2 of the European Convention of Human Rights.

- (a) First, the appellant has now served the custodial component of her sentence and, by the time this appeal is heard, she will have served almost all of the period of suspension.
- (b) Secondly, assuming the appellant and/or Mr Markovski gave the same evidence again on a retrial, the evidential burden of disproof of possession would be discharged. That evidence, together with the good character evidence and the absence of any forensic or surveillance evidence implicating the appellant, means that there is more than a reasonable prospect of acquittal. Indeed, it appears extremely unlikely that, on all the evidence, a jury would exclude beyond reasonable doubt the possibility that the appellant was not aware of the drugs.
- (c) Finally, by the time this appeal is heard, it will be over five years since the events giving rise to the charge occurred. Given the delays currently experienced in the County Court, the matter might not come on for retrial for at least another year after the date of this Court's orders. The matter should not go back for retrial.

Ground 2: Requirement of knowledge of drugs for trafficking charge

78. The appellant's complaint under this ground is that the Court of Appeal erred in concluding that there was no error in the trial judge's failure to direct the jury that the appellant could not be found to have had the drugs in her possession for sale, and therefore could not have been guilty of trafficking, unless the prosecution proved beyond reasonable doubt that she knew of the presence of the drugs on the premises.
79. It is submitted that, whether s 5 is read as casting a legal or an evidential onus of disproof on an accused, where knowledge of the presence of the drugs is in issue, despite s 5, a person cannot be guilty of trafficking (as distinct from the offence of possession) unless the prosecution prove beyond reasonable doubt that the accused is aware of the existence of the drugs in question. This proposition is taken from the following authorities:
80. First, in *R v Tragear*,⁸³ when speaking of the Crown's task on the retrial of Mr Tragear, Callaway JA said as follows:
- [E]ven if the Crown successfully invokes s 5 in relation to counts 1 [trafficking] and 2 [possession] to establish possession, **it will still have to prove beyond reasonable doubt that the applicant knew of the cocaine in the knapsack in order to secure a conviction on count 1 [trafficking]**. Otherwise he would lack the requisite *mens rea*, of which s 73(2) is only prima facie evidence.
81. Similarly, in *R v Georgiou*,⁸⁴ Neave JA and Robson AJA made it clear that, on the charge of trafficking, had it been put in issue at trial that Mr Georgiou disputed knowledge of the presence of the drugs, it would have been necessary for the judge to

⁸³ (2003) 9 VR 107 at [43] (emphasis added); see also [44]. It appears that Ormiston JA (at [7]) and Batt JA (at [45]) agreed with Callaway JA's reasons on this issue.

⁸⁴ [2009] VSCA 57 at [6]-[10] per Neave JA; at [48], [51] & [55]-[61] per Robson AJA.

have directed that the Crown had to prove that Mr Georgiou knowingly had a traffickable quantity of drugs in his possession.

82. Whilst the Court of Appeal referred to *Tragear* and *Georgiou*,⁸⁵ it is submitted that their Honours misapplied the principles for which those authorities stand. The point of the relevant passages of those decisions is that, despite s 5, a person cannot intentionally participate in the commercial movement of a drug or possess a drug for sale – and therefore cannot have an intention to traffick the drug – unless he or she is aware of the presence of the drug. Thus, where such awareness is in issue on a count of trafficking, as it was in this case, to adapt the words of Callaway JA, the jury must be instructed that the prosecution “will still have to prove beyond reasonable doubt that the appellant knew of the [methylamphetamine in her apartment] in order to secure a conviction”. No such direction was given in the appellant’s case.
83. Accordingly, given that the principal issue at trial was whether the appellant was aware of the presence of the drugs,⁸⁶ the failure to give directions of that type, and the repeated references to the appellant’s having to prove on the balance of probabilities that she did not know of the drugs, gave rise to a miscarriage of justice. All at trial – both counsel and the judge – and the Court of Appeal proceeded on the misunderstanding that, given the issues fought at trial, the ultimate onus was on the appellant to prove on the balance of probabilities that she was not aware of the presence of the drugs, when in fact, as is made plain by *Tragear* and *Georgiou*, the appellant could not be guilty of trafficking based on possession for sale unless the jury were satisfied beyond reasonable doubt that she was aware of the presence of the drugs. The conviction must fall in consequence.
84. If this ground succeeds, for the same reasons given under cover of Ground 1, above,⁸⁷ the Court must quash the appellant’s conviction and should direct an acquittal.

PART VII: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

85. The applicable constitutional and statutory provisions are attached as an annexure.

PART VIII: ORDERS SOUGHT BY THE APPELLANT

86. The appellant seeks the following orders:

- (1) that the appeal be allowed and the orders of the Court of Appeal be set aside; and
- (2) that in lieu thereof:
 - (a) the application for leave to appeal against conviction be granted;
 - (b) the appeal be treated as instituted and heard *instanter* and allowed;

⁸⁵ *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [164]-[168] (AB 335-337).

⁸⁶ *R v Momcilovic* (2010) 265 ALR 751; [2010] VSCA 50 at [161]-[168] (AB 334-337).

⁸⁷ See paragraph [76], above.

- (c) the conviction be quashed and the sentence set aside;
- (d) if Ground 1 or 2, succeeds, a judgment and verdict of acquittal be directed; or, if Ground 3 succeeds, the presentment be quashed; and
- (e) an indemnity certificate be granted to the appellant pursuant to s 14 of the *Appeal Costs Act 1998* (Vic).

Dated: 17 January 2010

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Relevant provisions of the *Charter of Human Rights and Responsibilities* 2006 (Vic) (Version No. 003 – version as at 1 January 2008)

Section 2

(1) This Charter (except Divisions 3 and 4 of Part 3) comes into operation on 1 January 2007.

(2) Divisions 3 and 4 of Part 3 come into operation on 1 January 2008.

Section 7(2)

10 A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

20 Section 25(1)

A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

Section 32

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

30 (3) This section does not affect the validity of-

- (a) an Act or provision of an Act that is incompatible with a human right;
- or
- (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

Section 36(2)

40 Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.

Section 37

Within 6 months after receiving a declaration of inconsistent interpretation, the Minister administering the statutory provision in respect of which the declaration was made must-

- (a) prepare a written response to the declaration; and
- (b) cause a copy of the declaration and of his or her response to it to be—
 - (i) laid before each House of Parliament; and
 - (ii) published in the Government Gazette.

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Section 49

- (1) This Charter extends and applies to all Acts, whether passed before or after the commencement of Part 2, and to all subordinate instruments, whether made before or after that commencement.
- (2) This Charter does not affect any proceedings commenced or concluded before the commencement of Part 2.
- (3) Division 4 of Part 3 does not apply to any act or decision made by a public authority before the commencement of that Division

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Relevant provisions of the *Drugs Poisons and Controlled Substances Act 1981 (Vic)* (Version No. 075 – version incorporating amendments as at 30th November 2005)

Section 4(1)

In this Act unless inconsistent with the context or subject-matter—

...

30

“drug of dependence” means a substance that is—

...

- (c) a drug—
 - (i) specified in column 1 of Part 3 of Schedule Eleven; or
 - (ii) included in a class of drug specified in column 1 of Part 3 of Schedule Eleven—

and includes—

- (d) any form of a drug specified in column 1 of Part 1 or column 1 of Part 3 of Schedule Eleven, whether natural or synthetic, and the salts, derivatives and isomers of that drug and any salt of those derivatives and isomers; and

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- (e) any—

- (i) drug specified in, or drug included in a class of drug specified in column 1 of Part 1 or column 1 of Part 3 of Schedule Eleven, whether natural or synthetic; or
- (ii) salts, derivatives or isomers of a drug specified in column 1 of Part 1 or column 1 of Part 3 of Schedule Eleven; or
- (iii) salt of any derivative or isomer mentioned in sub-paragraph (ii)—
contained in or mixed with another substance;

10 Section 5

Without restricting the meaning of the word possession, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary.

Section 70(1)

In this Part and Part VI, unless inconsistent with the context or subject-matter—

...

“**traffick**” in relation to a drug of dependence includes —

- 20 (a) prepare a drug of dependence for trafficking;
- (b) manufacture a drug of dependence; or
- (c) sell, exchange, agree to sell, offer for sale or have in possession for sale, a drug of dependence;

“**traffickable quantity**”, in relation to a drug of dependence—

...

- 30 (c) the name of which is specified in column 1 of Part 3 of Schedule Eleven means the quantity of that drug, including any other substance in which it is contained or with which it is mixed, that is specified in column 3 of that Part of that Schedule opposite to the name of that drug of dependence;

Section 71AC

A person who, without being authorized by or licensed under this Act or the regulations to do so, trafficks or attempts to traffick in a drug of dependence is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum).

Section 72C

- 40 It is a good defence to a prosecution for an offence against section 72, 72A or 72B involving the cultivation of a narcotic plant if the person charged with the offence adduces evidence which satisfies the court on the balance of probabilities that, having regard to all the circumstances (including his or her conduct) in which the matter

alleged to constitute the offence arose or preparatory to the alleged commission of the offence, he or she did not know or suspect and could not reasonably have been expected to have known or suspected that the narcotic plant was a narcotic plant.

Section 73

(1) A person who without being authorized by or licensed under this Act or the regulations to do so has or attempts to have in his possession a drug of dependence is guilty of an indictable offence and liable—

(a) where the court is satisfied on the balance of probabilities that—

(i) the offence was committed in relation to a quantity of cannabis or tetrahydrocannabinol that is not more than the small quantity applicable to cannabis or tetrahydrocannabinol;

(ii) the offence was not committed for any purpose related to trafficking in cannabis or tetrahydrocannabinol—

to a penalty of not more than 5 penalty units;

(b) subject to paragraph (a), where the court is satisfied on the balance of probabilities that the offence was not committed by the person for any purpose relating to trafficking in that drug of dependence—to a penalty of not more than 30 penalty units or to level 8 imprisonment (1 year maximum) or to both that penalty and imprisonment; or

(c) in any other case—to a penalty of not more than 400 penalty units or to level 6 imprisonment (5 years maximum) or to both that penalty and imprisonment.

(2) Where a person has in his possession, without being authorized by or licensed under this Act or the regulations to do so, a drug of dependence in a quantity that is not less than the traffickable quantity applicable to that drug of dependence, the possession of that drug of dependence in that quantity is prima facie evidence of trafficking by that person in that drug of dependence.

Schedule 11

PART 3

Column 1	Column 1A	Column 1B	Column 2	Column 2A	Column 2B	Column 3	Column 4
Drug	(Large Commercial Quantity) Quantity	(Large Commercial Quantity) Quantity of mixture of substance and drug of dependence	(Commercial Quantity) Quantity	(Commercial Quantity) Quantity of mixture of substance and drug of dependence	(Automatic Forfeiture Quantity) Quantity	(Traffickable Quantity) Quantity	(Small Quantity) Quantity
...
METHYLAMPHETAMINE	750.0 g	2.50 kg	250.0 g	1.25 kg	75.0 g	6.0 g	1.0 g
...

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Relevant provisions of the *Criminal Code (Cth)* (Schedule to the *Criminal Code Act 1995 (Cth)*) (compilation as at 11 January 2006 taking into account amendments up to Act No. 144 of 2005)

Section 4.1

(1) A physical element of an offence may be:

- 10 (a) **conduct; or**
 (b) a result of conduct; or
 (c) a circumstance in which conduct, or a result of conduct, occurs.

(2) In this Code:

conduct means an act, an omission to perform an act or a state of affairs.

engage in conduct means:

- (a) do an act; or
 (b) omit to perform an act.

Section 5.2

- 20 (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
 (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
 (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

Section 5.4

- 30 (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.
 (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

Section 13.1

(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

Note: See section 3.2 on what elements are relevant to a person's guilt.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Code:

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

Section 13.2

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(1) A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

(2) Subsection (1) does not apply if the law creating the offence specifies a different standard of proof.

Section 13.3

(1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only.

(2) A defendant who wishes to deny criminal responsibility by relying on a provision of Part 2.3 (other than section 7.3) bears an evidential burden in relation to that matter.

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(3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

(4) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.

(5) The question whether an evidential burden has been discharged is one of law.

(6) In this Code:

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evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Section 13.4

A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly:

- (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or
- (b) requires the defendant to prove the matter; or
- (c) creates a presumption that the matter exists unless the contrary is proved.

Section 13.5

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A legal burden of proof on the defendant must be discharged on the balance of probabilities.

Section 300.4

(1) This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

(2) Without limiting subsection (1), this Part is not intended to exclude or limit the concurrent operation of a law of a State or Territory that makes:

- (a) an act or omission that is an offence against a provision of this Part; or
- (b) a similar act or omission;

an offence against the law of the State or Territory.

10 (3) Subsection (2) applies even if the law of the State or Territory does any one or more of the following:

- (a) provides for a penalty for the offence that differs from the penalty provided for in this Part;
- (b) provides for a fault element in relation to the offence that differs from the fault elements applicable to the offence under this Part;
- (c) provides for a defence in relation to the offence that differs from the defences applicable to the offence under this Part.

Section 302.1

20 (1) For the purposes of this Part, a person traffics in a substance if:

...

- (e) the person possesses the substance with the intention of selling any of it.

Section 302.4

(1) A person commits an offence if:

- (a) the person traffics in a substance; and
- (b) the substance is a controlled drug.

Penalty: Imprisonment for 10 years or 2,000 penalty units, or both.

30 (2) The fault element for paragraph (1)(b) is recklessness.

Section 302.5

(1) For the purposes of proving an offence against this Division, if a person has:

...

- (d) possessed a trafficable quantity of a substance;

the person is taken to have had the necessary intention or belief concerning the sale of the substance to have been trafficking in the substance.

(2) Subsection (1) does not apply if the person proves that he or she had neither that intention nor belief.

Note 1: A defendant bears a legal burden in relation to the matters in subsection (2) (see section 13.4).

Section 314

(1) The following table lists controlled drugs and sets out quantities:

	Controlled drug	Traffickable quantity (grams)	Marketable quantity (grams)	Commercial quantity (kilograms)
...
9	Mephamphetamine	2.0	250.0	0.75
...

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(2) A substance is a controlled drug if the substance (the drug analogue) is, in relation to a controlled drug listed in subsection (1) (or a stereoisomer, a structural isomer (with the same constituent groups) or an alkaloid of such a controlled drug):

- (a) a stereoisomer; or
- (b) a structural isomer having the same constituent groups; or
- ...
- (f) otherwise a homologue, analogue, chemical derivative or substance substantially similar in chemical structure;

however obtained, except where the drug analogue is separately listed in subsection (1).