ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY **NO M134 OF 2010**

BETWEEN:

VERA MOMCILOVIC
Appellant

THE QUEEN
First Respondent

THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA
Second Respondent

THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION
Third Respondent

THIRD RESPONDENT'S SUBMISSIONS

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PART I CERTIFICATION

1. The Third Respondent (**the Commission**) certifies that these submissions are in a form suitable for publication on the internet.

PART II STATEMENT OF ISSUES

2. The Commission makes submissions only in relation to the following issues:

   (a) the meaning of s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**);

   (b) the validity of s 32(1) of the Charter (**s 32(1)**);

   (c) the effect of s 32(1) on the interpretation of s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (**the Act**);

   (d) the validity of s 36 of the Charter.

3. In summary, the Commission submits that:

   (a) Identification of the operation of s 32(1) requires close attention to the terms of that provision, as well as to its legislative history. Section 32(1):

      (i) requires all Victorian statutory provisions to be "interpreted" in a particular way. Accordingly, subject to questions of legislative purpose, the limits of the operation of s 32(1) correspond with the limits of what is "possible" as a matter of "interpretation". Cases decided in accordance with well-established principles of interpretation demonstrate that it is frequently possible to interpret statutory provisions in a way that departs from the ordinary meaning of the text;

      (ii) requires a statutory provision to be interpreted compatibly with human rights only where such an interpretation is possible "consistently with its purpose". Those words were intended to ensure that s 32(1) operated subject to the same limits as had been identified with respect to s 3 of the *Human Rights Act 1998* (UK) (**the HRA**) in *Ghaidan v Godin-Mendoza*[1] (***Ghaidan***). The express reference to statutory purpose in s 32(1) is not properly understood as stamping s 32(1) with the character of a provision that merely codifies and updates the common law principle of legality;

      (iii) directs attention to whether it is possible to interpret legislation in a way that is "compatible with human rights". A statutory provision will be "compatible with human rights" even if it limits a human right in Part 2 of the Charter, provided that any such limitation can be demonstrably justified having regard to s 7(2) of the Charter. Accordingly, it is impossible to divorce the operation of s 32(1) from that of s 7(2).

   (b) If interpreted in the manner outlined above, s 32(1) does not infringe Chapter III of the Constitution.

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1 [2004] 2 AC 557.

(c) It is possible, consistently with the purpose of s 5 of the Act, to interpret the words "unless the person satisfies the Court to the contrary" in s 5 as imposing only an evidential burden on an accused.

(d) Section 36 of the Charter is valid. The limited circumstances in which s 36(1) permits a declaration of inconsistent interpretation to be made reveal that s 36(2) is best understood not as a "remedy", but as a power formally to record a conclusion reached by the Supreme Court in the course of resolving a question of statutory interpretation that has arisen in the course of quelling a dispute. If the Supreme Court chooses to exercise that power, the "declaration" becomes the factum upon which ss 36(6) and 37 of the Charter operate to impose legal obligations on the Executive. Accordingly, s 36 does not confer upon the Supreme Court jurisdiction to give an advisory opinion. However, even if it did, s 36 would not be invalid because the function conferred on the Supreme Court would not be incompatible with its capacity to be invested with federal jurisdiction.

PART III SECTION 78B NOTICES

4. The Commission does not consider that any further notices pursuant to s 78B of the *Judiciary Act 1903* are required.

PART IV FACTUAL ISSUES IN CONTENTION

5. The Commission does not take issue with the facts set out in paragraphs 8 to 21 of the Appellant's submissions.

PART V LEGISLATIVE PROVISIONS

6. The Appellant's statement of applicable constitutional and statutory provisions is incomplete. A statement of the relevant provisions is annexed.

PART VI STATEMENT OF ARGUMENT

A. SECTION 32(1) OF THE CHARTER

7. Section 32(1) of the Charter provides:

> 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.

8. The interpretation of that subsection must begin with close consideration of its terms. That requires attention to the words "interpreted", "consistently with their purpose" and "compatible with human rights".

The meaning of "interpreted"

9. The interpretation of legislation is one of the fundamental tasks of the courts, which over a long period have developed principles concerning the way in which that task should be performed. Those principles emphasise that the starting point must be the legislative text which is the surest guide to "legislative

intention".[2] However, "when it is said the legislative 'intention' is to be ascertained, 'what is involved is the "intention manifested" by the legislation'",[3] not the subjective intention of the enacting legislature.

10. While the interpretive task must commence with the text, it does not end there. The legal meaning of a provision frequently does not correspond to its literal meaning.[4] Courts often arrive at interpretations that are not apparent from the text alone in order to give effect to the context, purpose or history of a provision,[5] or in order to give effect to values it is presumed Parliament intended to respect despite the fact that those values are not acknowledged in the text. Many such values are embodied in principles or canons of interpretation.[6]

11. The common law principle of legality,[7] for example, may require legislation to be given a strained[8] construction so as not to override fundamental rights or fundamental principles recognised by the common law.[9] That principle routinely operates so that powers or discretions conferred in general language are read down such that their valid exercise depends on compliance with the rules of procedural fairness,[10] or so as not to authorise interference with fundamental rights.[11] That is done on the basis of a presumption or expectation about what Parliament intended (or, perhaps more accurately, did not intend).[12] Nevertheless, the practical operation of the principle of legality is such that, as part of the process of "interpreting" statutory provisions, courts commonly read general language that has an obvious ordinary meaning in a way that does not reflect that meaning.[13]

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2 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at 538 [22], 555-556 [82]-[84].

3 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15] (French CJ) and 264 [31] (Gummow, Hayne, Crennan and Kiefel JJ).

4 *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297 at 320-321; *Mills v Meeking* (1990) 169 CLR 214 at 235; *Bennion on Statutory Interpretation* (2008) at 455-456.

5 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ), noting that "[i]nstances of general words in a statute being so constrained by their context are numerous"; *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642 at 653 [12] (French CJ and Bell J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

6 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] and 385 [80]; *Bennion on Statutory Interpretation* (2008) at 441-442.

7 See, e.g., *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19] (Gleeson CJ).

8 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113 (McHugh J).

9 See, e.g., *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 271 [58]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30]; *Potter v Minahan* (1908) 7 CLR 277 at 304.

10 See, e.g., *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 271 [58] - [59] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

11 See, e.g., *Coco v R* (1994) 179 CLR 427 at 437.

12 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15], approving *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] (Gleeson CJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30].

13 For example, provisions that confer coercive powers of inquiry are not interpreted as requiring answers to be given where the privilege against self-incrimination or legal professional privilege would apply unless those privileges are overridden either expressly or by necessary implication: *Sorby v Commonwealth* (1983) 152 CLR 281 at 309; *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11].

12. In addition to limiting general words, statutory interpretation frequently results in implied additions to statutory language. For example, there is a strong presumption that mens rea is an essential ingredient of every offence. That presumption frequently leads to words being read into legislative provisions that create offences. In the leading case, *He Kaw Teh v The Queen*,[14] a provision that stated that any person who "imports ... into Australia any prohibited imports" shall be guilty of an offence was interpreted as requiring the prosecution to prove that the accused knew of the existence of the prohibited import in his or her possession. Mere proof of the fact of importation of a prohibited import was insufficient, despite the fact that the word "import" does not carry its own connotation of knowledge or intention.[15] The requirement for proof of knowledge of the existence of the prohibited import was implied despite the absence of any words to support that requirement because "the provision has to be read in the light of the general principles of the common law which govern criminal responsibility".[16] Those general principles in effect added to the statutory requirements in a way that limited the operation of the statutory offence, without giving rise to any suggestion that the court was engaging in an activity not capable of being described as "interpretation".

13. There will often be room for debate about how far the process of interpretation will allow the meaning of particular provisions to depart from the ordinary meaning of the words used. As McHugh J observed in *News Ltd v South Sydney District Rugby League Football Club Ltd*,[17] "[q]uestions of construction are notorious for generating opposing answers, none of which can be said to be either clearly right or clearly wrong." *Al-Kateb v Godwin*[18] provides a good example of such a division of opinion in this Court.[19] Despite the difference of opinion, the process in which the minority engaged was clearly one of "interpretation". The same is true of the leading United Kingdom authorities that have applied s 3 of the HRA.

14. There are good policy reasons (including transparency) why courts are reluctant to strain to interpret a statutory provision in accordance with the above presumptions.[20] However, it is open to Parliament to conclude that other public interests outweigh the public interest in statutes being read in accordance with their ordinary meaning. Properly understood (see paras 38ff below), s 32(1) authorises and requires a departure from the ordinary meaning of a statutory provision only if the ordinary meaning results in an unjustifiable interference with human rights. Parliament having chosen to give preference to the public interest in avoiding unjustifiable interference with human rights over

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14 (1985) 157 CLR 523 at 528 (Gibbs CJ, with whom Mason J agreed), 552 (Wilson J), 565-566 (Brennan J), 590-591 (Dawson J).

15 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 528 (Gibbs CJ, with whom Mason J agreed), stating that "[i]f one in fact brings goods into Australia from abroad one imports them, whatever one's intention may be and whether or not one knows their nature or quality".

16 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 528 (Gibbs CJ, with whom Mason J agreed).

17 (2003) 215 CLR 563 at 580 [42].

18 (2004) 219 CLR 562.

19 (2004) 219 CLR 562 at 96 [33]-[35] (McHugh J), 157 [239] and 158 [241] (Hayne J, with whom Heydon J agreed), and 176 [298] (Callinan J); cf 91-93 [15]-[22] (Gleeson CJ), 122 [117] (Gummow J), and 131-132 [150], 135 [160] and 145 [193] (Kirby J).

20 See *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319 at 349 [42] (French CJ).

the public interest in the transparency of the law, the courts should give effect to that choice.

Statutory modification of rules of interpretation

15. It has long been accepted that Parliament may validly legislate on the subject of statutory interpretation, including by altering the circumstances in which the courts will deploy particular interpretive tools. For example, Parliament may:

    (a) direct courts to favour a purposive construction over the literal meaning of a provision (as in s 15AA of the *Acts Interpretation Act 1901* (Cth) (**AIA**));

    (b) alter the circumstances in which courts may have regard to extrinsic materials in ascertaining Parliament's intention (as in s 15AB of the AIA);

    (c) direct courts to construe legislation so far as possible to preserve its validity (as in s 15A of the AIA).

16. The modification of the rules of statutory interpretation (including by requiring existing rules to be used in different circumstances) may require a court to construe legislation in a way that differs from the way "intended" by the enacting Parliament.[21] The new rule requires courts to give effect to a "legislative intention" which is a combination of the intent of the enacting Parliament and the intent of the Parliament that enacted the new rule.[22] While such a combined intent would be problematic if the search for legislative intent concerned the subjective intention of legislators in the enacting Parliament, the difficulty disappears once it is recognised that what is involved: [23]

> is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor. Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws ... [T]he preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.

17. Once Parliament enacted s 32(1), and applied it to all Victorian statutory provisions irrespective of the time they were enacted (see s 49), it was necessary in order to give effect to "the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws" to give full effect to the rule that s 32(1) creates.

18. In the judgment under appeal, the Court of Appeal failed to give proper effect to the constitutional relationship just identified. It constructively refused to give effect to Parliament's intent in enacting s 32(1), in stating: (AB310 at [103])

> What is 'possible' is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights.

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21 To confine the operation of a statutory provision to the applications that the enacting legislators had in mind is "to fall into the error of seeking the subjective intention" of the legislature: *Singh v Commonwealth* (2004) 222 CLR 322 at 386 [162].

22 See *Ghaidan* [2004] 2 AC 557 at 571 [30] ("intention reasonably to be attributed to Parliament in enacting section 3") and 573 [40] ("countervailing will of Parliament expressed in the UK HRA"); *Sheldrake v DPP* [2005] 1 AC 264 at 314 [53].

23 *Zheng v Cia* (2009) 239 CLR 446 at 455-456 [28] (Gummow J), quoted by the whole Court in *Dickson v R* (2010) 270 ALR 1 at 10 [32]. See also *Mills v Meeking* (1990) 169 CLR 214 at 234; *Singh v Commonwealth* (2004) 222 CLR 322 at 385 [159] (Gummow, Hayne and Heydon JJ).

19. This approach denies Parliament's capacity to alter "the existing framework of interpretive rules". It also led the Court of Appeal to undertake a false inquiry as to whether s 32(1) creates a "special" rule of interpretation, which it defined as a rule that authorized a court "where necessary, to depart from the meaning which would be arrived at by application of 'ordinary' principles of interpretation." (AB281 at [33]) That was a false inquiry because the true issue is whether a particular interpretation of legislation is "possible", not whether it is possible on "ordinary principles of interpretation".

20. The Court of Appeal's conclusion that s 32(1) does not create a "special" rule of interpretation led directly to its conclusion that, by enacting s 32(1), Parliament merely "embraced and affirmed [the principle of legality] in emphatic terms". (AB310 at [104]) The Court of Appeal accepted that s 32(1) applied the principle of legality to additional rights, but otherwise denied that s 32(1) had an effect beyond that already achieved by the principle of legality.

21. That reasoning should be rejected for three reasons. First, if Parliament had intended to codify the principle of legality, it could not rationally have enacted a provision so closely modelled on s 3 of the HRA, which plainly had not been interpreted as codifying the principle of legality.

22. Second, the extrinsic material lends no support to the proposition that s 32(1) was intended merely to codify an existing presumption of interpretation. As is explained in paragraph 33 below, s 32(1) was drafted on the basis that it would replicate the effect of s 3 of the HRA as interpreted in *Ghaidan*.

23. Third, as a matter of principle there are fundamental distinctions between the principle of legality and the command embodied in s 32(1).[24] The difference is most apparent in relation to legislation passed prior to the commencement of the Charter. Section 32(1) supplants the principles of construction that were known at the time pre-Charter legislation was enacted, and requires the words used by the enacting Parliament to be examined against Part 2 of the Charter in order to determine whether it is possible to give those words an interpretation that is compatible with that standard. The exercise:[25]

> is not directed at the "true" intention of Parliament, but rather at identifying an interpretation of a statute which complies, if possible, with an external rule or standard ... The legal warrant for adopting this approach is that Parliament itself has enacted the relevant interpretative obligation in s. 3 of the HRA, rather than (as with the principle of legality) that it is inherent in the concept of Parliament's meaning and intention as expressed in legislation.

24. It follows that fidelity to the command in s 32(1) may require the courts to interpret a provision in a way that differs from the interpretation that would have been reached prior to the enactment of s 32(1). Nettle JA was correct in so

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[24] Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 *LQR* 598 at 607-611; *HM Treasury v Ahmed* [2010] 2 AC 534 at 646-647 [111]-[115], [117] (Lord Phillips).

[25] Sales, "A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998" (2009) 125 *LQR* 598 at 608. Mr Sales appeared for the UK Government in *Ghaidan*.

holding in *RJE*.[26] Such a consequence could not follow from the principle of legality, which goes only to discerning the intention of the enacting Parliament.

Section 15A

25. The approach adopted by this Court to the operation of s 15A of the AIA (**s 15A**) supports the submissions advanced above concerning the operation that should be given to s 32(1).

26. In 1930, shortly after the enactment of s 15A, this Court accepted that it could produce results that could not have been reached applying pre-existing principles of interpretation. For example, in *Australian Railways Union v Victorian Railways Commissioners*,[27] which was decided in the same year that s 15A commenced, Isaacs CJ had no difficulty in concluding that s 15A affected the interpretation of legislation passed prior to its enactment, even though that altered the interpretation that would previously have been given to the enactment. His Honour accepted that "the Court must give judgment in accordance with the direction contained in" the later Act.[28] Similarly, in *Pidoto v Victoria*, Latham CJ said that the Court must consider "the intention of Parliament, as disclosed in the statute, taken together with the Acts Interpretation Act".[29]

27. The rule of interpretation created by s 15A is similar in strength to that created by s 32(1). It authorises and requires courts to use known interpretive tools in new circumstances where, on ordinary principles of construction, a statutory provision would be invalid.[30] Thus, s 15A has been held to be a "direction to the Court" to treat a statute as being valid "as far as possible".[31] It:

    (a) permits courts to give an otherwise invalid statute an "entirely artificial construction";[32]

    (b) permits a law expressed in general terms that would transgress a limitation on Commonwealth power to be read as subject to that limitation, even where the relevant limitation has no foundation in the text of the legislation;[33]

    (c) allows a law expressed in general terms that authorises Commonwealth officers to prosecute State offences to operate validly where a head of power would be applicable in the circumstances of the particular offence charged.[34]

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26 *RJE v Secretary, Department of Justice* (2008) 21 VR 526 at 554 [106] and 556-557 [114]. See also *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at 72 [75]; *R v Lambert* [2002] 2 AC 545 at 585 (Lord Hope).

27 (1930) 44 CLR 319.

28 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 374, quoting *Attorney-General v Hertford* (1849) 3 Exch 670 at 688-689, 154 ER 1014 at 1022.

29 *Pidoto v Victoria* (1943) 68 CLR 87 at 109 (emphasis added).

30 *Bank Nationalisation Case* (1948) 76 CLR 1 at 370-371 (Dixon J); *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 92; *R v Poole* (1939) 61 CLR 634 at 651.

31 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 65 (Latham CJ).

32 *R v Poole* (1939) 61 CLR 634 at 652 (Dixon J).

33 See, e.g., *Victoria v Commonwealth (Industrial Relations Case)* (1996) 187 CLR 416 at 502-503; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

34 *R v Hughes* (2000) 202 CLR 535 at 556 [43].

28. Each of the above processes involves "interpretation". If these steps are "possible" as a matter of interpretation in order to avoid invalidity, they must equally be "possible" in order to ensure compatibility with human rights. A provision is either capable of bearing a particular meaning or it is not. It is wrong in principle to distinguish cases concerning interpretation to avoid invalidity from those concerning interpretation to ensure compatibility with human rights, for that assumes that interpretations may be "possible" for one reason but not for another.[35]

29. Following the enactment of s 15A, this Court grappled with issues concerning the boundary between legislative and judicial functions similar to those that have now arisen in relation to s 32(1).[36] The validity of s 15A was not questioned, on the basis that certain limits were identified beyond which the courts may not go in compliance with the command in s 15A.[37] In particular, when s 15A is invoked for the purpose of reading down general words, it will operate only where "the law itself indicates a standard or test which may be applied for the purpose of limiting, and thereby preserving the validity of, the law".[38] An equivalent limit on the operation of s 32(1) is created by the words "possible ... consistently with their purpose".

"Possible ... consistently with their purpose"

30. Section 32(1) requires statutory provisions to be interpreted compatibly with human rights only if "possible ... consistently with their purpose". For the reasons that follow, those words do not provide a basis for distinguishing s 32 from s 3 of the HRA.

31. In the Second Reading speech for the Charter, the Attorney-General stated that the Charter as a whole was "based on human rights laws that now operate successfully in the Australian Capital Territory, the United Kingdom and New Zealand" (each of which contain an interpretive provision drafted in similar language to s 32). The Attorney-General referred to a comprehensive community consultation undertaken in 2005 and then stated that, having given detailed consideration to the consultation committee's report, "the government has decided to introduce a bill based on the model recommended in the committee's report, but modified in light of responses to the report."[39]

32. The "model recommended in the committee's report" was set out in a draft Bill annexed to that report. That draft Bill contained a provision that was relevantly indistinguishable from s 32(1). That provision was, in turn, closely modeled on s 3 of the HRA, the main difference being the inclusion of the words "consistently with their purpose".

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35 As the Court of Appeal reasoned at [61]: see AB 294.5.

36 *Pidoto v Victoria* (1943) 68 CLR 87 at 109-110 (Latham CJ); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 676 (Evatt and McTiernan JJ); *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 386 (Rich, Starke and Dixon JJ); *Bank Nationalisation Case* (1948) 76 CLR 1 at 372 (Dixon J).

37 *Pidoto v Victoria* (1943) 68 CLR 87 at 109 (Latham CJ); *Bank Nationalisation Case* (1948) 76 CLR 1 at 252 (Dixon J); *Strickland v Rocla Concrete Pipes Pty Ltd* (1971) 124 CLR 468 at 498-499 (Barwick CJ), 506 (Menzies J), 513 (Windeyer J), 520-521 (Walsh J).

38 *Pidoto v Victoria* (1943) 68 CLR 87 at 109 (Latham CJ); *Victoria v Commonwealth (Industrial Relations Case)* (1996) 187 CLR 416 at 502.

39 Second Reading Speech, *Charter of Human Rights and Responsibilities Bill* (Assembly, 4 May 2006) 1290 (emphasis added).

33. The inclusion of those words was not one of the "modifications"[40] made by the Government to the consultation committee's proposed model. It was a part of the model that the committee recommended. In explaining the reason it had added those words to s 3 of the HRA, the consultation committee said that the text of its proposed s 32(1) was "consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation was favoured".[41] The consultation committee then quoted Lord Nicholls's statement from *Ghaidan* that "[t]he meaning imported by application of s 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must ... 'go with the grain of the legislation'."[42]

34. *Ghaidan* remains the leading authority on s 3 of the HRA. The Court of Appeal's suggestion that it "remains to be seen" whether *R (Wilkinson) v Inland Revenue Commissioners*[43] represented an "apparent change of approach" (AB292 at [57]) from *Ghaidan* is not supportable. The reasoning in *Wilkinson* with respect to s 3 of the HRA has not been followed in any United Kingdom case. By contrast, *Ghaidan* is routinely cited and applied,[44] and it is treated as authoritative in the leading United Kingdom textbooks and journals.[45] It follows that the consultation committee, by proposing the words "consistently with their purpose", accurately identified the operation of s 3 of the HRA, and reflected that operation in the terms of the proposed s 32(1).

35. The Second Reading speech and the report of the consultation committee are materials of a kind routinely used in statutory interpretation. The report is a document of the very kind referred to in s 35(b)(iv) of the *Interpretation of Legislation Act 1984* (Vic) (**ILA**), which indicates that legislation modeled on such a report should be interpreted in light of the report.[46]

36. Given the terms of the consultation committee's recommendations, including its explanation for the inclusion of the words "consistently with their purpose" in its draft Bill, and given the Government's acceptance of those recommendations, it was not open to the Court of Appeal to conclude that Parliament intended s 32(1) to operate differently to s 3 of the HRA. In particular, it was not open to the Court of Appeal to conclude that the addition of the words "consistently with their purpose" "stamped s 32(1) with a quite different character from that of

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40 The draft Bill was modified in one respect, with the word "interpreted" being substituted for the words "read and given effect".

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

42 *Ghaidan* [2004] 2 AC 557 at 572, 601. See also *Sheldrake v DPP* [2005] 1 AC 264 at 304 (Lord Bingham), where various formulations that have been used to identify the limits of what is "possible" are collected. Those formulations are quoted at AB 289-290 at [52]-[54].

43 [2005] 1 WLR 1718 at 1723-1724.

44 See, e.g., *Webster v R* [2010] EWCA Crim 2819 at [28]-[31]; *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council & Ors* [2010] EWCA Civ 1214 at [159]; *HM Treasury v Ahmed* [2010] 2 AC 534 at 646 [115] (Lord Phillips); *AS (Somalia) v Secretary of State for the Home Department* [2009] UKHL 32 at [19]; *Test Claimants In the Franked Investment Group Litigation v Commissioners of the Inland Revenue (Rev 1)* [2010] EWCA Civ 103 at [260].

45 Clayton and Tomlinson, *The Law of Human Rights* (OUP, 2nd edn, 2009) at 176-177, 190, 198-199; Beatson, Grosz, Hickman, Singh and Palmer, *Human Rights: Judicial Protection in the United Kingdom* (Thomson, 2008) at 459.

46 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408. See also *Acts Interpretation Act 1901* (Cth), s 15AB; *Pepper v Hart* [1993] AC 593 at 630.

s 3(1) of the HRA". (AB299 at [74]) That attributes an intention to Parliament in using those words that is:

(a) contrary to the express intention of the committee that proposed those words and whose recommendations the Government accepted;

(b) not supported by any contemporaneous material (including the speeches by individual members of Parliament upon which the Court of Appeal relied at AB303-305 at [88]-[90], which are not relevant in any event[47]).

37. The stringency of the limitation imposed by the words "consistently with their purpose" depends on the level of specificity at which the relevant purpose is identified. The Court of Appeal held that the focus of the inquiry must be on the purpose of the provision that falls to be construed, rather than upon the purpose of the Act more generally (AB299-300 at [75]-[76]). That approach should be rejected because:

(a) there is obvious circularity in constraining the interpretation of a particular provision by reference to its own purpose, when that purpose cannot sensibly be discerned until the provision has been interpreted;[48]

(b) there is no textual reason to focus only on the purpose of a particular provision, given that "statutory provision" is defined in s 3 of the Charter to include "an Act ... or a provision of an Act";

(c) the relevant part of the Explanatory Memorandum for the Charter refers to s 32(1) ensuring that courts do not "interpret legislation in a manner which avoids achieving the object of the legislation";[49] and

(d) there is no reason to conclude that Parliament intended the "purpose" that constrained permissible interpretations under s 32(1) to be any different to the purpose that was already relevant to statutory interpretation in Victoria by reason of s 35 of the ILA, that being the purpose or object "underlying the Act"[50] (a formula with obvious parallels to the "underlying thrust" terminology used in *Ghaidan*).

"Compatible with human rights"

38. The Court of Appeal held that "the question of what s 32(1) authorises is logically distinct from the issue of when the justification question under s 7(2) should be considered".(AB311 at [105]) That approach involved error (that error being the subject of the Second Respondent's notice of contention). It fails to pay due regard to the meaning of the phrase "compatible with human rights".

39. The "human rights" to which s 32(1) refers are defined in s 3 of the Charter to mean "the civil and political rights set out in Part 2". Part 2 consists of ss 7 to 27 inclusive. Most of the rights in ss 8 to 27 are based on a right in the

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47 *Mills v Meeking* (1990) 169 CLR 214 at 236; Gleeson, "The meaning of legislation: Context, purpose and respect for fundamental rights" (2009) 20 *Public LR* 26 at 32.

48 *In the matter of an application for bail by Islam* [2010] ACTSC 147 at [41].

49 Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill* (2006) p 23 (emphasis added).

50 *Interpretation of Legislation Act 1984* (Vic) s 35. To the same effect see *Acts Interpretation Act 1901* (Cth) s 15AA.

International Covenant on Civil and Political Rights (**ICCPR**).[51] However, while the ICCPR rights are generally expressed in articles that commence by setting out the right in broad terms, and then specify the circumstances in which the right may permissibly be limited, Part 2 of the Charter does not follow that structure.[52] Rather, it contains s 7(2), a general limitation provision that identifies the circumstances in which all human rights protected by the Charter may be limited.

40. The adoption of that drafting style does not mean that the scope of the human rights protected by the Charter can properly be determined without reference to the circumstances in which rights may be limited. On the contrary, the location of s 7(2) within Part 2 of the Charter, when read with the definition of "human rights", strongly suggests that the question whether a particular statutory provision is "compatible" with "human rights" can only be answered by considering the particular right in combination with s 7(2) of the Charter.

41. That approach is reinforced by the structure of the Charter as a whole, which uses the concept of "compatibility with human rights" in ss 1(2)(b) to (d), 28(3)(a) and 32(1). In addition to those sections, ss 28(3)(b), 30, 31(1) and 38(1) each use the related term "incompatible" with human rights.

42. Sections 28 and 38 of the Charter are particularly instructive. Section 28 concerns the "statements of compatibility" that must be tabled in Parliament on the introduction of any Bill. In the context of that section, the reference to "compatibility with human rights" must be a reference to human rights as reasonably limited having regard to s 7(2) of the Charter, because otherwise a member of Parliament who introduced a Bill that limited human rights in a way that was demonstrably justified having regard to the factors identified in s 7(2) would be required by s 28(3)(b) to inform Parliament that the Bill was "incompatible with human rights". On that reading, permissible limitations on rights would be ignored, and the Charter would not achieve the purpose of ensuring proper debate "about whether proposed measures strike the right balance between the rights of Victorians and what limits can be justified in a free and democratic society".[53]

43. Section 38(1) makes it "unlawful" for a public authority to act in a way that is incompatible with human rights. If conduct can be incompatible with human rights even if it is demonstrably justified having regard to the criteria identified in s 7(2) of the Charter, then a "public authority" (defined in s 4) that acted in a way that is demonstrably justifiable under s 7(2) would nevertheless act "unlawfully" if its conduct limited any of the rights in Part 2 of the Charter.

44. The phrase "compatible with human rights" should be given a consistent meaning wherever it is used in the Charter. It follows that, when s 32(1)

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51 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force for Australia (except Article 41) 13 November 1980. See Second Reading Speech, *Charter of Human Rights and Responsibilities Bill* (Assembly, 4 May 2006) p 1291; Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill* (2006) p 8.

52 Although a specific limitation provision is found in s 15(3) of the Charter in relation to freedom of expression. See also s 13, which is expressed as a right to be free from "unlawful or arbitrary" interference with privacy, family, home or correspondence.

53 Second Reading Speech, *Charter of Human Rights and Responsibilities Bill* (Assembly, 4 May 2006) p 1290.

requires statutory provisions to be interpreted, if possible consistently with their purpose, in a way that is "compatible with human rights", that section directs attention to whether there are any possible constructions of a provision that avoid limitations on human rights of a kind not demonstrably justified having regard to the criteria in s 7(2).[54] That construction is confirmed by the Second Reading speech for the Charter, where the Attorney-General expressly stated, after referring to limitations under s 7(2), that:[55]

> [w]here a right is so limited, then action taken in accordance with that limitation will not be prohibited under the charter, and is not incompatible with the right.

45. The above interpretation of the phrase "compatible with human rights" is further supported by the public interest that favours legislation being given its ordinary meaning,[56] because on this approach s 32(1) requires legislation to be given its ordinary meaning unless the ordinary meaning results in an unjustified limitation on human rights. By contrast, if the operation of s 32(1) is divorced from that of s 7(2), s 32(1) may require a court to interpret a provision in a way that departs from its ordinary meaning even if any limitation on rights that would arise on the ordinary meaning is demonstrably justifiable.[57]

46. Consistently with the above, in other jurisdictions that possess statutory bills of rights the question whether a statutory provision can be interpreted in a manner that is compatible with rights ordinarily arises only once it is determined that on the ordinary interpretation of a provision it interferes with human rights in a way that is not demonstrably justifiable in a democratic society.[58] In New Zealand, that approach has resulted in the adoption of a multi-step methodology of the kind advanced by the Appellant.[59] Such a methodology may assist in some cases. However, it is not appropriate in other cases,[60] such as when interpreting statutory provisions expressed in language with a continuum of possible meanings, or when deciding whether a discretionary decision is authorised by a particular provision.[61]

47. It is sufficient for the purposes of this case for this Court to hold that the requirement in s 32(1) to interpret legislation in a way that is "compatible with human rights" requires an interpretation that avoids interference with human rights in a way that is not demonstrably justifiable having regard to s 7(2). A case by case approach should then be adopted to identifying the reasoning required to identify such an interpretation in different statutory contexts.

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54 This was the approach taken in *RJE v Secretary, Department of Justice* (2008) 21 VR 526 at 556-558 [114]-[119] (Nettle JA); *DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381 at [53] (Warren CJ); *R v Fearnside* (2009) 165 ACTR 22 at 49 [97]-[98].

55 Second Reading Speech, *Charter of Human Rights and Responsibilities Bill* (Assembly, 4 May 2006) 1291 (emphasis added).

56 See *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319 at 349 [42] (French CJ).

57 See *R v Hansen* [2007] 3 NZLR 1 at 27 [58]-[60 (Blanchard J), 37 [90]-[91] (Tipping J)

58 See *R v Lambert* [2002] 2 AC 545 at 567 [26]; *R v Johnstone* [2003] 3 All ER 884 at [54]; *Sheldrake v DPP* [2005] 1 AC 264 at 289 [1]; *R v Oakes* [1986] 1 SCR 103 at 114; *HKSAR v Wai* (2006) 9 HKCFAR 574 at 595 [29]; *Hansen v The Queen* [2007] 3 NZLR 1 at [92].

59 Appellant's submissions, paragraph 55, based on *Hansen v The Queen* [2007] 3 NZLR 1.

60 As was recognised in *Hansen v The Queen* [2007] 3 NZLR 1 at 27 [61] (Blanchard J) and 38 [94] (Tipping J); *R v Fearnside* (2009) 165 ACTR 22 at 43 [98].

61 See, e.g., the power to make non-publication orders under s 42 of the *Serious Sex Offenders Monitoring Act 2005* (Vic) considered by this Court in *Hogan v Hinch* [2010] HCA Trans 284 at 54-57.

B. THE VALIDITY OF SECTION 32(1) OF THE CHARTER

48. The parties to this appeal do not contend that s 32(1) is invalid. However, at the special leave hearing the Court raised a question as to the validity of s 32(1), and the Second Respondent has issued a notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) in relation to this issue. (AB 357)

49. Section 32(1) is valid because it does not – and does not purport to – authorise a court or any other person to engage in legislative activity in order to render a provision compatible with human rights. Section 32(1) defines the task that it requires to be performed as "interpretation". Effect should be given to Parliament's selection of that word, with the result that s 32(1) does not authorise any attempt to render a statutory provision compatible with human rights by means not properly described as "interpretation".

50. On that approach, s 32(1) does not infringe the constitutional implication from Chapter III of the Constitution first identified in *Kable v Director of Public Prosecutions (NSW).*[62] While it is "implicit in the terms of Ch III of the Constitution ... that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal",[63] that implication is irrelevant to the validity of s 32(1) because s 32(1) does not affect the independence of Victoria's courts,[64] their impartiality,[65] fairness[66] or adherence to the open court principle,[67] or "those defining characteristics which mark a court apart from other decision-making bodies".[68]

51. Nor does s 32(1) "confer powers on State courts which are "repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia".[69] Section 32(1) neither takes away "general features" of the judicial process[70] nor confers "functions which are incompatible with the proper discharge of judicial responsibilities or with the exercise of judicial power".[71] It simply builds on and extends existing common law presumptions concerning statutory interpretation.[72]

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62 (1996) 189 CLR 51.

63 *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at 163; *Forge v ASIC* (2006) 228 CLR 45 at 76 [64] (Gummow, Hayne and Crennan JJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 598 [35] (McHugh J) and 656 (Callinan and Heydon JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 552 [10].

64 *Forge v ASIC* (2006) 228 CLR 45 at 77 [66] (Gummow, Hayne and Crennan JJ).

65 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 378 [136 (Hayne, Crennan and Kiefel JJ, dissenting).

66 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 354 [54] (French CJ); *South Australia v Totani* (2010) 85 ALJR 19 at 40 [62] (French CJ).

67 *South Australia v Totani* (2010) 85 ALJR 19 at 40 [62] (French CJ).

68 *Forge v ASIC* (2006) 228 CLR 45 at 76 [63] (Gummow, Hayne and Crennan JJ); *South Australia v Totani* (2010) 85 ALJR 19 at 112 [428] (Crennan and Bell JJ).

69 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 353 [52] (French CJ), 367 [98] (Gummow and Bell JJ), 379 [140] (Heydon J); *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [111] (Gummow and Crennan JJ).

70 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 615 [92].

71 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 592 [19] (Gleeson CJ). See also *HKSAR v Wai* (2006) 9 HKCFAR 574 at 610 [74], [76] (Sir Anthony Mason NPJ).

72 Including both the principle of legality, and the presumption that legislation should be interpreted consistently with international law: *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22 at 38-39; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183

52. Finally, s 32(1) does not purport to direct Victorian courts in the exercise of their jurisdiction.[73] It applies to all persons who interpret Victorian legislation, not just the courts. Further, even at the Commonwealth level, Chapter III of the Constitution does not prevent Parliament from legislating in any way that bears upon the exercise of judicial power.[74] Observations in the authorities that "acceptance of instructions from the legislature to exercise judicial power in a particular way [is] inconsistent with the duty to act impartially",[75] or that "[a] law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid",[76] are not directed to statutory provisions that are concerned with the approach to be taken to the interpretation of legislation. Such provisions have long been accepted as valid.

53. Further or alternatively, even if:

(a) s 32(1) does, on its ordinary meaning, authorise courts to exercise legislative power, or otherwise to perform a function that is incompatible with the exercise of federal judicial power; and

(b) on that interpretation, s 32(1) would be invalid;

s 6 of the *Interpretation of Legislation Act 1984* (Vic) would require s 32(1) to be read down to preserve its validity. That could be done by reading down the word "interpreted" in s 32(1).

C. THE INTERPRETATION OF SECTION 5 OF THE ACT

54. As presently interpreted by Victorian courts, the effect of s 5 of the Act (**s 5**) is that a person may be convicted of a criminal offence because they are unable to disprove possession, which may be the central element of the crime charged.[77] The effect of s 5 is to permit convictions even in the face of a doubt as to the guilt of the accused.[78] Further, given the statutory context in which s 5 appears, the operation of that section may result in a lengthy sentence of imprisonment.[79] That result is fundamentally at odds with the presumption of innocence recognised in s 25(1) of the Charter. (AB323 at [135])

CLR 273 at 287; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 304; *Nolan v MBF Investments Pty Ltd* [2009] VSC 244 at [151]-[160].

73 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 352 [50] – 355 [56] (French CJ); *Nicholas v The Queen* (1998) 193 CLR 173 at 230 [138]-[139] (Gummow J); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 [39].

74 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 352 [49] (French CJ) and 360 [77] (Gummow and Bell JJ); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 560 [39]; *Nicholas v The Queen* (1998) 193 CLR 173 at 202 [54] (Toohey J).

75 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 352 [50] (French CJ), citing *Nicholas v The Queen* (1998) 193 CLR 173 at 188 [20] (Brennan J).

76 *Nicholas v The Queen* (1998) 193 CLR 173 at 188 [20] (Brennan CJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 36 (Brennan, Deane and Dawson JJ); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 669-670 [47]-[48].

77 *Clarke* [1986] VR 643 at 647-648; *R v Tragear* (2003) 9 VR 107 at 117.

78 As was similarly held to be the case in *R v Johnstone* [2003] 3 All ER 884 at [50]; *R v Whyte* (1988) 51 DLR (4th) 481 at 493; *R v Lambert* [2002] 2 AC 545 at [35], [38], [89], [156]; *R v Oakes* [1986] 1 SCR 103 at 132-134; *HKSAR v Wa and Asano* (2006) 9 HKCFAR 614 at [80].

79 See, e.g., Act ss 71A, 71AC, 73. This was a significant consideration in *R v Lambert* [2002] 2 AC 545 at [38], [154]; *R v Oakes* [1986] 1 SCR 103 at 134; *HKSAR v Wai* (2006) 9 HKCFAR 574 at [50].

55. The Court of Appeal correctly concluded that, on the above interpretation of s 5, the limitation on the presumption of innocence caused by that section had not been demonstrably justified having regard to s 7(2) of the Charter. (AB329.4 at [152]) There is no challenge to that conclusion, which is supported by a number of overseas authorities concerning reverse onus provisions.[80]

56. It follows that the prevailing interpretation of s 5 is not "compatible with human rights".[81] Section 32(1) therefore requires a different interpretation of s 5 to be adopted if that is possible consistently with the underlying purpose of the Act.

57. The Court of Appeal erred in holding that it was not possible, consistently with the purpose of s 5, to interpret the words "unless the person satisfies the Court to the contrary" in a way that is compatible with the presumption of innocence. (AB316.5-317.3 at [116]-[119])

58. Section 5, unlike other provisions of the Act,[82] is silent as to the standard of proof that is required in order to "satisfy" the Court. As a result, the Court is required to identify that standard by reference to considerations that stand outside the Act. (AB277-278 at [21]-[22]) Accordingly, this is not a case in which, in order to comply with the command in s 32(1) to interpret s 5 compatibly with human rights, it would be necessary to depart from the literal meaning of the words used, to read down particular words, or to read words into the statute. For that reason, it is unnecessary to decide the extent to which s 32(1) authorises any of those steps.

59. For the purposes of this appeal, it is sufficient to recognise that, Parliament not having identified the relevant standard in s 5, it is necessary for the Court to look beyond the words of that section in order to select the standard to which the Court must be "satisfied" to displace the presumption created by s 5. It is "possible" to select a standard that differs from that selected by reference to the "existing framework of interpretive rules" (AB310 at [103]) prior to the enactment of s 32(1).

60. Notwithstanding the Court of Appeal's statement that "[i]t has long been established that, where at common law or by statute a defendant has the burden of proving or disproving any fact, the standard of proof is the civil standard",[83] (AB277-278 at [22]) the criminal law is replete with examples of general words being construed in a way favourable to the accused, particularly in relation to burdens of proof imposed on an accused. For example, in *He Kaw Teh v The Queen*, Wilson J said of a statement in a seminal authority[84] that "the defendant has to <u>prove</u> that he did not know" a particular matter, "should not in this context be understood to mean any more than to 'adduce evidence of'".[85]

61. It is a general principle of the criminal law that, when a criminal defendant wishes to rely on an exception, exemption, excuse, qualification or justification

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80 See, e.g. *R v Oakes* [1986] 1 SCR 103; *Hansen v The Queen* [2007] 3 NZLR 1; *R v Lambert* [2002] 2 AC 545; *R v Johnstone* [2003] 3 All ER 884; *HKSAR v Wai* (2006) 9 HKCFAR 574.

81 See paragraph 44 above.

82 See ss 73(1) and 72C of the Act.

83 Citing *Sodeman v The King* (1936) 55 CLR 192 at 216, a case concerning the defence of insanity.

84 *Sherras v De Rutzen* [1895] 1 QB 918 at 921.

85 (1985) 157 CLR 523 at 558 (emphasis added).

provided by the law, the defendant is required only to discharge an evidential burden in order to raise that matter as something the prosecution must then disprove beyond a reasonable doubt.[86] That principle is a manifestation of the central rule of the criminal law that the legal burden to prove the defendant's guilt beyond a reasonable doubt rests on the prosecution.[87] As Gaudron, Gummow, Kirby and Hayne JJ said in *Azzopardi v R*,[88] "[t]he fundamental proposition from which consideration of the present matters must begin is that a criminal trial is an accusatorial process, in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt".

10 62. Accordingly, an interpretation of s 5 as imposing only an evidential burden of proof (meaning the accused could "satisfy the Court to the contrary" by adducing or pointing to evidence that suggests a reasonable possibility that she was not in possession of the drugs[89]) would draw support from fundamental principles of the criminal law. Further:

(a) that interpretation would not defeat the purpose of the Act (the First Respondent having conceded before the Court of Appeal that if s 5 was read as imposing an evidential onus that would not make a demonstrable difference to drug prosecutions) (AB326 at [145]);[90] and

(b) on that interpretation of s 5, that section would be "compatible" with
20 human rights, because the limitation on the presumption of innocence arising from an evidential burden would be demonstrably justifiable.[91]

63. What is possible as a matter of "interpretation" is informed by what courts in comparable jurisdictions have done, as "interpretation" is a traditional function of courts throughout the common law world. There are numerous overseas cases of high authority in which it has been held that it is possible to interpret provisions that are similar to s 5 (or, indeed, that use stronger language) as imposing only an evidential burden on an accused.

64. The case involving the closest textual analogy to s 5 is *HKSAR v Wai and Man*,[92] where Sir Anthony Mason NPJ, giving judgment for the Hong Kong
30 Court of Final Appeal, interpreted a provision in a firearms ordinance that a person did not commit an offence if he "satisfie[d] the Magistrate" of one or more identified matters as imposing only an evidential onus.[93] His Honour

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86 See *Macleod v R* (2003) 214 CLR 230 at [39], quoting Williams, *Criminal Law: The General Part*, 2nd ed (1961), §117; *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 558. That principle is reflected in the *Criminal Code 1995* (Cth) s 13.3(1)-(3). This point is more fully developed in Williams, "The Logic of Exceptions" [1988] *Criminal Law Journal* 261.

87 *Woolmington v DPP* [1935] AC 462 at 481.

88 (2001) 205 CLR 50 at [34]. See also *RPS v The Queen* (2000) 199 CLR 620 at 630 [22]; *R v Carroll* (2002) 213 CLR 635 at [21].

89 Cf *Criminal Code 1995* (Cth) s 13.3(6); *HKSAR v Wai* (2006) 9 HKCFAR 574 at 594-595 [26]; *R v Lambert* [2002] 2 AC 545 at 588-589 [90]-[92]; *DPP v Smyth and Smyth* [2010] IECCA 34, [20]-[21] (which describes this as "legal burden discharged on the lowest standard of proof, namely that of proving a reasonable doubt").

90 In *R v Lambert* [2002] 2 AC 545 at 589 [91], Lord Hope expressed the same view, stating that the effect of shifting from a persuasive to evidential burden "is likely in almost every case ... to be minimal". See also *HKSAR v Wai* (2006) 9 HKCFAR 574 at 647 [83].

91 See, e.g., *R v Lambert* [2002] 2 AC 545 at 563, 572, 589; *HKSAR v Wai* (2006) 9 HKCFAR 574, 594 [25].

92 (2006) 9 HKCFAR 574.

93 The terms of the section are set out at *HKSAR v Wai* (2006) 9 HKCFAR 574 at 593 [22].

accepted that the natural reading of the section required satisfaction on the balance of probabilities, but found that it was possible to interpret the provision as imposing only an evidential burden so as not to infringe the presumption of innocence unjustifiably.[94] His Honour found that that "interpretation does no violence to the fundamental or essential elements of the legislation".[95]

65. In *HKSAR v Wa and Asano*,[96] which was decided on the same day, Sir Anthony Mason NPJ applied the same reasoning to s 47(1) of the *Dangerous Drug Ordinance*, which provided that a person who was proved to have had anything containing a drug "shall, until the contrary is proved, be presumed to have had such a drug in his possession".[97] That section was likewise held to impose only an evidential burden so as not to infringe the presumption of innocence unjustifiably.[98]

66. In *R v Lambert*,[99] the House of Lords held that the words "it shall be a defence for the accused to prove" in s 28(2) of the *Misuse of Drugs Act 1971* (UK) imposed only an evidential burden.[100] The words "to prove" were read as meaning "to give sufficient evidence".[101] Professor Glanville Williams had previously suggested that such an interpretation was possible,[102] and the House of Lords agreed.[103] As Lord Slynn said, "Even if the most obvious way to read section 28(2) is that it imposes a legal burden of proof I have no doubt that it is 'possible', without doing violence to the language or to the objective of the section, to read the words as imposing only the evidential burden of proof."[104] The House of Lords took the same approach in *Sheldrake v Director of Public Prosecutions*[105] in relation to s 11(2) of the *Terrorism Act 2000*,[106] which provided that it was a defence for a person charged "to prove" various specified matters. The same approach had been adopted on two prior occasions by the Privy Council, quite independently of the HRA.[107]

67. Finally, in *DPP v Smyth and Smyth*,[108] the Irish Court of Criminal Appeal considered s 29(2) of that country's *Misuse of Drugs Act 1977*, which was

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94 *HKSAR v Wai* (2006) 9 HKCFAR 574 at 597 [34], 612 [84].

95 *HKSAR v Wai* (2006) 9 HKCFAR 574 at 612 [82].

96 (2006) 9 HKCFAR 614.

97 The legislation is set out at *HKSAR v Wa and Asano* (2006) 9 HKCFAR 614 at 636-637 [43]. Like the present appeal, that case involved possessing a drug for the purpose of trafficking: at 636 [41].

98 *HKSAR v Wa and Asano* (2006) 9 HKCFAR 614 at 648 [86].

99 [2002] 2 AC 545.

100 The relevant sections are found at *R v Lambert* [2002] 2 AC 545 at 564 [20].

101 *R v Lambert* [2002] 2 AC 545 at 590 [94] (Lord Hope), in observations with which Lord Steyn specifically agreed at 575 [42]. See also 609-610 [157] (Lord Clyde); cf 625 [198] (Lord Hutton).

102 Williams, "The Logic of Exceptions" [1988] *Criminal Law Journal* 261 at 264-265, stating that "unless the contrary is proved" can mean "unless sufficient evidence is given to the contrary".

103 Despite Lord Cooke's dissent in *R v DPP; Ex parte Kebilene* [2002] 2 AC 326 at 373, to which the Court of Appeal referred at AB316-317, Lord Cooke accepted that Professor William's reading was "possible". That observation was adopted in *Lambert* [2002] 2 AC 545 at 575 [42] (Lord Steyn) and 587 [84] (Lord Hope).

104 [2002] 2 AC 545 at 563 [17].

105 [2005] 1 AC 264 at 314 [53] (Lord Bingham, with whom Lords Steyn and Phillips agreed); cf Lord Rodger and Lord Carswell.

106 The text of which can be found at *Sheldrake v DPP* [2005] 1 AC 264 at 311 [47].

107 See *Vasquez v The Queen* [1994] 1 WLR 1304 at 1314D-E (reading "proved on his behalf" as meaning "if there is such evidence as raises a reasonable doubt as to whether") and in *Yearwood v The Queen* [2001] UKPC 31 (to the same effect).

108 [2010] IECCA 34.

relevantly identical to the provision at issue in *Lambert*. The Court concluded that the words "to prove" in that provision imposed an evidential burden of proof on the accused that was "discharged when the accused proves the existence of a reasonable doubt that he did not know, and had no reasonable ground for suspecting that what he had in his possession was a controlled drug."[109]

68. In light of the general principles of the criminal law concerning burdens of proof on an accused, and the international authorities outlined above, this Court should conclude that s 32(1) requires s 5 to be interpreted as imposing a burden on the accused that is discharged once the accused satisfies the Court that there is evidence that raises a reasonable doubt as to whether the accused was in possession of the relevant drugs.

D. SECTION 36 IS CONSTITUTIONALLY VALID

69. Section 36 of the Charter does not impose a function on the Supreme Court that is incompatible with the capacity of that Court to be invested with Federal jurisdiction.

70. The better view is that the making of a declaration of inconsistent interpretation pursuant to s 36(2) occurs as an incident of the exercise of judicial power, and therefore is not incompatible with the capacity of the Supreme Court to exercise federal judicial power. That is because such a declaration:

(a) can be made only when a question as to the interpretation of a statutory provision arises in a proceeding between parties in which some other relief or remedy is sought,[110] which ensures that a declaration of inconsistent interpretation can be made only in the course of the Supreme Court resolving a dispute concerning "some immediate right, duty or liability"[111] that is affected by the meaning or application of a Victorian statutory provision;

(b) can be made only where the Supreme Court, in the course of determining such a dispute, concludes that it is not possible to interpret a statutory provision that is relevant to the resolution of that dispute in a way that is compatible with the human rights identified in Part 2 of the Charter. In that context, the declaration of inconsistent interpretation can be seen to be simply a formal statement of a conclusion that the Court would necessarily have set out in its reasons for judgment (in the course of explaining why it was not possible to interpret a provision compatibly with human rights under s 32(1)). Such a formal statement, like a statement in a Court's reasons for judgment, does not affect the "validity, operation or enforcement" of the relevant provisions (s 36(5)(a)). However, it embodies a conclusion reached in exercising judicial power to resolve a

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109 [2010] IECCA 34 at [20]-[21].

110 Charter, ss 33, 36(1) and 39.

111 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258 (Mason CJ, Brennan and Toohey JJ), 269 (Deane, Dawson, Gaudron and McHugh JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [68] Gummow and Crennan JJ); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374.

particular dispute between parties,[112] and therefore is not "divorced from the ordinary administration of the law";[113]

(c) is not accurately characterised as a "remedy" in the traditional sense, because the true purpose of a declaration of inconsistent interpretation is to be the factum upon which ss 36(7) and 37 of the Charter operate to create an obligation:

(i) upon the Attorney-General to bring the Court's conclusion to the attention of the Minister administering the statutory provision in respect of which the declaration is made; and

(ii) on that Minister to prepare a written response to the declaration and to table that response in Parliament.

In *Baker*, this Court accepted that a statement made by a judge in the course of sentencing could validly be selected by a State Parliament as the factum upon which legislation operated to create future legal consequences.[114] Accordingly, the Charter could validly have provided that the obligations set out in s 37 arose in any case where the Supreme Court "concluded" or "found" that it was not possible, consistently with s 32(1), to interpret a particular statutory provision compatibly with human rights. A different conclusion should not follow simply because Parliament adopted a specific measure in s 36(2) to enable (but not require) the Supreme Court to ensure that its conclusions concerning incompatibility with rights are not overlooked, by providing for such findings or conclusions to be recorded in a formal "declaration" of which the Attorney-General must be given prior notice (s 36(3)).

71. Further or alternatively, if s 36 is to be assessed by reference to the considerations that apply to other powers to make declarations, then by reason of s 37 of the Charter a declaration of inconsistent interpretation has sufficient foreseeable consequences for future governmental action so that the making of such a declaration would be permissible even in the exercise of the judicial power of the Commonwealth.[115]

72. Further or alternatively, even if a declaration of inconsistent interpretation is properly characterised as involving the provision of an advisory opinion, that establishes only that there is no "matter" and thus no exercise of the judicial power of the Commonwealth.[116] It does not establish that in making such a declaration the Supreme Court would not be exercising state judicial power,[117]

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112 Cf *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232; *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 305; *Attorney-General (Cth) v Alinta* (2008) 233 CLR 542.

113 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 305. See also *Croome v Tasmania* (1997) 191 CLR 119 at 126 (Brennan CJ, Dawson and Toohey JJ).

114 *Baker v The Queen* (2004) 223 CLR 513 at 532 [43] (McHugh, Gummow, Hayne and Heydon JJ), acknowledging that "in general, a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence": see also at 522 [9]; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 213 [145] (McHugh J), 240 [230] (Gummow J), 281 [351] (Hayne and Callinan JJ). See also *South Australia v Totani* (2010) 85 ALJR 19 at [71], [137], [369], [420].

115 *M61 v Commonwealth* (2010) 272 ALR 14 at 38 [103]. Those consequences include that Parliament will reconsider a provision in light of the declaration: see Second Reading Speech, *Charter of Human Rights and Responsibilities Bill* (Assembly, 4 May 2006) 1293.

116 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264-266, 270.

117 See, e.g., *Gould v Brown* (1998) 193 CLR 346 at 420-421 (McHugh J), 440 (Gummow J).

let alone that it would be discharging a function inconsistent with the Supreme Court remaining a proper receptacle for federal judicial power under s 77(iii) of the Constitution.

73. Section 36 of the Charter will be invalid only if there is some feature of that provision that conflicts with Chapter III of the Constitution. There is no such feature. The conferral of a power to make declarations of inconsistent interpretation has no effect on the institutional integrity of the Supreme Court.[118] The Court remains entirely independent of the Executive, its procedure is not subject to external control or influence, and the declaration is made in the course of proceedings that otherwise bear all of the ordinary hallmarks of the judicial process.[119] Section 36 of the Charter is therefore valid (although on this alternative limb of the argument that section would be incapable of being picked up and applied in any matter involving federal jurisdiction[120]).

74. If the Court of Appeal is correct that "the question of what s 32(1) authorises is logically distinct from the issue of when the justification question under s 7(2) should be considered" (AB311 at [105]) then any inquiry as to whether a limitation on rights complies with s 7(2) would be divorced from the exercise of judicial power, because that inquiry could not affect the interpretation of the relevant provision and therefore could not affect the rights of the parties. The doubt as to the validity of s 36 that may arise on that construction provides further support to the submission above that the phrase "compatible with human rights" refers to human rights as limited under s 7(2) of the Charter.

75. The Commission makes no submissions as to whether an appeal lies to this Court under s 73 of the Constitution from a declaration under s 36(2).

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118 *Forge v ASIC* (2006) 228 CLR 45 at 76 [63].

119 *Forge v ASIC* (2006) 228 CLR 45 at 76 [63]; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 601-602 (McHugh J) and 617 (Gummow J); cf *International Finance Trust Co Limited v NSW Crime Commission* (2009) 240 CLR 319.

120 See, e.g., *Solomons v District Court of NSW* (2002) 211 CLR 119 at 134; *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 593.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY **NO M134 OF 2010**

BETWEEN:

VERA MOMCILOVIC
Appellant

THE QUEEN
First Respondent

THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA
Second Respondent

THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION
Third Respondent

THIRD RESPONDENT'S ANNEXURE OF CONSTITUTIONAL AND STATUTORY PROVISIONS

Commonwealth Constitution

Section 71

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Section 77

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

(i) defining the jurisdiction of any federal court other than the High Court;

(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;

(iii) investing any court of a State with federal jurisdiction.

Charter of Human Rights and Responsibilities 2006 (Vic)

(Version No. 003 – as in force on 21 July 2008. These provisions are still in force, in this form, as at 27 January 2011.)

Section 1 Purpose and citation

...

Victorian Equal Opportunity and Human Rights Commission
Level 3, 380 Lonsdale Street
Melbourne VIC 3000
Contact: Tessa van Duyn

(2) The main purpose of this Charter is to protect and promote human rights by—

(a) setting out the human rights that Parliament specifically seeks to protect and promote; and

(b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and

(c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and

(d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and

(e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.

2 Commencement

(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.

3 Definitions

(1) In this Charter—

...

human rights means the civil and political rights set out in Part 2;

...

statutory provision means an Act (including this Charter) or a subordinate instrument or a provision of an Act (including this Charter) or of a subordinate instrument;

PART 2 HUMAN RIGHTS

7 Human rights—what they are and when they may be limited

(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

(2) 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.

(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

25 Rights in criminal proceedings

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

...

PART 3 APPLICATION OF HUMAN RIGHTS IN VICTORIA

28 Statements of compatibility

(1) A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.

(2) A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.

(3) A statement of compatibility must state—

(a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and

(b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.

(4) A statement of compatibility made under this section is not binding on any court or tribunal.

30 Scrutiny of Acts and Regulations Committee

The Scrutiny of Acts and Regulations Committee must consider any Bill introduced into Parliament and must report to the Parliament as to whether the Bill is incompatible with human rights.

31 Override by Parliament

(1) Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.

...

32 Interpretation

(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.

(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.

36 Declaration of inconsistent interpretation

(1) This section applies if—

(a) in a Supreme Court proceeding a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or

(b) the Supreme Court has had a question referred to it under section 33; or

(c) an appeal before the Court of Appeal relates to a question of a kind referred to in paragraph (a).

(2) 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.

(3) If the Supreme Court is considering making a declaration of inconsistent interpretation, it must ensure that notice in the prescribed form of that fact is given to the Attorney-General and the Commission.

(4) The Supreme Court must not make a declaration of inconsistent interpretation unless the Court is satisfied that—

(a) notice in the prescribed form has been given to the Attorney-General and the Commission under subsection (3); and

(b) a reasonable opportunity has been given to the Attorney-General and the Commission to intervene in the proceeding or to make submissions in respect of the proposed declaration of inconsistent interpretation.

(5) A declaration of inconsistent interpretation does not—

(a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or

(b) create in any person any legal right or give rise to any civil cause of action.

(6) The Supreme Court must cause a copy of a declaration of inconsistent interpretation to be given to the Attorney-General—

(a) if the period provided for the lodging of an appeal in respect of the proceeding in which the declaration was made has ended without

such an appeal having been lodged, within 7 days after the end of that period; or

(b) if on appeal the declaration is upheld, within 7 days after any appeal has been finalised.

(7) The Attorney-General must, as soon as reasonably practicable, give a copy of a declaration of inconsistent interpretation received under subsection (6) to the Minister administering the statutory provision in respect of which the declaration was made, unless the relevant Minister is the Attorney-General.

37 Action on declaration of inconsistent interpretation

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.

38 Conduct of public authorities

(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

...

49 Transitional provisions

(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.

***Drugs Poisons and Controlled Substances Act 1981* (Vic)**

The Appellant's Annexure of Constitutional and Statutory Provisions contains all the relevant provisions of this Act.

***Interpretation of Legislation Act 1984* (Vic)**

(Version No. 91 – as in force on 21 July 2008. These provisions are still in force, in this form,[±] as at 27 January 2011)

Section 6(1)

Every Act shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of the State of Victoria, to the intent that where a

provision of an Act, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power and the remainder of the Act and the application of that provision to other persons, subject-matters or circumstances shall not be affected.

Section 35

In the interpretation of a provision of an Act or subordinate instrument—

(a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and

(b) consideration may be given to any matter or document that is relevant including but not limited to—

(i) all indications provided by the Act or subordinate instrument as printed by authority, including punctuation;

(ii) reports of proceedings in any House of the Parliament;

(iii) explanatory memoranda or other documents laid before or otherwise presented to any House of the Parliament; and

(iv) reports of Royal Commissions, Parliamentary Committees, Law Reform Commissioners and Commissions, Boards of Inquiry or other similar bodies.

***Acts Interpretation Act 1901* (Cth)**

(As in force on 21 July 2008. These provisions are still in force, in this form,[±] as at 27 January 2011)

Section 15A

Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

Section 15AA(1)

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

***Criminal Code* (Cth) (Schedule to the *Criminal Code Act 1995* (Cth)**

The Appellant's Annexure of Constitutional and Statutory Provisions contains all the relevant provisions of this Act.