

**IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE**

No: 0702684, 0702686 and 0702932

The Queen

– and –

Kylie Fenech, Robert Murone and Jessie Fenech

**SUBMISSIONS ON BEHALF OF THE VICTORIAN EQUAL OPPORTUNITY
& HUMAN RIGHTS COMMISSION, INTERVENING**

A. INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Victorian Equal Opportunity & Human Rights Commission (the **Commission**) was originally established under s 6 of the former *Equal Opportunity Act 1984* (Vic) and continues by virtue of s 160 of the current *Equal Opportunity Act 1995* (Vic). Under the *Charter of Human Rights and Responsibilities 2006* (the **Charter**) the Commission was given a range of new functions. Section 40 of the Charter provides the Commission with the right to intervene in legal proceedings initiated by other parties. It is pursuant to this provision that the Commission intervenes in this matter.
2. The Commission's intervention in any proceedings aims to advance the principles and objectives that underpin the enactment of the Charter, which are reflected in its preamble. In particular that:
 - (1) human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
 - (2) human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
 - (3) human rights come with responsibilities and must be exercised in a way that respects the human rights of others.
 - (4) human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their

diverse spiritual, social, cultural and economic relationship with their traditional land and waters.

3. The Commission intervenes in these proceedings to make written submissions only in respect of the operation and effect of s 33 of the Charter, in relation to the question of the interpretation of the *Drugs, Poisons and Controlled Substances Act 1981* (the **Act**) in accordance with the Charter. In this context, the Commission notes that in the event that the substantive question is to be decided by the County Court, or if it is referred to the Supreme Court pursuant to s 33, the Commission will make further submissions on the interpretive implications of the Charter in relation to the Act.

Summary of Argument

4. In relation to s 33 of the Charter, the Commission contends as follows:
 - (1) There are three requirements that need to be satisfied before a court or tribunal can refer a question to the Supreme Court for determination:
 - (a) The proceedings must give rise to either a question of law regarding the application of the Charter, or a question regarding the interpretation of a statutory provision in accordance with the Charter;
 - (b) A party must make an application for referral; and
 - (c) The court or tribunal must consider the question appropriate for determination by the Supreme Court.
 - (2) In determining the meaning and intended operation of s 33 a court or tribunal must have regard to the object and purpose of the Charter. Section 33 must also be interpreted in accordance with s 32 of the Charter.
 - (3) In these proceedings, the central issue for the court is whether the relevant question concerning the interpretation of the Act in accordance with the Charter is appropriate for determination by the

Supreme Court, which requires an assessment of whether it is significant and important.

B. RELEVANT LEGISLATIVE PROVISIONS

B1. The *Drugs, Poisons and Controlled Substances Act 1981*

5. The Act sets out a regime that, inter alia, provides for indictable offences involving the possession, use, sale and supply of drugs, poisons and controlled substances.

6. Relevantly, for the purposes of these proceedings, s 5 of the Act provides:

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.

7. The Commission understands that the accused persons have all been charged with at least one count of possession of a drug in circumstances where the drug in question was found at the accused persons' place of residence.
8. By operation of section 5 of the Act, the accused persons are **deemed** to be in possession of the drug in question because the drug was upon premises that were occupied by the accused, unless the accused satisfy the court to the contrary. The practical effect of section 5 of the Act is that the onus of proof is transferred to the accused, as opposed to being borne by the prosecution. Such a provision is commonly known as a "reverse onus provision".

B2. The *Charter of Human Rights and Responsibilities*

9. The Charter makes provision for the protection of human rights in Victoria. It commenced on 1 January 2007, with the exception of Divisions 3 and 4 of Part 3, which commenced on 1 January 2008.
10. Relevantly, Division 3 of Part 3 of the Charter deals with the interpretation of laws under the Charter.
11. Section 32 relevantly provides:
 - (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.*
12. Section 33 provides:
- (1) *If, in a proceeding before a court or tribunal, 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, that question may be referred to the Supreme Court if –*
 - (a) *a party has made an application for referral; and*
 - (b) *the court or tribunal considers that the question is appropriate for determination by the Supreme Court.*
 - (2) *If a question has been referred to the Supreme Court under sub-section (1), the court or tribunal referring the question must not –*
 - (a) *Make a determination to which the question is relevant while the referral is pending; or*
 - (b) *Proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question.*
 - (3) *If a question is referred under sub-section (1) by the Trial Division of the Supreme Court, the referral is to be made to the Court of Appeal.*
 - (4) *Despite anything contained in any other Act, if a question arises of a kind referred to in sub-section (1), that question may only be referred to the Supreme Court in accordance with this section.*
13. Two of the rights enshrined in the Charter are the right to a fair hearing (s 24) and the presumption of innocence (s 25(1)). Both of these rights are engaged by reverse onus provisions and questions therefore arise regarding the interpretation of reverse onus provisions compatibly with the Charter.

C. INTERPRETATION OF SECTION 33 OF THE CHARTER

C1. Background

14. The Commission is only aware of one matter to date where a court or tribunal has been called upon to consider whether or not to make a referral to the Supreme Court under s 33. This occurred in the matter of *Seachange Management Pty Ltd v. Benvol Constructions and Developments Pty Ltd & Ors (Domestic Building)*¹ before the Victorian Civil and Administrative Tribunal. The relevant question concerned the possible implications of the

¹ [2008] VCAT 2629.

Charter for a stay of proceedings. Vice President Ross determined not to refer the question on the basis that it was not appropriate for referral given the issues had been fully ventilated and the most expeditious course of action was to determine the application.² Vice President Ross made no further observations about the meaning and operation of s 33 more generally.

15. In terms of broader guidance regarding s 33 this appears limited as its formulation, compared to other referral provisions differs significantly in two respects. Firstly, whilst a range of referral provisions are expressed in terms of referral of a question of law to a higher court,³ s 33 of the Charter provides greater specificity regarding the type of question that can be referred (i.e. a question of law about the application of the Charter, or a question of statutory interpretation in accordance with the Charter). Secondly, unlike for example, s 39 of the *Federal Magistrates Act 1999* (Cth) which deals with referral of entire proceedings from the Federal Magistrates' Court to the Federal Court, and directs the court to consider a broad range of issues before making a referral, s 33(1)(b) directs the court to apply a very limited test, defined in terms of the appropriateness of the question for referral.

C2. Object and Purpose of s 33

16. The Commission submits that in determining whether a question is appropriate for referral to the Supreme Court under s 33 of the Charter, in accordance with s 32 of the Charter, s 33 must be interpreted, so far as it is possible to do so consistently with its purpose, in a way that is compatible with human rights.
17. Having regard to the circumstances of these proceedings and the three preconditions in s 33 that must be satisfied before a referral can be made to the Supreme Court, the Commission submits that there is no dispute as to the following issues:
 - (1) that a question arises with respect to the interpretation of a statutory provision in accordance with the Charter (notices previously served

² At paras 33-34.

³ For example s 96 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), (its predecessor s 54 of the *Administrative Appeals Tribunal Act 1984*), s 118 of the *Mental Health Act 1986* (Vic) and s 45 of the *Administrative Appeals Tribunal Act 1975* (Cth).

in accordance with section 35 of the Charter have identified a question has arisen concerning the interpretation of s 5 of the Act in accordance with the Charter); and

- (2) that a party has made an application for referral (an application has been made on behalf of Mr Murone).

18. In this context, the Commission submits that the primary interpretive exercise that the court must undertake in these proceedings, is the interpretation of what constitutes a question that is **appropriate** for determination by the Supreme Court (s 33(1)(b) of the Charter). The Commission's submissions therefore focus on this specific element of s 33.
19. In determining this matter, the Commission submits that the court should first engage in the task of statutory interpretation, according to ordinary principles of statutory construction, pursuant to both common law and the *Interpretation of Legislation Act 1984* (Vic).
20. Section 35 of the *Interpretation of Legislation Act 1984* (Vic) provides:

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.*

21. Accordingly, the Commission submits that the court should adopt an interpretation of s 33 that is consistent with the object and purpose of the Charter, and in determining this it is instructive to consider the Attorney-

General's second reading speech; the Explanatory Memorandum; and the Human Rights Consultative Committee Report in respect of the Charter.

22. In his second reading speech, the Attorney-General described the overall operation of the Charter in the following terms⁴:

It is a model which encourages and promotes dialogue about human rights between all the institutions of government - the Parliament, the courts and the executive. It ensures that human rights are taken into account when developing new laws and policies. It ensures that the courts consider human rights when interpreting laws. And above all else, it promotes the need to respect and promote human rights across government and in the community.

23. The Commission submits that it is clear that parliament envisaged that the Charter would operate so as to encourage involvement of all courts and tribunals in the human rights dialogue, particularly by virtue of the obligation in s 32. The intended meaning and operation of s 33 needs to be understood in this context, and in particular, that “over-use” of s 33 would be contrary to the intended operation of the Charter by marginalising the consideration of human rights from the day-to-day operation of lower courts and tribunals. In addition, the Charter was not intended to delay or unduly complicate matters before courts and tribunals. Rather it needs to be seamlessly integrated into existing functions in order to realise its objectives. At the same time, s 33 has to be given room to operate and perform its role in facilitating human rights dialogue – the challenge is to identify the category of matters it was intended to capture.
24. Section 33(1)(b) directs the Court to ask itself whether the relevant question is **appropriate** for determination by the Supreme Court. On the face of the provision, however, s 33(1)(b) gives little guidance as to what type of question will be appropriate for referral.
25. The Macquarie Dictionary (Fourth Edition, 2005) defines “appropriate” as “*suitable or fitting for a particular purpose...*”. In this context it is relevant to consider the Attorney-General's comments on s 33 in this second reading speech:⁵

⁴ Hansard, 4th May 2006, page 1295.

⁵ Ibid, page 1293.

Clause 33 of the bill allows a court or tribunal to refer a question of law or statutory interpretation that relates to the application of the Charter to the Supreme Court upon application by a party to the proceeding and if the court or tribunal considers that such a referral is appropriate.

*This recognises the need for a court with the authority of the Supreme Court to determine the **significant** issues that may arise under the Charter (our emphasis).*

26. The Macquarie Dictionary (Fourth Edition, 2005) defines “significant” as “*important; of consequence*”.
27. Of further guidance to the court is the Report of the Human Rights Consultation Committee that led to the enactment of the Charter⁶. In respect of the interpretation of legislation, the Report relevantly notes:

There may be cases where a lower court or tribunal requires guidance on an interpretive question. The Committee sees value in allowing such matters to be referred to a single judge of the Supreme Court for consideration, but only for interpretive questions where the lower court or tribunal considers that it would be an appropriate matter for determination by the Supreme Court.

28. Accordingly, the Commission submits that in exercising the power under s 33, the court needs to be satisfied that the question of statutory interpretation in accordance with the Charter is **important and significant** enough to warrant determination by the Supreme Court. The notion of importance and significance needs to be approached conservatively, in order to set an appropriately high bar, but at the same time, not so high as to nullify s 33. The Commission considers that where on the scale a particular question rests is a matter for the relevant court or tribunal to decide, having regard to the particular question involved.
29. By way of illustration the Commission notes that an example of where referral of a question for determination by the Supreme Court may be appropriate (insofar as it might be characterised as important or significant), is where the interpretation of a statutory provision in light of s 32 of the Charter raises significant complexities, with possible widespread ramifications across many statutory instruments that are commonly

⁶ *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, December 2005, page 83.

administered by lower courts. In this instance, it is apparent that lower courts would benefit from interpretive guidance from the Supreme Court.

30. In matters where an application for referral under s 33 is made part-way through proceedings, the emerging complexity and ramifications of s 32 for the statutory provision in question, may lead the court or tribunal to consider an interpretive question important and significant (and thus appropriate to refer for determination by the Supreme Court) where there is an emerging possibility of an inconsistency between a statutory provision and the Charter. Such matters might be regarded as best determined by the Supreme Court as only it has the power to make a declaration of inconsistent interpretation under s 36. Clearly it is far too premature for this to be a consideration in these proceedings.

C3. Interpreting s 33 of the Charter in accordance with the directive in section s 32 of the Charter

31. Section 32 of the Charter requires the court to interpret s 33, so far as it is possible to do so consistently with its purpose, in a manner that is compatible with human rights. To satisfy this directive the Commission submits that the first step the court must take in interpreting s 33, is to ascertain the ordinary meaning, having regard to principles of statutory construction. If this ordinary meaning is compatible with human rights s 32 does not require the court to do anything further. The Commission submits that this approach was confirmed implicitly by the majority, and explicitly by the minority, in the recent Victorian Court of Appeal decision in *RJE v The Secretary to the Department of Justice*⁷.
32. In particular, in *RJE*, all three judges approached the interpretive exercise by first ascertaining the ordinary meaning of the provision in question. The majority found that the ordinary meaning was compatible with human rights, and accordingly, no further analysis in relation to s 32 of the Charter was required. Nettle JA, in his minority judgment, held that the ordinary meaning of the provision in question was not compatible with human rights,

⁷ [2008] VSCA 265.

and went on to reinterpret the relevant provision compatibly with human rights (which lead to the same interpretation as the majority).

33. The Commission submits that in these proceedings, the ordinary meaning of s 33 is compatible with human rights and accordingly it is not necessary for the court to engage in an analysis of compatibility in accordance with s 32.
34. It is important to note, however, that the Commission foresees that in some circumstances, having regard to the requirement in s 32, the court would be required to reconsider the scope of factors relevant to a decision whether or not to refer a question under s 33. In particular, the Commission notes that this may arise in circumstances where an accused person in criminal proceedings raised concerns about the effect that a referral may have in terms of creating an unreasonable delay. Such an issue would require the court, in deciding whether to make a referral under s 33, to engage in an analysis of how such a decision might be affected by the protections from unreasonable delay set down in s 21(5)(b) and s 25(2)(c) of the Charter.
35. In light of the fact that, as the Commission understands it, the accused persons in this case all agree that the interpretation of s 5 of the Act in accordance with the Charter, is a question that is appropriate for referral to the Supreme Court, the Commission notes that it is not a live issue for the court in these proceedings.

C4. Application of s 33 in these proceedings

Proceedings must give rise to ... a question regarding the interpretation of a statutory provision in accordance with the Charter

36. The Commission submits that in these proceedings, a question arises regarding the interpretation of section 5 of the Act in accordance with the Charter. Accordingly, the first requirement of s 33(1) is satisfied.

Party has made an application for referral

37. The Commission is aware that one of the accused, Mr Murone, has made an application for referral in these proceedings. Accordingly, the Commission submits that the requirement in s 33(1)(a) is satisfied.

The Court must consider that the question is appropriate for determination by the Supreme Court

38. The Commission submits, having regard to our analysis above, that for a question to be appropriate for referral to the Supreme Court, a court must determine that it is “significant” and “important” so as to warrant a referral. The Commission considers that this is a matter for the court to decide, having regard to the particular question involved.