IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
(COURT OF APPEAL) **No. S APCR 2011 0099**

BETWEEN:

THE QUEEN

v

[redacted]

(INTERVENING)

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

REPLY SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION (INTERVENING)

I. RELEVANCE OF INTERNAL LIMITS ON RIGHTS TO THE APPLICATION OF S 32 OF THE CHARTER

1. Section 13 of the Charter does not confer a right to privacy in absolute terms. Instead, it confers a right to be free from "unlawful or arbitrary" interference with privacy. That language is modelled on Article 17 of the International Covenant on Civil and Political Rights (**the ICCPR**).[1]

2. However, given the existence of s 7(2) of the Charter, the Commission contends that, as discussed in oral argument,[2] there is no work to be done by the requirement that an interference with privacy be "unlawful or arbitrary" before

[1] Explanatory Memorandum, *Charter of Human Rights and Responsibilities Act 2006* (Vic) 2834; *Kracke v Mental Health Review Board* [2009] VCAT 646, [591]. Article 8 of the European Convention on Human Rights is similar: *Kracke v Mental Health Review Board* [2009] VCAT 646, [590].

[2] See Ts at pp 150-152 (31/5/11).

s 13 of the Charter is engaged. As Bell J explained in *Kracke* (in the specific context of s 13(a) of the Charter):[3]

> Where rights are expressed in terms that contain a specific limitation, the nature and content of the rights in their plain state are not seen to be reduced by the specific limitation. Rather, the specific limitation is seen as an indication of what might be considered in determining whether any limitations are reasonable and justified under the general limitations provision in s 7(2).
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> Thus, when identifying the scope of the right at the engagement stage, this is done broadly and purposively, even where the right contains a specific limitation. Such a limitation becomes subsumed in the overall justification analysis which is undertaken in the next stage. That is why the international jurisprudence shows there is very considerable interplay between the application of specific limitations provisions on the one hand and general limitations provisions on the other.

3. On the above approach, any interference with privacy that is not demonstrably justifiable having regard to the criteria in s 7(2) of the Charter will be "arbitrary". But this analysis comes into play only at the point at which s 7(2) comes into play — that is, after the interpretive exercise required by s 32 of the Charter.

4. In any event, as submitted in oral argument, the Commission contends that the recording of private conversations by police without authorisation pursuant to a warrant or equivalent procedure is arbitrary. Thus even if the internal limitation is relevant to the s 32 analysis, the construction of s 6 of the SDA for which the Crown contends produces an outcome that is inconsistent with an individual's right not to have his or her privacy arbitrarily interfered with.

II. *WBM v Chief Commissioner of Police* SHOULD NOT BE FOLLOWED

5. The Crown relied, albeit without extended argument, on the decision of *WBM v Chief Commissioner of Police*[4] in support of the proposition that the term "arbitrary" in s 13 of the Charter ought not to be interpreted by reference to international authorities and other materials, but rather that it has a significantly more limited meaning — namely, that in order to be arbitrary, the law in question

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[3] *Kracke v Mental Health Review Board* [2009] VCAT 646, [109]-[110]. That same approach was predicted and endorsed in Pound and Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008) 110 [1580].

[4] [2010] VSC 219.

must involve "capriciousness" or "acts of whim".[5]

6. The Commission contends that *WBM* should not be followed by this Court. It contains a number of errors and is inconsistent with High Court authority in relation to the interpretation of legislation that gives effect to Australia's treaty obligations.

7. First, in paragraph 49, Kaye J referred to the fact that there is no strict separation of judicial powers in some of the countries that are represented on the Human Rights Committee; that the Human Rights Committee doesn't perform a judicial role; and that the majority of members of the Human Rights Committee do not come from countries which have the same system of democracy as Australia. His Honour then concluded that the opinions of the Committee involve expressions of value judgments in a manner that is at odds with the traditional judicial function.

   (a) Kaye J erred in thinking that countries are "represented" on the Human Rights Committee. The Committee is composed of independent human rights experts,[6] including academics[7] and former judges,[8] and the experts do not "represent" their country of origin.

   (b) While it may be correct to say that the Committee's role is not judicial, in the sense that its views are not enforceable, it is properly described as "quasi-judicial" in relation to its role in resolving individual complaints against States pursuant to the First Optional Protocol to the ICCPR.

   (c) While there may be no strict separation of powers in the countries from which the independent experts on the Committee come, there is equally no strict separation of powers in Victoria.

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[5] Ts at pp 209-210 (31/5/11).

[6] See http://www2.ohchr.org/english/bodies/hrc/members.htm.

[7] For example, Gerald Neuman, a Professor of Law at Harvard Law School: see http://www2.ohchr.org/english/bodies/hrc/membersCVs/neuman.htm.

[8] For example, Elizabeth Evatt, formerly Justice Evatt, was a member of the Human Rights Committee: see "Australia and the United Nations" http://www.aph.gov.au/house/committee/jfadt/u_nations/UNchap11.pdf.

(d) In any event, these matters are not relevant to the question whether the jurisprudence of the Human Rights Committee ought to be followed in interpreting s 13 of the Charter. The relevance of that jurisprudence comes from its status as an authoritative statement of the meaning of the ICCPR, which is implemented by the Charter.

8. Second, at paragraph 51 Kaye J considered the submission that "arbitrary" means "unreasonable" or "disproportionate",[9] and rejected it. He stated that "*[t]he adjective arbitrary is a word of common use. It denotes a decision or action not based on any relevant identifiable criterion which stems from an act of caprice or whim.*" The language of "caprice" or "whim" adopted by His Honour was based on the dictionary definition of "arbitrary". His Honour then in paragraphs 52 and 53 considered the UN Human Rights Committee's General Comment 16, and the meaning attributed to "arbitrary" there, noting that it had been followed in *Kracke*, and rejected that approach.

9. There appear to be two limbs to His Honour's reasoning, first that "arbitrary" has a "plain ordinary English meaning" (found in the dictionary), and second, that a broader approach "imports a significant degree of judicial value judgment which is not warranted by the Charter". His Honour concluded that "[t]here is nothing in the Victorian Charter which would justify giving to the adverb 'arbitrarily' in 13(a) the broader meaning adopted by the Human Rights Committee."

10. The Commission concludes that there are several reasons to justify giving to the adverb "arbitrarily" the broader meaning adopted by the Human Rights Committee.

(a) First, it is clear that s 13 of the Charter was modelled on Article 17 of the International Covenant on Civil and Political Rights. That emerges from the language of the two provisions; from the Explanatory Memorandum for the Charter;[10] from the Second Reading Speech for the Charter;[11] and

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[9] The submission was based on Bell J's decision in *Kracke* and on Vickery J's decision in *Nolan v MBF Investments*,[9] now reversed on appeal.[9]

[10] EM at p 13.

[11] Victorian Parliament, *Hansard*, 4 May 2006, Assembly at 1290 (Hulls).

from the final report of the Victorian Human Rights Consultation Committee,[12] which was the basis for the enactment of the Charter.[13]

(b) Second, by the time that the Charter was enacted, Article 17 of the ICCPR had a well-settled meaning — the meaning that was reflected in General Comment 16 adopted by the Human Rights Committee in April 1988 and applied by the Human Rights Committee in *Toonen v Australia* in 1992. This Court should assume that in adopting the words of Article 17, expressly in an attempt to reflect the right in Article 17, that Parliament intended the right to mean what it meant in the ICCPR, as interpreted by the Human Rights Committee.

(c) Third, section 32(2) of the Charter expressly directs attention to international and comparative material in the interpretation exercise. That section applies to the interpretation not just of ordinary statutes, but also to the interpretation of the Charter itself, because section 32(1) refers to interpreting "statutory provisions", which term is expressly defined to include the Charter (s 3(1) of the Charter).

11. In summary the Commission contends that where Parliament draws on and copies a provision from an international treaty that has an established meaning and says in enacting the provision that it is intending to give effect to that treaty, the legislation should be given the meaning that it has been accepted as having under the treaty. To sever the meaning of the provision in the Charter from that pre-existing body of learning because the dictionary definition of the word is different is to fail to give effect to Parliament's intent in enacting the words used.

12. Finally, *WBM* is inconsistent with High Court authorities concerning the interpretation of legislation that gives effect to a treaty. The High Court has, in a series of cases, taken the view that where a statute implements a treaty, the statute is to be interpreted consistently with the treaty, understood in accordance with international norms of interpretation, and further that treaties ought to be

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[12] *Rights, Responsibilities and Respect*, at pp 31-3.

[13] Victorian Parliament, *Hansard*, 4 May 2006, Assembly at 1290 (Hulls).

interpreted uniformly by contracting states.[14]

13. The decision in *WBM* means in effect that section 13(a) of the Charter, despite its identical wording to Article 17, has a completely different meaning from Article 17. The Commission contends that that was not Parliament's intention and that *WBM* is erroneous and ought not be followed.

III. EUROPEAN AND CANADIAN JURISPRUDENCE OUGHT TO BE PREFERRED

14. The Commission acknowledges that the comparative jurisprudence in relation to participant surveillance is not consistent across jurisdictions. In particular, there is a divergence between, on the one hand, the European Court of Human Rights and the Canadian Supreme Court and, on the other hand, the United States Supreme Court and a single judge of the South African High Court. (The Commission agrees with the Attorney-General that the New Zealand jurisprudence is "unsettled" in relation to participant surveillance and whether there is a reasonable expectation of privacy[15]).

15. The Commission contends that the approach adopted in the European and Canadian jurisprudence ought to be preferred by this Court as it gives greater protection to the right to privacy than the approach adopted by the United States and South Africa. The Canadian Supreme Court's decision in *Duarte*[16], in particular, ought to be accepted for the cogency and persuasiveness of its reasoning; and for its explanation of why the United States jurisprudence ought not be followed. Further, the Commission contends that the significantly different law and culture concerning rights in the United States militates against adopting the approach of the United States Supreme Court.

Dated: 5 July 2010

KRISTEN WALKER

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[14] See, eg, *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at 202 [24]-[25] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142, 158-60; *A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 at 239-240 (Dawson J); *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 349-350 (Dawson J).

[15] Ts at p 223 (31/5/11).

16 [1990] 1 S.C.R. 30.