IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
IN THE COURT OF APPEAL
CIVIL DIVISION SAPC I 2010 0143
BETWEEN:

CHRISTIAN YOUTH CAMPS LIMITED (ACN 095 681 342)
First Applicant

MARK ROWE
Second Applicant

And

COBAW COMMUNITY HEALTH SERVICES LIMITED
First Respondent

VICTORIAN EQUAL OPPORTUNITY & HUMAN RIGHTS COMMISSION
Second Respondent

And

ATTORNEY-GENERAL FOR VICTORIA
Intervener

ADDITIONAL SUBMISSIONS OF THE SECOND RESPONDENT RESPONDING TO THE SUPPLEMENTARY SUBMISSIONS OF THE ATTORNEY-GENERAL FOR VICTORIA DATED 28 MARCH 2013

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1. These submissions reply to the Attorney-General's submissions filed on 28 March 2013.

Common law principles and the use of unincorporated international treaties

2. As to the common law principles addressing the use of *unincorporated* international human rights treaties in construing Australian statutes, there are two principal canons of construction:

   (a) *the presumption of compatibility* – that the Parliament cannot have intended to legislate contrary to international law treaty obligations, even if unincorporated;[1] and

[1] An unincorporated treaty being a treaty that Australia has ratified and which imposes binding international legal obligations but those obligations have not been directly incorporated into federal or state law by statute. An unincorporated treaty has no formal standing in Australian law and is not justiciable.

(b) *the presumption of legality* - courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by an unmistakable and unambiguous language.[2]

The Attorney-General's submissions at paragraph 8 appear to accept these two canons.

3. Contrary to paragraphs 3, 5, 13 and 14 of the Attorney-General's submissions, it is not correct to say that unincorporated international law affects the construction of a statutory provision only to the extent Parliament intended to give effect to that treaty. The presumptions of compatibility and legality apply regardless of the relationship between the domestic legislation and the international law.[3]

4. Paragraph 4 of the Attorney-General's submission appears to confuse the approach that should be taken when the treaty in issue is *incorporated*[4] in whole or in part in the relevant statute and the approach to be taken where the treaty is not incorporated but the subject matter of a treaty touches on the subject matter of the dispute and the questions of interpretation.

5. With respect to the former, if the statute expressly incorporates or refers to a provision of an international human rights instrument, the statutory provision must be given the same meaning as the international instrument. In *Applicant A v Minister of Immigration and Ethnic Affairs* (1997) 190 CLR 255 at 231 - 232 Brennan CJ observed:[5]

> *If a statute transposes the text of a treaty or a provision of treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty.*

6. Chief Justice French's observations in *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR 1372 at 1383 have not been cited in the full context and only part of his Honour's comment is reproduced in paragraph 4 of the Attorney-General's submissions.

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see *Royal Women's Hospital v Medical Practitioners Board* (2006) 15 VR 22 at 38-9 [72]-[77].

See also *Zachariassen v Commonwealth* (1917) 24 CLR 166 at 181, *Polites v Commonwealth* (1945) 70 CLR 60 at 69, *Chu Kheng Lim v Minster for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287, *AMS v AIF* (1999) 199 CLR 160 at 180 [50], *Dow Jones & Co Inc v. Gutnick* (2002) 210 CLR 575 at 626 [116] and also *Kennedy v Australian Securities & Investments Commission & Ors* (2005) 142 FCR 343 at [96]. Cf *Blathwayt v Lord Cawley* [1976] AC 397 at 426.

[2] *Potter v Minahan* (1908) 7 CLR 277 at 304, S*argood Bros v Commonwealth* (1910) 11 CLR 258 at 279, *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206, *Morris v Beardmore* [1981] AC 446 at 463, *Coco v R* (1994) 179 CLR 427 at 436-8, *Re Bolton; ex parte Beane* (1997) 162 CLR 514 at 520-1, *Plaintiff S157/2000 v Commonwealth* (2003) 211 CLR 476 at 492 [28]- [29], *Al Kateb v Godwin* (2004) 219 CLR 562 at 577 [19], *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 373 and *DPP v Hamilton* [2011] VSC 598 at [34].

[3] *Hogg v Toye & Co Ltd* [1935] Ch 497 at 520, *Salomon v Commissioners of Custom and Excise* [1967] 2 QB 116 at 141 and144, *Dietrich v R* (1992) 177 CLR 292 at 305 and 360, *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 138 and *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

[4] Incorporated treaties are those where the text and/or a relevant treaty obligation becomes part of domestic law by statute,

[5] See also McHugh J at 252-256 and Kirby J at 292 – 294 and *De L v Director General, NSW Department of Community Services* (1996) 187 CLR 640.

In *Plaintiff M47/2012,* French CJ is addressing the approach to be taken where the relevant Australian statute incorporates an international law. In context, French CJ said:

> *[11] In any dispute about the application of an Australian law which gives effect to an international Convention, the first logical step is to ascertain the operation of the Australian law. However, where, as in the case of the Migration Act,* ***the Act uses terminology derived from or importing concepts which are derived from the international instrument, it is necessary to understand those concepts and their relationships to each other in order to determine the meaning and operation of the Act.***
>
> (emphasis added and footnotes omitted)

7. As to the question of construction, French CJ started with consideration of the relevant international law obligations. At [12], he said:

> *Nevertheless, the Convention informs the construction of the provisions of the Migration Act and the Regulations which respond to the international obligations which Australia has undertaken under it.* ***It is necessary in this case to refer to those obligations before turning to the Act and Regulations****.*
>
> (emphasis added and footnotes omitted)

8. See also French CJ's observations at [43] and [65] of his Honour's reasons.[6]

9. The presumption of compatibility is primarily concerned with the use of unincorporated treaties and does not strictly arise where the question of construction concerns a statute that expressly incorporates an international law.[7]

10. As to the presumption of compatibility for *unincorporated* treaties, again it is not correct to say that resort to international treaty law is limited only to circumstances where there is uncertainty or ambiguity in the statute. Resort may be had to international treaties even in the absence of ambiguity.[8]

11. The Attorney-General's reference to Callinan J's comments *Western Australia v Ward* (2002) 213 CLR 1 at 388-389 [956] should also be read in context. At [956], his Honour said:

> *Consistency with, and subscription to, our international obligations are matters for Parliament and the Executive, who are in a better position to answer to the international community than tenured judges. Where legislation is not genuinely ambiguous, there is no warrant for adopting an artificial presumption as the basis for, in effect, rewriting it.*

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[6] See also *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at [90] and [222].

[7] *Salomon v Commissioners of Custom and Excise* [1967] 2 QB 116 at 143 and *In re M and H (Minors*) [1990] 1 AC 686 at 721. see also *Applicant A* (supra), *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 303-305, *Garland v British Rail* [1983] 2 AC 751, *R (Al-Skeini) v Secretary of State for Defence* [2005] 2 WLR 1401 at [301], together with *R v Brown* [1996] AC 543 at 555 and *R (Mullen) v Secretary of State for the Home Department* (2004) 1 AC 1 at [5].

[8] *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at [127] and, Brownlie I *Principles of International law*, 5th edition page 48 and authorities cited in footnote 102 and *Quila & Bibi v Secretary of State for the Home Department* [2011] UKSC 45; [2011] 3 WLR 836 at para 66.

(footnotes omitted)

12. His Honour was not in the majority and the comments are at odds with long standing authority that courts may consider whether a domestic law should be construed consistently with international obligations across a wide range of areas from shipping, aviation, communications, heritage, consular relations and extradition. His Honour's comments were in response to submissions put by the Human Rights and Equal Opportunity Commission (**HREOC**) that '*the presumption that the courts construe domestic statutes to accord with international obligations should not be limited to cases of ambiguity, and that the courts, wherever possible, should read statutes consistently with international law*.' [955]. HREOC also submitted that '*the common law was obliged to develop in accordance with international law*.' [957]

13. In *Western Australia v Ward* (2002) 213 CLR 1 at 242 [565], Kirby J concurred generally with the reasons given by the majority. On the question of ambiguity of the meaning of "recognition" and "extinguishment", his Honour said:

> *Where ambiguous, such provisions should be given a construction that is consistent with the principles of fundamental human rights, as expressed in international law*. (at page 242 [566])

Further,

> *.... in the case of any ambiguity, the interpretation of the statutory text should be preferred that upholds fundamental human rights rather than one that denies those rights recognition and enforcement. Secondly, so far as is possible, it should take into account relevant analogous developments of the common law in other societies facing similar legal problems...* (at page 242 [567])

14. Kirby J favoured a construction of the relevant provisions in the *Native Title Act 1993* (Cth) that '*is further supported by Australia's ratification of international instruments which expressly provide for the protection of fundamental human rights*.' (at page 247 [581])

15. As to paragraph 12 of the Attorney-General's submission, the Commission submits there is no principle of 'special caution' when considering the relevance of international law to State statutes. The Attorney-General's reference to *Coleman v Power* (2004) 220 CLR 1 is also out of context. There, at pages 27-29 [17] – [19], [24] the Chief Justice was raising the question of the relevance of the ICCPR to legislation which predated Australia's ratification of the ICCPR in 1980, rather than distinguishing the approach to be taken to state legislation. To approach State legislation differently is at odds with existing authority and practice.[9]

Common law principles and the use of foreign judgments concerning international law

16. As for the common law principles concerning the use of foreign judgments, there is long standing authority that regard may be had to comparative international human

[9] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, *Dietrich v R* (1992) 177 CLR 292, *Jago v District Court of New South Wales* (1989) 168 CLR 23 and (1988) 12 NSWLR 558 (CA) and *Adler v District Court of New South Wales* & o*rs* (1990) 19 NSWLR 317 (CA).

rights jurisprudence, whether domestic or international courts.[10] The Commission notes that the Attorney-General's submission does not suggest otherwise.

Application of common law principles to the construction of the EO Act

17. Contrary to paragraphs 13 – 15 of the Attorney-General's submissions, it is not correct that unless there is an express reference to the ICCPR (or other treaty) in the EO Act or the Second Reading Speech, international law is not relevant to the construction of a statute. The subject matter of the EO Act is plainly and directly concerned with the right to equality and freedom from discrimination. These are rights which run deep in natural law theory of human rights[11] and modern statements of international human rights law. Australia's (and Victoria's) interest in the legal protection of the right to equality did not arise only after ratification of the ICCPR in August 1980.

18. Contrary to paragraph 14 of the Attorney-General's submissions, the Commission has not contended that ss 75(2) and 77 of the EO Act were enacted to give effect to article 18 of the ICCPR. Rather, it has always been the Commission's contention that when construing ss 75(2) and 77 of the EO Act, regard may be had to the international human rights laws concerning the nature of the freedom of religion and the manner in which that right has been developed internationally with respect to the content of the right and the limitation on the right.

What difference does s 32(2) of the Charter make to these general principles of construction?

19. The Attorney-General contends that s 32 of the Charter and the common law principles are 'quite different' (paragraph 18). The Commission does not agree with the Attorney-General's contention. Section 32 builds on the common law principles discussed above. First, there is an express requirement to interpret Victorian law, as far as possible, in way that is compatible with human rights.

20. Secondly, the sources of international human rights law which may be considered is broader than the common law principle. Section 32(2) of the Charter provides:

> *(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.*

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[10] *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 , *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* (1943) 67 CLR 116 and *J v Lieschke* (1987) 162 CLR 447.
International Court of Justice: *Bonser v La Macchia* (1969) 122 CLR 177, *New South Wales v Commonwealth* (1975) 135 CLR 337, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, *Commonwealth v Tasmania* (1983) 158 CLR 1, *Gerhardy v Brown* (1985) 159 CLR 70, *Polyukhovich v Commonwealth* (1991) 172 CLR 501, *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and more recently *Roach v Electoral Commissioner* [2007] HCA 43.

European Court of Human Rights: *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation* (1982) 152 CLR 25, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* (1992) 177 CLR 106, *Dietrich v R* (1992) 177 CLR 292, *Breen v Williams* (1996) 186 CLR 71, *Commissioner Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, *Re East; Ex parte Nguyen* (1998)196 CLR 354at 374 and in Victorian pre-Charter *R v Wei Tang* [2007] VSCA 134. See also *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 116 ALR 54 at 64, in the Family Court *Re Kevin and Jennifer* (2003) 172 FLR 300 and earlier (2001) 165 FLR 404 and *B v B* (1997) 21 Fam LR 676.

UN Human Rights Committee: *Re East; Ex parte Nguyen* (1998)196 CLR 354 at 389, *Pearce v R* (1998) 194 CLR 610 at 645.

[11] See McKean W, *Equality and Discrimination under International Law*, Clarendon Press (1983), pages 1- 87.

21. For the purpose of s 32(2), the expression 'international law' is not defined in the Charter or the *Interpretation of Legislation Act* 1984 (Vic). The Commission agrees with the Attorney-General's submission (paragraph 20.1) that article 38 of the Statute of the International Court of Justice identified relevant sources of international law. But, s 32(2) of the Charter does not limit 'international law' to treaties ratified by Australia. Rather, s 32(2) invites consideration of a wide range of sources of international law including UN General Assembly recommendations and declarations, regional human rights treaties that Australia is not a party to, international reports of UN Special Rapporteurs and customary international law etc.[12] In this respect, paragraphs 20.2 and 25 of the Attorney-General's submission are not correct. The language of s 32(2) is not confined to the ICCPR or treaties ratified by Australia.[13]

22. Section 32(2) extends the common law principle because it invites the court to consider the subject matter of the relevant human right, not just the existence of an international obligation on Australia. The common law principles operate on the premise that Australian law should be consistent with international law. In this sense, the objective is to interpret the Australian law in a way that does not put Australia in breach of its international obligations. Section 32(2) also operates on the same premise but goes much further. It allows the court to consider a much broader range of international laws to examine the content of a relevant human right. Section 32(2) is not restricted to treaties that Australia has ratified or merely ensuring compliance with international obligations.

23. In this respect, international human rights treaties often describe a human right in a general way. The content of the right and the manner in which the treaty provision has been interpreted by international courts and bodies or considered by relevant international agencies gives substance to the right. In this respect, s 32(2) permits a court to go well beyond the text of a treaty and consider a wide range of international law sources to consider the subject matter and the scope of the relevant human right in issue.[14]

24. The Attorney-General's submission proceeds on a number of incorrect premises, namely:

    (a) that the words of the treaty must match the words of the statutory provision before resort to international law is of assistance;

    (b) resort to international law is for the purpose of identifying Parliament's intentions.

25. Contrary to paragraph 23 of the Attorney-General's submissions, s 32 is not directed to a limited question of whether a construction of a statute would result in a breach of an international obligation. Rather, a construction which calls for compatibility with a human right requires an examination of the way in which the right operates in practice and in context, as developed in international jurisprudence.

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[12] *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 at [201] – [203]; Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill* , p23.

See also without s 32(2) the use of a range of international law sources - *Morton v Queensland Police Service* [2010] QCA 160; 240 FLR 261 fn 42, where a report of a special Rapportuer was considered by the Queensland Court of Appeal*; Habib v Commonwealth of Australia* [2010] FCAFC 12; 183 FCR 62 at [106] referring to the Inter-America Commission on Human Rights and *Bropho v State of Western Australia* [2008] FCAFC 100; 169 FCR 59 at [79] and [80] referring to the Inter-American Court of Human Rights and the ECOSOC of the UN.

[13] See Explanatory Memorandum to the Charter referring to cl 32(2).

[14] Compare approach taken in South Africa in *S v Makwanyane* (1995) (3) SA 391 (CC) at 413-14.

26. Clearly, consistency between the language international texts and the statutory provision is an important consideration. It may touch on the weight to be given to international sources.[15] However, s 32(2) is not limited to textual matters. Section 32(2) directs attention to the substance and subject matter of the 'relevant human right'. In the present matter, the Commission's primary submissions and those of the ICJ are directed to international law concerning the substance of the right to equality and non discrimination and the freedom of religion. It is not suggested that the inquiry be limited to a comparison of the text of the ICCPR and the EO Act.

Sections 75(2) and 77 of the EO Act

27. Paragraphs 22 – 27 of the Attorney-General's submissions traverse issues beyond the narrow question raised. The Commission responds briefly to these submissions as follows:

(a) it has not been suggested that ss 75 and 77 of the EO Act are contrary to international human rights, rather the Commission and the ICJ's submissions expressly contend that ss 75 and 77 are premised on the protection of the freedom of religion, which is not an unlimited right (see paragraph 22 of the Attorney-General's submissions);

(b) it is correct to say that article 2 of the ICCPR does not direct how a State should reconcile tensions or conflict between rights. Rather, other provisions of the ICCPR such as articles 4 and 5 are directed to the question, as are the limitation built into the rights, on a rights by rights basis;

(c) the Commission does not disagree with paragraphs 25.1, 25.2 and 26 of the Attorney-General's submissions with respect to the way in which the human right of freedom of religion has been interpreted to apply in a wide range of circumstances. However, the Commission submits that the Attorney-General's submission does not correctly state the Commission's written or oral submissions with respect to the right to manifest religion. The Commission's submission has always been that the freedom of religion has a number of facets, one of which includes the right to manifest religious belief (the external expression of religion);

(d) with respect to this facet, the scope of the freedom has been construed more narrowly than other facets of the right, such as what constitutes a religion or religious belief. The international jurisprudence draws the distinction between the internal and external nature of the right (see paragraphs 52 - 53 of the Commission's primary submission and paragraphs 11 and 31-41 of the ICJ submissions). No limitations on the internal aspect of the right are permitted; the external freedoms however are subject to limitations;

(e) the substance of the right is a separate question to the limitation of the right. To establish whether there has been a violation of the right to freedom of religion, the first question is whether the action in question is a 'manifestation' of religious belief. If so, the second question is whether that outward expression of the belief can be reasonably limited;

(f) in regards to the first question, not all expressions of religious belief are accepted as manifestations of that belief that attract the protection of the right.[16] A 'sufficiently

[15] *Purvis v State of New South Wales* (2003) 217 CLR 92 at 153 – 156.
[16] *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246.

close and direct nexus between the act and the underlying belief'[17] is required for an act to count as a 'manifestation' of belief;

(g) once an action has been characterised as a manifestation of belief, the further question is whether that particular manifestation of religious belief can be reasonably limited. This question is context specific and will depend on the circumstances of the individual case. For example, in *Eweida v United Kingdom* (European Court of Human Rights, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10 2013, 15 January 2013), both Ms Eweida and Ms Chaplin alleged a breach of their right to freedom of religion because they were not permitted to wear a cross at work. The court held that wearing a cross was a manifestation of religious belief; however, in Ms Eweida's case the refusal to allow her to wear a cross while at work amounted to an interference with her right to manifest her religion, while in the case of Ms Chaplin it did not. This is because the circumstances of each case determined where the balance was struck. The aim of protecting health and safety in a hospital ward where Ms Chaplin worked 'was inherently of a greater magnitude' than British Airways' desire to promote a corporate image; and

(h) the Commission does not agree with the Attorney-General's contention in paragraphs 26 and 27 that there has been a 'conflation' of the issues between the substance of the right and the limitation of the right.

K L Eastman
Counsel for the Second Respondent
15 April 2013

[17] *Eweida v United Kingdom* (European Court of Human Rights, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10 2013, 15 January 2013) *at 82.*