

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
IN THE COURT OF APPEAL
CIVIL DIVISION
BETWEEN:

SAPC I 2010 0143

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

SECOND RESPONDENT'S SUBMISSIONS

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1. The Victorian Equal Opportunity and Human Rights Commission's (**Commission**) submissions are directed to the questions of law and grounds of appeal relevant to the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**) and the proper interpretation of the *Equal Opportunity Act 1995* (Vic) (**EO Act**).¹
2. The complaint of discriminatory conduct in this proceeding (determined by the Victorian Civil and Administrative Tribunal (**Tribunal**) at first instance) concerns direct discrimination on the basis of (same sex) sexual orientation, in the area of goods and services. The Applicants contend that the Tribunal erred in finding that the Applicants unlawfully discriminated against the 10 named persons to the complaint. The Commission makes no submission as to the findings of direct discrimination by the Tribunal.
3. Rather, the Commission confines its submissions to those appeal points regarding the interpretation of the exception provisions in ss 75 and 77 of the EO Act (**religious exceptions**), the application of the Charter to the interpretative task of the Tribunal by the operation of s 32(1) of the Charter and the scope of the human rights engaged by the operation of the general prohibition against discrimination (the equality right) and by the operation of the religious exceptions (the right to freedom of thought, conscience, religion and belief).²
4. In summary, the Commission submits that:

¹ The Commission will not make submissions on the grounds of appeal concerning factual findings, namely grounds 5(c), 5(d), 5(e), 5(f), 5(g), 5(h), 5(i), 5(j), 5(n), 5(o), 5(p), 5(q) and 5(r).

² Notice of Appeal, Questions 4(a), (b) and (m); Grounds 5(a), (b) and (m)

- (a) The Tribunal did not misapply s 32 of the Charter. While the Tribunal's decision³ was delivered before the High Court's decision in *Momcilovic v The Queen* ⁴ (*Momcilovic*) the approach taken by the Tribunal was consistent with the proper principles of statutory interpretation and s 32 of the Charter;
 - (b) The central issue in the Tribunal proceeding was whether the religious exceptions in ss 75(2) and/or 77 of the EO Act applied on the evidence. The Charter was relevant to how ss 75(2) and 77 should be interpreted and the way in which two apparently conflicting sets of human rights applied. The Tribunal's task was to apply ordinary principles of statutory construction, including section 32 of the Charter. In this respect, the Tribunal properly applied the principles that exceptions or limitations in remedial legislation should be construed strictly.⁵
 - (c) The Tribunal correctly approached the task of interpreting the religious exceptions in s 75(2) and s 77 in light of the Charter. To the extent that these provisions gave effect to a human right, namely the right to freedom of religion in s 14 of the Charter,⁶ it was appropriate for the Tribunal to interpret ss 75(2) and 77 compatibly with freedom of religion. In doing so, the Tribunal was correct to approach the task on the basis that:
 - i. none of the human rights in issue are absolute and all may be limited;
 - ii. if there are apparently conflicting human rights, neither the EO Act, the Charter nor international human rights principles directs a tribunal to find one set of rights nullifies the other set of rights.⁷ The task was to strike a balance that recognises all relevant rights may be limited.
5. As to the First Respondent's Notice of Contention, the Commission submits that the Tribunal correctly decided this issue by finding that the jurisdiction conferred by s 136 of the EO Act, to find a complaint or any part of it proven or not proven,⁸ necessarily requires a determination of the connection between the subject matter of the complaint and the complainant, in order to determine whether the complainant is a party that is able to complain.⁹

Questions 4(a), (b) and (m); Grounds 5(a), (b) and (m)
The Charter and EO Act Interpretation

6. The Applicants contend that the Tribunal erred because it determined that the Charter required a broad interpretation of the provisions proscribing discrimination but a narrow interpretation of the exceptions found in ss 75(2) and 77 of the EO Act.¹⁰ The Applicants also say that the Tribunal erred because it gave more weight to the equality/non discrimination rights and failed to interpret ss 75(2) and 77 of the EO Act consistent with the freedom of religion and freedom of expression rights provided in the Charter.¹¹

³ *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti-Discrimination)* [2010] VCAT 1613 (8 October 2010) (*Cobaw*)

⁴ [2011] HCA 34; (2011) 280 ALR 221; (2011) 85 ALJR 957

⁵ [2010] VCAT 1613 at [221]

⁶ The Commission notes the Applicants maintain that the right to freedom of expression was in issue but this right was not relevant to the dispute. Section 75(2) and 77 of the EO Act are not intended to protect the right of freedom of expression. While expression of religious beliefs may involve the exercise of expression, there is no suggestion that ss 75(2) or 77 of the EO Act have the purpose of protecting the types of rights contemplated by s 15 of the Charter.

⁷ *Cobaw* at [39]

⁸ Subsections 136(a), (b) and (c) respectively

⁹ *Cobaw* [48]

¹⁰ Applicants' submissions at paragraph 6

¹¹ Grounds 5(a), (b) and (m) of the Applicants' Notice of Appeal and paragraphs 1 - 7 of the Applicants' submissions.

7. The Commission submits that the Applicants' contentions do not correctly or fairly describe the Tribunal's reasons or how the Tribunal applied the Charter.
8. The Commission submits that the Tribunal's approach to the construction of the EO Act in light of the Charter was correct. In accordance with established principles of statutory construction,¹² the Tribunal was required to construe the EO Act in light of its text, context and purpose and apply ordinary tools of statutory interpretation such as the *Interpretation of Legislation Act 1984* (Vic) and s 32 of the Charter.
9. It is well accepted that the EO Act had the object and purpose of eliminating discrimination on the basis of certain attributes. Section 3(a) and 3(b) of the EO Act provided:
 - (1) *The objectives of this Act are—*
 - (a) *to promote recognition and acceptance of everyone's right to equality of opportunity;*
 - (b) *to eliminate, as far as possible, discrimination against people.*
10. It is also well accepted that discrimination legislation should be interpreted beneficially.¹³ When adopting a beneficial and purposive approach, a court or tribunal may give such legislation 'the widest interpretation that its language will permit'.¹⁴
11. Where legislation is enacted pursuant to, or in contemplation of, the assumption of international obligations, in cases of ambiguity a court or tribunal should favour a construction which accords with Australia's obligations.¹⁵ While the EO Act does not directly incorporate a specific international human rights law, it is well accepted that freedom from discrimination and the right to equality of treatment are long-standing and well accepted human rights.¹⁶ The EO Act specifically protects those human rights in Victorian law.
12. The human rights of equality and freedom from discrimination are not absolute rights and the rights may be limited in some circumstances.¹⁷ However, as a matter of general principle, where human rights are limited, "courts should not impute into the legislature an intention to interfere

¹² As enunciated by the High Court of Australia in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

¹³ *IW v City of Perth* (1997) 191 CLR 1, 14 (Brennan CJ and McHugh J), 22-23 (Gaudron J), 27 (Toohey), 39 and 41-42 (Gummow J), 58 (Kirby J), *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J) and *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 332 (Kirby J).

¹⁴ *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231, 260-261 (McHugh J), *Bropho v Western Australia* (1990) 171 CLR 1, 20 applying *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 423, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408, *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112-113 and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381, 384.

¹⁵ *R & R Fazzolari Pty Limited v Parramatta City Council*; *Mac's Pty Limited v Parramatta City Council* [2009] HCA 12 at [43], [44] (French CJ), and *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [28] (Gleeson CJ).

¹⁶ See for example article 55(c) of the UN Charter, article 2(1) of the Universal Declaration of Human Rights, articles 2(2) and 26 of the International Covenant on Civil and Political Rights, General Comment No. 18 of the Human Rights Committee in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, pp. 134-137, article 2(2) of the International Covenant on Economic, Social and Cultural Rights. See also *South West Africa Case (Second Phase)* (1966) Rep 6, pp303-304, 305 per Tanaka J, *Case of Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 28 May 1985, Series A, No. 94, p. 36 para 72.

¹⁷ See s 7(2) of the Charter.

with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.”¹⁸

13. The EO Act provided for a range of exceptions or defences for conduct which would otherwise amount to discrimination. Some exceptions were specific to a particular area (for example discrimination in insurance s 66) or for a particular attribute (for example where a person's sex is a genuine occupational qualification s 14(1)). Other exceptions applied generally to all areas where discrimination would otherwise be prohibited (see Part 4, ss 69 – 82, 84). There was also provision for specific exemptions to be granted by the Tribunal for one-off or particular circumstances (see s 83 of the EO Act).¹⁹ The relevant exceptions in the present matter applied to religious bodies in ss 75(2) and 77 of the EO Act.
14. Consistently with general principles, exceptions or defences in discrimination legislation should be construed strictly.²⁰
15. A respondent to a complaint bears the onus of establishing that an exception applies.²¹
16. Assuming these principles apply, the task of the Tribunal was to consider how the Charter applied to the construction of the EO Act. The Commission submits that the Tribunal posed the correct questions and took the correct approach to applying the Charter.²²

The operation of section 32 (including retrospectivity issue)

17. Section 32(1) of the Charter 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.*
18. Section 32(1) of the Charter means that all relevant provisions in the EO Act must be interpreted in a way that is compatible with *relevant* human rights (being those rights in Part 2). The identification of relevant human rights involves construing the nature and content of the human rights set out in Part 2.
19. The Applicants contended at first instance that the Charter had no retrospective application to these proceedings. The Commission submits that the Tribunal correctly reasoned that the Charter does apply to these proceedings by virtue of s 1(2)(b) read together with s 49(1) of the Charter. The Commission contends that the Tribunal's reasons²³ were correct in this regard.
20. The operation of s 32 was examined by the High Court in *Momcilovic*.²⁴ Six members of the High Court confirmed the validity of s 32(1) of the Charter and held that s 32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of

¹⁸ *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 591-92 [43], *South Australia v Totani* (2010) 242 CLR 1 at [53] (French CJ), *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501 at [47] (French CJ), *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [29] (Gleeson CJ) citing *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ), *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131 and *Annetts v McCann* (1990) 170 CLR 596 at 598 (Mason CJ, Deane and McHugh JJ). See also *Dover v Doyle & Anor* [2012] VSC 117 at [44] - [45].

¹⁹ See for example the discussion about the nature of the Tribunal's powers to grant exemption in *Department of Human Services & Department of Health (Anti-Discrimination Exemption)* [2010] VCAT 1116 at [2] and [3] and *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869.

²⁰ *X v Commonwealth* (1999) 200 CLR 177, 223 (Kirby J) and *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 333 and footnotes 168-169 (Kirby J)

²¹ *Taylor v Moorabbin Saints Junior Football League & Anor* [2004] VCAT 158

²² *Cobawit* [11(i)], [12] - [41].

²³ At [26] - [29].

²⁴ [2011] HCA 34; (2011) 280 ALR 221; (2011) 85 ALJR 957

Parliament in enacting the provision. The court or tribunal must discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction.²⁵

21. The approach taken by the members of the High Court to s 32(1) is consistent with this particular aspect of the Court of Appeal's approach in *R v Momcilovic* (2010) 25 VR 436 at [103]:

Compliance with the s 32(1) obligation means exploring all 'possible' interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights. What is 'possible' is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights. That is a powerful presumption, as Gleeson CJ made clear in Plaintiff S157/2002 v The Commonwealth.

22. However, the High Court was divided as to what is meant by the interpretive obligation in s 32 insofar as the relationship between s 32 and s 7(2).²⁶ As Nettle JA observed in *WK v The Queen* [2011] VSCA 345 at [55]:

The problem is that the judgments of the High Court in Momcilovic v The Queen do not yield a single or majority view as to what is meant by interpreting a statutory provision in a way that is compatible with human rights within the meaning of s 32 of the Charter.

23. Recently, in *Slaveski v Smith* [2012] VSCA 25 at [21], the Court of Appeal explained *Momcilovic* as follows:

French CJ, Crennan and Kiefel JJ concluded that s 7(2) 'cannot inform the interpretative process which s 32(1) mandates' but is engaged only when and if 'the statutory provision under consideration imposes a limit on its enjoyment'. '[I]t cannot be interpreted into the content of the rights and freedoms set out in the Charter'. In contrast, Gummow, Hayne and Bell JJ held that s 7(2) does inform the interpretative task to the extent that it will usually be appropriate for a court first to consider whether under s 7(2) there is scope for a justified limitation of the right in issue. It followed, as Gummow J put it, that '[s]ection 32(1) is directed to the interpretation of statutory provisions in a way which is compatible with the human right in question, as identified and described in Part 2, including, where it has been engaged, s 7(2). Heydon J observed that, if s 7(2) were valid, it would inform the interpretative task, but his Honour held that both s 7(2) and s 32(1) were invalid.

24. The Court left open whether, in these circumstances, it was "bound to follow its own decision in *Momcilovic* unless satisfied that it is clearly wrong."²⁷
25. More recently, in *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors* [2012] VSCA 91 at [29], Warren CJ and Cavanough AJA said that having regard to the overall result in *Momcilovic*, there is no ratio on this point in the High Court. They noted that there is at least some doubt as to whether the Court of Appeal is bound to follow its previous decision in *Momcilovic*, particularly in light of the fact that the High Court set aside the Court of Appeal's orders. The Commission submits that the plurality view of the High Court that s 7(2) does inform the interpretive task in s 32 should be followed by this Court.

²⁵ *Slaveski v Smith & Anor* [2012] VSCA 25 at [20]

²⁶ Chief Justice French, Justices Bell and Heydon gave separate judgments, Justices Crennan and Kiefel delivered a joint judgment and Justice Hayne agreed with the reasons of Justice Gummow on this particular issue.

²⁷ [2012] VSCA 25 at [22], citing *Green v The Queen* [2011] HCA 49, [83]–[87] (Heydon J); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [135]; *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 562 [112] (Gaudron, McHugh and Gummow JJ); *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314.

26. In the present matter, the Tribunal correctly observed:
- a. both the EO Act and the Charter must be interpreted in conformity with s35(a) of the *Interpretation of Legislation Act* 1984 (Vic) such that a construction that will promote the purpose or object underlying the EO Act is to be preferred to one which does not promote that purpose or object at [14];
 - b. the EO Act, like discrimination legislation generally, is remedial legislation and should be construed beneficially [17];
 - c. s 32 of the Charter is to be regarded as part of the body of rules governing the interpretative task and not a separate special rule [24]; and
 - d. where s 32(1) of the Charter uses the expression 'compatible', it means that the task of interpreting the relevant legislation, here the EO Act, should be to give effect to the relevant human rights, with regard to any limitation as appropriate. [20] [21].
27. The Tribunal's approach to construing the EO Act provisions' compatibility with all of the relevant human rights in issue was correct. Section 32 does not permit the Tribunal to adopt a meaning inconsistent with a 'fundamental feature' or the 'underlying thrust' of the EO Act.²⁸ The Tribunal is not permitted to 'play with [the] words' of the EO Act.²⁹ The task remains one of determining what Parliament would reasonably be understood to have meant by using the actual language of the EO Act.
28. Implicit in s 32(1) of the Charter is the need to identify whether a human right in Part 2 is relevant to the interpretative task. The Tribunal correctly identified the right to equality and freedom from discrimination (ss 8(2) and 8(3) of the Charter) as relevant to the interpretation of ss 42(1)(a), 42(1)(c), 49(a) and 104(1B)(a) of the EO Act. The Tribunal also correctly identified the right to freedom of religion (s 14 of the Charter) as relevant to the interpretation of ss 75(2) and 77 of the EO Act.
29. The Commission submits that it is not enough to identify the human rights in issue. The Tribunal was also required to determine the content of the human rights in issue. As the Tribunal observed in this matter, this exercise is not done in the abstract.³⁰
30. As to this task, it is generally accepted that the human rights in issue should be construed in a broad way. As Warren CJ said in *Re an application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [80]:
- As already observed, human rights should be construed in the broadest possible way...*
- The Charter supports the approach that rights should be construed in the broadest possible way before consideration is given to whether they should be limited in accordance with s 7(2) of the Charter. That section serves the purpose of mitigating any damage to society that may arise from upholding an individual's right.*
31. Section 32(2) of the Charter allows reference to international sources relevant to a human right when interpreting a statutory provision, which includes the Charter itself.³¹
32. As French CJ observed in *Momcilovic* at [18], s 32(2) does not authorise a court to do anything which it cannot already do. He noted that the use of comparative materials in judicial decision-making in Australia is not novel. He also observed that s 32(2) does not create a mechanism by which international law or interpretive principles affecting international treaties become part of the law of Victoria. On the other hand, it does not exclude the application of common law principles

²⁸ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [33] (per Nicholls LJ) and see discussion by the Court of Appeal in *Momcilovic* at [52] – [53].

²⁹ *Wilkinson v Inland Revenue Commissioners* [2006] 1 WLR 1718 discussed in *Momcilovic* at [55].

³⁰ *Cobaw* at [224]

³¹ see *Kracke v Mental Health Review Board* [2009] VCAT 646, [201]-[202].

of interpretation relevant to a statute which adopts, as the Charter has, the terminology of an international convention.

33. Accordingly, the Commission submits that when determining the scope and content of rights engaged, it is both instructive, and the Victorian Parliament's intention, that regard is had to relevant sources of international law.

Rights engaged in this proceeding and the balancing exercise carried out by the Tribunal

34. The rights engaged in this proceeding have been identified by all the parties as: the rights of the named persons to equal and effective protection from discrimination (the equality right) and the right of the Applicants' to religious freedom, including the freedom to manifest (demonstrate) their religious belief.
35. The task for the Tribunal, as identified by the Commission in its original submissions, was to interpret the religious exception provisions in the EO Act in a way that appropriately balanced these two sets of rights, with reference to the reasonable limitation test in s 7(2) of the Charter: so that a rights-compatible interpretation,³² could be reached.
36. The Applicants contend that the Tribunal erred in the way it weighed the competing sets of rights that are engaged in this proceeding and, specifically, erred in giving greater weight to the equality rights than to the right of religious freedom.³³
37. The Commission submits that the Tribunal's analysis of the relevant sections in the EO Act,³⁴ particularly the operation of the religious exception provisions, constituted a lawful balancing exercise of the two sets of rights. It was open to the Tribunal to strike a balance between both rights which, by their nature and the operation of the limitation provision in s 7(2) of the Charter, are not absolute and can be reasonably limited.³⁵
38. The Commission also submits that the Tribunal was correct in determining that it did not need to determine whether there had been a 'breach' of rights, or that one set of rights trumps another in scoping the religious exception provisions in the EO Act. The Commission adopts the First Respondent's submission in this respect.³⁶

Equality and freedom from discrimination

39. The definition of discrimination in s 8 of the Charter has the meaning of 'discrimination' for the purposes of the EO Act on the basis of a protected attribute in s 6 of the EO Act.³⁷ This link between the definition of discrimination for the purposes of s 8 of the Charter and the identification of discriminatory conduct in the EO Act reflects the close relationship between the two Acts and between the *Equal Opportunity Act 2010* and the Charter, as the key rights-protective legislation in Victoria.³⁸
40. The link between the protection against anti-discrimination afforded by the EO Act and the scope of the right in s 8 of the Charter was considered in some detail in Bell J in *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)*.³⁹ As Bell J observed,⁴⁰ the Charter operates to strengthen

³² In accordance with subsection 32(1) of the Charter

³³ Applicants' submissions at [6]

³⁴ Sections 42, 44, 75 and 77

³⁵ See: article 18(3) of the ICCPR and *S.W.M. Broeks v. the Netherlands* CCPR/C/OP/2, pp. 196-201 (9/4/1987). See generally Joseph S et al *The International Covenant on Civil and Political Rights* (2nd edition) OUP 2004, pp 700 – 728

³⁶ First Respondent's Submissions, at [7]

³⁷ Charter, section 4

³⁸ See: Explanatory Memorandum to the *Equal Opportunity Act 2010*, p. 3

³⁹ [2009] VCAT 1869 at [106] – [303]

⁴⁰ *Lifestyle Communities (No. 3)* at [10]

Victoria's anti-discrimination legislative framework. The Commission adopts in summary the discussion about the elements of the right to equality and freedom from discrimination identified by Bell J for the purpose of s 8 of the Charter.

41. The Commission agrees with the First Respondent's submission⁴¹ that the Applicants' contention that the definition of 'discrimination' in the Charter is limited by the operation of s 12 of the EO Act, is misconceived.⁴² Section 12 of the EO Act does not address the core definition of discrimination (found in s 7 of the EO Act) but merely operates to explain the effect of the exception and exemption provisions in Parts 3 and 4 of the EO Act. Conduct that is subject to an exception or exemption may remain discriminatory in nature, but will not be prohibited. In any event, the scope of s 8 of the Charter (the equality right) and the definition of 'discrimination' in that context goes beyond the right to effective protection from discrimination, and should not be unduly confined.⁴³
42. The EO Act provides a broad legislative scheme to protect people from discrimination, victimisation and sexual harassment. Key objectives of the EO Act are to promote recognition and acceptance of everyone's right to equality of opportunity,⁴⁴ and to eliminate discrimination as far as possible.⁴⁵ As a general principle, anti-discrimination legislation should be interpreted beneficially, as it is remedial legislation.⁴⁶ Further, when adopting a beneficial and purposive approach to anti-discrimination statutes, a court or tribunal may give such legislation "*the widest interpretation that its language will permit*".⁴⁷
43. While the EO Act does not directly incorporate a specific international human rights law, it is well accepted that freedom from discrimination and the right to equality of treatment are long standing and well accepted human rights.⁴⁸ The EO Act specifically protects those human rights in Victorian law. Where legislation is enacted pursuant to, or in contemplation of, the assumption of international obligations, in cases of ambiguity a court or tribunal should favour a construction which accords with Australia's obligations.⁴⁹

⁴¹ First Respondent's submissions at [6]

⁴² Applicant's submissions at [4]

⁴³ See: subsection 8(2) and subsection 8(3): 'everyone is equal before the law and is entitled to the equal protection of the law without discrimination'.

⁴⁴ EO Act, subsection 3(a)

⁴⁵ EO Act, subsection 3(b)

⁴⁶ *IW v City of Perth* (1997) 191 CLR 1, 14 (Brennan CJ and McHugh J), 22-23 (Gaudron J), 27 (Toohey), 39 and 41-42 (Gummow J), 58 (Kirby J); *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J); *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 332 (Kirby J)

⁴⁷ *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231, 260-261 (McHugh J). See also: *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 332; *Bropho v Western Australia* (1990) 171 CLR 1, 20 applying *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 423; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112-113 and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381, 384

⁴⁸ See for example: article 55(c) of the UN Charter, article 2(1) of the Universal Declaration of Human Rights, Articles 2(2) and 26 of the *International Covenant on Civil and Political Rights*, General Comment No. 18 of the Human Rights Committee in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, pp. 134-137; article 2(2) of the *International Covenant on Economic, Social and Cultural Rights*. See also: *South West Africa Case (Second Phase)* (1966) Rep 6, pp303-304, 305 per Tanaka J; *Case of Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 28 May 1985, Series A, No. 94, p. 36 para 72.

⁴⁹ *R & R Fazzolari Pty Limited v Parramatta City Council; Mac's Pty Limited v Parramatta City Council* [2009] HCA 12 at [43], [44] (French CJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [28] (Gleeson CJ); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).

44. In terms of sexual orientation as a protected attribute under the EO Act, the Commission notes the Second Reading Speech of the *Equal Opportunity (Gender Identity and Sexual Orientation) Bill 2000*.⁵⁰

This bill prohibits discrimination against a person on the basis of his or her sexual orientation. This is defined to mean homosexuality - including lesbianism - bisexuality or heterosexuality. The amendment is not intended to limit the current operation of the Equal Opportunity Act in any way but rather to ensure that people are fully protected from discrimination on the basis of their sexual orientation.

(emphasis added).

45. By including sexual orientation as a protected attribute, the EO Act reflects accepted international standards which also recognise that discrimination on the ground of sexual orientation is contrary to human rights.⁵¹
46. In *R (Amicus) & Others v Secretary of State for Trade and Industry* [2004] EWHC 860; [2007] ICR 1176 (**Amicus**), discrimination on the ground of sexual orientation is recognised as an impermissible ground of discrimination and subject to the protection of the right to privacy and freedom from discrimination. The issue in *Amicus* was the validity of regulations which limited the freedom from discrimination on the ground of sexual preference and homosexuality. At [28], the Court said:

Sexual orientation is a most intimate aspect of private life and personal identity. It is protected under the Convention, in particular under articles 8 and 14 the application of which is considered later in this judgment. Such protection extends to the employment context. The Convention case-law also shows that weighty reasons are required to justify any interference with an individual's Convention rights not to be discriminated against on grounds of sexual orientation.

47. The Commission also notes the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (26 March 2007) formulated by a group of 29 international human rights experts,⁵² and the resolution adopted by the European Parliament concerning Discrimination on the basis of sexual orientation and gender identity.
48. The Commission submits that when determining the scope and content of the equality right, the following general principles should be followed:
- (a) The EO Act is beneficial and remedial legislation and accordingly prohibition against discrimination should be construed broadly in keeping with this principle;
 - (b) The equality right works as the 'protective arch' of the Charter and should be construed broadly;
 - (c) In protecting sexual orientation as an attribute under the EO Act, Parliament has turned its mind to the protection of equality rights of people of (same sex) sexual orientation and considers that people should be fully protected from discrimination on this basis; and

⁵⁰ Hansard, Legislative Assembly, 13 April 2000, p. 1014

⁵¹ *Toonen v. Australia* UN Doc CCPR/C/50/D/488/1992 (4 April 1994), (*Dudgeon v UK* 45 Eur. Ct. H.R. (ser. A) at 14 (1981), *Norris v Ireland*, Application No. 10581/83) 26 October 1998, *Modinos v Cyprus* (Application no. 15070/89) 23 April 1993, *Sutherland v United Kingdom* 25186/94 [2001] Eur Court HR 234 (27 March 2001), *Lustig-Prean and Beckett v United Kingdom* (2000) 29 ECHR 548, *A. D. T v United Kingdom* (Application no. 35765/97) (31 July 200), *Salgueiro da Silva Mouta v Portugal* [1999] 1999-IX Eur. Ct. H.R. 309. See contra *Laskey, Jaggard, and Brown v United Kingdom* (1997) 24 EHHR 39. See also *British Columbia College of Teachers v Trinity Western University* [2001] 1 SCR 772 and the authorities cited there in and recently *Christian Legal Society v. Martinez*, 561 U.S. ____ (2010).

⁵² http://www.yogyakartaprinciples.org/principles_en.htm

- (d) International law supports the proposition that protection of equality rights in terms of sexual orientation is important, and that discrimination on this basis is a breach of human rights.

49. The Commission submits that it was proper for the Tribunal to construe ss 6, 42 and 49 of the EO Act in a manner that provided the fullest protection against discrimination on the ground of sexual orientation.

Freedom of religion

50. Section 14 of the Charter relevantly provides:

14. Freedom of thought, conscience, religion and belief

(1) Every person has the right to freedom of thought, conscience, religion and belief, including-

(a) the freedom to have or to adopt a religion or belief of his or her choice; and

(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

51. The expressions 'thought', 'conscience', 'religion' and 'belief' are not defined in the Charter, but reference can be made to Article 18 of the International Covenant on Civil and Political Rights (ICCPR).⁵³

52. The UN Human Rights Committee's General Comment No. 22⁵⁴ explains the scope of the aspects of the right protected by Article 18.⁵⁵ The Committee has observed:

- (a) the terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions;
- (b) Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. No one can be compelled to reveal his thoughts or adherence to a religion or belief. The Commission notes that this is referred to as the *internal freedom - forum internum*;
- (c) the freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts;
- (d) the *concept of worship* extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts;
- (e) the *observance and practice of religion* or belief include ceremonial acts and customs;
- (f) the *practice and teaching of religion* or belief includes acts integral to the conduct by religious groups of their basic affairs. The Commission notes that these latter matters are referred to as the *external freedoms - forum externum*; and
- (g) the external freedoms are subject to limitations as provided by Article 18(3).

⁵³ [1980] ATS 23. Entry into force generally (except Article 41) on 23 March 1976. Entry into force for Australia (except Article 41) on 13 November 1980.

⁵⁴ Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

<http://www1.umn.edu/humanrts/gencomm/hrcom22.htm>

⁵⁵ see also *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981) G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981). <http://www1.umn.edu/humanrts/instree/d4deidrb.htm>

53. As to the right to manifest religion or belief (the external freedom), the international jurisprudence confirms that:

- (a) not all acts *motivated* by a religion or belief are 'manifestations' of that belief. For example, a claim by a Quaker that paying a tax that financed weapons research infringed his religious beliefs was rejected. The European Commission on Human Rights said the article 9 "*does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief*".⁵⁶ The freedom to hold beliefs is broader than the freedom to act upon them;⁵⁷
- (b) the right does not mean that one has the right to manifest one's religion at any time and in any place and in any manner that accords with one's beliefs;⁵⁸
- (c) the 'manifestation' must be clearly connected to the belief in order to be protected. Consideration must be given to what the person believes he or she is obliged to do as a consequence of their belief.⁵⁹ For a non-religious belief, it must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs;
- (d) the context in which the religion or belief is exercised is relevant.⁶⁰ In *Pichon and Sajous v France*,⁶¹ the European Commission on Human Rights upheld the approach that it is mainly personal convictions and religious beliefs which are protected by Article 9, although closely linked acts "of worship or devotion forming part of the practice of a religion or a belief" are also protected. In this case, religious beliefs did not justify a refusal by pharmacists to sell contraceptives as '*the sale of contraceptives is legal and occurs nowhere other than in a pharmacy*', and the pharmacists could '*manifest [their] beliefs in many ways outside the professional sphere*.';
- (e) the right does not extend to members of any religion imposing their beliefs on secular society;⁶²
- (f) the right does not impose a positive obligation on the State to shield those holding beliefs from criticism of the beliefs. For example, there is no obligation on the State to introduce legislation to proscribe blasphemy or, where blasphemy laws are present, there is no duty on public authorities to bring proceedings against publishers of works that offend the sensitivities of any individual or group;⁶³ and
- (g) the manifestations consistent with basic standards of human dignity are to be protected.

⁵⁶ *C v United Kingdom* App. No. 10358/83, 37 ECHR Dec & Rep 142 at 147 referred to with approval in *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (Equality and Human Rights Commission intervening)* [2010] EWHC 520 (Ch)

⁵⁷ *British Columbia College of Teachers v Trinity Western University* [2001] 1 SCR 772 at [36] and [37]. See also *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1 at [22] – [25] and *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (Equality and Human Rights Commission intervening)* [2010] EWHC 520 (Ch).

⁵⁸ *R (SB) v Denbigh High School* [2007] 1 AC 100 at [86] referring to *Kalaç v Turkey* (1997) 27 EHRR, 552, para 27.

⁵⁹ *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 1339, 1358, para 60 and referred to in *Williamson* at [63]

⁶⁰ *Ahmad v United Kingdom* (1981) 4 EHRR 126, para 11

⁶¹ App. No. 49853/99 (2 October 2001).

⁶² See observations of Laws LJ in *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1 at [22] – [25].

⁶³ *Choudhury v United Kingdom* Application No.00017439/90 (1991) and In *Wingrove v United Kingdom* App. No. 17419/90, 24 Eur. H.R. Rep. 1 (1997), ¶ 52–53 the Commission that while religious believers could not expect to be exempt from all criticism and must tolerate the denial by others of their beliefs.

54. The Commission submits that s 14 of the Charter should be interpreted consistently with the way the internationally recognised human right has interpreted. It is clear that the nature of the right and the manner in which the right is protected must be determined by the context in which the freedom of religion is claimed. In this present matter, the Tribunal was correct to interpret ss 75(2) and 77 consistently with the human right of freedom of religion, but it was required to do so having regard to the content and the nature of the right. It was also proper for the Tribunal to have regard to the context in which the ss 75(2) and 77 of the EO Act protected the right, namely as an exception to the rights of equality and non discrimination otherwise afforded by the EO Act.
55. The enactment of the EO Act predates the Charter but it is instructive to note that the Parliament specifically acknowledged that the religious exceptions recognised the right of freedom of religion, and that the purpose of the religious exceptions was to "strike a balance" between different and important rights.⁶⁴ However, while the EO Act provides a comprehensive scheme for the protection of the right to be free from discrimination, it does not create a stand-alone right to freedom of religion, but rather it recognises that aspects of the human rights concerning religion may operate to limit the right to be free from discrimination.
56. Whilst it is acknowledged that actions taken to conform to religious doctrines are important and protected by the freedom of religion, these must be balanced against competing rights in the circumstances. The reliance on the freedom of religion operated to limit the right to equality and discrimination. While not seeking to undermine or diminish the importance of freedom of religion, its application must be considered in this context. The Parliament considered that the purpose of the exceptions was to 'strike a balance' between two rights. There is no suggestion that one set of rights trumps the other in the operation of the EO Act, rather both sets of rights may co-exist.
57. The Commission submits that ss 75(2) and 77 of the EO Act do not confer a positive right to exercise a person's religious beliefs at the expense of another person's rights.⁶⁵ These provisions are a shield rather than sword. The freedom of religion is not an absolute right and it may be limited. In this respect, there is a difference in the way the freedom may be enjoyed. While recognition of the right to hold religious beliefs is broad, the manifestation of those beliefs or acting in accordance with the beliefs is a more limited right. Section 75(2) and 77 of the EO Act should be interpreted in this context. Parliament recognised that the exception provisions were intended to strike a balance between equality and freedom of religion.

Application of s 32(1) of the Charter to the EO Act

58. The Commission submits that s 32(1) of the Charter did not require the Tribunal to determine whether any of these human rights had been breached. The Commission submits that the Applicants have wrongly assumed that the Tribunal's task required by s 32 was to determine whether a human right in Part 2 has been breached.⁶⁶
59. The parties sought to characterise the claim as a claim of two competing sets of human rights. Claims were advanced that one set of human rights should prevail over the other. The Commission submits that in the context of the EO Act, it is wrong for the Applicants to characterise the dispute in this way. The Tribunal was correct when it rejected an approach that required it to find one set of rights trumped another.
60. The Charter does not expressly address what approach should be taken if the question of interpretation involves conflicting sets of human rights. The Commission notes that in *Momcilovic* the issue was not directed to how s 32(1) applies where there are apparently conflicting human

⁶⁴ Victoria, *Hansard*, Legislative Assembly, 4 May 1995, 1250-1

⁶⁵ Compare *Burke v Tralagga & Anor* [1986] EOC 92-161 in relation to s 56(d) of NSW *Anti-Discrimination Act 1977* (NSW).

⁶⁶ See paragraphs [2] and [3] of the Applicants' submissions.

rights. However, members of the High Court all acknowledged that the human rights in Part 2 of the Charter were not absolute and all the rights may be limited by s 7(2) of the Charter. In essence, the question was whether 'compatible with' required consideration of any s 7(2) limitations when interpreting the legislation in issue for the purpose of s 32. The differences between the members of the High Court was *when* the limitation of rights should be considered for the purpose of s 32(1) of the Act. It is clear that none of the members of the Court suggested that limitations should not be considered.

61. As noted at paragraphs 20 – 23 above, the Commission notes that as to the differing approaches to s 32, there was a 4:3 plurality that s 7(2) informs the s 32(1) interpretative task.
62. If the plurality approach is followed, then s 7(2) should be applied to both ss 8 and 14 when the content of these rights are considered. Consistently with s 7(2), the Tribunal adopted a proper approach. Contrary to the Applicants' contention, the Tribunal did not read down the religious exceptions in ss 75 and 77 of the EO Act by reference to the Charter. Contrary to the Applicant's submissions, the Tribunal did not use the Charter in such a way as to give one set of Charter rights primacy over other such rights.
63. When considering how s 7(2) applies, the Charter must be read as a whole, so that one right is not '*privileged at the expense of another*.'⁶⁷ The rights co-exist and an interpretation which is compatible with the Charter is one which recognises that these rights co-exist.⁶⁸ The Commission submits that this is the very reason that s 7(2) of the Charter was included in Part 2 of the Charter along with the rights themselves.
64. In the present matter, the Commission submits that a possible construction of ss 75(2) and/or 77 of the EO Act compatible with the Charter rights is to ask whether these exceptions are reasonable, rational and proportionate to the objectives for which the alleged discriminatory actions are taken. In effect, this is to test these provisions against the formula set out in s 7(2) of the Charter and by reference to relevant international sources.
65. For the purpose of s 75(2) of the EO Act, the expressions 'religious purposes', 'religion', 'doctrines' and 'religious sensitivities' are not defined. The Commission submits that these expressions should be construed consistently with the Charter which means that the meaning of religion should not be unduly confined.
66. The Commission further submits that an interpretation which is compatible with human rights is one which permits s 75(2)(a) to operate when the discrimination is 'reasonably necessary' to conform to religious doctrines.⁶⁹ This did not require the Tribunal to read in words to s 75(2)(a), but rather take a strict approach to the meaning of 'conform'. The expression 'conform' should not be interpreted to mean anything that is done by a person holding religious beliefs or motivated by religious beliefs satisfies the exemption.
67. A construction of s 75(2)(a) that is compatible with the Charter is one which required the Applicants to demonstrate that their conduct was clearly connected to the belief. Consideration must be given to the evidence presented to the Tribunal as what the person believes he or she is obliged to do as a consequence of their belief.⁷⁰ Such an approach permits a respondent's (here the Applicants') actions to be examined objectively in terms of whether they are reasonable,

⁶⁷ cf *British Columbia College of Teachers v Trinity Western University* [2001] 1 SCR 772 at [31]

⁶⁸ [2001] 1 SCR 772 at [34].

⁶⁹ See also *Jubber v Revival Centres International* [1998] VADT 62 (7 April 1998), *Mornington Baptist Church Community Caring Inc* [2005] VCAT 2438 (10 November 2005)

⁷⁰ *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 1339, 1358, para 60 and referred to in *Williamson* at [63]

rational, and proportionate and balanced in relation to competing rights. Consistently with the Charter, it will not involve the Tribunal making an assessment about the validity of the religious views but focuses on the conformance with the religious doctrines.

68. For the purpose of s 75(2)(b) of the EO Act, there must be evidence that the conduct of the religious body is *necessary* to avoid injury to '*religious sensitivities*' of people of a particular religion. Consistently with s 32(1) and 32(2), in international law, 'necessary' means more than convenient or reasonable.⁷¹ The Commission submits that applying Charter principles to s 75(2)(b), the 'sensitivities' must have some connection with the religion itself. It is not enough that for some reason unconnected with their religion, the adherents of a religion find conduct embarrassing or unacceptable. The limitation on the right to equality in the context of religious bodies being permitted to discriminate where this is necessary to avoid injury to the adherents of their faith can be regarded as reasonable and demonstrably justifiable in that it recognises and promotes observance to religion.
69. Section 75(2)(b) has an inbuilt constraint in that the discriminatory actions must be 'necessary'; and the sensitivities of adherents must have a causal nexus with a particular religion.
70. With respect to s 77 of the EO Act, the expression '*necessary to comply*' is commonly used in discrimination legislation. The most authoritative consideration of the phrase is *Waters v Public Transport Corporation* (1991) 173 CLR 349. At 369, Mason CJ and Gaudron (with whom Deane J agreed) said that a wide construction of the exception in s 39 would be '*inconsistent with the general scheme of the [EO] Act*'. They concluded that the exception would only apply where the conduct in question was directly and specifically authorised by the statute in issue. At 413, Justice McHugh described the test as requiring the conduct in question to be mandatory and specific.
71. Applying the reasons of Mason CJ and Gaudron J to this case, the exception applies if there is evidence that the religious belief or principle directly and specifically authorises the conduct in question.
72. With respect to s 77 of the EO Act, the Commission submits that the purpose of this exception is to allow a person to discriminate if the discrimination is necessary to enable the person to comply with the person's genuinely held religious beliefs or principles. This exception gives rise to a significant limitation in that it may be relied upon by any person in relation to anything prohibited by the EO Act.
73. The Commission submits that an interpretation which is compatible human rights is one which permits s77 of the EO Act to operate only where a respondent's (here the Applicants') actions are necessary to comply with subjectively held genuine religious beliefs or principles.
74. The Commission submits that such an approach is compatible with the plurality view of the High Court in *Momcilovic*.

First Respondent's notice of contention: Representative complaint

⁷¹ For example see discussion in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [132], *Matadeen v Pointu* [1999] AC 98 at 109, *R (o/a Scholes) v Secretary of State for the Home Department* [2006] EWCA Civ 1343, 93 BMLR 132 and *R (o/a Gentle and others) v Prime Minister and others* [2008] 2 All ER 1 at [9], [28], [29] and [74].

75. In its Notice of Contention,⁷² the First Respondent submits that the Tribunal had no jurisdiction to inquire whether the requirements for a representative proceeding set out in s 104(1B) of the EO Act had been met, as this matter had already been determined by the Human Rights and Equal Opportunity Commissioner when she had accepted the complaint.
76. The Commission does not adopt this submission. Rather, the Commission submits that the Tribunal correctly decided this issue by finding that the jurisdiction conferred by section 136 of the EO Act, to find a complaint or any part of it proven or not proven,⁷³ necessarily requires a determination of the connection between subject matter of the complaint and the complainant, in order to determine whether the complainant is a party that is able to complain.⁷⁴
77. In relation to the proper interpretation of ss 104(1B) and 104(1C) of the EO Act, the Commission submits that these sections should be interpreted in a manner that facilitates the making of a complaint, and should not be construed narrowly or given an overly technical meaning, in keeping with the beneficial nature of the EO Act.
78. The Commission also submits that, when considering whether the First Respondent has a sufficient interest to make a representative complaint under s 104(1B), section 104 of the EO Act should be interpreted in a manner compatible with relevant human rights (the right to equality before the law),⁷⁵ and should be read so as to give effect to the rights of the persons represented by the First Respondent (the named persons) to seek and obtain an effective remedy. Relevantly, Article 2(3) of the ICCPR recognises a right to an effective remedy in relation to the rights of the kind contained in the Charter.⁷⁶ This international law norm is consistent with the following common law principle:⁷⁷
- If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.*
79. The Commission also notes that s 104(1C) of the EO Act contemplates that a representative party has an interest in a matter beyond that of an ordinary member of the public.⁷⁸ However, where a complaint under the EO Act is made by a representative body, the representative or derivative interests of that body should also be recognised.⁷⁹ The Commission submits that ss 104(1B)(b) and 104(1C) of the EO Act may be satisfied if the representative body's interest is to protect the rights of the persons represented.

Victorian Equal Opportunity & Human Rights Commission
 per Kate Eastman
 Counsel for the Second Respondent
 4 June 2012

⁷² First Respondent's submissions, at [49] – [50]

⁷³ Subsections 136(a), (b) and (c) respectively

⁷⁴ *Cobaw v Christian Youth Camps & Mark Rowe* (Anti-Discrimination) [2010] VCAT 1613 at [48]

⁷⁵ Charter, subsection 32(1)

⁷⁶ *International Covenant on Civil and Political Rights*, Article 2(3)

⁷⁷ *Ashby v White* (1702) 2 Ld Rayd 938 at 953

⁷⁸ *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 54 FLR 421 at 438.

⁷⁹ see *Cameron* at 519, per French J; *AIMPE v Secretary, Department of Transport* (1986) 13 FCR 124 at 133 per Gummow J) and *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537 at 538 per Wilcox J.

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
IN THE COURT OF APPEAL
CIVIL DIVISION

S APCI 2010 0143

BETWEEN

CHRISTIAN YOUTH CAMPS LIMITED (ACN 095 681 342)

First Applicant

and

MARK ROWE

Second Applicant

and

COBAW COMMUNITY HEALTH SERVICES LIMITED

First Respondent

(ACN 136 366 722)

and

**VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS
COMMISSION**

Second Respondent

SECOND RESPONDENT'S LIST OF AUTHORITIES

Date of document:	15 May 2012
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PART A

Legislation

1. *Charter of Human Rights and Responsibilities Act 2006* (Vic): ss 4, 8(2), 8(3), 14, 32
2. *Equal Opportunity Act 1995* (Vic): ss 6, 42(1)(a), 42(1)(c), 49(a), 75(2), 77 and 104(1B)(a)

Cases

3. *Noone Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors* [2012] VSCA 91
4. *Slaveski v Smith & Anor* [2012] VSCA 25
5. *Momcilovic v R* [2011] HCA 34, (2011) 280 ALR 221, (2011) 85 ALJR 957
6. *R v Momcilovic* (2010) 25 VR 436
7. *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869
8. *Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415

PART B

Cases

1. *Dover v Doyle & Anor* [2012] VSC 117 at [44] - [45].
2. *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573
3. *South Australia v Totani* (2010) 242 CLR 1
4. *Department of Human Services & Department of Health (Anti-Discrimination Exemption)* [2010] VCAT 1116
5. *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501
6. *R & R Fazzolari Pty Limited v Parramatta City Council* [2009] HCA 12
7. *Kracke v Mental Health Review Board* [2009] VCAT 646
8. *Mornington Baptist Church Community Caring Inc* [2005] VCAT 2438
9. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476
10. *X v Commonwealth* (1999) 200 CLR 177
11. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355
12. *Qantas Airways Limited v Christie* (1998) 193 CLR 280
13. *Jubber v Revival Centres International* [1998] VADT 62
14. *IW v City of Perth* (1997) 191 CLR 1
15. *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85
16. *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384
17. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273
18. *Coco v The Queen* (1994) 179 CLR 427
19. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1
20. *Waters v Public Transport Corporation* (1991) 173 CLR 349
21. *Bridge Shipping Pty Ltd v Grand Shipping SA* (1991) 173 CLR 231
22. *Bropho v Western Australia* (1990) 171 CLR 1
23. *Annetts v McCann* (1990) 170 CLR 596
24. *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404
25. *Burke v Tralagga & Anor* [1986] EOC 92-161

UK authorities

26. *Rudewicz, R (on the application of) v Secretary of State for Justice & Ors* [2012] EWCA Civ 499
27. *Doogan & Anor, Re Judicial Review* [2012] ScotCS CSOH_32
28. *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83
29. *McFarlane v Relate Avon Ltd* [2010] EWCA Civ B1
30. *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales (Equality and Human Rights Commission intervening)* [2010] EWHC 520 (Ch)
31. *R (o/a Gentle and others) v Prime Minister and others* [2008] 2 All ER 1
32. *Playfoot v Governors Millais School* [2007] EWHC 1698 (Admin).
33. *R (SB) v Denbigh High School* [2007] 1 AC 100 at [86]
34. *R (o/a Scholes) v Secretary of State for the Home Department* [2006] EWCA Civ 1343
35. *Wilkinson v Inland Revenue Commissioners* [2006] 1 WLR 1718
36. *R (Williamson) v SS Education and Employment* [2005] 2 AC 246
37. *R (Amicus) & Others v Secretary of State for Trade and Industry* [2004] EWHC 860
38. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557

39. *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48
40. *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115
41. *Matadeen v Pointu* [1999] AC 98

Canadian, NZ and US authorities

42. *Christian Legal Society v. Martinez*, 561 U.S. ____ (2010)
43. *British Columbia College of Teachers v Trinity Western University* [2001] 1 SCR 772
44. *R v Oakes* [1986] 1 SCR 103
45. *R v Big M Drug Mart* [1985] 1 SCR 295
46. *British Columbia College of Teachers v Trinity Western University* [2001] 1 SCR 772
47. *Hansen v The Queen* [2007] 3 NZLR 1

European Court of Human Rights

48. *Case of Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 28 May 1985, Series A, No. 94, p. 36
49. *C v United Kingdom* App. No. 10358/83, 37 ECHR Dec & Rep 142 at 147
50. *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 1339, 1358
51. *Sutherland v United Kingdom* 25186/94 [2001] Eur Court HR 234 (27 March 2001)
52. *Lustig-Prean and Beckett v United Kingdom* (2000) 29 ECHR 548
53. *A. D. T v United Kingdom* (Application no. 35765/97) (31 July 2000)
54. *Choudhury v United Kingdom* Application No.00017439/90 (1991)
55. *Wingrove v United Kingdom* App. No. 17419/90, 24 Eur. H.R. Rep. 1 (1997)
56. *Kalaç v Turkey* (1997) 27 EHRR, 552, para 27.
57. *Pichon and Sajous v France* App. No. 49853/99 (2 October 2001).
58. *Norris v Ireland*, Application No. 10581/83) 26 October 1998
59. *Salgueiro da Silva Mouta v Portugal* [1999] 1999-IX Eur. Ct. H.R. 309
60. *Modinos v Cyprus* (Application no. 15070/89) 23 April 1993
61. *Ahmad v United Kingdom* (1981) 4 EHRR 126
62. *Dudgeon v UK* 45 Eur. Ct. H.R. (ser. A) at 14 (1981)
63. *Arrowsmith v United Kingdom* 19 DR 5 (1980); [1975] 3 EHRR 218.

PART C

Extrinsic materials

1. *International Covenant on Civil and Political Rights* – Articles 2, 18 and 26
2. *Yogyakarta Principles* (26 March 2007)
3. European Parliament Resolution 1728/2010
4. UN Human Rights Committee General Comment 18
5. UN Human Rights Committee General Comment 22
6. *Toonen v. Australia* UN Doc CCPR/C/50/D/488/1992