

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

**S CI 2008 1647
S CI 2009 8292**

IN THE MATTER of the *Confiscation Act 1997*

IN THE MATTER of property which a member of the police force suspects on reasonable grounds to be tainted property in relation to a Schedule 2 office

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

- and -

Dounia ALI

First Respondent

- and -

Khodi ALI

Second Respondent

- and -

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Intervener

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

I. INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (the **Commission**) intervenes as of right under s 40(1) of the *Charter of Human Rights and Responsibilities 2006* (Vic) (the **Charter**) to make submissions in relation to the two questions of law raised by the First Respondent in the Amended Notice to the Victorian Equal Opportunity and Human Rights Commission dated 23 June 2010 (the **Charter Notice**).

2. The questions identified in the Charter Notice are as follows:
 - (a) Does s 32 of the Charter (with ss 13, 17 and/or 20) qualify the Court's discretion under s 38(2) of the *Confiscation Act 1997* (Vic) (the **Act**), so that when exercising that discretion either:
 - (i) greater weight must be given to the impact of not excluding property from a civil forfeiture order on persons rights with respect to home, family, children and property; or
 - (ii) where those rights are engaged the Court should exclude property unless forfeiture can be demonstrably justified under s 7(2) of the Charter?
 - (b) If the First Respondent "acquired" an interest in the Property from a person specified in s 24(b)(v) of the Act, can "sufficient consideration", as defined in s 3 of the Act, be interpreted in accordance with s 32 (with ss 13, 17, 19 and/or 20) of the Charter so that the First Respondent meets the criterion in s 24(b)(v) of the Act? If it cannot, should the Court make a declaration of inconsistent interpretation to that effect under s 36(2) of the Charter?
3. In summary, the Commission contends that:
 - (a) in relation to Question (a), that where Charter rights are engaged, the Court's discretion under s 38(2) of the Act must be exercised consistently with the relevant rights except where a limitation on rights can be demonstrably justified under s 7(2) of the Charter; or
 - (b) in the alternative, if the Court decides that its discretion under s 38(2) of the Act is not limited in the way articulated above, then the Charter requires significant weight to be given to the impact of a forfeiture order on a person's rights with respect to home, family, children and property in the exercise of the discretion.
 - (c) The answer to Question (b) is that "sufficient consideration" as defined in s 3 of the Act ought to be interpreted so as to recognise the intangible contributions of a spouse to her or his family and home where those contributions give rise to an equitable interest in the property in question. If "sufficient consideration" is not so interpreted then the Court should make a declaration of inconsistent interpretation.
4. The Commission's right to intervene is conferred by the Charter; and while it may be the case that once it intervenes it is a party to the matter in question and is entitled to make submissions in relation to any issue in the matter, in this case the Commission confines its submissions to the questions raised by the Charter Notice. In particular, the Commission does not make submissions in relation to:
 - (a) the question whether Dounia Ali has an interest in the Property; and
 - (b) the manner in which the Court's discretion under s 38(2) should be exercised.

II. RELEVANT FACTS

5. The facts are largely set out in the First Respondent's Affidavit dated 21 September 2009, the First Respondent's Submissions and the judgment of the Court of Appeal in *DPP v Ali* [2009] VSCA 162 at [15]-[20]. Briefly summarised, the relevant facts are as follows:
- (a) In August 2005, upon execution of a search warrant, facilities for the production of drugs and a quantity of methylamphetamine were found at property located at 495 Tunnecliff's Lane, Knowsley (the **Property**).¹ Neither Khodi Ali nor Dounia Ali lived at the Property at the time of the execution of the warrant.
 - (b) As a result of this discovery the Second Respondent, Khodi Ali, and three other persons were charged, in November 2007, with conspiring to traffick in a drug of dependence (count 1) and conspiring to traffick in a drug of dependence in a commercial quantity (count 2).²
 - (c) Khodi Ali is and was at all material times the registered proprietor of the Property; the three co-accused were tenants.³
 - (d) The charges against Khodi Ali were dismissed and he was acquitted as the judge ruled that he had no case to answer because the Crown could not establish beyond reasonable doubt that Khodi Ali knew the nature of the drug being manufactured.⁴
 - (e) The co-accused were convicted of count 1.⁵
 - (f) Dounia Ali is Khodi Ali's wife. She was born in Lebanon and married Khodi Ali in Lebanon in May 2002. Her marriage to Khodi was arranged according to Lebanese custom. She came to Australia in early 2003.⁶
 - (g) Upon arriving in Australia in 2003, Dounia Ali lived at the Property with Khodi Ali and his three children from a previous relationship.⁷
 - (h) Dounia Ali and Khodi Ali have three children together aged 4, 2 and 1.⁸
 - (i) In 2004 Dounia and Khodi Ali and their children and Khodi's children moved out of the Property.⁹

¹ *DPP v Ali* [2009] VSCA 162 at [15].

² *DPP v Ali* [2009] VSCA 162 at [17].

³ Affidavit of Avi Furstenberg dated 25 February 2010 (**Furstenberg Affidavit**) at [4]; *DPP v Ali* [2008] VSC 167 at [5].

⁴ *DPP v Ali* [2009] VSCA 162 at [18].

⁵ *DPP v Ali* [2009] VSCA 162 at [18].

⁶ Affidavit of Dounia Ali dated 21 September 2009 (**Ali Affidavit**) at [2], [3], [8], [10].

⁷ *Ali Affidavit* at [10], [11].

⁸ *Ali Affidavit* at [12].

- (j) In 2007 Dounia and Khodi Ali moved back to the Property after Khodi Ali's acquittal.¹⁰ Dounia Ali and her children currently reside at the Property.¹¹
- (k) Dounia Ali has claimed an equitable interest in the property based on assurances made by Khodi Ali before their marriage, her contribution to the marriage and the pooling of their finances throughout the marriage.¹²
- (l) Dounia Ali had no knowledge of any illegal activity taking place at the Property and was not involved in the commission of any offence in relation to the Property.¹³
- (m) On 2 July 2009 the Applicant applied for a restraining order in relation to the Property.
- (n) On 6 July 2009 Byrne J granted a restraining order over the Property pursuant to s 18 of the Act.
- (o) On 6 August 2009 the DPP gave notice to Dounia and Khodi Ali that he intended to apply for a civil forfeiture order in relation to the Property under s 37(1) of the Act.
- (p) On 3 September 2009 Dounia Ali and Khodi Ali each applied under s 20 of the Act for an order excluding their interests in the Property from any forfeiture order.

III. THE CONFISCATION ACT

- 6. Broadly stated, the Act makes provision for restraint and forfeiture of property that is tainted property, that is property that has been used in, or derived from, the commission of certain offences.¹⁴
- 7. Part 2 of the Act makes provision for the making of a restraining order in relation to tainted property. There is no dispute that there is a restraining order in place in relation to the Property, thus it is unnecessary to set out in detail the provisions of the Act in relation to the making of a restraining order.
- 8. Section 37 of the Act provides for an application for a forfeiture order as follows:

37 Application for civil forfeiture order

(1AA) In this section—

the Court means the Supreme Court or the County Court.

⁹ Ali Affidavit at [13].

¹⁰ Ali Affidavit at [16].

¹¹ Ali Affidavit, chapeau.

¹² Ali Affidavit at [20]; Furstenberg Affidavit at [5].

¹³ Ali Affidavit at [17].

¹⁴ See definition of "tainted property" in s 3 of the Act.

(1) If a restraining order is in force under section 18(2) in respect of property, the DPP or a prescribed person, or a person belonging to a prescribed class of persons, may apply to the Court for a civil forfeiture order in respect of the property.

(4) The applicant must give written notice of the application to every person who the applicant has reason to believe has an interest in the property.

...

(7) Any person notified under subsection (6) and any other person who claims an interest in the property are entitled to appear and to give evidence at the hearing of the application but the absence of a person does not prevent the Court from making a civil forfeiture order

9. Section 38 then confers power on a Court to make a forfeiture order, as follows:

38 Determination of application for civil forfeiture order

(1AA) In this section—

the Court means the Supreme Court or the County Court.

(1) On an application under section 37(1), the Court must order that the restrained property be forfeited to the Minister if the Court is satisfied that—

(a) the requirements of section 37 as to notice of the application have been complied with; and

(b) not less than 30 days have elapsed since the last notice given in accordance with section 37; and

(c) there are no pending applications under section 20 in relation to the restrained property.

(2) The Court may exclude particular property or any particular interest in property from the operation of a civil forfeiture order if satisfied that otherwise hardship may reasonably be likely to be caused to any person by the order.

(3) A civil forfeiture order must specify the interests in property to which it applies.

(4) The Court may, subject to any rules of court, take into account in determining the application any material that it thinks fit.

10. Section 20 of the Act provides for a person to apply to have certain property excluded from the scope of a restraining order. It relevantly provides as follows:

20 Application for exclusion from restraining order

(1) If a court makes a restraining order against property under section 18, any person claiming an interest in the property (including the accused) may apply to that court for an order under section 21, 22 or 24.

11. Section 24 is the relevant section in relation to exclusion in this proceeding. It provides as follows:

24 Determination of exclusion application — restraining order — civil forfeiture

On an application made under section 20, where the restraining order has been made in relation to a Schedule 2 offence for the purposes of civil forfeiture—

(a) the court may make an order excluding the applicant's interest in the property from the operation of the restraining order if the court is satisfied that—

- (i) the property is not derived property; and
- (ii) the property is not tainted property; or

(b) the court may make an order excluding the applicant's interest in the property from the operation of the restraining order if the court is not satisfied that the property in which the applicant claims an interest is not tainted property or derived property but is satisfied that—

(i) the applicant was not, in any way, involved in the commission of the Schedule 2 offence; and

(ii) where the applicant acquired the interest before the commission, or alleged commission, of the Schedule 2 offence, the applicant did not know that the property would be, or was intended to be, used in, or in connection with, the commission of the Schedule 2 offence; and

(iii) where the applicant acquired the interest at the time of or after the commission, or alleged commission, of the Schedule 2 offence, the applicant acquired the interest without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property or derived property; and

(iv) the applicant's interest in the property was not subject to the effective control of the person who is suspected to have committed the Schedule 2 offence on the earlier of the date on which that person was charged with the Schedule 2 offence (if such a charge was filed) or the date that the restraining order was made in relation to the property; and

(v) where the applicant acquired the interest, directly or indirectly, from the person who is suspected to have committed the Schedule 2 offence, that it was acquired for sufficient consideration.

12. “Sufficient consideration” is defined in s 3 of the Act as follows:

sufficient consideration, in relation to property, means consideration that reflects the market value of the property and does not include-

(a) consideration arising from the fact of a family relationship between the transferor and transferee;

(b) if the transferor is the spouse or domestic partner of the transferee, the making of a deed in favour of the transferee;

(c) a promise by the transferee to become the spouse or domestic partner of the transferor;

(d) consideration arising from love and affection;

(e) transfer by way of gift;

IV. THE CHARTER

13. The Charter provides for the recognition and protection of human rights in Victoria. In this proceeding the Commission contends that the following rights are relevant:
- (a) the right to equality and non-discrimination (s 8);
 - (b) the right not to have one's home and family arbitrarily interfered with (s 13); and
 - (c) recognition of the entitlement of families and children to protection (s 17).
14. The Commission contends that:
- (a) the rights protected by ss 13 and 17 affect the construction of the discretion conferred on the Court by s 38(2) of the Act; and
 - (b) the rights protected by ss 8, 13 and 17 affect the interpretation of the definition of "sufficient consideration" in s 3 of the Act.
15. None of the rights in the Charter are absolute: s 7(2) provides that rights may be limited where such limitation is "demonstrably justified in a free and democratic society based on dignity, equality and freedom". An assessment of whether a particular limitation on rights is so justified is undertaken by reference to the factors set out in s 7(2).
16. Section 32 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.
 - (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.
17. That interpretive exercise for which s 32 provides must now be approached in the manner set out in *R v Momcilovic*,¹⁵ where the Court of Appeal set out several principles concerning the proper approach to the interpretation of a statutory provision when it is contended that the provision infringes a Charter right. The Court there summarised the task as follows:¹⁶
- Step 1:** Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic).
 - Step 2:** Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter.
 - Step 3:** If so, apply s 7(2) of the Charter to determine whether the limit imposed on the right is justified.

¹⁵ (2010) 265 ALR 751.

¹⁶ (2010) 265 ALR 751 at [35].

18. The Commission submits that the following principles may be drawn from *Momcilovic*:¹⁷
- (a) The meaning of the statutory provision in question must be ascertained by applying s 32 of the Charter at the outset of the interpretive exercise, in conjunction with other relevant principles of statutory interpretation.
 - (b) “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.”
 - (c) The presumption against interference with fundamental rights must now be understood to extend to the protection and promotion of the human rights set out in the Charter.
 - (d) Whether it is “possible” to give a statutory provision a meaning compatible with human rights does not depend on the presence of ambiguity in the language of the provision being interpreted.
 - (e) Justification under s 7(2) of the Charter becomes relevant only if the provision, properly interpreted, breaches a right protected by the Charter. Justification is not taken into account in the interpretation exercise.
19. Furthermore, the Commission accepts that it is necessary, as part of the exercise of statutory construction consistently with the Charter, to identify at the outset those rights that are engaged by the provision in question. In this matter, as indicated above, the Commission contends that the rights to non-discrimination (s 8), home and family (ss 13(a) and 17 of the Charter) are engaged.
- (a) The right to equality and non-discrimination: s 8**
- (2) *Every person has the right to enjoy his or her human rights without discrimination.*
 - (3) *Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.*
20. “Discrimination” is defined in s 3 of the Charter to mean discrimination within the meaning of the *Equal Opportunity Act 1995* (the **EO Act**) on the basis of an attribute set out in s 6 of the EO Act.
21. Section 6 of the EO Act identifies a number of personal attributes, on the basis of which discrimination is prohibited in a range of areas of public life (covered separately in Part 3 of the Act). One of those attributes is sex.

¹⁷ (2010) 265 ALR 751 at [35], [103]-[110].

22. The EO Act — and in turn the Charter — prohibit both direct and indirect discrimination. Sections 7, 8 and 9 of the EO Act provide as follows:

7. Meaning of discrimination

- (1) Discrimination means direct or indirect discrimination on the basis of an attribute or a contravention of section 13A, 14A, 15A, 31A, 51 or 52.
- (2) Discrimination on the basis of an attribute includes discrimination on the basis –
 - (a) that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination;
 - (b) of a characteristic that a person with that attribute generally has;
 - (c) of a characteristic that is generally imputed to a person with that attribute;
 - (d) that a person is presumed to have that attribute or to have had it at any time.

8. Direct discrimination

- (1) Direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances.
- (2) In determining whether a person directly discriminates it is irrelevant—
 - (a) whether or not that person is aware of the discrimination or considers the treatment less favourable;
 - (b) whether or not the attribute is the only or dominant reason for the treatment, as long as it is a substantial reason.

9. Indirect discrimination

- (1) Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice –
 - (a) that someone with an attribute does not or cannot comply with; and
 - (b) that a higher proportion of people without that attribute, or with a different attribute, do or can comply with; and
 - (c) that is not reasonable.
- (2) Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including –
 - (a) the consequences of failing to comply with the requirement, condition or practice;
 - (b) the cost of alternative requirements, conditions or practices;
 - (c) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice.
- (3) In determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination.

(b) Section 13(a): right to home and family

A person has the right ... not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

Meaning of “home” and “family” in s 13(a) of the Charter

23. In accordance with the general approach to the interpretation of the rights protected by the Charter, the rights protected by s 13(a) of the Charter should be interpreted broadly.¹⁸
24. “Family”, in both s 13(a) and s 17(1), is not to be “narrowly interpreted or confined”;¹⁹ it should be interpreted to include various family forms. In this case, the First Respondent’s family includes her husband and children and also her husband’s children from a previous relationship, because she has provided care for them.
25. “Home” in s 13(a) is to be interpreted in a non-technical sense, as explained by Bell J in *Director of Housing v Sudi*:²⁰

In human rights, identifying a person’s ‘home’ is approached in a common-sense and pragmatic way. It depends on the person showing ‘sufficient and continuous links with a place in order to establish that it is his home’. ... If someone’s links with the place where they live are ‘close enough and continuous enough’, that is their home. The general approach is ‘to apply a simple, factual and untechnical test, taking full account of the factual circumstances but with very little of legal niceties.’ The concept of ‘home’ in human rights is autonomous and is not based on ‘domestic notions of title, legal and equitable rights, and interests’. In short, it is a question of fact, not law. A home may be where a person or family is living in unlawful occupation. Where a tenant is living in social housing, the rented premises are their home for the purposes of s 13(a) of the Charter. This remains so where the tenant continues to live in the premises after the end of the tenancy, or continues to occupy the premises without consent. The same principle applies to other arrangements under which a person may be living in a place which is their home.

26. In this case, although the First Respondent is not the registered proprietor of the Property and has no legal interest in it, she resides at the Property and has done so for several years. This is sufficient for the Property to be regarded as her home within the meaning of that term in s 13(a) of the Charter.

Meaning of “interference” with home and family

27. The notion of “interference” with home and family is also to be understood in a broad and non-technical sense.²¹

[T]he question of what amounts to an ‘interference’ with the rights in s 13(a) is approached in a ‘simple and untechnical’ manner. This is Manfred Nowak, again speaking of article 17(1) of the ICCPR: ‘Every invasion of that sphere paraphrased

¹⁸ *Re Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (**DAS**).

¹⁹ *Director of Housing v Sudi* [2010] VCAT 328 at [33].

²⁰ [2010] VCAT 328 at [32] (footnotes omitted).

²¹ [2010] VCAT 328 at [34] (footnotes omitted).

by the term “home” that occurs without the consent of the individual affected... represents interference.’ Evicting or seeking to evict someone living in social housing is interfering with the human rights relating to their home. Any attempt to do so, directly or indirectly or by process of law, constitutes such interference. Serving a notice to quit and bringing possession proceedings constitute such interference. ... Other decisions which deprive a person of, or impair their capacity to live in, their home also constitute an interference, such as denying them planning permission and undertaking enforcement measures, and withdrawing a permission already held, rendering people homeless.

28. There can be no doubt that to make a civil forfeiture order in relation to a person’s home is an interference with his or her home; and where the forfeiture order will result in the person and their family being removed from their home, such an order also constitutes an interference with the person’s family.

Meaning of “arbitrary” interference with home and family and the role of s 7(2)

29. Section 13(a) of the Charter does not confer a right to home and family in absolute terms. Instead, it confers a right is to be free from “unlawful or arbitrary” interference with home and family. That language is modelled on Article 17 of the International Covenant on Civil and Political Rights (**the ICCPR**).²²
30. In General Comment 16, the United Nations Human Rights Committee explained the concept of “arbitrary interference” with privacy under Article 17 as follows:²³

In the Committee’s view the expression “arbitrary interference” can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.

31. In other words, even if an interference with privacy is legal, in the sense that it is authorised by law, it may nevertheless be “arbitrary” if the interference is not “reasonable in the particular circumstances”. Thus, in *Toonen v Australia* the Human Rights Committee referred to General Comment 16 before noting that Article 17 of the ICCPR requires any interference with privacy to be “reasonable in the particular circumstances”.²⁴ It then said:²⁵

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

²² 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].

²³ Office of the High Commissioner for Human Rights, General Comment 16, 8 April 1988, [4]. This passage was quoted with approval by Bell J in *Kracke v Mental Health Review Board* [2009] VCAT 646, [169].

²⁴ *Toonen v Australia* CCPR/C/50/D/488/1992 (Jurisprudence) at [8.3]

²⁵ *Toonen v Australia* CCPR/C/50/D/488/1992 (Jurisprudence) at [8.3]

32. The Human Rights Committee said that the “introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event reasonable in the circumstances”.²⁶ It went on to find that Tasmanian legislation that prohibited homosexual conduct between consenting adults breached Article 17 because it involved an arbitrary interference with privacy (even though the prohibition was plainly lawful).
33. The fact that the concept of “arbitrary” interference with privacy is used to import a proportionality analysis into the ICCPR is not surprising, because the ICCPR does not contain a general limitations provision of the kind found in s 7(2) of the Charter.²⁷
34. However, given the existence of s 7(2) of the Charter, there may be little work to be done by the requirement that an interference with privacy be “unlawful or arbitrary” before s 13 of the Charter will be contravened. As Bell J explained in *Kracke* (in the specific context of s 13(a) of the Charter).²⁸

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).

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.

35. On the above approach, any interference with home and family that is not demonstrably justifiable having regard to the criteria in s 7(2) of the Charter will be “arbitrary”.
36. The Commission contends that the question whether a particular interference with home and family is arbitrary should, as Bell J explained, be considered as part of the justification analysis under s 7(2) and not as a threshold question in determining whether the legislation in question limits rights (often referred to as the “engagement” question).

²⁶ *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/4888/1992, 4 April 1994, para 8.3, referring to an earlier view expressed on Article 17 in General Comment 16 (32), Doc CCPR/C/21/Rev 1 (19 May 1989)

²⁷ *Kracke v Mental Health Review Board* [2009] VCAT 646, [106]

²⁸ *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].

(b) Section 17: Right of families and children to protection

(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

(2) Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.

37. In addition to s 13, the First Respondent relies on s 17 of the Charter. The Commission contends that s 17 is engaged in this proceeding for the same reason that s 13(a) is engaged in relation to the right to family.

VI. QUESTION (a): DISCRETION UNDER S 38(2) OF THE CONFISCATION ACT

38. The discretion as to whether to exclude property from a forfeiture order must be interpreted in light of s 32 of the Charter, read with ss 13(a), 17 and 20, being the rights that are engaged by the making of a civil forfeiture order under s 38.

39. It will normally be “possible” to interpret a statutory discretion so that it does not permit interference with the rights protected in Part 2 of the Charter unless that interference is demonstrably justifiable having regard to the factors in s 7(2) of the Charter. As Bell J said in *Kracke*:²⁹

Because s 32(1) requires all legislation to be interpreted compatibly with human rights if possible, it imposes a particular interpretation on provisions which confer open-ended discretions. If possible consistently with their purpose, the provision must be interpreted such that the discretion can only be exercised compatibly with human rights. Therefore, unless the very purpose of the provision is incompatible with human rights, which will surely be an exceptional case, the solution to legal problems concerning the exercise of an open-ended statutory discretion will depend on whether it has been exercised compatibly with human rights ...

40. The consequence of the above approach is that “it is not the interpretation and compatibility with human rights of the authorising discretion that is in issue; it is the compatibility with human rights of the **exercise** of the discretion”.³⁰

41. In support of the above reasoning, Bell J referred to the decision of the Supreme Court of Canada in *Slaight Communication Inc v Davidson*.³¹ In that case Lamer J (as his Lordship then was), who dissented as to the result but whose analysis on this point was accepted by the other members of the Court,³² said:³³

²⁹ *Kracke v Mental Health Review Board* [2009] VCAT 646, [208]. See also *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869, [77]-[78], [85], [90]-[91].

³⁰ *Kracke v Mental Health Review Board* [2009] VCAT 646, [210] (emphasis added).

³¹ [1989] 1 SCR 1038, cited in *Kracke v Mental Health Review Board* [2009] VCAT 646, [210].

³² [1989] 1 SCR 1038, 1048, 1058.

³³ [1989] 1 SCR 1038, 1078 (emphasis added). See also *Michaud v. Quebec (Attorney General)* [1996] 3 SCR 3; *Quebec (C.D.P.D.J.) v Montreal (City)* [2000] 1 SCR 665.

Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect. **Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed.**

42. The Court of Appeal in the United Kingdom in *R v Lord Saville ex p. A* took a similar approach:³⁴

[W]hen a fundamental right such as the right to life is engaged, the options available to the reasonable decision maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision maker to risk interfering with fundamental rights in the absence of a compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with the human right involved and then apply the test accepted by the Lord Chief Justice in *Smith*, which is not in issue.

43. In the United Kingdom this common law strand of human rights jurisprudence is referred to as “the principle of legality”.³⁵ In Australia this principle can be seen in the jurisprudence of the High Court, exemplified in *Coco v The Queen*, which dealt with the judicial discretion to exclude evidence obtained in breach of criminal process rights.³⁶

In England, Lord Browne-Wilkinson has expressed the view that the presence of general words in a statute is insufficient to authorize interference with the basic immunities which are the foundation of our freedom; to constitute such authorization express words are required. That approach is consistent with statements of principle made by this court, ... An insistence on the necessity for express words is in conformity with earlier judicial statements in England which call for express authorization by statute of any abrogation or curtailment of the citizen’s common law rights or immunities...

The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute into the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.

44. The interaction between this common law principle of interpretation and modern human rights legislation similar to the Charter has been considered in the United

³⁴ [1999] 4 All ER 860 at 872 [37].

³⁵ As to the principle of legality in Australian jurisprudence, see *Electrolux Home Products Pty Ltd v The Australian Workers’ Union* (2004) 221 CLR 309 at 329 [21] (Gleeson CJ); *K-Generation* (2008) 237 CLR 501 at [47] (French CJ).

³⁶ (1994) 179 CLR 427, 436-7.

Kingdom. In *R v Secretary of State for the Home Department ex P Simms* Lord Hoffman commented:³⁷

The *Human Rights Act 1998* will make three changes to the scheme of things. ... Secondly, the principle of legality will be expressly enacted as a rule of construction in section 3 and will gain further support from the obligation of the minister in charge of a Bill to make a statement of compatibility under section 19.

45. This approach is consistent with the approach adopted by the Victorian Court of Appeal in *Momcilovic*.³⁸ As a result of the introduction of s 32, therefore, this interpretive principle has been elevated to a legislative command, required to be applied by Victorian Courts when construing Victorian legislation as a matter of course.
46. In this proceeding the Commission contends that s 17(a) is clearly engaged by the operation of the Act and, in particular, by the making of a civil forfeiture order under s 38 of the Act, for the following reasons:
 - (a) The First Respondent will lose her home if the civil forfeiture order is made in relation to the Property without excluding her interest in the Property from the scope of the order; this is sufficient to demonstrate an interference with her home.
 - (b) The First Respondent's family will be affected by a civil forfeiture order as they too will lose their home if the civil forfeiture order is made in relation to the Property; this is sufficient to demonstrate an interference with the First Respondent's family.
47. The effect of the above analysis is that, when exercising the discretion to exclude property from a forfeiture order that is conferred by s 38(2) of the Act, the Court must exercise its discretion compatibly with the Charter. Thus it must exclude the property from the scope of any forfeiture order unless the Applicant satisfies the Court³⁹ that the resulting interference with a person's rights to home, family, children or property is demonstrably justifiable in a free and democratic society, having regard to the factors enumerated in s 7(2) of the Charter.
48. This approach to the discretion conferred by s 38(2) is not precluded by the purpose of the provision. The purpose of s 38(2) is not incompatible with human rights; to the contrary, s 38(2) is clearly designed to enhance rights by enabling the court to exclude property from the scope of a forfeiture order in order to preclude hardship to a person.
49. The Commission makes no submissions in relation to the exercise of the discretion in this particular factual situation; however, the Commission observes that it will generally be easier for a court to be satisfied that an interference with rights is demonstrably justified where the person whose property is being forfeited was involved in the commission of the offence in question, as the limitation on rights will be more easily regarded as a proportionate response to

³⁷ [1999] 3 WLR 328 at

³⁸ (2010) 265 ALR 751.

³⁹ *DAS* confirms that the onus under s 7(2) falls on the person seeking to justify a limitation on rights: [2009] VSC 381 at [147]. The Court there observed that "[t]he standard of proof is high".

the commission of a crime and the need to deter crime; in contrast, where a person was not involved in, and had no knowledge of, the offence in question, it will be more difficult for a court to be satisfied that the limitation on that person's rights to home and family is demonstrably justified in a free and democratic society. Forfeiture of an innocent person's property is more likely to be regarded as a disproportionate response to the commission of crime; thus while such a course remains possible, pursuant to the legislative regime, as a consequence of the Charter it ought not to occur unless it can be demonstrably justified in the particular circumstances.

50. In the alternative, if the Court rejects the contention that the discretion under s 38(2) of the Act is required to be exercised compatibly with the Charter, the Commission contends that the Charter requires that the rights protected by it be given significant weight in the exercise of the discretion.⁴⁰ Again, however, the Commission makes no submissions as to the exercise of the discretion in this particular factual situation.

VII. QUESTION (b): INTERPRETATION OF “SUFFICIENT CONSIDERATION”

51. Under s 20 of the Act, a person may apply to have property excluded from the scope of a restraining order made under the Act. A forfeiture order under s 38 may be made only if there are no pending applications under s 20 in relation to the property in issue.
52. In this case Dounia Ali has made an application under s 20 for an order under s 24 excluding her interest in the Property from the restraining order. If that application is successful, her interest in the property will not be subject to the restraining order and hence will not be able to be the subject of a forfeiture order under s 38.
53. The question thus arises as to whether the Court may make an order excluding Dounia Ali's interest in the Property from the restraining order pursuant to s 24. Under s 24 the Court may make an order excluding property from a restraining order if it is satisfied that the property is not tainted property or derived property (under s 24(a)) or if it is satisfied of particular matters (under s 24(b)).
54. There is no dispute that the Property is “tainted property” within the meaning of the Act. Thus the question is whether the Court can be satisfied of the matters set out in s 24(b) of the Act. Those matters are, in summary, as follows:
- (a) the applicant was not involved in the commission of the relevant offence;
 - (b) where the applicant acquired the interest before the commission, or alleged commission, of the relevant offence, the applicant did not know that the property would be used in connection with the commission of the relevant offence;
 - (c) where the applicant acquired the interest at the time of or after the commission, or alleged commission, of the relevant offence, the applicant

⁴⁰ This is consistent with *Castles v Secretary, Department of Justice* [2010] VSC 310 at [162], where Emerton J concluded that a right to medical treatment conferred by s 47(1)(f) of the *Corrections Act*, while not a guarantee that a permit to leave prison to access treatment would be granted, would be a factor that would “weigh heavily in favour of the grant of a permit”.

- acquired the interest without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was tainted property;
- (d) the applicant's interest in the property was not subject to the effective control of the person who is suspected to have committed the relevant offence on the earlier of the date on which that person was charged with the offence or the date that the restraining order was made in relation to the property; and
 - (e) where the applicant acquired the interest, directly or indirectly, from the person who is suspected to have committed the relevant offence, that it was acquired for sufficient consideration.
55. The Commission does not understand there to be any dispute that Dounia Ali satisfies s 24(b)(i) and either s 24(b)(ii) or s 24(b)(iii) (whichever is relevant) — that is, she was not involved in the commission of the relevant criminal offences and had no knowledge of the use of the property in connection with those offences at any relevant time. However, there is an issue between the Applicant and the First Respondent as to whether Dounia Ali has an interest in the property in relation to which ss 20 and 24 could have any operation.
56. As explained in paragraph [4], above, the Commission makes no submissions in relation to the question whether Dounia Ali has an interest in the Property.
57. However, should the Court conclude that Dounia Ali has an interest in the Property, she will still need to satisfy the Court that she acquired that interest for “sufficient consideration” pursuant to s 24(b)(v). The Commission's submissions on Question (a) are confined to the construction of “sufficient consideration” in that section, should that issue arise.
58. “Sufficient consideration is a defined term”. In s 3 it is defined as follows:
- sufficient consideration**, in relation to property, means consideration that reflects the market value of the property and does not include-
- (a) consideration arising from the fact of a family relationship between the transferor and transferee;
 - (b) if the transferor is the spouse or domestic partner of the transferee, the making of a deed in favour of the transferee;
 - (c) a promise by the transferee to become the spouse or domestic partner of the transferor;
 - (d) consideration arising from love and affection;
 - (e) transfer by way of gift;
59. The question in this proceeding is whether Dounia Ali's claimed interest in the property, pursuant to a constructive trust, was obtained for “sufficient consideration” within the meaning of the Act, given that “sufficient consideration” cannot include:
- (a) consideration arising from the fact of a family relationship between the transferor and transferee (paragraph (a)); and
 - (b) consideration arising from love and affection (paragraph (d)).

60. The Commission contends that these exclusions from the definition of “sufficient consideration”, which will operate to enable a restraining order, and hence a forfeiture order, to be made in relation to tainted property where such an order interferes with the home and family of an innocent third party, must be interpreted narrowly.
61. Recalling that *Momcilovic* requires that “all possible constructions” of a provision be explored, and that the construction that least limits Charter rights be adopted, the Commission observes that there are at least two approaches to paragraphs (a) and (d) of the definition of “sufficient consideration”:
- (a) First, each of (a) and (d) could be interpreted to mean that “sufficient consideration” cannot include “the fact of a family relationship” between the parties and the fact of “love and affection” between the parties. That is, in this case, Dounia Ali could not claim that either her love and affection for Khodi Ali or her family relationship with him constitutes “sufficient consideration”. However, on this interpretation valuable contributions to the family and home, both financial and non-financial, although they might on one view stem from family relationship and/or love and affection, can constitute “sufficient consideration” as they go beyond the mere relationship or affection. This is the narrower view of the exceptions to “sufficient consideration”.
 - (b) Alternatively, paragraphs (a) and (d) could be interpreted so as to exclude from “sufficient consideration” not only “bare” love and affection or family relationship, but also valuable contributions to family that arise from such relationship or affection. On this view, Dounia Ali’s financial and non-financial contributions to her family would be excluded from the meaning of “sufficient consideration” because those contributions were made as a result of her family relationship and/or love and affection for Khodi Ali. This is the broader view of the exceptions.
62. The Commission contends that the narrower view should be adopted.
63. That is, the Commission contends that, where an innocent third party’s interest in tainted property arises as a result of a common intention or constructive trust, the financial and non-financial contributions of that third party that gave rise to the trust should be recognised as “sufficient consideration” within the meaning of the definition of that term in s 3 of the Act. In particular, those contributions should not be regarded as excluded by reason of any of paragraphs (a) to (e) of that definition.
64. Thus, in the present case:
- (a) Dounia Ali’s financial contributions to the property through pooled income ought to be regarded as “sufficient consideration”; and
 - (b) Dounia Ali’s non-financial contributions by way of care for her children and Khodi Ali’s children, and through general housework, ought to be regarded as “sufficient contribution”.
65. The Court ought to conclude that these contributions are not “consideration arising from the fact of a family relationship” between Khodi Ali and Dounia Ali and not “consideration arising from love and affection” between Dounia Ali and Khodi Ali. Those exclusions from the definition of “sufficient consideration” ought

to be confined to circumstances where the consideration asserted is **no more than** the existence of a family relationship, or the existence of love and affection, without concrete contributions, whether financial or non-financial.

66. This view is supported by reference to the second reading speech for the Confiscation Amendment Bill 2007. That speech makes it clear that the definition of “sufficient consideration” was inserted into the Act in response to the decision of the Court of Appeal in *DPP v Le*.⁴¹ In that case the Court of Appeal had held that “natural love and affection”, without more, could constitute “sufficient consideration” for the purposes of s 24(b)(v) of the Act (in the absence of any definition of that phrase). The purpose of the amendment was to overturn the decision of the Court of Appeal; but it was not, the Commission contends, intended by Parliament to go further and to exclude from the definition of “sufficient consideration” otherwise valuable consideration that happened to be provided along with, or because of, love and affection.
67. The Commission contends that to interpret the exclusions so that they encompassed financial and non-financial contributions, thus rendering such contributions not “sufficient consideration” for the purpose of the Act would:
- (a) permit interference with the innocent third party’s home and family; and
 - (b) constitute or result in discrimination within the meaning of s 8 of the Charter because it would result in contributions more commonly made by women than men not being recognised as “sufficient consideration” under the Act.

(b) Effect of ss 13 and 17(a) – protection of home and family – on construction

68. As explained above, ss 13 and 17(a) are engaged by the making of a civil forfeiture order under s 38 of the Act, for the following reasons:
- (a) The First Respondent will lose her home if the civil forfeiture order is made in relation to the Property without excluding her interest in the Property from the scope of the order; and
 - (b) The First Respondent’s family will be affected by a civil forfeiture order as they too will lose their home if the civil forfeiture order is made in relation to the Property.

69. In those circumstances, “sufficient consideration” should be interpreted broadly and the exceptions interpreted narrowly, so as to minimise the interference with the rights to home and family that will be occasioned by the operation of a forfeiture order.

(b) Effect of s 8 — right to equality and non-discrimination — on construction

70. The Commission contends that s 8 of the Charter is engaged in relation to the interpretation of a legislative provision if one of the possible constructions available would involve discrimination, whether direct or indirect, on the basis of sex. Thus when interpreting the meaning of “sufficient consideration” in s 3 of the

⁴¹ [2007] VSCA 18. See Parliament of Victoria, *Hansard*, Assembly, 8 August 2007 (Second Reading Speech) at 2572.

Act, the Court must consider whether any of the possible constructions involves such discrimination and, if so, should choose a less discriminatory possible construction.

71. The Commission contends that if the definition of “sufficient consideration” is interpreted so as to exclude financial and/or non-financial contributions⁴² of a person who has no legal title to property where such contributions would be sufficient to give rise to an entitlement to an equitable interest in property, such an interpretation would result in indirect discrimination on the basis of sex. This is because:

- (a) where legal title to a home is held by one member of a couple, it is disproportionately more likely that the male partner will hold legal title;⁴³ and
- (b) women are disproportionately more likely to make contributions to a home through unpaid domestic labour⁴⁴ (in particular, through care of children, but also by way of domestic services provided to her male partner, thereby relieving her male partner from either purchasing those services in the marketplace or foregoing income in order to perform those tasks himself).

72. Imposing a rule that recognises only direct financial payment as a form of consideration, and precludes traditionally female contributions from being recognised as a form of “sufficient consideration”, in a context where men are more likely to be the sole legal holder of title to property than women, is to impose a rule that:

- (a) Ms Ali does not comply with; and
- (b) a higher proportion of men do comply with, as compared to women; and
- (c) is not reasonable,

applying the meaning of “indirect discrimination” as set out in the EO Act and picked up and applied by the definition of “discrimination” in s 3 of the Charter.

(c) Conclusion on construction of “sufficient consideration”

73. Accordingly, after exploring the possible interpretations of the definition of “sufficient consideration”, the Court should adopt that interpretation which least

⁴² See *Baumgartner v Baumgartner* (1988) 164 CLR 137 at 156 (Gaudron J).

⁴³ Jefferson and Ong, “Profiling Gender Differentials in Asset and Debt Portfolios in Australia” Centre for Research in Applied Economics, Working Paper 2010/04, Curtin University of Technology (2010) at 13, 15.

http://espace.library.curtin.edu.au:80/R?func=dbin-jump-full&local_base=gen01-era02&object_id=134343

⁴⁴ See, eg, Catherine Hakim, “Competing Family Models, Competing Social Policies” (2003) 64 *Family Matters* 52; Australian Human Rights Commission, *Gender Equality Blueprint* (2010) at 14; Australian Human Rights Commission, *Accumulating poverty? Women’s experiences of inequality over the lifecycle* (2009) 14-15, 17; Australian Human Rights Commission, *Striking the balance: women, men, work and family — Discussion Paper* (2005), Ch 3; Australian Bureau of Statistics, *Australian Social Trends* March 2009; Australian Bureau of Statistics, 2001.

infringes Charter rights, namely the interpretation that does not exclude financial and non-financial contributions made by an innocent third party that give rise to an equitable interest in the property from the definition of “sufficient consideration”.

74. In this case, if the Court is satisfied that Dounia Ali has an equitable interest in the Property as a result (whether in whole or in part) of her financial and non-financial contributions to the Property (including pooled income, care of children and housework) then the Court should regard those contributions as constituting “sufficient consideration” within the definition of that term in s 3.

Dated: 6 August 2010

KRISTEN WALKER
Melbourne Chambers