

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION**

S CI 2013 03970

JUDICIAL REVIEWS AND APPEALS LIST

BETWEEN:

**DIRECTOR OF PUBLIC PROSECUTIONS
(On behalf of David Watson)**

Plaintiff

and

MAGNUS KABA

First Defendant

and

THE MAGISTRATES' COURT OF VICTORIA

Second Defendant

**FURTHER SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN
RIGHTS COMMISSION**

Filed pursuant to the orders of Bell J dated 7 November 2014

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Filed on behalf of: Intervener

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INTRODUCTION

1. By email and at the directions hearing on 7 December 2014 the Court identified three issues on which further submissions are sought from the parties.

1.1. **Issue 1:** The operation of the principle that legislation is to be interpreted so that it conforms to, rather than derogates from, Australia's treaty obligations (the principle of consistency).

Under the International Covenant on Civil and Political Rights (**ICCPR**), each of the rights relevant in the present case is subject to internal limits that involve consideration of the proportionality of any limit on rights. How is the principle of consistency to be applied in reference to such rights? Given that Australia would not appear to be in breach of her obligations in relation to the rights by legitimately limiting them, is it necessary to take legality and proportionality into account when considering the application of the principle of consistency to the interpretation of s 59(1)(a) of the *Road Safety Act 1986* (Vic) (**Road Safety Act**)? How is that to be done?

1.2. **Issue 2:** Overlap between principle of consistency and the principle of legality in cases where rights and freedoms that are relevantly covered by the principle of legality are the same, or fall within the same cognate class, as those covered by the ICCPR.

The rights to liberty, freedom of movement and perhaps privacy would appear to be relevant to both the principle of legality and the principle of consistency. How are the principles of consistency and legality to be applied in a case where the application of both is called for in the interpretation of legislation? Does the ICCPR strengthen the protection of the rights and freedoms concerned under the (common law) principle of legality? More generally, under the common law or the legitimate evolution of the common law, is the ICCPR a legitimate source of principle for the purposes of identifying the rights and freedoms covered by the principle of legality or for the purposes of deepening the protection of those rights and freedoms under the principle? If so, are legality and proportionality taken into account?

1.3. **Issue 3:** If the application of the principles of consistency and legality involves proportionality-type considerations, does the Commission rely upon its submissions about s 7(2) of the *Charter of Human Rights and Responsibilities 2006* (Vic) (**Charter**) in relation to those principles?

ISSUE 1: THE PRINCIPLE OF CONSISTENCY

2. The principle of consistency requires that legislation be interpreted so that it is consistent with Australia's treaty obligations, rather than so as to place Australia in breach of its treaty obligations.¹ This is the principle referred to by the Plaintiff as a "presumptive canon". The principle of consistency applies generally, to all legislation, not simply to legislation enacted to implement a particular treaty. In addition, when legislation implements a particular treaty and uses the language of that treaty, then terms used in the legislation are "construed by municipal courts in accordance with the meaning to be attributed to the treaty provision in international law".²
3. The Commission agrees with the Plaintiff that the principle of consistency as a "presumptive canon" is relevant to the construction of the *Road Safety Act* (which was not enacted to give effect to a treaty); and the latter principle is relevant to the Charter, which was enacted to give effect to the ICCPR.
4. The Plaintiff contends that the principle of consistency "must give way to a construction reached through ordinary means".³ This submission misunderstands the nature of the principle of consistency and its relationship to statutory interpretation. The principle of consistency, like the principle of legality, is a part of the "ordinary means" of statutory construction. It is one of the ways that a Court ascertains the intention of the Parliament. The principle of consistency does not require that a statute operate consistently with international law; the presumption will give way to a clear textual indication to the contrary; but the principle does not stand outside the "ordinary means" by which the Parliament's intention is ascertained.
5. Indeed, the use of the term "Parliamentary intention" expresses the relationship between the arms of government with respect to the making, interpretation and application of laws.⁴ "Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have

¹ *Dietrich v R* (1992) 177 CLR 292, 305-6 (Mason CJ and McHugh J); *R v Home Secretary; Ex parte Brind* [1991] 1 AC 696, 747-8; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 138; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

² *Koowarta v Bjelke Petersen* (1982) 153 CLR 168 at 265 (Brennan J); *Quazi v Quazi* [1980] AC 744, 802, 822; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 255 at 231-232 (Brennan J).

³ Plaintiff's Further Submissions at [10].

⁴ *Zheng v Cai* (2009) 239 CLR 446 at 455-456 (the Court).

been applied to reach the preferred results and which are known to parliamentary drafters and the courts.”⁵

6. The Plaintiff also contends that the presumption is to be applied with “special caution” in relation to State legislation.⁶ There is no authority for this proposition; indeed, the contrary is true: to approach State legislation differently from Commonwealth legislation is at odds with existing authority and practice.⁷ As Gummow and Hayne JJ observed in *Kartinyeri v Commonwealth*:⁸

It has been accepted that a statute of the Commonwealth **or of a State** is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law. On the other hand, the provisions of such a law must be applied and enforced even if they be in contravention of accepted principles of international law.

7. This principle has also been expressed and applied by State courts in relation to State legislation.⁹
8. The Plaintiff’s reference to the judgment of Gleeson CJ in *Coleman v Power*¹⁰ is taken out of context. There the Chief Justice was raising the question of the relevance of the ICCPR to legislation that predated Australia’s ratification of the ICCPR in 1980, rather than distinguishing the approach to be taken to state legislation. That issue has no relevance to the present case, where the legislation in issue post-dated ratification.
9. The Commission also notes that Australia has no reservations to Articles 2 and 50 in place; an earlier reservation was withdrawn.¹¹ Australia now has in place a “declaration”, which simply records the fact that while Australia as a nation is bound by the ICCPR, implementation of Australia’s obligations under the ICCPR may occur at either the federal or State level. The declaration does not have the status of a

⁵ *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 592 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁶ Plaintiff’s Further Submissions at [11].

⁷ See, eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Dietrich v R* (1992) 177 CLR 292; *Jago v District Court of New South Wales* (1989) 168 CLR 23 and (1988) 12 NSWLR 558; *Adler v District Court of New South Wales* (1990) 19 NSWLR 317.

⁸ (1998) 195 CLR 337 at 384 (emphasis added, footnotes omitted). See also *AMS v AIF* (1999) 199 CLR 160 at [50] (Gleeson CJ, McHugh and Gummow JJ).

⁹ See, eg, *Garland v Chief Executive, Department of Corrective Services* [2006] QSC 245 at [99]-[123]; *Royal Women’s Hospital v Medical Practitioners Board* (2006) 15 VR 22 at [75]; *ZZ v Secretary, Department of Justice* [2013] VSC 267, [67]-[68], [81].

¹⁰ (2004) 220 CLR 1 at [20].

¹¹ UN Status of Multilateral Treaties Database, ICCPR, note 14 (status as at 26-11-2014):

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

reservation. In any event, the declaration supports, rather than detracts from, the application of the principle of consistency to State legislation.

10. As for the question of the necessity for an ambiguity before the application of the principle, and the nature of such ambiguity, it is not necessary for this Court to deal with that question because here the text of the *Road Safety Act* is sufficiently ambiguous. This is demonstrated by the fact that the Plaintiff needs to imply into s 59 the power it relies upon to authorise the actions of the officers in signalling the vehicle to stop. The Commission notes, however, that the remarks of Callinan J relied upon by the Plaintiff were by way of *obiter* and his Honour dissented in part in *Western Australia v Ward*.¹² To the extent that the Plaintiff seeks to use Callinan J's *obiter* remarks in support of a narrow approach to ambiguity, the submission ought to be rejected. It is contrary to the accepted approach, which is that no narrow conception of ambiguity is to be adopted.¹³ Rather, the question is simply whether the language of the instrument is susceptible of a construction that is consistent with Australia's treaty obligations. If it is, that construction should prevail.
11. As to the role that proportionality plays in relation to the principle of consistency in this case, the Commission notes that the Plaintiff asserts that its proffered interpretation of s 59 would conform with, and not conflict with, Australia's international obligations, on the basis of the internal limitations contained within the relevant rights.¹⁴ No argument is given as to why this is so; and the assertion should be rejected.
12. The plaintiff also relies upon a reservation to Art 17 of the ICCPR.¹⁵ That reservation, too, has been withdrawn.¹⁶
13. The Commission agrees generally with the submissions of the First Defendant on Issue 1.

ISSUE 2: THE INTERACTION OF THE PRINCIPLE OF CONSISTENCY WITH THE PRINCIPLE OF LEGALITY

14. The Commission agrees with the Plaintiff that the principle of legality and the principle of consistency are unlikely to conflict, at least in a case such as the present where the

¹² (2002) 213 CLR 1. Plaintiff's Submissions at [9].

¹³ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

¹⁴ Plaintiff's Submissions at [13].

¹⁵ Plaintiff's Submissions at [13].

¹⁶ UN Status of Multilateral Treaties Database, ICCPR, note 14 (status as at 26-11-2014):

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

relevant treaty is a human rights treaty. That is, both principles are likely to point to the same construction: that which least interferes with or limits human rights. The Commission notes that the construction required by s 32(1) of the Charter also points in this direction.

15. The Commission reiterates a submission it made in oral argument: that the principle of legality does not involve a proportionality assessment. The principle of legality is a presumption that the legislature would not intend to interfere with fundamental common law rights. It is a requirement for some indication that the legislature has not only directed its attention to the question of the curtailment of basic rights, but has also determined upon curtailment of them.¹⁷ As a consequence, general words will rarely suffice “because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights”.¹⁸ That is, general words will often not reveal that Parliament turned its mind to the issue and determined to curtail rights. No assessment of the proportionality of the legislative interference with rights is necessary. The Commission refers, as it did in oral argument, to the analysis of the authorities by Associate Professor Meagher.¹⁹
16. The Commission further observes that the principle of legality is a common law principle of interpretation. International law “is a legitimate and important influence on the development of the common law, especially where international law declares the existence of universal human rights”.²⁰ Accordingly, when the courts are identifying fundamental common law rights and freedoms it is permissible to have regard to Australia’s treaty obligations; and this may “deepen” the principle of legality.²¹
17. This does not mean that each right protected by the ICCPR is *ipso facto* a fundamental common law right. As Brennan J observed in *Mabo (No 2)*, “the common law does not necessarily conform with international law”.²² Rather, development of the common law to recognise rights not hitherto recognised as

¹⁷ *Coco v The Queen* (1994) 179 CLR 427 at 437; and see *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131 (Lord Hoffman).

¹⁸ *Ibid.*

¹⁹ D Meagher, “The Common Law Principle of Legality in the Age of Rights” (2011) 35 MULR 449, especially pp 460-464.

²⁰ *Mabo v Queensland (No 2)* (1992) 177 CLR 292 at 42 (Brennan J, with whom Mason CJ and McHugh J agreed).

²¹ Chief Justice French, “Oil and Water? International Law and Domestic Law in Australia”, The Brennan Lecture, Bond University, 26 June 2009, available at:

<<http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac>> .

²² *Ibid.*

fundamental common law rights for the purposes of the principle of legality must occur through orthodox common law principles, of which the existence of a treaty obligation is but one factor.

18. However, the Commission agrees with the First Defendant that in this case the rights in issue — freedom of movement, privacy and freedom from arbitrary detention — are recognised by the common law (and, of course, under the Charter) and so there is no need in this case for development of the common law.²³
19. The Commission agrees generally with the submissions of the First Defendant on Issue 2.

ISSUE 3: THE APPLICATION OF THE COMMISSION'S SUBMISSIONS ON SECTION 7(2) PROPORTIONALITY TO THE PRINCIPLE OF LEGALITY AND THE PRINCIPLE OF CONSISTENCY

20. Issue 3 is premised on the proposition that proportionality has a role to play in the application of both the principle of legality and the principle of consistency. For the reasons given above, the Commission contends that proportionality has no role in the application of the principle of legality; but for the purposes of Issue 3 the Commission will assume that proportionality has a role to play in both of these principles.
21. The Commission's submissions on the application of s 7(2) in the context of the statutory interpretation task under the Charter are found at paragraphs 80 to 84 of its submissions. The Commission notes that its submissions on this issue concerned only the right to freedom of movement, because it contended that s 59 necessarily involves a limitation on freedom of movement, but did not necessarily involve detention²⁴ (and the right to privacy was raised not as an aspect of the vehicle stop and the construction of s 59, but as an aspect of the demands for Mr Kaba's name and address, to which the *Road Safety Act* had no relevance). For that reason, the Commission's submissions on Issue 3 concern only the right to freedom of movement.

The principle of consistency and proportionality

22. The Commission observes that the ICCPR contains no general limitation clause equivalent to s 7(2) of the Charter. Rather, some rights under the ICCPR are subject to internal limitations; and others are absolute, so that no question of justified limitations arises (such as the right not to be subject to torture). For this reason some

²³ First Defendant's Submissions at [19].

²⁴ Commission's Submission at [65].

care must be taken in any simple transposition of the analysis required by s 7(2) to the context of the internally limited rights under the ICCPR in the context of the principle of consistency.

23. The Commission further observes that Art 12(3) of the ICCPR (concerning freedom of movement) specifies that limitations on the right must be “necessary” for certain specified purposes, namely “to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others”. In contrast, s 12 of the Charter does not contain any internal limitation. However, the Commission contends that the inquiry under Art 12(3) as to whether a measure is “necessary” for a specified purpose involves an assessment of whether it is proportionate.²⁵
24. Bearing in mind the differences between the Charter and the ICCPR, the Commission contends that its written submissions on proportionality in respect of ss 7(2) and 12 of the Charter and s 59 of the *Road Safety Act* cannot be *directly* applied in determining whether the limitation on rights effected by permitting random vehicle stops is consistent with Art 12 of the ICCPR.²⁶ However, those submissions are nonetheless relevant to the exercise required by Art 12.
25. Taking the elements of s 7(2), and the Commission’s submissions in relation to them, in turn, the Commission makes the following observations.
 - 25.1. *The nature of the right:* Art 12 does not in terms direct attention to the nature of the right it protects. By its inclusion in the ICCPR, the right has been recognised as important; and to that extent the Commission’s submission in paragraph 82.1 is relevant to Art 12. The Commission also contends that it is relevant that the right under Art 12 is subject to internal limitation, rather than being absolute.
 - 25.2. *The purpose of the limitation:* Art 12 is more prescriptive than s 7(2) in relation to purpose; thus the Commission’s s 7(2) submissions on this issue are not directly applicable to the Art 12 analysis. However, in this case the Commission considers that the purpose of “the safe use of roads” is a purpose directed at public health and the rights and freedoms of others. The Commission’s submission in paragraph 82.2, that this purpose is legitimate and important, is applicable to the analysis required under Art 12.

²⁵ See, eg, Castan and Joseph, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2013) at 31 and the communications there cited; and see UN Human Rights Committee, General Comment 31 at [6]; UN Human Rights Committee, General Comment 27 at [14].

²⁶ Commission’s written submissions at [82]-[84].

- 25.3. *The nature and extent of the limitation:* The Commission contends that this aspect of its submissions is relevant to the Art 12 analysis. A power to conduct random stops without cause results in a relevantly unfettered power that is properly regarded as arbitrary (for the reasons given in its submissions at paragraph 82.3). An arbitrary power cannot be regarded as “necessary” to protect public health or the rights and freedoms of others.
- 25.4. *The relationship between the limitation and the purpose:* The Commission contends that this aspect of its submissions is relevant to the Art 12 analysis. In this case there is no evidence to support the proposition that a power to conduct random vehicle stops is necessary for road safety; and the Court cannot safely conclude that the power is necessary.
- 25.5. *The availability of less restrictive means:* The Commission contends that this aspect of its submissions is relevant to the Art 12 analysis, and reiterates its contention that less restrictive means are available.
26. In summary, s 7(2) of the Charter articulates an approach to proportionality reflected in international instruments and jurisprudence, including the ICCPR (and in comparative jurisprudence). The Charter does not deal with proportionality in precisely the same way as the ICCPR, but the two instruments require generally the same approach and so the Commission’s submissions on s 7(2) are broadly relevant to an analysis of freedom of movement under the ICCPR.
27. On the question whether it is correct to speak of an “onus of proof” in the context of statutory interpretation, the Commission again refers the Court to the judgment of Warren CJ in *Re Application Under the Major Crimes (Investigative Powers) Act*²⁷ and contends that her Honour’s approach ought to be followed by this Court.
28. In any event, the Commission agrees with the First Defendant that if the language of “onus of proof” is inapt, nonetheless the person asserting that a limitation is justified or necessary bears in practical terms the “persuasive onus”.²⁸ In this case there was simply no evidence; and while there may be cases in which no evidence is needed to persuade a court that a limitation on rights is necessary or justified, this is not such a case (for the reasons developed by the Commission in oral argument, including, in

²⁷ (2009) 24 VR 415 at 448-449 [147].

²⁸ First Defendant’s Further Submissions at [35].

particular, that there are a number of assumptions and unanswered questions underpinning the assertion of justification in this case²⁹).

29. Accordingly, the Court should conclude that the restriction on freedom of movement that would be effected by the plaintiff's construction is not necessary for the protection of public health or the rights and freedoms of others and so would place Australia in breach of Art 12. For that reason, that construction is not to be preferred.

The principle of legality

30. If a proportionality analysis were to be relevant to the application of the principle of legality, then the Commission contends that the proportionality analysis outlined in its submissions would be generally applicable, without the need for the qualifications given in relation to the analysis under the ICCPR.

The Plaintiff's Submissions on Issue 3

31. Finally, the Commission notes that the Plaintiff's submissions on Issue 3 appear to be directed not to the application of the Commission's s 7(2) submissions to the principles of consistency and legality (as articulated by the Court in its email to the parties dated 6 November 2014), but to the relationship between s 7(2) and s 32. The Commission makes no further submissions on this issue, but in response to the Plaintiff's submissions makes the following point.

32. It is not correct to say, as the Plaintiff does at paragraph [37], that the Commission's submission on s 7(2) "fails to take account of the rights and safety of other road users".³⁰ Rather, the Commission's submissions accepted the existence of those rights as a legitimate purpose,³¹ but the Commission contended that mere assertions about those rights are insufficient to enable the Court to conclude that random vehicle stops are a proportionate or necessary mechanism for protecting those rights. Rather, the Plaintiff ought to have demonstrated, through cogent evidence, the relationship between the restriction on rights and the purpose of protecting the rights of others. It did not do so (whether by reference to legislative fact evidence³² or otherwise).

Dated: 27 November 2014

KRISTEN WALKER SC

²⁹ See, in particular, the questions raised by the minority in *R v Ladouceur* [1990] 1 SCR 1257 at 1265-1267 (Dickson CJ, Wilson, La Forest and Sopinka JJ).

³⁰ Cf Plaintiff's Submissions at [37].

³¹ Commission's Submissions at [82.1].

³² Cf Plaintiff's Submissions at fn 31.