

Regulatory Crime

Recent cases
Responding to quasi-criminal
investigations

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Overview

1. Responding to Notices to Produce
2. Obligations of Disclosure
3. Continuing and Non-continuing offences

Aurora and Epping -v- VWA [2018] VSCA 165

Background

- Concrete truck rolled
- WorkSafe issued notices to Aurora and Epping to give information and produce documents
- Response to WorkSafe that any statutory powers to investigate have lapsed
- WorkSafe issued charges for failure to comply with the notices

Aurora and Epping -v- VWA [2018] VSCA 165

The proceedings

- Magistrates' Court: charges contested on basis the notices were invalid;
- alternatively, the company had a reasonable excuse for failing to comply by accepting legal advice.
- The Magistrates' Court found offences proven.
- On appeal to Supreme Court on a question of law, trial judge dismissed appeals.
- On appeal to Court of Appeal, notices were found to be valid, and the appeal dismissed.
- Majority found the notices sufficiently informed applicants of the suspected contravention and were not required to specify the provision suspected to have been contravened.

Aurora and Epping -v- VWA [2018] VSCA 165

Fundamental Principles

- Two fundamental principles of a notice to produce:
 - “First, the notice must disclose, on its face, that it is an exercise of the power which is conferred on the Authority by the statutory provision in question.*
 - ...
 - Secondly, the notice must specify, with reasonable clarity, the information that the recipient is required to provide, or the documents that the recipient is required to produce’ at [79]*

Aurora and Epping -v- VWA [2018] VSCA 165

Responding to Notices to Produce

When responding to notices to produce, consider:

1. What is the statutory power conferred
2. Do the documents or information come within the power
3. Is it clear what information / documents are being requested
4. Does privilege apply
5. How long might it take to respond
6. The consequence of non-compliance

Roberts v The Queen [2020] VSCA 277

Background

- In 1998, two police officers were shot and in 2002 Bandali Debs and Jason Roberts were convicted of their murder.
- Police officer's dying declarations were pivotal part of Crown case.
- One ground of appeal was fresh and compelling evidence of non-compliance with the duty of disclosure.

Roberts v The Queen [2020] VSCA 277

The non-disclosure

- Written statement of police officer who heard the dying declarations was expressed to be made four hours after the events.
- Written statement was in fact made 10 months later. Statement made at the time was not provided to defence.
- Respondent conceded the non-disclosure deprived the appellant of a legitimate forensic choice with respect to the dying declarations.
- Further 12 allegations of police misconduct relied upon, including direction to omit information in statements, revising police statements, non-disclosure of initial statements and records of that process being destroyed

Roberts v The Queen [2020] VSCA 277

Principles

- Prosecution must disclose all material relevant to their defence – failure to do so may give rise to substantial injustice and a quashed guilty verdict
- Arises first from statute (*Criminal Procedure Act 2009*), but also common law
- Duty extends to credibility evidence of Prosecution witnesses
- Material is in Prosecution's possession if it is in investigating official's possession
- The duty is subject to limitations

Roberts v The Queen [2020] VSCA 277

Substantial miscarriage of justice

- Primary question: whether the irregularity at trial, by way of non-disclosure, was such that without more, the convictions should be set aside.
- Court was satisfied there had been a gross and fundamental corruption of the trial process such that it ceased to be a fair trial according to law.
- Court was satisfied that a substantial miscarriage of justice had occurred.
- Appellant's convictions quashed and an order made for a new trial.

Roberts v The Queen [2020] VSCA 277

The duty of disclosure –

Applying *Roberts*

- Disclosure of investigating official's notes and draft statements
- Disclosure of materials, reports etc. compiled by an expert witness
- Photographs – video – other material compiled (and perhaps forgotten) during an investigation
- Investigating officials should adopt careful and cautious approach to the duty
- Investigating officials must identify documents subject to claim of privilege
- Disclosure Certificates – section 41A *Criminal Procedure Act 2009*

**Optus Administration Pty
Ltd v Saluwadana [2023]
VSCA 266**

- Wage Inspectorate Victoria charged Optus with 5 offences under section 9 of the *Long Service Leave Act 2018 (Vic)*
- At Magistrates' Court, Optus sought leave to amend the charges from occurring *on* a date to *between* dates
- Optus opposed the amendment on two grounds:
 1. The offence was not capable of being alleged as a continuing offence
 2. Leave should not be granted to amend the charge, as doing so amounts to the creation of a new offence and an injustice to the Accused
- Magistrate decided that offence was both capable of being alleged as a continuing offence, and that amendment did not create a new offence (and no injustice to the accused)

Optus

(9) What happens if employment ends before leave is taken?

- (1) If an employee's employment ends (other than because of the employee's death) before the employee has taken all the long service leave to which the employee is entitled, the employee is taken to have started long service leave on the day that the employment ended.
- (2) **On the day** referred to in subsection (1), the employee's **employer must pay the employee** the full amount of the employee's long service leave entitlement as at that day.
 - Penalty: In the case of a natural person, 12 penalty units for each day during which the offence continues;
 - **In the case of a body corporate, 60 penalty units for each day during which the offence continues.**

Optus

- Optus sought judicial review of decision that the offence was capable of being alleged as a continuing offence
- Unsuccessful

- Optus appealed to Court of Appeal (citing error of primary judge in conclusion that the offence was capable of being alleged as continuing)
 - ❖ Provision cannot be separated – obligation and penalty read together
 - ❖ Nothing turns on Explanatory Memorandum or ambiguity

Optus

Similar (but not identical) regulatory offences

Dangerous Goods Act 1985 – section 45

- A person who is guilty of an offence against this Act for which no penalty is expressly provided is liable—
 - (a) in the case of a body corporate—to a penalty of not more than 500 penalty units and to a further penalty of not more than **50 penalty units for each day on which the offence continues after conviction ...**

Water Act 1989 – section 3D (offence to interfere etc. with State observation bore)

- A person who is guilty of an offence ... that is of a continuing nature is liable, in addition to the penalty set out at the foot of that subsection, to a **further penalty of not more than 5 penalty units for each day during which the offence continues—**
 - (a) after service of a notice of contravention on the person under section 151; or
 - (b) if no notice of contravention is served, after conviction.

Questions?

[Aurora and Epping v VWA \[2018\] VSCA 165](#)

[Roberts v The Queen \[2020\] VSCA 277](#)

See also Roberts v The Queen [2020] 60 VR 431; [\[2020\] VSCA 58](#) (the leave decision)

References

[Optus Administration Pty Ltd v Saluwadana \[2023\] VSCA 266](#)

[Section 41A](#) – *Criminal Procedure Act 2009*

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