sign and ratify an international instrument dealing with individual rights, those rights should be regarded as important for the sake of an 'anxious scrutiny' or proportionality approach to judicial review of administrative action.

While some complexities in a substantive review approach to judicial review cannot be avoided, such as the determination of the appropriate standard of review where different factors seem to point in different directions, the entire process could be much faster and, perhaps more importantly, applicants would feel more as if they have been *heard* on the merits of their case. Compare this to a decision under the current model of Australian judicial review, where applicants are regularly confused by judgments attempting to explain why the matters in question did not relate, for example, to a jurisdictional fact and cannot be reviewed. The adoption of a Canadian or UK 'substantive review' approach, avoiding the flaws in those systems as identified above, and including an appropriate degree of deference to the decision-maker, is simply a better way of ensuring administrative justice, which, despite the protestations in *Attorney-General (New South Wales) v Quin,*[123] should be the goal of a reviewing court.

Endnotes

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MAKING SENSE OF *MOMCILOVIC*: THE COURT OF APPEAL, STATUTORY INTERPRETATION AND THE *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006*

Bruce Chen*

Since the High Court's landmark decision on the *Charter of Human Rights and Responsibilities Act 2006* in *Momcilovic v The Queen*, the Victorian Court of Appeal has had the opportunity to apply the High Court's findings on several occasions. This paper examines four key cases to shed light on the current state of play regarding the *Charter* and statutory interpretation.

On 8 September 2011, the High Court of Australia handed down its decision in *Momcilovic v The Queen* (*Momcilovic*),[1] the first to deal extensively with the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the *Charter*). The High Court made significant findings in respect of the interpretive provision under the *Charter* - section 32. Section 32(1) provides that '[s]o 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'. The High Court held that section 32(1) did not replicate the extensive effects of section 3 of the United Kingdom *Human Rights Act 1998*, which permits legislation to be interpreted in a way that may depart from parliament's original intention.

However, as the High Court's decision was delivered by way of six separate reasons for judgment, it has been difficult to determine the *ratio* in respect of certain matters. In particular, while section 32(1) was considered to amount to an ordinary principle of statutory interpretation, its precise effect was left unclear. So too the role of s 7(2) of the *Charter*, if any, in respect of section 32(1). Section 7(2) of the *Charter* provides that '[a] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors', including those set out under that subsection.

This paper examines four cases in which the Victorian Court of Appeal (the Court) has sought to apply *Momcilovic* with respect to the Charter and statutory interpretation.

Slaveski v Smith

In *Slaveski v Smith*,[2] the Court was predominantly concerned with the correct interpretation of section 24 of the *Legal Aid Act 1979* (Vic), which provides that Victoria Legal Aid 'may' provide legal assistance to a person in certain circumstances. More specifically, the Court was asked to determine whether certain rights to legal assistance in criminal proceedings protected by sections 25(2)(d) and (f) of the *Charter* operated to transform this discretionary power into an entitlement, such that an eligible person must be given legal aid.

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In considering whether the provisions of the *Legal Aid Act*, interpreted in light of the *Charter*, provided for an entitlement to legal aid, the Court (per Warren CJ, and Nettle and Redlich JJA) noted that the High Court in *Momcilovic* by way of a 6:1 majority held that section 32(1) 'does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision'.[3] Rather, section 32(1) required that the purpose of a provision be discerned 'in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky Inc v Australian Broadcasting Authority*.'[4] The Court called upon the judgment of French CJ in *Momcilovic* as being representative of the High Court's position on this issue, observing that it 'emerges from Momcilovic that the effect of s 32(1) is limited'.[5]

The Court set out a passage of French CJ's judgment, that section 32(1) requires:

> statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) [thus] applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application...[6]

The principle of legality encompasses a well-recognised presumption at common law that parliament does not intend to interfere with fundamental common law rights and freedoms except by clear expression of an unmistakable and unambiguous intention.[7] Such rights and freedoms include, for example, private property rights,[8] the privilege against self-incrimination,[9] access to the courts,[10] and open justice.[11] The significance of this principle has recently been reaffirmed by the High Court.[12] Pursuant to section 32(1) of the *Charter*, such a presumption is now also applied to a broader range of rights, some of which are lesser protected or unprotected by the common law, such as the right to privacy (section 13(a) of the *Charter*) and the right to freedom of expression (section 15(2) of the *Charter*). That is the 'wider field of application' to which French CJ refers.

In *Slaveski*, the Court went on to lay down the following principles as to the precise effect of section 32(1) of the *Charter*:

> Consequently, if the words of a statue [sic] are clear, the court must give them that meaning. If the words of a statue are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an usual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.[13]

Thus, it can be seen that section 32(1) has been interpreted as operating in a truly orthodox fashion. It should be noted that *Slaveski* is now the leading authority on the operation of section 32(1), such that it is arguably no longer necessary to refer back to the High Court's decision in *Momcilovic*. The above passage has been applied by the Trial Division of the Supreme Court as the definitive statement on what is permitted by section 32(1) in interpreting legislation.[14]

Applying those considerations to the relevant provisions of the *Legal Aid Act*, the Court noted that, according to ordinary principles of statutory interpretation, the word 'may' could be read as 'shall' or 'must' 'where the particular context of words and circumstances make it apparent that Parliament intended a statutory power to be exercised in a particular way in certain events'.[15] Nonetheless, the Court found that section 32(1) did not transform the discretionary power to grant legal aid under the *Legal Aid Act* into a mandatory one.

The Court outlined a number of factors relevant to this determination, but most significantly in the author's view, it held that the human rights protected by sections 25(2)(d) and (f) of the *Charter* were 'expressly conditioned upon the existence of an entitlement to legal assistance under the Legal Aid Act'. Those rights by their own terms were not 'absolute and unqualified', and as such, were 'not intended to alter' the pre-*Charter* interpretation that the power was discretionary.[16]

Due to the qualified scope of the human rights concerned, the Court had no need to consider the limitation of human rights and whether section 7(2) of the *Charter* had any role to play in section 32(1). However, this issue was given consideration in *Noone v Operation Smile (Australia) Inc*.

Noone v Operation Smile (Australia) Inc

In this case,[17] proceedings had been brought by the Director of Consumer Affairs Victoria against a former dentist and his associated companies, in respect of claims that certain alternative therapy treatments offered by a clinic they operated were effective in treating cancer and had scientific support. The Director alleged that these claims amounted to misleading and deceptive conduct in trade or commerce contrary to section 9(1) of the *Fair Trading Act 1999* (Vic). Amicus curiae had appeared in the proceedings below, and submitted that section 9(1) should be construed in light of the right to freedom of expression under section 15(2) of the *Charter* as including a *mens rea* element.

On appeal to the Court, Warren CJ and Cavanough AJA looked to the purpose of the prohibition on misleading and deceptive conduct in trade or commerce under the *Fair Trading Act*. Their Honours discerned that its 'clear purpose' was to reproduce in Victorian law the consumer protection regime under the Commonwealth *Trade Practices Act 1974* (and thus unifying the two). They rejected the argument that the statutory prohibition under Victorian law, interpreted pursuant to the *Charter*, required the incorporation of a *mens rea* element. Such an interpretation, it was held, would make the provision 'radically different from its federal counterpart', and thus would not be consistent with the purpose of the provision.[18] As provided by section 32(1), statutory provisions are to be interpreted compatibly with human rights so far as it is possible to do so *consistently with their purpose*.

In a separate judgment, Nettle JA expressed a similar view.[19] However, his Honour gave further consideration to, and appeared to place greater emphasis on, the scope of the right to freedom of expression. Based on comparative jurisprudence, Nettle JA found that the right to freedom of expression under the *Charter* did not confer a right to engage in misleading and deceptive conduct, and that even if it did, the absence of a *mens rea* requirement would not offend the *Charter*.[20]

These findings of the Court were sufficient to dispose of the appeal.

However, it is the further discussion by the Court in respect of section 7(2) which bears greater significance to the *Charter* jurisprudence. As alluded to above, what amounts to an interpretation of a statutory provision *compatible* with human rights pursuant to section 32(1) was unclear prior to *Momcilovic*, and remains so. The *Charter* harbours no definition of the word, 'compatible'. This has given rise to conflicting arguments. On the one hand, it has been argued that considerations relating to justification of human rights limitations must be taken into account pursuant to section 7(2) before any incompatibility may be found. On the other hand, it has been argued that section 7(2) is relevant only after incompatibility has been found, and upon the Supreme Court giving consideration to making a 'declaration of inconsistent interpretation' pursuant to section 36 of the *Charter*.

The Court of Appeal in *The Queen v Momcilovic*[21] had determined that the latter approach was correct. The practical effect of this determination was to narrow the range of meanings which could potentially be given to a statutory provision, so as to be 'compatible' with human rights. As such, there was a greater likelihood that a statutory provision could be found incompatible with human rights. However, although the Court was unanimous in its findings on section 7(2), the High Court was deeply divided by this issue on appeal.

In *Noone*, Warren CJ and Cavanough AJA dissected the various judgments of the members of the High Court. Based on this analysis, their Honours observed that there seemed to be a 4:3 majority in favour of the proposition that section 7(2) *did* inform the interpretation process under section 32(1), but that two of the four members in the majority on that point were in dissent as to the final orders (Hayne and Heydon JJ). Chief Justice Warren and Cavanough AJA therefore concluded that no *ratio* could be drawn from *Momcilovic* on this issue. Their Honours considered that there was 'at least some doubt as to whether the Court of Appeal is bound to follow its previous decision in Momcilovic', but otherwise left the question open.[22]

Justice Nettle agreed that there was no binding majority view in *Momcilovic*. However, his Honour took a different tack, considering that it was appropriate to adhere to the Court's previous finding on this point 'until and unless the High Court determines that it is incorrect'.[23]

Accordingly, while the Court's reasons on this point in *Noone* are both *obiter* and non-conclusive, the joint judgment of Warren CJ and Cavanough AJA suggests that the Court may, where appropriate, be amenable to reconsidering its position that section 7(2) has no part to play in the interpretation of legislation. Nevertheless, until then, the Trial Division of the Supreme Court has, when confronted with this choice, shown preference for the approach of Nettle JA.[24] The current authority is that of the Court in *Momcilovic* prior to its appeal.

However, it should be noted that the position taken by the Attorney-General[25] and the Victorian Equal Opportunity and Human Rights Commission[26] (both of whom have rights of intervention under the *Charter*) is that section 7(2) *does* inform the interpretation process under section 7(2).

WBM v Chief Commissioner of Police

In *WBM v Chief Commissioner of Police*,[27] the appellant had pleaded guilty and received an aggregate sentence of imprisonment for knowingly possessing child pornography, making/producing child pornography, as well as other non-sexual offences. Subsequently, the *Sex Offenders Registration Act 2004* (Vic) was enacted. It provided for a sex offender registration scheme for certain offenders who had committed 'registrable offences'.

The issue before the Court was whether the appellant was subject to the scheme. This turned upon the proper construction of the definition of an 'existing controlled registrable offender' under the *Sex Offenders Registration Act*. It required that a person be 'serving' a sentence for a 'registrable offence' immediately before the date of enactment of the Act. The appellant argued that he did not meet the definition. His primary argument was that on the natural, grammatical meaning of the definition, he was not 'serving' the sentence because it was an aggregate sentence for numerous offences, and only the offences related to child pornography were registrable. It was therefore not possible to show that he would have fallen within the definition had he only been sentenced for the two registrable offences. In respect of the *Charter*, the appellant relied in support on the right under section 13(a) 'not to have his ... privacy unlawfully or arbitrarily interfered with'.

Aside from issues as to retrospectivity of the *Charter's* operation, the Court (per Warren CJ, Hansen JA and Bell AJA) was unanimous in finding that the *Sex Offenders Registration Act* did not limit the appellant's right to privacy, since it did not give rise to an 'arbitrary' interference (nor was it unlawful).

Chief Justice Warren (Hansen JA agreeing) found that the aims of the legislation were to reduce the likelihood of re-offending, facilitate the investigation and prosecution of future offences, prevent registered sex offenders working in child-related employment, and empower the monitoring of compliance with the legislative requirements. Her Honour considered that these aims were 'legitimate' and 'important' and could within reason 'provide a basis for abrogating certain fundamental rights'. It was also considered 'in the best interests' of society (and sex offenders) that sex offenders be deterred from re-offending, and that those who re-offend or attempt to be capable of being located swiftly. The legislation was 'directly linked to achieving these goals' and there was 'no practical, more minimal, alternative'.[28]

Consistently with *Slaveski*, Warren CJ asserted that:

> The interpretative exercise in s 32 (1) of the Charter merely demands that the Court select the interpretation which is compatible (or the least incompatible) with human rights. The constructions urged by the parties are compatible with the Charter right. As any construction is compatible, the Charter can provide no further guidance.[29]

Justice Bell agreed that sex offender registration schemes of this kind were not incompatible with human rights, because their purpose was to ensure that children were protected from harm.[30] Moreover, the inclusion of offenders sentenced in the past was not of itself arbitrary. His Honour examined in detail the confined scope of application of the definition for 'existing controlled registrable offender' in reaching this finding. Justice Bell also expressed that he 'gave weight to the method chosen by the legislature for selecting which past offenders are to be subject of the child-protecting scheme'.[31]

As is evident from the discussion above, the Court unanimously found that the *Charter* arguments offered no assistance to the appellant.

The Court also made a number of significant observations on the common law principle of legality (the appellant having argued there had been an abrogation of the common law right or freedom to carry on one's own business or trade). The Court unanimously agreed that the principle of legality did not involve justification considerations. As Warren CJ stated:

> When applying the principle of legality one takes the right at its highest. It is not appropriate to consider whether any abrogation of a common law fundamental right or freedom is justified. It must be kept in mind the fact that the principle of legality does not require one to look at whether the intended end justifies the proposed means. In other words, the principle of legality is engaged when fundamental rights and freedoms are threatened even where the Parliament had a good reason to abrogate them such as to promote an overall increase in rights and freedoms for all.[32]

The strength of the common law principle of legality, where it is applicable, can thus be contrasted with that of the *Charter* due to the principle's absence of justification considerations (should section 7(2) of the *Charter* indeed be found to have a role to play in interpretation). Nevertheless, Warren CJ noted that the strength of the principle may vary according to the significance of the right, the context in which it is raised, and depending on whether the right has been weakened or qualified over time (including by legislation).[33]

Taha and Brookes

The last of this quartet of cases is *Victorian Toll v Taha; Victoria v Brookes*,[34] a case handed down in March this year.

That case dealt with the interpretation of section 160 of the *Infringements Act 2006* (Vic), which pursuant to subsection (1) conferred on the Magistrates' Court the power to order that an 'infringement offender' be imprisoned for a specified period for non-payment of fines. Subsections (2) and (3) contemplated the making of less severe orders for certain infringement offenders, such as those with a mental or intellectual impairment, disorder, disease or illness. Two appellants were involved in these proceedings. One possessed an intellectual disability, and the other suffered from a mental illness.

The question before the Court was whether the proper construction of section 160 of the *Infringements Act* required the Magistrates' Court to take into account the options available under subsections (2) and (3), before making an order for imprisonment under subsection (1).

The Court answered this question in the affirmative. Justice Nettle reached his conclusion on the basis of ordinary principles of statutory interpretation, and considered that his construction was supported by the *Charter*. Justice Nettle equated section 32(1) with the common law principle of legality, consistently with the approach previously adopted in *Slaveski* (his Honour having been one of the judges of the Court in that case). Justice Tate also reached her findings on the basis of ordinary principles of statutory interpretation (although her Honour's judgment went further on *Charter* grounds, as discussed below). Justice Osborn agreed with the findings of Nettle and Tate JJA on non-Charter grounds.

Although the operation of section 32(1) of the *Charter* was not central to the determination of the appeal, the judgment of Tate JA is interesting to note because it revisits the effect of section 32(1), as well as the role of section 7(2), in light of the High Court's reasoning in *Momcilovic*.

In relation to section 32(1), Tate JA considered that the High Court's findings in *Momcilovic* 'should not be read as implying that s 32 is no more than a "codification" of the principle of legality'.[35] In her Honour's view, not all six members of the High Court had shared this position. Justice Tate reproduced and relied upon this passage of Gummow J's judgment (Hayne J agreeing):

> [T]he reference to 'purpose' in such a provision as s 32(1) is to the legislative 'intention' revealed by consideration of the subject and scope of the legislation in accordance with principles of statutory construction and interpretation. There falls within the constitutional limits of that curial process the activity which was identified in the joint reasons in *Project Blue Sky* ... [where] McHugh, Gummow, Kirby and Hayne JJ, before setting out a lengthy passage from Bennion's work *Statutory Interpretation*, said:
>
> > 'The duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'
>
> That reasoning applies a fortiori where there is a canon of construction mandated, not by the common law, but by a specific provision such as s 32(1).[36]