

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COURT OF APPEAL

No. S APCR 2012 0054
No. S APCR 2012 0055

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

- and -

DILLON LEYS AND TYSON LEYS

Respondents

- and -

ATTORNEY GENERAL FOR THE STATE OF
VICTORIA

- and -

VICTORIAN EQUAL OPPORTUNITY AND
HUMAN RIGHTS COMMISSION

Interveners

OUTLINE OF SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND
HUMAN RIGHTS COMMISSION

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 Act 2006* (Vic) (**the Charter**).

I. THE ISSUE

2. Section 21 of the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic) (**the Amending Act**) repealed ss 36 to 48 of the *Sentencing Act 1991* (Vic) (**the Act**), which conferred power to make Community Based Orders.¹ The same section substituted new ss 36 to 48 into the Act, which empower the courts to make Community Correction Orders (**CCOs**).
3. Section 21 of the Amending Act commenced on 16 January 2012.² However, while the new s 37 commenced on that date, the application of that section is governed by clause 5 of Schedule 3 to the Act³ (**the transitional provision**), which provides:

Section 37 as inserted by section 21 of the [Amending Act] applies to a sentence imposed on or after the commencement of that Act, irrespective of when the offence was committed or the finding of guilt was made.
4. By s 2 of the Amending Act, different sections of the Amending Act commence on different dates. Some provisions of the Amending Act have not yet commenced, and may not commence until 30 June 2013.⁴
5. Section 11(4) of the *Interpretation of Legislation Act 1984* (**ILA**) provides:

A reference in an Act to the date of commencement of ... another Act or a portion containing 2 or more provisions of ... another Act is, if the whole of the Act or portion referred to ... is not to come ... into operation on the one day, a reference to the first day on or before which all the provisions of the Act or portion referred to have come, or will have come, into operation.

¹ As well as Combined Custody and Treatment Orders and Intensive Corrections Orders.

² Amending Act s 2(3); SG (No 423) 21 December 2011, p 3.

³ To which effect is given by the new s 116A of the Act.

⁴ Amending Act s 2(4).

6. If, on its proper interpretation, the effect of the transitional provision is that the new s 37 does not “apply” until the entirety of the Amending Act has commenced, the consequence would be that for the period between the commencement of s 21 of the Amending Act and the commencement of all of the remaining provisions of that Act – being a period that could be as long as 18 months – the courts have been deprived of a sentencing option that might have been used in place of imprisonment. That would follow notwithstanding the fact that there is no policy rationale for the introduction of such a gap, and that Parliament plainly intended to replace the old provisions about community based orders with the new provisions concerning CCOs.
7. In summary, the Commission submits:
 - (a) If the transitional provision is interpreted as having the effect summarised above, that interpretation would be incompatible with s 21(2) of the Charter.
 - (b) Like the ILA, s 32(1) of the Charter creates a rule of statutory interpretation that is potentially relevant to the interpretation of all Victorian statutory provisions. The effect of s 32(1) is that, in every case where there is a constructional choice between an interpretation of a statutory provision that is compatible with a human right in Part 2 of the Charter and an interpretation that is not so compatible, s 32(1) requires the adoption of the interpretation that is compatible with human rights unless that interpretation is inconsistent with the purpose of the provision.
 - (c) Section 32(1) supports the interpretation of the words “commencement of that Act” in the transitional provision as meaning the “commencement of that section of the Act”. On that interpretation the Amending Act would not reduce the power of the courts to impose sanctions other than fines or imprisonment, and there would be no incompatibility with s 21 of the Charter. Such an interpretation would be consistent with the legislative purpose, and must therefore be adopted.

II. ENGAGEMENT OF CHARTER RIGHTS

8. Section 21(2) of the Charter relevantly provides that “A person must not be subjected to arbitrary arrest or detention”. That section is modelled on Articles 9 and 11 of the International Covenant on Civil and Political Rights.⁵
9. If a person is imprisoned in circumstances where a CCO would have been made if the power to make such an order was available, that imprisonment is “arbitrary” within the meaning of s 21(2) of the Charter because it would result not from a policy change to withdraw that sentencing option, but from accidental drafting error that would require the person imprisoned to be treated more harshly than other persons who engage in equivalent offending at either an earlier or later point in time.
10. In *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*, a Full Court of the Federal Court of Australia examined the concept of “arbitrary” detention under Article 9 of the ICCPR and explained that:⁶

In construing Art 9(1) it should first be noted that the right not to be subjected to arbitrary detention is, textually, in addition to the right not to be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. ... [I]t is not enough for the deprivation of liberty to be provided for by law; the law itself must not be arbitrary.

In applying Art 9 ... the Human Rights Committee ... has also interpreted the provision broadly and as containing an important element additional to, and beyond, compliance with the law. So, in *van Alphen v The Netherlands* (UNHRC Communication No. 305/88)... [t]he Committee concluded (at [5.8]):

⁵ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill*, p 16.

⁶ (2003) 126 FCR 54 at [143] and [146].

"The drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances"

11. In circumstances where s 21(2) of the Charter is clearly engaged, it is unnecessary to examine whether the transitional provision also engages s 27(2) of the Charter (which concerns retrospective increases in penalty). The Commission will address s 27(2) orally if that would assist the Court.

III. SECTION 32 OF THE CHARTER

12. Section 32(1) of the Charter provides:

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.

13. The operation of s 32(1) of the Charter was extensively examined in *Momcilovic v The Queen* (***Momcilovic***).⁷ But as Nettle JA has observed:⁸

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

14. While the High Court divided in relation to some questions concerning the operation of s 32(1), it is clear following *Momcilovic* that when interpreting a statutory provision the Court must, at a minimum:

- (a) "discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky Inc v Australian Broadcasting Authority*";⁹ and
- (b) construe the provision "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".¹⁰

15. The "ordinary techniques of statutory construction" that s 32(1) requires to be deployed to achieve an interpretation that is compatible with human rights provide considerable scope for interpretation that departs from the literal language of a statute. While the interpretive task must commence with the text, it does not end there.¹¹ The legal meaning of a provision frequently does not correspond to its literal meaning.¹² Courts often arrive at interpretations that are not apparent from the text alone in order to give effect to the context, purpose or history of a provision,¹³ or in order to give effect to values it is presumed Parliament intended to respect, despite the fact that those

⁷ (2011) 280 ALR 221.

⁸ *WK v The Queen* [2011] VSCA 345 at [55].

⁹ *Slaveski v Smith* [2012] VSCA 25 at [20] (Warren CJ, Nettle and Redlich JJA), distilling the effect of *Momcilovic*.

¹⁰ *Slaveski v Smith* [2012] VSCA 25 at [23], quoting *Momcilovic v R* (2011) 280 ALR 221 at [51] (French CJ).

¹¹ *Momcilovic v R* (2011) 280 ALR 221 at [50], [170], [565], [684].

¹² *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297 at 320-321; *Mills v Meeking* (1990) 169 CLR 214 at 235; *Bennion on Statutory Interpretation* (2008) at 455-456.

¹³ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642 at 653 [12] (French CJ and Bell J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

values are not acknowledged in or apparent from the text.¹⁴ Thus, in *CIC Insurance v Bankstown Football Club Ltd*, the High Court said:¹⁵

[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses “context” in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous... [I]nconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent. (emphasis added)

16. In *Momcilovic*, the High Court emphasised that s 32(1) of the Charter requires this very kind of approach to be deployed if possible consistently with the purpose of a statutory provision to achieve an interpretation that is compatible with human rights. As Gummow J stated (in a part of his reasons with which Hayne J agreed):¹⁶

[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* ...

“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).

17. Similarly, French CJ said that s 32(1) of the Charter:¹⁷

operates upon constructional choices which the language of the statutory provision permits. Constructional choice subsumes the concept of ambiguity but lacks its negative connotation. It reflects the plasticity and shades of meaning and nuance that are natural attributes of language and the legal indeterminacy that is avoided only with difficulty in statutory drafting.

18. Accordingly, at a minimum, s 32(1) of the Charter authorises and requires courts to apply the above principles to the extent necessary to interpret Victorian statutory provisions to operate compatibly with human rights, even if that interpretation is not apparent from the literal or grammatical meaning of the words Parliament has used.

19. Even if that was the only operation of s 32(1) of the Charter, that would be sufficient for the purposes of this case. It has long been established that in certain circumstances it is permissible for a court to read down¹⁸ words in a statute to overcome an unintended consequence of the words used. The applicable principles were discussed by the High

¹⁴ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78] and 385 [80]; *Bennion on Statutory Interpretation* (2008) at 441-442.

¹⁵ *CIC Insurance v Bankstown Football Club Ltd* (1995) 187 CLR 384 at 408.

¹⁶ (2011) 280 ALR 221 at [170].

¹⁷ *Momcilovic v R* (2011) 280 ALR 221 at [50]. See also at [565] (Crennan and Kiefel JJ).

¹⁸ There is some debate as to whether the process is properly characterised as “reading down” or “reading in”: see, e.g., *R v Young* (1999) 46 NSWLR 681 at 688-689 (Spigelman CJ); cf *VWA v Vitoratos* (2005) 12 VR 437 at 439; *Birmingham v Corroctive Services Commission (NSW)* (1988) 15 NSWLR 292 at 308.

Court in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*,¹⁹ and by this Court in *Victorian Workcover Authority v Wilson*.²⁰ In the latter case, Callaway JA (with whom Winneke P agreed) said:²¹

In his dissenting but influential judgment in *Kingston v Keprose Pty Ltd* McHugh JA referred to the three conditions which Lord Diplock had said, in *Jones v Wrotham Park Settled Estates*, must be satisfied before words could be read into a statute. First, the Court must know the mischief with which the Act was dealing. Secondly, the Court must be satisfied that, by inadvertence, Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.

20. Those observations are equally applicable in this case. They have the consequence that the transitional provision should not be given its literal meaning. Instead, the reference to “commencement of that Act” should be read down, so that it is confined to and read as a reference to the “commencement of that section of the Act”. That interpretation is required by s 32(1) of the Charter because:
- (a) the mischief is plain, as it is apparent on the face of the transitional provision that it was intended to clarify the operation of the new s 37 with respect to pre-existing offences or findings of guilt, rather than to confine the operation of the new s 37 until the entirety of the Amending Act had commenced;²²
 - (b) it is evident that Parliament has, by inadvertence, overlooked that the language used creates a gap in which neither the old nor new regime applies to particular offences or findings of guilt;²³ and
 - (c) it is possible to state with certainty the words that Parliament would have used had the defect been identified.
21. While the above approach is sufficient for the purposes of this case, it should not be assumed that the principles discussed above exhaust the operation of s 32(1) of the Charter. While *Momcilovic* establishes that s 32(1) does not contain an interpretive rule of the strength of the rule created by s 3 of the *Human Rights Act 1998* (UK), it has not yet been necessary to decide whether in an appropriate case s 32(1) of the Charter may require courts to adopt an interpretation of legislation that would not have been adopted having regard only to ordinary principles of interpretation.
22. That said, *Momcilovic* implies that in some circumstances s 32(1) may have such an operation. That implication arises from the discussion in *Momcilovic* concerning the relationship between ss 32(1) and s 7(2) of the Charter. The High Court did not reach a clear view upon this issue. In *Slaveski v Smith*, this Court summarised the position as follows:²⁴

French CJ, Crennan and Kiefel JJ concluded that s 7(2) ‘cannot inform the interpretative process which s 32(1) mandates’ but is engaged only when and if ‘the statutory provision under consideration imposes a limit on its enjoyment’ ... In contrast, Gummow, Hayne and Bell JJ held that s 7(2) does inform the interpretative task to the extent that it will usually be appropriate for a court first to consider whether

¹⁹ (1981) 147 CLR 297 at 305, 311, 320-321.

²⁰ (2004) 10 VR 298.

²¹ (2004) 10 VR 298 at [26] and [27]; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113-116.

²² See Statement of Compatibility, *Sentencing Amendment (Community Correction Reform) Bill 2011*, Assembly, 15 September 2011, p 3291 (re clause 54).

²³ The extrinsic material strongly suggests that no gap between the introduction of the CCO regime and the previous regime was intended: Explanatory Memorandum, *Sentencing Amendment (Community Correction Reform) Bill 2011*, pp 5, 29; Statement of Compatibility, *Sentencing Amendment (Community Correction Reform) Bill 2011*, Assembly, 15 September 2011, p 3290; Second Reading Speech, *Sentencing Amendment (Community Correction Reform) Bill 2011*, Assembly, 15 September 2011, pp 3291-3292.

²⁴ [2012] VSCA 25 at [21] (Warren CJ, Nettle and Redlich JJA).

under s 7(2) there is scope for a justified limitation of the right in issue. It followed, as Gummow J put it, that '[s]ection 32(1) is directed to the interpretation of statutory provisions in a way which is compatible with the human right in question, as identified and described in Part 2, including, where it has been engaged, s 7(2)'. Heydon J observed that, if s 7(2) were valid, it would inform the interpretative task, but his Honour held that both s 7(2) and s 32(1) were invalid.

23. In *Slaveski*, the Court left open whether, in light of the above, it was "bound to follow its own decision in *Momcilovic* unless satisfied that it is clearly wrong".²⁵ But the Court revisited this issue in *Noone v Consumer Affairs Victoria*, where Warren CJ and Cavanough AJA, while noting that there is no *ratio* on the point, said that "there seems to be a 4:3 majority in the High Court that s 7(2) informs the s 32(1) interpretative task".²⁶ Their Honours doubted²⁷ whether the Court of Appeal was bound to follow its own previous decision in *Momcilovic*.²⁸ That is the better view, having regard to the fact that the High Court quashed the orders of the Court of Appeal in *Momcilovic*.
24. Once the question becomes one of persuasive authority, there is no reason to disregard the dissenting judgment of Heydon J. His Honour expressed the strong view that, as a matter of the proper construction of the Charter, s 7(2) does form part of the analysis required by s 32.²⁹ It is entirely proper to extract an authoritative proposition of law from a combination of majority and minority judgments, provided that proposition is not in conflict with the *ratio* of the case.³⁰ In those circumstances, given that four Justices of the High Court take the view that the interpretive task required by s 32 brings in the proportionality analysis under s 7(2), that approach should be adopted.
25. The point is of present significance because, once s 7(2) is relevant to interpretation, it follows that there must be a difference between the interpretation that can be reached applying ordinary principles of statutory construction, and that which is possible under s 32(1) of the Charter (being an interpretation required only in the event that any limitation on human rights arising from an alternative interpretation is not demonstrably justified having regard to s 7(2) of the Charter). Such a difference is acknowledged in *R v Hansen*,³¹ to which Gummow and Hayne JJ referred with approval.³²
26. Accordingly, even if the Court were to conclude (contrary to the submission above) that it could not interpret the transitional provision in the manner identified above applying ordinary principles of statutory interpretation, it would remain necessary to consider whether such an interpretation was "possible" without departing from a task properly described as "interpretation". If it is, s 32(1) of the Charter requires the Court to adopt such an interpretation despite the fact that that interpretation would not otherwise have been available, because the arbitrary interference with liberty that would result from the literal application of the transitional provision obviously cannot be justified having regard to the factors set out in s 7(2) of the Charter.

Dated: 23 July 2012

STEPHEN DONAGHUE

Douglas Menzies Chambers

²⁵ [2012] VSCA 25 at [22].

²⁶ [2012] VSCA 91 at [28]-[29].

²⁷ [2012] VSCA 91 at [20], cf [142] (Nettle JA).

²⁸ *R v Momcilovic* (2010) 25 VR 436 at [105]-[110].

²⁹ (2011) 280 ALR 221 at [408]-[409], [439].

³⁰ See MacAdam and Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998) [10.34], citing *Commonwealth v Clark* [1994] 2 VR 333, where the Full Court of the Supreme Court of Victoria extracted such a principle from the majority and minority judgments in *Commonwealth v Verwayen* (1990) 170 CLR 394.

³¹ [2007] 3 NZLR 1 at [57]-[62], [88]-[92] and [191].

³² *Momcilovic v R* (2011) 280 ALR 221 at 279 [161], 280 [168]. See also at [683]-[684] (Bell J).