ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M134 of 2010

BETWEEN:

VERA MOMCILOVIC

Appellant

and

THE QUEEN

First Respondent

and

ATTORNEY-GENERAL FOR VICTORIA

Second Respondent

and

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Third Respondent

HUMAN RIGHTS LAW RESOURCE CENTRE'S WRITTEN SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Basis of seeking leave to be heard

2. The Human Rights Law Resource Centre (the **Centre**) seeks leave to be heard as *amicus curiae* by summons dated 4 October 2010. The basis for the application is set out in the affidavit of Philip Alan Lynch sworn 4 October 2010.

3. Principally, the Centre seeks to assist the Court by making submissions on the relationship between s 7(2) and s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**). Those submissions were made by the Centre below (where the Centre appeared as *amicus*), and were accepted by the Court of Appeal.[1] No party to this appeal is putting those submissions; indeed, the Appellant, the Attorney-General for the State of Victoria and the

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1 *R v Momcilovic* (2010) 265 ALR 751 at 780-781 [105]-[110]. The Court of Appeal expressly stated that the Centre's submission on this point was correct: at [107].

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Filed on behalf of: the Human Rights Law Resource Centre
Filed by: **Allens Arthur Robinson**
530 Collins Street Tel: 03 9613 8300
Melbourne Vic 3000 Fax:
DX 30999 Melbourne Contact: Rachel Nicholson

Victorian Human Rights and Equal Opportunity Commission (**the Commission**) contend the Court of Appeal erred in accepting them. Unless the Centre is granted leave to appear as *amicus*, no party will present argument in support of this aspect of the Court of Appeal's reasons.

4. Given the importance of the issue to the operation of the Charter, the Centre seeks leave to make brief oral submissions as well as relying on this outline.

5. The Centre does not seek to be heard in support of any particular party.

Part III: Reasons why leave to be heard should be granted

6. For the reasons given in paragraphs 2-5 above, the Centre's submissions will assist the Court to arrive at the correct determination of the case where the argument is unlikely to receive adequate treatment by the parties.[2]

Part IV: Applicable constitutional and statutory provisions

7. The Centre adopts the appellant's list of applicable constitutional and statutory provisions.

Part V: Submissions

8. In the affidavit of Mr Lynch sworn 4 October 2010, para 15, two questions were outlined upon which the Centre proposed to make submissions (which were the subject of its submissions below), namely:

(a) Is it necessary first to construe a statutory provision absent s 32 of the Charter, to arrive at an "ordinary" construction of the provision, before considering s 7(2)? (**the first question**).

(b) What is the relationship, if any, between s 7(2) and s 32 of the Charter? Does s 32 only come into play after the statutory provision has been measured against s 7(2)? (**the second question**).

9. In relation to those two questions, the affidavit indicated that the submissions the Centre would seek to make were, in summary, as follows:

(a) **On the first question**: The proper approach to statutory construction under the Charter is to start with s 32: that is, to see s 32 as a cardinal principle of statutory construction (rather than seeing s 32 as a 'last resort' or 'extraordinary' provision

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2 *Cf Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312.

which only comes into play in the event that a statutory provision is incompatible with human rights as a matter of 'ordinary' construction).

(b) **On the second question**: Where a provision is said to limit a human right, it is wrong to consider, first, whether such limits can be justified under s 7(2), before considering whether it is possible to interpret the provision compatibly with human rights under s 32. Rather, where it is alleged that a statutory provision limits human rights, it is necessary to consider whether it is possible to interpret the provision in a way that is compatible with human rights in accordance with s 32 of the Charter. Consideration of s 7(2) only arises in the event that it is not possible to interpret the provision compatibly with human rights under s 32.

10. Before the Court of Appeal, the Centre was the only person to make those submissions. The Court of Appeal accepted the Centre's submissions on both points: at [35], [107].

11. The Attorney-General (Vic) has now filed submissions (dated 27 January 2011) which are very similar to the Centre's submissions below on the first question.[3] Accordingly, the Centre does not propose to make submissions on the first question, but rather to indicate its agreement with paras 28-31 of the Attorney-General (Vic)'s Submissions.

12. The Centre seeks to make submissions on the second question. A summary of the Centre's submission is set out in paragraph 9(b) above. (This issue is the subject of paras 1 and 2 of the Attorney-General (Vic)'s notice of contention.)

13. In addition, the Centre seeks to make a submission to the effect that the Court of Appeal correctly held (at [103]) that compliance with the s 32(1) obligation means (inter alia) adopting the interpretation which "least infringes" human rights. That conclusion is challenged by the Attorney-General (Vic) in paras 3 and 4 of his notice of contention and paras 51-54 of his submissions. The Centre seeks to support the reasons of the Court of Appeal on this issue.

First Submission: Relationship between s 7(2) and s 32

14. The Court of Appeal dealt with the relationship between s 7(2) and s 32 of the Charter at paragraphs [105]-[110] of its reasons. The Court of Appeal held that the interpretive obligation imposed by s 32(1) of the Charter is logically distinct from the proportionality assessment

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3 See Attorney-General (Vic)'s Submissions, paras 28-31.

required by s 7(2) of the Charter. The Appellant, the Attorney-General (Vic) and the Commission submit that the Court of Appeal erred in so holding.[4]

15. The Centre submits that the Court of Appeal was correct, for the following reasons.

16. **First**, the text of s 32(1) supports the Court of Appeal's approach. Section 32 relevantly requires statutory provisions to be interpreted in a way that is "*compatible with human rights*" rather than "*compatible with human rights as reasonably limited in accordance with s 7(2)*".

17. **Secondly**, the provenance and conceptual purpose of s 7(2) support the Court of Appeal's approach. Section 7(2) is based on s 5 of the *New Zealand Bill of Rights Act* and s 36 of the *Constitution of the Republic of South Africa*. Those provisions were in turn based on s 1 of the *Canadian Charter of Rights and Freedoms* (forming part of the Constitution Act 1982), which provides:

> "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

18. That provision allows limited derogation from human rights in the context of a supreme law allowing for judicial review of legislation. Thus legislation which was "demonstrably justified in a free and democratic society" would survive challenge, with the onus lying on the State to make out the justification.[5] In *R v Oakes*, the Supreme Court expressly declined to consider s 1 of the *Canadian Charter* when interpreting the provision of the *Narcotics Control Act* at issue in that case and applied s 1 only when considering whether the impugned law should be upheld.[6] So, in Canada, the interpretation of a provision arises at a different (and earlier) stage to justifying any limitation the provision, as interpreted, imposes on human rights.[7]

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4 See Appellant's Submissions, paras 54, 56; Attorney-General (Vic)'s Submissions, paras 26, 40-50; Commission's Submissions, paras 38-47.

5 See, eg, *R v Oakes* [1986] 1 SCR 103.

6 *R v Oakes* [1986] 1 SCR 103 at [60]-[62].

7 Peter Hogg, *Constitutional Law of Canada*, vol 2 (5th ed, 2007) at [38.1] ("Section 1 of the Charter contemplates that judicial review of legislation under the Charter should proceed in two stages. In the first stage, the court must decide whether the challenged law has the effect of limiting one of the guaranteed rights. If the challenged law does have this effect, the second stage is reached: the court must then decide whether the limit is a reasonable one that can be demonstrably justified in a free and democratic society. The first stage involves the interpretation and application of the provisions of the Charter that define the guaranteed rights. The second stage involves the interpretation and application of s 1 of the Charter.")

19. The Court of Appeal correctly recognised that a provision such as s 7(2) is directed either at judicial review of a provision or to those making or advising on legislative measures potentially limiting of human rights.[8]

20. It is not part of the process of interpretation to engage in what amounts to judicial review of the legislative provision by reference to the legislative judgment made in enacting the provision, a proportionality assessment of the provision and a consideration of alternative means open to the legislature to have achieved its purpose. Such considerations only arise at a later stage, when considering whether to make a declaration of inconsistent interpretation.[9]

21. **Thirdly**, the Court of Appeal's approach best furthers the Charter's purpose of protecting and promoting human rights.[10] Collapsing the interpretation of the right and the justification provision is insufficiently protective of human rights.[11] To consider s 7(2) as part of the interpretation process fails to respect and promote the human rights enacted by Parliament and elevates the importance of limitations over rights and is thus likely to erode rights.[12] On this point, the Court of Appeal correctly adopted the powerful reasons of the minority judgment of Elias CJ in the New Zealand Supreme Court in *R v Hansen*.[13]

22. **Fourthly**, as the Court of Appeal recognised, to import the justification provision into the interpretation process would lead to inconsistencies in the application of the justification provision and so to uncertainties in interpretation.[14] That is because (a) s 32 speaks to all involved in interpreting legislation, including tribunal members, lawyers and public officials, who would then be required to review for themselves Parliament's judgment about the provision; and (b) satisfaction of the justification provision depends on whether the limitation has been "demonstrably" justified, which may turn on how a case is presented. It is well established that it is for the government party to satisfy the court with evidence that a purported limitation is "demonstrably justifiable"[15] and that if it fails to discharge that burden then there is no basis upon which the court can be satisfied that a limitation is reasonable. It is difficult to reconcile

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8 *R v Momcilovic* (2010) 265 ALR 751 at 781 [109], citing *R v Hansen* [2007] 3 NZLR 1 at [22]-[23] (Elias CJ).

9 Charter, s 36.

10 *R v Momcilovic* (2010) 265 ALR 751 at 780 [107]-[108].

11 *R v Momcilovic* (2010) 265 ALR 751 at 781 [109].

12 *R v Hansen* [2007] 3 NZLR 1 at [17] (Elias CJ).

13 [2007] 3 NZLR 1.

14 *R v Momcilovic* (2010) 265 ALR 751 at 778, 781 [97]-[98], [110].

15 See, eg, *R v Oakes* [1986] 1 SCR 103 at 105, 136-7; *Minister of Transport v Noort* [1992] 3 NZLR 260 at 283; *Moise v Transitional Land Council of Greater Germiston*, 2001 (4) SA 491 (CC) at [19]; *R v Momcilovic* (2010) 265 ALR 751 at 790 [143]-[144], 791 [147].

that approach with the view that the court's role under s 32(1) is its traditional one of interpreting legislation.

23. The Attorney-General (Vic)'s contentions on the relationship between ss 7(2) and 32 rely on authorities from the United Kingdom and Hong Kong.[16] However, the *Human Rights Act 1998* (UK) does not contain a provision equivalent to s 7(2). And, in Hong Kong there is no equivalent of s 32 or of s 7(2). It is thus difficult to see what may be gained by any comparison with how courts in those jurisdictions engage in the process of statutory construction.[17]

24. Further, there is a fundamental weakness in the Attorney-General (Vic)'s approach. The Attorney-General accepts that s 32 should be considered in the first instance, as part of the body of rules governing the interpretive task. However, the Attorney-General does not explain how it is possible to apply s 7(2) as part of that process. Section 7(2) cannot form part of the interpretive process because the proportionality assessment that it requires cannot be undertaken until a construction has been reached.[18]

25. The Attorney-General (Vic) and the Commission rely on ss 28 and 38 of the Charter to support their contention that the Court of Appeal erred.[19] In the Centre's submission, neither of those provisions supports the Attorney-General (Vic)'s and the Commission's contention.

26. As to s 38, there are at least three reasons why s 7(2) has no operation in the context of that provision.

(a) First, the terms of the section itself mark out the boundaries of the standard of unlawfulness for the purposes of sub-s (1). That standard is disapplied in the circumstances referred to in sub-ss (2) and (3) and it is elaborated upon in sub-s (4).

(b) Secondly, s 7(2) expressly states that human rights may only be limited "under law". That expression, which plainly encompasses legislative limitations, confirms that

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16 See Attorney-General (Vic)'s Submissions, paras 44, 48, 50.

17 *Contra* Attorney-General (Vic)'s Submissions at paras 44, 48, 50; Commission's Submissions at para 46.

18 That is because s 7(2) assumes a "law" that limits human rights and because it requires an assessment of the "limitation", including its "purpose", "means" and "extent".

19 Attorney-General (Vic)'s Submissions, para 41; Commission's Submissions, paras 41-43.

Parliament did not intend executive action that limited human rights be measured for lawfulness against s 7(2).[20]

(c) Thirdly, the explanatory memorandum affirms that s 38(1) of the Charter is "modelled" on s 6 of the *Human Rights Act 1998* (UK).[21] But, in that jurisdiction, there is no equivalent of s 7(2) of the Charter and so no work for a provision of that kind to do. The scope or ambit of some of the rights under the European Convention is, however, expressly qualified and so, in relation to those rights, some analysis of lawfulness, legitimate aim and proportionality is necessary in order to determine whether the right itself has been breached. But, having established that a protected right has been breached, s 6 of the *Human Rights Act* does not require a distinct inquiry into whether that breach might be justified. Given the express statement that s 38 of the Charter is modelled on the UK provision, Parliament's intention must have been that s 7(2) have no operation in relation to s 38.

27. As to s 28 of the Charter, there is no reason to suppose that the reference to "compatibility" necessarily requires it be a reference to a process involving a determination pursuant to s 7(2) of the Charter. Contrary to the submissions of the Commission,[22] the Centre contends that a member who introduces a Bill, the provisions of which limit human rights, is required to state pursuant to s 28(3)(b) that a provision of the Bill is incompatible with human rights if it limits a human right (regardless of whether the provision must be justifiable pursuant to s 7(2) of the Charter). That enhances the utility of the process and the transparency of provisions of the Bill that limit human rights but which, in the opinion of a member, nevertheless may be justifiable. The Parliament is best able to debate the justifiability of the provision if all limitations are expressly drawn to its attention. It is simply wrong to say that on this reading, "permissible limitations on rights would be ignored".[23] There is no reason why the member could not proffer his or her opinion on the question of proportionality when making the statement and the permissibility of the limitation would likely be an aspect of debate on the Bill.

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20 The explanatory memorandum to the Charter confirms that the reference in s 7(2) of the Charter to "subject under law" does not include actions by public authorities: at 8 ("a human right may only be subject under law (whether statutory or common law) …").

21 Explanatory memorandum at 27.

22 Commission's Submissions at [42]. See also, by implication, Attorney-General's Submissions at [40].

23 Commission's Submissions at [42].

28. An argument that the term "compatibility" should be read consistently across the Charter begs the question.[24] The real question is what does compatibility with human rights mean. Properly construed, the Charter envisages three possible relationships between a human right and a law:

(a) the law is *compatible* with human rights;

(b) the law is *incompatible* with human rights, but the incompatibility is a *reasonable limit* on the right (in which case the provision is given its incompatible meaning, but no declaration of inconsistent interpretation would be made);

(c) the law is *incompatible* with human rights and the incompatibility is *not a reasonable limit* on the right (in which case the provision is given its incompatible meaning and a declaration of inconsistent interpretation may be made).

29. That understanding of the relationship between compatibility and reasonable limits properly respects and accounts for the text and structure of the Charter and gives primacy to the Charter's purpose of protecting and promoting human rights.

30. The Attorney-General (Vic)'s and the Commission's approach would involve attributing to s 32 of the Charter an operation that would be, in effect, weaker than that of the common law principle of legality. It would be weaker because while the principle of legality gives full effect to the fundamental rights and freedoms that it recognises,[25] s 32 would protect against only those limitations on rights that cannot be demonstrably justified. It should not be presumed that Parliament intended s 32 to have such a confined operation. None of this is to say that the rights are absolute; the scope of some of the rights is expressly limited[26] and they must, in any event, be read together.

Second Submission: Least infringement of human rights

31. The Court of Appeal was right to conclude that compliance with s 32 means "exploring all 'possible' interpretations of the provision(s) in question and adopting that interpretation which

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24 *Cf* Commission's Submissions at [44].

25 See, eg, *Coco v R* (1994) 179 CLR 427 (privacy, property rights); *Daniels Corporation International v ACCC* (2002) 213 CLR 543 (legal professional privilege); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (access to the courts); *Al-Kateb v Godwin* (2004) 219 CLR 562 (liberty).

26 See, eg, Charter, s 13 which protects against unlawful or arbitrary interferences with the right to privacy and reputation.

least infringes Charter rights".[27] Of course, it must be understood that in saying this, the Court of Appeal was assuming that the interpreter had already considered the text, context and purpose of the provision and there remained more than one possible construction. The Attorney-General (Vic)'s argument is based on a misconception about the interpretive tools already taken into account by the court.[28]

32. The words of s 32 support the Court of Appeal's conclusion: an interpretation that is compatible with human rights is to be adopted "*so far as*" it is possible to do so. Those words serve two purposes in s 32: first, to condition the operation of the section on consistency with purpose; and secondly, to direct the interpreter as to the extent to which a human rights
10 compatible interpretation should be sought.

33. Further, the Court of Appeal's approach best gives effect to the purpose of s 32. Assuming there are two available constructions of a provision (i.e. two constructions which are possible and consistent with the purpose of the provision or Act[29]), then the court should favour that which gives greater protection to human rights. The Attorney-General (Vic)'s submissions do not explain how the interpretational dilemma is to be resolved. Section 32 is a perfectly legitimate tool to resolve the dilemma in that situation.

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27 *R v Momcilovic* (2010) 265 ALR 751 at 779 [103]. *Contra* Attorney-General (Vic)'s Submissions at 51-54.

28 Attorney-General (Vic)'s Submissions, paras 51, 53.

29 In identifying the "purpose" of the provision or Act (see the definition of "statutory provision" in s 3 of the Charter), it is important to distinguish between the "purpose" of the provision and its legal meaning. The Court of Appeal erroneously conflated the two concepts at 782 [113]. The proper approach was stated by Gleeson CJ in *Carr v Western Australia* (2007) 232 CLR 138 at 143 [5], [7].

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Mark Moshinsky SC
Ph: (03) 9225 7328
Fax: (03) 9225 6061
m.moshinsky@vicbar.com.au

Chris Young
(03) 9225 8772
(03) 9225 8395
chris.young@vicbar.com.au

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