

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

NO M134 OF 2010

BETWEEN:

VERA MOMCILOVIC

Appellant

THE QUEEN

First Respondent

**THE ATTORNEY-GENERAL FOR THE STATE
OF VICTORIA**

Second Respondent

**THE VICTORIAN EQUAL OPPORTUNITY AND
HUMAN RIGHTS COMMISSION**

Third Respondent

THIRD RESPONDENT'S FURTHER SUPPLEMENTARY SUBMISSIONS

- 1 These submissions are filed in response to the Court's letter dated 1 March 2011. The Third Respondent (**the Commission**) makes submissions only in response to question 4. That question asks:

"Does s 32 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* assist in resolving the question whether s 5 of the *Drugs Act*¹ applies to 'possession for sale' in the definition of 'traffick' in s 70 and thereby to the offence created by s 71AC?"

- 2 The Commission does not submit that the case should be re-entered for further oral argument in relation to that question.

THE CIRCUMSTANCES IN WHICH SECTION 32 OF THE CHARTER WILL ASSIST IN RESOLVING QUESTIONS OF STATUTORY INTERPRETATION

- 3 Section 32 of the Charter (s 32) will assist in resolving a question of statutory interpretation whenever:
- (a) it is possible, consistently with the purpose underlying the relevant Act, to interpret a statutory provision in two or more ways; and
 - (b) at least one of the possible interpretations is "compatible with human rights" while at least one is not.

¹ Defined as the *Drugs, Poisons and Controlled Substances Act 1981 (Vic)*



4. If those conditions are satisfied, s 32 requires an interpreter to prefer a construction that is compatible with human rights over any construction that is not. On the other hand, if all possible constructions of a provision are compatible with human rights, or if none of the possible constructions are compatible, then s 32 will not assist.
5. Section 32 is directed to everyone who is required to interpret Victorian legislation, including superior courts, inferior courts, tribunals, administrative decision-makers and practitioners. For that reason, it will ordinarily fall to be applied by interpreters who are constrained by:
 - (a) existing authorities concerning the meaning of the same or related statutory provisions; or
 - (b) pre-existing administrative practices that are based upon a particular interpretation of the relevant provisions.
6. While this Court is not bound by existing authorities, it should identify a methodology in applying s 32 that is appropriate for interpreters of Victorian legislation who are so constrained.
7. For that reason, the Commission submits that when applying s 32 it is ordinarily appropriate for an interpreter to start by considering whether the construction of a statutory provision that would ordinarily be preferred – that is, the meaning ascertained applying principles of statutory interpretation other than s 32 – is compatible with human rights.
8. If a statutory provision has been the subject of a judicial decision, that decision will have established the meaning of the provision having regard to those principles. In that event, the interpretive process required by s 32 should commence by examining whether the established meaning is “compatible with human rights”. That approach is consistent with the doctrine of precedent² (if the earlier decision was made by a higher court), with considerations of comity³ (if the earlier decision was made by the same or an equivalent court), and with the public interest in the certainty and stability of the law (in all cases).⁴
9. In some of the cases, the construction identified in the above manner is described as the “ordinary meaning”.⁵ That terminology should not, however, be understood as suggesting that s 32 creates an interpretive rule of a “special” or different kind to that created by, for example, s 15A of the *Acts Interpretation*

² See *ASC v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; *R v Daher* [1981] 2 NSWLR 669 at 672; *R v Parsons* [1983] 2 VR 499 at 509; Pearce and Geddes, *Statutory Interpretation in Australia* (6th edn, 2006) at [1.6]-[1.7]. Note, however, that judicial statements as to the construction and intention of an Act can never supplant or supersede its proper construction: see *Ogden Industries Pty Ltd v Lucas* [1970] AC 113 at 127, quoted in *Brennan v Comcare* (1994) 50 FCR 555 at 572 (Gummow J).

³ *Telstra Corp Ltd v Treloar* (2000) 102 FCR 595 at 603; *The Queen v Momcilovic* [2010] VSCA 50 at [16] (AB 276); *RJE v Secretary to the Department of Justice* (2008) 21 VR 526 at 553-554 [104] (Nettle JA); Pearce and Geddes, *Statutory Interpretation in Australia* (6th edn, 2006) at [1.8]-[1.11].

⁴ Although that public interest will not prevail where an established interpretation is plainly erroneous: see *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13-14; cf *Geelong Harbor Trust Commissioners v Gibbs Bright & Co* (1974) 129 CLR 576 at 582-585 (Lord Diplock); *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382 at 393-394.

⁵ *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 381 at [51]; *RJE v Secretary to the Department of Justice* (2008) 21 VR 526 at 542 [54] and [55] (Maxwell P and Weinberg JA), 556 [114] (Nettle JA); *The Queen v Momcilovic* [2010] VSCA 50 at [25] (AB 279).

Act 1901 (Cth) or s 35 of the *Interpretation of Legislation Act 1984* (Vic). It simply recognizes that if the ordinary or established meaning is “compatible with human rights” then s 32 does not provide any reason to depart from that meaning (even if there are other “possible” meanings that are also compatible with human rights).

10. Of course, in many cases the principle of legality will ensure that the ordinary or established meaning of a statutory provision is compatible with human rights. In those cases, s 32 will not alter the interpretation of the provision.
11. In order to determine whether the ordinary or established meaning of a statutory provision is “compatible with human rights”, it is necessary to ask two questions:
 - (a) first, does the statutory provision, so construed, limit any human right identified in Part 2 of the Charter?
 - (b) second, if so, is that limitation a reasonable limit that is demonstrably justified having regard to the criteria in s 7(2) of the Charter?⁶
12. If the answer to the first question is “yes” and the second question is “no”, then the ordinary or established meaning of a statutory provision is not “compatible with human rights”.
13. In that situation (but only in that situation), s 32 requires an interpreter to consider whether it is possible to interpret the relevant provision differently, such that it would be compatible with human rights. That requires the interpreter to identify any other constructions that are possible consistently with the underlying purpose of the Act, and then to ask the above questions in respect of each such construction.
14. If, following that analytical process, a construction is identified that is compatible with human rights, then s 32 requires that construction to be adopted even though that will involve departing from the ordinary or established meaning of a provision.
15. Section 32 can authorize and require an interpreter to depart from the established meaning of a provision without any inconsistency with the doctrine of precedent because, in cases where the ordinary or established construction is not “compatible with human rights”, but where there is a possible alternative interpretation that is compatible with human rights, Parliament should be understood as having impliedly amended the relevant provision by the enactment of s 32.⁷ The role of the interpreter is to identify the content of the law following that implied amendment.⁸ That task obviously cannot be performed by reference to authorities that predate the implied amendment.

⁶ See Third Respondent's Submissions dated 27 January 2011, paras 38-47; Second Respondent's Submissions dated 27 January 2011, paras 40-50; *Momcilovic v The Queen* [2011] HCA Trans 15 at 40 In 1695-1735, 47 In 2027 – 48 In 2060, 55 In 2386 – 56 In 2429, 57 In 2475-2506.

⁷ *Momcilovic v The Queen* [2011] HCA Trans 15 at 77 In 3396 - 78 In 3439, 85 In 3751-3758, 93 In 4125-4136, 94 In 4166 – 95 In 4247 (8 February 2011); [2011] HCA Trans 16 at 150 In 6655 – 151 In 6698 (9 February 2011). See also *RJE v Secretary to the Department of Justice* (2008) 21 VR 526 at 556-557 [114] (Nettle JA).

⁸ Just as it would be with other implied amendments: see the example given in oral argument concerning the best interests of children: *Momcilovic v The Queen* [2011] HCA Trans 15 at 53 In 2319 – 2329 and 54 In 2355-2359.

THE EFFECT OF SECTION 32 OF THE CHARTER ON THE INTERPRETATION OF SECTION 71AC OF THE DRUGS ACT

16. Section 71AC of the Drugs Act states:

A person who, without being authorized by or licensed under this Act or the regulations to do so, trafficks or attempts to traffick in a drug of dependence is guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum).

17. Section 70 of the Drugs Act defines “traffick’ in relation to a drug of dependence” to include “have in possession for sale” a drug of dependence.

18. Section 73(2) of the Drugs Act states:

Where a person has in his possession ... a drug of dependence in a quantity that is not less than the traffickable quantity applicable to that drug of dependence, the possession of that drug of dependence in that quantity is prima facie evidence of trafficking by that person in that drug of dependence.

19. The offence of trafficking a drug of dependence based on “possession for sale”⁹ has consistently been interpreted by the Court of Appeal (and, previously, by the Full Court of the Supreme Court of Victoria) as comprising two elements, being: (a) possession of a drug of dependence; and (b) intention to sell the drug. Those courts have consistently held that s 5 of the Drugs Act (along with s 73(2), where applicable) may be used by the prosecution to prove the first of those two elements.¹⁰

20. Given that there is a clear established construction of s 71AC of the Drugs Act, for the reasons outlined above it is appropriate, when interpreting s 71AC in light of s 32 of the Charter, to commence by considering whether the established construction is “compatible with human rights”.

21. Accordingly, the first question is whether the established construction of s 71AC limits any of the human rights in Part 2 of the Charter. On the established construction, the first of the two elements in the phrase “possession for sale” can be established by relying on s 5 of the Drugs Act. For that reason, the established construction of ss 71AC and 70 necessarily limits the right to be presumed innocent in s 25(1) of the Charter¹¹ (although the extent of that limitation will depend on whether s 5 imposes a legal or an evidential burden).

22. The second question is whether that limitation is justified having regard to s 7(2) of the Charter. The answer to that question depends upon the meaning of s 5 of the Drugs Act.

⁹ Under s 71AC of the Drugs Act (since 1 January 2001) and previously under s 71 of the Drugs Act. See, e.g., *R v Clarke* [1986] VR 643 at 658.6 – 660.7; *Marabito v R* (1990) 50 A Crim R 412 at 415; *R v Mateiasevici* [1999] 3 VR at 189 [15] (Chernov JA); *R v Tragear* (2003) 9 VR 107 at 116 [39] (Callaway JA, with whom Batt JA agreed); *R v Francis-Wright* (2005) 11 VR 354 at 358 [13]; *R v Tran* [2007] VSCA 19 at [18] (Redlich JA). This approach to ss 5, 70 and 71AC of the Drugs Act is reflected in the standard charge contained in the *Victorian Criminal Charge Book* at 7.7.1.2. The charge book, published by the Judicial College of Victoria, is widely relied upon by judicial officers and its use has been endorsed by the Court of Appeal: see *R v Said* [2009] VSCA 244 at [24]-[32].

¹¹ *The Queen v Momcilovic* [2010] VSCA 50 at [122]-[136] (AB 318-322). This finding by the Court of Appeal was correct, and it has not been challenged in this proceeding.

23. If, as the Appellant and the Commission submit, s 32 requires s 5 to be read as imposing an evidential burden only,¹² then the limitation of the presumption of innocence is minor because a defendant could not be convicted in the face of a reasonable doubt as to his or her guilt. Further, the limitation on the presumption of innocence that arises from an evidential burden is readily justified, because facts relating to the possession of drugs will often be peculiarly within the knowledge of the defendant. It is for those reasons that evidential burdens have routinely been accepted as being consistent with the presumption of innocence (as occurred, for example, in *Lambert*).
24. However, if the Court finds that it is not “possible” to interpret s 5 other than as imposing a legal burden on an accused, then the Court of Appeal was correct in concluding that the limitation on the presumption of innocence that would result from reading ss 71AC together with s 70 and s 5 is not justified.¹³
25. In light of the above reasoning, it follows that, before the Court can determine whether the established interpretation of s 71AC is “compatible with human rights”, it is necessary for it to determine the proper construction of s 5. If that section is interpreted as imposing only an evidential burden, then the established construction of s 71AC (read with s 70) is compatible with human rights, and s 32 would not affect the construction of s 71AC (read with s 70). The answer to question 4 would therefore be “no”.
26. If, however, the Court concludes that it is not possible to interpret s 5 as imposing an evidential burden, then the established construction of s 71AC would not be “compatible with human rights”. In that situation, s 32 of the Charter would require the Court to consider whether there are any other possible interpretations of s 71AC (read with s 70) that would be compatible with human rights.
27. During the hearing, the Court identified as a “possible” construction of s 70 that the phrase “possession for sale” in the definition of “traffick” is a composite concept, with the result that s 5 cannot be used to prove “possession” for the purpose of that definition.¹⁴ On that interpretation, s 71AC would not limit the right to be presumed innocent at all, meaning the section would be “compatible with human rights”.
28. Accordingly, in the event that the Court finds:
- (a) that it is not possible to interpret s 5 as imposing only an evidential burden; and
 - (b) that it is possible, consistently with the purpose of the Drugs Act, to interpret the phrase “possession for sale” as a composite concept to which the operation of s 5 is irrelevant;

s. 32 of the Charter would require the Court to adopt the latter interpretation, notwithstanding the fact that that would involve departing from the established meaning of s 71AC (when read with s 70). In that event, the answer to question 4 is “yes”.

¹² See Third Respondent's Submissions dated 27 January 2011, paras 54-68; *Momcilovic v The Queen* [2011] HCA Trans 15 at 95 – 100 (8 February 2011).

¹³ *The Queen v Momcilovic* [2010] VSCA 50 at [137]-[154] (AB 323-329).

¹⁴ *Momcilovic v The Queen* [2011] HCA Trans 16 at 111 In 4844 – 112 In 4907 and 173 In 7704 – 174 In 7745 (9 February 2011); [2011] HCA Trans 17 at 207 and 255 (10 February 2011).

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A handwritten signature in black ink, appearing to read 'STEPHEN DONAGHUE', is written over a horizontal line.

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