

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS2246/20

Applicant: AUSTRALIAN INSTITUTE FOR PROGRESS LTD (ACN
101 843 396)

and

Respondent: ELECTORAL COMMISSION OF QUEENSLAND

OUTLINE OF SUBMISSIONS

FOR THE QUEENSLAND HUMAN RIGHTS COMMISSION (INTERVENING)

Introduction

1. The Queensland Human Rights Commission ('QHRC') intervenes pursuant to s 51(1)(b) of the *Human Rights Act 2019* ('the HR Act').
2. Section 51(1)(b) enshrines the right of the QHRC to intervene in the circumstances of the present case if the Court determines the preliminary issue of justiciability in the Applicant's favour. This is because if the application is to proceed to be considered on its merits, the construction of certain provisions of the *Electoral Act 1992* must be undertaken in accordance with s 48 of the HR Act.
3. Ultimately, the QHRC notes that this case involves the first judicial consideration of the requirements of the HR Act. In these circumstances, prudence might be exercised in ensuring that the jurisprudence develops incrementally, only where it becomes necessary to determine the case, and in circumstances where a court has the benefit of comprehensive submissions by the parties.
4. The QHRC limits its submissions to the effect of s 48 upon the interpretative process. Not all aspects of that process will necessarily require determination in this case. Further, given the urgency with which these submissions were prepared, the QHRC has not made submissions on:
 - (a) The justification analysis of limitations on rights under s 8(b) and s 13; and
 - (b) The application of the principles to the legislation currently under consideration.
5. In the event the Court wishes to proceed to consider justification of limitations on rights, or indeed would seek submissions from the QHRC applying the relevant principles to the legislation at hand, then the QHRC would need further time to prepare submissions that could be of greater assistance.

Interpretation under s 48 of the *Human Rights Act*

6. The QHRC agrees with the Attorney-General's submissions (at [12]-[13]) that regardless of whether the party to a proceeding relies upon the HR Act, s 48 applies to construction of a Queensland statute, whenever enacted, which impacts upon human rights.¹
7. Further, the Attorney-General's submissions (at [14]-[16]) as to the significance of the two key concepts referred to in s 48(1) are also accepted. However, the QHRC would emphasise that the meaning of s 48(1) is found not in its separate components, but when it is read as a whole, in its context. The words '*to the extent possible*' form part of the approach to be taken. That is, s 48(1) expresses a legislative intent that human rights be protected and promoted² in the interpretation of other provisions, to the extent, or as far as, this is permitted by the language used and the meaning that the legislature is taken to have intended by those words.³ Section 48(2), a provision which is unique in human rights statutes in this country, reinforces this approach in that it requires an interpretation that is '*most compatible*' with human rights to be preferred, where a compatible interpretation is not possible.

The ordinary approach to construction must consider the context of human rights

8. The Attorney-General submits that the 'first question' in interpretation under s 48 is one of whether the provision is ambiguous, or capable of more than one interpretation, under ordinary principles of construction (par [17]).
9. Whilst it is true that s 48 'operates upon constructional choices which the language... permits',⁴ the starting point must be to recognise that human rights factor into the ordinary process of construction as part of the context at the outset. See *Momcilovic v The Queen* per Crennan and Keifel JJ (as her Honour the Chief Justice then was):⁵

This statutory direction seeks to ensure that Charter rights are kept in mind when a statute is construed. The direction is not, strictly speaking, necessary. In the ordinary course of construction regard should be had to other existing laws. The Charter forms part of the context in which a statute is to be construed. It will be recalled that Lord Hoffmann viewed the Convention in a similar way in *Wilkinson*. The process of construction commences with an essential examination of the context of the provisions being construed. (citations omitted)

10. Whilst the Attorney-General's submission adopts the shorthand approach to the issue that has featured in some cases in Victoria post-*Momcilovic*, the QHRC submits the Court should favour the more nuanced approach of French CJ in *Momcilovic*:⁶

The subsection limits the interpretation which it directs to that which is consistent with the purpose of the statutory provision under consideration. It operates upon constructional choices which the language of the statutory provision permits. Constructional choice subsumes the

¹ 'Human rights' being those stated in part 2, divisions 2 and 3 of the HR Act: s 7

² A main object of the HR Act: s 3(a)

³ *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78]

⁴ *Momcilovic v The Queen* (2011) 245 CLR 1 per French CJ at 50 [50], see also *Slaveski v Smith & Victoria Legal Aid* (2012) 34 VR 206, 215 [24]

⁵ *Momcilovic v The Queen* (2011) 245 CLR 1 at [565]

⁶ At 50 [50]-[51], see also at 46 [43]

concept of ambiguity but lacks its negative connotation. It reflects the plasticity and shades of meaning and nuance that are the natural attributes of language and the legal indeterminacy that is avoided only with difficulty in statutory drafting.

... It 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) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application. (citations omitted)

11. Such an approach is consistent with the common law method. See *The Queen v A2, The Queen v Magennis, The Queen v Vaziri*⁷ per Kiefel CJ and Keane J:

[32] The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.

[33] Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy... (citations omitted)

12. Where constructional choices are open, the principle of legality recognises that statutes are to be construed to avoid or minimise their encroachment upon rights and freedoms.⁸ Section 48 can be taken, consistently with that principle, to express a presumption against interference with human rights in the absence of clearly expressed language or necessary implication in the statutory provision in question.
13. Section 48 permits departure from the clear literal grammatical meaning of a statutory provision where this is necessary to construe the provision consistently with its context and purpose. This follows from the approach of statutory construction sanctioned by the plurality of the High Court in *Project Blue Sky*, and adopted by Gummow J (with whom Hayne J agreed) in *Momcilovic* as applying *a fortiori* where there is a canon of construction mandated by a provision such as s 48.⁹

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

⁷ [2019] HCA 35 at [32]-[33]

⁸ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341; *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at [23], recently accepted in *Mann & Anor v Paterson Constructions Pty Ltd* (2019) 373 ALR 1 at 41 [159]

⁹ *Project Blue Sky* (supra) at 384 [78], in *Momcilovic* at 92 [170], also citing *Kennon v Spry* (2008) 239 CLR 366, 397 [90]. See also *Momcilovic* at 123 [280] (Hayne J) and 250 [684] (Bell J).

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. (citations omitted)

14. As concluded by Tate JA in *Victoria Police Toll Enforcement & Ors v Taha & Ors*, s 48 is not simply a codification of the principle of legality. It recognises that a rule of interpretation mandated by the legislature, that directs that a construction be favoured that is compatible with human rights, might more stringently require that words be read in a manner that does not correspond with literal or grammatical reasoning.¹⁰

Shades of meaning

15. Where the text of the statutory provision admits of ‘shades of meaning and nuance’ consistent with its intended purpose under ordinary principles of statutory interpretation (including a context of preserving and protecting human rights), s 48(1) and (2) of the HR Act together then require a court to give the words whichever of the available meanings is ‘compatible with human rights’, or if not compatible, then ‘*most* compatible with human rights’.
16. In the Queensland context, because of s 8, which defines ‘*compatible with human rights*’ to expressly include reference to the justification analysis in s 13,¹¹ the assessment of compatibility involves not only whether the provision limits the human right, but if it does, whether it limits the human right only to the extent that is reasonable and demonstrably justifiable. Accordingly, as succinctly put by Bell J in *Momcilovic*:¹²

If the literal or grammatical meaning of a provision appears to limit a Charter right, the court must consider whether the limitation is demonstrably justified by reference to the s 7(2) criteria. As the Commonwealth submitted, these are criteria of a kind that are readily capable of judicial evaluation. Consideration of the purpose of the limitation, its nature and extent, and the question of less restrictive means reasonably available to achieve the purpose are matters that commonly will be evident from the legislation. If the ordinary meaning of the provision would place an unjustified limitation on a human right, the court is required to seek to resolve the apparent conflict between the language of the provision and the mandate of the Charter by giving the provision a meaning that is compatible with the human right if it is possible to do so consistently with the purpose of the provision. (citations omitted)

17. In Victoria, even without the benefit of s 8 clarifying that questions of proportionality may become relevant to assessing compatibility, or of s 48(2) clarifying that even where the legislation cannot be interpreted compatibly it should be interpreted in the *most* compatible way, courts have considered the interpretative requirement in the Charter as allowing for, or often supporting, an interpretation that ‘*best accords*’ with,¹³ ‘*least infringes*’¹⁴ or ‘*better accommodates*’¹⁵ the human right in question.

¹⁰ *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 at [189]-[190] per Tate JA

¹¹ Explanatory Memorandum, *Human Rights Bill 2018*, p 31

¹² At [684]

¹³ *Slaveski v Smith & Victoria Legal Aid* (2012) 34 VR 206, 215 [24], *Carolyn v The Queen* (2015) 48 VR 87, 104 [47]

¹⁴ *Taha v Broadmeadows Magistrates Court* [2011] VSC 642 at [59], citing *Momcilovic v R* (2010) 25 VR 436, 464 [102], affirmed on appeal in *Victoria Police Toll Enforcement* (supra) at [24]-[27] per Nettle JA (as his Honour then was)

¹⁵ *Nguyen v Director of Public Prosecutions* (2019) 368 ALR 344, 375 [105], citing *Hogan v Hinch* (2011) 243 CLR 506 at [78]

18. Accordingly, the QHRC agrees with the Attorney-General's submissions at [18](a) and (c).
19. However, the QHRC contends that where there may be two or more interpretations said to be compatible with human rights, (AG's submissions at par [18](b)), the construction which best promotes or preserves the human right in question would be preferred over the operation of s 14A of the *Acts Interpretation Act 1954* (AI Act).
20. First, if there are in fact two interpretations compatible with human rights that are more or less compatible with human rights, the less compatible interpretation must limit a human right to some extent and in that case, will not be compatible unless justified under s 13. In that situation, there would be a preference for the interpretation which is most, or more compatible with protecting and preserving the relevant human right.
21. Second, to support the submission at [18](b), the Attorney-General relies upon s 14A of the AI Act and a decision of the ACT Supreme Court in *In the matter of an application for bail by Islam*.¹⁶ At [31], the Attorney-General also relies upon the decision of Warren CJ in *WBM v Chief Commissioner of Police*.¹⁷
22. In *An application for bail by Islam*, Penfold J called into aid the ACT equivalent of s 14A (s 139 of the *Legislation Act 2001*) to find that where an interpretation that is compatible with human rights and consistent with the legislative purpose is 'not available', then the meaning that best achieves the legislative purpose is to be adopted.¹⁸ Notably, her Honour did not find that s 139 had work to do when there were two interpretations consistent with human rights which needed to be decided between. The finding was limited to the circumstances in which s 48(2) would have operation in Queensland and to that extent is legislatively overridden. This decision has since been overturned, but on a discrete basis.¹⁹
23. In *WBM*, Warren CJ described the approach to interpretation under s 32 of the Charter, which is advanced by the QHRC in par 9-14 above:

[31] Statutory construction begins with considering the text of the provision. Ordinarily, but not always, the natural and ordinary and grammatical meaning of the words of a statutory provision should and will correspond with its legal meaning. However, the natural and grammatical meaning of almost any given phrase may alter by virtue of its context in a sentence, a section or an Act. In such cases, without referring to the wider context, even the natural or strict grammatical meaning of a phrase might be ambiguous or misleading. (...)

[39] Consistently with the common law, one must take the purpose and objects of Victorian legislation into account even when this would result in an interpretation that differs from a provision's literal meaning. One may avoid the literal meaning of an Act if the result would have been incongruous, contrary to objects of the Act, capricious and irrational. However, "the modification must be precisely identifiable as that which is necessary to effectuate those purposes and it must be consistent with the wording otherwise adopted by the draftsman". The limitation is that a court may give a "strained" construction to the language used to achieve a clear legislative purpose so long as the construction is neither unreasonable nor unnatural. (...)

¹⁶ [2010] ACTSC 147

¹⁷ (2012) 43 VR 446

¹⁸ Ibid at [216].

¹⁹ *Andrews v Thomson* [2018] ACTCA 53 at [42] and [53]

[41] Statutory interpretation in the context of the purpose of an Act also involves looking at the *consequences* of different constructions to see if a construction would render a section ineffectual, or result in inconvenience, or injustice or interference with legal rights or hardship, or absurdity, or incongruity or anomaly, whereas another would not. This is especially relevant where a given situation is not within the general purview of the Act. However, caution should be exercised before relying on such results to reject what otherwise appears to be the correct construction and to avoid being distracted from the true intention of the legislation.

[42] Common law canons of construction, specifically those relating to retrospective operation and fundamental rights and freedoms, must also be considered, where relevant, in a statutory construction exercise. Furthermore, the Charter must also be considered. (...)

[60] Moreover, it cannot be assumed that legislation is pursuing a single purpose at all costs or to the fullest possible extent. A choice of construction does not arise simply because one construction better promotes the purposes of an Act, but rather it will arise if one construction will fail to promote the purposes of an Act. (...) [Note: whilst this is consistent with s 35(a) of the *Interpretation of Legislation Act 1984 (Vic)*, her Honour cited common law principles here.]

[62] A section is not ambiguous where the meaning of the language used is clear, either by express words or necessary implication. Meaning may be necessarily implied where the provision would be rendered inoperative or largely frustrated if the right or freedom were to prevail.(...)

[97] As a consequence of s 32(1) of the Charter, if a statutory provision interferes with an identified human right, then an interpretation must be preferred that does not interfere with that right or least interferes with that right, provided it is not contrary to statutory intent... (citations omitted)

24. Warren CJ concluded that the statutory scheme under consideration in *WBM* did not offend the Charter (at [121]). In doing so, her Honour stated, in the passage relied upon by the Attorney-General:

[122] For completeness, I observe that there is no obvious ratio from the High Court in *Momcilovic v R* as to whether s 7(2) should be considered as part of the s 32(1) interpretative exercise. In my view, the application of s 7(2) would not appear to alter the scope of the s 13 right. Even if it were to do so, it would only narrow the scope of the right and would therefore not assist the appellant. I consider it is unnecessary to consider which of the approaches to the s 32(1) task described in *Momcilovic* could be applied.

[123] 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. (citations omitted)

25. Whilst the statements of Penfold J and Warren CJ, may be of some comparative assistance, s 48(2) does not have any equivalent in the ACT or Victorian Acts. Those Acts do not have the same consistency which has been adopted in the HR Act (in s 8) as between the requirements placed upon the courts (to interpret statutory provisions) and those placed upon public agencies (to act or make decisions consistently with human rights). Section 8 posits a positive state of compatibility with human rights if the provision (a) does not limit a human right or (b) limits a human right only to the extent reasonable and demonstrably justifiable.

26. Notwithstanding the terms of s 14A(1) of the AI Act, the HR Act directs the approach to be taken where there are two human rights-compatible interpretations available of a provision, the interpretation which will best promote or protect the human right in question.

P Morreau

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16 March 2020