INTRODUCTION

Thank you for that kind introduction and the opportunity to speak today.

I have been asked to provide a background to the *Momcilovic* case, and to examine the decision in relation to the *Victorian Charter* – most particularly in relation to the interpretation provision under s 32.

BACKGROUND: COURT OF APPEAL DECISION

The issues

In terms of background, I will begin with the facts.

*Momcilovic* concerned the rights-compatibility of a classic reverse onus provision in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (‘*Drugs Act*’). Under s 5, a substance is deemed ‘to be in the possession of a person ... unless the person satisfies the court to the contrary’. According to pre-Charter interpretation principles, s 5 was considered to impose a legal burden of disproving possession on the balance of probabilities.

A failure to discharge this reverse onus has very serious consequences – as in the case at hand, a person may be exposed to a conviction for drug trafficking under ss 73(2)

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and 71AC of the Drugs Act, which is an offense punishable by up to 15 years imprisonment.

The Court of Appeal had to consider whether the reverse legal burden in s 5 imposed an unjustifiable limitation on Momcilovic’s right to the presumption of innocence under s 25(1) of the Charter. If it did, it then had to consider whether the rights-incompatibility could be remedied through interpretation under s 32(1), which 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.’ It was argued by three of the four parties, and the amicus curiae, that s 5 should be interpreted under s 32(1) as imposing only an evidentiary onus on the accused to ensure rights-compatibility. If such an interpretation was not available under s 32(1), the Court of Appeal had to consider whether to issue a declaration of inconsistent interpretation under s 36(2) of the Charter.

This became a test case on, inter alia, the strength of the s 32(1) interpretation obligation, and the appropriate methodology for the statute-related mechanisms under the Charter.

The Choices before the Court of Appeal

What were the choices before the Court of Appeal?

Strength of s 32(1)?

Let us first consider the strength of s 32(1). In my opinion, s 32(1) is modelled on s 3(1) of the UK Human Rights Act 1998. Section 3(1) provides that ‘[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’ The similarity between s 32(1) and s 3(1) is striking, as you can see on the powerpoint, with the only relevant difference being that s 32(1) adds the words ‘consistently with their purpose’.

By way of contrast, s 6 of the Bill of Rights Act 1990 (NZ) (“NZBORA”) reads ‘[w]herever an enactment can be given a meaning that is consistent with the rights

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3 The Victorian Equal Opportunity and Human Rights Commission and the Human Rights Law Resource Centre argued that the latter could be achieved by “reading in” the evidential burden, such that s 5 ought to read “unless the person satisfies the court that there is some evidence to the contrary”: Momcilovic [2010] VSCA 50 [40]. The Attorney-General argued that the latter could be achieved by simply interpreting the phrase “satisfies the court to the contrary” as legally meaning that only an evidentiary burden was imposed. That is, the Attorney-General did not think the Momcilovic Court had to go as far as “reading in” to “save” the provision from being an unjustified limitation on rights: Momcilovic [42].

4 Human Rights Act 1998 (UK), c 42 (“UKHRA”).

5 Bill of Rights Act 1990 (NZ) (“NZBORA”).
and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.’ Whether or not s 6 and s 3(1) achieve the same outcome is highly contested;\(^6\) regardless, s 32(1) is clearly modelled on s 3(1) by way of comparison to s 6.

For the purposes of today’s discussion, the British jurisprudence on s 3(1) is of three categories. The earliest case of \(R v A\)\(^7\) is considered the ‘high water mark’,\(^8\) with one commentator considered that the judgment signalled ‘that the interpretative obligation is so powerful that [the judiciary] need scarcely ever resort to s 4 declarations’ of incompatibility,\(^9\) suggesting that ‘interpretation is more in the nature of a “delete-all-and-replace” amendment.’\(^10\)

The middle ground is represented by \(Ghaidan\).\(^11\) Although \(Ghaidan\)\(^12\) is considered a retreat from \(R v A\),\(^13\) its approach to s 3(1) is still considered “radical” because of Lord Nicholls obiter comments about the rights-compatible purposes of the HRA potentially being capable of overriding rights-incompatible purposes of an impugned law. It is questionable whether the obiter comments are in truth that “radical”. I address this in my Public Law Review article.\(^14\)

The “narrowest”\(^15\) interpretation of s 3(1) was proposed by Lord Hoffman in \(Wilkinson\).\(^16\) Lord Hoffman draws an analogy between s 3(1) and the principle of

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7. \(R v A\) (No 2) [2001] UKHL 25 (‘\(R v A\)’).


9. Section 4(2) of the UKHRA is the equivalent to s 36(2) of the Charter.


11. \(Ghaidan v Godin-Mendoza\) [2004] UKHL 30 (‘\(Ghaidan\)’).

12. And the cases leading up to \(Ghaidan\), for example, \(R v Lambert\) [2001] UKHL 37 (‘\(Lambert\)’); re \(S\) [2002] UKHL 10; \(R (Anderson) v Secretary of State for the Home Department\) [2002] UKHL 46 (‘\(Anderson\)’); \(Bellinger v Bellinger\) [2003] UKHL 21.


legality. Wilkinson has failed to materialise as the leading case on s 3(1); rather, Ghaidan remains the case relied upon.\textsuperscript{17}

The methodology

Another issue to be decided was the appropriate methodology to be used under the Charter.

Under the two most relevant comparative statutory rights instruments\textsuperscript{18} – the UKHRA\textsuperscript{19} and the NZBORA\textsuperscript{20} – the methodology adopted is similar and, by and large, settled. Indeed, three Justices of the Supreme Court of Victoria had already essentially adopted the approach under the UK HRA in the decisions of RJE,\textsuperscript{21} Krackle\textsuperscript{22} and Das.\textsuperscript{23}

The method focuses on two “classic rights questions” and two “Charter questions”,\textsuperscript{24} and can be summarised in Charter-language as follows:

\textsuperscript{17} See, for example, Jack Beatson, Stephen Grosz, Tom Hickman, Rabinder Singh, and Stephanie Palmer, Human Rights: Judicial Protection in the United Kingdom (Sweet & Maxwell, London, 208) [5-64] – [5-127]; Kavanagh, Aileen Kavanagh, Constitutional Review Under the UK Human Rights Act (Cambridge University Press, 2009), 28: “In what is now the leading case on s 3(1), Ghaidan, ...”
\textsuperscript{18} This article critiques the Momcilovic decision as against British and New Zealand (“NZ”) authority. It has not been considered necessary to address any arguments based on the Basic Law of Hong Kong because under this instrument the alternative to a remedial re-interpretation is the invalidity of a rights-incompatible law. In the context of considering the legal methodology under a legislative instrument that contains a remedial re-interpretation provision, coupled with the power to issue declarations of inconsistent interpretation, and which establishes a dialogue about human rights, the Basic Law of Hong Kong is of limited assistance.
\textsuperscript{19} UKHRA (UK) c 42. The methodology under the UKHRA was first outlined in Donoghue [2001] EWCA Civ 595 [75], and has been approved and followed as the preferred method in later cases, such as, R v A [2001] UKHL 25 [58]; International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158[149] (“Roth”); Ghaidan [2004] UKHL 30 [24].
\textsuperscript{20} Bill of Rights Act 1990 (NZ) (“NZBORA”). The current methodology under the NZBORA was outlined by the majority of judges in R v Hansen [2007] NZSC 7 (“Hansen”). This method is in contra-distinction to an earlier method proposed in Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (NZCA) (known as “Moonen No 1”).
\textsuperscript{21} See the decision of Nettle JA in RJE [2008] VSCA 265, [114] – [116].
\textsuperscript{22} Krackle v Mental Health Review Board & Ors (General) [2009] VCAT 646, [52] – [65].
The “Rights Questions”

First: Does the legislative provision limit a rights in ss 8-27?

Second: If yes, is the limitation justifiable under the s 7(2) general limits power or under a right-specific limit?

The “Charter Questions”

Third: If the legislative provision imposes an unjustified limit on rights, interpreters must consider whether the provision can be “saved” through a s 32(1) interpretation; accordingly, the judge must alter the meaning of the provision in order to achieve rights-compatibility.

Fourth: The judge must then decide whether the altered rights-compatible interpretation of the provision is “possible” and “consistent[] with [statutory] purpose”.

The Conclusion...

Section 32(1): If the s 32(1) rights-compatible interpretation is “possible” and “consistent[] with [statutory] purpose”, this is a complete remedy to the human rights issue.

Section 36(2): If the s 32(1) rights-compatible interpretation is not “possible” and not “consistent[] with [statutory] purpose”, the only option is a non-enforceable declaration of inconsistent interpretation under s 36(2).

I will refer to this as the “UK/NZ Method”.

The Court of Appeal decision

The Court of Appeal eschewed the earlier Victorian authority, and the R v A and Ghaidan approaches, and chose to align its judgment most closely with the Wilkinson approach.25

The Court of Appeal unanimously held that s 32(1) ‘does not create a “special” rule of interpretation [in the Ghaidan sense], but rather forms part of the body of interpretative rules to be applied at the outset, in ascertaining the meaning of the

provision in question.’

The ‘framework of interpretive rules’ includes s 32(1) of the Charter, s 35(a) of the Interpretation of Legislation Act, and the common law rules of statutory interpretation, particularly the presumption against a parliamentary intention to interfere with or infringe rights (or, the principle of legality, as it is known). To meet the s 32(1) obligation, a court must explore ‘all “possible” interpretations of the provision(s) in question, and adopt[] that interpretation which least infringes Charter rights’, with the concept of “possible” being bounded by the ‘framework of interpretative rules’.

For the Court of Appeal, the significance of s 32(1) is that Parliament ‘embraced’, ‘affirmed’ and codified the principle of legality. Moreover, the guaranteed rights are codified in the Charter.

The Court of Appeal outlined a three-step methodology for assessing whether a provision infringes a Charter right, as follows (“Court of Appeal Method”):

Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the Interpretation of Legislation Act 1984 (Vic).

Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter.

Step 3: If so, apply s 7(2) of the Charter to determine whether the limit imposed on the right is justified.

The main differences between the methods are as follows:

- Under the Court of Appeal method, s 32(1) is relevant at the outset; and s 7(2) is not relevant to interpretation at all, but is a step preparatory to making a s 36 declaration.

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26 Momcilovic [2010] VSCA 50 [35]. This is in contrast to Lord Walker’s opinion that ‘[t]he words “consistently with their purpose” do not occur in s 3 of the HRA but they have been read in as a matter of interpretation’: Robert Walker, ‘A United Kingdom Perspective on Human Rights Judging’ (Presented at Courting Change: Our Evolving Court, Supreme Court of Victoria 2007 Judges’ Conference, Melbourne 9-10 August 2007) 4.

27 Ibid [103]. It is merely ‘part of the body of rules governing the interpretative task’: [102].

28 Momcilovic [2010] VSCA 50 [103].

29 Ibid [104].

30 Ibid.

31 Momcilovic [2010] VSCA 50 [35].
• This is in contrast to the UK/NZ Method, which uses ordinary interpretative methods to establish whether a right is limited; and then s 7(2) to adjudge the justifiability of the limit; and then s 32(1) is only used after an unjustified limit has been established, with s 32(1) being used as part of the remedial power to address the unjustified limitation.
• This comparison identifies the essential question: what is s 32? Is it simply a rule of ordinary interpretation, or is it a special rule allowing ‘remedial’ interpretation of a provision to render it rights-compatible?

In applying its methodology,\(^{32}\) the Court of Appeal held that: first, the proper meaning of s 5 is the imposition of a reverse legal onus;\(^{33}\) secondly, ‘that the combined effect of s 5 and s 71AC is to limit the presumption of innocence’;\(^{34}\) and thirdly, that the limitation was not reasonable or demonstrably justified under s 7(2).\(^{35}\) Although a rights-compatible interpretation was not available, s 5 remained valid and enforceable under s 32(3) of the Charter.\(^{36}\) The only remedy available under the Court of Appeal Method was the making of a declaration under s 36(2), which the Court of Appeal did issue.\(^{37}\)

In my opinion, in its effort to avoid the assumed “judicial activism” associated with s 32(1) replicating s 3(1) as interpreted by Ghaidan, the Momcilovic Court rejected a strong remedial methodology as well.\(^{38}\) The result is a very narrow construction of

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\(^{32}\) It should be noted that the Momcilovic Court’s language changes between its statement of the general rule under step 2 (“breach”) and its application of the rule under step 2 (“limit”). The latter is the correct language, whereas the former demonstrates a fundamental misunderstanding about the operation of rights.

\(^{33}\) Momcilovic [2010] VSCA 50 [35].

\(^{34}\) Ibid [123]. The Momcilovic Court stated that the provisions are (at [135]):

> a substantial infringement of the presumption of innocence, in our view. It means that – subject always to the reverse onus – proof merely of occupation of relevant premises operates (by means of s 5 and s 73(2)) to establish a prima facie case of trafficking against an accused... [A] person in the position of the applicant comes before the jury not as a person presumed to be innocent but as a person presumed to have a case to answer.

\(^{35}\) The Momcilovic Court held that the arguments advanced to justify the reverse onus in connection to the trafficking offence did not ‘come close to justifying the infringement’ and that the reverse onus in connection to the possession offence was ‘not so much an infringement of the presumption of innocence as a wholesale subversion of it’: Ibid [153] and [152] respectively. ‘In our view, there is no reasonable justification, let alone any “demonstrable” justification, for reversing the onus of proof in connection with the possession offence’: at [152].

\(^{36}\) Ibid [154].


\(^{38}\) Although the issues of s 32(1)/s 3(1) replication and methodology are related, the methodology is not dictated by the strength of s 32(1). Indeed, throughout the British jurisprudence, and in the decisions of Warren CJ, Nettle J and Bell J, the methodology did not dictate the strength of the remedial force of ss 3(1) and 32(1) respectively.
s 32(1) and a rights-reductionist methodology which, in turn, delivers a much weaker rights instrument than I think was intended by Parliament.

CRITIQUE OF COURT OF APPEAL

In an earlier article, I undertake a close critique of the reasoning of the Court of Appeal. Relevant to today’s discussions, I undertake a critique of the characterisation of s 32(1) being a codification of the principle of legality. Time does not permit me to canvas this critique today, suffice to say that the criticisms equally apply to the High Court judgments which sanction s 32 as a codification of the principle of legality, and give s 32(1) no greater reading than that of ordinary interpretation.

HIGH COURT OF AUSTRALIA DECISION

Summary of the decision

Having read through the entire 273 page judgment, I must acknowledge my debt to the High Court summary of its judgment for this overall summary of the decision.

On the operation of s 5 of Drugs Act:

- Five judges (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) held that s 5 did not apply to the offence of trafficking under s 71AC of the Drugs Act. As a result, their Honours held that Ms Momcilovic’s trial had miscarried because the jury had been misdirected.
- Justice Bell held that s 5 did apply to s 71AC of the Drugs Act, but nevertheless that the jury had been misdirected.
- Six judges (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ) held that s 71AC of the Drugs Act was not invalid for s 109 inconsistency with the trafficking offence provision of the Criminal Code (Cth). The Court quashed Ms Momcilovic’s conviction, set aside her sentence, and ordered that a new trial be had.

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39 The term “rights-reductionist” is used because the Momcilovic method decreases the remedial reach of the Charter, particularly the remedial reach of the judiciary. Reducing the remedies available to judges will reduce the protection of rights within Victoria because, by design, the judiciary is considered more likely to protect the rights of the vulnerable, the minority and the unpopular, than the democratically-motivated and majoritarian executive and parliament. To illustrate the point, one need look no further than the RJE decision, which was rights-protective of serious sex offenders (RJE [2008] VSCA 265), and Parliament’s swift response to it, which re-instatement the rights-incompatible meaning of the legislative provision in issue (Serious Sex Offenders Monitoring Amendment Act 2009 (Vic)).

On the *Charter*:

- Six judges (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) held that s 32(1) operated as a valid rule of statutory interpretation, which is a function that may be conferred upon courts; but their reasoning differed, and this is what I will explore.
- Section 36(2) declarations:
  - Four judges (French CJ, Bell J, Crennan and Kiefel J) held that s36 was valid.
    - Two of those judges (French CJ and Bell J) held that there could be no appeal to the High Court from a declaration made under that section.
    - The other two judges (Crennan and Kiefel JJ) held that a declaration of inconsistent interpretation should not have been made by the Court of Appeal in this proceeding.
  - Three judges (Gummow, Hayne and Heydon JJ) held that s 36 was invalid for impermissibly impairing the institutional integrity of the Supreme Court.
  - As a majority of the Court was of the view that the declaration of inconsistent interpretation made pursuant to s 36 either was invalid or ought not to have been made by the Court of Appeal in this proceeding, the Court ordered that the declaration be set aside.

**Section 7(2), s 32(1) and method issues?**

As noted, six judges upheld s 32(1) as a valid rule of statutory interpretation, but their reasoning differed, and this is what I will now explore.

**French CJ**

In overview, Chief Justice French agrees with the Court of Appeal that s 32(1) is a codification of the principle of legality and the implications this has for s 7(2). He is silent about Court of Appeal method, but one can assume that he approves of that method b/c it follows on from the principle of legality characterisation.

In terms of s 7(2), French CJ accepts the submission put by the Human Rights Law Centre that the Canadian Supreme Court ‘expressly declined to consider s 1 of the *Canadian Charter* when interpreting a reverse onus provision. It applied s 1 only when considering whether the impugned law should be upheld.’\(^{41}\) Accordingly, proportionality was argued to not be an interpretative function.\(^{42}\)

\(^{41}\) At [33]  
\(^{42}\) At [34].
I respectfully disagree with this. It is not to the point that the Canadian Supreme Court ("Canadian SC") does not consider s 1 when interpreting the statutory provision. The Canadian SC interprets the statutory provision according to ordinary principles of interpretation; if a right is engaged, the Canadian SC then applies s 1; and then the Canadian SC applies the constitutional remedy of invalidation if a right is unjustifiably limited. This process could be replicated under the Victorian Charter, and I argue was intended to be replicated here, if s 32(1) is given a “special” remedial interpretative power role – that is, we would interpret the provision according to ordinary principles of interpretation, then apply s 7(2), and then apply the Victorian Charter remedy of remedial interpretation if a right is unjustifiably limited.

The essential misunderstanding here is the role of s 32(1) – that is, s 32(1) should be seen as a Victorian Charter remedy, just as invalidation is seen a Canadian Charter remedy.

French CJ concludes that s 7(2) has no role to play in establishing the content of rights, and thereby no role to play in ‘the interpretative process under s 32(1)’. For good measure, his Honour also adds that on the same logic s 7(2) will be excluded in s 36(2) when considering whether a provision can be interpreted consistently with a right, but may be relevant to the Court’s decision whether to exercise the discretion to make a declaration. I presume this means the Court of Appeal method stands.

The Chief Justice then accepts that s 32(1) merely codifies the principle of legality, relying on the Wilkinson decision. His Honour states: ‘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. The Court of Appeal was essentially correct in its treatment of s 32(1).’

In addition to the criticisms in my earlier article about s 32 merely codifying the principle of legality, I wish to add that by his Honour’s myopic focus on the words ‘consistent with statutory purpose’, he respectfully fails to appreciate the work to be done by the words ‘so far as it is possible to do so’.

At this point, my pessimism deepened.

Crennan and Kiefel JJ

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43 Momcilovic v R [2011] HCA 34 [35]
44 Momcilovic v R [2011] HCA 34 [36]
45 Momcilovic v R [2011] HCA 34 [51].
46 See Momcilovic v R [2011] HCA 34 [50].
I now turn to the joint judgment of Crennan and Kiefel JJ. In overview, Crennan and Kiefel JJ consider s 32(1) to be an ordinary rule of construction, although their Honours do not explicitly go as far as the Court of Appeal in considering it a codification of the principle of legality. The analysis of s 7(2) begins very well, but their Honours then discount s 7(2) as not being applicable b/c the s 32(1) interpretation comes first. Finally, their Honours reject both the Court of Appeal and the NZ/UK methodologies, without substituting a new method. The reason for rejecting the Court of Appeal method centres around not wanting s 7(2) to be the precursor to a s 36(2) declaration, because this may turn s 36(2) applications into hypothetical decisions (i.e. advisory opinions), which is not within judicial power and so would pose an issue for separation of judicial power.

The joint judgment spends a great deal of time attempting to differentiate s 7(2) from other general limitation clauses, particularly the Canadian Charter.47 In my respectful opinion, their Honours place too much emphasis on the factors listed in s 7(2) and not enough emphasis on the actual test in s 7(2) – that is, the overarching test is whether the limit is reasonable and demonstrably justified, with the factors in paragraph (a) to (e) helping to inform the overarching test. Moreover, their Honours opinion that the paragraph (e) “least restrictive means” test is different to the Canadian impairment “as little as possible” test is astonishingly narrow.

In relation to s 32(1), their Honours hold that ‘Section 32 does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes.’48 Their Honours also note that the acknowledgement in s 32(3)(a) that a rights-compatible interpretation may not be possible in all cases indicates that “[i]t cannot be said that s 32(1) requires the language of a section to be strained to effect consistency with the Charter.”49

When analysing the interaction between s 7(2) and s 32(1), my pessimism lifted for a brief moment. In paragraphs 571 and 572 of the joint judgment, their Honours correctly acknowledge that rights are not absolute, that Charter rights are to be read as subject to justifiable limitations, that s 7(2) has no influence on the interpretation of a statutory provision, and that if a limit on a right is justified under s 7(2) that one could conclude that there was compatibility between the provision and the Charter – all great stuff. But their Honours go on to hold that the inquiry under s 7(2) does not inform s 32(1). There is no link between ss 7(2) and 32(1) in their Honours opinion

48 Momcilovic v R [2011] HCA 34 [565].
49 Momcilovic v R [2011] HCA 34 [566].
because, inter alia, ‘the process referred to in s 32(1) is clearly one of interpretation in the ordinary way.’

So, on my tally, we have three judges that accept the Court of Appeal decision in whole or in part. In my opinion, these judges form the minority on these issues. Turning to the majority opinions on ss 7(2) and 32(1).

Gummow J (Hayne J concurring)

Justice Gummow, with whom Justice Hayne concurs, accept the NZ/UK method.

Upfront, in his Honours 13 step “Primary Conclusions”, the scene is set when his Honour notes the structure of the Charter in step 4. Justice Gummow acknowledges that s 7 sits in Part 2 with the statement of rights, whilst s 32(1) sits in Part 3. His Honour notes that ‘part 2 ... then operate[s] upon the provisions of Part 3’.

In placing the Charter in comparative context, Justice Gummow considers the NZBORA and Hansen ‘of greater comparative utility’, than the UKHRA. Although I can live with this, I am not convinced by his Honours reasoning for differentiating the UKHRA.

Justice Gummow then puts s 7(2) and s 32(1) on a par with s 5 and s 6 of the NZBORA and accepts the majority methodology from Hansen, which is the NZ/UK Model that I have been talking about. His Honour states: ‘Section 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 Pt 2, including, where it has been engaged, s 7(2). This relationship between s 32(1) and s 7(2) is thus similar to that between s 5 and s 6 of the NZ Act.’

Interestingly, in the context of dismissing any separation of judicial power argument in relation to s 32, Justice Gummow cites the passage from Project Blue Sky which acknowledges that statutory interpretation ‘may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning’, and his Honour then states ‘[t]hat reasoning applies a fortiori where there

50 Momcilovic v R [2011] HCA 34 [574].
51 Momcilovic v R [2011] HCA 34 [146].
52 Momcilovic v R [2011] HCA 34 [161].
53 Momcilovic v R [2011] HCA 34 [151].
54 Momcilovic v R [2011] HCA 34 [168].
is a canon of construction mandated, not by the common law, but by a specific provision such as s 32(1).  

Bell J

In my opinion, Justice Bell gives the most clear, coherent and concise judgment.

In relation to s 7(2), Justice Bell correctly considered the Court of Appeal approach to pay ‘insufficient pays insufficient regard to the place of s 7 in the scheme of the Charter.’ Her Honour then holds that ‘[t]he rights set out in the succeeding sections of Pt 2 are subject to demonstrably justified limits’ and ‘[t]he Charter’s recognition that rights may be reasonably limited and that their exercise may require consideration of the rights of others informs the concept of compatibility with human rights.’ Justice Bell then goes onto to accept the Victorian Attorney-General’s submission that s 7(2) is part of the process of determining whether a rights-compatible interpretation exists.

Justice Bell then accepts the NZ/UK Method, which she describes in Charter language as follows:

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... 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.

Justice Bell is at pains to highlight the re-interpretative limit of ‘consistency with purpose’, which she notes ‘directs attention to the intention, objectively ascertained, of the enacting Parliament. The task imposed by s 32(1) is one of interpretation and not of legislation.’

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55 Momcilovic v R [2011] HCA 34 [170].
56 Momcilovic v R [2011] HCA 34 [678].
57 Momcilovic v R [2011] HCA 34 [678].
58 Momcilovic v R [2011] HCA 34 [683]
59 Momcilovic v R [2011] HCA 34 [684].
60 Momcilovic v R [2011] HCA 34 [684].
Interestingly, she notes that s 32(1) ‘does not admit of “remedial interpretation” of the type undertaken by the Hong Kong Court of Final Appeal as a means of avoiding invalidity.’ This is interesting because she does not state that remedial interpretation under the UKHRA is not contemplated, although most of her reasoning on s 32(1) is tied to the NZBORA.

**Heydon J**

Then we have Justice Heydon’s decision. His view that ‘[t]he odour of human rights sanctity is sweet and addictive’ and that human rights are ‘a comforting drug stronger than poppy’, may lead some to dismiss this judgment. This is ill-advised because it is, in fact, Justice Heydon that provides us with the fourth opinion in favour of a role for s 7(2) and a strong remedial interpretative provision in s 32(1). Justice Heydon supports a wide reading of ss 7(2) and 32(1) which sits within the NZ/UK Model, such that he is the fourth judge in the majority on these issues; even though the consequence of his broad reading is to invalidate s 7(2), s 32(1) and, indeed, the entire *Charter*.

For current purposes, Justice Heydon begins by out rightly rejecting the court of Appeal’s characterisation of s 32(1) as codifying the principle of legality.  

Justice Heydon also holds that ‘in assessing what human rights exist before the s 32(1) process of interpretation is completed, it is necessary to apply s 7(2) to ss 8-27.’

Having recognised established the operation of s 7(2) and confirmed the NZ/UK Method of analysis with s 7(2) coming before s 32(1), Justice Heydon then proceeds to invalidate s 7(2) because it impermissibly imposes legislative tasks on judges—that is, ‘s 7(2) confers functions on the Victorian courts which could not be conferred on a court’ in the *Kable* sense.

In terms of s 32(1), his Honour holds that ‘s 32(1) goes well beyond the common law’—indeed, he muses that ‘there would be no point in s 32(1) unless its function was to go further than the common law principle of legality... The function of s 32(1)

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63 *Momcilovic v R* [2011] HCA 34 [415].
64 *Momcilovic v R* [2011] HCA 34 [431]
65 *Momcilovic v R* [2011] HCA 34 [436]
66 *Momcilovic v R* [2011] HCA 34 [450].
evidently is to make up for the putative failure of the common law rules...67

Significantly, his Honour seems to go so far as to sanction *Ghaidan*-type analysis: ‘In effect s 32(1) permits the court to “disregard the express language of a statute when something not contained in the statute itself, called its ‘purpose’, can be employed to justify the result the court considers proper”.’68

Again, although Justice Heydon accepted the appellant’s submission on the width of the s 32(1) interpretative obligation, his Honour then used that as a reason to invalidate it because it impermissibly conferred legislative functions on the judiciary.

I argue that Justice Heydon’s reasoning on ss 7(2) and 32(1) forms part of the majority, even if his conclusions lead to the invalidation of the *Charter*.

**IMPLICATIONS**

So what are the implications?

Having a bare majority seemingly in support of the NZ/UK method under which s 32(1) is a special rule of remedial interpretation is one thing. The next question is the strength of that remedy? A preference for a narrow, middle or broad view was not clear from the judgments. Indeed, Warren CJ and Nettle JA in their decisions similarly indicated that they preferred the NZ/UK method, but did not consider it necessary to decide upon the strength of the remedy in the case at hand, particularly the *Ghaidan* issue.

One thing is certain, however: the majority judges were comfortable in aligning the *Charter* with the *NZBORA*, but not with the *UKHRA*. A closer analysis at the New Zealand jurisprudence may prove more fruitful in the future, than debates about *Ghaidan* versus *Wilkinson*.

**CONCLUSION**

By way of conclusion, I hark back to Justice Heydon’s comments about human rights being ‘a comforting drug’. I am not sure if they are an illicit drug or not. But being in possession of my human rights treaty book makes me nervous. Could I possibly be automatically deemed to be in possession of drugs for the purpose of trafficking? On that note, I had better leave the lectern, lest my paper be considered a sales pitch!

Thank you.

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67 *Momcilovic v R* [2011] HCA 34 [450]