Victorian Government Solicitor's Office

Case Note

Noone v Operation Smile (Australia): Freedom of Expression and Consumer Protection
June 2012

Following the High Court's decision in *Momcilovic,*[1] there has been some uncertainty about how s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (**Charter Act**) should apply to the interpretation of statutes. The recent Court of Appeal decision in *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Aust) Inc*[2] sheds some light on this issue, and includes some interesting commentary on the scope of the right to freedom of expression, and its interaction with our consumer protection laws.

Summary

- The Court of Appeal has declared that a range of statements made on the website of an alterative therapy clinic called the "Hope Clinic" were misleading or deceptive.
- In deciding the matter, the Court of Appeal considered the application of the *Charter of Human Rights and Responsibilities Act 2006* to the relevant consumer protection legislation.
- Although the issue was not definitively determined, the judgment suggests that the settled interpretation of s 9 of the *Fair Trading Act 1999,* which prohibits misleading or deceptive conduct in trade or commerce, is consistent with the right to freedom of expression.
- The judgment also indicates that, following the High Court decision in *Momcilovic,* the Court of Appeal may be open to reconsidering their earlier judgment on the operation of the Charter Act's interpretive provision.

Background

The respondents in *Operation Smile* operate a clinic that provides alternative therapy treatments to cancer patients. The Director of Consumer Affairs Victoria (**the Director**) sought declarations that certain claims on the clinic's website were misleading or deceptive on the basis that they falsely represented that the treatments were effective and had scientific support. The Director argued that these claims breached s 9 of the *Fair Trading Act 1999* (**FTA**), which prohibits misleading or deceptive conduct in trade or commerce.

The matter was initially heard before Justice Pagone in the Supreme Court. His Honour raised a question regarding whether s 9 of the FTA may be inconsistent with the right to freedom of expression under s 15 of the Charter Act.

The defendants were unrepresented, but counsel appeared as "amicus curiae" (friends of the court) to make submissions on the Charter Act issues. The Attorney-General also intervened under s 34 of the Charter Act. The VGSO acted on his behalf.

Extensive submissions were made on the Charter Act and other issues. Ultimately, Pagone J concluded that the claims made on the defendant's website were not misleading or deceptive.[3] He therefore found that he did not need to consider whether the FTA was consistent with the Charter Act.

The Director appealed.

Court of Appeal

The appeal was heard by Chief Justice Warren, Justice Nettle, and Acting Justice of Appeal Cavanough.

The Court of Appeal took a different view of the evidence than that taken by Pagone J. Their Honours all found in favour of the Director's arguments, and the Court made a declaration that each of the impugned statements was misleading or deceptive or likely to mislead or deceive, and that the respondents had contravened s 9 of the FTA.

Operation of the Charter's interpretive provision

In interpreting s 9 of the FTA, the Court of Appeal considered how s 32 of the Charter Act should be applied. Section 32 provides that, so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted compatibly with Charter Act rights. The provision is significant as it has the potential to affect the interpretation of all Victoria statutes.

Although the proper application of s 32 was considered in great detail by the High Court in *Momcilovic,* it did not decisively overturn the Court of Appeal's earlier decision on this point. The Court of Appeal in *Momcilovic*[4] had held that s 32 meant that, where possible, legislation must be interpreted so as not to impose *any* limitations on Charter Act rights. Whether or not a possible limitation was justifiable according to section 7(2) (the "reasonable limitations" provision of the Charter Act) was found to be irrelevant to the process of interpretation under s 32.

On appeal, three of the seven High Court judges took a similar view to the Court of Appeal's finding in *Momcilovic* that s 7(2) was not a part of the interpretive process under s 32. However, the remaining four judges all considered that s 7(2) did form a part of the interpretive process. Those judges considered that the effect of s 32 was that, where possible, legislation had to be interpreted so as not to impose any *unreasonable* limitations on human rights. If a provision limited a right, but the limitation was reasonable when assessed according to s 7(2), then the provision would be compatible with the right.

Although four judges took this view, two of those judges dissented as to the final orders in the case. This meant that there was no binding ratio on the application of s 32.

In the joint judgment of Warren CJ and Cavanough AJA in *Operation Smile,* their Honours considered the effect of the High Court's decision. Their Honours found that "there is at least some doubt as to whether the Court of Appeal is bound to follow its previous decision in *Momcilovic.*"[5] They held that the fact that four High Court judges took a different view to that of the Court of Appeal in *Momcilovic* may be enough to satisfy the Court of Appeal that their earlier judgment was "clearly wrong" and need not be followed. However, their Honours did not finally rule upon the issue.

Nettle JA, on the other hand, considered that, as there was no binding High Court ratio on the role of s 7(2) in the interpretive process, "one must deal with the point in the way that one thinks to be correct." His Honour considered that it was appropriate to adhere to the earlier Court of Appeal decision that s 7(2) did not play a role in s 32.

While the decision in *Operation Smile* is not conclusive on the operation of s 32, it suggests that:

- The current authority on s 32 is the Court of Appeal's judgment in *Momcilovic.*
- However, the Court of Appeal may, in an appropriate case, be open to an argument that the judgment of the majority of the High Court in *Momcilovic* should be followed.

Please note that further detail on the role of s 32 is available in the VGSO's earlier casenote on the High Court's decision in *Momcilovic.* This is available from the VGSO's website (www.vgso.vic.gov.au).

Compatibility of s 9 of the FTA with the right to freedom of expression

In *Operation Smile*, the Director (supported by the Attorney-General) argued that there was no inconsistency between the settled meaning of s 9 of the FTA and the right to freedom of expression. The Director considered that this was the case because:

- The right to freedom of expression does not protect commercial expression that is misleading or deceptive.
- Even if the right does extend to such expression, the prohibition on misleading and deceptive conduct in trade or commerce is reasonably necessary to protect the rights of others or for the protection of public order or public health. It therefore falls within the internal limitations on freedom of expression set out in s 15(3) of the Charter Act.

Nettle JA agreed with the Director's arguments on both these grounds.[6] While Warren CJ and Cavanough AJA considered that these questions need not be determined in this case, their Honours saw "great force" in Nettle JA's reasoning.[7]

All judges of the Court of Appeal rejected the argument that to be compatible with the right to freedom of expression, s 9 must be reinterpreted so that it only prohibited a person from *consciously* engaging in misleading or deceptive conduct. The Court considered that this would be inconsistent with the clear purpose of s 9 to reproduce the federal consumer protection regime in Victoria.[8] Like its federal equivalent, s 9 is intended to prohibit misleading and deceptive conduct in trade or commerce regardless of whether the person engaging in the impugned conduct was aware of its misleading or deceptive nature.

This finding suggests that in applying s 32 of the Charter Act to Victorian acts that form part of a national legislative scheme, courts will take into account that consistency across jurisdictions is one of the purposes of such schemes. The Charter Act is therefore unlikely to result in Victorian legislation being interpreted significantly differently from equivalent legislation in other jurisdictions.

The outcome of *Operation Smile* is that s 9 of the FTA is likely to be considered compatible with the right to freedom of expression.

Further information

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[1] *Momcilovic v The Queen* (2011) 280 ALR 221.
[2] [2012] VSCA 91 ("*Operation Smile*").
[3] His Honour did find that one statement was misleading, but that statement had already been taken off the website, so no declaration was made.
[4] (2010) 265 ALR 751.
[5] At [30].
[6] At [147] - [148].
[7] At [22].
[8] At [20], per Warren CJ and Cavanough AJA, and at [166] per Nettle JA.