

The Charter of Human Rights and Responsibilities Act 2006 (Vic)

Advice

1. I have been asked to summarise my views on the proper construction of s 39 of the Charter, which provides as follows:

(1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

(2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right—

*(a) to seek judicial review under the **Administrative Law Act 1978** or under Order 56 of Chapter I of the Rules of the Supreme Court; and*

(b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

(3) A person is not entitled to be awarded any damages because of a breach of this Charter.

(4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

2. Section 39(1) confers standing upon a person to seek relief or a remedy in respect of an act or decision of a public authority on a ground of unlawfulness arising because of the Charter only if the stipulated precondition to that entitlement is satisfied. The precondition is that the person has an entitlement to seek the same relief or remedy in respect of the act or decision on the ground that it was unlawful otherwise than because of the Charter. In other words, the relevant person must be entitled to ‘seek’ the relief or remedy sought in respect of the

allegedly unlawful act or decision without reference to the Charter before that person is entitled to also seek the same relief or remedy on a ground of unlawfulness arising because of the Charter.

3. The pre-condition in s 39(1) that a person must be entitled to seek relief or a remedy based on a non-Charter cause of action is open to several constructions. One is that it is only concerned with standing to seek non-Charter relief. Another is that it imports a requirement that the person has a prima facie entitlement to seek relief in the sense that the person has a reasonably arguable cause of action for the relief sought. Yet another is that the person is entitled to the relief.
4. Plainly, the preferred construction is one that gives effect to the plain and ordinary meaning of the words used and to the apparent purpose of the sub-section. That purpose is that the Charter, standing alone, does not create a new cause of action but, rather, creates an entitlement in a person to seek a remedy based on the Charter if the person has a non-Charter entitlement to seek that remedy.
5. It is my view that the first construction described above (ie a 'standing' to seek relief approach) and the second construction (ie an arguable entitlement to the relief) are both capable of falling within the sub-section on the approach to construction described in para 3 above. Although I prefer the first construction I accept that it is also open to regard the concept of an entitlement to seek non-Charter relief as importing the notion of a reasonably arguable cause of action for

that relief. The reason for that conclusion is that, if the claim fails to meet that standard, it can be struck out with the consequence that the person will have been found not to be entitled to seek the relief. I see little merit in a construction based upon actual entitlement to the relief as it is not supported by the language employed in s 39(1), which speaks of an entitlement to seek relief, rather than an entitlement to the relief.

6. The argument in favour of the conclusion that s 39(1) is about standing to seek relief, rather than about a prima facie entitlement to the relief, is supported by the following matters:

- (a) The sub-section's concern with 'unlawful' acts or decisions of a public authority suggests that its primary, but not exclusive, concern is with public or administrative law remedies. That view is supported by the particular focus in s 39(1) on remedies that are most likely to arise in the areas of public or administrative law and in the requirement of 'unlawfulness' in relation to acts or decisions of a public authority.
- (b) Public and administrative law remedies are usually only available, whether expressly or otherwise, to persons who are affected or aggrieved by the relevant act or decision or can demonstrate a special interest in the subject matter of the decision. Thus, it is commonplace for statutory standing to challenge (eg by appeal or review) such decisions or acts to be framed in

terms that authorise a person to apply for a review or appeal only if that person, or that person's interests, are affected by the decision.

Significantly, for present purposes, an entitlement to seek the relief or remedy is not expressed to be preconditioned on a prima facie case criterion.

- (c) Although s 39(1) does not use the term 'apply', the term 'seek' seems to be intended to have the same meaning.
- (d) If s 39(1) was concerned with a prima facie entitlement to relief then it could be expected that terms expressing that entitlement would have been used, rather than terms that appear to relate to standing to seek or apply for relief.

7. An analogous approach has been adopted by the courts with respect to a 'matter' (in the constitutional sense) involving the exercise of federal jurisdiction. In such cases a federal court's accrued jurisdiction enables it to exercise jurisdiction in respect of claims arising under the common law or State law if those claims are determined to form part of the 'matter' before the court. The rationale for the accrued jurisdiction is that the court has jurisdiction to determine the non-federal aspects of a single justiciable controversy, of which the federal aspects form an integral or non-severable part.

8. In the accrued jurisdiction cases it has been accepted that even if the federal part of the matter is decided adversely, is struck out or is found not necessary to be decided the matter does not cease to be within the jurisdiction of the court: see, for example, *Beck v Spalla* [2005] FCAFC 82 at [25] (13 May 2005).

9. Of course, s 39 is not concerned with a ‘matter’ in the constitutional sense. However, it is concerned with a single justiciable controversy in which the same relief or remedy is being sought on two bases – a non-Charter, and a Charter, basis. Therefore, in the absence of anything in the sub-section that imports the notion of a prima facie entitlement to the remedy sought there is a cogent argument in favour of not importing such an entitlement. As explained above, I do not see the words of the sub-section as *requiring* any such entitlement. Thus, relying on analogous reasoning to that employed in the accrued jurisdiction cases, there is no reason to import a ‘policy of the law’ reason to require the court to lose its Charter jurisdiction under s 39(1) if the non-Charter cause of action is later found to be not to be reasonably arguable or is otherwise struck out.

10. However, there is a significant qualification to the above analysis in respect of the accrued jurisdiction cases that is likely to be applicable to s 39(1). The qualification is that federal jurisdiction has not been found to be attracted if the non-federal claim is colourable in the sense that it is made for the improper purpose of fabricating a claim in order to attract jurisdiction: see *Burgundy Royale Pty Ltd v Westpac* (1987) 18 FCR 212 at 219 and *Johnson Tiles v Esso*

Aust (2000) 104 FCR 564 at 598-599. There are good grounds for concluding that a similar qualification will apply to a claim under s 39(1) with the consequence that, if the non-Charter claim is ‘colourable’ in the sense discussed in the cases, it is unlikely that the Charter claim will survive.

11. I have set out the argument in favour of the ‘standing’ approach to construction as it is plainly an argument that best supports the position that public interest litigants might wish to put forward in support of a claim based upon their Charter ‘rights’. However, as explained above, the accrued jurisdiction cases are founded on the definition of a ‘matter’ in its constitutional sense and, while analogous, can be distinguished because of their special constitutional context.
12. I see little difficulty with the other sub-sections of s 39. Section 39(2) provides that s 39 is not to affect any right a person has to seek relief or a remedy against a public authority otherwise than under the Charter and s 39(4) contains a similar provision, which ensures the section cannot affect a person’s right to damages arising otherwise than under the Charter. Finally, 39(3) ensures that a Charter claim cannot result in an award of damages.
13. In summary, it is my preferred view that s 39(1) authorises a claim for relief under the Charter in respect of a Charter cause of action provided the person has standing to seek the same relief on the basis of a claim that arises independently of the Charter. However, until the Courts have authoritatively determined this

question of construction it must be accepted that the alternative view that requires the claimant to have a reasonably arguable cause of action, and therefore one that is not liable to be struck out, is also open.

Dated: 21 August 2007

A handwritten signature in black ink, appearing to read "Ron Merkel", with a stylized flourish at the end.

RON MERKEL

Melbourne Chambers