

CHAPTER III OF THE CONSTITUTION, FEDERAL JURISDICTION AND DIALOGUE CHARTERS OF HUMAN RIGHTS

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[The High Court’s decision in Momcilovic v The Queen is the first to consider the compatibility of the Charter of Human Rights and Responsibilities 2006 (Vic) with ch III of the Constitution. The decision will have significant implications for the continuing effectiveness of key provisions of the Charter, the Human Rights Act 2004 (ACT) and any future federal charter of human rights. This article analyses the decision and evaluates its implications for the dialogue model of statutory human rights protection in Australia. It also considers several controversial statements concerning the principles of federal jurisdiction that arise from the decision.]

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I INTRODUCTION

There remains a great deal of ignorance in the legal profession concerning federal jurisdiction, both in its constitutional outlines and its detailed application. This is so even among those whose legal practices oblige them to know better. ... [O]ne gets the impression from time to time that federal jurisdiction is exercised without those doing so appreciating it.¹

When Vera Momcilovic first applied to the High Court for special leave to appeal following her conviction in the County Court of Victoria for trafficking in a drug of dependence, little did she realise that her appeal would raise a range of important constitutional questions. In fact, when the appeal was first presented to the High Court, no constitutional law claim was made at all. Ms Momcilovic's initial claim was that the trial court and the Victorian Court of Appeal had not interpreted certain Victorian criminal provisions consistently with the *Charter of Human Rights and Responsibilities 2006* (Vic) ('*Charter*'). However, in the special leave hearing, French CJ, Crennan and Bell JJ pressed a range of constitutional points, with Crennan J observing that '[t]he case bristles with some constitutional issues which do not really surface in the submissions before us today.'² What then started as a case about the application of the *Charter* to Victorian criminal provisions spiralled into a major

¹ Justice W M C Gummow, 'Foreword' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) v, vi–vii.

² Transcript of Proceedings, *Momcilovic v The Queen* [2010] HCATrans 227 (3 September 2010) 486–8.

constitutional case, with four days of High Court hearings and interventions by the Attorneys-General for the Commonwealth, four states and the Australian Capital Territory.

The constitutional points raised by the bench during the special leave hearing all concerned the impact of ch III of the *Constitution* on key aspects of the 'dialogue' model of human rights protection underlying the *Charter* (and the *Human Rights Act 2004* (ACT) ('HRA (ACT)')). By the time the appeal was heard, these ch III points had multiplied. This article will focus on these ch III issues and will consider the continuing effectiveness of key *Charter* provisions following the High Court's decision. While broad propositions and conclusions can be drawn, as will be explained, there are multiple layers of complexity arising from the six separate judgments which complicate the assessment of almost every issue. Thus, close and detailed analysis is often required to expose and explain the decision's implications.

The Court covered a range of other issues concerning the interpretation of the *Charter* and the relevant criminal provisions. The Court also considered the constitutional question of whether the state provisions were inconsistent with federal criminal provisions relating to drug trafficking.³ This article, however, is limited to considering the ch III implications for the *Charter* (and the HRA (ACT)).

II MOMCILOVIC V THE QUEEN

Ms Momcilovic was charged with an offence against s 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ('*Drugs Act*'): 'trafficking in a drug of dependence'. Section 73(2) of the *Drugs Act* provides that the unauthorised possession of a certain quantity of a controlled drug 'is prima facie evidence of trafficking by that person in that drug of dependence.' A quantity of methylamphetamine in excess of the traffickable quantity was discovered by police at Ms Momcilovic's apartment, and this discovery formed the basis of the charge against her.⁴

³ The s 109 issue was whether s 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) was inconsistent with a provision in the *Criminal Code Act 1995* (Cth). In summary, French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ held that there was no inconsistency: *Momcilovic v The Queen* (2011) 280 ALR 221, 263–5 [106]–[112] (French CJ), 305 [276]–[277] (Gummow J), 365 [486] (Heydon J), 403 [656]–[657] (Crennan and Kiefel JJ), 404 [660] (Bell J) ('*Momcilovic*'). Only Hayne J considered that s 109 applied to render the Victorian law inoperative: at 327 [366].

⁴ *Ibid* 229 [7]–[8] (French CJ).

Section 5 of the *Drugs Act* provides:

any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary.

Ms Momcilovic was tried in the County Court of Victoria. The trial judge accepted the prosecution's argument that the effect of s 5 of the *Drugs Act* was to reverse the legal onus of proof, requiring Ms Momcilovic to positively prove that she did not know of the presence of the methylamphetamine in her apartment.⁵ The jury was instructed accordingly, and a verdict of guilty was returned.⁶ Ms Momcilovic was sentenced to two years and three months imprisonment.⁷

In applying for leave to appeal to the Victorian Court of Appeal, Ms Momcilovic argued that the interpretation of s 5 of the *Drugs Act* adopted by the trial judge in his direction to the jury was contrary to her human right to the 'presumption of innocence' provided for in s 25(1) of the *Charter*.⁸ Ms Momcilovic argued that, under s 32 of the *Charter*, the trial judge was required to interpret s 5 compatibly with her human right, and that this required interpreting s 5 as imposing only an evidentiary burden, rather than a legal burden.⁹ The Court of Appeal rejected this argument, holding that s 5 could only be interpreted as a reversal of the onus of proof,¹⁰ and refused leave to appeal against conviction.¹¹ The Court of Appeal did, however, make a declaration of inconsistent interpretation under s 36(2) of the *Charter* — declaring that s 5 of the *Drugs Act* was incompatible with the human right to the presumption of innocence.¹²

Ms Momcilovic appealed to the High Court, arguing that the Court of Appeal had incorrectly applied the interpretive principle in s 32 of the *Charter*. As indicated, the High Court was also interested in a range of constitutional issues, most of which concerned the impact of ch III on the operation of the *Charter*. Stated shortly, a majority of the Court held that the

⁵ Ibid 230 [11].

⁶ Ibid 229 [7].

⁷ Ibid.

⁸ *R v Momcilovic* (2010) 25 VR 436, 443 [23] (Maxwell P, Ashley and Neave JJA).

⁹ Ibid.

¹⁰ Ibid 469 [119].

¹¹ Ibid 485 [187].

¹² Ibid 478 [155]–[157].

deeming provision in s 5 was not applicable to s 71AC of the *Drugs Act*.¹³ Consequently, Ms Momcilovic should not have been deemed to be in possession and, accordingly, her appeal was successful. The Court did, however, take the opportunity to consider, in detail, the constitutional issues that arose in the appeal. While the declaration of incompatibility was set aside, the *Charter* survived invalidation. However, the Court significantly undermined its future operation on the basis of constitutional principles located in ch III.

Three core ch III issues were agitated in Ms Momcilovic's appeal. First, whether ss 7, 32 or 36 of the *Charter* were invalid because of the *Kable*¹⁴ principle. Secondly, if valid according to *Kable*, whether any of these provisions, particularly s 36, could be validly applied in federal jurisdiction. Thirdly, whether a declaration of inconsistency could be taken on appeal to the High Court.

On the first issue, a majority of the Court held that none of the provisions infringed the *Kable* principle. On the second, a majority held that s 36 cannot be applied when the Supreme Court of Victoria exercises federal jurisdiction. While the outcome of the Court's reasoning on these issues can be shortly stated, the reasoning of each of the six judgments produced by the Court is complex and requires close analysis. The result on the third issue was less clear and will be explained in Part VI of this paper.

Before considering the reasoning of the Court regarding the impact of ch III on the *Charter* provisions, it is worth reviewing the operation of the *Charter* and the system of federal jurisdiction established by ch III and the *Judiciary Act 1903* (Cth) ('*Judiciary Act*').

III THE CHARTER

Based on the *Human Rights Act 1998* (UK) c 42 ('*HRA* (UK)') and the *HRA* (ACT), the *Charter* is often said to give effect to a 'dialogue' model of human rights protection.¹⁵ In pt 1 of the *Charter*, s 6(1) provides that '[a]ll persons have the rights set out in Part 2.' Part 2, entitled 'Human Rights', sets out the

¹³ *Momcilovic* (2011) 280 ALR 221, 251 [73] (French CJ), 275 [146], 286 [199]–[200] (Gummow J), 310 [297] (Hayne J), 395 [611]–[612] (Crennan and Kiefel JJ).

¹⁴ *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*').

¹⁵ See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290 (Rob Hulls, Attorney-General); Stephen Gageler and Henry Burmester, 'In the Matter of Constitutional Issues Concerning a Charter of Rights: Opinion' (SG No 40 of 2009, 15 June 2009) 1–2 (app E of the 2009 *National Human Rights Consultation Report*).

human rights to be accorded protection in Victoria. It also establishes, in s 7(2), a justification provision that provides that the human rights set out in pt 2 can only be subject to 'such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.'

Part 3, entitled 'Application of Human Rights in Victoria', provides the mechanisms for the protection of the human rights enumerated in pt 2. These mechanisms operate differently in respect of the three arms of the Victorian government. Sections 28–31 and 37 impose procedural requirements on the Victorian Parliament designed to safeguard human rights in the law-making process. Sections 38 and 39 impose obligations on Victorian 'public authorities' (including the executive) in respect of human rights, making it unlawful, subject to exceptions, for such bodies to act in a way that is contrary to the human rights in pt 2.

Sections 32 and 36 provide the Victorian judiciary with two mechanisms to safeguard human rights. The first is the rule contained in s 32(1): '[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.' The second, contained in s 36(2), empowers the Supreme Court of Victoria to make a declaration of incompatibility: 'if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.'

Importantly, s 36(5) provides that:

A declaration of inconsistent interpretation does not —

- (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or
- (b) create in any person any legal right or give rise to any civil cause of action.

In short, a declaration has no impact on the pre-existing rights of the parties in dispute before the Court.

Prior to *Momcilovic*, commentary on the constitutionality of the *Charter* (and the similarly drafted *HRA (ACT)*, and proposals for a similar scheme to be enacted by the federal Parliament) had focused on ss 32 and 36.¹⁶ Opinion

¹⁶ See, eg, Geoffrey Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?' (2006) 17 *Public Law Review* 188; Jim South, 'The Campaign for a National Bill of Rights: Would "Declarations of Incompatibility" Be Compatible with the *Constitution*?' (2007) 10 *Constitutional Law and Policy Review* 2; Dominique

was deeply divided on whether the *Charter* fell foul of, either, federal separation of judicial power principles or the *Kable* principle, both derived from ch III of the *Constitution*. Before moving to consider the Court's judgment in *Momcilovic*, it is useful to outline the aspects of ch III and the mechanics of the federal judicial system that are relevant to an assessment of the validity of the *Charter*.

IV CHAPTER III IMPLICATIONS

A *The Federal Separation of Judicial Power*

The High Court has held that the vesting of Commonwealth judicial power in federal courts and courts exercising federal jurisdiction by s 71 of the *Constitution* entrenches separation of judicial power principles which consist of two limbs:

- 1 Only a court referred to in s 71 ('ch III court') can exercise Commonwealth judicial power;
- 2 A court exercising Commonwealth judicial power cannot exercise non-judicial power, or a power that is not incidental to a judicial power.

As will be explained further, it is the second limb that is relevant to the impugned provisions in *Momcilovic*. Although it was effectively established prior to the joint judgment of Dixon CJ, McTiernan, Fullagar and Kitto JJ in the famous *Boilermakers'* case,¹⁷ this side of the separation of judicial power equation has become popularised as the *Boilermakers'* doctrine.

The crucial question for the application of *Boilermakers'* is whether a power is judicial in nature. If it is not, and it is not incidental to judicial power, then Parliament cannot confer such a power on a ch III court. However, *Momcilovic* concerned state legislation. In that context, ch III has two

Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights' (2007) 12(1) *Deakin Law Review* 1; Stefanie Wilkins, 'Constitutional Limits on Bills of Rights Introduced by a State or Territory' (2007) 35 *Federal Law Review* 431; James Stellios, 'State/Territory Human Rights Legislation in a Federal Judicial System' (2008) 19 *Public Law Review* 52; Michael McHugh, 'A Human Rights Act, the Courts and the *Constitution*' (2009) 11 *Constitutional Law and Policy Review* 86; Helen Irving, 'The Dilemmas in Dialogue: A Constitutional Analysis of the NHRC's Proposed Human Rights Act' (2010) 33 *University of New South Wales Law Journal* 60; Gageler and Burmester, above n 15.

¹⁷ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers'*'); James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113, 117–19.

implications for state legislative power to enact human rights schemes. First, because of the inclusion of state courts in the ch III scheme as repositories of Commonwealth judicial power and federal jurisdiction, the High Court has held that there are limits to what powers and functions state Parliaments can give to state courts. Secondly, the *Boilermakers'* principle also has implications for what powers can be given by state Parliaments to state courts *exercising federal jurisdiction*. Because the complex details of the vesting of federal jurisdiction in state courts occupied a significant amount of the Court's attention in *Momcilovic*, a further explanation of these ch III features now follows.

B Chapter III and the Kable Principle

Starting with the decision in *Kable*,¹⁸ the High Court has held that ch III limits the powers and functions that state Parliaments can confer on state courts. As will be explained further below, the Commonwealth Parliament can confer federal jurisdiction on state courts under s 77(iii) of the *Constitution* and, subject to exceptions and regulations, appeals to the High Court are guaranteed under s 73 from state supreme courts and state courts exercising federal jurisdiction. Thus, the High Court has held, state courts transcend their status as 'state courts' by their inclusion in the federal judicial system created by ch III and, accordingly, ch III affects the way that state Parliaments can deal with their courts.

While the scope of the *Kable* limitation has developed with much uncertainty, the overarching principle has always been that state Parliaments cannot confer powers or functions on state courts which are incompatible with the exercise of judicial power. The applicable tests have been refined to protect the essential characteristics of institutional integrity,¹⁹ independence and impartiality,²⁰ and these ch III standards have been tied to the meaning of the words 'State courts' as they appear in ch III.²¹ While the strength of the *Kable* principle appeared to experience a period of decline, it has rebounded with renewed vigour in recent years in *International Finance Trust Co Ltd v*

¹⁸ (1996) 189 CLR 51.

¹⁹ *Fardon v A-G (Qld)* (2004) 223 CLR 575.

²⁰ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

²¹ *Ibid.*

Crime Commission (NSW),²² *South Australia v Totani* ('Totani'),²³ *Kirk v Industrial Court (NSW)*²⁴ and *Wainohu v New South Wales*.²⁵ *Momcilovic* provided another opportunity for the Court to consider the application of these principles.

C Conferring Federal Jurisdiction on State Courts: Sections 39, 68 and 79 of the Judiciary Act

Sections 75 and 76 of the *Constitution* set out the nine heads of federal jurisdiction. For example, federal jurisdiction includes matters 'arising under [the] *Constitution*, or involving its interpretation' (s 76(i)); 'arising under any laws made by the Parliament' (s 76(ii)); and, importantly for the prosecution and appeal in *Momcilovic*, 'between a State and a resident of another State' (s 75(iv)). The nine heads of jurisdiction in ss 75 and 76 are the only source of federal jurisdiction.²⁶

The scheme set out in ch III allows for federal jurisdiction to be vested in the High Court, lower federal courts created by Parliament and state courts.²⁷ Provision is made in s 77 for 'the autochthonous expedient of conferring federal jurisdiction on State courts'.²⁸ Section 77(iii) empowers the Commonwealth Parliament to invest state courts with federal jurisdiction and s 77(ii) allows the Commonwealth Parliament to define 'the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States'. Thus, s 77 does not automatically vest federal jurisdiction in state courts. Rather, it confers power on the

²² (2009) 240 CLR 319, invalidating NSW provisions authorising the Supreme Court of NSW to issue ex parte restraining orders in respect of the property of persons involved in serious crimes.

²³ (2010) 242 CLR 1, invalidating South Australian provisions requiring the South Australian Magistrates Court to issue control orders in relation to members of declared organisations.

²⁴ (2010) 239 CLR 531, reading down state privative clauses so as not to prevent the Supreme Court of NSW from reviewing the jurisdictional errors of the Industrial Court of NSW.

²⁵ (2011) 243 CLR 181, invalidating NSW provisions conferring power on judges in their personal capacity to declare organisations as a preliminary step to the Supreme Court of NSW issuing control orders.

²⁶ *Ah Yick v Lehmert* (1905) 2 CLR 593, 603 (Griffith CJ); *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 575 (Gummow and Hayne JJ).

²⁷ It has also been accepted that territory courts can exercise federal jurisdiction: *Blunden v Commonwealth* (2003) 218 CLR 330; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

²⁸ *Boilermakers'* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

Commonwealth Parliament to invest state courts with such jurisdiction and to define the extent of that jurisdiction. The Commonwealth has exercised that power through ss 38 and 39(1) of the *Judiciary Act*: those provisions remove from state courts any state jurisdiction they might otherwise have had in relation to matters of federal jurisdiction vested in the High Court, and s 39(2) then re-invests state courts with all heads of jurisdiction, save a limited number of exceptions provided for in s 38 of the *Judiciary Act*.²⁹

Crucially for present purposes, the High Court in *Momcilovic* held that the Victorian trial court and Court of Appeal were exercising federal jurisdiction.³⁰ Ms Momcilovic had moved to Queensland by the time of her trial and, consequently, her prosecution by the Crown in Victoria, and her subsequent appeal, presented a ‘matter ... between a State and a resident of another State’.³¹ The provisions of the *Judiciary Act* had the effect of removing any state jurisdiction that the Supreme Court of Victoria may have had in relation to that matter, and authorised it to resolve the dispute between the parties by an exercise of federal jurisdiction. The fact that the trial court and Court of Appeal had been exercising federal jurisdiction escaped the attention of the parties until the point was raised in the course of the High Court appeal by the Attorney-General for Western Australia as intervener.³²

D *Federal Jurisdiction in State Courts: Applicable Law and Constitutional Limitations*

One final aspect of federal jurisdiction should be introduced at this stage. If federal jurisdiction is attracted in a proceeding in a state court, the established position seems to be that no state law can apply until applied by a federal

²⁹ *Felton v Mulligan* (1971) 124 CLR 367; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601.

³⁰ *Momcilovic* (2011) 280 ALR 221, 229 [6], 229 [9], 260 [99] (French CJ), 270–1 [134]–[139] (Gummow J), 306 [280] (Hayne J), 390 [594] (Crennan and Kiefel JJ).

³¹ *Constitution* s 75(iv).

³² Transcript of Proceedings, *Momcilovic v The Queen* [2011] HCATrans 17 (10 February 2011) 9347–58. This is not the first occasion that the existence of federal jurisdiction has been identified during a High Court appeal: see, eg, *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 41 [3] (Gleeson CJ), 50 [35] (McHugh, Gummow and Hayne JJ), 69 [98] (Kirby J). High Court judges have been critical in the past of the failure by parties and lower courts to identify the existence of federal jurisdiction: see, eg, Transcript of Proceedings, *Gordon v Tolcher* [2005] HCATrans 843 (7 October 2005) 42–3 (Kirby J), 45–9 (McHugh J).

law.³³ Sections 68(1) and 79(1) of the *Judiciary Act* operate to ‘pick up’ any state laws so far as ‘they are applicable’ to a proceeding in federal jurisdiction. Section 68(1) picks up the laws of criminal procedure to federal criminal offences and s 79(1) picks up state law generally. In such a case, the law that is picked up loses its character as a state law and becomes ‘a surrogate federal law’.³⁴

Importantly, ss 68 and 79 cannot pick up state law that is inconsistent with the *Constitution*.³⁵ It is this limitation on the scope of ss 68 and 79, and ultimately the legislative power of the Commonwealth, that results in the application of the *Boilermakers’* doctrine to state courts exercising federal jurisdiction.

It was these principles that directed the Court’s ch III analysis of the *Charter* in *Momcilovic*. Part V of this article will consider the Court’s assessment of the application of ch III to the interpretive rule in s 32(1). The application of ch III to the declaration provision in s 36(2) will be considered in Part VI. Part VII will then consider three specific issues raised in French CJ’s judgment.

V CHAPTER III AND THE INTERPRETIVE PRINCIPLE

A *Validity and Operation of Section 32(1)*

A good deal of the Court’s attention was directed towards the proper scope to be given to the construction of the interpretive rule contained in s 32 of the *Charter*. Section 32(1) 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.’

³³ See, eg, *Solomons v District Court (NSW)* (2002) 211 CLR 119 (‘*Solomons*’); *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2000) 204 CLR 559. For an excellent discussion of the application of s 79, see Graeme Hill and Andrew Beech, “‘Picking Up’ State and Territory Laws under s 79 of the *Judiciary Act* — Three Questions’ (2005) 27 *Australian Bar Review* 25.

³⁴ *Solomons* (2002) 211 CLR 119, 134 [20] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ). Sections 64 and 80 of the *Judiciary Act* also ‘pick up’ state law. On the operation of these provisions, see *Commonwealth v Mewett* (1997) 191 CLR 471; *Blunden v Commonwealth* (2003) 218 CLR 330. Other Commonwealth legislation may also pick up state law in federal jurisdiction: see, eg, *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161.

³⁵ *Solomons* (2002) 211 CLR 119, 134 [23] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

Two related interpretive controversies arose in respect of s 32(1). The first was whether it authorises ‘remedial’³⁶ interpretations — that is, an interpretation that seeks to give a meaning to a provision that is not within the range of literal or grammatical meanings. A model case for a remedial interpretation was said to be the 2004 decision of the House of Lords in *Ghaidan v Godin-Mendoza*.³⁷ In that case, the interpretive provision upon which s 32 was modelled, s 3 of the *HRA* (UK), was used to interpret the words ‘a person who was living with the original tenant *as his or her wife or husband*’³⁸ as including homosexual de facto partners. The speech of Lord Nicholls evidences the ‘remedial’ approach authorised by s 3, by reasoning that s 3 is ‘apt to require a court to read in words which change the meaning of the enacted legislation’.³⁹ The second controversy was whether s 7, the *Charter*’s ‘justification’ provision, could be taken into account in the process of interpretation required by s 32(1).

Although these were issues of interpretation, there were questions concerning the constitutional validity of s 32 lurking in the background of the Court’s analysis. To construe s 32 as requiring a remedial approach to interpretation, or to incorporate the s 7(2) justification provision in the process of interpretation, raised the question of whether the Supreme Court was exercising a power that was incompatible with the exercise of Commonwealth judicial power (that is, the application of the *Kable* standard). Furthermore, since the Supreme Court was exercising federal jurisdiction, it raised the question of whether the interpretive process required under the *Charter* was non-judicial in nature. If so, then s 79 of the *Judiciary Act* could not operate to pick up that provision as a surrogate federal law.

Six members of the Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)⁴⁰ held that s 32 did not authorise a remedial approach, with only Heydon J accepting Ms Momcilovic’s submission that s 32 required a remedial interpretation.⁴¹ However, the result was much closer on the question of whether the s 7(2) justification provision should be applied in the interpretive

³⁶ An expression used by Lord Steyn in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 577 [50].

³⁷ *Ibid.*

³⁸ *Ibid* 564 [4] (Lord Nicholls), quoting *Rent Act 1977* (UK) c 42, sch 1 item 2(2) (emphasis added).

³⁹ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571–2.

⁴⁰ *Momcilovic* (2011) 280 ALR 221, 242 [46], 248–9 [62] (French CJ), 274 [146], 280 [170]–[171] (Gummow J), 306 [280] (Hayne J), 378 [544]–[545] (Crennan and Kiefel JJ), 412 [684] (Bell J).

⁴¹ *Ibid* 354–5 [450].

process. Four judges (Gummow, Hayne, Heydon and Bell JJ)⁴² considered that s 7(2) was applicable to the interpretive process, whereas three judges (French CJ, Crennan and Kiefel JJ)⁴³ held that it was not. The split in the Court across these two issues complicates the overall assessment of majority positions on the validity of ss 32(1) and 36(2). As will be seen, this is particularly so in the case of Heydon J, who held s 32(1) invalid in part because of the application of the s 7(2) justification provision to that interpretive process.

Although in dissent, Heydon J's judgment deals with the constitutional issues that underlay (often without being explicitly confronted in) the reasoning of the remainder of the Court. As such, it is useful to begin with Heydon J's judgment, as his Honour's reasoning exposes many of the silent premises of the majority's reasoning in respect of s 32.

B *The Dissenting View of Justice Heydon*

For Heydon J, the provision in the *Charter* most immediately offensive to ch III was s 7, and the problems identified were of two kinds. First, his Honour considered the expressions used in s 7(2) are vague: 'demonstrably justified', 'free and democratic society', and 'based on human dignity, equality and freedom'. This language, among other expressions in the provision, was considered to be 'highly general, indeterminate, lofty, aspirational and abstract', 'nebulous, turbid and cloudy'.⁴⁴ For his Honour, these expressions do not present a court with objectively determinable criteria and, thus, their application lacked a key characteristic of judicial power.

Secondly, the matters to be 'balanced or weighed' when applying the proportionality test in s 7(2) were 'not readily comparable'.⁴⁵ There would be disputes about matters of 'practical expediency', 'social interests' and 'considerations of morality', and for Heydon J, these were matters for the legislature — not the courts.⁴⁶ His Honour reasoned that the balancing process required by s 7(2) in determining when a limitation on a right is reasonably justified in

⁴² Ibid 280 [168] (Gummow J), 306 [280] (Hayne J), 345 [426]–[427] (Heydon J), 411–12 [683]–[684] (Bell J).

⁴³ Ibid 239 [35], 247 [59] (French CJ), 385–7 [568]–[576] (Crennan and Kiefel JJ).

⁴⁴ Ibid 345 [429].

⁴⁵ Ibid 346 [430].

⁴⁶ Ibid 346–7 [430]–[431].

a free and democratic society requires a Victorian court to act as a legislative body. As his Honour concluded, the balancing tasks required by s 7(2)

are not tasks for judges. They are tasks for a legislature. Section 7(2) reveals that the Victorian legislature has failed to carry out for itself the tasks it describes. Instead of doing that, it has delegated them to the judiciary. Because the delegation is in language so vague that it is essentially untrammelled, it is invalid. It contemplates the making of laws by the judiciary, not the legislature.⁴⁷

Ruling directly on the application of the *Kable* principle, Heydon J held that a legislative function conferred on a state court would — leaving aside legislative activity when the court is not carrying out a judicial role, like making rules of court — be so intertwined with the judicial functions of the court as to alter the nature of those judicial functions and the character of the court as an institution.⁴⁸

The conferral of a legislative function on the Supreme Court would deny it the constitutional character of a ‘Supreme Court’ or a ‘court of [a] State’ and, thus, would be beyond power. Having accepted that s 7(2) was central to the interpretive process, his Honour held that s 32 was invalid as inseverable from s 7(2).⁴⁹

Even without s 7(2), his Honour considered that s 32(1) would breach the *Kable* principle. In his Honour’s view, s 32(1) should be construed to require a remedial approach to interpretation. In doing so, Heydon J drew a distinction in s 32 between ‘purpose’ and ‘meaning’: s 32 requires an interpretation that changed the ‘meaning’ of a provision to give effect to a wider ‘purpose’. For his Honour, *Ghaidan v Godin-Mendoza*⁵⁰ was an example of this approach.⁵¹ This requirement in s 32 to change the ‘meaning’ of a provision to ensure it conforms with human rights amounted to a command to ‘the courts not to apply statutory provisions but to remake them — an act of legislation.’⁵² For Heydon J:

To interpret legislation as having a meaning which is in truth not the actual meaning, but a desired modification of it, is to legislate. The appellant’s submis-

⁴⁷ Ibid 346 [431].

⁴⁸ Ibid 348 [436] (citations omitted).

⁴⁹ Ibid 345 [426]–[427]. Indeed, his Honour held that the whole *Charter* was rendered invalid: at 349 [439].

⁵⁰ [2004] 2 AC 557.

⁵¹ *Momcilovic* (2011) 280 ALR 221, 352–6 [447]–[454].

⁵² Ibid 355 [450].

sion was correct to interpret s 32(1) widely. But on that interpretation it is invalid because the conferral of legislative functions on the courts alters their character.⁵³

Thus, for Heydon J, s 32(1) failed the *Kable* standard and was consequently invalid.⁵⁴

C The Remaining Judges

As indicated, the other six judges considered that s 32(1) did not authorise remedial interpretations. For example, Gummow J (with Hayne J agreeing)⁵⁵ considered that the reference to ‘purpose’ in s 32 is a reference to ‘the legislative “intention” revealed by consideration of the subject and scope of the legislation in accordance with principles of statutory construction and interpretation.’⁵⁶ Such an approach forecloses a remedial approach to statutory interpretation and has an ambit of operation limited to that traditionally undertaken by a court in construing the words of a statutory provision. On this understanding of the scope of the interpretive provision, it ‘does not confer upon the courts a function of a law-making character which for that reason is repugnant to the exercise of judicial power.’⁵⁷ The other judges expressed similar views.⁵⁸

However, their Honours were evenly divided on the relationship between ss 32(1) and 7(2). French CJ, and Crennan and Kiefel JJ saw no role in the interpretive process for the s 7(2) justification provision.⁵⁹ As such, the interpretive function conferred on the court by s 32(1) was an ordinary

⁵³ Ibid 356 [454]. For Heydon J, another aspect of s 32 that reinforced its invalidity was the authorisation in s 32(2) to refer to foreign law: at 355–6 [453].

⁵⁴ Since those provisions were inseverable, then the entire Act was invalid: ibid 356 [454], 357 [456].

⁵⁵ Ibid 306 [280].

⁵⁶ Ibid 280 [170].

⁵⁷ Ibid 280 [171].

⁵⁸ Ibid 242 [46], 248–9 [62] (French CJ), 274 [146], 280 [170]–[171] (Gummow J), 306 [280] (Hayne J), 378 [544]–[545] (Crennan and Kiefel JJ), 412 [684] (Bell J).

⁵⁹ Crennan and Kiefel JJ held that s 7(2) is relevant for determining whether a legislative burden on a right is *incompatible* with that right, but *incompatibility* was considered not to be the relevant question for either ss 32(1) or 36(2) — the relevant question is whether there is an *inconsistency*, and that question is to be resolved without taking s 7(2) into account. As their Honours acknowledged, this left s 7(2) with little, if any, work to do within the legislative scheme: ibid 385–7 [571]–[576].

judicial function and, thus, not in breach of the *Kable* principle.⁶⁰ By contrast, Gummow, Hayne and Bell JJ considered that s 7(2) was to be applied as part of the interpretive process. However, unlike Heydon J, their Honours did not appear to consider that this interpretive function stretched beyond the ordinary judicial function. In this respect, Bell J agreed with the Commonwealth's submissions that the criteria in s 7(2) 'are readily capable of judicial evaluation'.⁶¹

D Section 32: Conclusion and Prospects

Hence, all judges, save Heydon J, upheld the validity of s 32, but only by denying it any operation beyond the traditional boundaries of interpretation: s 32 does not authorise a court to go beyond the intention or purpose of an Act. In this respect, the outcome in *Momcilovic* sets the interpretive provision in the *Charter* aside from the interpretation given to its progenitor, the *HRA* (UK). It is clear that a remedial style interpretive provision would not have survived scrutiny against the requirements of ch III.

On the issue of the relationship between the s 7(2) justification provision and s 32, a close majority (Gummow, Hayne, Heydon and Bell JJ) held that s 7(2) is relevant to the interpretive process. However, this majority position is a fragile one given that Heydon J concluded that the application of s 7(2) to the interpretive process resulted in the invalidity of s 32(1). Once Heydon J is excluded, the search for majority positions becomes very difficult. Certainly, all members of the Court save Heydon J would seem to accept the simple proposition that, divorced from s 7(2), s 32 would survive constitutional scrutiny. But only French CJ and Crennan and Kiefel JJ held that s 7(2) should be interpreted in that way. There is, thus, no majority of the Court in favour of both the validity of s 7(2), and its connection (or disconnection) with s 32.

A further complication is that the majority view (of Gummow, Hayne, Heydon and Bell JJ) on this issue (that s 7(2) is relevant to the interpretive process) might result in a majority of the Court holding s 32 constitutionally invalid. Any future challenge to the validity of s 32(1) would require the

⁶⁰ Ibid 378 [544] (Crennan and Kiefel JJ). At least French CJ considered his Honour's approach to be a mere codification of the principle of legality, albeit 'with a wider field of application': at 245 [51]. What the scope of the principle of legality is, and whether the approach of Gummow J, Hayne J and Bell J could also be described as codifying the principle of legality, are questions that are beyond the scope of this article.

⁶¹ Ibid 412 [684], citing *Thomas v Mowbray* (2007) 233 CLR 307 and *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542.

support of French CJ, Crennan or Kiefel JJ. However, it is unclear whether those three judges would decide in favour of validity if the justification process mandated by s 7(2) were grafted to the interpretive process in s 32(1). There are certainly comments made in those judgments that the justification process is one for the legislature not the courts,⁶² and that the application of the justification provision would result in the statutory words being altered to achieve a different outcome — an exercise ‘approaching a legislative function’.⁶³ If that were the case, then, as Heydon J concluded in this respect, s 32(1) may not survive the *Kable* test. Even if it does, it may not be judicial in nature and, thus, not applicable in federal jurisdiction. Unfortunately, these issues are not addressed directly and, thus, safe conclusions are hard to draw.

Given this state of affairs, lower courts required to apply the interpretive rule are placed in an invidious position. Legislative clarification is certainly desirable, but anything other than a conservative choice (in line with the approach of French CJ, Crennan and Kiefel JJ, including disconnecting s 7(2) from s 32(1)) will leave s 32(1) at some risk of invalidity or inapplicability in federal jurisdiction. This uncertainty is also relevant to any future policy initiatives at the federal level. If a federal human rights charter were to be enacted, an interpretive rule replicating the approach of French CJ, Crennan and Kiefel JJ would be on safe constitutional ground. However, beyond that, it runs some risk of falling foul of the *Boilermakers*’ principle.

VI CHAPTER III AND THE DECLARATION PROVISION

In some respects, majority statements on the ch III implications for s 36 are much easier to identify. However, as will be explained, their translation into conclusions on the validity of s 36 and its applicability in federal jurisdiction raises a number of uncertainties. It is most helpful in this respect to start with some core majority conclusions on whether a declaration involves an exercise of judicial power or is incidental thereto. Part VI will then consider whether the conferral of the declaration power in s 36 is in breach of the *Kable* principle and whether it can be picked up and exercised by the Victorian Supreme Court in federal jurisdiction. A range of complications to the majority positions taken on the various issues will be uncovered along the way. The Part will conclude by offering further observations on specific implications for the operation of the declaration provision in the *HRA* (ACT).

⁶² See, eg, *Momcilovic* (2011) 280 ALR 221, 239 [36] (French CJ).

⁶³ *Ibid* 387–8 [581] (Crennan and Kiefel JJ).

A Core Majority Conclusions: Is a Declaration Judicial in Nature or Incidental Thereto?

All members of the Court held that an exercise of power under s 36 is not judicial in nature. The core reasoning accepted by the Court was that a declaration has no impact on the legal rights of the parties in dispute before the court.⁶⁴ In other words, it has no impact on the resolution of the justiciable controversy (ie, the legal dispute) between the parties and, thus, is missing the core characteristic of judicial power. As already indicated,⁶⁵ s 36(5) provides that a declaration does not 'affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made',⁶⁶ or 'create in any person any legal right or give rise to any civil cause of action.'⁶⁷ Nor could the declaration be said to fall within a category of power considered to be judicial in character in the hands of the judiciary, because of some analogy to judicial power or historical practice by the judiciary, despite the absence of the core characteristic of rights determination.⁶⁸

This reasoning was taken further by five judges to support the conclusion that the making of a declaration was not *incidental* to the exercise of judicial power.⁶⁹ Given s 36(5), a declaration would not assist in any way in the resolution of the dispute between the parties and, thus, could not be said to be *incidental* to the exercise of judicial power to resolve that dispute. The immediate consequence of this conclusion is that a declaration could not be made in federal jurisdiction,⁷⁰ and s 79 of the *Judiciary Act* could not pick up and apply s 36 as a surrogate federal law in federal jurisdiction since its exercise does not involve an exercise of judicial power or an incidental non-judicial power.⁷¹

⁶⁴ Ibid 253 [80], 257 [89] (French CJ), 282 [178] (Gummow J), 306 [280] (Hayne J), 357 [457] (Heydon J), 388 [584] (Crennan and Kiefel JJ) 404–5 [661] (Bell J).

⁶⁵ See above Part III.

⁶⁶ *Charter* s 36(5)(a).

⁶⁷ Ibid s 36(5)(b).

⁶⁸ *Momcilovic* (2011) 280 ALR 221, 253 [89] (French CJ). On this aspect of ch III jurisprudence see *R v Davison* (1954) 90 CLR 353.

⁶⁹ *Momcilovic* (2011) 280 ALR 221, 257–8 [90]–[91] (French CJ), 284 [187] (Gummow J), 306 [280] (Hayne J), 357 [457] (Heydon J), 404–5 [661] (Bell J).

⁷⁰ Ibid 261 [100] (French CJ), 275 [146] (Gummow J), 306 [280] (Hayne J), 404–5 [661] (Bell J). Heydon J did not state this conclusion directly, but it necessarily follows from his Honour's judgment: at 357 [457].

⁷¹ Ibid 261 [100] (French CJ), 275 [146] (Gummow J), 306 [280] (Hayne J), 404–5 [661] (Bell J).

Only Crennan and Kiefel JJ considered the declaration to be ‘a function properly regarded as incidental to the exercise of the power.’⁷² For Crennan and Kiefel JJ, a s 36 declaration merely requires ‘a statement or conclusion as to the interpretation of the *Charter* and the statutory provision in question’⁷³ and, thus, is connected to a ‘matter’ which is the question of the interpretation of a Victorian Act pursuant to s 32. This was sufficient to render the power conferred by s 36 incidental to judicial power. Consequently, s 36 could be validly picked up by s 79 in federal jurisdiction. Importantly, however, this was a dissenting view.

The majority conclusions have significant implications for any future federal charter. The *Boilermakers*’ principle would prevent the federal Parliament from conferring the power to make a declaration on a court (whether federal or state). Furthermore, it could not be said that a declaration gives rise to or is referable to a ‘matter’ of federal jurisdiction that can be conferred on a court by Parliament, since there is no ‘immediate right, duty or liability to be established by the determination of the Court.’⁷⁴

B *The Kable Challenge*

Since this was state legislation conferring a non-judicial power on a state court, the first question was whether the power conferred by s 36 was incompatible with Commonwealth judicial power. If so, then s 36 of the *Charter* would be invalid in its entirety for breaching the *Kable* principle, and this would be the case whether the court were exercising federal or state jurisdiction.

A slim majority of the High Court (French CJ, Crennan, Kiefel and Bell JJ) held that s 36 survived the *Kable* test.⁷⁵ On the application of *Kable*, French CJ (with Bell J agreeing)⁷⁶ said:

The power conferred upon the Supreme Court of Victoria to make a declaration of inconsistent interpretation is ... a distinct non-judicial power. It provides a mechanism by which the court can direct the attention of the

⁷² Ibid 392–3 [600], quoting *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 20 n 68 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

⁷³ *Momcilovic* (2011) 280 ALR 221, 390 [590].

⁷⁴ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

⁷⁵ *Momcilovic* (2011) 280 ALR 221, 259–60 [95]–[97] (French CJ), 391–4 [595]–[605] (Crennan and Kiefel JJ), 405 [661] (Bell J).

⁷⁶ Ibid 404–5 [661].

legislature, through the Executive Government of Victoria, to disconformity between a law of the state and a human right set out in the *Charter*. The making of the declaration does not affect the court's judicial function. It is consistent with the existing constitutional relationship between the court, the legislature and the Executive.⁷⁷

The 'existing constitutional relationship' to which his Honour referred fell within the traditional Diceyan separation of powers, where 'it is parliament's responsibility ultimately to determine whether the laws it enacts will be consistent or inconsistent with human rights. The court must decide the cases which come before it according to law.'⁷⁸ Thus, for French CJ, it was precisely because a s 36 declaration does not confer any right or impose any obligation but leaves Parliament's decision to infringe a human right intact that pointed to validity. The non-invasiveness of a s 36 declaration 'serves to reinforce, rather than impair, the institutional integrity of the court.'⁷⁹

For Crennan and Kiefel JJ, the decisive factor in favour of validity on the *Kable* challenge was that '[t]he making of a declaration is not a function having a close connection with the executive or the legislature. It is made independently of any "instruction, advice or wish of the Legislature or the Executive Government".'⁸⁰ This factor focused on the importance of independence and impartiality to the *Kable* principle. Because s 36 conferred a discretionary power that left Victorian courts free of executive influence, it could not be said that the *Charter* 'enlist[ed] the court to give effect to any pre-determined conclusion on the part of the legislature or the executive, as was the case in *Totani*';⁸¹ it 'does not implement any policy or action of the executive or the legislature.'⁸² Nor does s 36 authorise a court 'to advise as to law reform';⁸³ rather, s 36 was considered merely to provide a formal mechanism for the common judicial practice of 'incidentally pass[ing] comments upon conclusions they have reached about defects in legislation in the course

⁷⁷ Ibid 259 [95] (citations omitted).

⁷⁸ Ibid 259 [96] (French CJ).

⁷⁹ Ibid 260 [97].

⁸⁰ Ibid 391 [597], quoting *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

⁸¹ *Momcilovic* (2011) 280 ALR 221, 391 [597].

⁸² Ibid 393 [602].

⁸³ Ibid 392 [600].

of their reasons.⁸⁴ Thus, the institutional integrity of the court was not threatened.

Justices Gummow, Hayne and Heydon dissented. Justice Gummow (with Hayne J agreeing)⁸⁵ held that s 36 infringed *Kable* and, thus, a s 36 declaration could not be made by the Supreme Court in state or federal jurisdiction. His Honour held that, in substance, s 36 empowered the Court to give formal advice to the Attorney-General which is not required to be acted on.⁸⁶ The creation of this advisory structure, his Honour said, ‘attempts a significant change to the constitutional relationship between the arms of government with respect to the interpretation and application of statute law.’⁸⁷ Furthermore, by authorising the Supreme Court to give an advisory opinion on a question of law to the executive government, s 36 suffered the same ‘vice’ as the provisions in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (‘*Wilson*’).⁸⁸ In *Wilson*, the High Court held such a function conferred on a Federal Court judge in her personal capacity incompatible with the exercise of judicial power. The conclusion then followed for Gummow J that violation of the *Wilson* ‘incompatibility’ principle by s 36 was sufficient to undermine the institutional integrity of the Supreme Court of Victoria, in breach of the *Kable* principle.⁸⁹ Ultimately, for Gummow J, the problem with the declaration was that it formally ‘set in train a process whereby the executive branch of government may or may not decide to engage legislative processes to change existing legislation.’⁹⁰ Deciding whether to change statute law is the responsibility of the legislature, not a function for the judiciary.⁹¹ This resulted in the invalidity of ss 33, 36 and 37, but his Honour considered that the invalid provisions could be severed from the remainder of the *Charter*.⁹²

⁸⁴ Ibid.

⁸⁵ Ibid 306 [280].

⁸⁶ Ibid 283 [181].

⁸⁷ Ibid 283 [183].

⁸⁸ (1996) 189 CLR 1, cited in *ibid*.

⁸⁹ *Momcilovic* (2011) 280 ALR 221, 283 [183]–[184]. As Gummow J recognised, in *Wainohu v New South Wales* (2011) 243 CLR 181, the High Court had already applied the *persona designata* incompatibility test to state Supreme Courts: *Momcilovic* (2011) 280 ALR 221, 283 [183].

⁹⁰ *Momcilovic* (2011) 280 ALR 221, 283 [184].

⁹¹ Ibid 283 [184] (Gummow J).

⁹² Ibid 271–2 [140], 284 [189].

Justice Heydon's conclusion that ss 7 and 32 were invalid and inseverable from the rest of the *Charter* foreclosed any possibility of finding s 36 valid.⁹³ His Honour did, however, separately consider the validity of s 36, holding it invalid under *Kable*. His Honour held that '[t]he power to make a s 36 declaration takes the Supreme Court of Victoria outside the constitutional conception of a "court"',⁹⁴ because the work of the Court is limited to the judicial process, and a declaration is neither judicial nor incidental thereto. These observations are very interesting, suggesting that there is further scope to incorporate separation of judicial power principles into the concept of a state 'court'.

C *The Application of Kable: Further Complications*

In summary, s 36 survived the *Kable* challenge, but only just. It remains a valid power that is capable of exercise by the Supreme Court of Victoria (the complication of its exercise in federal jurisdiction will be considered further below at Part VIIA).

This majority position, however, is complicated by a range of matters. First, three of the majority judges on this point (French CJ and Crennan and Kiefel JJ) reached the *Kable* conclusion on the basis of their view of the place of the s 7(2) justification provision in the interpretive process. As a reminder, those judges did not consider that s 7(2) had a place in the application of the interpretive rule: a minority view on that issue. It is unclear whether their Honours would reach the same conclusion on *Kable* if the interpretive process did include an assessment of whether the burden on a right could be justified. As indicated above, their Honours made comments suggesting that the justification of a human rights breach is a matter for the legislature.

The second complication that arises is that French CJ considered that the justification provision might be relevant to the Court's discretionary decision to make a declaration (although not taken into account at the interpretive stage).⁹⁵ By contrast, Crennan and Kiefel JJ took the view that the justification provision could not be taken into account at all.⁹⁶ It is unclear whether Crennan and Kiefel JJ would have reached a different view on *Kable* if they had adopted French CJ's understanding of the declaration-making process.

⁹³ Ibid 349 [439].

⁹⁴ Ibid 357 [457].

⁹⁵ Ibid 239 [36].

⁹⁶ Ibid 386 [573].

However, their Honours indicated that, if s 7(2) were relevant to the making of a declaration (but not to the process of interpretation), the declaration might not be incidental to judicial power, and perhaps run into *Kable* territory.⁹⁷

The third complication is that Crennan and Kiefel JJ indicated that a s 36 declaration ought not be made in respect of a criminal trial that results in a conviction, because to do so would place

the Court of Appeal in a position where it acknowledged that the trial process conducted by the County Court involved a denial of the appellant's *Charter* rights even though it upheld the validity of the conviction. In such a circumstance not only does a declaration serve no useful purpose to the appellant, it is not appropriate that it be made.⁹⁸

Their Honours concluded that 'in the sphere of criminal law, prudence dictates that a declaration be withheld.'⁹⁹ This conclusion formed part of a five-judge majority, along with Gummow, Hayne and Heydon JJ, in favour of setting aside the s 36 declaration made by the Court of Appeal.

Importantly, Crennan and Kiefel JJ's view was not shared by French CJ (nor presumably Bell J who agreed with the Chief Justice's conclusion on *Kable*).¹⁰⁰ Indeed, French CJ's reasons explicitly reject such a restriction, holding that '[t]here is no distinction in principle to be drawn ... between civil and criminal proceedings which would render a declaration of inconsistent interpretation inappropriate in the latter class of case.'¹⁰¹ As Gummow J intimated, Crennan and Kiefel JJ's solution seems to suggest that a declaration made in criminal proceedings might undermine the Court's

⁹⁷ Ibid 390 [590]. If that were the case, their Honours said, the Court would be 'asked to consider an abstract question of law.' Their Honours had earlier said that '[t]he fact that s 7(2) is divorced from the process of determining inconsistency is a factor *in favour of the validity of s 36(2)*, as will be discussed later in these reasons': at 387 [576] (emphasis added). Later in their Honours' reasons, when assessing the *Kable* requirement of independence, it was said that '[t]he independence of [the assessment to make a declaration] is not affected by the court having undertaken the unnecessary inquiry under s 7(2) of the *Charter*': at 391 [597]. These statements, taken together, suggest *Kable* difficulties if s 7(2) were taken into account at the declaration stage (but not at the interpretation stage), as suggested by French CJ.

⁹⁸ Ibid 394 [604].

⁹⁹ Ibid 394 [605].

¹⁰⁰ Ibid 405 [661].

¹⁰¹ Ibid 259–60 [96].

criminal process and, thus breach the *Kable* standard of institutional integrity.¹⁰²

The fourth complication is that the majority on the *Kable* challenge (French CJ, Crennan, Kiefel and Bell JJ) approached the *Kable* question on the assumption that the exercise of power to make a declaration is discretionary in nature.¹⁰³ In *International Finance Trust Co Ltd v Crime Commission (NSW)*,¹⁰⁴ French CJ had considered a duty placed on the NSW Supreme Court — to make an ex parte restraining order in respect of the property of persons involved in serious crime — to be in contravention of *Kable*. This conclusion was reached largely on the basis that the provision imposed a duty to make the order rather than being viewed as conferring a discretionary power.¹⁰⁵ Presumably, his Honour's conclusion in *Momcilovic* (that the declaration was discretionary) had significance for the resolution of the *Kable* claim. The discretionary nature of the declaration power was also important to the conclusions of Crennan and Kiefel JJ in *Momcilovic*,¹⁰⁶ particularly because, in their Honours' view, the Court retained a discretion to withhold declaratory relief in criminal cases. A requirement to make a declaration in criminal matters would have complicated their Honours' *Kable* analysis. Justice Gummow did not consider it necessary to directly address this point, but hinted that the use of 'may' in s 36 would impose an obligation on a court to make a declaration.¹⁰⁷ Justice Heydon did not consider the point.

Difficult issues surround the scope and content of statutory powers, like s 36, that are expressly conditioned on the establishment of certain matters and are conferred by permissive language, such as 'may'. To inquire simply whether such powers are 'discretionary' can be unhelpful. It is more useful to inquire whether the repository of such a power can decline to exercise it, notwithstanding the establishment of the express pre-conditions of the power. It was in this sense that French CJ and Crennan and Kiefel JJ held that s 36 was 'discretionary'.

¹⁰² Ibid 283–4 [186].

¹⁰³ Ibid 239 [36] (French CJ), 374 [529], 388 [584], 391 [597] (Crennan and Kiefel JJ), 404–5 [661] (Bell J).

¹⁰⁴ (2009) 240 CLR 319.

¹⁰⁵ Ibid 354–5 [54]–[55] (French CJ). See also his Honour's comments in *Hogan v Hinch* (2011) 243 CLR 506, 534 [27].

¹⁰⁶ See *Momcilovic* (2011) 280 ALR 221, 391 [597].

¹⁰⁷ Ibid 281 [174]. His Honour also noted that in *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 894 [59]–[60], Lord Steyn interpreted the word 'may' in s 4(2) of the HRA (UK) as 'must': at 273 [146].

A number of cases have considered the jurisdiction to decline to exercise a statutory power expressed in permissive language.¹⁰⁸ Those cases demonstrate that the question whether such language confers a discretion to decline or a duty to exercise a power is answered by reference to the statutory context in which the provision conferring the power is found.¹⁰⁹ Those cases also demonstrate that different statutory contexts will produce different outcomes. Some held that once the relevant statutory pre-conditions were established, the use of ‘may’ imposed a duty to exercise the power.¹¹⁰ Others held that the same language conferred a jurisdiction to decline to exercise a statutory power even where the statutory pre-conditions were satisfied.¹¹¹ Given this line of authority, one might expect a detailed consideration of the place of the declaratory power in the *Charter* context to ascertain whether the Supreme Court can decline to make a declaration, notwithstanding the opinion having been formed that a statutory provision cannot be interpreted consistently

¹⁰⁸ See, eg, *Ward v Williams* (1955) 92 CLR 496 (‘Ward’); *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 (‘Finance Facilities’); *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (‘Royal Insurance’); *Samad v District Court (NSW)* (2002) 209 CLR 140 (‘Samad’); *Leach v The Queen* (2007) 230 CLR 1 (‘Leach’). See recently *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664 [32]–[33] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ); *Hogan v Hinch* (2011) 243 CLR 506, 548 [68] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also the discussion in D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) 352–4 [11.10]–[11.12]. Although, ordinarily, the vesting of a power in a court is taken to be facultative only, a statutory scheme may intend ‘the benefit of the relief sought to flow automatically once the court [has] determined that the relevant facts were established’: at 353 [11.11].

¹⁰⁹ *Leach* (2007) 230 CLR 1, 17 [38] (Gummow, Hayne, Heydon and Crennan JJ), quoting *Finance Facilities* (1971) 127 CLR 106, 134–5 (Windeyer J).

¹¹⁰ See, eg, *Finance Facilities* (1971) 127 CLR 106, 128 (Barwick CJ), 134–6 (Windeyer J), 138–9 (Owen J) (‘may’ in the *Income Tax Assessment Act 1936* (Cth) s 46(3) imposed a duty on the Federal Commissioner of Taxation to pay a rebate); *Royal Insurance* (1994) 182 CLR 51, 63–6, 81, (Mason CJ), 88 (Brennan J), 103 (Toohey J), 103 (McHugh J) (‘may’ in the *Stamps Act 1958* (Vic) s 111(1) imposed a duty to refund overpaid tax where Victoria was liable for the refund under the general law); *Leach* (2007) 230 CLR 1, 17–18 [38] (Gummow, Hayne, Heydon and Crennan JJ) (‘may’ in the *Sentencing (Crime of Murder) and Parole Reform Act 2003* (NT) s 19(1) imposed a duty on a court to fix a non-parole period).

¹¹¹ See, eg, *Ward* (1955) 92 CLR 496, 508–9 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ) (‘may’ in the *Public Health Act 1902* (NSW) s 66(2) conferred on a judge or magistrate a discretion to decline to make an order requiring compliance with a served notice concerning a nuisance); *Samad* (2002) 209 CLR 140, 152–4 [31]–[37] (Gleeson CJ and McHugh J), 163 [76] (Gaudron, Gummow and Callinan JJ) (‘may’ in the *Poisons and Therapeutic Goods Regulation 1994* (NSW) cl 149 conferred a discretion on the Director-General of the NSW Department of Health to decline to cancel a licence to supply methadone).

with a human right. However, analysis of this kind is not undertaken to support the conclusions reached by French CJ, Crennan and Kiefel JJ.

Of course, different conclusions might be reached on this question. However, there appears to be a strong argument that the statutory context indicates that a court has no jurisdiction to decline to make a s 36 declaration, since the entire *Charter* is geared towards the 'protection' of the human rights identified therein, and given the role played by each arm of government to protect human rights in this so-called 'dialogue' model. The jurisdictional threshold on the non-judicial power contained in s 36 is an antecedent conclusion that a provision cannot be interpreted compatibly with a human right. Such a conclusion necessarily entails that a litigant's human right has been violated. Interpreting s 36 in light of the purpose of the *Charter* would seem to indicate that, in the event a right has been violated, the Court must make a declaration for the purpose of bringing the rights violation to the attention of the executive and the Parliament.

Despite these difficulties, as it stands, four judges considered that the power to make a declaration is discretionary in nature, although there is little common ground on how that discretion is to be exercised. French CJ (Bell J presumably agreeing, but not Crennan and Kiefel JJ) considered that the s 7(2) justification is a discretionary matter to be taken into account when making the declaration. On the other hand, Crennan and Kiefel JJ (but not French CJ or Bell J) considered that a declaration should not be made in criminal matters.¹¹² No assistance to form a majority can be found from the other three judges, with Gummow J (with whom Hayne J agreed)¹¹³ seemingly leaning towards a view of the provision as non-discretionary and Heydon J not expressing a view.

The complications covered so far arise irrespective of the source of jurisdiction being exercised. The complications arising when the Court is exercising federal jurisdiction will now be given closer attention.

D Section 36 Declarations in Federal Jurisdiction

Since the Victorian Court of Appeal was exercising federal jurisdiction, the second important question was whether the declaration could be picked up and applied by s 79 of the *Judiciary Act*. As a reminder, the declaration power can only be applied in federal jurisdiction if it is picked up by a federal law,

¹¹² *Momcilovic* (2011) 280 ALR 221, 394 [605].

¹¹³ *Ibid* 306 [280].

and *Boilermakers*¹¹⁴ prevents the picking up of powers that are neither judicial in nature nor incidental thereto.

As explained above, only Crennan and Kiefel JJ held that the making of a declaration was incidental to the exercise of judicial power. A majority of five judges held that a s 36 declaration involved neither an exercise of judicial power nor incidental non-judicial power. Consequently, it could not be picked up by s 79 and applied when the Supreme Court was exercising federal jurisdiction.¹¹⁴

In principle, this result reduces the number of proceedings in which a s 36 declaration can be made. For example, the following proceedings would be determined in the Victorian Supreme Court's federal jurisdiction:

- a civil proceeding or criminal prosecution in which the Commonwealth is a party, including where a right of statutory intervention is exercised (*Constitution* s 75(iii));
- a criminal prosecution of a resident of another state (*Constitution* s 75(iv));
- a civil proceeding with opposed non-corporate parties resident in different states (*Constitution* s 75(iv));
- a criminal prosecution under Commonwealth criminal legislation, even if the s 36 declaration is sought in relation to Victorian criminal procedure legislation applied in a federal prosecution (*Constitution* s 76(ii));
- a civil proceeding or criminal prosecution in which a constitutional issue is raised (*Constitution* s 76(i));
- a civil proceeding or criminal prosecution in which a claim is made under the *Australian Competition and Consumer Act 2010* (Cth) (*Constitution* s 76(ii)); and
- any proceeding in the admiralty or maritime jurisdiction (*Constitution* s 76(iii)).

The Chief Justice's judgment, however, presents a complication to this position. Although concluding that no declaration could be made in federal jurisdiction, his Honour went on to say that:

Accepting the validity of s 36, there is no reason in principle why the Court of Appeal, having exhausted its functions in the exercise of its federal jurisdiction

¹¹⁴ See above nn 34–5 and corresponding text.

in this case, could not proceed to exercise the distinct non-judicial power, conferred upon it by s 36, to make a declaration of inconsistent interpretation.¹¹⁵

The consequence of this obiter view is that, even when the Victorian Supreme Court is exercising federal jurisdiction, a declaration could still be made once federal jurisdiction runs its course (presumably upon completion of the interpretive process and the making of orders disposing of the dispute). When combined with the view of Crennan and Kiefel JJ that a declaration is incidental to the exercise of judicial power, arguably there is majority support for the proposition that the declaration could be made by the Victorian Court of Appeal.

This 'majority' proposition, however, is unstable and unsustainable. First, the Chief Justice's observations in this respect were tentative. No firm view was needed because his Honour held that the High Court could not set aside the declaration under *Constitution* s 73 (a matter to which we will return in Part VII). Secondly, as will be discussed in the next part, French CJ's suggestion does not sit comfortably with previous decisions of the High Court and fundamental ch III principles. Thirdly, it is not entirely clear that Bell J agreed with this conclusion. Bell J did not expressly agree with this reasoning and, because her Honour's concurrence with the orders proposed by French CJ can be explained on an acceptance of the inability to appeal the declaration under *Constitution* s 73, there is no necessary endorsement of the Chief Justice's suggestion about the exhaustion of federal jurisdiction. Fourthly, the view of Crennan and Kiefel JJ is based on a dissenting understanding of the nature of the declaration power (ie, that it is incidental to the exercise of judicial power). That view is at odds with the view of French CJ (with Bell J agreeing) that the declaration is neither judicial nor incidental thereto. Finally, this majority position would see the declaration being made by a state court in state jurisdiction for French CJ (and perhaps Bell J) and federal jurisdiction for Crennan and Kiefel JJ — a highly undesirable outcome.

Given these complications, the Victorian Supreme Court is placed in an unenviable position when exercising federal jurisdiction. However, in our view, there is no firm majority support for the making of a declaration when the Court has been exercising federal jurisdiction, and reliance on a constructed majority in this respect is attended by considerable uncertainty.

¹¹⁵ *Momcilovic* (2011) 280 ALR 221, 261 [101]. The only other judges to directly address this point were Crennan and Kiefel JJ who considered that a s 36 declaration is part of the federal 'matter': at 388 [585].

E *Additional Implications for the Human Rights Act 2004 (ACT)*

The *HRA (ACT)*, upon which the *Charter* was based,¹¹⁶ contains a similarly worded interpretive rule (s 30) and justification provision (s 28(1)), and a power conferred on the ACT Supreme Court to make a declaration (s 32(2)), which has no effect on rights (s 32(3)). It is well accepted that territory courts can exercise federal jurisdiction¹¹⁷ and are subject to the *Kable* principle.¹¹⁸ Thus, the commentary so far applies equally to the *HRA (ACT)*.

However, the nature of a territory court, and the ultimate source of legislative power for its creation (that is, the territories power in s 122 of the *Constitution*), may mean that *Momcilovic* has an even more pronounced impact on the continuing effectiveness of the *HRA (ACT)* provisions — particularly the declaration power. One important question that remains to be resolved by the High Court is whether any jurisdiction exercised by a territory court in relation to ‘matters’ is non-federal jurisdiction. In other words, is all jurisdiction exercised by territory courts federal jurisdiction because, as decided in *Northern Territory v GPAO*,¹¹⁹ an exercise of power by Parliament under s 122 of the *Constitution* gives rise to a ‘matter’ under s 76(ii) of the *Constitution*? As Professor Zines has said, ‘[a]ny other view would be difficult to reconcile with the decision in *GPAO*’.¹²⁰ If that view were correct, then all jurisdiction in relation to matters in the ACT Supreme Court would be federal jurisdiction, and the declaration power could never be exercised by the ACT Supreme Court when determining a matter.

VII THREE ISSUES RAISED IN THE JUDGMENT OF CHIEF JUSTICE FRENCH

This article will finish by exploring further three issues raised by the Chief Justice’s judgment: (i) the view that declarations could be made by the Supreme Court in state jurisdiction even when the Court had been exercising federal jurisdiction to resolve the substantive claims underlying the dispute;

¹¹⁶ See Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290 (Rob Hulls, Attorney-General).

¹¹⁷ *Blunden v Commonwealth* (2003) 218 CLR 330; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

¹¹⁸ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

¹¹⁹ (1999) 196 CLR 553.

¹²⁰ Leslie Zines, *Cowen and Zines’s Federal Jurisdiction in Australia* (Federation Press, 3rd ed, 2002) 179.

(ii) that the declaration could not be appealed to the High Court; and (iii) that state provisions might directly apply in federal jurisdiction.

A The View of Chief Justice French on Declarations in Federal Jurisdiction

As mentioned, the Chief Justice suggested that a declaration of incompatibility could be made by the Supreme Court of Victoria when exercising federal jurisdiction once federal jurisdiction has been 'exhausted'.¹²¹ To demonstrate by reference to the facts in *Momcilovic*: having applied the interpretive rule, the Court of Appeal refused leave to appeal against conviction. That decision was then followed eight days later by the declaration of inconsistency.¹²² The Chief Justice's suggestion seems to be that federal jurisdiction came to an end following the application of the interpretive rule and upon the refusal of leave to appeal, and that state jurisdiction kicked in upon the making of the declaration.¹²³

At first sight, this suggestion seems to have some logical appeal. As explained earlier, it is now well accepted that the vesting of federal jurisdiction in a state court to determine a federal matter operates to strip that court of any state jurisdiction to determine that dispute.¹²⁴ Thus, there would not have been any state jurisdiction ('authority to decide') left to determine the matter in *Momcilovic* before either the County Court of Victoria or on appeal to the Victorian Court of Appeal. However, the declaration does not form part of the federal matter. A core finding by a majority of the High Court was that the declaration did not resolve the dispute underlying the federal matter. Thus, it might be argued, as French CJ seems to be suggesting, that the making of the declaration falls within state jurisdiction hovering outside the federal matter.

¹²¹ *Momcilovic* (2011) 280 ALR 221, 261 [101] (French CJ).

¹²² The decision of the Court of Appeal was dated 17 March 2010; the declaration was made on 25 March 2010: *R v Momcilovic* (2010) 25 VR 436, 489.

¹²³ Presumably, this suggestion could equally apply to the ACT Supreme Court in cases of federal jurisdiction. Even if the ACT Supreme Court exercises federal jurisdiction in all matters before it (see above nn 119–20 and corresponding text), it still might be the case that territory judicial power or jurisdiction may be conferred on territory courts under s 122 of the *Constitution*, since territory courts are not federal courts: *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322; *Spratt v Hermes* (1965) 114 CLR 226; *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591. Thus, the critique of his Honour's suggestion that follows in the text is equally applicable to the position in the ACT.

¹²⁴ See above n 34 and corresponding text.

However, this suggestion is misplaced for three reasons: first, it rests on the assumption that federal jurisdiction ceases upon the resolution of the substantive claims underlying the federal dispute — an assumption that does not sit comfortably with existing High Court authority; secondly, s 36 does not confer separate state jurisdiction to make a declaration; and, thirdly, it seems to be incompatible with fundamental principles underlying ch III.

As to the assumption that federal jurisdiction is exhausted upon the resolution of the substantive claims underlying the federal matter, the High Court's decision in *Solomons*¹²⁵ stands for the proposition that federal jurisdiction extends past the disposition of those substantive claims. In *Solomons*, the High Court considered a NSW statutory provision¹²⁶ that conferred a power on a NSW court to issue a certificate to a person acquitted of a NSW criminal offence. The acquitted person could then present the certificate to the Under Secretary of the NSW Treasury, along with an application to have his or her legal costs reimbursed from the Consolidated Revenue Fund.¹²⁷ The appellant had been acquitted of a Commonwealth offence tried in the District Court of NSW and sought a costs certificate from that court.¹²⁸ During the trial of the Commonwealth offence the NSW Court had been exercising federal jurisdiction. Since the Court had jurisdiction 'with respect to' the trial and conviction of a state offence on indictment, it had the like federal jurisdiction conferred by s 68(2) of the *Judiciary Act* with respect to persons charged with federal offences.¹²⁹ In considering the appellant's argument that s 79 of the *Judiciary Act* operated to pick up the costs certificate provisions of the NSW Act and apply them in federal jurisdiction, the High Court was prepared to assume in the appellant's favour that the District Court was still exercising federal jurisdiction, after verdict and before judgment, when it received the application for a costs certificate.¹³⁰

Although the High Court did not decide the point, there is no reason to doubt that the assumption of jurisdiction was well-founded. The federal criminal jurisdiction of the District Court is conferred in terms of 'wide import':¹³¹ it has jurisdiction 'with respect to' the trial and indictment of a

¹²⁵ (2002) 211 CLR 119.

¹²⁶ *Costs in Criminal Cases Act 1967* (NSW) s 2.

¹²⁷ *Solomons* (2002) 211 CLR 119, 131 [12] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

¹²⁸ *Ibid* 129 [4].

¹²⁹ *Ibid* 128 [3].

¹³⁰ *Ibid* 133 [18].

¹³¹ *R v Gee* (2003) 212 CLR 230, 248 [39] (McHugh and Gummow JJ).

Commonwealth offence.¹³² If this is so in relation to an application following acquittal, the argument is at least as strong that any exercise of power to issue a declaration of inconsistency — in the same proceeding as the ‘matter’ — would be undertaken in federal jurisdiction.

Thus, at least in relation to an exercise of federal criminal jurisdiction, a purported exercise of the power to issue a declaration of inconsistency is likely to be in the exercise of federal jurisdiction. Even in relation to non-criminal federal jurisdiction, the authority to decide the ‘matter’ conferred by s 39(2) of the *Judiciary Act* is unlikely to have been exhausted at the time a declaration of inconsistency is made, given that the exercise follows immediately from an unsuccessful interpretive exercise under s 32(1).

The second reason why French CJ’s suggestion should not be accepted is that the *Charter* does not purport to confer *separate* state jurisdiction on the Supreme Court to make a declaration. As Crennan and Kiefel JJ said:

In so far as s 36(2) suggests a declaratory order, the word ‘declaration’ is a misdescription, as is the statement of the object in s 1(2)(e), namely, ‘conferring jurisdiction’ upon the Supreme Court to make a declaration of inconsistency. When the whole of s 36 is considered it is clear that the Supreme Court does not have jurisdiction to determine the question of inconsistency. Rather, the Supreme Court is empowered to make a declaration consequent upon exercising jurisdiction otherwise conferred, in this case, in respect of s 32.¹³³

The jurisdiction in *Momcilovic* ‘otherwise conferred ... in respect of s 32’¹³⁴ was federal jurisdiction — state jurisdiction to resolve the matter having been stripped out — and there is no separate attempt to confer state jurisdiction to make a declaration. There is no separate application process for a declaration, and no separate proceeding for it to be made. The making of a declaration is designed to follow immediately from an unsuccessful application of the interpretive rule. The fact that there might be a temporal gap — as was the case in *Momcilovic* — does not change the character of the connection between the declaration and the federal matter being resolved.

The third reason why the Chief Justice’s suggestion should not be accepted is that it runs counter to fundamental principles underlying ch III. This point may be demonstrated by contrasting the choices available to the federal Parliament if it decided to enact its own human rights charter. As already

¹³² *Judiciary Act* s 68(2).

¹³³ *Momcilovic* (2011) 280 ALR 221, 388 [583].

¹³⁴ *Ibid.*

noted, Parliament could not confer the power to make a declaration on a federal court.¹³⁵ Nor could it instead decide to confer such a power on a state court if it chose to vest state courts (rather than federal courts) with that federal 'human rights' jurisdiction. The Chief Justice's suggestion would allow the state Parliaments (perhaps at the request of the federal Parliament) to confer the declaration power on state courts exercising federal jurisdiction. Any suggestion that state jurisdiction can be parasitic in this way on a federal matter would lead to the invidious outcome that the Commonwealth Parliament could easily avoid the application of the *Boilermakers*' limitation by simply vesting federal jurisdiction in state courts, rather than inferior federal courts. Irrespective of its merits or demerits,¹³⁶ the *Boilermakers*' doctrine is an accepted feature of the constitutional landscape, and an interpretation of the relevant provisions that undercuts the constitutional separation of judicial power should, where possible, be avoided.

B *Appealing Declarations to the High Court under Section 73 of the Constitution*

Section 73 of the *Constitution* gives the High Court jurisdiction to hear appeals from the 'judgments, decrees, orders, and sentences' of lower courts. Chief Justice French held that the High Court had 'no jurisdiction under s 73 of the *Constitution* to entertain the appeal so far as it relate[d] to the declaration of inconsistent interpretation made by the Court of Appeal.'¹³⁷ Although Bell J did not specifically agree with that conclusion, her Honour's concurrence with the Chief Justice's orders is at least explained on that basis.

The final orders of the Court set aside the declaration. Because Heydon J dismissed the appeal, the order setting aside the declaration was supported by only four judges (Gummow, Hayne, Crennan and Kiefel JJ). However, Crennan and Kiefel JJ held that the declaration was incidental to an exercise of judicial power and, thus, their Honours were not required to confront the question of whether a declaration, as an exercise of power which is neither judicial nor incidental thereto, could be appealed to the High Court. Thus, it

¹³⁵ See above Part IVA.

¹³⁶ See, eg, Sir Anthony Mason, 'A New Perspective on Separation of Powers' [1996] (82) *Canberra Bulletin of Public Administration* 1; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008); Fiona Wheeler, *The Separation of Federal Judicial Power: A Purposive Analysis* (PhD Thesis, The Australian National University, 1999); Stellios, 'Reconceiving the Separation of Judicial Power', above n 17.

¹³⁷ *Momcilovic* (2011) 280 ALR 221, 262 [101].

would seem that the judgments in *Momcilovic* are evenly balanced on whether the High Court could set aside a non-judicial order, like the declaration, on appeal under s 73 and, consequently, French CJ's interpretation needs to be further explored.

In some respects, French CJ's interpretation of s 73 was uncontroversial. As stated by Gaudron, Gummow and Hayne JJ in *Mobil Oil Australia Pty Ltd v Victoria*¹³⁸ (quoted with approval by French CJ in *Momcilovic*),¹³⁹ '[i]t is well established that "judgments, decrees, orders and sentences" is to be understood as confined to decisions made in the exercise of judicial power.' Thus, it would appear that decisions made in the exercise of a non-judicial power (as the declaration was held to be by a majority of the Court) cannot be the subject of an appeal to the High Court.¹⁴⁰

However, in other respects, the Chief Justice's view appears to conflict with deep principles concerning the operation of the power of constitutional review which go to the heart of judicial power.¹⁴¹ If the power to make a declaration of incompatibility were without constitutional foundation (either because it breached *Kable* or could not be picked up by s 79 where a court is exercising federal jurisdiction), it would be a constitutional nullity. As French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ held in *Haskins v Commonwealth*, quoting the 'celebrated dictum' of the Supreme Court of the United States in *Norton v Shelby County*,¹⁴² '[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.'¹⁴³ To allow such a judicial order to stand, and to have continuing legal consequences, would seem to cut across the very idea of constitutionalism.

As will be explained, the tension between the text of the *Constitution* and the underlying constitutional principles can be resolved by an appreciation that s 73 operates at two levels: it allows the High Court to set aside non-

¹³⁸ (2002) 211 CLR 1, 38, quoting *Constitution* s 73.

¹³⁹ *Momcilovic* (2011) 280 ALR 221, 261 [101].

¹⁴⁰ Of course, French CJ also suggested that the declaration could have been made in the exercise of state judicial power: above n 115. Consequently, the absence of an order setting the declaration aside might have followed in any event.

¹⁴¹ The precise constitutional source for the exercise of judicial review is yet to be pinned down. However, its likely foundation lies in deep constitutional principles concerning the role of the judiciary in a federal system of government: see James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) 321–2 [7.26].

¹⁴² 118 US 425 (1886).

¹⁴³ *Haskins v Commonwealth* (2011) 244 CLR 22, 42 [45], quoting *ibid* 442 (Field J).

judicial orders that lack constitutional authority, but prevents the High Court from reconsidering the making of such an order if otherwise constitutionally valid. This distinction finds some reflection in the judgment of Brennan J (in dissent, but not on this point) in *Mellifont v Attorney-General (Qld)* ('*Mellifont*'):

If a State Court be vested with non-judicial power, no exercise of that power can found an appeal to this Court for this Court has no power available itself to make a non-judicial order *in place of* any non-judicial order which a State Court ought to have made at first instance.¹⁴⁴

It is also implicit in Gummow J's summation of *Mellifont* in *Kable*: 'this Court has no power to make a non-judicial order *in place of* any non-judicial order which the State court ought to have made at first instance'.¹⁴⁵

Cases which have considered the limitation on non-judicial power in s 73 have traditionally involved an appellant requesting the High Court, in the appellate jurisdiction, to perform the power of the court below. Such cases have, thus, addressed the question whether the High Court should 're-exercise' the non-judicial power of the Court below.¹⁴⁶ Other cases heard in the appellate jurisdiction have involved an application to quash the orders made below on the ground that they are unconstitutional. For example, the High Court's jurisdiction in *Kable*¹⁴⁷ and *Totani*¹⁴⁸ was appellate. Both cases were appeals brought from orders of state courts. In both cases, the state courts were exercising federal jurisdiction.¹⁴⁹ In both cases, the High Court held that the state laws under which the orders were made were contrary to ch III as they conferred functions that undermined the institutional integrity of the state court. In *Kable*, the orders made were quashed.¹⁵⁰ In *Totani*, the state court rejected South Australia's application for control orders and the High Court upheld that rejection on the ground that the South Australian

¹⁴⁴ (1991) 173 CLR 289, 312 (emphasis added) (citations omitted).

¹⁴⁵ *Kable* (1996) 189 CLR 51, 142–3 (emphasis added).

¹⁴⁶ See, eg, *Saffron v The Queen* (1953) 88 CLR 523; *Minister for Works (WA) v Civil & Civic Pty Ltd* (1967) 116 CLR 273; *Fisher v Fisher* (1986) 161 CLR 438; *Swiss Aluminium Australia Ltd v Federal Commissioner of Taxation* (1987) 163 CLR 421. Cf *Mellifont* (1991) 173 CLR 289.

¹⁴⁷ (1996) 189 CLR 51.

¹⁴⁸ (2010) 242 CLR 1.

¹⁴⁹ In *Kable* and *Totani*, federal jurisdiction was triggered when a constitutional argument based on ch III was raised. In both cases, the state courts were exercising jurisdiction under the impugned Acts, and it was that exercise of jurisdiction that formed the basis of the appeal to the High Court.

¹⁵⁰ (1996) 189 CLR 51, 99 (Toohey J), 108 (Gaudron J), 124 (McHugh J), 144 (Gummow J).

legislation under which the application was made was unconstitutional.¹⁵¹ In neither case was it suggested that the High Court was prevented from declaring the orders appealed from invalid because they were made in the exercise of non-judicial power. Indeed, this seems to have been the approach of Gummow J in *Momcilovic*, setting aside the declaration ‘for want of jurisdiction to make it’.¹⁵²

Support for a bifurcated approach to s 73 is strengthened if one considers the impact of French CJ’s interpretation of s 73 on lower federal courts. Section 73 does not only provide for appeals from state courts, it also establishes High Court jurisdiction to entertain appeals from ‘judgments, decrees, orders or sentences’ of inferior federal courts. If a non-judicial power were conferred on a lower federal court, French CJ’s interpretation would prevent an appeal from the exercise of such a power and cut across the clear prohibition on federal courts exercising non-judicial power.

It might be said in response to all of this that an application could be made in the original jurisdiction of the High Court to have the conferral of such a non-judicial power held invalid and, thus, s 73 need not be interpreted in a way to facilitate the exercise of judicial review. However, there is no good policy reason for that approach. Indeed, in relation to state laws, the only reliable head of original jurisdiction that might be triggered is s 76(i) of the *Constitution*. But, that jurisdiction is not constitutionally entrenched and, presumably, could be repealed by Parliament, leaving no avenue to bring the constitutional challenge before the High Court. That would be an undesirable position when alternative interpretations of s 73 are available.

C State Provisions Directly Applying in Federal Jurisdiction

Having accepted that the County Court and the Court of Appeal had been exercising federal jurisdiction, French CJ went on to say:

There is a question, not debated at the hearing of the appeal, whether in the exercise of that jurisdiction the provisions of the *Drugs Act* applied directly along with the statutory and common law rules affecting their interpretation. Although I would not wish, in the absence of argument on the point, to express

¹⁵¹ (2010) 242 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J), 92–3 [236]–[237] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J).

¹⁵² *Momcilovic* (2011) 280 ALR 221, 275 [146]. Of course, his Honour first concluded that s 36 was in breach of *Kable*: at 284 [188].

a concluded view, there is much to be said for the proposition that they did so apply and not by virtue of s 79 of the *Judiciary Act*.¹⁵³

His Honour explained that, where a court is exercising diversity jurisdiction under s 75(iv) of the *Constitution*, ‘the “matter” may be said to be defined by reference to the rights or liabilities to be determined under the relevant state law and/or the common law.’¹⁵⁴ Thus, while the state courts were empowered in *Momcilovic* to resolve the dispute with federal jurisdiction, the content of the rights and duties being determined had its source in state law. His Honour drew¹⁵⁵ from the statement of Windeyer J in *Felton v Mulligan* that ‘[t]he existence of federal jurisdiction depends upon the grant of an authority to adjudicate rather than upon the law to be applied or the subject of adjudication’,¹⁵⁶ and from Professor Zines who said that ‘[i]n the context of diversity jurisdiction, ... the *content* of the jurisdiction of State courts remains the same, but the *source* is different and the conditions and regulations imposed by s 39(2) are attached.’¹⁵⁷

The state provisions in *Momcilovic* that operated to define the rights and obligations in dispute included, not only the provisions in the *Drugs Act*,¹⁵⁸ but also s 32(1) of the *Charter*, which helped to define those rights and obligations. Thus, his Honour suggested that these provisions should have ‘direct application’ in federal jurisdiction and not be picked up and applied by s 79 of the *Judiciary Act*. On the other hand, s 36 had to be picked up in federal jurisdiction by s 79, but could not be because it involved an exercise of non-judicial power. The distinction between ss 32(1) and 36 seems to be that s 36 is a power given to the Supreme Court and not a provision defining the rights and duties in dispute. As to this idea of the direct application of state laws in federal jurisdiction, his Honour seemed to suggest that the same conclusion would follow for state laws that are applied within the accrued jurisdiction of the High Court.¹⁵⁹ Gummow J (with Hayne J agreeing)¹⁶⁰

¹⁵³ Ibid 260 [99].

¹⁵⁴ Ibid. If this reasoning suggests that the matter is defined *exclusively* by reference to state or common law it is problematic. As the preconditions for triggering any of the matters of federal jurisdiction are set out in the *Constitution*, the dispute between the parties will always involve a constitutional dimension.

¹⁵⁵ Ibid 261 [100].

¹⁵⁶ (1971) 124 CLR 367, 393, endorsed by Mason, Murphy, Brennan and Deane JJ in *Fencott v Muller* (1983) 152 CLR 570, 606.

¹⁵⁷ Zines, *Federal Jurisdiction in Australia*, above n 120, 90 (emphasis in original).

¹⁵⁸ Sections 5, 71AC.

¹⁵⁹ *Momcilovic* (2011) 280 ALR 221, 260–1 [100].

disagreed with how the interpretive provision applied in federal jurisdiction, considering that s 79 of the *Judiciary Act* operated to pick up all the valid provisions of the *Charter*.¹⁶¹ The other judges did not engage with this issue.

This is a very interesting development. Prior to these observations, it seemed to have been accepted by the High Court that Parliament has the exclusive authority to prescribe the laws that can be applied when a court — federal or state — is exercising federal jurisdiction.¹⁶² On this view, no state law can apply of its own force in federal jurisdiction — it must be picked up and applied as a surrogate federal law. This, it seemed, results ‘from an absence of State legislative power’, as Gummow J explained in *APLA Ltd v Legal Services Commissioner (NSW)*.¹⁶³

This position seems to have been applied in a range of cases, not just to state provisions (like s 36) that confer powers on state courts,¹⁶⁴ but also state provisions that go to the definition of the rights and obligations of parties in dispute.¹⁶⁵ Of course, as Hill and Beech have recognised, this gives rise to very difficult questions not yet addressed by the High Court about the constitutional authority of the federal Parliament to pick up state laws (as surrogate federal laws) that go to the definition of the rights and obligations in dispute.¹⁶⁶ Nevertheless, this seems to have been the majority position.

It is beyond the scope of this article to attempt to resolve these difficult questions, however, we emphasise the following five points. First, the position of the Chief Justice does not sit comfortably with the majority view of the development of the principles of federal jurisdiction. Secondly, and specifically on French CJ’s reference to the observations of Windeyer J and Professor Zines,¹⁶⁷ there is no necessary incompatibility between those views and the accepted position that the states lack power to prescribe laws to be applied in federal jurisdiction. The content of the rights and obligations may be defined by state law, yet be picked up and applied by federal law.

¹⁶⁰ Ibid 306 [280].

¹⁶¹ Ibid 275 [146].

¹⁶² See above nn 33–4.

¹⁶³ (2005) 224 CLR 322, 406.

¹⁶⁴ See, eg, *Solomons* (2002) 211 CLR 119.

¹⁶⁵ See, eg, *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 (Western Australian provision limiting right of action against the Crown); *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136 (Queensland provision allowing third party contributions). In relation to s 68(1) see also *Putland v The Queen* (2004) 218 CLR 174 (Northern Territory sentencing provisions).

¹⁶⁶ Hill and Beech, above n 33, 29–30.

¹⁶⁷ See above nn 156–7 and corresponding text.

Thirdly, having raised the possibility of this ‘direct application’ principle, the Chief Justice said ‘[t]he implications of a proposition that the concept of “matter” in s 75(iv) does not extend to encompass rights and liabilities arising under state law may be considerable and were not explored on the appeal.’¹⁶⁸ Not only does this suggestion cut across long established principles that a federal ‘matter’ extends to cover non-severable state claims,¹⁶⁹ but it seems to be raising a different point. Whether state laws directly apply in federal jurisdiction is a different question to whether the court is resolving those state-based claims that fall within the federal ‘matter’ with federal authority (ie, in federal jurisdiction).

Fourthly, there is difficulty in applying the Chief Justice’s ‘direct application’ view to matters in federal courts where the dispute in question is partly¹⁷⁰ defined by reference to state laws. The application of such a principle to federal courts would run up against the decision of the court in *Re Wakim; Ex parte McNally* (*‘Re Wakim’*),¹⁷¹ where the High Court held that state Parliaments cannot vest state jurisdiction in federal courts, because ch III is the exclusive source of power in relation to federal courts.

Finally, and assuming *Re Wakim* results in the inapplicability of the direct application rule to federal courts, applying the direct application rule to state courts exercising federal jurisdiction would produce the undesirable outcome that the same ‘matter’ would be defined differently depending on whether it were determined by a federal court or state court. There is no indication in ch III that ‘matters’ should be treated in this differentiated way.

That is not to say that principles could not be developed to give effect to French CJ’s ‘direct application’ principle, but that there are a number of obstacles to be faced, not the least of which is the weighty line of case law on federal jurisdiction over the last 20 years.

VIII CONCLUDING OBSERVATIONS

Momcilovic will stand as an important case on the separation of judicial power in Australia. It is a strong endorsement of the *Boilermakers’* doctrine: that courts exercising federal judicial power cannot exercise non-judicial

¹⁶⁸ *Momcilovic* (2011) 280 ALR 221, 261 [100] (French CJ).

¹⁶⁹ See, eg, *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

¹⁷⁰ See above n 154.

¹⁷¹ (1999) 198 CLR 511.

power unless it is incidental to the performance of judicial functions. It is a reminder that ch III of the *Constitution* limits what legislatures in Australia — federal, state and territory — can do with their courts.

It is clear that *Momcilovic* presents a number of incompatibilities between the so-called dialogue model of rights protection and Australia's entrenched separation of judicial power. The federal separation of judicial power principles displace the possibility of enacting a declaration of inconsistency provision in any federal charter, and create some uncertainty over the scope of an interpretive provision that might be adopted. The details of how ch III principles apply to the *Charter* (and the *HRA* (ACT)) are less clear. Because of its multiple levels of complexity across six judgments, *Momcilovic* presents serious difficulties for lower courts looking for majority statements of how the key judicial provisions in the *Charter* are to be applied. There will be danger in oversimplifying the positions of the judges on the various ch III issues, and close and detailed analysis of the judgments will be required.

Ironically, for Vera Momcilovic none of this really mattered. The ch III issues were not raised by her initially in the High Court appeal and, ultimately, were of little consequence to her. The drugs that were found in her apartment should not have been deemed to be in her possession for the purposes of the trafficking offence and, consequently, her conviction was overturned. Fortunately for her, the same constitutional fanfare is unlikely to accompany any retrial.