

DOES PROPORTIONALITY ANALYSIS HAVE A ROLE IN STATUTORY INTERPRETATION UNDER THE VICTORIAN *CHARTER*?

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ABSTRACT

The High Court's decision in Momcilovic v The Queen clarified that courts applying the interpretative obligation imposed by s 32(1) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) are not permitted to use the remedial approach to statutory interpretation adopted in the United Kingdom. However, that decision did not establish a binding precedent on whether courts interpreting statutes under s 32(1) are permitted, as part of the interpretation process, to apply the proportionality test prescribed by s 7(2) of the Charter. This article analyses constitutional aspects of this unresolved question and contends there is a significant likelihood that the relevant power to use proportionality analysis as part of the interpretation process cannot validly be conferred on any court vested with federal jurisdiction.

I INTRODUCTION

Section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') requires all Victorian statutory provisions to be interpreted, so far as it is possible to do so consistently with their purpose, in a way that is compatible with human rights. This interpretative obligation is of fundamental importance to the operation and purpose of the *Charter*. Indeed, the 'main purpose' of the *Charter* includes ensuring that all statutory provisions are interpreted 'so far as is possible in a way that is compatible with human rights'.¹

Although s 32(1) is a key provision of the *Charter* and has been in operation since 1 January 2008, its meaning and operation remain clouded by uncertainty. The case law to date has, to some extent, reduced this uncertainty. Most notably, *Momcilovic v The Queen*² clarified that courts applying s 32(1) are not permitted to use the remedial approach to statutory

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¹ *Charter* s 1(2).

² (2011) 245 CLR 1 ('*Momcilovic*').

interpretation adopted in the United Kingdom by the House of Lords in *Ghaidan v Godin-Mendoza*.³ However, *Momcilovic* did not establish a binding precedent on whether courts interpreting statutes under s 32(1) are permitted, as part of the interpretation process, to apply the proportionality test prescribed by s 7(2) of the *Charter*. This unresolved question is critical to the operation of the *Charter* and is likely to come before the High Court in due course.

The purpose of this article is to analyse potential constitutional impediments to the relevant use of proportionality analysis by Australian courts. It should be noted that it is beyond the scope of this article to analyse whether such use of proportionality analysis by the courts is desirable from a policy and philosophical perspective. Rather, this article focuses on the narrow legal question of whether Australian courts can validly be conferred with the relevant power to use proportionality analysis as part of the interpretation process.

II THE LEGISLATION

Section 32(1) of the *Charter* states:

So 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.

Section 7(2) of the *Charter* states:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and

³ [2004] 2 AC 557 ('*Ghaidan*'). This remedial approach to statutory interpretation allows courts in the United Kingdom to depart from the legislative intention and to change the meaning of legislation by reading down or reading in words: see *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264, [28] (Lord Bingham of Cornhill); *Ghaidan* [2004] 2 AC 557, [30], [32] (Lord Nicholls of Birkenhead), [40]–[51] (Lord Steyn).

- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

III THE CASE LAW

As explained in the second reading speech for the Charter of Human Rights and Responsibilities Bill 2006 (Vic), s 7(2) of the *Charter* is a ‘general limitations clause’ which ‘embodies what is known as the “proportionality test”’.⁴ This test provides a process for assessing whether identified limits on rights are reasonable and demonstrably justified in a free and democratic society. The central question being considered in this article is whether the Victorian Supreme Court can validly be conferred with the power to apply the s 7(2) proportionality test as part of the interpretation process under s 32(1) of the *Charter*. There is case law, albeit inconclusive, on this question. The relevant case law is set out below, as well as in a number of academic articles published in the aftermath of the High Court’s *Momcilovic* decision.⁵

A The High Court’s *Momcilovic* Decision

In *Momcilovic*, a majority of the High Court held that in cases where a statute limits a right, the proportionality test prescribed by s 7(2) has a role in the interpretation process under s 32(1).⁶ However, a differently constituted majority expressed dicta indicating or implying that it is or may be incompatible with ch III of the *Constitution* for the proportionality test to be part of the interpretation process.⁷ Both those majorities included Heydon J, who held, in dissent, that the whole of the *Charter* is invalid.⁸ Thus, there is no ratio in *Momcilovic* on

⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls, Attorney-General).

⁵ See, eg, Will Bateman and James Stellios, ‘Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights’ (2012) 36 *Melbourne University Law Review* 1, 11–17; Bruce Chen, ‘Making Sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the *Charter of Human Rights and Responsibilities Act 2006*’ (2013) 74 *Australian Institute of Administrative Law Forum* 67; Julie Debeljak, ‘Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond’ (2014) 40 *Monash University Law Review* 340, 365–87; Adrienne Stone, ‘Constitutional Orthodoxy in the United Kingdom and Australia: The Deepening Divide – *Constitutional Review under the UK Human Rights Act* by Aileen Kavanagh’ (2014) 38 *Melbourne University Law Review* 836, 850–7; Justice Pamela Tate, ‘Statutory Interpretive Techniques under the *Charter*: Three Stages of the *Charter* – Has the Original Conception and Early Technique Survived the Twists of the High Court’s Reasoning in *Momcilovic*?’ (2014) 2 *Judicial College of Victoria Online Journal* 43, 63–8 <http://www.judicialcollege.vic.edu.au/sites/default/files/jcv_online_journal_vol02.pdf>.

⁶ (2011) 245 CLR 1, 92 [168] (Gummow J), 123 [280] (Hayne J), 170 [427] (Heydon J), 249–50 [683]–[684] (Bell J).

⁷ *Ibid* 44 [36] (French CJ), 174–5 [436]–[439] (Heydon J), 219–20 [574] (Crennan and Kiefel JJ).

⁸ *Ibid* 175 [439].

whether courts interpreting statutes under s 32(1) are permitted, as part of the interpretation process, to apply the proportionality test prescribed by s 7(2). Below is a summary of the relevant reasons and dicta in *Momcilovic*.

French CJ accepted the Human Rights Law Centre's submissions 'that a proportionality assessment of the reasonableness of legislation is not an interpretive function' and that s 7(2) 'cannot ... form part of the interpretive process because the proportionality assessment that it requires cannot be undertaken until a construction has been reached'.⁹ His Honour also stated:

In the event [of the making of a declaration of inconsistent interpretation under s 36(2) of the *Charter*], the justification of limitations on human rights is a matter for the Parliament. That accords with the constitutional relationship between the Parliament and the judiciary which, to the extent that it can validly be disturbed, is not to be so disturbed except by clear words. The *Charter* does not have that effect.¹⁰

Gummow J stated that s 32(1) 'is directed to the interpretation of statutory provisions in a way which is compatible with the human right in question, as identified and described in Pt 2, including, where it has been engaged, s 7(2)'.¹¹ His Honour also stated that the following reasoning of the joint majority in *Project Blue Sky Inc v Australian Broadcasting Authority* 'applies *a fortiori* where there is a canon of construction mandated, not by the common law, but by a specific provision such as s 32(1)'.¹²

The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.¹³

⁹ Ibid 43–4 [34].

¹⁰ Ibid 44 [36].

¹¹ Ibid 92 [168].

¹² Ibid 92 [170].

¹³ (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted) ('*Project Blue Sky*'). Note, however, that if the relevant use of proportionality analysis is constitutionally impermissible, that impediment cannot validly be circumvented by applying any of the principles of construction referred to in the quoted passage from *Project Blue Sky*. The common law rules of construction, like those prescribed by legislation, must conform with the *Constitution* (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ)).

Based on this reasoning, Gummow J concluded that s 32(1) ‘does not confer upon the courts a function of a law-making character’.¹⁴

Hayne J agreed with Gummow J’s above reasons.¹⁵

Heydon J concluded ‘that s 7(2) is central to the interpretation process to be carried out under s 32(1)’.¹⁶ In support of this conclusion, his Honour stated that the expression ‘human right’ is defined in s 3(1) of the *Charter* ‘as meaning not merely something listed in ss 8–27, but the civil and political rights set out in Pt 2, namely ss 7–27, including s 7(2)’.¹⁷ His Honour therefore reasoned that ‘[t]he relevant rights are not those which correspond to the full statements in ss 8–27, but those which have limits justified in the light of s 7(2)’.¹⁸

Heydon J also contended that the concept of ‘compatibility’ is a central conception of the *Charter* and that absurd outcomes would result if all limits on rights were deemed to be incompatible with the affected rights.¹⁹ This would mean that:

a member of Parliament who introduced a Bill limiting human rights, but only in a way that was demonstrably justified in the light of s 7(2), would be required by s 28(3)(b) to state that the Bill was ‘incompatible with human rights’ ... And if in s 38(1) ‘incompatible with a human right’ meant ‘incompatible with a human right in its absolute form, even if reasonable limits were imposed on it pursuant to s 7(2)’, then a public authority would act unlawfully if it acted incompatibly with the absolute human right notwithstanding that it acted compatibly with the right limited in the light of s 7(2).²⁰

In addition, Heydon J contended that the extrinsic materials, including the below passage from the second reading speech, support the view that s 7(2) has a role in the interpretation process under s 32(1):²¹

Part 2 reflects that rights should not generally be seen as absolute but must be balanced against each other and against other competing public interests. Clause 7 is a general limitations clause that lists the factors that need to be taken into account in the balancing process. It will assist courts and government in deciding when a limitation arising under the law is reasonable and

¹⁴ *Momcilovic* (2011) 245 CLR 1, 92–3 [171].

¹⁵ *Ibid* 123 [280].

¹⁶ *Ibid* 170 [427].

¹⁷ *Ibid* 165 [415].

¹⁸ *Ibid*.

¹⁹ *Ibid* 165–6 [416].

²⁰ *Ibid* 166 [416].

²¹ *Ibid* 166–7 [418]–[419].

demonstrably justified in a free and democratic society. Where a right is so limited, then action taken in accordance with that limitation will not be prohibited under the charter, and is not incompatible with the right.²²

Having decided that s 7(2) is central to the interpretation process under s 32(1), Heydon J went on to hold, in dissent, that both those sections and the whole of the *Charter* are invalid.²³ His Honour's reasons for concluding that s 7(2) is invalid include the following. First, s 7(2) gives a court a non-judicial power to 'determine what legal rights and obligations should be created'²⁴ by giving it the power to decide the legal extent of the limit to a human right.²⁵ Secondly, s 7(2) 'reveals that the Victorian legislature has failed to carry out for itself the tasks it describes'²⁶ and 'has delegated them to the judiciary'.²⁷ Thirdly, '[b]ecause the delegation is in language so vague that it is essentially untrammelled, it is invalid'.²⁸ Fourthly, s 7(2) 'contemplates the making of laws by the judiciary, not the legislature'.²⁹ Finally, in accordance with the principle established in *Kable v Director of Public Prosecutions (NSW)*,³⁰ s 7(2) is invalid as the conferred legislative function would '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'.³¹

Crennan and Kiefel JJ concluded that s 7(2) 'has no bearing upon the meaning and effect of a statutory provision, which are derived by a process of construction, not any enquiry as to justification'.³² They contended that 'an understanding of the extent of the effects of the statutory provision is essential to the enquiry under s 7(2)'³³ and that the justification question

²² Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls, Attorney-General).

²³ *Momcilovic* (2011) 245 CLR 1, 175 [439].

²⁴ *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Precision Data*').

²⁵ *Momcilovic* (2011) 245 CLR 1, 170 [428].

²⁶ *Ibid* 172 [431].

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ *Ibid*.

³⁰ (1996) 189 CLR 51, 96 (Toohey J), 103 (Gaudron J), 116–19 (McHugh J), 127–8 (Gummow J) ('*Kable*'). *Kable* established the principle that State legislation cannot validly confer upon a State court a function that substantially impairs the institutional integrity of the court as a recipient or potential recipient of federal jurisdiction.

³¹ *Momcilovic* (2011) 245 CLR 1, 174 [436].

³² *Ibid* 219 [572].

³³ *Ibid* 218 [568].

‘is a distinct and separate question from one as to the meaning of a provision’.³⁴ Their Honours also stated:

Despite the word ‘compatible’ appearing in s 32(1) (and ‘incompatible’ in s 32(3)) it cannot be concluded that the enquiry and conclusion reached in s 7(2) informs the process to be undertaken by the courts under s 32(1). If some link between s 7(2) and s 32(1) were thought to be created by the use of such terms in s 32, such a result has not been achieved: (a) because the process referred to in s 32(1) is clearly one of interpretation in the ordinary way; and (b) because s 7(2) contains no method appropriate to the ascertainment of the meaning and effect of a statutory provision.³⁵

Bell J concluded ‘that the question of justification in s 7(2) is part of, and inseparable from, the process of determining [pursuant to s 32(1)] whether a possible interpretation of a statutory provision is compatible with human rights’.³⁶ Her Honour contended this construction ‘recognises the central place of s 7 in the statutory scheme and requires the court to give effect to the *Charter*’s recognition that rights are not absolute and may need to be balanced against one another’.³⁷ With respect to the criteria set out in s 7(2), her Honour stated ‘these are criteria of a kind that are readily capable of judicial evaluation’.³⁸

B Case Law from the Victorian Court of Appeal

At the time of writing, the Victorian Court of Appeal is yet to determine its response to the High Court’s division of opinion in *Momcilovic* on whether s 7(2) has a role in the interpretation process under s 32(1). In the decision appealed against in *Momcilovic*, the Court of Appeal had decided that the question of justification under s 7(2) ‘becomes relevant only after the meaning of the challenged provision has been established’.³⁹

In each case since *Momcilovic* where two or more Justices of the Court of Appeal have considered the issue, the majority view has been that it was unnecessary in the circumstances

³⁴ Ibid.

³⁵ Ibid 219–20 [574].

³⁶ Ibid 249 [683].

³⁷ Ibid.

³⁸ Ibid 250 [684] (citations omitted).

³⁹ *R v Momcilovic* (2010) 25 VR 436, 465 [105] (Maxwell P, Ashley and Neave JJA).

of the case to determine whether the Court is bound to follow its previous decision on the relationship between ss 7(2) and 32(1).⁴⁰

With respect to the principle that an intermediate appellate court should follow its earlier judgments unless satisfied that the earlier judgment is clearly wrong, the Court of Appeal has left open the question whether this principle applies where there is a majority (albeit non-binding) view in the High Court going against the earlier judgment, or where the earlier judgment has been overturned by the High Court on appeal.⁴¹ The Court of Appeal has also left open the question whether, even if the above principle does apply, the fact that a majority of the High Court disagrees with the earlier judgment may be enough to satisfy the intermediate appellate court that the earlier judgment was clearly wrong.⁴²

Even if the Court of Appeal does eventually decide whether s 7(2) has a role in the interpretation process under s 32(1), its decision would not necessarily end the uncertainty surrounding this question. The relationship between ss 7(2) and 32(1) is of fundamental importance to the operation of the *Charter* and is contentious because it raises highly contested questions about the appropriate role of the judiciary in a representative democracy. Any decision by the Court of Appeal on the relationship between ss 7(2) and 32(1) would therefore be likely to be scrutinised by the High Court in due course. This scrutiny might even be initiated by one or more Justices of the High Court, as occurred in *Momcilovic*.⁴³

IV THE ACADEMIC LITERATURE

As indicated earlier, the High Court's *Momcilovic* decision has generated a number of academic articles.⁴⁴ Most of them focus on summarising the case law, which is detailed above. Some of them present arguments challenging the respective Justices' interpretations of ss 7(2) and 32(1) of the *Charter*.⁴⁵ However, apart from setting out the inconclusive case law,

⁴⁰ *Slaveski v Smith* (2012) 34 VR 206, 214–15 [21]–[22] (Warren CJ, Nettle and Redlich JJA); *Noone v Operation Smile (Australia) Inc* (2012) 38 VR 569, 575–7 [24]–[31] (Warren CJ and Cavanough AJA); *WBM v Chief Commissioner of Police* (2012) 43 VR 446, 473 [122] (Warren CJ), 475 [133] (Hansen JA); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383–4 [87]–[88] (Redlich, Osborn and Priest JJA).

⁴¹ *Noone v Operation Smile (Australia) Inc* (2012) 38 VR 569, 576–7 [30]–[31] (Warren CJ and Cavanough AJA).

⁴² *Ibid.*

⁴³ During the special leave hearing, Crennan J observed that '[t]he case bristles with some constitutional issues which do not really surface in the submissions before us today' (Transcript of Proceedings, *Momcilovic v The Queen* [2010] HCATrans 227 (3 September 2010) 486–8).

⁴⁴ See above n 5.

⁴⁵ See, eg, Debeljak, above n 5; Tate, above n 5.

there is a paucity of further analysis of the *constitutional* (as distinct from *interpretative*) issues likely to arise in any future High Court challenge to the validity of a conferral of the relevant power for courts to conduct proportionality analysis.

Adrienne Stone delves beyond the case law to offer a possible explanation for why the High Court's approach to judicial review of rights differs from the approach adopted in the United Kingdom.⁴⁶ She contends that the explanation for the 'vast differences'⁴⁷ between those approaches 'may lie in fundamental conceptions about the role of the judiciary rather than contingent aspects of constitutional structures'.⁴⁸ In support of that view, she states:

The Australian constitutional conception of judicial power is notably 'legalist'. That is, it reflects a preference of the Australian courts — and especially the High Court — for the view that judges deciding hard questions of constitutional law should do so, as far as they possibly can, by reference only to legal materials and without recourse to other matters such as considerations of political morality or policy preferences.⁴⁹

In view of the constitutional and conceptual differences identified by Stone, the case law on the *Human Rights Act 1998* (UK) is not an appropriate source of guidance on whether the relevant power can validly be conferred on Australian courts. As stated by French CJ in *Momcilovic*, the decisions of the European Court of Human Rights and the United Kingdom courts are 'of little assistance in determining the function of s 7(2) in the *Charter*'.⁵⁰

In a subsequent article, Stone presents arguments supporting the view that there is no constitutional impediment to the conferral on Australian courts of the relevant power to use proportionality analysis as part of the interpretation process:

As I have argued elsewhere, the task of implementing the Australian *Constitution* inevitably requires the same kinds of judgments as are involved in proportionality analysis: judgments as to the meaning of the many morally contested ideas that the *Constitution* adopts. The need for this kind of reasoning is especially obvious where judges have developed unwritten structural principles that resemble constitutional rights. In Australian constitutional law these include a right of freedom of political communication and a 'rule of law' principle. Equally, it is required by s 92 of the *Constitution*, which guarantees freedom of trade among the states. ...

⁴⁶ Stone, above n 5.

⁴⁷ Ibid 855.

⁴⁸ Ibid 856.

⁴⁹ Ibid.

⁵⁰ (2011) 245 CLR 1, 13 [22].

But given the many ways in which the Australian courts already interpret vague and general language and choose between competing conceptions of contestable ideas, the claim that proportionality analysis is so entirely foreign to Australian courts that it is constitutionally impermissible does not sit well with reality of judging under the Australian *Constitution*.⁵¹

The analysis in Part V of this article acknowledges that the use of proportionality analysis by Australian courts is permissible in certain contexts, but identifies potential constitutional impediments that apply in the present context. As will be seen in Part V, that context is distinguishable from the others in a number of constitutionally significant ways.

In contrast to the arguments presented by Stone, Dan Meagher identifies several reasons why Australian courts may be disinclined to incorporate proportionality analysis into the interpretation process.⁵² Those reasons include the following points: incorporating proportionality into the principle of legality framework would require judges to answer questions that are more political and philosophical than legal; courts will often lack the institutional resources and expertise to properly undertake this sort of polycentric decision-making; and the application of the proportionality test is very much in the eye of the judicial beholder.⁵³

It is acknowledged that Meagher raises the above points as potential reasons why the common law principle of legality might not evolve in Australia to incorporate proportionality analysis. Nevertheless, those reasons entail separation of powers considerations that may also be relevant in any High Court examination of the validity of a legislative conferral on Australian courts of the relevant power to apply proportionality analysis as part of the interpretation process.

Like Stone, Claudia Geiringer offers a possible explanation for why the High Court's approach to judicial review of rights differs from the approach adopted in other jurisdictions.⁵⁴ Geiringer considers that the differences of opinion expressed in *Momcilovic* on the relationship between ss 7(2) and 32(1) of the *Charter* are manifestations of an

⁵¹ Adrienne Stone, 'Judicial Power – Past, Present and Future: A Comment on Professor Finnis' on *Judicial Power Project* (10 November 2015) <<http://judicialpowerproject.org.uk/judicial-power-past-present-and-future-a-comment-on-professor-finnis/>>.

⁵² Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449, 469–70.

⁵³ *Ibid.*

⁵⁴ Claudia Geiringer, 'What's the Story? The Instability of the Australasian Bills of Rights' (2016) 14 *International Journal of Constitutional Law* 156, 164–6.

unresolved contest between two competing narratives.⁵⁵ Those narratives are the ‘internationalist narrative’, which favors the borrowing of human rights doctrines developed in other jurisdictions, and the ‘Australian exceptionalism narrative’, which draws on a long tradition of legalism in Australian public law.⁵⁶ With respect to the latter narrative, Geiringer states that it:

tends to support the view that proportionality analysis is, at best, peripheral to the operation of the charters in the courts. That is because proportionality analysis is foreign to traditional common law method and invites the courts into a task not ordinarily exercised by judges outside of the context of the federal constitution—that of evaluating the adequacy or legitimacy of legislation. On this view, proportionality analysis is, at best, an alien interloper that involves a significant departure from the ordinary judicial role; at worst, a technique that involves the exercise of non-judicial power and thus brings the courts into conflict with constitutional doctrine.⁵⁷

Geiringer also expresses the following warning:

If local institutions misread the tea leaves strewn by the High Court in *Momcilovic*, they may find themselves promoting readings of their statutory bills of rights that increase the likelihood of provisions in the two instruments (or indeed the instruments as a whole) being held to be invalid.⁵⁸

V POTENTIAL CONSTITUTIONAL IMPEDIMENTS TO SECTION 7(2) HAVING A ROLE IN THE INTERPRETATION PROCESS UNDER SECTION 32(1)

This part of this article identifies and analyses potential constitutional impediments to s 7(2) having a role in the interpretation process under s 32(1). The constitutional validity of s 7(2) having such a role depends on the answers to the following questions:

- (A) Does the relevant use of proportionality analysis entail the exercise of a power that would not be able to be conferred on any court as federal jurisdiction?

⁵⁵ Ibid.

⁵⁶ Ibid 165.

⁵⁷ Ibid 166 (citations omitted).

⁵⁸ Ibid 172.

- (B) If so, and given the absence of a constitutional separation of powers in Victoria,⁵⁹ would it be compatible with the requirements of ch III of the *Constitution* for the Victorian Supreme Court to exercise the relevant power when exercising state jurisdiction?

If the answers to those questions are ‘yes’ and ‘no’ respectively, it is not constitutionally permissible for s 7(2) to have a role in the interpretation process under s 32(1).

The following analysis offers opinions on the above questions. Of course, those opinions are necessarily speculative, as no-one can predict with certainty how the High Court would rule on these issues.

A Does the Relevant Use of Proportionality Analysis Entail the Exercise of a Power that Would Not Be Able to Be Conferred on Any Court as Federal Jurisdiction?

Courts exercising federal jurisdiction are not permitted to exercise any power that is not judicial power in terms of ch III of the *Constitution* or a power incidental thereto.⁶⁰ It follows that the Victorian Supreme Court is not permitted to exercise legislative or executive power when interpreting State laws in exercise of federal jurisdiction. Any provision of the *Charter* conferring such a power on the Victorian Supreme Court would be incapable of being ‘picked up’ by s 79(1) of the *Judiciary Act 1903* (Cth) and applied in federal jurisdiction as Commonwealth law.⁶¹

This constitutional limitation has potential implications for the validity of the role of the courts in applying ss 7(2) and 32(1). The High Court may conclude that it would be incompatible with ch III of the *Constitution* for the *Charter* to confer a power on the Victorian Supreme Court to interpret statutes in a way that is constitutionally prohibited when federal jurisdiction is being exercised. Therefore, in order to analyse the validity of the role of the courts in applying ss 7(2) and 32(1), it is necessary first to consider whether that role entails an exercise of power that would not be able to be conferred on any court as federal jurisdiction.

⁵⁹ *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

⁶⁰ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kable* (1996) 189 CLR 51; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

⁶¹ *Solomons v District Court (NSW)* (2002) 211 CLR 119, 134–5 [20]–[24] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ); *Rizeq v Western Australia* [2017] HCA 23 (21 June 2017) [81] (Bell, Gageler, Keane, Nettle and Gordon JJ).

The High Court has acknowledged that ‘it has not been found possible to offer an exhaustive definition of judicial power’.⁶² The reasons for the difficulty in formulating such a definition were referred to in *Brandy*:

Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not.⁶³

As indicated in the above passage, the High Court has accepted that some functions may, chameleon like, take their character from the body in which they are reposed.⁶⁴ As pointed out by Gaudron J in *Sue v Hill*, there are other functions which, inherently, are exclusively judicial or exclusively non-judicial.⁶⁵

In the absence of any exhaustive definition of judicial power, the High Court has developed criteria to assist in identifying functions and powers that are, or may be, exclusively judicial or exclusively non-judicial. Only some of those criteria are relevant for present purposes. The criteria considered relevant are identified and analysed below.

1 *Does the Power Entail Determining What Legal Rights Should Be Created?*

In *Precision Data*, the High Court stated:

if the object of the adjudication is not to resolve a dispute about the existing rights and obligations of the parties by determining what those rights and obligations are but to determine what legal rights and obligations should be created, then the function stands outside the realm of judicial power.⁶⁶

In *Momcilovic*, Heydon J included this criterion as a reason for holding, in dissent, that s 7(2) is invalid. His Honour concluded that s 7(2) ‘gives a court power to “determine what legal rights and obligations should be created” by giving it the power to decide the legal extent of

⁶² *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 257 (Mason CJ, Brennan and Toohey JJ) (citations omitted) (*‘Brandy’*).

⁶³ *Ibid* 267 (Deane, Dawson, Gaudron and McHugh JJ) (citations omitted).

⁶⁴ *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 18 (Aickin J); *Sue v Hill* (1999) 199 CLR 462, 516–17 [134]–[135] (Gaudron J, Gleeson CJ, Gummow and Hayne JJ agreeing); *Pasini v United Mexican States* (2002) 209 CLR 246, 253–4 [12] (Gleeson CJ, Gaudron, McHugh and Gummow JJ); *Thomas v Mowbray* (2007) 233 CLR 307, 326–7 [10]–[12] (Gleeson CJ).

⁶⁵ (1999) 199 CLR 462, 515–16 [132].

⁶⁶ (1991) 173 CLR 167, 189 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

the limit to a human right'.⁶⁷ In *Precision Data*, however, the High Court went on to qualify its above statement:

In some situations, the fact that the object of the determination is to bring into existence by that determination a new set of rights and obligations is not an answer to the claim that the function is one which entails the exercise of judicial power. The Parliament can, if it chooses, legislate with respect to rights and obligations by vesting jurisdiction in courts to make orders creating those rights or imposing those liabilities. ... Leaving aside problems that might arise because of the subject-matter involved or because of some prescribed procedure not in keeping with the judicial process, where a discretionary authority is conferred upon a court and the discretionary authority is to be exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature, it will be possible to conclude that the determination by the court gives effect to rights and obligations for which the statute provides and that the determination constitutes an exercise of judicial power.⁶⁸

This means that even if, as seems likely, it is the case that the relevant use of proportionality analysis entails a power to determine what legal rights should be created, it does not necessarily follow that this power is incapable of being characterised as judicial. The characterisation of the power also depends on other criteria, including whether the power is to be exercised 'by reference to an objective standard or test prescribed by the legislature'.⁶⁹

2 Is the Power to Be Exercised by Reference to an Objective Standard or Test Prescribed by the Legislature?

Only four of the Justices in *Momcilovic* dealt with this criterion in their reasons. Heydon J undertook a detailed analysis⁷⁰ of the criteria prescribed by s 7(2) and concluded that they 'are so vague that s 7(2) is an impermissible delegation to the judiciary of power to make legislation'.⁷¹ Crennan and Kiefel JJ concluded, without elaboration, that s 7(2) 'contains no method appropriate to the ascertainment of the meaning and effect of a statutory provision'.⁷² In contrast, Bell J concluded that 'these are criteria of a kind that are readily capable of

⁶⁷ (2011) 245 CLR 1, 170 [428].

⁶⁸ (1991) 173 CLR 167, 190–1 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (citations omitted).

⁶⁹ Ibid 191.

⁷⁰ (2011) 245 CLR 1, 170–2 [428]–[432].

⁷¹ Ibid 164 [409].

⁷² Ibid 219–20 [574].

judicial evaluation'.⁷³ Apart from citing supporting case law,⁷⁴ her Honour did not elaborate on this point.

As stated by Gummow and Crennan JJ in *Thomas v Mowbray*, '[i]t should be said at once that the case law shows acceptance of broadly expressed standards' [governing the exercise of powers conferred on courts].⁷⁵ There are numerous examples of vague and broadly expressed criteria, such as 'reasonably necessary',⁷⁶ 'reasonably appropriate and adapted' (which, like s 7(2), entails proportionality analysis),⁷⁷ 'oppressive, unreasonable or unjust',⁷⁸ 'just and equitable',⁷⁹ and 'necessary to make to do justice',⁸⁰ that have been found by the High Court to be acceptable for application in federal jurisdiction. The High Court has also determined that the inclusion of policy or moral considerations in such criteria is not necessarily indicative of non-judicial power.⁸¹

In view of the case law outlined above, there is considerable uncertainty as to whether the criteria prescribed by s 7(2) constitute 'an objective standard or test'⁸² capable of application in the exercise of judicial power. However, the validity of s 7(2) does not necessarily depend on the answer to that question. Even if the criteria prescribed by s 7(2) do constitute the required objective standard or test, it does not necessarily follow that there is no constitutional impediment to the relevant use of proportionality analysis in the interpretation process. Perhaps the greatest risk of such an impediment lies in an important qualification

⁷³ Ibid 250 [684] (citations omitted).

⁷⁴ *Thomas v Mowbray* (2007) 233 CLR 307, 331–4 [20]–[28] (Gleeson CJ), 344–8 [71]–[82], 350–1 [88]–[92] (Gummow and Crennan JJ), 507 [596] (Callinan J); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 553–4 [14] (Gummow J), 597 [168]–[169] (Crennan and Kiefel JJ).

⁷⁵ (2007) 233 CLR 307, 345 [72].

⁷⁶ Ibid 331–3 [20]–[27] (Gleeson CJ), 352–3 [99]–[103] (Gummow and Crennan JJ), 507–8 [596] (Callinan J), 526 [651] (Heydon J).

⁷⁷ Ibid.

⁷⁸ *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368, 383 (Kitto J) ('*Amalgamated Engineering Union Case*'); *Thomas v Mowbray* (2007) 233 CLR 307, 345–6 [73] (Gummow and Crennan JJ).

⁷⁹ *Cominos v Cominos* (1972) 127 CLR 588, 590–1 (McTiernan and Menzies JJ), 594–5 (Walsh J), 598–600 (Gibbs J), 600–6 (Stephen J), 608–9 (Mason J).

⁸⁰ Ibid.

⁸¹ *Amalgamated Engineering Union Case* (1960) 103 CLR 368, 383 (Kitto J); *Thomas v Mowbray* (2007) 233 CLR 307, 345 [73], 348–51 [80]–[93] (Gummow and Crennan JJ); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 551 [5] (Gleeson CJ), 553 [14] (Gummow J), 560 [37] (Kirby J), 597 [168] (Crennan and Kiefel JJ).

⁸² *Precision Data* (1991) 173 CLR 167, 191 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

contained in the passage quoted above from *Precision Data*.⁸³ That qualification forms the basis of the following criterion.

3 Do the Nature and Treatment of the Subject-matter of the Power Result in that Power Being Characterised as Exclusively Non-judicial?

In *Precision Data*, the High Court accepted that judicial power may include a legislatively conferred authority for a court to create new rights and obligations, provided that authority is exercised according to legal principle or by reference to an objective standard or test prescribed by legislation.⁸⁴ That acceptance, however, was prefaced and qualified by the following words: ‘Leaving aside problems that might arise *because of the subject-matter involved* or because of some prescribed procedure not in keeping with the judicial process ...’⁸⁵

The above reference to ‘problems that might arise because of the subject-matter involved’ signifies that the nature and treatment of the subject-matter of a power conferred on a court constitute a criterion for determining whether that power is exclusively non-judicial. It is important to note that the application of this criterion does not necessarily depend on whether or not an objective standard or test has been prescribed by the legislature for exercise of the power. What matters for this criterion is the nature and treatment of the subject-matter involved, not necessarily the way in which the power would be exercised. Where this criterion applies, the relevant power is incapable of being characterised as judicial. As will be seen, this criterion has potentially significant implications for the constitutional validity of the relevant use of proportionality analysis as part of the process of interpreting legislation.

If the *Charter* does or is amended to empower the courts to apply s 7(2) when interpreting statutory provisions, the power of the courts to apply s 7(2) will involve and extend to the following subject-matters:

- (1) statutory provisions interpreted under s 32(1);
- (2) statutory provisions assessed under s 36(2) of the *Charter* to determine whether they cannot be interpreted consistently with human rights; and

⁸³ Ibid 190–1.

⁸⁴ Ibid 191.

⁸⁵ Ibid (emphasis added).

- (3) acts and omissions of public authorities who are relevantly required to comply with the obligations imposed by s 38(1) of the *Charter*, which states:

Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

For the first two items listed above, the subject-matter of the power is the statutory law itself, as distinct from something dealt with by statutory law. This distinction becomes evident when considering the previously mentioned examples of vague and broadly expressed criteria that have been found by the High Court to be acceptable for application in federal jurisdiction.

In *Thomas v Mowbray*, the criteria of ‘reasonably necessary’ and ‘reasonably appropriate and adapted’ involved the subject-matter of ‘obligations, prohibitions and restrictions’ to be imposed by the order of the issuing court under s 104.4 of the *Criminal Code* (Cth).⁸⁶ These criteria are not used for assessing any statutory provisions. Rather, they are used for assessing ‘obligations, prohibitions and restrictions’ to be imposed by the relevant court orders.

In *Amalgamated Engineering Union Case*, the criterion of ‘oppressive, unreasonable or unjust’ involved the subject-matter of ‘conditions, obligations or restrictions’ imposed by ‘[a] rule of an organization’ upon ‘applicants for membership, or members, of the organization’.⁸⁷ This criterion, which had been prescribed by s 140 of the *Conciliation and Arbitration Act 1904* (Cth), was used for assessing the relevant ‘conditions, obligations or restrictions’, not any statutory provisions.

In *Cominos v Cominos*, the criteria of ‘just and equitable’ and ‘necessary to make to do justice’ involved the subject-matters of property settlements and court orders under the *Matrimonial Causes Act 1959* (Cth).⁸⁸ As with the criteria in the preceding examples, these criteria were not used for assessing any statutory provisions.

In contrast, if a court were to apply the criteria prescribed by s 7(2) when interpreting a statutory provision under s 32(1) or assessing a statutory provision under s 36(2), the involved subject-matter would be the involved statutory provision. The *content* of the

⁸⁶ (2007) 233 CLR 307, 342–3 [64] (Gummow and Crennan JJ).

⁸⁷ (1960) 103 CLR 368, 379–80 (Kitto J).

⁸⁸ (1972) 127 CLR 588, 595–7 (Gibbs J).

statutory law would be assessed, as distinct from something governed by legislation or something done or proposed to be done under legislation. This is a critical distinction between the relevant application of the s 7(2) criteria and the application of the criteria in the examples detailed above.

The fact that a power conferred on the courts involves the subject-matter of statutory provisions will not necessarily result in that power being characterised as exclusively non-judicial. For example, s 35(a) of the *Interpretation of Legislation Act 1984* (Vic) requires that a construction that would promote the purpose or object underlying an Act shall be preferred to a construction that would not promote that purpose or object. The power of the courts to apply that section when interpreting statutes is clearly judicial. Statutory and common law rules of construction are commonly applied by the courts for the purpose of choosing between available interpretations of statutes. Applying these rules is an accepted part of the judicial power to interpret statutes.

This analysis leads to the conclusion that in order to determine whether the subject-matter of a power results in that power being characterised as exclusively non-judicial, it is necessary to consider not just the nature of the subject-matter but also what is being done or proposed to be done in relation to it. In other words, it is necessary to consider both the nature and the treatment of the subject-matter, which in this case is statutory provisions.

What is the relevant nature of the subject-matter of statutory provisions? A prominent and constitutionally significant part of the nature of statutory provisions is that making them is an inherently legislative function. This has implications for the characterisation of any power that extends to making or amending statutory provisions, otherwise than through the accepted processes of statutory interpretation. It is considered highly unlikely that the High Court would characterise such a power as judicial.

Assuming the *Charter* does or is amended to empower the courts to apply s 7(2) when interpreting statutory provisions, would the exercise of that power involve treating the subject-matter of statutory provisions in a way that extends to making or amending them, otherwise than through the accepted processes of statutory interpretation? For the following reasons, it is considered the answer to that question is ‘yes’.

Instead of merely regulating the way the courts choose between available interpretations of statutory provisions, the relevant power would require the courts to create the interpretations by applying the criteria prescribed by s 7(2). The criteria would be applied to determine what the law should be. In Australia, this type of legislative policy-making is an inherently non-judicial function. It could be countered that the judicial function of interpreting legislation involves lawmaking. However, the extent of that lawmaking within the judicial function has traditionally been limited to choosing between interpretations that are reasonably open having regard to the existing statutory text and context. As explained above, the relevant power would exceed that limit. The courts would undertake the delegated legislative task of balancing the prescribed rights against each other and against other conflicting interests. Through this balancing process, the courts would create the legal limits of the prescribed rights, which would be taken to be legislated limits prescribed by the *Charter*. In effect, the courts would legislate under the guise of interpretation.

As already explained, the judicial function includes various powers that involve creating rights in applying legislation. The critical distinction here is that the relevant power would require the courts to create the legislative limits of the prescribed rights. As distinct from merely applying legislation, the courts would create it.

In these circumstances, it is considered the characterisation of the power would be unaffected by the availability or otherwise of an objective standard or test prescribed by the legislature. As indicated by the previously quoted qualifying words of the High Court in *Precision Data*,⁸⁹ in some cases the nature and treatment of the subject-matter of a power may result in that power being characterised as exclusively non-judicial, notwithstanding the availability of an objective standard or test prescribed by the legislature. For the reasons outlined above, it is considered this is such a case. The relevant type of legislative policy-making is an inherently non-judicial function, regardless of whether or not the criteria prescribed by s 7(2) are capable of judicial application.

Moreover, because of the inherently legislative nature of the relevant power and the fact that it would extend beyond the judiciary's accepted lawmaking role of choosing between available interpretations, it is considered the power would not, chameleon like, take its

⁸⁹ (1991) 173 CLR 167, 191 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

character from the body in which it is reposed.⁹⁰ Any power of this nature to make statutory law involving ‘a discretion or, at least, a choice as to what that law should be’⁹¹ would be likely to be characterised as exclusively non-judicial.

4 *Does the Power Entail Reviewing Legislation on the Merits?*

Another potential reason why the relevant power may be characterised as exclusively non-judicial is that it arguably entails reviewing legislation on the merits. In Australia, judicial review does not extend to reviewing the merits of administrative and legislative decisions made by the political branches of government. Judicial review is confined to declaring and enforcing the law that determines the limits and governs the exercise of the repository’s power.⁹² The merits of a decision, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.⁹³ Although these principles have been expressed in cases involving administrative decisions, the underlying separation of powers considerations indicate that the expressed principles apply equally to legislative decisions.

A court applying s 7(2) when interpreting a statutory provision would be required to review that provision to assess whether it satisfies the prescribed proportionality test. The outcome of the review would not affect the validity of the involved provision. This is evident from s 36(5) of the *Charter*, which states:

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.

Moreover, in *Kerrison v Melbourne City Council*, the Full Court of the Federal Court held that s 38 of the *Charter*, which provides that it is unlawful for a public authority to act in a

⁹⁰ *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 18 (Aickin J); *Sue v Hill* (1999) 199 CLR 462, 516–17 [134]–[135] (Gaudron J, Gleeson CJ, Gummow and Hayne JJ agreeing); *Pasini v United Mexican States* (2002) 209 CLR 246, 253–4 [12] (Gleeson CJ, Gaudron, McHugh and Gummow JJ); *Thomas v Mowbray* (2007) 233 CLR 307, 326–7 [10]–[12] (Gleeson CJ).

⁹¹ *Western Australia v Commonwealth* (1995) 183 CLR 373, 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

⁹² *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J), quoted with approval in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 160 [25] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

⁹³ *Ibid.*

way that is incompatible with a human right, does not apply to the making of subordinate legislation.⁹⁴ This means that, as with primary legislation, the outcome of the relevant review process would not affect the validity of subordinate legislation.

Because the review process would not affect the validity of the involved statutory provision or the lawfulness of its making, the High Court may take the view that the relevant use of proportionality analysis entails reviewing legislation on the merits. Accordingly, the High Court may conclude that this use of proportionality analysis is an exclusively non-judicial function.

It could be argued the above reasoning is flawed as judicial power clearly does include some functions that involve reviewing statutory provisions in a way that does not affect their validity. Once again, s 35(a) of the *Interpretation of Legislation Act 1984* (Vic) serves as a useful example. As mentioned previously, s 35(a) requires that a construction that would promote the purpose or object underlying an Act shall be preferred to a construction that would not promote that purpose or object. The answer to the above argument is that the judicial function required by provisions such as s 35(a) does not entail any review of the merits of the reviewed statutes. The task for a court applying s 35(a) is to endeavour to identify the involved statutory purpose or object. The merits of the reviewed statute are irrelevant. The court is not required to undertake the lawmaking role of balancing the involved rights and interests. In contrast, a court applying s 7(2) of the *Charter* when interpreting a statutory provision would be required to assess the merits of the involved statute with respect to the balance struck between the involved rights and interests.

The High Court may therefore conclude that the power to apply s 7(2) when interpreting statutory provisions is exclusively non-judicial, as it entails reviewing legislation on the merits.

5 Conclusion on Whether the Power Would Be Able to Be Conferred on Any Court as Federal Jurisdiction

As indicated by the above analysis, it is considered the High Court would be likely to characterise the power to apply s 7(2) when interpreting statutory provisions as exclusively non-judicial. In support of this view, it is contended the High Court may conclude that

⁹⁴ (2014) 228 FCR 87, 129–30 [182], 133 [198]–[199] (Flick, Jagot and Mortimer JJ).

creating the legislative limits of rights is an inherently legislative function and that the relevant use of proportionality analysis entails reviewing legislation on the merits.

If the characterisation of the relevant power as exclusively non-judicial is correct, that power cannot validly be conferred on any court as federal jurisdiction. The next part of this article considers whether the relevant power would nevertheless be able to be exercised in state jurisdiction.

B Would It Be Compatible with the Requirements of Ch III of the Constitution for the Victorian Supreme Court to Exercise the Power when Exercising State Jurisdiction?

Notwithstanding the absence of a constitutionally mandated separation of powers in Victoria,⁹⁵ the Victorian Parliament's legislative power to confer powers and functions on Victorian courts is limited by the *Kable* principle established in *Kable*.⁹⁶ In *Wainohu v New South Wales*, French CJ and Kiefel J conveniently summarised this principle as follows:

Decisions of this Court, commencing with *Kable*, establish the principle that a State legislature cannot confer upon a State court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the *Constitution*, as a repository of federal jurisdiction and as a part of the integrated Australian court system. The term 'institutional integrity', applied to a court, refers to its possession of the defining or essential characteristics of a court. Those characteristics include the reality and appearance of the court's independence and its impartiality.⁹⁷

Would the *Kable* principle result in the invalidity of any provision of the *Charter* that purports to empower the Victorian Supreme Court to apply s 7(2) when interpreting statutory provisions under s 32(1)? In order to answer this question, it is necessary to consider whether the relevant power would result in the Victorian Supreme Court no longer possessing the defining or essential characteristics of a court, including the reality and appearance of the Court's independence and impartiality.

It is considered the relevant power would not affect the reality and appearance of the Victorian Supreme Court's independence and impartiality. In exercising the power, the Court

⁹⁵ *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

⁹⁶ (1996) 189 CLR 51, 96 (Toohey J), 103 (Gaudron J), 116–19 (McHugh J), 127–8 (Gummow J).

⁹⁷ (2011) 243 CLR 181, 208 [44] (citations omitted).

would be independent of the political branches of government. It is acknowledged that by virtue of the involved power to create the legislative limits of rights, the Court would become a participant in the lawmaking process. However, there does not appear to be any reason to suppose that the Court would act otherwise than independently and impartially in performing this role. The Court would no longer be independent of the lawmaking process, but it would remain independent of the political branches of government. The reality and appearance of the Court's independence and impartiality would be maintained.

There is a contrary argument that the Court's independence and impartiality would be compromised because its exercise of the relevant power may in some cases result in the Court making a declaration of inconsistent interpretation under s 36(2) of the *Charter*. The view could be taken that each of these declarations is, in effect, a report to the political branches of government. Consideration of this argument would involve the question 'whether the function is required to be performed independently of any instruction, advice or wish of the Legislature or the Executive Government'.⁹⁸ However, because a majority in *Momcilovic* upheld the validity of the s 36(2) declaration power when exercised in state jurisdiction,⁹⁹ the contrary argument identified here can be discounted.

Are there any defining or essential characteristics of a court, other than the independence and impartiality characteristic analysed above, that may be relevant for present purposes? French CJ, Kiefel and Bell JJ provided the following summary of these characteristics and the *Kable* principles in *North Australian Aboriginal Justice Agency Limited v Northern Territory*:

1. A State legislature cannot confer upon a State court a function or power which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the *Constitution*, as a repository of federal jurisdiction and as a part of the integrated Australian court system.
2. The term 'institutional integrity' applied to a court refers to its possession of the defining or essential characteristics of a court including the reality and appearance of its independence and its impartiality.

⁹⁸ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow).

⁹⁹ (2011) 245 CLR 1, 66–8 [92]–[97] (French CJ), 224–9 [593]–[605] (Crennan and Kiefel JJ), 241 [661] (Bell J).

3. It is also a defining characteristic of courts that they apply procedural fairness and adhere as a general rule to the open court principle and give reasons for their decisions.
4. A State legislature cannot, consistently with Ch III, enact a law which purports to abolish the Supreme Court of the State or excludes any class of official decision, made under a law of the State, from judicial review for jurisdictional error by the Supreme Court of the State.
5. Nor can a State legislature validly enact a law which would effect an impermissible executive intrusion into the processes or decisions of a court.
6. A State legislature cannot authorise the executive to enlist a court to implement decisions of the executive in a manner incompatible with the court's institutional integrity or which would confer on the court a function (judicial or otherwise) incompatible with the role of the court as a repository of federal jurisdiction.
7. A State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member.¹⁰⁰

Apart from the independence and impartiality characteristic, none of the characteristics indicated in the above list appears to be relevant for present purposes. However, there is no complete list of the defining or essential characteristics of a court. As pointed out by Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission*, '[i]t is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court'.¹⁰¹ Their Honours also said that the defining characteristics of a court are those 'which mark a court apart from other decision-making bodies'.¹⁰²

Traditionally, one of the things that marks a court apart from other decision-making bodies is that courts do not legislate. Thus, it could be argued that a defining or essential characteristic of a court is that it does not possess legislative power. However, it seems unlikely that the High Court would accept this argument, as doing so would mean that a constitutionally

¹⁰⁰ (2015) 256 CLR 569, 593–5 [39] (citations omitted).

¹⁰¹ (2006) 228 CLR 45, 76 [64].

¹⁰² Ibid 76 [63].

mandated separation of powers applies in each of the States and Territories, which is contrary to existing High Court case law.¹⁰³

Alternatively, it could be argued that a defining or essential characteristic of a court is that its judicial power to interpret statutes does not extend to legislating, except to the extent of choosing between interpretations that are reasonably open having regard to the existing statutory text and context. The High Court might accept this argument, as it is not contrary to existing case law. The suggested characteristic would not preclude every conferral of legislative power on a state supreme court. It would apply only to the conferral of legislative power that is merged with a court's judicial power to interpret statutes. If the High Court accepts this argument and concludes that it applies to the relevant power, the *Kable* principle would result in the invalidation of any provision of the *Charter* that purports to confer that power on the Victorian Supreme Court.

On the other hand, there is a counter-argument that the *Kable* principle would not so apply. According to this counter-argument, the requirement in s 32(1) for interpretations under that section to be consistent with the statutory purpose would limit the discretion of the courts to choosing interpretations that are reasonably open. Thus, so the argument goes, exercise of the relevant power in state jurisdiction would not impair the Victorian Supreme Court's institutional integrity. This supposedly would be so even if the power is not exercisable in federal jurisdiction because it entails creating the legislative limits of rights and choosing interpretations based on reviews of legislation on the merits.

As evident from this analysis, there is considerable uncertainty as to whether the *Kable* principle would result in the invalidation of any provision of the *Charter* that purports to empower the Victorian Supreme Court to apply s 7(2) when interpreting statutory provisions under s 32(1).

It is important to recognise, however, that a state law conferring a power on a state supreme court may be invalid even if the *Kable* principle is not applicable. That principle is limited to situations in which the institutional integrity of a court is impaired. It is conceivable that the conferral of a power on a state supreme court does not impair that court's institutional integrity but is nevertheless constitutionally impermissible. This situation could arise, for

¹⁰³ *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

example, where the court's exercise of the power would 'alter or interfere with the working of the federal judicial system'¹⁰⁴ or 'undermine the operation of Ch III'¹⁰⁵ or 'strike at the effective exercise of the judicial power of the Commonwealth'.¹⁰⁶ For the reasons outlined below, it is contended these outcomes would inevitable arise if the power to apply s 7(2) when interpreting statutes is conferred on the Victorian Supreme Court and is exercisable only in state jurisdiction.

A key feature of the working of the federal judicial system set up by ch III of the *Constitution* is that High Court decisions, apart from those made by a single Justice,¹⁰⁷ and their *rationes decidendi* bind all other Australian courts.¹⁰⁸ This means if the High Court has made such a decision in its appellate or original jurisdiction as to the meaning of a statutory provision, the Victorian Supreme Court is bound by that decision and its *ratio decidendi*. Consequently, if the Victorian Supreme Court has or acquires the power to apply s 7(2) when interpreting statutory provisions under s 32(1), that power cannot validly be used to reinterpret a statutory provision if the High Court has ruled on its applicable meaning. This is so regardless of whether the Victorian Supreme Court is exercising state or federal jurisdiction. The only exception to this limitation is where the High Court decision has ceased to be binding because of a change in law (statute or common) or facts potentially affecting the meaning of the involved statutory provision.

Nevertheless, it could be argued that it would be constitutionally permissible for the Victorian Supreme Court to use the relevant power when the Court is exercising state jurisdiction and there is no binding High Court precedent. But what would happen when the High Court hears an appeal against an interpretation given by the Victorian Supreme Court that was based on its assessment under s 7(2) of the interpreted statutory provision? If the relevant power is exercisable by the Victorian Supreme Court but not the High Court, it inevitably follows that

¹⁰⁴ *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 364 [78] (McHugh J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598 [37] (McHugh J); *The Commonwealth v Queensland* (1975) 134 CLR 298, 314–15 (Gibbs J, Barwick CJ, Stephen and Mason JJ agreeing).

¹⁰⁵ *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 622–3 [36]–[37] (Gleeson CJ, Gummow and Hayne JJ).

¹⁰⁶ *Ibid.*

¹⁰⁷ *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499, 504 (Gummow J).

¹⁰⁸ *Lipohar v The Queen* (1999) 200 CLR 485, 507 [50] (Gaudron, Gummow and Hayne JJ). As to the binding force of the *rationes decidendi* of decisions made by the High Court in its original jurisdiction, see *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 43–4 [33]–[35] (Gleeson CJ, Gummow and Hayne JJ).

in some appeals the High Court would be forced to uphold interpretations that would not be given by the High Court if it were exercising original jurisdiction.

This would occur where, despite the Victorian Supreme Court's interpretation being reasonably open and its s 7(2) assessment being one that could reasonably be made, there is no reason why the High Court would identify or choose that particular interpretation if it were exercising original jurisdiction. An assessment under s 7(2) would be neither undertaken nor relevant if the High Court were exercising original jurisdiction, whereas such an assessment may have been a decisive factor in the Victorian Supreme Court's identification or choice of its preferred interpretation.

If the relevant power is exercisable in state jurisdiction but not federal jurisdiction, both of the following discrepancies would inevitably arise. First, there would be a discrepancy between the way the High Court is permitted to interpret statutes when exercising appellate jurisdiction and the way it is permitted to interpret them when exercising original jurisdiction. In its appellate jurisdiction, the High Court would be permitted to have regard to the proportionality (as assessed by the Victorian Supreme Court)¹⁰⁹ of the involved limit on a right, whereas doing so would not be permitted when the Court is exercising original jurisdiction. Secondly, there would be a similar discrepancy between the way the Victorian Supreme Court is permitted to interpret statutes when exercising state jurisdiction and the way it is permitted to interpret them when exercising federal jurisdiction.

The identification of these discrepancies should not be taken to suggest that the procedures for the High Court's appellate jurisdiction must always be the same as those for its original jurisdiction. Some differences between these respective procedures are permissible. For example, the High Court has confirmed that 'when it [ch III of the *Constitution*] refers to the appellate jurisdiction, it is speaking of appeals in the true or proper sense'.¹¹⁰ This means the admissibility of evidence rules for the High Court's appellate jurisdiction differ from those for its original jurisdiction. Because such differences are constitutionally permissible, they are not discrepancies, at least not in the sense used here of differences between things that (according to the below analysis) ought to be the same. This applies equally to permissible

¹⁰⁹ The High Court's role with respect to the Supreme Court's proportionality assessment would be limited to determining whether any error of law occurred in the making of that assessment.

¹¹⁰ *Clodumar v Nauru Lands Committee* (2012) 245 CLR 561, 571–2 [28] (French CJ, Gummow, Hayne and Bell JJ) (citations omitted).

differences between the procedures for the Victorian Supreme Court's state jurisdiction and those for its federal jurisdiction.

Nor is it suggested that courts interpreting statutes must always do so in the same way. The problem here is not that courts use different ways of interpreting statutes, but rather that courts exercising federal jurisdiction would not be permitted to use a certain way of interpreting Victorian statutes that is supposedly permissible in state jurisdiction.

When the High Court's jurisdiction to interpret a statute is enlivened, the scope of the Court's power to interpret that statute should not depend on which jurisdiction is being exercised. The scope of the power in the High Court's appellate jurisdiction ought to be the same as the scope of the power in its original jurisdiction. Regardless of the jurisdiction being exercised, the High Court has a duty to say what the law is.¹¹¹ Statutes are laws of general application. Their meanings have legal and constitutional implications that extend beyond the interests of litigants in any particular court case. Accordingly, the scope of the High Court's power to interpret a statute should not depend on the arguments raised by litigants, or on whether appellate or original jurisdiction is being exercised. Moreover, if the meaning of a statute depended on the jurisdiction exercised by the court interpreting it, the meaning would be a matter of happenstance, which would be antithetical to the rule of law.

Another potential constitutional impediment arises from that fact that the courts have a common law power to interpret statutes. This power has constitutional dimensions that set it apart from most other common law powers. These constitutional dimensions have potentially significant implications for the validity of any provision of the *Charter* that purports to empower the Victorian Supreme Court to apply s 7(2) when interpreting statutory provisions under s 32(1).

In *Re Wakim; Ex parte McNally*, Gummow and Hayne JJ made the following statement in relation to the nature of the common law in Australia:

[W]hen it is said that there is an 'integrated' or 'unified' judicial system in Australia, what is meant is that all avenues of appeal lead ultimately to this Court and there is a single common

¹¹¹ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J).

law throughout the country. This Court, as the final appellate court for the country, is the means by which that unity in the common law is ensured.¹¹²

The unity of the common law does not mean that the common law is applied uniformly throughout Australia. The Commonwealth, state and territory parliaments may validly enact laws modifying the application of the common law in their respective jurisdictions. But, as explained below, this legislative power to modify the application of the common law is limited by constitutional requirements.

It is likely only a matter of time before the High Court makes a decision, in its appellate or original jurisdiction, that contains a binding ratio decidendi indicating the correct approach to interpreting Victorian statutes that limit rights. If the relevant power to apply s 7(2) is not exercisable by the High Court, that correct approach must surely exclude the exercise of that power. It appears inconceivable that the High Court would accept the proposition that there are two correct but mutually exclusive approaches¹¹³ — one for use in state jurisdiction and the other for use in federal jurisdiction.

The High Court's acceptance of that proposition would mean that it is possible and permissible for a statute simultaneously to have two conflicting meanings that cannot be reconciled. As indicated by Hayne J in *Momcilovic*, the law does not countenance that possibility:

If there is conflict between two statutes, and reconciliation is not possible, the law does not countenance simultaneous operation of the conflicting provisions. Doctrines of implied repeal resolve conflicts between legislation enacted by the one legislature. Conflicts between Imperial and colonial legislation were resolved in favour of the Imperial legislation. And in a federal system, the federal law prevails.¹¹⁴

Axiomatically, conflicts between legislation and the *Constitution* are resolved in favour of the *Constitution*. Chapter III of the *Constitution* requires the High Court to have the power, in both appellate and original jurisdiction, to make final and conclusive determinations of the meanings of state laws. The High Court would no longer have that power if it were

¹¹² (1999) 198 CLR 511, 574 [110] (citations omitted).

¹¹³ The two approaches would be mutually exclusive because courts exercising state jurisdiction would not be permitted to use the approach required in federal jurisdiction, and courts exercising federal jurisdiction would not be permitted to use the approach required in state jurisdiction. Incorporating proportionality analysis into the interpretation process would be required in state jurisdiction but forbidden in federal jurisdiction.

¹¹⁴ (2011) 245 CLR 1, 133 [312].

permissible for a state law simultaneously to have two conflicting meanings that cannot be reconciled. Because the High Court would lack the power to resolve the conflict between the two meanings, it would be impossible for the Court to give a final and conclusive determination of the meaning of the involved statutory provision. An ‘either or’ determination of the meaning would not be conclusive; it would not conclude the matter in dispute. Moreover, the notion that a law may simultaneously have two conflicting meanings that cannot be reconciled is antithetical to the rule of law.

The following situation would arise if it were permissible for the Victorian Supreme Court to interpret rights-limiting statutes in a way that is constitutionally prohibited when federal jurisdiction is being exercised. For every Victorian statutory provision that limits a right, the application of the common law power to interpret that provision would not be the same for the Victorian Supreme Court as it would be for the High Court. With respect to the interpretation of the provision, the common law prohibition on courts legislating through interpretation would not apply when state jurisdiction is being exercised, but would apply when federal jurisdiction is being exercised.

In response to this concern, it could be argued ch III of the *Constitution* does not require that the application of the common law power to interpret statutes be uniform throughout Australia. That argument is accepted, but it is nevertheless contended ch III requires that the application of the common law power to interpret the laws of any particular jurisdiction must be the same for that jurisdiction’s supreme court as it is for the High Court. As explained above, this requirement is essential to ensure the High Court retains its power under ch III to make final and conclusive determinations of the meanings of statutes.

It could also be argued that if the relevant power is exercisable by the Victorian Supreme Court but not the High Court, it does not necessarily follow that it would be possible for a statute simultaneously to have two conflicting meanings that cannot be reconciled. According to this argument, any Victorian Supreme Court interpretation resulting from its exercise of the relevant power would be valid until such time as it is superseded by a High Court decision. Thus, there would be no simultaneous operation of conflicting meanings. However, this argument can be discounted for the following reason. If the Victorian Supreme Court’s interpretation is constitutionally valid, the High Court cannot give a contrary interpretation,

as doing so would be an impermissible exercise of legislative power that would change the valid meaning of the statute.

It would be no answer to these potential constitutional impediments to say that the application of the common law has been modified in state jurisdiction but not in federal jurisdiction. The application of the common law cannot validly be modified in a way that would cause the High Court to lose its power to make final and conclusive determinations of the meanings of state laws. The loss of this power of the High Court would ‘alter or interfere with the working of the federal judicial system’,¹¹⁵ ‘undermine the operation of Ch III’¹¹⁶ and ‘strike at the effective exercise of the judicial power of the Commonwealth’.¹¹⁷

It is therefore contended that any legislative conferral of the relevant power on the Victorian Supreme Court would be likely to be invalid.

VI CONCLUSION

According to the above analysis, there is a significant likelihood that the relevant power to use proportionality analysis as part of the interpretation process cannot validly be conferred on any court vested with federal jurisdiction.

It should be noted that the potential constitutional impediments identified in this article have a narrow range of application. They do not apply in circumstances where the use of proportionality analysis by the courts is required to determine the validity of a law or the lawfulness of an administrative decision. For example, the potential impediments do not apply to the use of proportionality analysis by the courts to ascertain whether:

- a law (for example, a law restricting the implied freedom of political communication) or administrative decision satisfies a proportionality requirement arising from the *Constitution*;
- a state or territory law satisfies a proportionality requirement imposed by Commonwealth legislation; or

¹¹⁵ *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 364 [78] (McHugh J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598 [37] (McHugh J); *The Commonwealth v Queensland* (1975) 134 CLR 298, 314–15 (Gibbs J, Barwick CJ, Stephen and Mason JJ agreeing).

¹¹⁶ *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 622–3 [36]–[37] (Gleeson CJ, Gummow and Hayne JJ).

¹¹⁷ *Ibid.*

- subordinate legislation or an administrative decision satisfies a proportionality requirement imposed by primary legislation.¹¹⁸

The potential impediments also do not apply to the use of proportionality analysis by the Victorian Supreme Court, when exercising state jurisdiction, to ascertain whether it should make a declaration of inconsistent interpretation under s 36(2) of the *Charter*. Nor do the potential impediments apply when the thing to be assessed for proportionality is not the law itself, but rather something done or proposed to be done in applying the law in accordance with legislatively prescribed criteria that include a proportionality requirement.¹¹⁹

Arguably, there might be a way to overcome the identified potential constitutional impediments to applying the s 7(2) proportionality test as part of the interpretation process under s 32(1). The *Charter* could be amended to provide that any statutory provision that does not satisfy the s 7(2) proportionality test is invalid unless an Act of the Victorian Parliament expressly provides that the provision shall be valid and operate notwithstanding the *Charter*. However, it is doubtful whether such a provision would be effective for invalidating primary legislation. The suggested provision includes a ‘manner and form’ requirement (the requirement for a ‘notwithstanding clause’) for the making of primary legislation that limits a right. This requirement would be unlikely to be binding for any primary legislation that is not a law ‘respecting the constitution, powers or procedure of the Parliament of the State’ in terms of s 6 of the *Australia Act 1986* (Cth). For example, the legislation¹²⁰ containing the reverse onus provision¹²¹ considered in *Momcilovic*¹²² is not a law ‘respecting the constitution, powers or procedure’ of the Victorian Parliament.

In conclusion, in view of the identified potential constitutional impediments, there is considerable uncertainty as to whether the power to apply the s 7(2) proportionality test as part of the interpretation process under s 32(1) can validly be conferred on any court vested with federal jurisdiction. It should be noted that the potential impediments have implications not just for the Victorian *Charter* and the *Human Rights Act 2004* (ACT), but also for the

¹¹⁸ According to the case law, the *Charter* does not impose a binding requirement for Victorian subordinate legislation to satisfy the s 7(2) proportionality test (*Kerrison v Melbourne City Council* (2014) 228 FCR 87, 129–30 [182], 133 [198]–[199] (Flick, Jagot and Mortimer JJ)).

¹¹⁹ For example, s 104.4 of the *Criminal Code* (Cth) prescribes the criteria of ‘reasonably necessary, and reasonably appropriate and adapted’ in relation to each of the obligations, prohibitions and restrictions to be imposed by a court order under that section.

¹²⁰ *Drugs, Poisons and Controlled Substances Act 1981* (Vic).

¹²¹ *Ibid* s 5.

¹²² (2011) 245 CLR 1.

Queensland government's Human Rights Bill 2018 (Qld) introduced on 31 October 2018 into the Queensland Parliament. Unlike the other two human rights instruments, the introduced version of that Bill clarifies beyond doubt that proportionality analysis is intended to have a role in statutory interpretation under the proposed legislation.¹²³ Ironically, that clarification of meaning, if enacted, could bring the unresolved constitutional question identified in this article to a head. The courts would not have the option of circumventing that question by giving an interpretation to the effect that proportionality analysis is not intended to have a role in statutory interpretation under the Queensland legislation.

¹²³ Human Rights Bill 2018 (Qld) cls 8, 13 and 48.

SHORT ESSAYS