

# PROPORTIONALITY, RIGHTS-CONSISTENT INTERPRETATION AND DECLARATIONS UNDER THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES: THE MOMCILOVIC LITIGATION AND BEYOND

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*The meaning, scope and interaction of the key provisions relating to the rights-compatibility of legislation under the Charter of Human Rights and Responsibilities Act 2006 (Vic) were analysed by the Victorian Court of Appeal in R v Momcilovic. On appeal, the High Court of Australia reviewed this analysis and considered the constitutionality of the key provisions. Although overall the High Court upheld the provisions as constitutional, no majority opinion emerged on the scope and operation of the provisions in Victoria, with similar differences of opinion reflected in the Victorian superior courts. Opinions differed on: the role, if any, of limitations under s 7(2); whether s 32(1) is an ordinary rule of statutory construction or a 'remedial' rule of interpretation; and the constitutionality and role of s 36(2) declarations of inconsistent interpretation. Even where a degree of agreement was apparent on one provision, the reasoning underlying the agreement differed, and/or there was no agreement on the interlinking provisions. An overarching theme concerned the methodology by which to approach the key provisions, which again produced disagreement.*

*This article will critically analyse the multiplicity of views in the High Court, both because of the importance of the decision and because its application in Victoria is unclear. Regarding the latter, the Victorian superior courts have considered the Court of Appeal decision to not be overruled by the High Court, and continue to rely on it in varying degrees, whilst also seeking to identify a ratio from the High Court. By way of background, the article will explore the choices facing the Court of Appeal and its decision. It will then analyse the five High Court judgments, focussing on the thematic issues of limitations, ordinary/remedial interpretation, declarations, and methodology. It concludes with a review of the Victorian superior courts' reaction to the High Court decision. Analysis will be limited to consideration of the Charter of Human Rights and Responsibilities Act 2006 (Vic) as it operates in Victoria. In*

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*addition to the specific disagreements on the key provisions, broader issues of parliamentary sovereignty, the proper role of the judiciary and democratic governance will be examined.*

## I INTRODUCTION

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') has survived its first major test case. The meaning, scope and interaction of the key provisions relating to the rights-compatibility of legislation were analysed by the Victorian Court of Appeal (VCA) in *R v Momcilovic*.<sup>1</sup> On appeal, the High Court of Australia (HCA) reviewed this analysis and considered the constitutionality of those provisions in *Momcilovic v The Queen*.<sup>2</sup> The HCA upheld the validity of the *Charter*, but no clear majority emerged on the key provisions. In particular, opinions differed on: the role, if any, of s 7(2) limitations; whether s 32(1) encapsulates ordinary interpretative principles or confers a remedial rule of interpretation; and the constitutionality and role of s 36(2) declarations of inconsistent interpretation. Even where there was apparent agreement on one provision, the reasoning underlying that agreement differed, and/or opinions on other interconnecting provisions differed.

The details of these differences, and their impact on the operation of the *Charter* in Victoria, have received little in-depth or critical analysis.<sup>3</sup> This article addresses this vacuum: first, because of the significance of the decision;<sup>4</sup> and secondly, because the proper and constitutional operation of the key provisions in Victoria is not settled — confronted with no clear majority in *HCA Momcilovic*, the Victorian superior courts consider *VCA Momcilovic* to not be overruled and continue to rely on it in varying ways.<sup>5</sup> This is so despite the 'tentative' nature of the views expressed in *VCA Momcilovic*, with the VCA cautioning that '[n]

1 (2010) 25 VR 436 ('*VCA Momcilovic*').

2 (2011) 245 CLR 1 ('*HCA Momcilovic*').

3 An in-depth analysis of the constitutional issues in the case is offered by 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. The decision is also briefly referred to in various articles on broader issues: see, eg, Simon Rice, 'Staring Down the ITAR: Reconciling Discrimination Exemptions and Human Rights Law' (2011) 10 *Canberra Law Review* 97, 102–3; Bryan Horrigan, 'Reforming Rights-Based Scrutiny and Interpretation of Legislation' (2012) 37 *Alternative Law Journal* 228, 232. Paul Rishworth considers the decision in a broader review of human rights in New Zealand: Paul Rishworth, 'Human Rights' [2012] *New Zealand Law Review* 321, 346–8.

4 Referring to the High Court decision, Tim Vines and Thomas Faunce note that '[t]his narrow interpretation of the *Charter* deserves greater academic and public scrutiny': Thomas Faunce, 'A Bad Trip for Health-Related Human Rights: Implications of *Momcilovic v The Queen*' (2011) 85 *ALJR* 957 (2012) 19 *Journal of Law and Medicine* 685, 693.

5 See, eg, *Slaveski v Smith* (2012) 34 VR 206, 214–15 [20]–[25], especially at 215 [23]–[24] ('*Slaveski*'); *Taha v Broadmeadows Magistrates' Court* [2011] VSC 642 (16 December 2011) [59]–[66]; *Noone v Operation Smile (Australia) Inc* [2012] VSCA 91 (11 May 2012) [26]–[31] (Warren CJ and Cavanough AJA), [139]–[142] (Nettle JA) ('*Noone*'); *WBM v Chief Commissioner of Police* (2012) 230 A Crim R 322, 350–1 [122]–[123] (Warren CJ, Hansen JA agreeing) ('*WBM*'). For the Australian Capital Territory response to the decisions, see *Allatt & ACT Government Health Directorate (Administrative Review)* [2012] ACAT 67 (2 October 2012) [71]–[73] ('*Allatt*').

argument was addressed to the Court on [the question of the operation of s 32(1)], and the further exploration of the scope of s 32(1) must await an appropriate case'.<sup>6</sup>

This article begins by canvassing the disputed legislation, the core issues before the VCA (the characterisation and strength of s 32(1), and the methodology for rights-assessment of legislation), and the VCA decision. It then explores the five judgments delivered in *HCA Momcilovic*, focussing on the meaning, scope and interaction of ss 7(2), 32(1) and 36(2), a discussion that involves the s 32(1) characterisation/strength and methodology questions. Analysis is limited to the *Charter* as it operates in Victoria,<sup>7</sup> highlighting the depth and breadth of disagreement of the HCA. The article concludes with an examination of the Victorian superior courts' response to *HCA Momcilovic*, which is of three kinds — first, judgments that follow *VCA Momcilovic* as approved by French CJ in *HCA Momcilovic*; secondly, one judgment that expands upon the codification of the principle of legality characterisation; and thirdly, judgments that suggest s 32(1) reaches beyond a codification of the principle of legality.<sup>8</sup>

There are specific tensions across the Victorian superior courts and the HCA over the scope, operation and constitutionality of the provisions relating to the rights-compatibility of legislation. These tensions are instances of much broader tensions over the retention of parliamentary sovereignty, the limits of judicial power, and the democratic nature of our governance and legal system, particularly where recognition of rights are concerned.

## II BACKGROUND

### A *The Legislation*

The rights-compatibility of a reverse onus provision in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (*Drugs Act*) was challenged. Under s 5, a substance is deemed 'to be in the possession of a person so long as it is upon any land or premises occupied by him ... *unless the person satisfies the court to the contrary*' (emphasis added). A failure to discharge this reverse onus exposed an accused

6 (2010) 25 VR 436, 464 [101].

7 That is, the operation of a similar model at the federal level, or the operation of the *Charter* where the Victorian courts are exercising federal judicial power, are not the focus of this article, and will only be mentioned in passing.

8 This article is not intended to address the issue of the competence of the Victorian parliament to limit its sovereignty or to reconstitute itself (see, eg, *A-G (NSW) v Trethowan* (1931) 44 CLR 394). This article considers the jurisprudence to date, and this issue has not come before the courts.

to a conviction for drug trafficking under ss 73(2) and 71AC of the *Drugs Act*,<sup>9</sup> which is an offence punishable by up to 15 years imprisonment.<sup>10</sup> According to pre-*Charter* interpretation principles, s 5 imposed a legal burden of disproving possession on the balance of probabilities.<sup>11</sup>

The VCA had to consider whether the reverse *legal* burden in s 5 imposed an unjustifiable limitation on the presumption of innocence under s 25(1) of the *Charter*. If it did, the VCA had to consider whether s 5 should be interpreted under s 32(1) as imposing only a reverse *evidentiary* burden to ensure rights-compatibility.<sup>12</sup> If the s 32(1) interpretation was not available, the VCA had to consider whether to issue a declaration under s 36(2).

## B The Choices

*VCA Momcilovic* addressed two fundamental issues: (a) the characterisation and strength of s 32(1); and (b) the methodology for the legislation-related mechanism.

### 1 Characterisation and Strength of Section 32(1)?

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'. It is modelled on s 3(1) of the *Human Rights Act 1998* (UK) c 42 ('*UKHRA*'), which provides that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the *Convention* rights'. The s 32(1) insertion of 'consistently with their purpose' is a relevant textual difference. The Human

9 Section 73(2) of the *Drugs Act* provides that where a person is in possession of a drug of dependence of a traffickable quantity, 'the possession of that drug of dependence in that quantity is prima facie evidence of trafficking by that person in that drug of dependence'. Section 71AC then criminalises drug trafficking, providing that a person who trafficks in a drug of dependence is guilty of an offence punishable by up to 15 years imprisonment. Under s 70, 'traffick' includes to 'have in possession for sale'. Accordingly, if a person fails to satisfy a court that they were not in possession under s 5, there is prima facie evidence of drug trafficking under s 73(2), for which the person will be guilty of a criminal offence under s 71AC.

10 Drugs of dependence of a traffickable quantity were found in an apartment owned and occupied by Vera Momcilovic. Momcilovic shared this apartment with her partner, Velimir Markovski. Momcilovic claimed she had no knowledge of the drugs, and Markovski admitted that the drugs were in his possession for the purpose of drug trafficking. Nevertheless, Momcilovic was deemed to be in possession of the drugs under s 5 and charged under s 71AC of the *Drugs Act*. Although Momcilovic led some evidence that she was not in possession of the drugs, the legal onus to disprove possession on the balance of probabilities was not discharged and Momcilovic was convicted with one count of trafficking in a drug of dependence.

11 *VCA Momcilovic* (2010) 25 VR 436, 442–3 [16]–[22].

12 This argument was put by three of the four parties and the amicus curiae. *R v Lambert* [2002] 2 AC 545 ('*Lambert*') is the equivalent British case, where the original words of the legislature were retained, but the judges altered the *meaning* of the words by reading the legislative words as imposing only an evidential burden of proof: at 563 [17] (Lord Slynn), 574–5 [42] (Lord Steyn), 586–7 [84], 589 [91], 589–90 [93]–[94] (Lord Hope), 609–10 [157] (Lord Clyde). Lord Hutton dissented: at 625 [198]. The equivalent case from New Zealand is *R v Hansen* [2007] 3 NZLR 1 ('*Hansen*'), where the reverse onus provision was held to be incapable of an interpretation other than imposing a legal burden of proof.

Rights Consultation Committee report<sup>13</sup> indicates that the phrase was intended to codify s 3(1) of the *UKHRA* as interpreted in the leading case of *Ghaidan v Godin-Mendoza*,<sup>14</sup> as does other extrinsic material.<sup>15</sup> Less textually similar is s 6 of the *New Zealand Bill of Rights Act 1990* (NZ) (*'NZBORA'*), which reads '[w] herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning'.<sup>16</sup> Where it is not possible or consistent with statutory purpose to interpret legislation compatibly with rights, the legislation remains enforceable;<sup>17</sup> and the judiciary may only issue an unenforceable declaration of inconsistent interpretation under s 36(2),<sup>18</sup> rather than invalidate the legislation.

By not empowering judges to invalidate legislation under ss 32(1) and 36(2), parliamentary sovereignty is said to be retained. Under constitutional instruments, if legislation unjustifiably limits a right, the remedies include judicial invalidation of the legislation; whereas, under statutory instruments, the remedy is rights-consistent judicial interpretation limited by an inability to judicially legislate, coupled with an unenforceable declaration. However, the veracity of the parliamentary sovereignty retention claim depends on the reach of s 32(1), with the line between *proper* judicial interpretation (*'possible'* interpretation) and *improper* judicial lawmaking (*not 'possible'* interpretation) being key. Defining this line under s 3(1) has proved 'elusive',<sup>19</sup> and is further complicated by 'consistently with their purpose' in s 32(1).

13 Human Rights Consultation Committee, 'Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee' (Report, November 2005) (*'HRCC Report'*).

14 [2004] 2 AC 557 (*'Ghaidan'*). In explaining the insertion of 'consistently with their purpose', the *HRCC Report* states that 'the courts would be provided with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation', an approach which 'is consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation was favoured': *HRCC Report*, above n 13, 82–3, citing *Ghaidan* [2004] 2 AC 557, 572 [33] (Lord Nicholls), 596 [110] (Lord Rodger).

15 For an exploration of the link between 'consistently with their purpose' and *Ghaidan* based on the Second Reading Speech, Explanatory Memorandum and parliamentary debate, see Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power over Human Rights that Parliament Intended It to Have' (2011) 22 *Public Law Review* 15, 25–39, especially 32–39.

16 Whether or not s 6 of the *NZBORA* and s 3(1) of the *UKHRA* achieve the same outcome is highly contested: see Claudia Geiringer, 'The Principle of Legality and the *Bill of Rights Act*: A Critical Examination of *R v Hansen*' (2008) 6 *New Zealand Journal of Public and International Law* 59, 66.

17 See *Charter* ss 32(3), 36(5).

18 Section 4 of the *UKHRA* also provides for declarations of incompatibility. The *NZBORA* does not contain an express declaration power, and judicial efforts to imply one have not been sustained: see *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17 [20] (Court of Appeal) (*'Moonen'*); Claudia Geiringer, 'On a Road to Nowhere: Implied Declarations and the *New Zealand Bill of Rights Act*' (2009) 40 *Victoria University of Wellington Law Review* 613; Rishworth, above n 3, 326, 328, 348. Although, the fact of incompatibility 'is discerned from the Court's reasoning process rather than one that is positively proclaimed as some sort of formal declaration': at 328.

19 *Ghaidan* [2004] 2 AC 557, 570 [27] (Lord Nicholls).

Correctly, the VCA considered British jurisprudence on s 3(1) for guidance. At one end of the spectrum is *Ghaidan*.<sup>20</sup> Although *Ghaidan* is considered a retreat<sup>21</sup> from *R v A*,<sup>22</sup> its approach is considered ‘radical’ because of Lord Nicholls’ obiter comments about the rights-*compatible* purposes of the *UKHRA* potentially being capable of overriding rights-*incompatible* purposes of a challenged law:

the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear ... Section 3 may require the court to depart from ... the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires the court to depart from the intention of the enacting Parliament. The answer ... depends upon the intention reasonably to be attributed to Parliament in enacting section 3.<sup>23</sup>

The other end of the spectrum is *Wilkinson*.<sup>24</sup> Lord Hoffman draws an analogy between s 3(1) and the principle of legality. His Lordship introduces an element of reasonableness, describing interpretation under s 3(1) as ‘the ascertainment of what, taking into account the presumption created by s 3, Parliament would *reasonably* be understood to have meant by using the actual language of the statute’.<sup>25</sup> Although Lord Hoffman’s reasoning was accepted by the other Law Lords in *Wilkinson*,<sup>26</sup> it failed to materialise as the leading case on s 3(1); rather, *Ghaidan* remains the case relied upon.<sup>27</sup> The VCA sought to resolve whether

20 [2004] 2 AC 557. In *Ghaidan*, the heterosexual definition of ‘spouse’ under the *Rents Act 1977* (UK) c 42, sch 1 para 2(2) was found to violate art 8 (right to home) when read with art 14 (right to non-discrimination) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) (*‘ECHR’*). The Court of Appeal and House of Lords ‘saved’ the rights-incompatible provision via s 3(1) by reinterpreting the words ‘living with the original tenant as his or her wife or husband’ to mean living with the original tenant ‘as if they were his or her wife or husband’: *Ghaidan v Godin-Mendoza* [2003] Ch 380, 395 [35] (Buxton LJ) (emphasis in original); *Ghaidan* [2004] 2 AC 557, 572 [35] (Lord Nicholls), 577 [51] (Lord Steyn), 604 [129] (Lord Rodger), 608–9 [144] (Baroness Hale). Lord Millett dissented. His Lordship agreed that there was a violation of the rights (at 583 [55]), and agreed with the general approach to s 3(1) interpretation (at 586 [69]), but did not agree that the particular s 3(1) interpretation that was necessary to save the provision was ‘possible’ on the facts: see especially at 583 [57], 588 [78], [81] 589 [82], 592 [96], 592–3 [99]–[101].

21 As are the cases leading up to *Ghaidan*: see, eg, *Lambert* [2002] 2 AC 545; *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 (*‘Re S’*); *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 (*‘Anderson’*); *Bellinger v Bellinger* [2003] 2 AC 467 (*‘Bellinger’*).

22 *R v A [No 2]* [2002] 1 AC 45 (*‘R v A’*) is considered the ‘boldest exposition’ on s 3(1): Keir Starmer, ‘Two Years of the *Human Rights Act*’ (2003) 8 *European Human Rights Law Review* 14, 16. It has also been described as the ‘high point’ and ‘radical’: D Rose and C Weir, ‘Interpretation and Incompatibility: Striking the Balance’ in J Jowell and J Cooper (eds), *Delivering Rights* (Hart Publishing, 2003). This case will not be discussed in this article because neither the VCA nor the HCA proposed going as far as *R v A*. For a not so radical take on *R v A*, see Aileen Kavanagh, ‘Unlocking the *Human Rights Act*: The ‘Radical’ Approach to Section 3(1) Revisited’ (2005) 10 *European Human Rights Law Review* 259, 259.

23 [2004] 2 AC 557, 571 [30] (emphasis added).

24 *R (Wilkinson) v Inland Revenue Commissioners* [2006] 1 All ER 529 (*‘Wilkinson’*).

25 *Ibid* 535 [17] (emphasis added).

26 *Ibid* 532 [1] (Lord Nicholls), 538 [32] (Lord Hope), 538 [34] (Lord Scott), 539 [43] (Lord Brown).

27 See, eg, Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008) 486–510 [5–64]–[5–127]; Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge University Press, 2009) 28.

the *Charter*-enacting Parliament sanctioned a *Ghaidan*-radical, or a *Wilkinson*-reasonable, approach to s 32(1).

## 2 The Methodology

The VCA also sought to establish the methodology for achieving rights-compatible legislative interpretation. Under the *UKHRA*<sup>28</sup> and *NZBORA*<sup>29</sup> the methodology adopted is similar. Three individual judges of the Supreme Court of Victoria had essentially adopted this approach in *RJE*,<sup>30</sup> *Kracke*,<sup>31</sup> and *Das*.<sup>32</sup>

The method focuses on two ‘rights questions’ and two ‘*Charter* enforcement questions’,<sup>33</sup> and is summarised in *Charter*-language as follows:

### The ‘Rights Questions’

First: Does the legislative provision limit a right?

Second: If yes, is the limitation reasonable and justifiable under s 7(2) or a right-specific limitation?

### The ‘*Charter* Enforcement Questions’

Third: If the legislative provision unjustifiably limits rights, can the provision be ‘saved’ through s 32(1) interpretation; accordingly, the judge must alter the meaning of the provision in order to achieve rights-compatibility.

Fourth: Is the altered rights-compatible interpretation of the provision ‘possible’ and consistent with statutory purpose?

### The Conclusion

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

Section 36(2): If the s 32(1) rights-compatible interpretation is not ‘possible’ and/or not consistent with statutory purpose, the judge may issue a non-enforceable declaration under s 36(2).

This is referred to as the ‘UK/NZ Method’. Three aspects are noteworthy. First, the concept of ‘rights-compatibility’ focuses on rights as reasonably and

28 The methodology under the *UKHRA* was first outlined in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 72–3 [75] (‘*Donoghue*’), and has been approved and followed as the preferred method in later cases: see, eg, *R v A* [2002] 1 AC 45, 72 [58]; *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, 784 [149] (‘*Roth*’); *Ghaidan* [2004] 2 AC 557, 570 [24].

29 The current methodology under the *NZBORA* was outlined by the majority of judges in *Hansen* [2007] 3 NZLR 1, 27–8 [57]–[62]. This method is in contra-distinction to an earlier method proposed in *Moonen* [2000] 2 NZLR 9, 15–17 [15]–[20].

30 *RJE v Secretary to the Department of Justice* (2008) 21 VR 526, 556–7 [114]–[116] (Nettle JA).

31 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 25–7 [52]–[65] (Bell J).

32 *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 427–8 [50]–[53] (Warren CJ) (‘*Das*’).

33 Julie Debeljak, ‘Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making’ (2007) 33 *Monash University Law Review* 9, 28, 32.

justifiably limited, not rights in their absolute form. This recognises that not all rights are absolute, and that justifiable limitations on rights are an expected and acceptable part of resolving conflicts between rights, and between rights and other values in a democratic society.<sup>34</sup> Secondly, if a limit is justified, that concludes the inquiry — there is no judicial reinterpretation under the third step, and no judicial assessment of possibility and consistency under the fourth step.<sup>35</sup> Importantly, this preserves parliamentary sovereignty.<sup>36</sup> Thirdly, s 32(1) interpretation comes after an unjustified limitation by way of judicial remedy. A rights-compatible interpretation of legislation is a complete remedy for what would otherwise have been a rights-incompatible application of the law.

### C The VCA Momcilovic Decision

*VCA Momcilovic* aligned s 32(1) most closely with *Wilkinson*.<sup>37</sup> Section 32(1) was characterised as an ordinary principle of statutory interpretation, and a unique methodology was proposed that weakened the role of s 7(2).

#### 1 Characterisation and Strength of Section 32(1)?

The VCA unanimously held that s 32(1) ‘does not create a “special” rule of interpretation [in the *Ghaidan* sense], but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question’.<sup>38</sup> The ‘framework of interpretive rules’<sup>39</sup> includes s 32(1) of

34 See *ibid* 31. See also Julie Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006’ (2008) 32 *Melbourne University Law Review* 422.

35 The best way to primarily preserve parliamentary sovereignty, whilst secondarily promoting rights, is to seek judicial involvement *after* a problem is identified. The UK/NZ Method, which allows judicial remedial intervention only *after* an *unjustified* limitation on rights is demonstrated, better preserves parliamentary sovereignty than the VCA Method. This was recognised by Geiringer: ‘[a]t the heart’ of the legal methodology of the majority in *Hansen* is ‘a concern that the interpretative direction in section 6 should not be invoked to limit or subvert Parliament’s deliberate and demonstrably justified policy choices’: Geiringer, ‘The Principle of Legality’, above n 16, 68.

36 *HRCC Report*, above n 13, 15, 20–2; Department of Justice, Victoria, ‘Human Rights Statement of Intent’ (May 2005), reproduced in *HRCC Report*, above n 13, appendix B, 162; Office of the Attorney-General, ‘Victoria Leads the Way on Human Rights’ (Media Release, 20 December 2005). See also Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290, 1292–3 (Rob Hulls, Attorney-General); Victoria, *Parliamentary Debates*, Legislative Assembly, 13 June 2006, 1984 (Lily D’Ambrosio); Victoria, *Parliamentary Debates*, Legislative Assembly, 13 June 2006, 1993 (Richard Wynne); Victoria, *Parliamentary Debates*, Legislative Assembly, 15 June 2006, 2196–7 (Joanne Duncan); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2639 (Jenny Mikakos); Victoria, *Parliamentary Debates*, Legislative Council, 20 July 2006, 2643 (John Hilton).

37 *VCA Momcilovic* (2010) 25 VR 436, 451–2 [54]–[56].

38 *Ibid* 446 [35]. This is in contrast to Lord Walker’s opinion that ‘[t]he words “consistently with their purpose” do not occur in s 3 of the United Kingdom Act but they have been read in as a matter of interpretation’: Lord Walker, ‘A United Kingdom Perspective on Human Rights Judging’ (2007) 8 *Judicial Review* 295, 297.

39 *VCA Momcilovic* (2010) 25 VR 436, 464 [103]. Section 32(1) is merely ‘part of the body of rules governing the interpretive task’: at 464 [102].



the *Charter*, s 35(a) of the *Interpretation of Legislation Act 1984* (Vic) ('*ILA*'), and the common law rules of statutory interpretation, particularly the presumption against a parliamentary intention to interfere with or infringe rights (the principle of legality). To meet the s 32(1) obligation, a court must explore 'all "possible" interpretations of the provision(s) in question, and [adopt] that interpretation which least infringes *Charter* rights',<sup>40</sup> with the concept of 'possible' being bounded by the 'framework of interpretive rules'.

For the VCA, the significance of s 32(1) is that Parliament 'embraced', 'affirmed' and codified the principle of legality, such that it 'is no longer merely a creature of the common law but is now an expression of the "collective will" of the legislature'.<sup>41</sup> Moreover, the guaranteed rights are codified in the *Charter*.<sup>42</sup>

## 2 Methodology

The VCA proposed the following methodology ('VCA Method'):

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

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

Step 3: If so, apply s 7(2) of the *Charter* to determine whether the limit imposed on the right is justified.<sup>43</sup>

There are significant differences between the VCA Method and UK/NZ Method. Under the VCA Method, s 32(1) is relevant during the initial and ordinary interpretative process,<sup>44</sup> and has no remedial scope.<sup>45</sup> Moreover, s 7(2) is not

40 Ibid 464 [103].

41 Ibid 465 [104].

42 Ibid.

43 Ibid 446 [35].

44 One 'fundamental consideration' reinforcing the VCA's conclusion about method 'is that the emphatic obligation which s 32(1) imposes ... is directed at the promotion and protection of those rights as enacted in the *Charter*', which led it to 'reject the possibility that Parliament is to be taken to have intended that s 32(1) was only to operate where necessary to avoid what would otherwise be an unjustified infringement of a right': *VCA Momcilovic* (2010) 25 VR 436, 466 [107]. The VCA's underlying motivation is to ensure the broadest reading of the rights themselves. This demonstrates a misunderstanding about the accepted approach to identifying the scope of a right — in brief, rights are given their broadest meaning possible, with the appropriate boundaries being placed on rights through justifiable limitations: see, eg, *Hunter v Southam Inc* [1984] 2 SCR 145; *R v Big M Drug Mart Ltd* [1985] 1 SCR 295. The rich jurisprudence on the scope of rights was cited with approval in *Kracke* (2009) 29 VAR 1, 19–20 [28]–[36] and confirmed in *Das* (2009) 24 VR 415, 434 [80], 441–2 [115], 445 [128].

45 In its effort to avoid characterising s 32(1) as replicating the '*Ghaidan*-radical' s 3(1), the VCA rejected a remedial methodology as well: see Debeljak, 'Who Is Sovereign Now?', above n 15, 23.

relevant to interpretation<sup>46</sup> or assessing rights-compatibility,<sup>47</sup> but is a step preparatory to ‘enforcement’ via s 36(2). By contrast, the UK/NZ Method uses ordinary interpretative methods to establish whether a right is limited; then s 7(2) to adjudge the justifiability of the limit; with s 32(1) being utilised after an unjustified limit is established, as part of the remedial powers to address the unjustified limitation. As discussed below, the VCA Method also differs to the method under constitutional instruments, even though the VCA (mistakenly) relied on constitutional methodology.<sup>48</sup>

In applying its methodology, the VCA held that, first, the proper meaning of s 5 is the imposition of a reverse legal onus, and that it was not possible consistently with its purpose to construe s 5 as imposing an evidential onus;<sup>49</sup> secondly, ‘that the combined effect of s 5 and s 71AC is to limit the presumption of innocence’;<sup>50</sup> and thirdly, that the limitation was not reasonable or demonstrably justified under s 7(2).<sup>51</sup> Although a rights-compatible interpretation was *not* available, s 5 remained valid and enforceable under s 32(3) of the *Charter*.<sup>52</sup> The only ‘remedy’ available was a s 36(2) declaration, which the VCA did issue.<sup>53</sup>

46 The VCA refers to Elias CJ’s dissent in *Hansen*, where her Honour relies on the *Canada Act 1982* (UK) c 11, sch B pt 1 (‘*Canadian Charter*’) to highlight that the limitations question is a ‘*distinct and later enquiry*’ to interpretation: *VCA Momcilovic* (2010) 25 VR 436, 466 [109], quoting *Hansen* [2007] 3 NZLR 1, 15 [22] (emphasis added).

Referring to the *Canadian Charter*, Elias CJ states:

The first question is the interpretation of the right. In ascertaining the meaning of the right, the criteria for justification are not relevant. The meaning of the right is ascertained from the ‘cardinal values’ it embodies. Collapsing the interpretation of the right and the s 1 justification is insufficiently protective of the right.

This passage does *not* undermine the UK/NZ Method because there are two distinct inquiries under the ‘rights questions’. The first inquiry concerns the scope of the right and the legislation as ordinarily ascertained, and whether the latter limits the former. Once a right is limited, the second and *distinct* inquiry focuses on the reasonableness and justifiability of the limit. Far from conflicting, the UK/NZ Method shares the two-step approach in Canada. Moreover, under the UK/NZ Method, there is no ‘grafting’ of limitation considerations onto interpretation considerations under s 32(1) — at the ‘*Charter* enforcement questions’ stage, the limitations power is ‘spent’. The VCA’s reliance on this passage lies in its misunderstanding of what Elias CJ is discussing. Her Honour is discussing the ‘meaning of the right’, not the meaning of the challenged *legislation*. A discussion about the meaning of a right and its interaction with a limitations provision has been confused with a discussion about the meaning of s 32(1) and its interaction with a limitations provision. The Canadian discussion about two ‘rights questions’ cannot be relied upon by the VCA in a discussion about the interaction between one ‘rights question’ (that is, s 7(2)) and one ‘*Charter* enforcement question’ (that is, s 32(1)). French CJ similarly mistakenly relies on Elias CJ: see text accompanying below n 166.

47 The VCA’s conclusion misunderstands the nature of limitations. It is widely acknowledged, and explicitly mentioned in the Explanatory Memorandum that not all rights are absolute; and that rights must be balanced against each other, and other communal values and needs: Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 9; see generally Debeljak, ‘Balancing Rights’, above n 34. Justifiable limits on rights are not problematic, whereas unjustifiable limits on rights are problematic. Constitutional and statutory rights instruments develop mechanisms to address the latter — whether via a judicial invalidation mechanism, or judicial interpretation or declaration mechanisms, respectively.

48 See above n 46.

49 *VCA Momcilovic* (2010) 25 VR 436, 446 [35], 467 [113], 469 [119].

50 Ibid 470 [123]. See also 473 [135].

51 Ibid 477 [152]–[153].

52 Ibid 477 [154].

53 Ibid 478 [155]–[157].

### 3 Critique of VCA Momcilovic

I previously examined *VCA Momcilovic*, critiquing the VCA's reliance on *Wilkinson*, its approach to the language of s 32(1), its analysis of the intention of Parliament in enacting s 32(1), the reasoning underlying its conclusion that s 32(1) is *not* a 'special' rule of interpretation, that s 32 is a codification of the principle of legality, and the VCA's methodology.<sup>54</sup> In essence, I argue that the VCA cherry-picked from comparative jurisprudence, extrinsic materials, and textual and structural interpretation arguments, to avoid a methodology that gives s 32(1) a remedial reach and *Ghaidan*-radical interpretation. Although this article focuses on *HCA Momcilovic*, this earlier critique remains relevant because French CJ and Crennan and Kiefel JJ sanction some or all of the VCA decision, and because Victorian superior courts continue to rely on the 'tentative views'<sup>55</sup> expressed in *VCA Momcilovic*.<sup>56</sup>

### D Constitutional Instruments

Before considering *HCA Momcilovic*, we must consider the approach to interpretation and remedies under constitutional instruments, such as the *Canadian Charter*. Although the VCA and French CJ<sup>57</sup> relied on the *Canadian Charter* to support the VCA reasoning, the method under the *Canadian Charter* more closely mimics the UK/NZ Method. Like the UK/NZ Method,<sup>58</sup> review under the *Canadian Charter* consists of 'rights questions' and 'enforcement questions', as follows:

#### The 'Rights Questions'

First: Does the legislative provision limit a right?

Second: If yes, is the limitation reasonable and justifiable under s 1 limitations?<sup>59</sup>

#### The 'Charter Enforcement Questions'

Third: If the legislative provision unjustifiably limits rights, the enforcement options include:

- (a) Interpretation-based remedies, such as reading in, reading down and severance;

54 For a broader ranging critique, see Debeljak, 'Who Is Sovereign Now?', above n 15.

55 *VCA Momcilovic* (2010) 25 VR 436, 465 [101].

56 See, eg, *Noone* [2012] VSCA 91 (11 May 2012) [30]–[31] (Warren CJ and Cavanough AJA), [142] (Nettle JA).

57 See below n 165 and accompanying text.

58 This method also reflects the influence of the *ECHR* and the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'): Peter W Hogg, Thomson Carswell, *Constitutional Law of Canada*, vol 2 (at 5<sup>th</sup> ed, 2012 Release 1) 38-2 [38.1].

59 Hogg, above n 58, vol 2 (2012 Release 1) 38-2 [38.1]. See, eg, *R v Oakes* [1986] 1 SCR 103, 112–13 ('*Oakes*').

- (b) Invalidation;<sup>60</sup>
- (c) Remedial powers, such as providing a just and appropriate remedy, and the exclusion of evidence.<sup>61</sup>

There are four salient points. First, the Canadian judiciary undertakes ordinary statutory interpretation when considering the first ‘rights question’<sup>62</sup> — that is, when characterising the challenged legislation, the court examines its purpose and effect.<sup>63</sup> Moreover, ‘[w]here the language of a statute will bear two interpretations’, one which limits a right and one which will not, ‘the *Charter* can be applied simply by selecting the interpretation that does not abridge the *Charter* right’.<sup>64</sup> As Hogg notes, this ‘is simply a canon of construction (or interpretation)’, through which the *Canadian Charter* ‘achieves its remedial purpose solely by the interpretation of the challenged statute’.<sup>65</sup> The first steps under the *Canadian Charter* and the UK/NZ Method are similar.

Secondly, if legislation limits rights, the judiciary assesses the reasonableness and demonstrable justifiability of the limit under the second ‘rights question’, which ‘involves the interpretation and application of s 1’.<sup>66</sup> This is similar to step 2 under the UK/NZ Method. Most importantly, limits analysis is not part of the initial interpretation process, nor part of the consequential remedies — it is a distinct stage.<sup>67</sup>

60 The power to invalidate comes from the ‘supremacy’ clause, which states that ‘[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect’: *Canada Act 1982* (UK) c 11, sch B s 52.

61 Section 24 of the *Canadian Charter* contains remedial powers. Section 24(1) empowers the courts to give anyone whose rights have been denied or infringed a remedy that is just and appropriate in the circumstances. Section 24(2) empowers a court to exclude evidence obtained in violation of rights if to admit it would bring the administration of justice into disrepute. Section 24 remedies will generally not be invoked if s 52 has been engaged: *Schachter v Canada* [1992] 2 SCR 679 (‘*Schachter*’). Section 24 remedies are generally used where the actions of a governmental official are unconstitutional, although exercised under constitutional legislation. For examples of remedies under s 24, see Justice Frank Iacobucci, ‘Judicial Review by the Supreme Court of Canada Under the *Canadian Charter of Rights and Freedoms*: The First Ten Years’ in David M Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (Martinus Nijhoff, 1994) 93, 126.

62 See, eg, *Oakes* [1986] 1 SCR 103, 114–18.

63 Hogg, above n 58, vol 2 (2007 Release 1) 36-22 [36.7(a)].

64 *Ibid* vol 2 (2007 Release 2) 36-25 [36.7(e)]. This is referred to as one of three presumptions of constitutionality: at vol 2 (2008 Release 1) 38-10 [38.5].

65 *Ibid* vol 1 (2006 Release 1) 15-26 [15.7]. Hogg continues:  
[G]eneral language in a statute which is literally apt to extend beyond the power of the enacting Parliament or Legislature will be construed more narrowly so as to keep it within the permissible scope of power. Reading down is simply a canon of construction (or interpretation). It is only available where the language of the statute will bear the (valid) limited meaning as well as the (invalid) extended meaning ...

66 *Ibid* vol 2 (2012 Release 1) 38-2 [38.1]. See, eg, *Oakes* [1986] 1 SCR 103, 135–42.

67 See *VCA Momcilovic* (2010) VR 436, 467 [109], quoting *Hansen* [2007] 3 NZLR 1, 15 [22] (Elias CJ).

Thirdly, the ‘remedial mechanisms’ under the *Canadian Charter* go beyond invalidating offending legislation, and include reading in<sup>68</sup> and reading down.<sup>69</sup> Such interpretation-based ‘remedies’ are available only *after* s 1 is ‘spent’ — that is, after an unjustifiable limitation is established.<sup>70</sup> Hogg notes that with reading down, ‘[t]he vindication of the *Charter* right is accomplished solely by interpretation’.<sup>71</sup> ‘Remedial interpretation’ under the *Canadian Charter* mimics the UK/NZ Method.<sup>72</sup>

Fourthly, the general rule under the Canadian constitution that ‘courts may not reconstruct an unconstitutional statute in order to render it constitutional’ is subject to many exceptions, including severance, reading in and reading down.<sup>73</sup> Similarly to the UK/NZ Method, however, there is a point where remedial interpretations go beyond the proper judicial role. Just as s 32(1) remedial interpretations which are *not* possible and/or consistent with statutory purpose are *not* sanctioned under the *Charter*, in Canada ‘[t]here is a point at which ... an unconstitutional statute cannot be salvaged except by changes that are too profound, too policy-laden and too controversial to be carried out by a court’.<sup>74</sup> Both statutory and constitutional rights instruments employ interpretation techniques for remedial purposes, and both identify a line between *legitimate* judicial interpretation and *illegitimate* judicial lawmaking.

68 *Schachter* [1992] 2 SCR 679, 695–702. Reading in legislative provisions will only be available in ‘the clearest of cases’ (at 718, 727), and where three conditions are met: (a) the legislative objective must be clear, and severance or reading in must further that objective or interfere less with the objective than would invalidating the entire legislation; (b) the legislature’s choice to pursue the objective by way of the impugned legislation is not so explicit that severance or reading in would unacceptably interfere with the legislative sphere; and (c) severance or reading in would not involve a substantial change to the budgetary implications of the objective such as to change the nature of the legislative scheme: at 705–15, 718. See also *Miron v Trudel* [1995] 2 SCR 418; *Vriend v Alberta* [1998] 1 SCR 493. See generally Hogg, above n 58, vol 2 (2013 Release 1) 40-15–40-18 [40.1(f)]; Iacobucci, above n 61, 122–3; Chief Justice Antonio Lamer, ‘Canada’s Legal Revolution: Judging in the Age of the *Charter of Rights*’ (1994) 28 *Israel Law Review* 579, 587–8.

69 See generally, Hogg, above n 58, vol 2 (2010 Release 1) 40-3–40-4 [40.1(b)].

70 See *VCA Momcilovic* (2010) VR 436, 467 [109], quoting *Hansen* [2007] 3 NZLR 1, 15 [22] (Elias CJ).

71 Hogg, above n 58, vol 2 (2007 Release 1) 40-19 [40.1(g)]. ‘[R]eading down achieves its remedial purpose solely by the interpretation of the challenged statute’: at vol 1 (2006 Release 1) 15-26 [15.7]. Hogg does differentiate reading down from severance (‘whereas severance involves holding part of the statute to be invalid’: at vol 1 (2006 Release 1) 15-26 [15.7]) and reading in (‘is not a technique of interpretation, but rather a technique of judicial amendment, altering the statute to make it conform to the Constitution’: at vol 2 (2007 Release 1) 40-19 [40.1(g)]).

72 Both instruments have additional remedies, such as declaration in the United Kingdom and invalidation in Canada.

73 Hogg, above n 58, vol 2 (2008 Release 1) 40-23 [40.1(i)].

74 *Ibid.* See *Schachter* [1992] 2 SCR 679, 705; *Hunter v Southam Inc* [1984] 2 SCR 145; *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177 (‘*Singh*’); *Rocket v Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232; *Canadian Foundation for Children, Youth and the Law v A-G (Canada)* [2004] 1 SCR 76; *City of Montréal v 2952-1366 Québec* [2005] 3 SCR 141. Indeed, just like the *UKHRA*, ‘[i]t is all a matter of degree, which is difficult to articulate and to predict’: Hogg, above n 58, vol 2 (2008 Release 1) 40-23 [40.1(i)]. The Canadian judges adopt interesting metaphors, such as, the appropriateness of ‘crude surgery’ to save a provision ‘but not plastic or re-constructive surgery’: see Hogg, above n 58, vol 2 (2008 Release 1) 40-24 [40.1(i)], quoting Beetz J in *Singh* [1985] 1 SCR 177, 236. See also Binnie J’s reference to ‘radical surgery’ in *City of Montréal v 2952-1366 Québec* [2005] 3 SCR 141, 145, 184.

The method under United Kingdom and New Zealand statutory instruments has a closer connection to the Canadian constitutional instrument than does the VCA Method. The reliance of the VCA and French CJ on the *Canadian Charter* is misconceived.

### III THE HCA MOMCILOVIC DECISION

On appeal, the HCA identified numerous constitutional law issues. This article focuses on those that pertain to the validity and operation of the *Charter* in Victoria.<sup>75</sup>

#### A Constitutional Background

Two relevant constitutional issues arose. The first concerns the constitutional relationship between the arms of government. As described in *Zheng v Cai*, judicial interpretation of a law is ‘an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws’.<sup>76</sup> Related is the constitutional tradition ‘that it is the task of the judiciary in interpreting an Act to seek to interpret it “according to the intent of them that made it”’.<sup>77</sup> These considerations influenced the construction of s 32(1).

The second concerns the separation of judicial powers. Because Vera Momcilovic had moved to Queensland by the hearing date, the VCA had in fact been exercising federal jurisdiction because it became a matter ‘between a State and a resident of another State’ under s 75(iv) of the *Constitution*. The implied separation of judicial powers principle that a Chapter III court<sup>78</sup> can only exercise judicial power,<sup>79</sup> or a non-judicial power incidental thereto,<sup>80</sup> arose. *HCA Momcilovic* thus has implications for the *Charter* when a Victorian Court is exercising federal

75 For analysis of some of the broader constitutional issues, see Bateman and Stellios, above n 3.

76 *Zheng v Cai* (2009) 239 CLR 446, 455 [28] (*‘Zheng’*).

77 *HCA Momcilovic* (2011) 245 CLR 1, 44 [37] (French CJ), quoting *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948, 951 (Viscount Dilhorne).

78 Chapter III courts are the High Court of Australia, other federal courts, and state courts that are vested with federal jurisdiction.

79 *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 (*‘Boilermakers’ Case’*). The other principle is that federal judicial power may only be exercised by a Chapter III court: *New South Wales v Commonwealth* (1915) 20 CLR 54; *Waterside Workers’ Federation v J W Alexander Ltd* (1918) 25 CLR 434; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245. There are two exceptions to this rule. First, certain non-judicial bodies have historically exercised some judicial power, for example: contempt of parliament (*R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157), public service disciplinary tribunals (*R v White; Ex parte Byrnes* (1963) 109 CLR 665), and courts martial (*R v Bevan* (1942) 66 CLR 452; *Ex parte Elias and Gordon; Re Tracey; Ex parte Ryan* (1989) 166 CLR 518). Second, federal judicial power can be delegated, under supervision, by a Chapter III court to one of its officers: *Harris v Caladine* (1991) 172 CLR 84.

80 *R v Joske; Ex parte Shop Distributive and Allied Employees’ Association* (1976) 135 CLR 194.

jurisdiction, and for the (in)validity of *Charter*-like provisions if enacted by a future federal parliament. These issues are not discussed here.<sup>81</sup>

Rather, this article concerns the validity of the *Charter* when operating in Victoria under state jurisdiction. There is no separation of powers doctrine in the *Victorian Constitution*.<sup>82</sup> However, the HCA has extended federal constitutional separation of powers protections to state courts. In *Kable*<sup>83</sup> and later cases,<sup>84</sup> the HCA held that because state courts are vested with federal jurisdiction, they are considered part of the federal judicial system, and separation of powers applies. Accordingly, state parliaments cannot confer a power or function on a state court which substantially impairs its institutional integrity, which will be repugnant to, or incompatible with, its exercise of the judicial power of the Commonwealth.<sup>85</sup> Essentially, state courts can only exercise judicial powers, or non-judicial powers, that are not repugnant to or incompatible with the exercise of federal judicial power thereby maintaining their institutional integrity. *Kable* was potentially relevant to ss 7(2), 32(1) and 36(2).

## B The Outcome

Five Justices held that the s 5 ‘possession’ deeming provision did not apply to the s 71AC offence of trafficking, which required the composite ‘possession for sale’. Their Honours held that because Momcilovic should not have been deemed in ‘possession’, the jury had been misdirected and the trial miscarried.<sup>86</sup> The HCA quashed Momcilovic’s conviction, set aside her sentence, and ordered a new trial. However, the HCA addressed, *inter alia*,<sup>87</sup> the validity and operation of the *Charter* in Victoria.

Six judges (excluding Heydon J) held that s 32(1) operated as a valid rule of statutory interpretation, but their reasoning differed. Four judges (French CJ, Bell, Crennan and Kiefel JJ) held that s 36(2) was valid but for different reasons, with Crennan and Kiefel JJ finding that a declaration should not have been made

81 See Bateman and Stellos, above n 3.

82 *Constitution Act 1975* (Vic) (‘*Victorian Constitution*’).

83 *Kable v DPP (NSW)* (1996) 189 CLR 51 (‘*Kable*’).

84 See, eg, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 (‘*International Finance Trust*’); *South Australia v Totani* (2010) 242 CLR 1 (‘*Totani*’); *Wainohu v New South Wales* (2011) 243 CLR 181 (‘*Wainohu*’). Cf *Baker v The Queen* (2004) 223 CLR 513; *Fardon v A-G (Qld)* (2004) 223 CLR 575.

85 That is, repugnant to or incompatible with its role as a repository of federal jurisdiction under an integrated court system under ch III of the *Commonwealth Constitution*. ‘Institutional integrity’ refers to the defining or essential characteristics of a court, including: the reality and appearance of independence and impartiality; procedural fairness; adherence to the open court principles; and the giving of reasons for decision: see generally *Kable* (1996) 189 CLR 51; *International Finance Trust* (2009) 240 CLR 319; *Totani* (2010) 242 CLR 1; *Wainohu* (2011) 243 CLR 181.

86 *HCA Momcilovic* (2011) 245 CLR 1, 31 [5], 58–9 [72]–[74] (French CJ); 86 [146(x)], 98–9 [197]–[202] (Gummow J, Hayne J concurring), 229–30 [606]–[612] (Crennan and Kiefel JJ). Although Bell J held that the deeming provision of s 5 did apply to the trafficking offence of s 71AC, her Honour still held that the jury had been misdirected: at 251–2 [692], 254–5 [699]–[702].

87 For example, six judges held that s 71AC of the *Drugs Act* was not invalid for inconsistency with the trafficking offence provision of the *Criminal Code Act 1995* (Cth).

in this proceeding. Three judges (Gummow, Hayne and Heydon JJ) held that s 36(2) was invalid. Overall, a majority of five held that the VCA's declaration was invalid or should not have been made, and it was set aside.

The extent of disagreement about the validity and operation of the *Charter* in Victoria, within the federal constitutional constraints, is remarkable. The judgments will be considered in two categories — those most aligned with the VCA, and those most aligned with the UK/NZ Method. Analysis within each category will focus on the thematic issues surrounding ss 7(2), 32(1), 36(2) and their interactions.

## C Support for VCA Momcilovic

The judgments of French CJ, and Crennan and Kiefel JJ more closely align with the VCA reasoning, although not necessarily the VCA Method. In brief, French CJ agrees with *VCA Momcilovic* that s 32(1) codifies the principle of legality and s 7(2) does not inform the interpretation process. His Honour held that s 36(2) is not an impermissible exercise of non-judicial power. Crennan and Kiefel JJ consider s 32(1) to be an ordinary rule of construction, without explicitly sanctioning the principle of legality characterisation, and that s 7(2) is a principle of *justification* which plays no role in the *interpretation* process. Their Honours reject both the UK/NZ and VCA methodologies. Their Honours held that s 36(2) does not interfere with the institutional integrity of the state courts and is valid.

### 1 Section 32(1)

Both judgments consider comparative jurisprudence, but highlight the unique aspects of the *Charter* and its broader constitutional setting. This is the prelude to supporting the narrow *Wilkinson*-reasonable approach to s 32(1). The constitutional relationship between the arms of government informs the judgments, but s 32(1) is construed on its own terms.<sup>88</sup>

French CJ began by noting *Zheng*'s reference to interpretation being 'an expression of the constitutional relationship between the arms of government',<sup>89</sup> and referring to the 'constitutional tradition' that judges interpret legislation 'according to the intent of them that made it'.<sup>90</sup> His Honour noted that the 'duty of the Court' is 'to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have',<sup>91</sup> with the ascertainment of legislative intention being

88 *HCA Momcilovic* (2011) 245 CLR 1, 209 [540]. The principles of separation of powers had no influence.

89 *Ibid* 44 [38], quoting *Zheng* (2009) 239 CLR 446, 455 [28].

90 *HCA Momcilovic* (2011) 245 CLR 1, 44 [37], quoting *Stock v Frank Jones (Tipton) Ltd* [1978] All ER 948, 951 (Viscount Dilhorne).

91 *HCA Momcilovic* (2011) 245 CLR 1, 45 [38], quoting *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').



a matter of complying with the common law and statutory rules of construction.<sup>92</sup> According to common law rules, '[t]he meaning given to ... [statutory] words must be a meaning which they can bear',<sup>93</sup> subject to 'an exceptional case' where 'the common law allows a court to depart from grammatical rules and to give an *unusual* or *strained* meaning to statutory words where the ordinary meaning and grammatical construction would contradict the apparent purpose of the enactment', although '[t]he court is not thereby authorised to legislate'.<sup>94</sup> These common law rules of construction '[help] to define the boundaries between the judicial and legislative functions'.<sup>95</sup>

French CJ analyses the British jurisprudence, and recognises that *Ghaidan* 'is routinely cited and applied and treated as authoritative'.<sup>96</sup> His Honour, however, avoids *Ghaidan* by holding that s 3(1) 'has a history and operates in a constitutional setting which is materially different from that which exists in Australia',<sup>97</sup> and that s 32(1) 'exists in a constitutional setting which differs from the setting in which the ... [UKHRA] operates'.<sup>98</sup>

Considering s 32(1) within its unique constitutional setting, French CJ refers to the *VCA Momcilovic* analysis of the Second Reading Speech:

in which s 32(1) was described as a provision which 'recognises the traditional role for the courts in interpreting legislation'. ... It observed, correctly in my respectful opinion, that if Parliament had intended to make a change in the rules of interpretation accepted by all areas of government in Victoria 'its intention to do so would need to have been signalled in the clearest terms'.<sup>99</sup>

The Chief Justice opines that s 32(1):

mandates an attempt to interpret statutory provisions compatibly with human rights. There is, however, nothing in its text or context to suggest that the interpretation which it requires departs from established understandings of that process. The sub-section limits the interpretation which it directs to that which is consistent with the purpose of the statutory provision under consideration. It operates upon constructional choices which the language of the statutory provision permits.<sup>100</sup>

92 *HCA Momcilovic* (2011) 245 CLR 1, 44–5 [38], citing *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

93 *HCA Momcilovic* (2011) 245 CLR 1, 45 [39]. French CJ then quotes Lord Reid in *Jones v Director of Public Prosecutions* [1962] AC 635, 662.

94 *HCA Momcilovic* (2011) 245 CLR 1, 45 [40] (emphasis added).

95 *Ibid* 46 [42].

96 *Ibid* 49 [48] (citations omitted).

97 *Ibid* 49 [49].

98 *Ibid* 50 [50].

99 *Ibid* 47–8 [46], quoting *VCA Momcilovic* (2010) 25 VR 436, 458 [81], 464 [100], quoting Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293, [100].

100 *HCA Momcilovic* (2011) 245 CLR 1, 50 [50].

Two propositions — that a change in the rules of interpretation should ‘have been signalled in the clearest of terms’<sup>101</sup> and that ‘nothing in its text or context’ suggests s 32(1) interpretation ‘departs from established understandings of that process’<sup>102</sup> — have been previously critiqued.

French CJ then accepts that s 32(1) codifies the principle of legality, relying on *Wilkinson*:

Section 32(1) does what Lord Hoffmann and the other Law Lords in *Wilkinson* said s 3 of the ... [UKHRA] does. It requires statutes to be construed against the background of human rights and freedoms set out in the *Charter* in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. ... Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application. The Court of Appeal was essentially correct in its treatment of s 32(1).<sup>103</sup>

The explicit approval of *VCA Momcilovic* opens French CJ to criticism. First, it is ‘far from clear that *Wilkinson* adopts a weaker or narrower conception of s 3(1) [than *Ghaidan*] as a general matter’.<sup>104</sup> Although French CJ sought to distance s 32(1) from *Ghaidan*, his Honour’s approval of *Wilkinson* may indeed sanction *Ghaidan*. Secondly, my previous analysis of the VCA’s reliance on Geiringer’s principle of legality conceptualisation of s 6 of the *NZBORA* warrants mention:

Geiringer’s central thesis — ‘that s 6 may on occasion entitle the courts to adopt constructions that are *at odds* with statutory purpose’ — and her conclusion ‘that in an appropriate case, even quite strong legislative indications of “purpose” *must yield* to the statutorily mandated imperatives set out in the *NZBORA*’ — are based on the common law: ‘[w]here fundamental values are perceived to be threatened, there is a long history of common law courts utilising presumptions of interpretation to promote literal or even *strained meanings in disregard of statutory purpose*’.<sup>105</sup>

As I conclude in that article, the principle of legality characterisation does not support French CJ’s underlying concern that s 32(1) ‘limits the interpretation which it directs to that which is consistent with the purpose of the statutory

101 Ibid 48 [46], quoting *VCA Momcilovic* (2010) 25 VR 436, 464 [100]. See also Debeljak, ‘Who is Sovereign Now?’, above n 15, 32. For a discussion of how the Victorian Parliament’s concerns about the displacement of parliamentary intention and the avoidance of legislative objectives are reflected in the preceding British jurisprudence: see at 35–6. For further critique of the *VCA Momcilovic* reliance on the Second Reading Speech: see at 33.

102 *HCA Momcilovic* (2011) 245 CLR 1, 50 [50]. See also Debeljak, ‘Who is Sovereign Now?’, above n 15, 29–33, 35, 48. For a discussion of how the parliamentary debates indicate that s 32(1) was intended to be more than a codification of the principle of legality: see at 38–9.

103 *HCA Momcilovic* (2011) 245 CLR 1, 50 [51].

104 Kavanagh, *Constitutional Review*, above n 27, 95. See generally, Debeljak, ‘Who Is Sovereign Now?’, above n 15, 24–5.

105 Debeljak, ‘Who is Sovereign Now?’, above n 15, 49–50, quoting Geiringer, ‘The Principle of Legality’, above n 16, 63, 91 (emphasis in original and added) (citations omitted).

provision under consideration<sup>106</sup> this characterisation ‘does *not* avoid *Ghaidan*-type interpretative analysis’ and ‘it does not automatically elevate the statutory purpose of the impugned provision over the statutory purpose of the rights instrument’.<sup>107</sup>

Thirdly, French CJ fails to acknowledge the limitations imposed by ‘so far as it is possible to do so’.<sup>108</sup> In terms of preserving the traditional constitutional relationships, the British jurisprudence indicates that the word ‘possible’ limits judicial power: what is ‘possible’ is interpretation; what is not ‘possible’ is legislation.<sup>109</sup> Similarly, the *Charter* envisages ‘possibility’ as the operative limit on judicial power. The s 1(2)(b) purposes provision refers to interpretation ‘so far as is possible in a way that is compatible with human rights’ *without* any reference to ‘consistently with their purpose’. This indicates the *Charter*-enacting parliament’s intention that ‘possibility’ be the predominant limit to interpretation rather than ‘consistently with their purpose’, which should be reflected in a traditional purposive interpretation of s 32(1), particularly where that purpose is stated in the legislation.<sup>110</sup> The preservation of the traditional constitutional relationship was intended to be guaranteed by the concept of ‘possibility’, rather than a narrow, non-remedial reading of s 32(1).

Finally, in construing s 5 of the *Drugs Act*, French CJ distinguishes *Hong Kong Special Administrative Region v Lam Kwong Wai*,<sup>111</sup> where Mason NPJ stated that ‘remedial interpretation’ would require courts ‘to give the statutory provision an interpretation that is consistent with the protected rights, even an interpretation that is *strained* in the sense that it was not an interpretation which the statute was capable of bearing as a matter of ordinary common law interpretation’.<sup>112</sup> The *Lam Kwong Wai* and *Project Blue Sky* rules of construction are similar — both acknowledge that ordinary common law interpretation is driven by purpose,

106 *HCA Momcilovic* (2011) 245 CLR 1, 50 [50]. Nor did Geiringer’s central thesis support the fundamental underpinnings of the conclusion in *VCA Momcilovic*: Debeljak, ‘Who Is Sovereign Now?’, above n 15, 50.

107 Debeljak, ‘Who Is Sovereign Now?’, above n 15, 50.

108 Indeed, his Honour fails to give *any* meaning or effect to the phrase, which itself eschews the traditional interpretative obligation to give *all* words *some* meaning and effect: see D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2011) 49–50 [2.26].

109 For example, Lord Woolf CJ in *Donoghue* [2002] QB 48 emphasised that when the court decides whether a re-interpretation of a legislative provision is ‘possible’, the courts ‘task is still one of interpretation’: at 72–3 [75]. If the court must ‘radically alter the effect of the legislation’ to secure compatibility, ‘this will be an indication that more than interpretation is involved’: at 73 [76]. See also *Ghaidan* [2004] 2 AC 557, 571–2 [32]–[33] (Lord Nicholls), as cited below nn 124–5 and accompanying text. See also *Adan v Newham London Borough Council* [2002] 1 All ER 931, 945 [42] (*Adan*); *Roth* [2003] QB 728, 785 [156].

110 *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J). Dawson J’s comments relate to s 35(a) of the *ILA*. Pearce and Geddes make similar observations in relation to s 15AA of the *Acts Interpretation Act 1901* (Cth): Pearce and Geddes, above n 108, 33–36 [2.9]–[2.10]. Note that ‘where an interpretation has been adopted that does not fit readily with ... [an objects] clause, it has had to be explained’: at 157 [4.49].

111 *Hong Kong Special Administrative Region v Lam Kwong Wai* (2006) 9 HKCFAR 574 (*‘Lam Kwong Wai’*).

112 *HCA Momcilovic* (2011) 245 CLR 1, 54–5 [61], quoting *Lam Kwong Wai* (2006) 9 HKCFAR 574, 607 [65] (emphasis added).

and both acknowledged that a *strained* interpretation that is not open on ordinary common law principles is acceptable. Any distinction between the two is not apparent.

French CJ sought to preserve the traditional constitutional relationship between the arms of government. Rather than relying solely on the constitutional relationship to justify a narrow reading of s 32(1), his Honour chose to rely on the questionable statutory interpretation of the VCA, which itself represents a *strained* interpretation of the history, text and context of s 32(1).<sup>113</sup> Moreover, his Honour failed to give any meaning or effect to the phrase intended to preserve the constitutional relationship — ‘so far as it is possible to do so’.<sup>114</sup>

Crennan and Kiefel JJ approach the operation of and interaction between the key provisions as ‘matters to be determined by reference to the construction of the *Charter* in its own terms’.<sup>115</sup> Focussing on s 32(1), their Honours begin by comparing the *Charter* provisions with comparative provisions, and conclude that ‘important differences in the terms of the sections are themselves sufficient to distinguish s 32(1) of the *Charter* from s 3(1) of the ... [UKHRA]’.<sup>116</sup>

One difference is ‘the rather emphatically expressed direction in s 3(1) that a “statute must be read and given effect”’ in a way which is compatible with rights; and that this *produced* the outcome of compatibility in *Ghaidan*.<sup>117</sup> Furthermore, the approach in *Ghaidan* paid ‘insufficient attention’ to the words ‘so far as it is possible to do so’, and whether those words ‘are directed to compliance with the usual rules of statutory interpretation in the context of the *Charter*’.<sup>118</sup> Their Honours then suggest that ‘consistently with their purpose’ in the *Charter* ‘points clearly to the task ordinarily undertaken by courts in construing legislation’, citing the principle from *Project Blue Sky* that construction ought to ‘achieve consistency with the language and the purpose of the statute’.<sup>119</sup>

This must be examined. First, contrary to their Honours suggestion, the British judiciary has paid little attention to the words ‘be read and given effect’, particularly in relation to distinguishing judicial interpretation from judicial legislation. Rather, the judiciary has used the phrase ‘so far as is possible to do so’ to impose the boundary between legitimate judicial interpretation and illegitimate judicial legislation.<sup>120</sup> Moreover, there is no suggestion in the British

113 See Debeljak, ‘Who is Sovereign Now?’, above n 15.

114 See above n 108.

115 *HCA Momcilovic* (2011) 245 CLR 1, 209 [540].

116 *Ibid* 211 [546].

117 *Ibid* 210 [544].

118 *Ibid*.

119 *Ibid*, citing *Project Blue Sky* (1998) 194 CLR 355, 381 [69].

120 See *Donoghue* [2002] QB 48, 73 [76]; *Adan* [2002] 1 All ER 931, 945 [42]; *Roth* [2003] QB 728, 785 [156]; *Lambert* [2002] 2 AC 545, 585–6 [81] (Lord Hope); *Hooper v Secretary of State for Work and Pensions* [2002] EWHC 191 (Admin) (14 February 2002) [158]; *R (Hooper) v Secretary of State for Work and Pensions* [2003] 3 All ER 673, 681 [26]; *Re S* [2002] 2 AC 291, 313 [37]–[40] (Lord Nicholls); *Ghaidan* [2004] 2 AC 557, 570 [27] (Lord Nicholls). See, eg, Lord Millett in *Ghaidan*: ‘section 3 requires the court to read legislation in a way which is compatible with the Convention only “so far as it is possible to do so”. It must, therefore, be possible, by a process of interpretation alone, to read the offending statute in a way which is compatible with the Convention’: at 585 [66] (emphasis in original). See generally Debeljak, ‘Parliamentary Sovereignty and Dialogue’, above n 33, 40–9.

jurisprudence that ‘so far as possible to do so’ sanctions only ‘the usual rules of statutory interpretation’.

Secondly, contrary to their Honours suggestion, the jurisprudential development of the meaning of ‘possible’, which culminates in *Ghaidan*, does not necessarily undermine the ‘consistency with language and purpose’ emphasised in *Project Blue Sky*. The UKHRA-enacting parliamentary intention underlying s 3(1) certainly emphasised language: s 3(1) enables ‘the courts to strive to find an interpretation of legislation that is consistent with convention rights, *so far as the plain words of the legislation allow*’.<sup>121</sup> Numerous judgments also highlight the importance of language and purpose. In *R v A*, Lord Hope held that any modified interpretation should not conflict with the express language of the legislation, nor any necessary implications thereto, as both are ‘means of identifying the plain intention of Parliament’.<sup>122</sup> In *Lambert*, the majority retained the original language used by parliament, but altered the meaning of the words.<sup>123</sup>

In *Ghaidan*, after discussing the potentially competing intentions of the UKHRA and challenged legislation, Lord Nicholls articulates a set of guidelines about what s 3(1) does and does not allow, with an emphasis on language and purpose.<sup>124</sup> Section 3(1) *allows* ‘language to be interpreted restrictively or expansively’; is ‘apt to require a court to read in words which change the meaning of the enacted legislation’; and allows a court to ‘modify the meaning, and hence the effect, of ... legislation’; allows implying words provided they ‘go with the grain of the legislation’.<sup>125</sup> However, s 3(1) does *not allow* the courts to ‘adopt a meaning inconsistent with a fundamental feature of legislation’; any s 3(1) re-interpretation ‘must be compatible with the underlying thrust of the legislation being construed’ and must ‘go with the grain of the legislation’.<sup>126</sup> Any attempt at altering the *language* — be it expansive or restrictive interpretation, reading in words, or modifying meaning — is limited by the underlying *purpose* of the legislation — its fundamental features, its thrust, its grain.<sup>127</sup> Moreover, Lord Nicholls opines that judges *may* (not *must*) depart from legislative intention, *but not* where it would undermine the fundamental features of legislation, be incompatible with the underlying thrust of legislation, or go against the grain of legislation. It is

121 United Kingdom, *Parliamentary Debates*, House of Commons, 3 June 1998, vol 313, col 421–2 (Jack Straw) (emphasis added). Moreover, the Home Secretary stated that ‘it is not our intention that the courts, in applying ... [s 3], should contort the meaning of words to produce implausible or incredible meanings’: at col 422.

122 [2001] 1 AC 45, 87 [108] (Lord Hope). His Lordship preferred to read down any language that threatened compatibility: at 87 [110]. Other judges have expressed a preference for the approach of Lord Hope: see, eg, *Adan* [2002] 1 All ER 931, [93] (David Steel J).

123 [2002] 2 AC 545, 563 [17] (Lord Slynn), 574–5 [42] (Lord Steyn), 586–7 [84], 589 [91], 589–90 [93]–[94] (Lord Hope), 609–10 [157] (Lord Clyde). Lord Hutton dissented: at 625 [198]. A further example of altering the legislative meaning of words is *R v Offen* [2001] 2 All ER 154. See also Starmer, above n 22, 18.

124 See above n 23 and accompanying text.

125 *Ghaidan* [2004] 2 AC 557, 571–2 [32]. Lord Rodger agreed with these propositions: at 600–1 [121], 602 [124], as did Lord Millett: at 585–6 [67].

126 *Ibid* 572 [33] (Lord Nicholls), 601 [121] (Lord Rodger), 585–6 [67] (Lord Millett). Lord Nicholls developed these ideas in the earlier case of *Re S* [2002] 2 AC 291, 313 [40].

127 It should also be noted that these techniques are part of the ordinary statutory interpretation toolbox: see, eg, Pearce and Geddes, above n 108, 54–63 [2.32]–[2.40].

difficult to conceive of a case where a *rights-incompatible legislative intention* would not be reflected in the fundamental features, the underlying thrust, and the grain of the legislation, so as to leave the statutory language open to judicial re-write.<sup>128</sup> Finally, the *ratio* of Lord Nicholls relies on the parliamentary intention underlying the challenged legislation.<sup>129</sup>

Another difference relied on is the distinction between ‘must be read and given effect’ under s 3(1) and ‘must be interpreted’ under s 32(1). Crennan and Kiefel JJ opine that use of the latter:

was intended to overcome any misapprehension about the role of the courts in construing legislation. The reference to interpretation must be taken to be a reference to that process of construction as understood and ordinarily applied by courts, a process which is to be taken as accepted by the other arms of government in a system of representative democracy.<sup>130</sup>

This must be examined. Regarding textual differences, the *HRCC Report*,<sup>131</sup> Explanatory Memorandum,<sup>132</sup> and the Second Reading Speech<sup>133</sup> indicate that Parliament attached no significance to the difference, and the words ‘interpreted’ and ‘read and give effect to’ were used interchangeably. The phrases are also

128 In my opinion, *R v A* [2002] 1 AC 45 is not even an instance of this. See Kavanagh, ‘Unlocking the *Human Rights Act*’, above n 22.

129 Lord Nicholls identifies the ‘essential feature’ of the definition of ‘spouse’ as ‘the cohabitation of a heterosexual couple’, when considering whether a legitimate aim exists for justifying discrimination (art 14) in the legislative provision for social housing (art 8), and holds that ‘the reason underlying this social policy ... is equally applicable to the survivor of a homosexual couple’, whom ‘as much as a heterosexual couple, share each other’s life and make their home together’: *Ghaidan* [2004] 2 AC 557, 568 [17]. Lord Nicholls also acknowledges the primary object of introducing assured tenancies — to increase the number of properties available for renting in the private sector — when considering whether there is a justification for extending protection to cohabiting heterosexual partners but not cohabiting homosexual partners. His Lordship holds that ‘this policy objective of the *Housing Act 1988* can afford no justification for amending paragraph 2 [of sch 1 of the *Rent Act 1977* (UK) c 42] so as to include cohabiting heterosexual partners but not cohabiting homosexual partners’: at 569 [20]. Finally, his Lordship explicitly considers whether the rights-compatible interpretation of *Rent Act 1977* (UK) c 42, sch 1 para 2, so as to include cohabiting homosexual couples, was ‘[consistent] with the social policy underlying paragraph 2’: at 572 [35].

130 *HCA Momcilovic* (2011) 245 CLR 1, 210 [545], citing *Zheng* (2009) 239 CLR 446, 455–6 [28].

131 *HRCC Report*, above n 13. The Report recommended the words ‘a Victorian law must be *read and given effect*’, and noted that this wording would provide the courts ‘with clear guidance to *interpret* legislation to *give effect* to a right’: at 82 (emphasis added).

132 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic). The Explanatory Memorandum notes that the object of s 32(1) ‘is to ensure that courts and tribunals *interpret* legislation to *give effect* to human rights’, and that s 32(2) permits consideration of international and comparative jurisprudence ‘relevant to a human right in *reading and giving effect* to a statutory provision’: at 23 (emphasis added).

133 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1289–95 (Rob Hulls, Attorney-General). The Second Reading Speech refers to rights-compatible interpretation ‘so far as it is possible to do so consistently with their purpose and *meaning*’: at 1293 (emphasis added).

used interchangeably in the extrinsic materials to the *UKHRA*<sup>134</sup> and the British jurisprudence.<sup>135</sup> Commentators have not attributed any significance to these textual differences.<sup>136</sup>

Turning to *Zheng*, the HCA in that case stated that:

judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*, the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.<sup>137</sup>

The *NAAV* reference is to French J's examination of the rules of construction.<sup>138</sup> In discussing purposive construction, French J notes that 'legislative intention' describes 'an *attributed intention* based on inferences drawn from the statute itself'.<sup>139</sup> His Honour states that the use of legislative intention:

in the process of statutory interpretation is of fundamental importance because it directs courts to objective criteria of construction which are recognised as legitimate. It requires reference to matters which were before the Parliament when the law was enacted. The first and best criterion

134 There are numerous references to 'interpretation' in Home Department (UK), *Rights Brought Home: The Human Rights Bill*, Cm 3782 (1997): 'The Bill provides for legislation ... to be *interpreted* so far as possible so as to be compatible with the Convention' and '[t]he courts will be required to *interpret* legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so' (at [2.7]) (emphasis added); 'This "*rule of construction*" is to apply to past as well as to future legislation. To the extent that it affects the *meaning of a legislative provision*, the courts will not be bound by previous interpretations': (at [2.8]) (emphasis added). Moreover, the parliamentary debate contained numerous references to 'interpretation'. Lord Cooke of Thorndon noted that s 3 'will require a very different approach to *interpretation* from that to which United Kingdom courts are accustomed' and 'the common law approach to statutory *interpretation* will never be the same again': United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, vol 582, col 1272–3 (emphasis added). The Lord Chancellor used the terms interchangeably: '[Section] 3 provides that legislation, whenever enacted, must as far as possible be *read and given effect* in a way which is compatible with the convention rights. This will ensure that, if it is possible to *interpret* a statute in two ways ... the courts will always choose the *interpretation* which is compatible': United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, vol 582, col 1230 (Lord Irvine of Lairg) (emphasis added). The Home Secretary also used the terms interchangeably: '[Section] 3 provides that legislation, whenever enacted, must as far as possible be *read and given effect* in such a way as to be compatible with convention rights. We expect that, in almost all cases, the courts will be able to *interpret* legislation compatibly with the convention': United Kingdom, *Parliamentary Debates*, House of Commons, 16 February 1998, vol 306, col 778 (Jack Straw) (emphasis added).

135 See, eg, 'the exercise which the court is called on to perform is still one of interpretation, not legislation: (legislation must be "*read and given effect* to")': *Ghaidan* [2004] 2 AC 557, 584 [63] (Lord Millett) (emphasis in original). In *Ghaidan*, Lord Rodger examines the differences between the concept of 'read'/'interpreted' on the one hand, and 'give effect' on the other: at 595 [107].

136 Priyanga Hettiarachi, 'Some Things Borrowed, Some Things New: An Overview of Judicial Review of Legislation under the *Charter of Human Rights and Responsibilities*' (2007) 7 *Oxford University Commonwealth Law Journal* 61, 83; Geiringer, 'The Principle of Legality', above n 16, 66.

137 *Zheng* (2009) 239 CLR 446, 455–6 [28] (citations omitted).

138 *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 410–14 [430]–[439] ('*NAAV*').

139 *Ibid* 411 [430] (emphasis added).

is the ordinary, grammatical meaning of the words themselves. ... It is sometimes said that the courts 'ascertain' the intention of the legislature by considering the meaning of the words it has used ... However the meaning of a legislative word is not like a rock lying on the ground waiting to be found. It is a product of interpretation which is legitimate if and only if the interpretation process invokes criteria which, whether developed by courts or decreed by statute, or both, are broadly understood by the Legislature, the Executive and the judiciary.

In some cases the grammatical and ordinary meaning of a statute may lead to absurdity or inconvenience in its operation or be inconsistent with the object of the Act ... In that event, the Court may apply additional generally accepted and understood criteria to the process of interpretation so that what emerges may still properly be described as according with legislative intention. One of those criteria ... is ... a court should have regard to the mischief which it was designed to cure. ...

It is also important to have regard to criteria of construction which Parliament has prescribed and which are set out in the *Acts Interpretation Act*.<sup>140</sup>

Such general statements concerning the *role* of the rules of construction are instructive insofar as explaining how the rules *justify*<sup>141</sup> and *fashion* judicial interpretation. However, such statements say nothing about the *substantive content* of the rules themselves. Why limit these substantive rules to judge-made common law and the *ILA*? Why is s 32(1) not considered a new substantive rule of construction? The answer cannot be because the rules of construction are fixed, given that common law rules develop over time and the *ILA* is ordinary legislation subject to change. It cannot be because of the democratic roots of the *ILA*, because the same can be said of the *Charter* and cannot be said of the common law rules. Indeed, the new *Charter* rules of construction received democratic sanction in Parliament, and the Executive is subject to these new rules through its s 28 pre-legislative scrutiny obligations and its s 38 obligations as a public authority.

It is difficult to accept Crennan and Kiefel JJ's conclusion that '[t]he reference to interpretation must be taken to be a reference to that process of construction as understood and ordinarily applied by courts'<sup>142</sup> when other *NAAV* factors are accounted for. Regarding *NAAV*'s concern with 'matters before the Parliament', the *HRCC Report* was before Parliament, and it contained an explicit reference to *Ghaidan* for the insertion of the words 'consistently with their purpose'.<sup>143</sup>

140 Ibid 411–12 [432]–[434].

141 Legislative intention 'operates as a persuasive declaration or an acceptance that the interpretation adopted is legitimate in a representative democracy characterised by parliamentary supremacy and the rule of law': *NAAV* (2002) 123 FCR 298, 411 [430].

142 *HCA Momcilovic* (2011) 245 CLR 1, 210 [545].

143 For an exploration of the link between 'consistently with their purpose' and *Ghaidan* based on the Second Reading Speech, Explanatory Memorandum and parliamentary debate, see Debeljak, 'Who Is Sovereign Now?', above n 15.



Moreover, s 32(1) is modelled on s 3(1) when many alternatives were available.<sup>144</sup> Regarding *NAAV*'s reference to 'mischief', the 'mischief' of the *Charter* included *better* protection of rights in Victoria.<sup>145</sup> As Heydon J notes, '[t]he function of s 32(1) evidently is to make up for the putative failure of the common law rules by legitimising reliance on a much broader kind of "purposive" interpretation going beyond the traditional search for "purpose" as revealed in the statutory words'.<sup>146</sup>

The joint judgment then contemplates the intended interaction between ss 7(2), 32(1) and 36(2). Regarding s 32(1), their Honours hold that '[s]ection 32 does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes. ... The *Charter* forms part of the context in which a statute is to be construed' — relying on Lord Hoffman in *Wilkinson*.<sup>147</sup> This suggests that structurally s 32(1) will form part of the initial interpretative task. Earlier critiques relating to the text and context of s 32(1) not departing from established understandings of ordinary interpretation, and *Wilkinson*, equally apply here.<sup>148</sup>

Crennan and Kiefel JJ also argue that, given s 32(3)(a) acknowledges a rights-compatible interpretation may not always be possible, '[i]t cannot therefore be said that s 32(1) requires the language of a section to be strained to effect consistency with the *Charter*',<sup>149</sup> and conclude<sup>150</sup> 'that a court's role in ascertaining the meaning of the legislation remains one of interpretation'.<sup>151</sup> Equally arguable is that the phrase 'so far as is possible to do so' ensures the judicial task 'remains one of interpretation', without relying on s 32(3)(a), yet this phrase is not relevantly explored by their Honours.

The joint judgment is driven in part by traditional constitutional relationships and in part by ordinary statutory construction. The distinctions drawn between the *Charter* and *UKHRA* rely on both but are open to critique, as are their Honours' textual and contextual arguments for reliance on *Wilkinson*, and their failure to give any meaning or effect to 'so far as it is possible to do so'.

144 For example, the Parliament could have codified the principle of legality as stated in any number of cases, used s 6 of the *NZBORA*, or used s 30 of the *Human Rights Act 2004* (ACT) as it was worded at the time.

145 Department of Justice, Victoria, 'Human Rights Statement of Intent' (May 2005), reproduced in *HRCC Report*, above n 13, appendix B, 161.

146 *HCA Momcilovic* (2011) 245 CLR 1, 181 [450].

147 *Ibid* 217 [565], citing *Wilkinson* [2006] 1 All ER 529, 535 [17].

148 See above nn 102–3, 105.

149 *HCA Momcilovic* (2011) 245 CLR 1, 217 [566] (emphasis added).

150 Before so concluding, their Honours refer to McGrath J in *Hansen*, and draw a connection between s 32(3)(a) and s 4 of the *NZBORA*. Relevant to methodology and their Honours' discussion of s 7(2) below, McGrath J in *Hansen* did note that '[s]ubject only to the application of s 5, which concerns justified limitations, the effect of s 4 is that any inconsistent legislation prevails over the Bill of Rights': *Hansen* [2007] 3 NZLR 1, 62 [179] (emphasis added). Their Honours' reliance on the interaction of ss 4, 5 and 6 in the *NZBORA* will only go so far, given that McGrath J supports the UK/NZ methodology and the joint judges explicitly reject this methodology: *HCA Momcilovic* (2011) 245 CLR 1, 220 [576] n 953.

151 *HCA Momcilovic* (2011) 245 CLR 1, 217 [566].

## 2 Section 7(2)

French CJ and Crennan and Kiefel JJ approach s 7(2) through statutory interpretation, not constitutional analysis. The characterisation of s 7(2) in both judgments is linked to the characterisation of s 32(1) being part of the ordinary interpretative process. The failure to conceive of s 32(1) as a remedy results in ‘one of the key provisions in the *Charter*’<sup>152</sup> having little to no consequence on rights protection.

French CJ refers to the Second Reading Speech in determining the operation of s 7(2). His Honour notes the Speech refers to the non-absoluteness of rights, the factors to be balanced, that s 7(2) will ‘assist courts and government in deciding when a limitation arising under the law is reasonable and demonstrably justified’, and that where a limit is justified ‘action taken in accordance with that limitation will not be prohibited under the charter, and is not incompatible with the right’.<sup>153</sup> French CJ then concludes that ‘[t]he Second Reading Speech did not spell out the context in which courts would be called on to make such decisions’.<sup>154</sup>

This conclusion must be challenged. First, the Speech states that s 7(2) will ‘assist courts’ in assessing limitations, indicating judicial involvement. Secondly, that justified limitations ‘will not be prohibited’ suggests the enforcement mechanisms will not apply to justified limitations; this, in turn, suggests that references to ‘compatible with human rights’ in ss 32(1) and 38(1) include the limitations analysis. Thirdly, the characterisation of justified limitations as ‘not incompatible with the right’ in the Speech explicitly confirms the role of s 7(2) in assessing compatibility.

French CJ only addresses the third argument. Although the link between s 7(2) and compatibility in the Speech is conceded, his Honour concludes ‘the same linkage was not made in the Explanatory Memorandum and ... is not made in the text of the *Charter*. Ministerial words in the Second Reading Speech cannot supply that statutory connection’.<sup>155</sup> The *Charter* does not define ‘compatible with human rights’, but its textual usage and the structure of the *Charter* supplies the meaning. Regarding structure, Evans and Evans note that ‘the [s 7(2)] limitation provision is in Pt 2 ... and forms part of the specification of the human rights that

152 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 7.

153 *HCA Momcilovic* (2011) 245 CLR 1, 40 [24] (citations omitted) (emphasis added), quoting Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls, Attorney-General).

154 *HCA Momcilovic* (2011) 245 CLR 1, 40 [24] (emphasis added).

155 *Ibid* 43 [31].

are protected by Pt 2,<sup>156</sup> such that a provision imposing a justified limitation is ‘compatible with rights’.<sup>157</sup>

Regarding text, ‘compatibility with rights’ is used in s 28 statements of compatibility. If ‘compatibility with human rights’ in s 28 referred to the rights without reference to s 7(2), statements of *incompatibility* would be required for proposed laws that technically violate rights but are patently reasonable and demonstrably justifiable.<sup>158</sup> This is not the routine practice with s 28 statements.<sup>159</sup> If s 28 contemplates a role for s 7(2), why wouldn’t s 32(1)?<sup>160</sup> A similar argument applies to s 30 reports by the Scrutiny of Acts and Regulations Committee, s 31 overrides, and s 38 obligations on public authorities.<sup>161</sup>

Moreover, the Explanatory Memorandum links s 7(2) with ‘compatibility with rights’. It notes that ‘[t]he operation of ... [s 7(2)] envisages a balancing exercise between Parliament’s desire to protect and promote human rights and the need

156 Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 100 [3.43].

157 Ibid. French CJ seems to make a similar mistake to the VCA. The VCA relies on the dissent of Elias CJ in *Hansen* to bolster its conclusion that s 7(2) analysis comes after s 32(1) ordinary interpretation. In considering the *NZBORA* methodology, Elias CJ opines that to apply the s 5 limitation before applying the s 6 interpretation ‘distorts the interpretative obligation under s 6 from preference for a meaning consistent with the rights and freedoms in Part 2 to one of preference for consistency with the rights as limited by a s 5 justification’: *Hansen* [2007] 3 NZLR 1, 9 [6], quoted in *VCA Momcilovic* (2010) 25 VR 436, 466 [108]. Elias CJ did ‘not think that approach conforms to the purpose, structure and meaning of the ... [NZBORA] as a whole’: *Hansen* [2007] 3 NZLR 1, 9 [6], quoted in *VCA Momcilovic* (2010) 25 VR 436, 466 [108]. Elias CJ’s view was dependant on the *structural* fact that the limitation and interpretation provisions are contained in pt 1 of the *NZBORA*, whereas the rights are contained in pt 2: Evans and Evans, *Australian Bills of Rights*, above n 157, 100 [3.43]. By contrast, Evans and Evans highlight that the rights and limitations provision under the *Charter* are *structurally* contained in pt 2, with the interpretation provision being in pt 3: at 100 [3.43]. Based on a structural analysis, s 7(2) must be part of the *initial* inquiry about whether a provision is ‘compatible with human rights’, with s 32(1) analysis occurring *after* an unjustified limitation has been identified. For an analysis of the different impacts on the judicial interpretative provision flowing from the majority and the dissenting judgments in *Hansen*, see Geiringer, ‘The Principle of Legality’, above n 16, 92.

158 Indeed, the centrality of identifying and justifying limits was highlighted in the Second Reading Speech: ‘The charter will make sure that there is proper debate about whether proposed measures strike the right balance between the rights of Victorians and what limits can be justified in a free and democratic society’: Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290 (Rob Hulls, Attorney-General).

159 Victorian Government, Submission No 324 to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006*, 2011, 13–16 [39]–[51], appendix A, especially 14 [42], 15 [46]. Moreover, s 28(4) provides that a statement of incompatibility is not binding on any court. The Explanatory Memorandum notes that s 28(4) ‘makes clear that the Supreme Court has an *independent* role in determining questions ... with respect to the interpretation of statutory provisions, including provisions for which a statement of compatibility has been made’: Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 21 (emphasis added). Linking statutory interpretation with statements of compatibility bolsters the argument that ‘compatibility for human rights’ means the same thing under ss 28 and 32(1).

160 After all, one rule of statutory interpretation is ‘that where a word is used consistently in legislation it should be given the same meaning consistently’: Pearce and Geddes, above n 108, 119 [4.6]. Pearce and Geddes quote from Hodges J in *Craig, Williamson Pty Ltd v Barrowcliff* [1915] VLR 450, 452: ‘I think it is a fundamental rule of construction that any document should be construed as far as possible so as to give the same meaning to the same words wherever those words occur in that document, and that that applies especially to an Act of Parliament’.

161 See below nn 208–9, 213–16 and accompanying text.

to limit human rights in some circumstances'.<sup>162</sup> This is explicit parliamentary intention that limiting rights was *equally* as necessary as protecting and promoting rights. This suggests that 'compatibility with human rights' encapsulates the three concepts of protecting, promoting and justifiably limiting rights.<sup>163</sup> The Explanatory Memorandum also acknowledges that s 7(2) is modelled on s 5 of the *NZBORA*, which envisages a role for limitations in assessing interpretation consistent with the guaranteed rights.<sup>164</sup>

French CJ then accepts the Human Rights Law Centre's submission that the Canadian Supreme Court 'expressly declined to consider s 1 of the *Canadian Charter* when interpreting a reverse onus provision. It applied s 1 only when considering whether the impugned law should be upheld'.<sup>165</sup> Accordingly, proportionality was said to not be an interpretative function.<sup>166</sup> This is not disputed, but does not further the argument. First, that s 7(2) is not part of the interpretive function is of no consequence — as discussed above,<sup>167</sup> neither s 1 nor s 7(2) are *meant* to influence interpretation; rather, they assess justification after an initial ordinary interpretation. Secondly, as discussed above, the analysis ignores the fact that *remedial* interpretation is available where a limitation is not justified under the *Canadian Charter*. Just because the s 1 or s 7(2) proportionality assessment is *not* an interpretative function does *not* preclude interpretation as a remedy — an initial interpretation can be supplemented by remedial interpretation under statutory and constitutional instruments.<sup>168</sup> French CJ's argument depends on the *contested* assumption that s 32(1) is a rule of ordinary interpretation and no regard being paid to *remedial* interpretation under the *Canadian Charter*.

Excluding s 7(2) from the concept of 'compatibility of rights' by relying on a contested assumption then bolsters the arguments in favour of that very assumption. French CJ concludes:

The logical structure of s 7(2) is such that it cannot be *incorporated* into the content of the rights and freedoms set out in the *Charter*. The compatibility which is to be sought in applying s 32(1) is compatibility 'with human rights'. Section 7(2) cannot *inform the interpretive process* which s 32(1) mandates. The question whether a relevant human right is subject to a limit which answers the criteria in s 7(2) can only arise if the statutory provision under consideration imposes a limit on its enjoyment.

162 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 9.

163 Indeed, this conception creates the 'missing link' between s 7(2) and compatibility.

164 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 9.

165 *HCA Momcilovic* (2011) 245 CLR 1, 43 [33]. For a critique of the *VCA Momcilovic* reasoning, see above n 46.

166 *Ibid* 43–4 [34].

167 See discussion under the heading 'Constitutional Instruments' above.

168 As well as invalidation under the *Canadian Charter* and the making of a declaration under the *Charter*.

Whether it does so or not will only be determined *after the interpretive exercise is completed*.<sup>169</sup>

This is open to critique. First, the UK/NZ Method does not seek to ‘incorporate’ s 7(2) into the content of the rights — that is what qualifications do, not limitations. With qualifications, the scope of the right is altered (that is, reduced) to the extent of the qualification, such that if legislation falls within the qualification, no violation is found.<sup>170</sup> With limitations, the full scope of the right is compared with legislation to assess whether a violation occurs. Section 7(2) assessment may then *excuse* that violation, but it does *not alter* the scope of the rights; justification excuses the limitation of the fully-constituted right.<sup>171</sup>

Secondly, s 7(2) is not intended to ‘inform the interpretative process’, whether s 32(1) is characterised as ordinary or remedial, and s 7(2) is only meant to operate ‘after the interpretative exercise is completed’. Both of these arguments simply raise the question — is s 32(1) ordinary or remedial interpretation? Both the VCA Method and the UK/NZ Method recognise that s 7(2) is not applied until the challenged legislation is interpreted, compared with the rights, and the former encroaches the latter; but they differ on whether s 32(1) is part of the initial ordinary interpretation or the later remedial interpretation. French CJ’s analysis does not necessarily favour one over the other.

Crennan and Kiefel JJ similarly approach s 7(2) as an ordinary interpretative task. Their Honours correctly acknowledge that rights are not absolute, that rights are read as subject to justifiable limitations, that s 7(2) has no influence on the interpretation of a statutory provision, and that if a limit on a right is justified under s 7(2) there is compatibility between the provision and the *Charter*.<sup>172</sup> However, Crennan and Kiefel JJ held that the outcomes of s 7(2) analysis have

169 *HCA Momcilovic* (2011) 245 CLR 1, 44 [35] (emphasis added). On the same logic, his Honour concludes that s 7(2) will be excluded from s 36(2) when considering whether a provision can be interpreted consistently with a right, but may be relevant to the Court’s decision whether to exercise the discretion to make a declaration: at 44 [36].

170 For example, under *ICCPR* art 9 and *ECHR* art 5, every person has the right to liberty and security of the person, and to be free from arbitrary arrest — but this right is qualified in specified circumstances, such as non-arbitrary arrest, lawful detention after conviction by a competent court, or the detention of a minor for the lawful purpose of educational supervision: see *ICCPR* arts 8–10, 14; *ECHR* art 5. Qualifications impact on the definition of the right by reducing its scope — that is, a non-arbitrary arrest does not come within the definition of the right and does not constitute a violation of the right. See also Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Juta, 5<sup>th</sup> ed, 2005) 186–7.

171 Crennan and Kiefel JJ make a similar mistake. Their Honours state that s 7(2) has ‘an interpretive effect directed to the content of the *Charter* right rather than the statutory provision in question, which remains unchanged’ and that a justified limitation is compatible ‘because the *Charter* allows the right to be viewed as reduced in a case where the limitation is justified’; concluding ‘that the *Charter* right has been rendered compatible with the statutory provision following this adjustment’: *HCA Momcilovic* (2011) 245 CLR 1, 219 [571]–[572]. The first difficulty is that limitations do *not* impact on the content of the right; rather, they excuse an encroachment on a fully-constituted right, as noted. The second difficulty is the direction of the adjustment. With rights being a minimum guarantee, the adjustment is usually made to the statutory provision to render it compatible with the rights.

172 *HCA Momcilovic* (2011) 245 CLR 1, 219 [571]–[572]. See further criticism of their Honours’ analysis of s 7(2) in above n 171.

no bearing on ss 32(1) and 36(2) — whether a limit is justified or not, ‘nothing follows from such a conclusion’.<sup>173</sup> Their Honours continue:

Despite the word ‘compatible’ appearing in s 32(1) ... it cannot be concluded that the inquiry and conclusion reached in s 7(2) informs the process to be undertaken by the courts under s 32(1). If some link between ss 7(2) and 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. The notion of incompatibility inherent in s 32(1) can only refer to an inconsistency found by a process of interpretation and no more. And so far as concerns the Supreme Court’s role under s 36(2), its terms confirm that the concern of the Court is only with the question of whether a provision cannot be ‘interpreted consistently’ with a human right. There is no suggestion in s 36(2) that the test provided by s 7(2) is to play any part in the making of a declaration. ...

It is not possible to read s 7(2) so that it operates with s 32(1) or s 36(2). It is not necessary to determine whether it has any other consequences, although it is difficult to discern that it might. It might operate as a statement of principle directed to the legislature ...<sup>174</sup>

As with French CJ, their Honours’ conclusions flow from their characterisation of compatibility as excluding limitations justification, and s 32(1) as ordinary interpretation. Regarding compatibility, their Honours fail to address structural and textual arguments in favour of compatibility including the justification assessment under s 7(2).<sup>175</sup> Moreover, the conclusion that s 32(1) incompatibility arises only via interpretation depends on the conclusion that s 32(1) sanctions only ordinary interpretative processes — a contested characterisation at the crux of the dispute. Further, the use of ‘consistently’ rather than ‘compatibly’ in s 36(2) is not explained in the extrinsic materials.<sup>176</sup> However, if the textual difference is used to deny a link between ss 7(2) and 36(2), the same argument can deny a link between ss 32(1) and 36(2).

Regarding s 32(1), it is correct that s 7(2) does not provide a method for ascertaining the meaning and effect of a provision, but how is this problematic? As Crennan and Kiefel JJ acknowledge, s 7(2) is not intended to impact on interpretation; rather, it is relevant to justification. The need to find an interpretative role for

173 Ibid 219 [573].

174 Ibid 219–20 [574]–[575].

175 See the critique of French CJ above, and in Debeljak, ‘Who is Sovereign Now?’, above, n 15.

176 Indeed, the *HRCC Report* uses ‘compatible’ rather than ‘consistently’ in Recommendation 17, and uses both terms in Recommendation 19: *HRCC Report*, above n 13, 83, 88. See also Simon Evans and Carolyn Evans, ‘Legal Redress under the Victorian *Charter of Human Rights and Responsibilities*’ (2006) 17 *Public Law Review* 264, 271; George Williams, ‘The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope’ (2006) 30 *Melbourne University Law Review* 880, 902–3. If this is a drafting oversight, it is causing serious implications to be drawn for s 7(2).

s 7(2) is because of their Honours' *mischaracterisation* of s 32(1). Indeed, the problems identified by their Honours dissolve if s 32(1) is characterised remedially. If s 32(1) is activated *after* a right is limited according to pre-*Charter* interpretative rules and *only if* that limitation is not justified, something does follow — that is, a s 32(1) remedial interpretation follows if it is possible and consistent with statutory purpose. Moreover, the links that were intended to be created between s 7(2), and ss 32(1) and 36(2), would be apparent. Further, compatibility would embody justified limitations, properly reflecting the text and structure of the *Charter*. Furthermore, s 7(2) would have a discernible role to play, which is important given that the Second Reading Speech states that s 7(2) 'will assist *courts* and government in deciding when a limitation ... is ... justified',<sup>177</sup> the Explanatory Memorandum describes it as 'one of the key provisions in the *Charter*',<sup>178</sup> and the general principle that statutory words and sentences are to 'be given some meaning and effect'.<sup>179</sup>

The s 7(2) conclusions of the three judges are coherent and logical insofar as their assumptions are concerned. Internally logical arguments based on weak assumptions fail to convince.

### 3 Method

Crennan and Kiefel JJ reject the UK/NZ Method because it incorrectly requires s 7(2) analysis before s 32(1).<sup>180</sup> Their Honours also reject the VCA Method for two reasons, both linked to s 7(2) analysis occurring before s 36(2).<sup>181</sup> First, s 7(2) cannot be linked to s 36(2) because s 7(2) goes to 'compatibility' whereas s 36(2) goes to 'consistency'.<sup>182</sup> Secondly, to link s 7(2) to s 36(2) may turn s 36(2) applications into 'abstract questions of law', which is beyond judicial power,

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

178 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 7.

179 Pearce and Geddes, above n 108, 49 [2.26].

180 *HCA Momcilovic* (2011) 245 CLR 1, 220 [576]. Their Honours explicitly link this to the approach in *Hansen*: at 220, n 953.

181 In addition to their Honours' concerns, the ordering of the VCA Method poses challenges. The first step of the VCA Method requires an interpreter to '[a]scertain the meaning of the relevant provision' using the 'framework of interpretive rules': *VCA Momcilovic* (2010) 25 VR 436, 445 [31], 464 [103]. This involves the interpreter exploring 'all "possible" interpretations of the provision(s) in question, and adopting that interpretation which least infringes *Charter* rights': at 464 [103]. From a doctrinal perspective, it is impossible to identify an interpretation that 'least infringes' a *Charter* right without: first, considering the scope of the rights and the legislation, and establishing whether the legislation limits a right; and secondly, considering whether the limitation is reasonable and demonstrably justified. That is, answering step 1 includes full consideration of steps 2 and 3 of the VCA Method. How can an interpretation that 'least infringes' a *Charter* right be identified without any discussion of the scope of the rights said to be 'breached' (VCA Method step 2)? Moreover, how can an interpretation that 'least infringes' a *Charter* right be identified without undertaking some form of limitations analysis like s 7(2), particularly the less restrictive legislative means assessment under s 7(2)(e) (VCA Method step 3). The entirety of the VCA methodology is in truth contained in step 1, with steps 2 and 3 becoming superfluous. For a similar analysis regarding the *NZBORA*, see Rishworth, above n 3, 333.

182 *HCA Momcilovic* (2011) 245 CLR 1, 220 [576]. This argument has been critiqued above.

thereby posing constitutional separation of powers problems.<sup>183</sup> Their Honours do *not* substitute a new method.

French CJ is silent about methodology. However, the VCA Method was ‘tentatively’ drawn from the principle of legality characterisation, including the non-role of s 7(2). This may lend implicit support to the VCA Method from French CJ’s judgment. Implicit support for a ‘tentative’ methodology is, however, far from settled legal doctrine.

#### 4 Section 36(2)

French CJ held that s 36(2) declarations do not involve exercises of judicial power, nor are they incidental thereto.<sup>184</sup> Under federal jurisdiction, s 36(2) lies beyond the limits of Commonwealth judicial power.<sup>185</sup> For state courts, however, his Honour held that declarations are *not* an invalid exercise of non-judicial power because s 36(2) does not compromise the institutional integrity of the court.<sup>186</sup> However, French CJ held that s 36(2) declarations made by the Victorian courts cannot be appealed to the HCA under s 73 of the *Constitution*.<sup>187</sup>

Crennan and Kiefel JJ held that, although the s 36(2) declaration power is *not* a judicial power,<sup>188</sup> it is incidental to an exercise of federal judicial power and thereby valid.<sup>189</sup> Significantly for their Honours, the validity of s 36(2) depends on there being no prior role for s 7(2): if the s 7(2) justification ‘process had been required it may well have been said that the Court was being asked to consider an abstract question of law ... which has no legal consequence’.<sup>190</sup>

Considering state courts, Crennan and Kiefel JJ held that the process of reaching a conclusion about inconsistency does not involve functions incompatible with judicial power — ‘[t]he process involves an ordinary interpretive task’.<sup>191</sup> Accordingly, s 36(2) is not an invalid conferral of non-judicial power on the

183 Ibid 224 [590]. Were their Honours to alter their opinion on the operation of s 7(2) in later judgments, there would be implications for the validity of s 36(2): see below n 191 and accompanying text.

184 *HCA Momcilovic* (2011) 245 CLR 1, 64–6 [88]–[91]. In relation to s 36(2) and federal jurisdiction, French CJ further holds that s 36(2) lies beyond the limits of Commonwealth judicial power: at 68–70 [99]–[100].

185 Ibid 68–70 [99]–[100].

186 Ibid 66 [92], 67–8 [95]–[97].

187 Ibid 70 [101]. See generally Bateman and Stellios, above n 3.

188 *HCA Momcilovic* (2011) 245 CLR 1, 222–3 [584]–[587]. Section 36(2) ‘is not directed to the determination of a legal controversy and has no binding effect’, nor could it ‘give rise to any “matter” within the meaning of Ch III of the *Constitution*’: at 222 [584].

189 In undertaking the judicial task of interpreting the *Drugs Act*, the VCA had to identify any inconsistency between that Act and the *Charter*, with the drawing of a conclusion on inconsistency being incidental to judicial power: *HCA Momcilovic* (2011) 245 CLR 1, 223 [589]. ‘This distinguishes such a function from the act of making a declaratory order about a hypothetical matter, which has been observed to be beyond the boundaries of judicial power’: at 223 [589]. As per Bateman and Stellios, this means that ‘s 36 could be validly picked up by s 79 in federal jurisdiction’: Bateman and Stellios, above n 3, 19.

190 *HCA Momcilovic* (2011) 245 CLR 1, 224 [590]. This would be avoided by giving s 32(1) remedial reach.

191 Ibid 227 [600].



state courts.<sup>192</sup> Curiously, their Honours caution against s 36(2) being used in the criminal context because of its ability to undermine a conviction. Their Honours explicitly deny that declarations in criminal contexts impair institutional integrity, but they state that declarations ‘will rarely be appropriate’, and that ‘prudence dictates that a declaration be withheld’, in criminal contexts.<sup>193</sup>

## 5 Avoiding Unconstitutionality?

French CJ’s and Crennan and Kiefel JJ’s narrow interpretations of the key provisions may be justified according to the HCA’s practice of preferring an interpretation that avoids unconstitutionality if such a construction is available.<sup>194</sup> Indeed, as discussed below, Heydon J invalidated the entire *Charter* on the basis of broad interpretations of the key provisions. However, there are two difficulties with this.

First, the purpose of reading down a provision to preserve its constitutionality ‘is to give effect so far as possible to Parliament’s intention’, and this depends on a ‘judicial assessment’ of whether the read-down provision ‘is one that Parliament would have intended if the challenged provisions were to fail’.<sup>195</sup> Provisions expressing the parliamentary intention for validity of statutes by states, such as s 6(1) of the *ILA*,<sup>196</sup> may be applied ‘so long as the ... [read-down provision] has not been changed so as to make it something different from the law enacted by Parliament’.<sup>197</sup> Arguably the narrow constructions their Honours gave the key provisions rendered them something different to that intended and enacted, and were thus not available.<sup>198</sup>

Secondly, in the context of severance, ‘[w]here ... the resulting invalidation is substantial and would strike down key provisions of a comprehensive and integrated legislative measure, the invocation of statutory or constitutional

192 Passing comment on defects in legislation ‘in the course of a permissible exercise of judicial power is “a function properly regarded as incidental to the exercise of the power”’: *ibid*, quoting *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 20 n 68 (‘*Wilson*’). Declarations are not improperly linked to the executive or legislature and the mandatory notification requirements of the provision do not give rise to incompatibility: at 228 [602]–[603].

193 *Ibid* 229 [605].

194 The author wishes to thank an anonymous referee for inspiring this conclusion.

195 George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6<sup>th</sup> ed, 2014) 473 [11.103].

196 *ILA* s 6(1) states:

Every Act shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of the State of Victoria, to the intent that where a provision of an Act, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid provision to the extent to which it is not in excess of that power and the remainder of the Act and the application of that provision to other persons, subject-matters or circumstances shall not be affected.

197 *New South Wales v Commonwealth* (2006) 229 CLR 1, 241 [597] (Kirby J) (‘*Work Choices Case*’), citing *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 339 (Brennan J). See also *Victoria v Commonwealth* (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Pidoto v Victoria* (1943) 68 CLR 87, 108.

198 See Debeljak, ‘Who Is Sovereign Now?’, above n 15.

principles of severance will be inappropriate'.<sup>199</sup> At least for Crennan and Kiefel JJ, one must query reading down s 7(2) so that it has no operation with the key integrated provisions of ss 32(1) and 36(2). Invalidation with severance may be preferred to reading down a provision so that it is of no effect.

## **D Support for the UK/NZ Approach**

The judgments of Gummow J (Hayne J relevantly concurring),<sup>200</sup> Bell J, and Heydon J more closely reflect the UK/NZ Method. The constitutional implications of ss 7(2), 32(1) and 36(2) have a more explicit influence on these judgments, leading to mixed results. Three of the four judges uphold the validity of ss 7(2) and 32(1), with only one upholding s 36(2).

In brief, Gummow J rejects the *VCA Momcilovic* characterisation of s 32(1) and adopts the UK/NZ Method, thereby recognising a role for s 7(2). However, his Honour holds s 36(2) invalid for offending *Kable*, but severable from the *Charter*. Bell J recognises a role for s 7(2), envisages a remedial reach for s 32(1), and essentially adopts the UK/NZ Method. Her Honour holds that s 36(2) is a valid conferral of non-judicial power. Heydon J provides the fourth opinion supporting a role for s 7(2) and a strong remedial reach for s 32(1), which sits within the UK/NZ Method. However, the consequence of broadly characterising these provisions is their invalidation for violating *Kable* — indeed, his Honour invalidates the entire *Charter*.

### **1 Relationship between Sections 7(2) and 32(1)**

All four judges held that 'compatibility with rights' includes an assessment of s 7(2) limitations. Their Honours rely on statutory interpretation of the *Charter*, rather than constitutional principles.

Gummow J notes the structure of the *Charter*, acknowledging that s 7(2) is in pt 2 which 'identifies and defines the human rights', whilst s 32(1) sits in pt 3 'interpretation of laws'; and notes that pt 2 'operate[s] upon the provisions of Pt 3'.<sup>201</sup> His Honour quotes with approval McGrath J:

As between ss 5 [limitations] and 6 [interpretation] it will usually be appropriate for a Court first to consider whether under s 5 there is scope for a justified limitation of the right in issue. The stage is then set for ascertaining if there is scope to read the right, as modified by a justifiable limitation, as consistent with the other enactment.<sup>202</sup>

199 *Work Choices Case* (2006) 229 CLR 1, 241 [598] (Kirby J).

200 *HCA Momcilovic* (2011) 245 CLR 1, 123 [280].

201 *Ibid* 84 [146]. This point is made above under the examination of French CJ, and Crennan and Kiefel JJ.

202 *Hansen* [2007] 3 NZLR 1, 65 [191], quoted in *HCA Momcilovic* (2011) 245 CLR 1, 91 [166]. Gummow J also notes that 'Blanchard J and Tipping J spoke to similar effect': at 91 [166] (citations omitted).

Gummow J held 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)'; with the 'relationship between ss 32(1) and 7(2) ... [being] thus similar to that between ss 5 and 6 of the [NZBORA]'.<sup>203</sup>

Bell J considers the VCA approach to pay 'insufficient regard to the place of s 7 in the scheme of the *Charter*', given its description in the Explanatory Memorandum 'as one of the "key provisions" of the *Charter*'.<sup>204</sup> Her Honour notes that pt 2 commences with s 7(2), and held that '[t]he rights set out in the succeeding sections of Pt 2 are subject to demonstrably justified limits', and that '[t]he *Charter*'s recognition that rights may be reasonably limited and that their exercise may require consideration of the rights of others informs the concept of compatibility with human rights'.<sup>205</sup>

In supporting her conclusions, Bell J highlights that s 7(2) applies to the s 38 obligations on public authorities. One reason that 'compatibility' means 'compatibility with the rights as reasonably limited under s 7(2) is the improbability that the Parliament intended to make unlawful the demonstrably justified acts of public authorities which happen to reasonably limit a *Charter* right'.<sup>206</sup> This implicitly supports s 7(2) applying equally across the pt 3 provisions.<sup>207</sup> Moreover, Bell J rejects the argument that proportionality assessment is inconsistent with interpretative processes. Her Honour held that 'if s 7(2) does not inform the interpretive function, there is no mechanism for the court in interpreting statutory provisions in a rights compatible way to recognise the need for rights to be read together', and such characterisation ignores that some rights contain internal limitations.<sup>208</sup> Finally, Bell J accepts that 's 7(2) is part of, and inseparable from, the process of determining whether a possible interpretation of a statutory provision is compatible with human rights'.<sup>209</sup> This characterisation is consistent with 'the central place of s 7 in the statutory scheme', and recognises 'that rights are not absolute and may need to be balanced against one another'.<sup>210</sup>

203 *HCA Momcilovic* (2011) 245 CLR 1, 92 [168].

204 *Ibid* 247 [678] n 1095.

205 *Ibid* 247–8 [678]. Indeed, her Honour states that her conclusions are 'consistent with the statement in the Preamble that human rights come with responsibilities and must be exercised in a way that respects the human rights of others' and that '[i]t accords with the extrinsic material to which the Court was referred': at 247 [678].

206 *Ibid* 249 [681].

207 This conclusion is supported by the fact that Bell J discusses how s 7(2) interacts with pt 3 divs 1, 3 and 4: *HCA Momcilovic* (2011) 245 CLR 1, 248–50 [679]–[685]. This is in contrast to the judgments of French CJ, and Crennan and Kiefel JJ.

208 *Ibid* 249 [682].

209 *Ibid* 249 [683].

210 *Ibid*. Her Honour quotes the following from Blanchard J:

It would surely be difficult to argue that many, if any, statutes can be read completely consistently with the full breadth of each and every right and freedom in the [NZBORA]. Accordingly, it is only those meanings that *unjustifiably* limit guaranteed rights or freedoms that s 6 requires the Court to discard, if the statutory language so permits.

*Ibid* 250 [683] (emphasis in original), quoting *Hansen* [2007] 3 NZLR 1, 27 [59].

Heydon J held that ‘in assessing what human rights exist *before* the s 32(1) process of interpretation is completed, it is necessary to apply s 7(2) to ss 8–27’ — that is, ‘[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)’.<sup>211</sup> This approach sanctions both s 7(2)’s role in assessing the ‘compatibility of rights’ and the UK/NZ Method.

His Honour justifies this interpretation by focusing on the principal operative provisions of the *Charter* — s 28(1) statements, s 32(1) interpretation and s 38 obligations on public authorities. Were s 7(2) to have no impact on ‘compatibility’, it ‘would have no application to the principal operative provisions of the *Charter*’, which would be ‘a peculiar result’ given that s 7(2) is the first substantive provision in the first substantive Part of the *Charter*, and immediately precedes the list of ‘human rights that Parliament specifically seeks to protect’.<sup>212</sup> Moreover, Heydon J highlights the improbability that the ‘framers of legislation could have intended to insert a provision which has virtually no practical effect’.<sup>213</sup> His Honour also refers to the Explanatory Memorandum<sup>214</sup> and the Second Reading Speech, which explicitly states that ‘[w]here 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’.<sup>215</sup>

Heydon J then invalidates s 7(2) because it impermissibly imposes legislative tasks on judges:<sup>216</sup> ‘s 7(2) confers functions on the Victorian courts which could not be conferred on a court’<sup>217</sup> in the *Kable* sense. Given ‘s 7(2) is part of the process contemplated by s 32(1)’, s 32(1) is invalid, triggering the invalidity of the entire *Charter* because ‘the main operative provisions are connected with both ss 7(2) and 32(1)’.<sup>218</sup>

## 2 Section 32(1)

Gummow J addresses the constitutional issues surrounding s 32(1). Heydon J considers the constitutional issues after the breadth of s 32(1) is established by

211 *HCA Momcilovic* (2011) 245 CLR 1, 165 [415] (emphasis added).

212 *Ibid* 166 [417].

213 *Ibid* 168 [423], quoting *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, 574 (Gummow J).

214 *Ibid* 166–7 [418]. His Honour highlights parts of the Explanatory Memorandum that indicate that rights are not absolute, and the links between s 32(2) and s 7(2) which ‘thus contemplates a linkage between s 32 and s 7(2)’: at 167 [418]. See Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8–9.

215 *HCA Momcilovic* (2011) 245 CLR 1, 167 [419], quoting Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls, Attorney-General) (emphasis added). His Honour also critiques the arguments put forward by the VCA and the Human Rights Law Centre: *HCA Momcilovic* (2011) 245 CLR 1, 167–70 [420]–[426].

216 *HCA Momcilovic* (2011) 245 CLR 1, 172 [431].

217 *Ibid* 174 [436].

218 *Ibid* 175 [439]. See also at 172 [431], 174 [436]. For Heydon J, only a constitutional amendment via s 128 of the *Constitution* would allow an interpretative role to be conferred on the judiciary that violated separation of powers: at 173 [433].

statutory interpretation. Bell J's analysis of s 32(1) and method is intertwined, and is discussed in the 'Method' section below.

In rejecting constitutional invalidation because of separation of powers concerns, Gummow J notes that 'purpose' in s 32(1) refers 'to the legislative "intention" revealed by consideration of the subject and scope of the legislation in accordance with principles of statutory construction and interpretation'.<sup>219</sup> His Honour then refers to activities that '[fall] ... within the constitutional limits of that curial process'<sup>220</sup> described in *Project Blue Sky*, being that '[t]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'; but that '[t]he 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*'.<sup>221</sup> Gummow J concludes '[t]hat reasoning 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)'.<sup>222</sup> His Honour relies on the s 32(1) reference to 'purpose' and *Project Blue Sky* to conclude that s 32(1) does not confer a law-making function on the courts that is repugnant to judicial power.<sup>223</sup>

Exploring these observations, Gummow J acknowledges that various factors 'may require the words of a legislative provision to be read in a way that *does not correspond with the literal or grammatical meaning*' — that is, ordinary meaning may need to give way to an alternative meaning. This rule applies a fortiori to s 32(1). The question is: to what extent can meaning change to achieve rights-compatibility; or what is the *strength* of the remedial force of s 32(1)? Gummow J does not mention *Ghaidan* or other British jurisprudence; however, acknowledgment that a canon of construction may justify a meaning other than the literal or grammatical meaning is *not* substantially different to the British jurisprudence, as discussed above.<sup>224</sup> That s 3(1) 'allowed the court to depart from unambiguous statutory meaning' was the 'most important premise in *Ghaidan*'.<sup>225</sup> Abandoning literal and grammatical meaning echoes Lord Steyn's sentiment that judges could go so far as the 'subordinat[ion of] the niceties of the language of [the] section'.<sup>226</sup> Lord Steyn has criticised the 'excessive concentration on

219 Ibid 92 [170]. Gummow J's expansive reading of 'purpose' is to be preferred to *VCA Momcilovic*. See *VCA Momcilovic* (2010) 25 VR 436, 458 [76]. The VCA's focus on the purpose of the particular statutory provision was open to criticism for, inter alia, eschewing the traditional rules of statutory interpretation, lacking conformity with the text of the *Charter* and its extrinsic materials, and failing to draw a distinction with *Ghaidan*: Debeljak, 'Who is Sovereign Now?', above n 15, 27–8.

220 *HCA Momcilovic* (2011) 245 CLR 1, 92 [170].

221 Ibid (emphasis added) (citations omitted), quoting *Project Blue Sky* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

222 *HCA Momcilovic* (2011) 245 CLR 1, 92 [170].

223 Ibid 92–3 [171].

224 See above nn 126–7 and accompanying text.

225 Kavanagh, *Constitutional Review*, above n 27, 94.

226 *R v A* [2002] 1 AC 45, 68 [45].

linguistic features',<sup>227</sup> and prefers an approach 'concentrating ... in a purposive way on the importance of the ... right'.<sup>228</sup>

Moreover, when referring to the canons of construction, Gummow J cites 'the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights'.<sup>229</sup> Geiringer's reminder of the 'long history of common law courts utilising presumptions of interpretation to promote literal or even *strained meanings in disregard of statutory purpose*'<sup>230</sup> is apt; with Gummow J confirming this should apply 'a fortiori where there is a canon of construction mandated ... by ... s 32(1)'.<sup>231</sup>

Heydon J rejects the VCA's characterisation of s 32(1).<sup>232</sup> After assessing its history,<sup>233</sup> his Honour held that 's 32(1) goes well beyond the common law' — indeed, 'there would be no point in s 32(1) unless its function was to go further than the common law principle of legality ... The function of s 32(1) evidently is to make up for the putative failure of the common law rules'.<sup>234</sup> Heydon J notes that s 32(1) legitimises:

reliance on a much broader kind of 'purposive' interpretation going beyond the traditional search for 'purpose' as revealed in the statutory words. ... The language of s 32(1) thus suggests that there is some gap between 'purpose' and 'interpretative meaning', by which 'purpose' controls 'interpretation' rather than merely being a reflection of it. In effect s 32(1) permits the court to 'disregard the express language of a statute when something not contained in the statute itself, called its "purpose", can be employed to justify the result the court considers proper' ... Ordinary statutory interpretation does not depend on the '*purpose*' of the statute, but its '*scope*'. But s 32(1) calls for a different task ... Section 32(1) commands the courts not to apply statutory provisions but to remake them — *an act of legislation*.<sup>235</sup>

227 *Ghaidan* [2004] 2 AC 557, 573 [41].

228 *Ibid* 573–4 [41]. See also at 577 [49].

229 *HCA Momcilovic* (2011) 245 CLR 1, 92 n 429, citing *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

230 Geiringer, 'The Principle of Legality', above n 16, 63 (emphasis added).

231 *HCA Momcilovic* (2011) 245 CLR 1, 92 [170].

232 *Ibid* 164 [411]. His Honour does, however, warn of the risk in the strategy, 'for if s 32(1) only does that, it would probably not be invalid, but the more it does, the greater the risk to its validity'.

233 Heydon J considers the Second Reading Speech, the Explanatory Memorandum, the *HRCC Report*, the ACT Bill of Rights Consultative Committee, 'Towards an ACT *Human Rights Act*' (Report, May 2003) ('*ACTHRA Report*'), and the original *Human Rights Act 2004* (ACT) equivalent provision and its amendment to bring it into line with the *Charter*: *ibid* 178–81 [445]–[449].

234 *HCA Momcilovic* (2011) 245 CLR 1, 181 [450].

235 *Ibid* 181–2 [450] (emphasis added and in original) (citations omitted), quoting Lon L Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616, 633, 636.

Having accepted a broad reading of s 32(1) — indeed, one that appears to sanction a *Ghaidan*-type analysis<sup>236</sup> — his Honour held it was invalid for impermissibly conferring legislative functions on the judiciary.<sup>237</sup>

Heydon J's conclusion that s 32(1) commands 'an act of legislation' is problematic. Similarly to other judges, his Honour failed to give any weight to 'so far as it is possible to do so'. This phrase of limitation differentiates legitimate acts of judicial interpretation from illegitimate acts of judicial legislation. Had this been recognised, his Honour may not have concluded that s 32(1) sanctions acts of legislation.<sup>238</sup>

### 3 Methodology

Gummow, Bell and Heydon JJ support the UK/NZ methodology vis-à-vis ss 7(2) and 32(1). This flows from their Honours' characterisation of ss 7(2) and 32(1). Although Heydon J's approach sanctions the UK/NZ Method, his Honour invalidated s 7(2) for impermissibly conferring legislative tasks on judges in the *Kable* sense.<sup>239</sup>

Gummow J approves the UK/NZ Method, subject to s 36(2) invalidation. His Honour's structural analysis contemplates s 7(2) analysis before s 32(1). Moreover, Gummow J equates ss 7(2) and 32(1) with ss 5 (limitations) and 6 (interpretation) of the *NZBORA*, and accepts the majority methodology from *Hansen*, which is reflected in the UK/NZ Method.<sup>240</sup> Finally, Gummow J's reasoning on the facts employs the UK/NZ Method.<sup>241</sup>

Bell J had no constitutional problems with the UK/NZ Method. Having held that s 7(2) informs 'compatibility', Bell J then accepts the UK/NZ Method, described in *Charter* language as follows:

If the literal or grammatical meaning of a provision appears to limit a *Charter* right [Rights Question 1], the court must consider whether the

236 Indeed, his Honour suggests that s 32(1) may go further than s 3(1) of the *UKHRA: HCA Momcilovic* (2011) 245 CLR 1, 182–3 [451]–[452].

237 *Ibid* 183–4 [454].

238 Moreover, having castigated others for failing to give meaning to s 7(2), his Honour did the same with a key phrase from s 32(1). Reference is made again to the general principle that statutory words and sentences are to 'be given some meaning and effect': Pearce and Geddes, above n 108, 49 [2.26].

239 *HCA Momcilovic* (2011) 245 CLR 1, 172 [431], 174 [436].

240 Gummow J's references to McGrath, Blanchard and Tipping JJ in *Hansen* encapsulate the New Zealand judges' support for the UK/NZ Method. In the paragraph after that which is cited by Gummow J, McGrath J outlines '[a]n approach that better fits the desirability of addressing s 5 before applying s 6' which is the UK/NZ Method: *Hansen* [2007] 3 NZLR 1, 66 [192]. Moreover, in noting that 'Blanchard J and Tipping J spoke to similar effect' to McGrath J, Gummow J cited sections of their judgments which outline the UK/NZ Method: *HCA Momcilovic* (2011) 245 CLR 1, 91 [166], citing *Hansen* [2007] 3 NZLR 1, 26–8 [57]–[62] (Blanchard J), 36–7 [88]–[92] (Tipping J).

241 Undertaking ordinary statutory interpretation, his Honour concludes that the s 5 'possession' deeming provision cannot apply to the composite 'possession for sale' under s 71AC: *HCA Momcilovic* (2011) 245 CLR 1, 97–9 [190]–[198]. Accordingly, there was no limitation to the presumption of innocence. His Honour then turns to the s 32(1) 'method of interpretation' which 'provides additional support' for the traditional interpretation of the provisions: at 99 [199].

limitation is demonstrably justified by reference to the s 7(2) criteria [Rights Question 2]. ... If the ordinary meaning of the provision would place an unjustified limitation on a human right, the court is required to seek to resolve the apparent conflict between the language of the provision and the mandate of the *Charter* by giving the provision a meaning that is compatible with the human right [*Charter* Enforcement Question 3] if it is possible to do so consistently with the purpose of the provision [*Charter* Enforcement Question 4].<sup>242</sup>

Bell J held that the s 7(2) criteria ‘are readily capable of judicial evaluation’,<sup>243</sup> and that ‘the purpose of the limitation, its nature and extent, and the question of less restrictive means reasonably available to achieve the purpose are matters that commonly will be evident from the legislation’.<sup>244</sup> Her Honour recognises that ‘[p]rovisions enacted before the *Charter* may yield different, human rights compatible, meanings in consequence of s 32(1)’.<sup>245</sup> Her Honour highlights the re-interpretative limit of ‘consistency with purpose’, which ‘directs attention to the intention, objectively ascertained, of the enacting Parliament. The task imposed by s 32(1) is one of interpretation and not of legislation’.<sup>246</sup> Her Honour notes that s 32(1) ‘does not admit of “remedial interpretation” of the type undertaken by the Hong Kong Court of Final Appeal as a means of avoiding *invalidity*’.<sup>247</sup>

Bell J’s comments on ‘remedial interpretation’ must be explored. Her Honour relies on the part of *Lam Kwong Wai* that discusses whether an implied power to make remedial interpretation exists under constitutional law,<sup>248</sup> and the relationship between remedial interpretation and common law principles of interpretation.<sup>249</sup> In relation to modern statutory interpretation, the HKFCA states:

[I]t is generally accepted that the principles of common law interpretation do not allow a court to attribute to a statutory provision a meaning which the language, understood in the light of its context and the statutory purpose, is incapable of bearing. A court may, of course, imply words into the statute, so long as the court in doing so, is giving effect to the legislative intention ... What a court cannot do is to read words into a statute in order to bring about a result which does not accord with the legislative intention properly ascertained.<sup>250</sup>

242 Ibid 250 [684].

243 Ibid, citing *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), 507–8 [596] (Callinan J); *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 553–4 [14] (Gummow J), 597 [168]–[169] (Crennan and Kiefel JJ).

244 *HCA Momcilovic* (2011) 245 CLR 1, 250 [684]. Cf Heydon J: at 170–1 [429], 172 [431], 172–3 [433].

245 Ibid 250 [684].

246 Ibid. Bell J fails to consider the role of ‘so far as it is possible to do so’ in drawing the line between proper judicial interpretation and improper judicial lawmaking, along with other Justices.

247 Ibid, citing *Lam Kwong Wai* (2006) 9 HKCFAR 574, 604–8 [57]–[66] (Mason NPJ) (emphasis added).

248 That is, the entrenched *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (‘*Basic Law*’).

249 The Hong Kong Final Court of Appeal (HKFCA) does not take for granted that a difference exists between remedial interpretation and common law principles of interpretation: *Lam Kwong Wai* (2006) 9 HKCFAR 574, 606 [62] (Mason NPJ).

250 Ibid 606 [63] (Mason NPJ) (citations omitted), citing *R v A* [2002] 1 AC 45, 67–8 [44] (Lord Steyn).



The HKCFA opines that the ‘very strong common law presumption ... of construction in favour of constitutional validity ... is subject to a similar limitation’.<sup>251</sup> The HKCFA acknowledges that s 3(1) of the *UKHRA* and s 6 of the *NZBORA* go further by allowing a rights-compatible interpretation ‘that is *strained* in the sense that it was not an interpretation which the statute was capable of bearing as a matter of ordinary common law interpretation’,<sup>252</sup> but that such interpretations are subject to limitations, including that a rights-compatible interpretation must be ‘*possible*’. Referring to *Sheldrake v DPP*,<sup>253</sup> *Anderson and Bellinger*, the HKCFA describes the limits of ‘possible’.<sup>254</sup> This is the discussion that Bell J cited.

In the discussion immediately following that which is cited, in the context of the entrenched *Basic Law*, the HKCFA ventures that:

[remedial] interpretation involves the well-known techniques of severance, reading in, reading down and striking out. These judicial techniques are employed by the courts of other jurisdictions whose responsibility it is to interpret and pronounce on the *validity* and *compatibility* of legislation which is challenged on the ground that it contravenes entrenched or statute-based human rights ...<sup>255</sup>

For the HKCFA, ‘remedial interpretation’ ‘involves the making of strained interpretations’, and it proffers that ‘[t]he justification for now engaging in remedial interpretation is that it enables the courts, in appropriate cases, to uphold the *validity* of legislation, albeit in an altered form, rather than strike it down’,<sup>256</sup> again referring to the presumption of constitutionality.

It is unclear why her Honour chose to distinguish the Hong Kong jurisprudence, rather than directly tackle the British jurisprudence, which is discussed in *Lam Kwong Wai*. *Ghaidan* has not been expressly ruled out or ruled in. Nor is it clear why her Honour cites discussion of ‘remedial interpretation’ ‘as a means of avoiding *invalidity*’,<sup>257</sup> which is a constitutional issue. Under the *Charter*, the issue is *compatibility* not *invalidity*, and the HKCFA discusses compatibility only in obiter. Nor is the relevance of the decision clear, given that the ratio concerned

251 Ibid 606 [64]. ‘Thus, it has been said that, if the language is not so intractable as to be incapable of being consistent with the presumption, the presumption should prevail’: at 606 [64].

252 Ibid 607 [65] (emphasis added).

253 [2005] 1 AC 264, 303–4 [28] (*‘Sheldrake’*).

254 *Lam Kwong Wai* (2006) 9 HKCFAR 574, 607–8 [66]. The limits of ‘possible’ include ‘an interpretation [that] would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance’: at 608 [66], quoting *Sheldrake* [2005] 1 AC 264, 304 [28] (Lord Bingham).

255 *Lam Kwong Wai* (2006) 9 HKCFAR 574, 609 [71] (emphasis added).

256 Ibid 610 [77] (emphasis added).

257 *HCA Momcilovic* (2011) 245 CLR 1, 250 [684] (emphasis added).

the capacity to invalidate legislation under an entrenched instrument and the presumption of constitutionality.<sup>258</sup>

Bell J has no issue with ‘modern statutory interpretation’ rules that allow words to be implied or read into a provision provided legislative intention is not undermined. However, her Honour does not favour ‘remedial interpretation’ in the sense of ‘strained’ interpretation, but the difficulty is that the HKFCA spoke of two versions of ‘strained’ interpretation. One version results in *invalidity*,<sup>259</sup> and is expressly referred to by Bell J, although the *Charter* does not involve invalidity. Another version goes to *compatibility*.<sup>260</sup> With compatibility, her Honour confronts the same problems as other judges by not acknowledging the brake on judicial legislation imposed by ‘so far as it is possible to do so’. Bell J must clarify.

In any event, the British and Hong Kong jurisprudence may be a distraction. Most of her Honour’s reasoning relies on the *NZBORA*, including the methodology, and her application of the *Charter* to the reverse onus provision is consistent with *Hansen*.<sup>261</sup>

#### 4 Section 36(2)

Gummow and Heydon JJ depart with Bell J on the constitutionality of s 36(2). Gummow J held that s 36(2) was neither a judicial power, nor incidental thereto.<sup>262</sup> His Honour held that s 36(2) declarations do not have dispositive effect, as is apparent under s 36(5),<sup>263</sup> and that to characterise s 36(2) as advisory would result in *Wilson*-style<sup>264</sup> incompatibility.<sup>265</sup> Gummow J concludes that s 36(2) ‘is incompatible with the institutional integrity of the Supreme Court and therefore ... invalid’, as are the related ss 33 and 37.<sup>266</sup> His Honour severs the invalid provisions, with the remainder of the *Charter* being valid.<sup>267</sup>

258 Perhaps it is because statutory and constitutional instruments are not that far apart — as discussed above, each will allow for remedial interpretation up to a point, and then require declarations of incompatibility or invalidity.

259 That is, ‘severance, reading in, reading down and striking out’: *Lam Kwong Wai* (2006) 9 HKCFAR 574, 609 [71].

260 That is, ‘an interpretation which the statute was [not] capable of bearing as a matter of ordinary common law interpretation’, subject to limits including possibility: *ibid* 607 [65].

261 *HCA Momcilovic* (2011) 245 CLR 1, 250 [685]. It must be noted that Bell J did not discuss *Hansen* or *Lambert* when assessing the reverse onus against the *Charter* provisions, other than by referring in her footnotes to parts of *VCA Momcilovic* that did discuss these cases: at 250 n 1108.

262 *HCA Momcilovic* (2011) 245 CLR 1, 96 [184], 96–7 [187].

263 *Ibid* 94–5 [178]–[179]. Section 36(5) prevents a declaration from affecting the validity, operation or enforcement of the provision, and does not create any legal right or civil cause of action.

264 (1996) 189 CLR 1.

265 To allow an advisory characterisation would ‘[attempt] a significant change to the constitutional relationship between the arms of government’: *HCA Momcilovic* (2011) 245 CLR 1, 95–6 [183]. Relevantly, for state courts exercising non-Chapter III judicial power, Gummow J highlights that *Wainohu* (2011) 243 CLR 181 establishes that *Wilson* applies equivalently to state courts: at 96 [183].

266 *Ibid* 97 [188].

267 *Ibid* 97 [189].

Heydon J held that s 36(2) impermissibly conferred non-judicial power on a Chapter III court in violation of separation of powers under *Kable*. His Honour characterised s 36 as ‘merely advisory in character’, which is not a judicial function or incidental thereto.<sup>268</sup> Accordingly, s 36, and the related ss 33 and 37, were invalidated.

By way of contrast, Bell J agrees with French CJ on s 36(2) — that it confers non-judicial power that does not violate *Kable*, but that declarations cannot be appealed to the HCA.<sup>269</sup>

### E *Rationes Decidendi?*

The multiplicity of views on the proper and constitutional operation of the key provisions on rights-compatibility of legislation is complex. On one hand, three VCA judges and French CJ support s 32(1) as a codification of the principle of legality and the VCA Method. Crennan and Kiefel JJ support aspects of this characterisation (s 32(1) as an ordinary rule of statutory construction), but not other aspects (s 7(2)’s role in assessing legislation and the VCA Method).

On the other hand, three individual Supreme Court Justices and four High Court Justices support the essentials of the UK/NZ Method, which includes s 7(2) justifiable limitations within the conception of ‘compatibility with rights’, and recognises s 32(1) as a special rule of remedial interpretation. However, Heydon J found this conception of the *Charter* to be unconstitutional. Moreover, these judgments are less clear on the strength of the remedial reach of s 32(1), generally not explicitly sanctioning *Ghaidan* and seeming more comfortable with the *NZBORA* and *Hansen*. Within this coalition, three High Court Justices found s 36(2) to be unconstitutional.

One certainty emerges: the majority were comfortable aligning the *Charter* with the *NZBORA*, but not the *UKHRA* — indeed, five judges highlight the textual differences between ss 3(1) and 32(1), and the different constitutional settings.<sup>270</sup> Although textual and constitutional differences also exist between the *Charter*/Australia and the *NZBORA*/New Zealand, a closer analysis of the *NZBORA* and its jurisprudence may prove more fruitful in the future, than debates about *Ghaidan*-radicalism versus *Wilkinson*-reasonableness.

## IV VICTORIAN JURISPRUDENCE

Confronted with no clear majority in *HCA Momcilovic*, Victorian superior courts consider *VCA Momcilovic* to not be overruled and, to varying degrees, continue

<sup>268</sup> Ibid 185 [457].

<sup>269</sup> Ibid 241 [661].

<sup>270</sup> See, eg, *ibid* 37–8 [19]–[20], 49–50 [49], 50 [51] (French CJ), 83–4 [146] (Gummow J, Hayne J concurring), 210–11 [544]–[546] (Crennan and Kiefel JJ).

to rely on *VCA Momcilovic*.<sup>271</sup> The reaction of the Victorian superior courts will be analysed, with judgments falling into three categories: first, judgments that follow *VCA Momcilovic* based on French CJ; secondly, a judgment that expands upon the principle of legality characterisation from *VCA Momcilovic*; and thirdly, judgments that suggests s 32(1) reaches beyond a codification of the principle of legality.

## A Judgments Following VCA Momcilovic

In *Slaveski*,<sup>272</sup> Warren CJ, Nettle and Redlich JJA summarised the different approaches in *HCA Momcilovic*, searching for a ratio on s 32(1). Their Honours note that all judges except Heydon J held:

that s 32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision, but in effect requires the court to discern the purpose of the provision ... in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky* ...<sup>273</sup>

Their Honours opine that *HCA Momcilovic* indicated that ‘the effect of s 32(1) is limited’, and cited from French CJ’s opinion that s 32(1) is a codification of the principle of legality.<sup>274</sup> Their Honours summarised French CJ’s judgment into four rules. First, ‘if the words of a statute are clear, the court must give them that meaning’; second, ‘[i]f the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question’; third, ‘[e]xceptionally, a court may depart from grammatical rules to give an *unusual or strained* meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment’; and fourth, ‘[e]ven if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment’.<sup>275</sup>

Finally, their Honours noted the lack of a clear ratio for s 7(2),<sup>276</sup> but held that ‘[i]t is unnecessary to decide whether ... the Court of Appeal is bound to follow its own decision in *Momcilovic* unless satisfied that it is clearly wrong’.<sup>277</sup>

271 For the ACT response to the decision, see *Allatt* [2012] ACAT 67 (2 October 2012).

272 (2012) 34 VR 206, 214–15 [20]–[25], especially 215 [23]–[24]. In this case, ss 7(2) and 32(1) issues arose in interpreting the circumstances in which legal assistance may be provided under s 24(1) of the *Legal Aid Act 1978* (Vic).

273 *Ibid* 214 [20].

274 *Ibid* 215 [23], quoting *HCA Momcilovic* (2011) 245 CLR 1, 50 [51] (French CJ).

275 *Slaveski* (2012) 34 VR 206, 215 [24] (emphasis added), citing *HCA Momcilovic* (2011) 245 CLR 1, 45–50 [40]–[50] (French CJ).

276 *Slaveski* (2012) 34 VR 206, 214–15 [20]–[22].

277 *Ibid* 215 [22].

Examining *Slaveski*, the analysis of *HCA Momcilovic* highlights the difficulty of identifying *any* ratio, let alone statutory construction under *Project Blue Sky* as *the* s 32(1) ratio. Moreover, *Project Blue Sky* allows strained interpretation, similar to *Ghaidan*, which is not adequately explored. Further, it is misleading to discuss s 32(1) in isolation from methodology, which is intimately linked. French CJ implicitly sanctioned the VCA Method, giving s 32(1) no remedial reach. However, the VCA Method was rejected by all other judges. Crennan and Kiefel JJ rejected it without suggesting a replacement method, whilst Gummow (Hayne J concurring), Bell and Heydon JJ all essentially approved of the UK/NZ Method, which gives s 32(1) remedial reach. Finally, and relatedly, the disparate views on the interconnecting provisions must be accounted for. To promote French CJ's characterisation as representative of the HCA ignores the significant differences in opinion amongst the judges on ss 7(2) and 36(2), as does seeking to identify a ratio given such disparity.

In *Noone*,<sup>278</sup> Warren CJ and Cavanough AJA presented a fuller picture of the divisions in *HCA Momcilovic* on s 7(2), identifying 'a 4:3 majority in the High Court that s 7(2) informs the s 32(1) interpretative task'.<sup>279</sup> However, their Honours opined that because Hayne and Heydon JJ dissented on the final orders, their judgments 'could not form part of the ratio of *Momcilovic* and hence there is no ratio on this point in the High Court'.<sup>280</sup>

In contrast to *Slaveski*, Warren CJ and Cavanough AJA explore whether the VCA is bound to follow its decision in *VCA Momcilovic*. Their Honours refer to *Green v The Queen*, where Heydon J 'discussed the principle that an intermediate appellate court should follow its earlier judgments, unless satisfied that the earlier judgment is clearly wrong'.<sup>281</sup> However, *Green* gave no guidance where there was a non-binding HCA majority opinion against the earlier appellate court, where the HCA overturns the earlier appellate court, and whether it is enough that a majority of the HCA disagrees with the earlier judgment.<sup>282</sup> Their Honours were not required to answer these issues, so took the discussion no further. Similarly, Nettle JA could not discern a majority view on s 7(2) from *HCA Momcilovic*;<sup>283</sup> but in contrast, his Honour preferred to follow the *VCA Momcilovic* 'approach until and unless the High Court determines that it is incorrect'.<sup>284</sup>

Given that the s 7(2) issue is an essential aspect of the correct methodology, and that the methodology dictates whether s 32(1) is part of ordinary or remedial

278 *Noone* [2012] VSCA 91 (11 May 2012). In this case, the VCA considered the interaction between the misleading and deceptive conduct provisions in the *Fair Trading Act 1999* (Vic) and freedom of expression under s 15 of the *Charter*.

279 *Noone* [2012] VSCA 91 (11 May 2012) [28].

280 *Ibid* [29] (citations omitted).

281 *Ibid* [30], citing *Green v The Queen* (2011) 244 CLR 462, 490–2 [83]–[87] (Heydon J) ('*Green*').

282 *Noone* [2012] VSCA 91 (11 May 2012) [30]. See also *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [214] (Tate JA) ('*Taha*').

283 *Noone* [2012] VSCA 91 (11 May 2012) [140]–[142].

284 *Ibid* [142], citing *Green* (2011) 244 CLR 462, 490–2 [82]–[87] (Heydon J). *WBM* does not take matters much further: *WBM* (2012) 230 A Crim R 322.

interpretation, determining the proper operation of s 7(2) is vital. This issue must be resolved as a matter of urgency.

## **B Section 32 as the Principle of Legality**

In *PJB v Melbourne Health*,<sup>285</sup> assuming that the *VCA Momcilovic* decision was correct, Bell J explored the meaning of the principle of legality. This analysis has implications where interpretative choices are available, and for the interactions of rights and limitations. Having traced the history of the principle across British and Australian jurisprudence, his Honour summarises its content:

the principle of legality is a strong presumption that legislative provisions are not intended to override or interfere with fundamental common law rights and freedoms and basic human rights. The presumption is displaced only by express language or necessary implication indicating unambiguously and unmistakably that the legislation was intended to have this effect. The application of the presumption is not triggered by ambiguity in the meaning of the statutory language ...

Applying this principle to legislation which *unmistakably intends some interference* to be authorised but the scope of the permitted interference is in issue, it is first necessary to identify the right or freedom which is said to be infringed and consider the importance of the interests which it protects in the particular circumstances. Then it is necessary to identify the nature and extent of the interference by, and the purposes of, the statutory provisions in question. If the interference complained of goes beyond what is shown to be reasonably necessary to meet a substantial and pressing need or legitimate aim, the proper interpretation will be that the interference is beyond the scope of the provision. In that regard, the more substantial is the infringement with the right or freedom, the more is required to show that the interference is necessary to meet the aims postulated and the interference should be the least necessary for that purpose.<sup>286</sup>

Bell J highlights that proportionality-type analysis is central to interpretation under the principle of legality.<sup>287</sup> Moreover, the factors for assessing the scope of permitted interferences are similar to the s 7(2) factors. If this is correct, it is unclear how s 7(2) factors play no role in ordinary interpretation — based on s 32(1), the *ILA* and common law principles — as per French CJ, Crennan and Kiefel JJ, and *VCA Momcilovic*. Moreover, it requires a rethink of the VCA Method.

285 [2011] VSC 327 (19 July 2011).

286 Ibid [270]–[271] (emphasis added).

287 See generally Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35 *Melbourne University Law Review* 449, 468–77.

### C Section 32 beyond the Principle of Legality

In *WK*,<sup>288</sup> Nettle JA acknowledges that *HCA Momcilovic* did ‘not yield a single or majority view’<sup>289</sup> on s 32(1). His Honour considers French CJ, and Crennan and Kiefel JJ to have adopted a view similar to *VCA Momcilovic*, but that Gummow, Hayne and Bell JJ ‘took a broader view of s 32, which attributes greater significance and utility to s 7’.<sup>290</sup> His Honour did not have to choose between the two approaches,<sup>291</sup> and did not express a preference. Yet Nettle JA’s judgment is significant for recognising the *impact* s 7(2) characterisation has on s 32(1) characterisation — that is, the *HCA Momcilovic* judgments cannot be reduced to one ratio based on one provision.

In *Taha*,<sup>292</sup> Tate JA refers to and cites from French CJ’s judgment, and then states that ‘the proposition that s 32 applies to the interpretation of statutes in the same manner as the principle of legality but with a broader range of rights in its field of application should *not* be read as implying that s 32 is no more than a “codification” of the principle of legality’.<sup>293</sup> Her Honour notes that ‘this would be to misread the reasoning of the High Court’, and ‘to overlook the . . . observation[s] made by Gummow J (with whom Hayne J relevantly agreed)’,<sup>294</sup> citing the above-quoted passage in which Gummow J discusses legislative intention, *Project Blue Sky*, and departures from the literal or grammatical meaning.<sup>295</sup> Tate JA concluded that, although six members of the HCA decided that s 32(1) was not analogous to s 3(1) of the *UKHRA*, and that the statutory construction techniques of *Project Blue Sky* are favoured:

[n]evertheless, there was recognition that compliance with a rule of interpretation, mandated by the Legislature, that directs that a construction be favoured that is compatible with human rights, might more *stringently* require that words be read in a manner ‘that does not correspond with literal or grammatical meaning’ than would be demanded, or countenanced, by the common law principle of legality.<sup>296</sup>

288 *WK v The Queen* (2011) 33 VR 516 (*‘WK’*).

289 *Ibid* 530 [55].

290 *Ibid*. His Honour noted that Heydon J concluded that s 32(1) was invalid. Maxwell P’s judgment was limited to a comment that s 32(1) does not sanction legislation, as opposed to interpretation, and cites *VCA Momcilovic* (his prior judgment), which ‘was emphatically confirmed by six members of the High Court in the subsequent decision on the appeal in that case’: at 524 [28]. Maxwell P’s comments do not take matters further because his discussion does not cast light on whether s 32(1) is ordinary or remedial interpretation, and the line that judicial interpretation improperly crosses into judicial legislation.

291 *Ibid* 531 [59]. This is because ‘[o]n balance, however, I have concluded that the result in this case is the same under either approach to s 32 of the *Charter*’.

292 [2013] VSCA 37 (4 March 2013). Nettle JA did not stray from the *VCA Momcilovic* and French CJ characterisation of s 32(1): at [24]–[27]. Osborn JA did not address the *Charter* directly.

293 *Ibid* [189] (emphasis added).

294 *Ibid*.

295 See above nn 222–3 and accompanying text.

296 *Taha* [2013] VSCA 37 (4 March 2013) [190] (emphasis added) (citations omitted).

Tate JA did not need to take the matter further because it was ‘sufficient to treat s 32 ... as *at least* reflecting the common law principle of legality’.<sup>297</sup>

Such nuanced observations concerning the *Charter* are welcome. Deeper analysis of the decisions of Bell and Heydon JJ may take Victorian courts even further from the principle of legality.

## D Assessment

The reliance by Victorian judges on the ‘tentative views’ in *VCA Momcilovic* as confirmed by French CJ is understandable given the conflicting multiplicity of views of the HCA, but it is lamentable. The Victorian superior court’s response to *HCA Momcilovic* fails to acknowledge the significant differences in reasoning between the different judgments, and the differing implications for key provisions and their interaction with other key provisions that flows from the different reasoning. Fortunately, Nettle and Tate JJA have recognised the distinctions of opinion on s 32(1), and numerous judges recognise the difficulties in resolving the operation of s 7(2).

## V CONCLUSION

The issues before the VCA and its reasoning differed from the HCA — the former focused on the meaning of key provisions based on the intention of the *Charter*-enacting Parliament, with the latter additionally focussing on the constitutionality of the provisions in possible violation of traditional constitutional relationships and the implied separation of judicial powers under the *Constitution*. However, both decisions highlight broader tensions between fundamental underpinnings within our constitutional settlements.

In order to avoid perceived judicial acts of legislation, *VCA Momcilovic* emasculated the reach of s 32(1) such that it merely codifies the principle of legality. This not only denies Parliament’s capacity to design rights legislation beyond rubber-stamping judge-made common law, it arguably was an act of judicial activism by handing back power that Parliament intended the judiciary to have — a blow to parliamentary sovereignty that the *Charter* was designed to protect.<sup>298</sup>

The decision in *HCA Momcilovic* also challenges democratic ideals. A democratically-sanctioned attempt to protect rights has been at best undermined, and at worst invalidated, by a mixture of judicially-developed constitutional relationships and judicially-sanctioned implications in our *Constitution*. Regarding the latter, the judicial development of the implied separation of judicial powers is a welcome bulwark against executive and parliamentary incursions on rights

<sup>297</sup> Ibid [191] (emphasis added). See also at [195].

<sup>298</sup> See generally, Debeljak, ‘Who Is Sovereign Now?’, above n 15.



within the largely rights-unfriendly *Constitution*.<sup>299</sup> However, its legitimacy must be questioned when a back-door, judicially-sanctioned rights principle invalidates or emasculates a front-door, democratically-sanctioned rights instrument.

This article has promoted the UK/NZ Method and critiqued the VCA Method, both in terms of historical, contextual, textual, structural, and policy arguments, as well as in relation to parliamentary intention, preserving parliamentary sovereignty, and human rights doctrine. Without any further test cases, there is scope for accepting Heydon J as a fourth judgment in favour of the UK/NZ Method, providing a majority in favour of this model. Unlike the VCA, the HCA had the benefit of full argument on these matters, and is thereby a more legitimate judgment to reference.

299 There are a handful of express rights in the *Constitution*: the acquisition of property on just terms (s 51(xxxi)); the right to trial on indictment by jury (s 80); the freedom of religion (s 116); and the right to be free from discrimination on the basis of interstate residence (s 117). There are also two implied limits on the power of the Parliament and executive: the implied separation of judicial power from the executive and Parliament (*Boilermakers' Case* (1956) 94 CLR 254) and the implied freedom of political communication (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520).