After Momcilovic: The State of Play
1. Background

- Traffickable quantity of drug of dependence (methylamphetamine) found in apartment owned and occupied by defendant and partner
- Prosecution against defendant in Victorian County Court for trafficking contrary to s 71AC of the Drugs, Poisons and Controlled Substances Act 1981, which prohibits “traffick[ing]” in a drug of dependence”, where possession of traffickable quantity “prima facie evidence of trafficking”
- Defendant’s move to Queensland meant that prosecution was in federal diversity jurisdiction, and thus relevant Victorian provisions “picked up” by s39(2) of the Judiciary Act 1903 (Cth)
- Question as to application/effect of s5 of the Drugs Act, providing that person deemed in possession of drugs in premises under their control unless “person satisfies court to the contrary”
2. Findings under Drugs Act

- Actual possession must be proved for purposes of s71AC – i.e. s 5 not engaged in the context of the word “possession” in s71AC

- The directions to the jury did not make this clear, and thus there was a miscarriage of justice; the conviction should be set aside, and new trial ordered
3. The Drugs Act & s 109 of the Constitution

- 6 Justices (Hayne J, dissenting) – no relevant inconsistency (either direct or indirect) between s 71AC of the Drugs Act and s302.4 of Criminal Code (Cth), and relevant adjectival provisions

- A retreat from, or pragmatic application of, Dickson?
- Differential treatment of differences in elements of offence, trial and sentencing regimes
- Pragmatic concern for federalism values – i.e. differences between federal interest in Commonwealth property and general criminal law offences?, or
- Deference to clear efforts at Commonwealth law reform, as opposed to mere statements of Commonwealth intention or well-established patterns of co-operation between Commonwealth and states - see e.g. Crennan & Kiefel JJ at [653]-[655]
4. Charter Rights & Statutory Interpretation

- 3 Justices (French CJ at [51], Crennan & Kiefel JJ at [565]) – s32 confirms the traditional CL approach/principle of legality, but in respect of a broader range of rights.

- 3 Justices (Gummow & Hayne JJ at [170], Bell J at [684]) – s32 permits a somewhat broader approach to reading down, but only within the limits of “interpretation” – i.e. existing purposive approaches to interpretation, which take account of context, structure and subject-matter (see e.g., *Project Blue Sky v Australian Broadcasting Authority* (1988) 194 CLR 355).
4. Charter Rights & Statutory Interpretation

- 1 Justice (Heydon J, dissenting at [442], [447]-[454]) – s32 permits remedial construction in mode of *Ghaidan v Godin-Mendoza*, [2004] 2 AC 557, but to that extent also inconsistent with Chapter III of the Constitution, and thus invalid – i.e. only strictly textualist approach to interpretation valid

- Cannot be relied on in order to adopt such a construction, given that court cannot accept dissenting “reasoning which would show the decision itself to be wrong”: see *Harper v National Coal Board* [1974] 1 QB 614 per Denning LJ; and more generally, *Federation Insurance Ltd v Watson* (1987) 163 CLR 303
5. The Reasonableness of Statutory Limits on Charter Rights

- 4 Justices (French CJ, Gummow & Hayne, Bell J) – it is open to Victorian courts to consider s7 in the application of the Charter

- Gummow & Hayne JJ at [166]-[168], Bell J at [676] – the application of s7 precedes the question of interpretation under s32 – compare *R v Hansen* [2007] 3 NZLR 1

- French CJ at [36] – s7 applies only where a court determines that is not possible to each an interpretation compatible with human rights (i.e. after s32 is applied); and does not constrain Victorian court’s jurisdiction under s 36, but may inform the exercise of discretion thereunder
  
  – i.e. in practical terms, should be considered by Victorian courts after s32, but before reliance on s36 of the Charter
5. The Reasonableness of Statutory Limits on Charter Rights

- 3 Justices (Crennan & Kiefel JJ at [576], Heydon J at, dissenting in the relevant respect) – questions of limitation under s7 are not proper questions for the courts
- Crennan & Kiefel JJ at [575] – s7 thus only applies outside of the context of judicial review, e.g. (in my suggestion) in the context of obligations on members of parliament under s28
- Heydon J at [408]-[439]– s 7 applies as part of the process of interpretation under s32 (compare Gummow, Hayne & Bell JJ), and is integral thereof, but is an inherently non-judicial exercise, and therefore undermines the validity of the entire scheme of interpretation under the Charter
6. Charter “Declarations of Inconsistent Interpretation” & the Constitution

- Chapter III prevents the making of such “declarations” by courts exercising federal jurisdiction.
- 7 Justices – the making of such a “declaration” is not an exercise of judicial power within the meaning of Chapter III of the Constitution.
- has no direct or immediate effect on rights or liabilities of parties.
- obligation on Attorney-General to bring “declaration” to the attention of parliament does not imply necessary legal effect.
- 5 Justices (Crennan & Kiefel JJ, dissenting) – the making of such a declaration is not sufficiently closely tied to the question of interpretation under s32 to be incidental to the exercise of Commonwealth judicial power.
6. Charter “Declarations of Inconsistent Interpretation” & the Constitution

- 4 Justices (Gummow, Hayne & Heydon JJ, dissenting) - state courts may still issue such remedies in the exercise of non-federal jurisdiction, consistent with Chapter III and the principle in Kable – i.e. the power to issue such remedies does not undermine the institutional integrity of state courts as courts capable of exercising federal jurisdiction

- French CJ & Bell J at [96]– simply a manifestation of “the constitutional limitations upon the court’s role and the fact that it is parliament’s responsibility ultimately to determine whether the laws it enacts will be consistent or inconsistent with human rights”

- Crennan & Kiefel JJ at [601]-[605]— s36 does not involve any co-option of the reputation of the judiciary in order to to “cloak” the exercise of executive or legislative power (compare Mistretta); and does not raise any immediate concern about bringing state court proceedings into disrepute
The HCA, however, does not have jurisdiction to hear an appeal from a decision to issue (or not issue) such a remedy, because it is not a “judgment, decree, order or sentence” within the meaning of s73 of the Constitution.
7. Comparative Law and the Charter

- Charter (s32(2)) simply confirms general interpretive approach, according to which the HCA looks to relevant sources of international and foreign law as sources of guidance/persuasive authority in developing the CL/interpreting statutes (see e.g. French CJ at [19])

- Constitutional differences, however, may prevent the borrowing of/reliance on certain foreign lines of authority – e.g. broad “remedial” approaches to statutory construction as in Ghaidan (see e.g. French CJ at [19], [47]-[50]; Gummow J at [152]-[160]; and Crennan & Kiefel JJ at [545]-[546])

- Other differences in context must always be considered – e.g. the role of European norms, and systemic pressures, in the development of UK human rights jurisprudence
The Victorian Charter (and ACT HRA) After Momcilovic
1. Victorian Courts & Reading Down

- Likely to apply principle of legality

- Differential application as between classic negative liberties and fairness/equality-type rights

- Differential application based on contingent linguistic choices
2. Victorian Courts & Limitation Analysis (s7 of the Charter)

- Likely to apply the Hansen approach – though not by reason of the force of Heydon J’s dissenting judgment
- Accords with the approach of the plurality of judges who view s7 as within proper ambit of judicial power
- The better approach – consider e.g. s7 of the Racial and Religious Tolerance Act 2001 (Vic) (RRTA), which provides that: “A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons”
- But still clearly an open question – no clear HCA majority position; and the Vic CA in Momcilovic preferred the French CJ approach
3. Victorian Courts & s36 Remedies

- Interesting questions about appeal/override and behaviour of the Vic CA/judicial behaviour more generally
- Recall that Vic CA has final authority over whether to issue such remedies, with appeal to HCA only in cases where plaintiff claims Court erred in failing to rely on s 32
- Potentially different pattern in public law/and or civil cases, as compared to criminal cases
  - 2 Justices (Crennan & Kiefel JJ at [605]) suggest may be important to the validity of such remedies (but contrast Gummow J at [185])
  - Comparable UK remedies have not been applied in criminal cases to date
4. The ACT Supreme Court & Equivalent Declaratory Remedies

- Open question whether ACT Supreme Court jurisdiction under *Human Rights Act 2004 (ACT)* (and in particular s32) is federal jurisdiction, and thus constrained by Chapter III.

- Better view is that only jurisdiction of SC that is “necessary for the administration of justice” in the Territory (see *Australian Capital Territory (Self-Government) Act 1988 (Cth)*, s48A(1)) is federal jurisdiction, and not other jurisdiction (s48A(2)).

5. Comparative Law and the Charter

- New Zealand as guidance?

- International and foreign law relevant to considering the substantive content of protected rights (see e.g. French CJ at [19])
Beyond Momcilovic: Implications for National Human Rights Legislation
1. The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)

- *Momcilovic* as support – i.e. suggests the willingness of the HCA to leave questions about human rights compatibility to parliaments

- But note – s8(5) of 2011 Act does not mention “interpretation”, but rather says: “failure to comply with this section in relation to a Bill that becomes an Act does not affect the validity, operation or enforcement of the Act or any other provision of a law of the Commonwealth”
2. Options for a Justiciable National Rights Charter

- **Out:** Human Rights Act 1998 (UK)

- **In:** New Zealand 1990 or Canada 1960
  - Bill of Rights 1990 (NZ), as interpreted pre-2000/Moonen v Film and Literature Review Board, [2000] 2 NZLR 9
  - Bill of Rights 1960 (Canada) (‘the Diefenbaker’ bill of rights) – removes power of implied repeal, and thus confers both power of reading down, and power to make a declaration of inconsistency

- **In or out?: Constitutional reform**
3. New Zealand v Canada

- Weak v Strong Judicial Review (see e.g. Mark Tushnet, Rosalind Dixon)

- Cautions about validity of the Canadian model
  - Question about consistency with doctrine of parliamentary sovereignty
  - Question about consistency with Chapter III

- Canada not entirely different “constitutional universe” – but relevantly different in that Supreme Court of Canada has “reference jurisdiction” under s53 of the Supreme Court Act, consistent with the Constitution Act, 1867

- 6 Justices who uphold s 32 explicitly note limits under Chapter III
  - see e.g. French CJ at [96] on the effect of s 36: “[b]y exemplifying the proper constitutional limits of the court’s functions it serves to reinforce, rather than impair, the institutional integrity of the court”; Gummow J at [171]: “[O]nce the significance of the reasoning in Project Blue Sky [for s 32] is appreciated... it is apparent that [s 32] does not confer upon the courts a function of a law-making character which for that reason is repugnant to the exercise of judicial power”.