POTENTIAL CONSTITUTIONAL AND STATUTORY LIMITATIONS ON THE SCOPE OF THE INTERPRETATIVE OBLIGATION IMPOSED BY S 32(1) OF THE *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006* (VIC)

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I INTRODUCTION

The purpose of this article is to analyse and identify potential limitations on the scope of the interpretative obligation imposed by s 32(1) of Victoria's *Charter of Human Rights and Responsibilities Act 2006* ('the Charter Act').

As part of the analysis, the scope of the s 32(1) interpretative obligation will be compared with that of the corresponding obligation imposed by s 3(1) of the UK's *Human Rights Act 1998* ('the UK Act'), on which the Charter Act was largely modelled.

Despite an acknowledgement that the Australian Constitution does not require a separation of powers at State level, this article will expound a fundamental proposition concerning Ch III of the Constitution and the power of State courts to interpret State laws. That proposition, on which the analysis will be premised, is that it would be incompatible with Ch III for a State Supreme Court to interpret State laws in a way that involves an exercise of legislative power. It will be argued that if a State Supreme Court gained a power to interpret State laws in that way, the High Court (which cannot exercise legislative power) would lose its constitutionally mandated power to make final and conclusive determinations as to the meaning and validity of State laws.

The analysis will identify a number of significant potential limitations on the scope of the s 32(1) interpretative obligation. If the Ch III incompatibility proposition mentioned above is accepted, those potential limitations arise not just from provisions of the Charter Act, but also from implied Ch III requirements.

It will be suggested that the High Court could possibly develop a principle of 'operational necessity' for use in drawing the line between permissible interpretation and impermissible lawmaking by courts applying interpretative obligation provisions. Such a principle would reflect the recognition that it is sometimes necessary and thus legitimate for courts to create or choose between alternative meanings when interpreting legislation. The analysis will indicate the type of criteria that could potentially be used for determining whether the relevant necessity exists in any particular situation.

Because the proportionality test prescribed by s 7(2) of the Charter Act limits the scope of the s 32(1) interpretative obligation, s 7(2) will be briefly analysed to identify potential limitations arising from that section. It will be contended that the assessments made by courts applying s 7(2) are part of the interpretative process, and that the courts are therefore not permitted to conduct those assessments in a way that involves an exercise of legislative power. Based on that contention, it will be argued that the High Court could take the view that any court applying s 7(2) must go no

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further than to decide whether a political assessment could reasonably be made that the involved legislatively prescribed limit satisfies the s 7(2) proportionality test.

This article will conclude by contending that the interpretative obligation imposed by s 32(1) of the Charter Act is likely to be narrower in scope than the corresponding obligation imposed by s 3(1) of the UK Act.

II THE INTERPRETATIVE OBLIGATIONS IMPOSED BY THE CHARTER ACT AND UK ACT

Section 32(1) of the Charter Act states:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

Section 3(1) of the UK Act states:

> So 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[1] rights.

III THE CASE LAW ON S 3(1) OF THE UK ACT

Section 3(1) of the UK Act has been in operation since 2 October 2000 and there is considerable case law on that section.

The exercise required to be performed by courts in applying s 3(1) 'is still one of interpretation, not legislation'.[2] Notwithstanding that supposed limitation, the House of Lords has interpreted s 3(1) as imposing a 'radical obligation'[3] on the courts 'to *modify* domestic legislation to avoid incompatibility with the Convention rights'.[4] The interpretative obligation imposed by s 3(1) 'is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament',[5] or to change the meaning of legislation by reading down or reading in words.[6] This can be done even where the statutory language is unambiguous,[7] and where a rights-compatible meaning would not be a reasonable interpretation.[8]

The courts in the UK consider it their duty to perform this function of modifying legislation as Parliament has 'decreed' that they must do so.[9]

Lord Bingham of the House of Lords has summarised that court's approach to identifying the circumstances in which a Convention-compliant interpretation is not 'possible':

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1 *Convention for the Protection of Human Rights and Fundamental Freedoms* (also known as the *European Convention on Human Rights*).

2 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [63] (Lord Millett) ('*Ghaidan*').

3 Ibid [44] (Lord Steyn).

4 *Secretary of State for Defence v Al-Skeini & Ors* [2007] UKHL 26, [15] (Lord Bingham of Cornhill) (emphasis added); *Ghaidan* [2004] 2 AC 557, [32] (Lord Nicholls of Birkenhead).

5 *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264, [28] (Lord Bingham of Cornhill) ('*Sheldrake*'); *Ghaidan* [2004] 2 AC 557, [30] (Lord Nicholls of Birkenhead).

6 *Ghaidan* [2004] 2 AC 557, [32] (Lord Nicholls of Birkenhead), [40]–[51] (Lord Steyn).

7 Ibid [29]–[30] (Lord Nicholls of Birkenhead), [44] (Lord Steyn).

8 Ibid [44] (Lord Steyn).

9 Ibid [26], [30] (Lord Nicholls of Birkenhead).

> In explaining why a Convention-compliant interpretation may not be possible, members of … [the House of Lords in *Ghaidan*] used differing expressions: such an interpretation 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, or would violate a cardinal principle of the legislation (paras 33, 49, 110-113, 116).[10]

R v A (No 2),[11] *Sheldrake*[12] and *Secretary of State for the Home Department v MB*[13] indicate the extent to which the House of Lords is prepared to modify legislation by way of interpretation to achieve a Convention-compliant interpretation.

R v A (No 2)[14] involved a 'rape shield' provision[15] which limited the circumstances in which alleged rape victims could be cross-examined about their sexual history. Applying the interpretative obligation under s 3(1) of the UK Act, the House of Lords read the provision 'as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible'.[16] That interpretation had the effect of substantially modifying the legislation to allow for evidence and questioning about 'logically relevant sexual experiences between a complainant and an accused'.[17] The 'excessive reach' of the legislation was thus 'attenuated in accordance with the will of Parliament as reflected in section 3' of the UK Act.[18] Although the 'rape shield' legislation was enacted after the enactment of the UK Act, the House of Lords based its interpretation on the intention of Parliament as reflected in the earlier Act.

Sheldrake[19] involved a provision of anti-terrorism legislation[20] which, 'conventionally interpreted',[21] imposed a legal burden only rather than an evidential burden.[22] This meant that the provision required the accused to prove certain matters on the balance of probabilities – failing which, he would have been convicted of the alleged offence. The House of Lords found that the provision was incompatible with the presumption of innocence guaranteed by article 6(2) of the Convention. Despite an acknowledgment that it 'was not the intention of Parliament when enacting the 2000 Act'[23] for the provision to impose an evidential burden, the House of Lords read down the provision so as to impose an evidential instead of a legal burden. Such

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10 *Sheldrake* [2005] 1 AC 264, [28].
11 [2002] 1 AC 45.
12 [2005] 1 AC 264.
13 [2007] 3 WLR 681.
14 [2002] 1 AC 45.
15 *Youth Justice and Criminal Evidence Act 1999* (UK), s 41.
16 *R v A (No 2)* [2002] 1 AC 45, [45] (Lord Steyn).
17 Ibid.
18 Ibid.
19 [2005] 1 AC 264.
20 *Terrorism Act 2000* (UK), s 11(2).
21 *Sheldrake* [2005] 1 AC 264, [1] (Lord Bingham of Cornhill).
22 Ibid. Lord Bingham provided the following explanation of the term 'evidential burden': 'An evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail the defendant'.
23 Ibid [53].

reading down was based on 'the intention of Parliament when enacting section 3 of the 1998 Act'.[24]

Secretary of State for the Home Department v MB[25] involved a provision of terrorism prevention legislation [26] dealing with control orders. The provision required the relevant court to give permission to the Secretary of State to withhold material from the subject of the control order where it considers that disclosure of the material would be contrary to the public interest. The House of Lords held that the provision 'should be read and given effect "except where to do so would be incompatible with the right of the controlled person to a fair trial"'.[27]

As will be argued later in this article, Ch III of the Australian Constitution and High Court decisions concerning the doctrine of implied repeal potentially limit the extent to which aspects of that UK case law can be adopted in Victoria. Those aspects include:

- Because of a legislative 'decree', courts have a duty and power to 'modify' valid legislation.
- Courts have a potentially wide discretion in choosing which modifications to make.
- Courts are permitted to change the meaning of valid and unambiguous legislation by reading down or reading in words.
- Courts are permitted to give interpretations that are neither reasonable[28] nor consistent with the purpose of the legislation being interpreted.
- In cases (such as *Sheldrake*)[29] where the clear intention of a valid Act is inconsistent with the intention of an earlier Act, courts are permitted to interpret the later Act in a way that gives precedence to the intention of the earlier Act.

IV THE CASE LAW ON S 32(1) OF THE CHARTER ACT

As s 32(1) of the Charter Act has been in operation only since 1 January 2008, there is limited case law on that section.

In *R J E v Secretary to the Department of Justice*,[30] Nettle JA of the Victorian Court of Appeal expressed the view that the following interpretative approach proposed by Lord Woolf CJ in *Poplar Housing and Regeneration Community*

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24 Ibid.
25 [2007] 3 WLR 681.
26 *Prevention of Terrorism Act 2005* (UK), para 4(3)(d) of the Schedule to the Act.
27 *Secretary of State for the Home Department v MB* [2007] 3 WLR 681, [72] (Baroness Hale of Richmond).
28 *Ghaidan* [2004] 2 AC 557, [44] (Lord Steyn). Lord Steyn asserted that 'Parliament specifically rejected the legislative model of requiring a reasonable interpretation'.
29 [2005] 1 AC 264.
30 [2008] VSCA 265, [114]–[115].

Association Ltd v Donoghue[31] should be adopted in relation to s 32(1) of the Charter Act:

> It is as though legislation which predates the [UK Act] and conflicts with the Convention has to be treated as being subsequently amended to incorporate the language of section 3. However, the following points, which are probably self evident, should be noted:
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> (a) Unless the legislation would otherwise be in breach of the Convention section 3 can be ignored (so courts should always first ascertain whether, absent section 3, there would be any breach of the Convention).
>
> (b) If the court has to rely on section 3 it should limit the extent of the modified meaning to that which is necessary to achieve compatibility.
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> (c) Section 3 does not entitle the court to *legislate* (its task is still one of *interpretation,* but interpretation in accordance with the direction contained in section 3).
>
> (d) The views of the parties and of the Crown as to whether a 'constructive' interpretation should be adopted cannot modify the task of the court (if section 3 applies the court is required to adopt the section 3 approach to interpretation) …[32]

With respect to the view (endorsed in *Ghaidan*) that s 3(1) of the UK Act may require a court to read in words and modify the meaning and effect of legislation,[33] Nettle JA concluded that it was unnecessary for the purposes of the relevant proceeding to determine whether s 32(1) of the Charter Act goes that far.[34]

However, it should be noted that Nettle JA's comments on s 32(1) do not establish a reliable precedent on the meaning or application of that section. Maxwell P and Weinberg JA decided that the relevant appeal 'succeeds on the merits, without it being necessary to decide any of the questions which were said to arise under the [Charter Act]'.[35] Consequently, Nettle JA's comments on s 32(1) have limited precedent value as they did not influence the outcome of the appeal.

The President of the Victorian Civil and Administrative Tribunal, Justice Kevin Bell, conducted a detailed analysis of s 32(1) in *Kracke v Mental Health Review Board*.[36] His view on the meaning and application of that section is as follows:

> [O]ne difference between s 32(1) of the Charter and s 3(1) of the *Human Rights Act* should be noted, if only to put it to one side. Our legislation contains a reference to "purpose". That reference was intended to put into s 32(1) the approach to s 3(1) adopted by the House of Lords in *Ghaidan v Godin-Mendoza* (which had been decided before the Charter was enacted).[37]
>
> That conclusion is consistent with the function of the special interpretative obligation in the two statutory schemes. Section 32(1) of the Charter and s 3(1) of the *Human Rights Act* express the same special interpretative obligation and are of equal force and effect. It is also consistent with the report of the Human Rights

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31 [2002] QB 48.
32 Ibid 72 [75] (emphasis in original).
33 *Ghaidan* [2004] 2 AC 557, [32] (Lord Nicholls of Birkenhead).
34 *R J E v Secretary to the Department of Justice* [2008] VSCA 265, [118]–[119].
35 Ibid [2], [55].
36 [2009] VCAT 646.
37 Ibid [214] (footnote omitted).

> Consultation Committee, which referred to *Ghaidan v Godin-Mendoza*, and said the purpose requirement would provide the courts "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 in question."[38]
>
> The purpose of the legislation is discerned at an appropriately general level of abstraction.[39]

It remains to be seen whether Justice Bell's view will be adopted by the Supreme Court of Victoria and the High Court. His analysis of whether aspects of the UK case law should be adopted did not include any consideration of the implications of differences between the constitutional contexts in the UK and Australia. Nor did he consider the implications of the fact that the requirement in s 32(1) for statutes to be interpreted consistently with their purposes applies to 'all statutory provisions' – not just Acts. Those implications will be explored later in this article.

In summary, the case law on s 32(1) is in the early stages of development and there remains considerable uncertainty as to the meaning and application of that section.

V RELEVANT EXTRA-JUDICIAL COMMENTS BY CHIEF JUSTICE SPIGELMAN OF THE SUPREME COURT OF NEW SOUTH WALES

In a lecture given in March 2008, Chief Justice Spigelman of the Supreme Court of New South Wales made a number of comments that are relevant to the purpose of this article of analysing and identifying potential limitations on the scope of the s 32(1) interpretative obligation. He raised the following points to support his view that the case law on s 3(1) of the UK Act is not a reliable source of guidance for Australian courts applying interpretative obligation provisions such as s 32(1) of the Charter Act:

> The Victorian and ACT Acts, unlike both the New Zealand and United Kingdom provisions, make reference to the purpose of the legislation. In the Victorian and recently amended ACT formulation there is a reference to "consistently with their purpose", which focuses attention on matters that are not expressly referred to in either the United Kingdom or New Zealand sections.
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> Furthermore, the Victorian and ACT Acts adopt, albeit with more explicit guidance, s 5 of the New Zealand Act, which refers to subjecting rights and freedoms to "reasonable limits". This is a consideration which distinguishes New Zealand from English case law on the rights compliant provision.
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> … When it comes to applying and interpreting the Charter of Rights of the Australian model and determining what, if any, reliance is to be placed on English authority, the quite different constitutional background must be borne in mind. In significant respects the United Kingdom has surrendered aspects of its sovereignty to the institutions of the European Union. Relevantly, this includes the *European*

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38 Ibid [215] (footnote omitted).
39 Ibid [230].

> *Convention on Human Rights,* which is administered in part by a supranational institution.[40]

The above points provide grounds for the view that the interpretative obligation imposed by s 32(1) of the Charter Act is likely to be narrower in scope than the corresponding obligation imposed by s 3(1) of the UK Act. In particular, the requirement for statutory provisions to be interpreted 'consistently with their purpose' imposes a potentially significant restriction on courts applying s 32(1) of the Charter Act.

In a subsequent lecture, Chief Justice Spigelman pointed out, without elaboration, that Ch III of the Australian Constitution may restrain the role of the courts, when exercising federal jurisdiction, in applying rights compliant interpretation provisions:

> Clearly the interpretation of legislation cannot be held to be spurious if it occurs pursuant to an express Parliamentary mandate such as the rights compliant interpretation provisions discussed in the second lecture.
>
> Nevertheless, even in this situation there remains a restraint on the judicial role. With respect to the exercise of federal jurisdiction that restraint could raise issues under Chapter 3 of the Constitution.[41]

The analysis set out later in this article will be premised on a fundamental proposition that relates to Chief Justice Spigelman's above comments concerning the potential for Ch III to restrain the judicial role of State courts. It is therefore convenient to put forward and expound that proposition before commencing the analysis of potential limitations on the scope of the s 32(1) interpretative obligation.

VI A FUNDAMENTAL PROPOSITION CONCERNING CH III AND THE POWER OF STATE COURTS TO INTERPRET STATE LAWS

As identified by Chief Justice Spigelman, Ch III restrains the power of State courts, when exercising federal jurisdiction, to interpret State laws. State courts interpreting State laws in exercise of *federal* jurisdiction are not permitted to exercise legislative power.[42] If the following proposition ('the Ch III incompatibility proposition') is accepted, that limitation must also apply when *State* jurisdiction is exercised:

> It would be incompatible with Ch III of the Australian Constitution for a State Supreme Court to interpret State laws in a way that involves an exercise of legislative power.

At first blush this proposition may appear to be heretical. The Constitution does not require a separation of powers at State level.[43] Subject to certain Ch III

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40 The Honourable J J Spigelman AC, Chief Justice of New South Wales, *Statutory Interpretation and Human Rights* (2008). See 'The application of quasi-constitutional laws', second lecture in the 2008 McPherson lectures.

41 Ibid. See 'Legitimate and spurious interpretation', third lecture in the 2008 McPherson lectures.

42 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

43 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 300 [13] (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

restrictions which apply 'only in very limited circumstances',[44] State Supreme Courts can validly be invested with functions involving the making of decisions that fall outside the High Court's appellate jurisdiction under s 73 of the Constitution.[45] Although the Constitution provides for an integrated court system, 'that does not mean that what federal courts cannot do, State courts cannot do'.[46] Section 118 of the Constitution requires the High Court to give 'full faith and credit' to the laws (if valid) of every State.

In *Kable v Director of Public Prosecutions (NSW)*, the majority established the principle that State legislation cannot confer jurisdiction or powers on State courts that would compromise their institutional integrity as courts exercising federal jurisdiction.[47] It is considered that principle would be unlikely to affect the validity of a State law empowering a State Supreme Court to interpret State laws in a way that involves an exercise of legislative power. Such a law would not offend against the *Kable* principle unless the institutional integrity of the court is distorted 'because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies'.[48] Provided the court's independence and impartiality are maintained,[49] conferral of the relevant interpretative power would be unlikely to distort the institutional integrity of the court.

However, notwithstanding the case law referenced in the last two preceding paragraphs, the following points provide a strong case in support of the Ch III incompatibility proposition stated above:

- Chapter III of the Australian Constitution requires the maintenance of an integrated national court system with the High Court at its apex.[50]

- Chapter III also requires that the State Supreme Courts remain part of that system.[51]

- In addition, Ch III requires that the High Court have the power, in both original[52] and appellate[53] jurisdiction, to make final and conclusive determinations as to the meaning and validity of State laws.

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44 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [37] (McHugh J).

45 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 300 [13] (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

46 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [36] (McHugh J). In the next paragraph of his judgment, McHugh J qualified this statement by referring to the *Kable* principle and stating that Ch III invalidates State legislation 'that attempts to alter or interfere with the working of the federal judicial system set up by Ch III'.

47 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 96 (Toohey J), 103 (Gaudron J), 116–119 (McHugh J), 127–128 (Gummow J) ('*Kable*').

48 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, [63] (Gummow, Hayne and Crennan JJ); *K-Generation Pty Limited v Liquor Licensing Court* (2009) 252 ALR 471, 489 [89] (French CJ).

49 *Forge,* ibid [64]–[66] (Gummow, Hayne and Crennan JJ).

50 *Kable* (1996) 189 CLR 51, 101–103 (Gaudron J), 110–114 (McHugh J), 137–143 (Gummow J).

51 Ibid 103 (Gaudron J), 110–111 (McHugh J), 139–140 (Gummow J).

52 The High Court has 'ultimate constitutional responsibility to decide conflicts between the Commonwealth and the States' and 'to decide finally questions as to the limits of Commonwealth and State powers' (*Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461). In order to fulfil that responsibility, the High Court requires the

- The power to interpret State laws is therefore part of the judicial power of the Commonwealth.

- The High Court exercises the power to interpret State laws in its original and appellate jurisdiction, including when determining whether a State law is inconsistent with the Constitution or a law of the Commonwealth in terms of s 109 of the Constitution.

- Although the Constitution does not require a separation of powers at State level, it does require that the judicial power of the Commonwealth be separated from the legislative, executive and judicial powers of the States.[54] This means that the High Court is not permitted to interpret State laws in a way that involves an exercise of legislative power.[55]

- In view of the above points, it would appear to be incompatible with Ch III for a State Parliament to confer on a State Supreme Court a power to interpret State laws in a way that involves an exercise of legislative power.

- As demonstrated by the hypothetical example described below, such a conferral (if valid) would result in the High Court no longer having the power to make final and conclusive determinations as to the meaning and validity of the involved State's laws. The High Court's constitutional role as the ultimate judicial 'umpire' in the Australian federation would thus be compromised. The following example also demonstrates that the conferral would require the relevant State Supreme Court to interpret State laws in the prescribed way when exercising State jurisdiction, and in a different way when exercising federal jurisdiction. These outcomes would be incompatible with the Ch III requirements identified at the first three points of this list.

Suppose, for a moment, that a State Parliament has purportedly conferred on a State Supreme Court a power to interpret State laws in a way that involves an exercise of legislative power. Now consider the following scenario.

The relevant State Supreme Court is required to interpret a State law when exercising federal jurisdiction. Despite the urging of a party to the proceeding, the Court concludes that it has no authority to exercise the relevant interpretative power when exercising federal jurisdiction. Consequently, the Court decides that the law in question has a particular meaning. That decision is eventually upheld on appeal to the High Court in accordance with s 73 of the Constitution.

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power to make final and conclusive determinations as to the meaning and validity of State laws.

53 Section 73 of the Constitution provides that the judgment of the High Court in all appeals under that section 'shall be final and conclusive'.

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

55 By operation of its division of powers at the Commonwealth level and between the Commonwealth and the States (see ss 1, 61, 71, 106, 107, 109 and 118), the Constitution separates the judicial power of the Commonwealth (s 71) from the legislative power of each State (s 107).

In a subsequent case, the same Supreme Court is required to interpret the same law when exercising State jurisdiction. In compliance with an interpretative obligation imposed by State legislation, the Court concludes that it has a duty to exercise the relevant interpretative power when exercising State jurisdiction. As a result, the Court decides that the law in question has a meaning different from that previously upheld by the High Court.

Such an outcome would be incompatible with s 73 of the Constitution, which provides that the judgment of the High Court in all appeals under that section 'shall be final and conclusive'.

Moreover, if the meaning of a State law ultimately depended on the way in which it is interpreted (and possibly modified) by a State Supreme Court, the High Court would not be able conclusively to determine the meaning and validity of that law when exercising original jurisdiction. That outcome also would appear to be incompatible with the Ch III requirements identified at the first three points of the above list.

Chapter III invalidates State legislation 'that attempts to alter or interfere with the working of the federal judicial system set up by Ch III'.[56] Any State legislation that purported to confer the relevant interpretative power would appear to fall within that prohibited category. As explained above, the conferral (if valid) would result in the High Court no longer having the power, in both original and appellate jurisdiction, to make final and conclusive determinations as to the meaning and validity of the involved State's laws. That result would 'undermine the operation of Ch III' and 'strike at the effective exercise of the judicial power of the Commonwealth'.[57]

Regardless of whether or not s 32(1) is intended to authorise courts to legislate, the Ch III incompatibility proposition stated earlier has significant implications for the way in which the High Court interprets that section. Any High Court interpretation of s 32(1) will be binding on all other Australian courts, including the Supreme Court of Victoria. If the High Court concludes that it would be incompatible with Ch III for a State Supreme Court to interpret State laws in a way that involves an exercise of legislative power, the word 'possible' in s 32(1) may well be interpreted as having a meaning different from that given in *Ghaidan* for the same word in s 3(1) of the UK Act.

If the High Court reaches the above conclusion, the requirements of Ch III will limit the extent to which it is 'possible' for Victorian courts to interpret statutory provisions in a rights-compatible way.

In effect, the Ch III incompatibility proposition raised in this article is a proposed rule of statutory construction purportedly imposed by the Constitution. The validity or otherwise of that proposition does not depend on the content or meaning of the Charter Act or UK Act. The Ch III incompatibility proposition is relevant to the interpretation and operation of the Charter Act because that proposition potentially affects the meaning of the word 'possible' in s 32(1) of that Act.

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[56] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, [78] (McHugh J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [37] (McHugh J); *The Commonwealth v Queensland* (1975) 134 CLR 298, 314–315 (Gibbs J, Barwick CJ, Stephen and Mason JJ agreeing).

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

VII ANALYSIS OF POTENTIAL LIMITATIONS ON THE SCOPE OF THE INTERPRETATIVE OBLIGATION IMPOSED BY S 32(1) OF THE CHARTER ACT

As foreshadowed earlier, the following analysis is premised on the proposition that it would be incompatible with Ch III for a State Supreme Court to interpret State laws in a way that involves an exercise of legislative power.

This has implications for the extent, if any, to which the case law on s 3(1) of the UK Act can be relied upon as a source of guidance for the purpose of interpreting s 32(1) of the Charter Act. In interpreting s 3(1), the House of Lords has taken the approach that it must do as Parliament has 'decreed'. Assuming the House of Lords is correct in its view of what Parliament decreed[58] by s 3(1), that approach is justified in a constitutional system in which the doctrine of parliamentary sovereignty applies. However, it has limited application in a federal constitutional system in which the powers of the federal and State parliaments are subject to the requirements of a supreme law in the form of an entrenched written Constitution.

Furthermore, the view of the House of Lords on where to draw the line between permissible judicial interpretation of legislation and impermissible judicial lawmaking is not an appropriate or reliable source of guidance on where Australian courts should draw that line. If such a line is to be drawn by Australian courts, it must be drawn by applying the common law of Australia having regard to the requirements of the Australian Constitution.

The Ch III incompatibility proposition stated earlier is relevant not just to *whether* the line in question is required to be drawn in relation to s 32(1), but also to *where* that line is required to be drawn. The placement of the line must be such that the interpretative power of the Supreme Court of Victoria under s 32(1) is not greater in scope than the High Court's power to interpret Victorian laws.[59] Any other

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[58] Professor James Allan has criticised the approach taken by the majority in *Ghaidan* in identifying the intention of Parliament (J Allan, 'The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism' [2006] 30(3) MULR 906–922). Lord Steyn asserted that 'Parliament specifically rejected the legislative model of requiring a reasonable interpretation'. In support of his assertion, Lord Steyn said that 'the draftsman … had before him the model of the New Zealand Bill of Rights Act which imposes a requirement that the interpretation to be adopted must be reasonable'. However, the New Zealand Act does not expressly impose any such requirement. Rather, it imposes a requirement (in s 5) for limits on rights to be 'reasonable'. The presence of that requirement in the New Zealand Act and its absence from the UK Act have no bearing on whether the New Zealand and UK Parliaments (in enacting their respective interpretative obligation provisions) intended to empower the courts to give interpretations of the *meanings* of legislation that are not reasonably open.

[59] It should be noted that this impediment would not apply to a State law conferring on a State Supreme Court a power to give non-binding advisory opinions. This is because the High Court would still have the power to make final and conclusive determinations as to the meaning and validity of the involved State's laws. For the same reason, the relevant impediment would not apply to a State law conferring on a State Supreme Court a power to legislate in a way that does not involve an exercise of the Court's judicial power to interpret legislation (for example, conferral of a power to legislate in non-judicial, legislative proceedings). In the event of such a conferral being made, the High Court would still have the power to make final and conclusive determinations as to the meaning and validity of the involved State's laws, including State laws as made or modified by the Supreme Court in its legislative proceedings. However, other impediments might apply in this situation. For example, it could be argued that any such conferral of a plenary or extensive legislative power would constitute an impermissible abrogation by Parliament of its legislative power (*Capital Duplicators Pty Ltd v*

placement of the line would result in the High Court no longer having the power, mandated by Ch III, to make final and conclusive determinations as to the meaning and validity of State laws.

A *Does the Charter Act impliedly amend other laws?*

Regardless of any legislative 'decree' and in contrast with the approach taken by the House of Lords in *Ghaidan*, it seems unlikely that the High Court would conclude that it or the Supreme Court of Victoria has a duty or power under s 32(1) of the Charter Act to 'modify' valid legislation.

In response to that potential impediment, it could be contended that the interpretative obligation imposed by s 32(1) requires the courts to give effect, where necessary and 'possible', to implied amendments to Victorian laws to make them rights-compatible. The affected laws would thus be modified by the Charter Act, not by any court. This would overcome the concern about courts interpreting laws in a way that involves an exercise of legislative power.

On the one hand, there are a number of reasons to doubt that s 32(1) is intended to amend any laws. The provisions relating to declarations of inconsistent interpretation allow for the possibility of laws being incompatible with human rights. The Charter Act expressly provides that such a declaration does not affect the validity, operation or enforcement of the incompatible law. Section 32(1) appears to relate to the *interpretation* of statutory provisions – not their amendment.

On the other hand, if the courts comply with the interpretative obligation imposed by s 32(1) when interpreting *earlier* laws, it is inevitable that some of those laws will be interpreted as having a new meaning that alters the rights, duties and liabilities originally created by the relevant law. The only way to avoid that result would be for the courts to continue to interpret earlier laws in the way they were interpreted before s 32(1) came into operation. This would mean that s 32(1) does not apply to earlier laws, which clearly is not a plausible interpretation of that section. Therefore, notwithstanding the doubts expressed in the last preceding paragraph, it is considered these circumstances provide very strong grounds to support the view that it 'is necessarily to be implied'[60] that s 32(1) is intended to amend earlier laws.

Assuming that view is correct, any such amendments have occurred only in those circumstances where the interpretative obligation imposed by s 32(1) has resulted in an earlier statutory provision having a new meaning. The resultant amendments are not retrospective and took effect when s 32(1) came into operation.[61]

The High Court has adopted the following rule of construction for the purpose of determining whether a statutory provision has been impliedly repealed, altered or derogated from by a later provision:

Australian Capital Territory (1992) 177 CLR 248, 263–267 (Mason CJ, Dawson and McHugh JJ), 269–271, 280–282 (Brennan, Deane and Toohey JJ)).

60 *Shergold v Tanner* (2002) 209 CLR 126, 137 [34] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *Saraswati v The Queen* (1991) 172 CLR 1, 17 (Gaudron J).

61 The Charter Act does not include any indication that it is intended to operate retrospectively. The common law presumption against retrospectivity has been expressed as follows: 'The rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction' (*Rodway v The Queen* (1990) 169 CLR 515, 518 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ)).

> It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other …[62]

The above rule of construction distinguishes between the situation where a provision is 'repealed, altered or derogated from' by another provision, and the situation where a provision is 'read as subject to' another provision. This distinction seems to indicate that only the first of the two situations is capable of involving an amendment. However, reading a provision as subject to a later provision does sometimes inevitably amend the earlier provision in the sense that its legal meaning is altered. In view of that fact, it appears that the intended distinction is between the situation where two provisions cannot stand together (for example, one requires what the other forbids), and the situation where two provisions can stand together, without any change of wording, when one is read as subject to the other.

Victorian laws enacted before the Charter Act came into operation are therefore likely to be read as subject to the following requirements imposed by s 38 of that Act:

> (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
>
> (2) Sub-section (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

Accordingly, if an earlier law had provided discretion for a public authority to act in a way that is incompatible with a human right, or to fail to give proper consideration to a relevant human right in making a decision, that law is likely to be interpreted as no longer providing that discretion in circumstances where the public authority could reasonably act differently or make a different decision.

In this situation the operation of the earlier law is modified by s 38 of the Charter Act, not by any court. Although its wording is not modified, the earlier law is amended in the sense that its legal meaning is altered.[63] The rights, duties and liabilities originally created by the earlier law are altered. As a result, that law 'no longer operates as it formerly did'.[64] The amendments made by s 38 are not retrospective and took effect when that section came into operation.[65]

Turning now to the question whether the Charter Act has impliedly amended any *later* laws, it is clear that the Charter Act cannot impliedly amend any laws enacted after it was made. According to the High Court's view in relation to implied repeals, if a later valid law is inconsistent with the Charter Act in the sense that the two laws cannot stand together, the later law will amend or repeal the Charter Act to the extent

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62 *Shergold v Tanner* (2002) 209 CLR 126, 137 [34] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *Saraswati v The Queen* (1991) 172 CLR 1, 17 (Gaudron J).

63 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, [46] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

64 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [9] (Brennan CJ and McHugh J); *Mathieson v Burton* (1971) 124 CLR 1, 10 (Windeyer J).

65 The Charter Act, s 49(3).

of the inconsistency.[66] The Victorian Parliament cannot deny or qualify (other than by imposing 'manner and form' requirements for the making of laws respecting its constitution, powers or procedure)[67] the power of itself or of a later parliament to repeal a law, and cannot bind itself or its successor parliaments not to amend the laws it makes.[68]

B *Does the Charter Act authorise courts to 'disapply' other laws?*

Professor Geoffrey Lindell has identified a potential way of avoiding the above limitation. He has suggested that sections such as s 32(1) of the Charter Act could possibly be construed as authorising courts to 'disapply' later statutory provisions found to be incompatible with human rights.[69] Such a construction could be based on the argument that the relevant parliament does not intend its laws to operate in a way that is found by the courts to be incompatible with human rights. But there is no evidence of that intention in the Charter Act. On the contrary, the Charter Act allows for the possibility of laws being incompatible with human rights and provides that such incompatibility does not affect the operation of the incompatible laws.

In any event, and as acknowledged by Professor Lindell, the notion that a State law could empower the courts to 'disapply' later statutory provisions may be inconsistent with the High Court's 'traditional view' in relation to implied repeals.

In the UK, the courts have modified the doctrine of implied repeal by deciding that certain statutes of constitutional importance such as the *European Communities Act 1972* (UK) cannot be impliedly repealed.[70] However, the constitutional context in Australia is different from that in the UK. Sections 106 and 107 of the Constitution and s 2 of the *Australia Act 1986* (Cth) confirm and continue the constitutions and legislative powers of the State parliaments. Those powers include the power to impliedly amend or repeal earlier laws (subject to any applicable 'manner and form' requirements for the making of laws respecting the State parliament's constitution, powers or procedure).[71] In the circumstances, it seems unlikely that the High Court will modify its 'traditional view' concerning the doctrine of implied repeal.

C *Capacity for the Charter Act to be read together with other laws*

The fact that the Charter Act cannot modify later laws is of no great consequence. The requirements of s 38 will automatically apply to the actions of public authorities under those laws from the time they come into operation, unless there is a clearly manifested contrary intention in the relevant law. In the absence of such a contrary intention, the two laws will simply be read together. In this situation

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66 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, [48] (Gummow and Hayne JJ); *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 56, 63 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

67 *Australia Act 1986* (Cth) s 6.

68 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, [16] (Brennan CJ and McHugh J).

69 Geoffrey Lindell, 'The statutory protection of rights and parliamentary sovereignty: Guidance from the United Kingdom?' (2006) 17 *Public Law Review* 188.

70 *R v Secretary of State for Transport; Ex parte Factortame Ltd (No 2)* [1991] 1 AC 603; *Thoburn v Sunderland City Council* [2003] QB 151.

71 *Australia Act 1986* (Cth), s 6.

neither the wording nor the operation of the later law is modified. The rights, duties and liabilities created by the later law are not altered.

Similarly, s 32(1) of the Charter Act will be read together with later laws (unless there is a clearly manifested contrary intention) in a way that does not modify those laws. From the time of their enactment, later Victorian laws are likely to be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.

As s 32(1) also applies to previously enacted Victorian laws,[72] those laws too are likely to be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.

D *Limitations Imposed by the Charter Act*

Notwithstanding the capacity for the Charter Act to be read together with other laws, there are significant limitations on the scope of the interpretative obligation imposed by s 32(1).

Section 32(1) imposes two of those limitations. The first is that statutory provisions must be 'interpreted', which means that courts applying s 32(1) are limited to using a genuine process of interpretation.

The second limitation imposed by s 32(1) is that all statutory provisions must be interpreted 'consistently with their purpose'. The notion of an intended purpose 'involves the intention of a person to achieve an object'.[73] The purpose of a law depends on the intention of Parliament when enacting that law. The purpose is a product of the intention. This means that the attributed original intention of the enacting Parliament still has an important role to play in the interpretation of Victorian statutes.

When ascertaining the legislative purpose of a statutory provision, 'the tribunal of fact must attribute a purpose to an artificial or notional mind that is deemed responsible for some act or omission. In such contexts, the tribunal of fact deduces the purpose of the artificial or notional person from the background of the act or omission including relevant statements and what was done or not done.'[74] However, consideration of the relevant legislative history and extrinsic material 'cannot be permitted to divert attention from the text'.[75]

It could be contended that the Charter Act has impliedly amended the purposes of earlier laws that have a new legal meaning as a result of it being 'possible' to interpret their purposes in a rights-compatible way. If that contention is accepted, the relevant amendments have occurred only in those circumstances where a rights-compatible interpretation of the involved purpose (different from the interpretation of the purpose that would be given were it not for the Charter Act) is achievable using a genuine process of interpretation. The interpretation of the purpose must be reasonably open based on the attributed original intention of the enacting Parliament. That requirement arises from the fact that the word 'possible' in s 32(1) is qualified by the words 'consistently with *their* purpose' (emphasis added). As indicated above, legislative purpose is a product of legislative intention. It is therefore not

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72 The Charter Act, s 49(1).

73 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, [39] (McHugh J).

74 Ibid [40] (McHugh J).

75 *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53, [7] (Gleeson CJ and Callinan J).

permissible to adopt an interpretation of the purpose that is inconsistent with the attributed original intention of the enacting Parliament.

There is an alternative view that the Charter Act has impliedly amended all earlier Victorian laws to include the purpose of protecting human rights. This would mean there is no requirement for the interpretation of the purpose to be consistent with the attributed original intention of the enacting Parliament. According to that view, the Charter Act has amended or overridden the original intention. However, the Charter Act allows for the possibility of statutory provisions being incompatible with human rights and provides that a 'declaration of inconsistent interpretation' does not affect the validity, operation or enforcement of the involved statutory provision.[76] If a statutory provision is incompatible with human rights, its purpose is likely to be incompatible with human rights. That fact militates against the view that the Charter Act has impliedly amended all earlier Victorian laws to include the purpose of protecting human rights.

Because laws may have unintended consequences, the legislative purpose of a law is not necessarily the same as the purpose served by that law in operation. It may transpire that a law fails to serve its intended purpose, or serves a purpose that is additional to the legislative purpose. Any such additional purpose would not be a 'purpose' in terms of s 32(1).

It will often be the case that the context and apparent meaning of a valid statutory provision evince its intended purpose. It would be impermissible in this situation for the court to interpret the provision as having an alternative purpose if that interpretation is not reasonably open. Moreover, in these circumstances the court could not validly circumvent the purpose by adopting an alternative meaning of the provision that does not evince the same purpose.

Furthermore, it should be noted that statutory provisions often have more than one purpose. Courts applying s 32(1) must take into account all of the involved purposes of the provision being interpreted.

The inclusion of the words 'statutory provisions' in s 32(1) also has significant consequences for the scope of the interpretative obligation imposed by that section. The term 'statutory provision' is defined as follows in s 3 of the Charter Act:

> 'statutory provision' means an Act (including this Charter) or a subordinate instrument *or a provision of an Act* (including this Charter) or of a subordinate instrument … (emphasis added)

Accordingly, when a court applying s 32(1) is interpreting a particular 'provision of an Act', as distinct from an Act as a whole, the court must interpret that provision consistently with its purpose/s. Consistency with the 'underlying thrust of the legislation' is not enough.[77] These considerations support the view that '[i]f there is a legislative purpose to be identified, it must be identified at a level of particularity that points to the resolution of the specific doubt about meaning that has arisen'.[78]

In contrast, the House of Lords has taken the approach that it is 'possible' to interpret a statutory provision in a way that is inconsistent with its intended purpose. As indicated earlier, this can be done unless the resultant interpretation 'would be incompatible with the underlying thrust of the legislation, or would not go with the

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[76] The Charter Act, s 36.

[77] *Contra Sheldrake* [2005] 1 AC 264, [28] (Lord Bingham of Cornhill).

[78] The Honourable Murray Gleeson AC, Chief Justice of the High Court, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights', Victoria Law Foundation Oration, Melbourne, 31 July 2008.

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, or would violate a cardinal principle of the legislation'.[79]

For example, in *Sheldrake*[80] the House of Lords interpreted a statutory provision that was intended to impose a legal burden as only imposing an evidential burden. Despite an acknowledgment that it was not the intention of the enacting Parliament for the provision to impose an evidential burden, the House of Lords read down the provision so as to impose an evidential instead of a legal burden. This reading down was claimed to be based on 'the intention of Parliament when enacting section 3 of the 1998 Act'.[81]

That interpretative approach clearly is incompatible with the requirement of s 32(1) that all statutory provisions must be interpreted consistently with their purpose. Reading down a statutory provision to comply with the intention of other legislation (as occurred in *Sheldrake*) is not a valid option when the other legislation does not manifest such an intention and instead manifests a contrary intention.

Section 7(2) of the Charter Act further limits the scope of the interpretative obligation imposed by s 32(1). Section 7(2) requires that 'all relevant factors' be taken into account when assessing whether a limitation on a right is reasonable and demonstrably justified in a free and democratic society. One of those relevant factors is that the right asserted by the aggrieved party may be in conflict with a right of an opposing party or persons not involved in the proceeding. In cases involving conflicting rights, the choice for the court may be between a limitation that is the less restrictive of a particular right and an alternative limitation that is the less restrictive of a conflicting right.

It could therefore be argued that courts applying s 32(1) are required to identify and take into account all involved rights. This requirement arguably applies even in cases where an assessment under s 7(2) is not necessary. Section 32(1) requires 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' – not just with rights asserted by aggrieved parties.

E *Potential Ch III limitations*

As explained earlier, this article contends that it would be incompatible with Ch III for the High Court or the Supreme Court of Victoria to interpret the laws of that State in a way that involves an exercise of legislative power. If that proposition is accepted, it would also be incompatible with Ch III for either of those courts to interpret Victorian laws in a way that involves an exercise of 'the power to make law involving … a choice as to what that law should be'.[82]

This limitation does not mean that it is always impermissible for the High Court or the Supreme Court of Victoria to interpret legislation in a way that involves choosing between alternative meanings. Those courts obviously do and must choose between alternative meanings when interpreting ambiguous,[83] obscure, absurd,

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79 *Sheldrake* [2005] 1 AC 264, [28] (Lord Bingham of Cornhill).

80 [2005] 1 AC 264.

81 Ibid [53] (Lord Bingham of Cornhill).

82 *Western Australia v Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373, 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

83 This use of the word 'ambiguous' refers to any ambiguity that remains or appears after the context 'in its widest sense', including the mischief intended to be remedied, has

uncertain,[84] inconsistent or partially invalid laws. Choosing between meanings in these circumstances is a judicial function, even though it involves an element of lawmaking. This limited lawmaking role of the courts is necessary because it is unavoidable (for example, where a law is ambiguous) and essential for giving effect to the attributed legislative intention[85] (for example, where a law is absurd). The involved laws cannot be effectively interpreted without performing the relevant lawmaking role.

However, the Ch III limitation in relation to choosing between meanings could apply when an intention to abrogate or curtail a right is 'clearly manifested by unmistakable and unambiguous language'[86] in a valid statutory provision that is not absurd, uncertain or inconsistent[87] with any other provision or law. In this situation, it would appear the court is not permitted to interpret the statutory provision as having an alternative meaning to remove the incompatibility with the right. The court is limited to using a genuine process of interpretation. It does not have a mandate or power to artificially create an alternative meaning to give itself 'a choice as to what that law should be'.

It is acknowledged that the concept of a genuine process of interpretation is highly contested.[88] For the purposes of this article, the concept means an interpretative process by which the court genuinely seeks to give effect to the attributed legislative intention,[89] subject to constitutional requirements and the extent to which the statutory text can be interpreted consistently with the attributed intention. This would ordinarily require the giving of an interpretation that is

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been considered (*CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ)).

84 This proposed label of 'uncertain' laws is intended to cover the situation where the meaning of a statute is uncertain because 'the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions' (*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 321 (Mason and Wilson JJ); *Mills v Meeking* (1990) 169 CLR 214, 223 (Mason CJ and Toohey J)).

85 The fundamental responsibility of a court when it interprets a statute is to give effect to the legislative intention (*Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 13 (Mason J); *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 439–440 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ)). However, it is not essential to give effect to a legislative intention that is incompatible with the Constitution. For example, the Federal Parliament cannot delegate to the High Court the legislative task of making a new law from the unobjectionable parts of the old (*Bank of NSW v The Commonwealth* (1948) 76 CLR 1, 372 (Dixon J); *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 492 (Barwick CJ), 503, 506 (Menzies J)).

86 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ); *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

87 A valid statutory provision that abrogates or curtails a right is not inconsistent with the Charter Act. Rather, it is inconsistent with the right. The Charter Act allows for the possibility of valid statutory provisions being inconsistent with rights and provides that such inconsistency does not affect the validity of the involved provisions.

88 The Honourable Justice R S French of the Federal Court, 'Dolores Umbridge and the Concept of Policy as Legal Magic', Australian Law Teachers' Association – National Conference Perth, 24 September 2007; Spigelman, see above n 40.

89 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 13 (Mason J); *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 439–440 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

reasonably open in light of the statutory text and attributed legislative intention. The process will not be genuine if the court (unless compelled to do so because of a constitutional requirement or a constraint arising from the statutory text) knowingly disregards, circumvents or subverts the attributed legislative intention. Regardless of the attributed legislative intention, the process will not be genuine if the court encroaches on an area of responsibility constitutionally assigned to the legislature or executive. The court's power must 'be exercised for the purpose for which, and in accordance with the conditions [including those imposed by the State and Commonwealth Constitutions] upon which, it was given'.[90]

It could be argued that in the situation described in the second-last preceding paragraph, the power to create and choose between alternative meanings would be permissible as the court would exercise the power in accordance with legal criteria supplied by the Charter Act. The availability of such criteria, however, might not be sufficient to ensure the validity of the purported power. In analogous circumstances involving the interpretative obligation imposed by s 15A of the *Acts Interpretation Act 1901* (Cth), the High Court has determined that the Federal Parliament cannot delegate to the Court the legislative task of making a new law from the unobjectionable parts of the old.[91]

Legislative power and the use of legal criteria are not mutually exclusive. In theory, the Federal Parliament could adopt parliamentary procedures requiring proposed federal laws to be assessed using prescribed legal criteria. Despite this use of legal criteria as part of the lawmaking process, the power exercised by Parliament would still be legislative. Exercise of the power would still produce new legislation or changes to existing legislation. The Ch III prohibition on delegating legislative power to the High Court applies regardless of whether the power would be exercised using legal criteria.

The 'chameleon doctrine' arguably provides an answer to that impediment. According to that doctrine, certain powers can be legislative, executive or judicial depending on the character of the body exercising the power and the way in which the power is exercised.[92] However, the 'chameleon doctrine' applies only to chameleon-like powers and usually operates in favour of the validity of powers exercised in the application of legislation – as distinct from the making of it.

Nevertheless, earlier it was contended that courts have a limited lawmaking role (additional to their role in developing the common law) by virtue of the choices they make when interpreting legislation. If that contention is accepted, it must also be accepted that legislative power is a chameleon-like power, but only to a limited extent. Based on a proposition that will be expounded later in this article, that extent depends on whether it is necessary in an operational sense for the court to perform the relevant lawmaking role in the applicable circumstances. According to that view, the way in which the lawmaking role would be performed (for example, by applying legal criteria) is irrelevant for the purpose of identifying whether the operational necessity exists.

Even if it is assumed that courts applying s 32(1) have the power to change the meaning of unambiguous laws, the Ch III limitations referred to above could have

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90 Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4.

91 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1, 372 (Dixon J); *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 492 (Barwick CJ), 503, 506 (Menzies J).

92 *Re Dingjan; Ex Parte Wagner* (1995) 183 CLR 323, [15] (Gaudron J); *Pasini v United Mexican States* (2002) 209 CLR 246, 253–254 [12]–[13] (Gleeson CJ, Gaudron, McHugh and Gummow JJ).

implications for the way in which the courts exercise that power. Such a power might not be available in situations where more than one alternative meaning is reasonably open.

This point can be demonstrated by considering a hypothetical case. Suppose that the Victorian Parliament has enacted a valid[93] law that makes it an offence to publicly display an anti-abortion sign or image within 300 metres of an abortion clinic. The relevant law was enacted before the commencement of the Charter Act and is not ambiguous, obscure, absurd or uncertain. In a proceeding involving an alleged offence under the relevant law, the Supreme Court of Victoria finds that the apparent meaning of the law is incompatible with the right to freedom of expression set down in the Charter Act.[94] As evidenced by the following list of potential meanings, the law arguably could be read down in a number of ways to remove the incompatibility:

- The law applies only in situations where the sign or image can be seen by persons entering or exiting a property on which an abortion clinic is located.

- The law applies only in circumstances where the sign or image is displayed in a way that unreasonably interferes with the movement of persons travelling to or from an abortion clinic.

- The law applies only in circumstances where the sign or image is displayed in a way that could tend to overbear the freedom of will of persons intending to use the services of an abortion clinic.

- The law applies only in circumstances where the displaying of the sign or image is likely to result in a breach of the peace.

In this situation there would be no way of knowing which, if any, of the alternative meanings the legislature intended. Although the Court could apply legal criteria to create and choose between alternative rights-compatible meanings, it would in truth be making rather than interpreting the law. In contrast with the unavoidable and essential lawmaking role performed by courts when interpreting ambiguous, obscure, absurd, uncertain, inconsistent or partially invalid laws, there would be no necessity for the Court to perform this lawmaking role. A legislative 'decree' cannot create that necessity if the 'decree' is incompatible with Ch III.

Some of the legal questions raised by the advent of statutory bills of rights in Australia will require the development of new legal principles that accord with the requirements of the Australian Constitution. The High Court could possibly develop a principle of necessity for use in drawing the line between permissible interpretation and impermissible lawmaking by courts applying interpretative obligation provisions.

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93 For present purposes, let it be assumed that the relevant hypothetical law satisfies the requirements of the Constitution in relation to the freedom of communication on political matters.

94 For present purposes, the question whether such a finding would be correct is irrelevant.

The necessity referred to here is an operational necessity similar to that which underpins the theory of the 'accrued' jurisdiction[95] of federal courts to determine State law issues in certain circumstances. The question whether the necessity exists in any particular situation does not depend on policy considerations. Rather, it depends on whether the involved statutory provision can be effectively interpreted without performing the relevant lawmaking role. In this context, the issue of whether the courts are well equipped to perform the lawmaking role is irrelevant. So too is the issue of whether the courts' performance of the role would assist in protecting rights or furthering the policy objectives of the legislation.

In *Ghaidan*, Lord Nicholls indicated that courts applying s 3(1) of the UK Act can choose between alternative rights-compatible meanings provided the choice does not raise 'issues ill-suited for determination by the courts or court procedures'.[96] The interpretative obligation imposed by s 32(1) of the Charter Act arguably empowers the High Court to apply the same principle when interpreting Victorian statutes (subject to the requirement for consistency with the statutory purpose). However, the High Court could take the view that it cannot choose between meanings in circumstances where doing so would breach the required separation of Commonwealth judicial power from State legislative power. Such a breach would occur whenever the choosing involves an exercise of legislative power. The breach would not be 'capable of repair' by the Court, 'for the breach invalidates the conferral' of the power.[97] Therefore, the Court would not be able to repair the breach by adopting Lord Nicholls' suggestion of only exercising the relevant power when the choice between meanings does not raise 'issues ill-suited for determination by the courts or court procedures'. Moreover, although the Victorian Parliament may in theory be able to enact legislation overriding the effect of the Court's interpretation, that fact would not justify or validate the breach. If the Ch III incompatibility proposition stated earlier in this article is accepted, this limitation must also apply to the Supreme Court of Victoria.

It could be argued that this analysis is flawed as all statutory provisions are ambiguous (so the argument goes) because the concept of legislative intention is based on a fiction.[98] However, even if legislative intention is considered to be an 'attributed' rather than a 'true' intention,[99] many statutory provisions are unambiguous from a legal perspective. The High Court often describes particular statutory provisions as 'unambiguous'. The common law distinguishes between ambiguous and unambiguous statutory provisions. For example, it is a presumption of the common law that 'courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly

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95 This 'accrued' jurisdiction is exercised only where 'the substratum of fact which gives rise to a matter in federal jurisdiction cannot be effectively disposed of without the application of State law' (*Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 562 [71] (McHugh J)).

96 [2004] 2 AC 557, [33]–[35].

97 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 16–17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

98 *Corporate Affairs Commission of NSW v Yuill* (1991) 172 CLR 319, 339 (Gaudron J), 345–346 (McHugh J); *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 612 (Lord Reid).

99 The Honourable Justice R S French of the Federal Court, see above n 88.

manifested by unmistakable and *unambiguous* language'.[100] Just as twilight does not invalidate the distinction between night and day, the fact that the difference between ambiguous and unambiguous laws is not always clear-cut does not invalidate that difference.[101]

It should also be noted that in some circumstances the legislative intention is a knowable fact. For example, it is known that the requisite majorities in both houses of the Federal Parliament voted for an amendment to lower the voting age to 18 years. There can be no doubt that the 'true' intention of Parliament in that instance was to lower the voting age to 18 years. In these circumstances, the 'attributed' legislative intention is also the 'true' legislative intention.

As alluded to by Chief Justice Gleeson of the High Court in *Roach v Electoral Commissioner*,[102] Ch III could also have implications for the way in which the High Court applies proportionality tests of the type prescribed by s 7(2) of the Charter Act:

> There is a danger that uncritical translation of the concept of proportionality from the legal context of cases such as *Sauvé* or *Hirst* [decisions of the Supreme Court of Canada[103] and the European Court of Human Rights][104] to the Australian context could lead to the application in this country of a constitutionally inappropriate standard of judicial review of legislative action. Human rights instruments which declare in general terms a right, such as a right to vote, and then permit legislation in derogation of that right, but only in the case of a legitimate objective pursued by means that are no more than necessary to accomplish that objective, and give a court the power to decide whether a certain derogation is permissible, confer a wider power of judicial review than that ordinarily applied under our Constitution. They create a relationship between legislative and judicial power significantly different from that reflected in the Australian Constitution … The difference between the majority and minority opinions in both *Sauvé* and *Hirst* turned largely upon the margin of appreciation which the courts thought proper to allow the legislature in deciding the question of proportionality. Neither side in the present litigation suggested that this jurisprudence could be applied directly to the Australian Constitution.[105]

Section 7(2) provides, *inter alia*, that a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society.

Assessing whether a limitation on a right is reasonable and demonstrably justified in a free and democratic society is an inherently political task which involves value judgments, policy choices and the balancing of conflicting rights.

It is true that the courts make similar political assessments when developing the common law. They also make political assessments when *applying* (as distinct from

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[100] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ) (emphasis added); *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

[101] This analogy was inspired by a similar analogy made in July 2000 by High Court Chief Justice Murray Gleeson when referring to the difference between merits review and judicial review (Gleeson, see above n 90).

[102] [2007] HCA 43.

[103] *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519.

[104] *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41.

[105] *Roach v Electoral Commissioner* (2007) 233 CLR 162, [17].

making) statutory provisions that require determinations of whether particular things are reasonable or in the public interest.

However, when a court applying s 7(2) is assessing a limit prescribed by legislation, the thing being assessed is the law itself. The making of that assessment is part of the process of interpreting the involved statutory provision to ascertain its meaning. A finding of incompatibility may result in the provision being reinterpreted as having a meaning that is different from its apparent meaning. But the process applied by the court must remain one of interpretation. If the Ch III incompatibility proposition stated earlier in this article is accepted, neither the High Court nor the Supreme Court of Victoria has the power to interpret a legislatively prescribed limit in a way that involves an exercise of legislative power.

The High Court could therefore take the view that any court applying s 7(2) must go no further than decide whether a political assessment could reasonably be made that the involved limit satisfies the s 7(2) proportionality test.[106] According to that view, to go further than deciding whether that assessment could reasonably be made would be to assume a function that is necessarily committed to another branch of government. [107] If the relevant political assessment could reasonably be made, the court must accept that assessment. It is not permitted to substitute its own assessment and then change the meaning of the 'incompatible' statutory provision so that it accords with the court's choice or preference 'as to what that law should be'. [108]

IX CONCLUSION

The main propositions raised in this article are summarised below:

- It would be incompatible with Ch III for a State Supreme Court to interpret State laws in a way that involves an exercise of legislative power.

- Courts applying s 32(1) of the Charter Act are limited to using a genuine process of interpretation.

- When a court applying s 32(1) is interpreting a particular provision of an Act, the court must interpret that provision consistently with its purpose/s. Such purpose/s 'must be identified at a level of particularity that points to the resolution of the specific doubt about meaning that has arisen'.[109] The interpretation of the purpose/s must be reasonably open based on the attributed original intention of the enacting Parliament. The purpose/s of the provision cannot validly be circumvented by adopting a meaning that does not evince the same purpose/s.

- Courts applying s 32(1) are required to identify and take into account all involved rights, not just those asserted by aggrieved parties.

- When an intention to abrogate or curtail a right is clearly manifested by unmistakable and unambiguous language in a valid statutory provision that

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106 *Gerhardy v Brown* (1985) 159 CLR 70, 138–139 (Brennan J).

107 Ibid.

108 *Western Australia v Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373, 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

109 Gleeson, see above n 78.

> is not absurd, uncertain or inconsistent with any other provision or law, the court is not permitted to interpret the statutory provision as having an alternative meaning.
>
> • Any court applying s 7(2) of the Charter Act must go no further than to decide whether a political assessment could reasonably be made that the involved legislatively prescribed limit satisfies the s 7(2) proportionality test. If that political assessment could reasonably be made, the court must accept it.

These propositions indicate that the interpretative obligation imposed by s 32(1) of the Charter Act is likely to be narrower in scope than the corresponding obligation imposed by s 3(1) of the UK Act.

That prospect will not be welcomed by those who believe 'that human rights-consistent interpretation can only operate in the context of a dynamic theory of statutory interpretation'.[110] They should take some comfort, however, from the fact that the potential Ch III limitations identified here have a limited range of application. Questions involving the interpretation of statutory provisions often arise because the provisions are in fact ambiguous.

Courts applying s 32(1) will still be required to do the 'line-drawing' on many moral, social and political issues in Victoria.

[110] Hilary Charlesworth, 'Human Rights and Statutory Interpretation' (ch 6) in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (2005).