State Jurisdictional Residue: What remains to a State Court when its Chapter III functions are exhausted?

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Introduction

Among the many issues facing the High Court in Momcilovic v The Queen1 was the constitutional validity of ‘declarations of inconsistent interpretation’ made under s 36(2)2 of the Charter of Human Rights and Responsibilities Act 2006 (Vic), and exercised for the first time in 2010 by the Victorian Court of Appeal in Vera Momcilovic’s unsuccessful application for leave to appeal against her conviction for drug trafficking under the Drugs, Poisons and Controlled Substances Act 1981 (Vic). Four Justices of the High Court found the declaration power to be valid. Three found it invalid. Four held that it could not be performed by a Court exercising federal judicial power. Chief Justice French was one of the first four, and one of the second four. He found the declaration power to be valid for a State court in the exercise of State judicial power, but joined Gummow, Hayne and Heydon JJ, for whom the declaration power was invalid tout court, when it came to federal judicial power. The complication was that, when it made its ‘declaration of inconsistent interpretation’, the Victorian Court of Appeal was exercising federal jurisdiction, under section 75 (iv) of the Constitution.3

How, then, were these positions reconciled? The Chief Justice identified what this paper calls ‘State jurisdictional residue’. In his Honour’s words, ‘There is no reason in principle why the Court of Appeal, having exhausted its functions in the exercise of its federal jurisdiction . . . could not proceed to exercise the distinct non-judicial power conferred upon it by’ the Charter.4

Momcilovic and the ontological dilemma.

The Chief Justice’s obiter dictum generated many questions, some arising because of the mere chance that the Victorian Court was exercising federal jurisdiction at the time of Ms Momcilovic’s appeal, and others going to the wider issue of whether and, if so, to what extent, a State court has a jurisdictional identity separate from its identity as a court vested with federal jurisdiction under s 39(2) of the Judiciary Act, pursuant to 77 (iii) of the Commonwealth Constitution.

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2 (2011) 245 CLR 1 (‘Momcilovic’)
3 S 36(2) ‘Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to the effect in accordance with this section.’
4 Momcilovic at 70.
As noted, four Justices found the declaration power valid for a State court in the exercise of State jurisdiction; the power would, thus, have been available to the Court of Appeal in Momcilovic had it not been exercising federal jurisdiction. This counterfactual conclusion, however, does not resolve the issue. Three of these four Justices found the power compatible with the Court’s exercise of both federal and State jurisdiction, but the Chief Justice, finding the power unavailable to the Court in the exercise of federal jurisdiction, did not set out conclusively why it might be available to the Court – *qua* State court - at the same time. His Honour adverted to two possible explanations: one, that rights and liabilities arising under State law might not be incorporated in the concept of a ‘matter’ in s 75 (iv); and secondly, that section 79 of the *Judiciary Act*, which acts to ‘federalise’ State laws, might not ‘pick up’ all aspects of the State law.\(^5\) Neither of these explanations was developed. The Chief Justice added, however, that any distinct non-judicial function capable of being performed by a State court (but not a Chapter III court) must satisfy the *Kable*\(^6\) test for compatibility with the court’s ‘institutional integrity’? The declaration power, it is to be inferred, did not offend the *Kable* doctrine. (We will consider *Kable* in detail, below.)

The power to make a declaration of inconsistent interpretation was characterised as non-judicial by all the Justices in Momcilovic. The reason given by the Chief Justice was, essentially, that a declaration is not referrable to a ‘matter’, as is required for the exercise of the judicial power of the Commonwealth under Chapter III of the Constitution. This raises further questions. Is a State court’s capacity to exercise such a function, ‘residually’ (if at all), affected by the function’s characterisation as non-judicial? In addition, how relevant is the fact of a function’s inability to be characterised as a ‘judgment, decree, order [or] sentence’, and thereby its inability to fall within the appellate jurisdiction of the High Court under s 73 of the Constitution (as the Chief Justice stated of the declaration power)\(^8\)?

These questions concern specifically a State court’s jurisdictional limits. There are further questions. On what grounds might it be stated, as the Chief Justice did, that there is no reason *in principle* that a State court, having exercised federal jurisdiction, could not proceed to exercise a ‘distinct non-judicial power’\(^9\) conferred upon it by a State legislature? What is the relevant *principle*?

It is almost reassuring to read Windeyer J’s words in the (pre-*Kable*) case of *Felton v Mulligan* concerning what his Honour called ‘the troublesome question that arises when a State court exercises federal jurisdiction with which it has been invested and in the same case exercises jurisdiction that belonged to it as a State court over the same subject matter’.\(^10\)

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\(^5\) The Chief Justice explained that section 79 ‘does not pick up a provision conferring non-judicial functions on a court which are not incidental to its judicial function.’ *Momcilovic* at 70

\(^6\) *Kable v Director of Public Prosecutions (NSW) (1996)* 189 CLR 51 (*‘Kable’*).

\(^7\) For a summary of the different components or ‘limbs’ of the *Kable* incompatibility test as it has evolved, see Suri Ratnapala and Jonathan Crowe, ‘Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power’ (2012) 36 Melbourne Law Review 175.

\(^8\) *Momcilovic* at 70

\(^9\) Ibid. Emphasis added.

\(^10\) *Felton v Mulligan* (1971) 124 CLR 367 at 391.
The question, Windeyer mused, creates ‘an abstract almost ontological problem’. This ‘ontological’ problem was not far from the surface in *Momcilovic*. To put it in non-juristic terms: does a State court have one, or two identities? How much do these identities intrude upon each other? Does one diminish the other, or can they co-exist – concurrently or sequentially – untroubled by each other’s presence? Is it possible, as it were, for the judges of a State court to take off their federal hats and put on their State hats without leaving the bench?

This multitude of questions – doctrinal or ‘ontological’ - cannot be addressed in a single paper. I propose to reduce them to three: (i) Is there any room left, when federal jurisdiction is exercised by a State court, for it simultaneously to perform a State function (non-judicial or judicial)? In other words, is the proposition that there is something like State jurisdictional residue persuasive, or does the exercise of federal jurisdiction ‘exhaust’ the controversy?; (ii) To what extent does the *Kable* doctrine apply to all the functions and powers of a State court? Might the Chief Justice’s obiter in *Momcilovic* suggest a reversal, however small, in what seemed to be the inexorable trend of the *Kable* test?; (iii) If so, what might the (constitutional) case be for putting the brakes on *Kable*?

To summarise what is at issue: the proposition that a State court may exercise a State function ‘residually’ when it is, or has been, exercising federal judicial power, relies upon (among other things) the capacity of the court to retain its State ‘identity’, either simultaneously with its performance as a Chapter III court, or at the conclusion of its performance as a Chapter III court, but while the controversy which gave rise to the exercise of federal judicial power is still at hand. Secondly, the ‘jurisdictional residue’ proposition, at least as suggested by the Chief Justice, requires a resolution of the question of whether the *Kable* ‘incompatibility’ test applies both to the exercise of federal judicial power and to the ‘residual’ exercise of State power. Might a power or function that is incompatible with the exercise of federal judicial power and therefore incapable of being performed by a State court in its capacity as a Chapter III court, still be performed by the State court in the exercise of State judicial power? These questions are interdependent: there can be no State jurisdictional residue if the specific ‘residual’ power or function – which is ‘residual’ because it falls outside the exercise of federal judicial power – cannot be performed because it is incompatible with federal judicial power.

In order to address these questions, we need to know, additionally, whether every aspect of a controversy that engages federal judicial power remains federal. Is a controversy capable of being broken into parts, some federal, some State? Or, does the conferral of federal judicial power on State courts mean that every aspect of the State law that is relevant to a controversy is picked up and ‘federalised’ by the *Judiciary Act*? Is federal jurisdiction *exhaustive*? I turn to this last question first.

**Is federal jurisdiction exhaustive?**

11 *Ibid* at 392.
Will Bateman and James Stellios have recently published an analysis of Momcilovic’s implications for the dialogue model of statutory human rights protection in Australia.\(^\text{12}\) Their article, among other things, considers the Chief Justice’s *obiter* on the State court’s power to make a declaration of inconsistent interpretation, and concludes that the view that a State court, having exercised federal jurisdiction, may then exercise a ‘distinct non-judicial’ State function (which is unavailable to it as a Chapter III court) is unpersuasive, or, to use their word, ‘misplaced’.\(^\text{13}\)

Bateman and Stellios give three reasons: first, the Chief Justice’s suggestion assumes that federal jurisdiction ceases when the substantive claims of the federal dispute are resolved. This assumption, they state, ‘does not sit comfortably with existing High Court authority’;\(^\text{14}\) secondly, s 36 of the *Victorian Charter of Human Rights and Responsibilities Act* does not confer State jurisdiction separately from the exercise of federal jurisdiction, but, rather – in the words of Crennan and Kiefel JJ in *Momcilovic* – the court is empowered to make a declaration in the course of proceedings, ‘consequent upon exercising jurisdiction otherwise conferred’.\(^\text{15}\) In other words, the declaration function cannot be regarded as ‘distinct’.\(^\text{16}\) (Bateman and Stellios’s third point - that the declaration power is incompatible with the exercise of Ch III judicial power under the *Kable* doctrine – is not directly relevant to the issue of ‘jurisdictional residue’.)

To the first of these observations, we may add Barwick CJ’s statement in *Felton v Mulligan* (noted by Toohey J in *Kable*\(^\text{17}\)) that ‘if federal jurisdiction is attracted at any stage of ... proceedings, there is no room for the exercise of State jurisdiction which apart from any operation of the *Judiciary Act* the State court would have had.’\(^\text{18}\) The impossibility of concurrent operation of federal and State jurisdiction, in Barwick CJ’s opinion, arose through a combination of the operation of the *Judiciary Act* and s 109 of the Constitution which renders invalid any State law inconsistent with a Commonwealth law on the same subject.

In *The Commonwealth v Queensland*,\(^\text{19}\) on the question of whether a State government could empower the Queensland Supreme State court to authorise the Governor to seek an advisory opinion from the Judicial Committee of the Privy Council, Jacobs J held that Chapter III was exhaustive in respect of the subject matters listed in ss 75 and 76 of the Constitution, so that a State court could not validly exercise jurisdiction over such matters even while exercising State jurisdiction; the matters listed, his Honour stated, ‘mark out the


\(^{13}\) Ibid, 31.

\(^{14}\) Ibid.

\(^{15}\) Ibid, 32. *Momcilovic* at 222, Crennan and Kiefel JJ.

\(^{16}\) The case law concerning non-federal claims arising in cases covered by federal law is discussed at length by Will Bateman, ‘Federal Jurisdiction in State courts: An Elaboration and Critique’ (2012) 23 *Public Law Review* 245.

\(^{17}\) *Kable* at 95.

\(^{18}\) (1971) 124 CLR 367 at 373.

\(^{19}\) (1975) 134 CLR 298.
limits of the judicial power or function which ... State courts can exercise in respect of those matters. There is ‘no residuary State power, because Ch. III is an exhaustive enunciation.’

The conclusion drawn from these, and other authorities, is that no State jurisdictional residue is possible when a State court is exercising federal jurisdiction: s 79 of the Judicairy Act picks up all aspects of the relevant and applicable State law; s 109 of the Constitution also works to exclude the concurrent operation of inconsistent State laws; and Chapter III provides an exhaustive statement of the subject matters over which a State court can exercise jurisdiction. As Bateman also points out, the High Court’s ‘backdating’ approach, which assumes that a federal ‘matter’ pre-exists the raising of federal claims (an approach adopted in Wakim), leaves no room for the operation of State law when federal jurisdiction is ‘enlivened.’

These authorities support Bateman’s and Stellios’s rejection of the proposition that a State function may be left to a State court when it is exercising federal jurisdiction. However, the Chief Justice did not necessarily conclude otherwise in Momcilovic. As mentioned, his Honour offered two alternatives for the possibility of ‘jurisdictional residue’, albeit without elaboration. He accepted that the declaration power could not be performed in the exercise of federal jurisdiction. His observation was that its performance could take place after the federal functions of the court had been completed. He did not contemplate its exercise simultaneously or concurrently with the exercise of federal jurisdiction.

The Chief Justice stated that there was ‘no reason in principle why the Court of Appeal, having exhausted its functions in the exercise of its federal jurisdiction . . . could not proceed to exercise [a] distinct non-judicial [State] power.’ Proceed suggests sequence. One of the grounds for finding that the declaration of inconsistent interpretation did not involve the exercise of a judicial function was its failure to affect the rights or liabilities of the parties: ‘At the point at which such a declaration is made the Court will have decided all matters relevant to the disposition of the proceedings.’ The challenge, then, was not to find a way in which the exercise of federal jurisdiction might incorporate, simultaneously, the exercise of a State (non-judicial and non-incidental) function, but to find a reason that the latter could not be performed once the former was exhausted.

One answer to what we might call the ‘sequence’ proposition is given in Bateman and Stellios’s second response. As they note (with reference to the opinion of Crennan and Kiefel JJ in Momcilovic), the declaration of inconsistent interpretation was an integral part of the jurisdiction exercised by the Victorian Court in ruling on Momcilovic’s application for an

20 Ibid at at 327.
21 Ibid at 328. My expression ‘State jurisdictional residue’ was coined before I noticed the similarity with Jacobs J’s.
22 Re Wakim; Ex parte McNally (1999) 198 CLR 511.
23 Bateman, n 16.
24 Indeed, the declaration was made eight days after the Court of Appeal refused leave to appeal against the conviction. As Bateman and Stellios observe, ‘The Chief Justice’s suggestion seems to be that federal jurisdiction came to an end following the application of the [Charter’s] interpretative rule and upon the refusal of leave to appeal, and that state jurisdiction kicked in upon the making of the declaration.’ Above n 11, 30.
25 Momcilovic at 65.
appeal. The Charter places the Court under an obligation to apply its interpretive principles in applying the law, and permits it, where relevant, to apply a test of consistency between the applicable law and the rights it protects. The declaration, regarded in this light, could not be made after the exercise of federal jurisdiction; there was no ‘after’. Along with all other aspects of the proceedings, it was completed with the making of the orders.

However, the matter is not so neatly resolved. The Chief Justice’s proposition did involve an ‘after’. Although, in his Honour’s words, the declaration of inconsistent interpretation had no legal effect upon ‘the validity of the statutory provision which is its subject’ and offered no guidance for future cases involving similar principles of law, it had what his Honour called a ‘statutory consequence’: namely, obligations falling on the Victorian Attorney-General to respond to the statutory rights inconsistency identified by the court.

It is worth noting here that a ‘matter’ is not indivisible. That is to say, there can be no objection to the ‘after’ argument on the ground that a whole controversy must be dealt with by a court. In Abebe v Commonwealth, against the plaintiff’s argument that jurisdiction may only be conferred on a federal court with respect to the whole ‘matter’ and quelling the whole controversy, Gleeson CJ and McHugh J stated that ‘[n]othing in the terms of s 77 or Ch III of the Constitution requires the Parliament to give a federal court authority to decide every legal right, duty, liability or obligation inherent in the controversy … merely because it has jurisdiction over some aspects of the controversy’. In other words, no constitutional principle applies according to which it is impossible to separate the issues in the controversy. Section 40 of the Judiciary Act, which provides for the removal to the High Court of part of a cause (‘arising under the Constitution or involving its interpretation’) from a State or federal court, also envisages that controversies may be broken into parts.

While this assists in responding to a non-severability objection to the State jurisdictional residue proposition, Abebe leaves unresolved the question of whether a ‘non-matter’, and non-federal, part of the controversy can be detached from the proceedings and addressed afterwards. This is significant for our analysis, because a Chapter III court cannot exercise a power that is not referable to a ‘matter’, therefore, any State jurisdictional residue concerning a ‘non-matter’ must involve the detachment of the State court from its identity as a Chapter III court. In other words, where a State court had been exercising federal judicial power, and then exercised a power that it was incapable of exercising as a Chapter III court, the power could only be severed from the controversy if the State court’s State identity could be resumed at this point. The Chief Justice’s finding in Mencilovic that the declaration of

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26 As Gummow J noted in Mencilovic at 90, it remains unresolved whether this arises under s 32 (1) ‘even in the absence of a point under the Charter being taken by a party before it’.
27 As set out in s 36 (1) (a), (b), and (c).
28 Mencilovic at 65. Charter s 37. In the event, the Victorian Government was not required to respond, because a majority found that the declaration was either invalid or had been made inappropriately on this occasion.
30 Ibid at 525.
31 In Re Judiciary and Navigation Acts (1921) 29 CLR 257.
inconsistent interpretation could only be made after the conclusion of the proceedings appears to have been relevant to the characterisation of the declaration as non-judicial, and this characterisation as a non-judicial function (and not incidental to the judicial power of the Commonwealth) was central to the conclusion that the declaration power could not be performed in the exercise of federal jurisdiction. The reason given was the inability of the declaration to produce ‘foreseeable consequences for the parties’ (as is necessary for there to be a ‘matter’). The Constitution, as noted, confines the jurisdiction of Chapter III courts to ‘matters’, and a ‘matter’, as is well established, requires ‘some immediate right, duty or liability to be established by the determination of the Court’. Advisory opinion jurisdiction, for example, cannot be conferred on a Ch III court, because it lacks this essential character.

The reasoning of the Justices who found the declaration power incapable of being conferred on a Ch III Court supports the conclusion that the power is a form of advisory opinion jurisdiction. While the High Court has consistently held that that the parliament is constitutionally precluded from conferring advisory opinion jurisdiction on a Ch III court, it has not been consistent in its characterisation of advisory opinions as judicial or non-judicial. Indeed, in the first case to address this issue, *In re Judiciary and Navigation Acts*, the High Court found advisory opinions to be judicial; the ground of invalidity was not the impugned law’s non-judicial character, but rather the fact that advisory opinions cannot be given in the exercise of the judicial power of the Commonwealth. This distinction between judicial power and the judicial power of the Commonwealth is often overlooked in discussions of federal jurisdiction, but, in the words of French CJ, it is ‘long acknowledged, directly and indirectly’ in the High Court. To repeat, it is the ‘judicial power of the Commonwealth’ to which Ch III courts are confined. A State court, as such, is not confined to the judicial power of the Commonwealth. Additionally, a State court may exercise certain non-judicial functions which (under the *Boilermakers* doctrine) cannot be performed by a federal court.

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32 For the Chief Justice, the fact of its being made after the disposition of the proceedings appears relevant to its ability to affect rights and liabilities and therefore its characterisation as non-judicial, although it is not clear how determinative this fact was, as distinct from the other elements of the characterisation of the declaration as non-judicial: it did, however, appear significant to his Honour’s conclusion that the declaration function could be performed independently of the exercise of federal jurisdiction, as a ‘mechanism by which the Court can direct the attention of the legislature, through the Executive Government of Victoria, to disconformity between a law of the State and a human right set out in the Charter.’ *Momcilovic* at 67.


34 *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.


36 *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257

37 *Momcilovic* at 62.

Significantly, the constitutional grounds for these two principles are different: the first arises from the confinement of the judicial power of the Commonwealth to ‘matters’; the second from the entrenched Commonwealth separation of powers under which the federal courts identified in s 71 are the exclusive repositories of the judicial power of the Commonwealth. To anticipate, the fact that some judicial functions exist outside the ‘judicial power of the Commonwealth’ may provide us with an opening for considering what a State court may do ‘residually.’ The question to be pursued at this point is whether the Kable doctrine should apply to both principles.

**Does the Kable doctrine subsume all State court functions?**

Whether State jurisdictional residue is available will depend upon, among other things, the answer to the ‘ontological’ question: does the State court have an identity separate from its identity as a Chapter III court? The Chief Justice’s *obiter* suggests that it does. This conclusion may seem uncontroversial, even commonplace. However, although *Baker v The Queen*[^39] affirmed that there are valid State functions that may not be performed in the exercise of federal jurisdiction, these nevertheless remained subject to the *Kable* test. More recent cases suggest that the identity of State courts is increasingly subsumed under their identity as federal courts. In *South Australia v Totani*,[^40] the *Kable* doctrine was consistently referred to as, in the words of Crennan and Bell JJ, standing for ‘limitations on the powers of State legislatures … by reference to the establishment by the Constitution of an integrated Australian court system, which contemplates the exercise of federal jurisdiction by State courts and has, as its apex, [the High Court] exercising the judicial power of the Commonwealth.’[^41] A similar view was advanced in *Wainohu v New South Wales*.[^42]

As we have noted, four Justices in *Momcilovic* found the declaration power to be non-judicial and incapable of being performed in the exercise of federal jurisdiction. The Chief Justice, who was among these four, did not find the declaration power offensive to the *Kable* doctrine in its application to a State function. This raises the possibility that other ‘distinct’ (non-federal) functions might be performed by a State court so long as these also pass the *Kable* test. The application of the *Kable* test (and the nature of the test), then, becomes a key element in determining whether State jurisdictional residue might be available. That is to say, all other things being equal, State jurisdictional residue will not be available if the ‘residual’ function is one that cannot be performed because it is incompatible with the State’s role as a court vested with federal jurisdiction. *Momcilovic* provides a limited degree of guidance on this question.

Gummow J (with whom Hayne J agreed on this point) applied the *Kable* test to the declaration power. His Honour held that s 36 of the Victorian *Charter* failed the test and was therefore incapable of being ‘picked-up’ by s 79 of the *Judiciary Act*; he emphasised that the

[^40]: (2010) 242 CLR 1 (‘Totani’).
[^41]: *Totani* at 156.
[^42]: (2011) 243 CLR 51.
‘touchstone’ of the Kable test concerned the ‘institutional integrity of the courts.’ The declaration, he held, ‘does not have a dispositive effect’; it provides, instead, ‘formal advice to the Attorney-General ... The advice is just that.’ Such an ‘advisory structure’, his Honour stated, would impair the separation of powers, and would attempt ‘a significant change to the constitutional relationship between the arms of government with respect to the interpretation and application of statute law.’ The fact of advice appears to provide the incompatibility element in Gummow J’s analysis: the declaration power, he stated, ‘has the vice described in Wilson v Minister for Aboriginal and Torres Strait Islander Affairs, namely the giving to the Executive of an advisory opinion upon a question of law’.

To paraphrase, the declaration turned the giving of legal advice into a political function. In short, Gummow J’s main ground for finding impairment of the institutional integrity of the court, as a court exercising federal jurisdiction, was breach of the separation of powers. Although his Honour stated that, even had the declaration power not failed under Kable, it ‘would have been beyond the judicial power of the Commonwealth because the Court would have been authorised thereby “to make a declaration of the law divorced from any attempt to administer that law”’ (in other words, for want of a ‘matter’), his judgment appears to merge the two tests. This, I will suggest, creates difficulties for resolving the ‘ontological’ question, at least to the extent that it applies to the possibility of State jurisdictional residue. The two grounds of invalidity – institutional integrity (incorporating impartiality and independence) which is derived from the Constitution’s separation of powers, and confinement of Chapter III courts to ‘matters’ - I will suggest below, need to be separated. Additionally, the first ground needs to be disaggregated. The ‘integrity’ ground should be sub-divided, distinguishing between the powers and functions that derive specifically from the separation of powers, and ‘integrity’ with respect to those features of a court that are definitionally essential to its characterisation as a (constitutionally-recognised) institution.

Heydon J’s judgment hints at a conceptualisation along these lines. His Honour also found the declaration power to be invalid, including for similar reasons (although, unlike Gummow J, he found s 36 to be non-severable and held the entire Charter invalid). In his words, ‘[a] s 36 declaration is merely advisory in character. It does not declare any rights of the parties. It decides nothing. And it does not affect their rights’. The declaration power, in other words, was not referable to a ‘matter’. Additionally, however, his reasons appear to go beyond tests deriving from Chapter III and are consistent with the approach found most

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43 Ibid at 94.
44 Ibid at 95.
47 Momcilovic at 96. Gummow J added that, while Wilson concerned the conferral of a non-judicial function on a federal judge as persona designata, Waimohu had applied this principle to a State Supreme Court.
48 Momcilovic at 86 (citing In re Judiciary and Navigation Acts (1921) 29 CLR 257 at 265-266).
49 Momcilovic at 185.
recently in *Kirk v Industrial Court (NSW)*,\(^{50}\) where the test for invalidity arose from the State court’s character as a *court*, rather than, specifically, a court vested with federal jurisdiction (*Kirk* is discussed further below). A s 36 declaration, Heydon J stated, ‘does not involve the exercise of a judicial function and is not an incident of the judicial process. The work of the Supreme Court of Victoria, sitting as such, is limited to the judicial process. The power to make a s 36 declaration takes the Supreme Court of Victoria outside the constitutional conception of a “court”.’\(^{51}\) In this statement we see the ‘judicial process’ identified as an institutional descriptor applying to State courts in their own right, rather than necessarily as courts vested with federal jurisdiction. This, I will suggest, assists in the resolution of the ‘ontological’/State jurisdictional residue dilemma.

Crennan and Kiefel JJ, writing jointly, held the declaration power to be valid in the exercise of federal jurisdiction. Their Honours considered whether s 36 was compatible specifically with the ‘role of the Supreme Court as a repository of the judicial power of the Commonwealth.’ They too recognised that the declaration has no dispositive effect: that it is ‘not an order of the Supreme Court of Victoria, and ‘is not directed to the determination of a legal controversy; it has no binding effect.’\(^{52}\) From these observations, however, they drew different conclusions from those of Gummow and Heydon JJ. A declaration, they said, is ‘no more than a statement by the Supreme Court’ following an interpretation of inconsistency between two statutes: ‘[i]n that sense it constitutes a conclusion but is not an advisory opinion’.\(^{53}\) The conclusion arises ‘out of the exercise undertaken by the Supreme Court in respect of s 32(1)’\(^{54}\) of the *Charter* which instructs courts to interpret laws conformably with rights. Section 36, they concluded, is not judicial and cannot stand on its own, but this is not fatal to its validity; as previous authorities have recognised, there are functions that are ‘not necessarily of a judicial character’ that may be conferred on a federal court as ‘incidental to the exercise of judicial power’.\(^{55}\)

On the *Kable* incompatibility test, Crennan and Kiefel found it to be significant that s 36 ‘does not oblige the Supreme Court to make a declaration’ and, in this, they distinguished it from what was at issue in *Totani* concerning legislation that required the South Australian Magistrates Court to make control orders against individuals on an application by the Commissioner of Police. In contrast, s 36, they said, does not ‘enlist the Court to give effect to any pre-determined conclusions on the part of the legislature or the executive.’\(^{56}\) The making of a declaration, furthermore, is done independently of the other arms of government; the declaration power thus survived the impartiality and independence tests at the heart of *Kable*. The power, their Honours concluded, should give no cause for concern; it ‘involves an ordinary interpretive task’, comparable to the comments judges may sometimes

\(^{50}\) (2010) 239 CLR 531 (‘*Kirk*’)

\(^{51}\) *Momcilovic* at 185.

\(^{52}\) Ibid at 222.

\(^{53}\) Ibid at 207.

\(^{54}\) Ibid at 222.

\(^{55}\) Ibid at 224.

\(^{56}\) Ibid at 226.
pass ‘upon conclusions they have reached about defects in legislation in the course of their reasons.’

Crennan and Kiefel JJ, however, found the declaration power to have been inappropriately made in this case. In contrast to Gummow J, who questioned the ‘perception and public confidence’ dimension of the institutional integrity test, their Honours highlighted the confidence dimension. They stated that, against the raised expectations encouraged by the Charter, ‘[t]he making of a declaration placed the Court of Appeal in a position where it acknowledged that the trial process conducted by the County Court involved a denial of the appellant’s Charter rights’. Indeed, they questioned the appropriateness, generally, of a declaration made in the context of a criminal trial, and suggested that it may ‘[u]ndermine a conviction.’ Nevertheless, they concluded, the declaration had ‘utility in other spheres,’ and did not impair the institutional integrity of the courts.

What, then, may we learn from these judgments with regard to the type of State function that might be performed sequentially or residually, alongside the exercise of federal jurisdiction, without offending the Kable doctrine? A non-judicial function will not impair the institutional integrity of the court if its performance is compatible with the courts’ impartiality and independence, and, arguably, if the function does not damage the perception that it is. The function also needs to be capable of being performed separately. These conclusions rest upon the characterisation of the function as non-judicial and severable from the other provisions in the State law under which it was conferred. One need not conclude that the s 36 declaration power, specifically, has these characteristics to arrive at the conclusion that some (other) ‘distinct non-judicial’ functions may be conferred on a State court, and may survive the court’s exercise of federal jurisdiction in the proceedings to which such functions also apply.

Such a conclusion, however, rests upon a restrained interpretation of the Kable doctrine. To make sense of what is at issue, we should go back to Kable itself. My concern is less about what Kable tells us about why the incompatibility test applies to State courts, than specifically about when it applies, and what this tells us about the identity of the State court and thus its capacity to exercise ‘residual’ jurisdiction. In brief, does, or should, the Kable doctrine apply only when a State court is exercising federal jurisdiction; or does it apply at all times because the court is capable of exercising federal jurisdiction, or, again, at all times, because State courts are part of an ‘integrated’ court system, and are recognised as such in both s 71 which lists them among the repositories of the judicial power of the

57 Ibid at 227.
58 Ibid at 228.
59 Ibid at 229.
60 As Bateman points out, citing the language borrowed from previous cases by the majority in Fencott v Muller (1983) 152 CLR 570 at 607-608, severability of a non-federal claim from a federal matter is subject to very stringent tests, including ‘completely disparate’, and ‘completely separate and distinct.’ Bateman, n 16, 255.
Commonwealth and s 73, under which their judgments, decrees, orders, and sentences are appealable to the High Court?

To put these questions ‘ontologically’, are State courts federal courts only when they are exercising federal jurisdiction, or are they always ‘on notice’ as Chapter III courts, regardless of the level of jurisdiction exercised in the case at hand? Are they, effectively, mini federal courts, like little Babushka dolls, nested inside larger, identical versions, of which the High Court is the largest of all? These alternatives may be styled the ‘actual exercise’ explanation and the ‘integrated exercise’ explanation.61 The Justices in Kable took different positions with respect to these, and, although (arguably) three favoured the ‘integrated exercise’ explanation, a majority did not settle on one or the other. While the three Justices who favoured the ‘integrated exercise’ explanation concluded that the State courts’ federal identity was controlling, three others held that the State courts’ identity as State courts and their identity as federal courts were distinct. Whether State courts can exercise ‘residual’ State jurisdiction while, or after, exercising federal jurisdiction will depend upon which of these two Kable explanations is preferred.

Gaudron J, leading the first explanation, questioned the proposition that there was a clear constitutional distinction between federal courts and State courts. Both ss 71 and 73, her Honour noted, make no distinction: ‘the provisions of Ch III clearly postulate an integrated Australian court system for the exercise of the judicial power of the Commonwealth.’62 While matters of appointment, tenure and remuneration of State judges, ‘and the structure, organisation and jurisdictional limits of State courts’ are for the States alone,

‘[n]either the recognition in Ch III that State courts are the creatures of the States nor its consequence that, in the respects indicated, the Commonwealth must take State courts as it finds them detracts from ... one of the clearest features of our Constitution, namely, that it provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth.’63

The limitation on State legislative power arising from this fact, her Honour stated, ‘derives from the necessity to ensure the integrity of the judicial process and the integrity of the courts specified in s 71 of the Constitution.’64 If we conceptualise this as a response to Windeyer J’s ‘ontological question’, Gaudron J’s integrated system means that State courts’ identities are submerged under their federal identity. The State courts have, effectively, only one jurisdictional identity: the federal.

61 The fact of being invested with federal jurisdiction under s 39(2) of the Judiciary Act and the appealability of a Supreme Court’s judgments to the High Court, under s 73 of the Constitution, suggest two different pathways to the ‘integrated exercise’ explanation, but the consequences for an analysis of State jurisdictional residue are unlikely to be different.
62 Kable at 101.
63 Ibid at 102.
64 Ibid at 104.
Gummow J similarly favoured the ‘integrated exercise’ explanation. His Honour rejected the proposition that the courts of the States could be segregated ‘into a distinct and self-contained stratum within the Australian judicature.’ Rather, he stated, ‘there is an integrated Australian legal system, with, at its apex, the exercise by [the High Court] of the judicial power of the Commonwealth.’

McHugh J reached similar conclusions. His judgment, however, accords greater recognition to the State courts’ separate identity; the conceptualisation of the integrated system appears less as the merging of identities, and more as a matter of overlapping roles. State courts, his Honour said, ‘have a status and a role that extends beyond their status and role as part of the State judicial system. They are part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power.’ In places, regarding the question of when the Kable test should apply McHugh J appears indeed to favour the ‘actual exercise’ explanation: for example, ‘neither the Parliament of New South Wales nor the Parliament of the Commonwealth can … legislate in a way that permits the Supreme Court while exercising federal judicial power to disregard the rules of natural justice or to exercise legislative or executive power. Such legislation is inconsistent with the exercise of federal judicial power.’ Nevertheless, the conferral of non-judicial functions on State courts, if these are ‘of a nature that might lead an ordinary reasonable member of the public to conclude that the Court was not independent of the executive government of the State’, or the conferral of non-judicial powers ‘so extensive or of such a nature that the Supreme Court would lose its identity as a court’ would be invalid under Ch III. State courts thus have a ‘dual’ identity, but the federal dominates.

Toohey J, on the other hand, favoured the ‘actual exercise’ explanation. He rejected the proposition advanced by the plaintiff that a separation of powers, operating as a limitation, should be inferred from the New South Wales Constitution; ‘there is nothing in the Constitution (NSW) which prevents the legislature from exercising judicial power.’ To the extent that they are invested with federal jurisdiction, his Honour said, ‘the federal courts and the courts of the States exercise a common jurisdiction. It follows that in the exercise of its federal jurisdiction a State court may not act in a manner which is incompatible with Ch III of the Commonwealth Constitution.’ He reiterated: ‘[i]t is not the investing of the Supreme Court with federal jurisdiction that is in issue; it is the exercise of federal jurisdiction by the Supreme Court in the circumstances arising under the Act that is challenged.’

The views of the two dissenting Justices are also of assistance in conceptualising the ‘ontological’ issue. Brennan CJ rejected the application of the ‘test of incompatibility’ to

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65 Ibid at 143.
66 Ibid at 114-5.
68 Ibid at 117.
69 Ibid at 94.
70 Ibid. Emphasis added.
71 Ibid at 96.
courts. The test, his Honour stated, had been taken from the majority judgment in *Grollo v Palmer*72 regarding, specifically, whether non-federal functions could be conferred on a federal judge as *persona designata*;73 it was not concerned with the jurisdiction of courts. Nothing in the text of the relevant State Constitution, he stated, pointed to a limitation on a State legislature’s powers, and nothing in the Constitutional Convention debates pointed towards an intention that the Commonwealth power to vest federal jurisdiction in State courts was meant to limit State legislative powers to confer non-federal powers on these courts. His Honour thus rejected the submission ‘that a State court cannot be a repository of both State non-judicial power and federal judicial power if the exercise of the former would be incompatible with the exercise of the latter’.74 The implication, then, was that State courts have two distinct identities: the one does not diminish the other.

Dawson J, also in dissent, emphasised that the New South Wales Constitution does not entrench a separation of powers and that the *Boilermakers* doctrine ‘has no application to the judicature of a State’.75 As Brennan CJ had done, he recalled Griffith CJ’s statement that ‘when the Federal Parliament confers a new jurisdiction upon an existing State Court it takes the Court as it finds it’.76 This, his Honour said, applies to, among other things, the number of judges, and the practice and procedure a State court is to follow in exercising federal jurisdiction. Additionally, the legislature ‘may go no further than is necessary for [the conferral of jurisdiction] … [I]t may not alter the character or constitution of the court.’77 Dawson J summarised the appellant’s argument as precluding a State legislature from conferring functions incompatible with Ch III on a State court ‘as the potential or actual repository of federal jurisdiction’.78 He held, against this argument, that State courts ‘remain State courts even though, when exercising federal jurisdiction, they may be regarded as a component of the federal judicature… [O]ur legal system, though integrated, is not a unitary system’.79 His Honour’s conclusion was that ‘State courts are not created by or under Ch III and, provided that they are courts within the meaning of s 77 (iii), it matters not for the purposes of Ch III what functions they perform in exercising the jurisdiction vested in them by State legislation.’80

The Supreme Court of New South Wales was, of course, exercising federal jurisdiction in *Kable*. Several issues therefore went unresolved. In addition to the question of *when* the doctrine applied, the question of whether the incompatibility test would extend to cases in the exercise of State jurisdiction remained to be determined. Subsequent cases confirmed that it would, and the ‘integrated exercise’ explanation appeared settled as the

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73 *Kable* at 67.
74 Ibid.
75 *Kable* at 78.
76 *Federated Sawmills, Timberyard and General Woodworkers’ Employees’ Association (Adelaide Branch) v Alexander Ltd* (1912) 15 CLR 308 at 313.
77 *Kable* at 82.
78 Ibid.
79 Ibid at 83-84.
80 Ibid at 83.
proposition for which Kable stands. In the words of McHugh, Gummow, Hayne and Heydon JJ, ‘The doctrine in Kable is expressed to be protective of the institutional integrity of State courts as recipients and potential recipients of federal jurisdiction.’ 81 Totani and Wainohu reaffirmed this principle.

This representation of Kable creates problems for the State jurisdictional residue proposition; indeed, for the idea that State courts are State courts.

The case for State jurisdictional residue.

Factually, Momcilovic presented an intriguing confluence of oddities: the first declaration of inconsistent interpretation under the Victorian Charter, an almost-overlooked exercise of federal jurisdiction,82 and other ‘novel’83 issues concerning s 109 of the Commonwealth Constitution. The ‘jurisdictional residue’ question may, therefore, appear to be peculiar to this case and unlikely to arise again, or only rarely. But, so long as the Victorian Charter is in operation, the potential lies for the issue to arise in future declarations of inconsistent interpretation by the Victorian Supreme Court.

Although a majority on the High Court in Momcilovic held the declaration power to be constitutionally valid for a State court (albeit not in the exercise of federal jurisdiction), Crennan and Kiefel JJ, as we saw, raised doubts about the appropriateness of the declaration power in criminal law cases – doubts that may go to the public confidence ‘limb’ of the Kable incompatibility test. In their words, in criminal trials, a declaration that the law under which an accused was convicted was upheld, notwithstanding that it ‘involved a denial of … Charter rights’,84 would place the court making the declaration in an invidious position. While the number of criminal cases in which a State court exercises federal jurisdiction is likely to be small, even one case in which a declaration of inconsistent interpretation made under State law was held by a majority to breach the Kable public confidence test would have a dramatic impact. In any case, federal jurisdiction may be engaged in various ways, including (as in Momcilovic) through diversity jurisdiction, or (as in Kable) via the raising of a question about constitutional validity. Indeed, as James Stellios notes, ‘the circumstances in

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81 Baker v The Queen (2004) 223 CLR 513 at 534. The emphasis was added by Leslie Zines, who comments that, in Kable, ‘the majority judges were not unanimous’ on the question of when the incompatibility test applied, but ‘three judges regarded the issue as arising, at all times, because the exercise of any power or jurisdiction by the court can affect public confidence in the integrity of a court in which federal jurisdiction has been invested. This seems now to be the accepted view.’ Zines, The High Court and the Constitution (Federation Press, 2008), 270.
82 As Gummow J noted: ‘At trial the appellant gave unchallenged evidence that she had leased out [her] apartment in Melbourne and had moved to Queensland … That meant that, while the appellant had the human rights conferred by the Charter because she was being prosecuted in a Victorian court … she was a resident of Queensland within the meaning of s 75 (iv) of the Constitution. It was only in this Court that the significance of these facts became apparent from the submissions presented by Western Australia as intervener.’ Momcilovic at 80.
83 Momcilovic at 124, Hayne J.
84 Momcilovic at 394.
which a State court may be exercising federal jurisdiction are potentially very broad. Other ‘residual’ non-judicial functions may well lend themselves to such a challenge.

This takes us to the ‘principle’ argument. As French CJ asked, why shouldn’t certain functions or powers that are not available in the exercise of federal jurisdiction remain available to a State court, even when the court has been exercising federal jurisdiction? The affirmative response lies in the federalism argument. The Constitution, as noted in *Kable*, describes a federal system: it entrenches State courts; it requires the existence of State courts. *Kable*, as we saw, offered alternatives on when the tests arising under Chapter III arose: the ‘integrated exercise’ explanation dominated numerically, but it was not the conclusion of a majority. It has, however, come to be treated as such, and as recent cases have indicated, it has triumphed, confirming the *Kable* capture. This, combined with the fact that federal jurisdiction is engaged, under s 76 (i) of the Constitution, when a constitutional point about incompatibility is raised, allows the *Kable* test to become a self-fulfilling prophesy. The test is applied because the test is invoked. State jurisdiction is transformed into federal jurisdiction.

If all State law is effectively federalised, there can be no residue. State courts become mini versions of federal courts, identical in all jurisdictional respects. This, among other reasons, is why the Chief Justice’s remark in *Momcilovic* is interesting: it suggests a restraint on this process.

The *Kable* ‘integrated exercise’ explanation for when the incompatibility test applies leads to the conclusion that - both ‘ontologically’ and jurisdictionally - State courts have only one identity: the federal. This cannot be correct, since, as noted, the Constitution recognises and entrenches bodies called ‘State courts’ (not just courts vested with federal jurisdiction). If the ‘actual exercise’ explanation found in Toohey J’s judgment in *Kable* were adopted instead, State courts, in the exercise of State jurisdiction, would be free to perform whatever function the relevant State legislature conferred upon them (subject to the *Kirk* test, discussed below). But, would they also be free to perform State functions after proceedings in the exercise of federal jurisdiction had concluded?

86 Bateman also points out that, given the High Court’s ‘backdating’ approach to the engagement of federal jurisdiction in a State court, the raising of a ‘*Kable* point’ in a defence turns the ‘threshold’ question into whether the relevant State law can be ‘picked up’ by s 79 of the *Judiciary Act*, rather than whether the law undermines the institutional integrity of the court. He quite rightly describes this as ‘strange’. Bateman notes, of course, that the High Court does not entertain ‘colourable’ federal claims (although this does not exclude weak claims). Bateman, n 16, 263.
87 Note Dawson J’s remark in *Kable* at 87 (footnote omitted): ‘[B]ecause [the appellant] raised in his defence the question of the invalidity of the [NSW Community Protection] Act under the Commonwealth Constitution[,] it was the appellant’s contention that this made the case a matter arising under the Constitution or involving its interpretation within the meaning of s 76(1) of the Constitution and thus within the ambit of the federal jurisdiction vested in the court … I am aware of the views expressed in *Felton v Mulligan* to the effect that once federal jurisdiction is attracted, even by a point raised in a defence, the jurisdiction exercised throughout the case will remain federal jurisdiction. For the purpose of determining the available avenues of appeal that may be the only practical approach, but I would observe that it may lead to a very artificial result in a case such as this, namely, that the Supreme Court of New South Wales was exercising federal jurisdiction … under a New South Wales Act.’
Things would have been simpler, had the Chief Justice characterised the declaration power as judicial, for there could surely have been no *Kable* incompatibility objection (in principle) to its ‘residual’ exercise as a State judicial function. A judicial function, of its nature - even if it falls outside a ‘matter’ and thus outside the judicial power of the Commonwealth - cannot damage a court’s integrity. If we accept the ‘sequence’ proposition, State functions that are *judicial*, but do not come within the judicial power of the Commonwealth might be performed, free of the *Kable* test, even when the proceedings fall under federal jurisdiction, so long as the latter is exhausted.

But the conclusion about the availability of State jurisdictional residue does not depend upon a distinction between judicial and non-judicial powers or functions. Not all non-judicial State functions impair a State court’s integrity. In *Momcilovic*, as we have seen, the Chief Justice found the declaration of inconsistent interpretation to be both non-judicial and non-impairing. A State court might thus be free to perform a ‘residual’ function, including a non-judicial function (subject to other tests, discussed below), where this was relevant to the controversy and once the orders had been given in the exercise of federal jurisdiction.

The point, of course, is not for the ‘residue’ to consist of just anything the court may want to say or do before stepping down, but may involve a function, conferred under State law that is associated with the (now completed) federal proceedings but which, at the same time, has not been ‘picked-up’ in the proceedings themselves. The hat that is taken off and the hat that is put on can fit the same head. So long as it does, the test for validity of the function should be a test that applies to the State court’s performance as a State court. As noted above, Heydon J, in *Momcilovic*, held the declaration power to be repugnant to the State court’s identity as a *court*. This may assist in resolving the ‘ontological’/jurisdictional residue dilemma. To restate, if one adopts the ‘actual exercise’ explanation in *Kable*, the *Kable* test will not apply when a State court is exercising State jurisdiction. That does not mean that the State legislature is free to confer any function whatsoever on a State court. The court’s integrity as a *court* can still be preserved.

This is the principle that can be drawn from *Kirk*, and, as suggested above, that allows us to distinguish between the ‘institutional integrity’ test for incompatibility that derives from the constitutional recognition of a court as an *institution*, and the ‘institutional integrity’ test that derives, specifically, from the federal constitutional separation of powers. In the words of French CJ, Gummow, Hayne, Crennan, Kiefel, and Bell JJ, ‘Chapter III of the Constitution requires that there be a body fitting the description of “the Supreme Court of a State”… It is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description.’

88 *Kirk* at 566 (footnotes omitted).
tribunals), and did not specifically employ the language of institutional integrity. Nevertheless, the concepts converge. While the reason given for protecting the Supreme Court from legislative erosion arises from the requirement in Ch III of the Commonwealth Constitution that the Supreme Court exist, this is grounded in the constitutional reference to the Supreme Court’s identity, qua State court, and not specifically in its capacity to serve as a federal court. The Kirk test, if understood in this light, may ‘de-federalise’ the Kable test, allowing the institutional integrity test to apply specifically to State courts on grounds related to their State identity, and making room for State jurisdiction to be assessed in its own right, not merely as an aspect of federal jurisdiction. We may, indeed, distinguish between the ‘institutional integrity’ test, and the ‘institutional identity’ test, the first applying to all courts, and the second, deriving from the Commonwealth separation of powers, applying only to courts actually exercising federal judicial power. To these tests, we add, of course, the ‘judicial power of the Commonwealth’ test which confines Chapter III courts to ‘matters’. This test should also apply only when a court is actually exercising federal jurisdiction.

Conclusion
To treat the Kable institutional integrity test, the separation of powers test, and the judicial power of the Commonwealth test as the same thing is to absorb State courts into federal courts, which itself offends the Constitution’s scheme for a federal Commonwealth that includes both a federal and a State judicial system. To disaggregate the tests allows for the conclusion that a State function, conferred under State law, which is severable from (but arising from) proceedings in the exercise of federal jurisdiction, may be performed ‘residually’, even where it could not be performed in the exercise of the judicial power of the Commonwealth.

As noted, advisory opinions cannot be given by a court exercising federal jurisdiction, but – so long as Kirk rather than Kable applies - a State court should not be prohibited from performing such a function merely because it is capable of exercising federal jurisdiction. This does not necessarily save s 36(2) of the Victorian Charter. A declaration of inconsistent interpretation may be a form of advice, but the category of

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89 The case has been described as standing for the proposition that ‘institutional integrity … prevents state legislatures from withdrawing certain types of jurisdiction from state courts.’ Ratnapala and Crowe, above n 7, 189.

90 The footnote in Kirk attached to the words ‘Chapter III of the Constitution’ (see n 83) refers to s 73 (providing for appeals from Supreme Courts to the High Court), rather than to s 71 or s 77 (iii). Compare this perspective, for example, with Gummow, Hayne, and Crennan JJ, in Forge v ASIC (2006) 228 CLR 45 at 74: ‘It may be accepted that the constitution and organisation of State courts is a matter for State legislatures. In that sense, the federal Parliament having no power to alter either the constitution or the organisation of a State court, the federal Parliament must take a State court “as it finds it”. It does not follow, however, that the description which State legislation may give to a particular body concludes the separate constitutional question of whether that body is a “court” in which federal jurisdiction may be invested.’ Forge is also referenced (Kirk fn 159) in the passage cited in Kirk, but without mention of the vesting of federal jurisdiction in State courts.
advisory opinions is wider. Some advisory functions may offend; others may not. It remains unresolved whether the declaration power is relevantly offensive. It also remains unresolved whether it is non-severable from the proceeding under which it arises.

Still the ‘message’ to be drawn from the Chief Justice’s obiter is this: the vesting of federal jurisdiction in State courts should be relevant only when State courts are exercising federal jurisdiction; the ‘integrity’ or ‘essential character’ test applied in Kirk can do the work for State jurisdiction that Kable does for federal jurisdiction; the exercise of federal jurisdiction need not subsume every aspect of a controversy; there should be ‘no reason’ that State jurisdictional residue cannot be exercised where an aspect of the controversy comes under State law but is unresolvable in federal jurisdiction, so long as it is otherwise innocent.

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91 For example, a reference on a point of law, as in Mellifont v A-G (Qld) (1991) 173 CLR 289.
92 Crennan and Kiefel JJ’s reasoning in Momcilovic provides powerful grounds (pace their Honours) for concluding that it is offensive, as such, as well as non-severable from the Charter. Regarding the ‘offensiveness’ dimension, the reasons given, as noted, related to the inappropriateness of a declaration of inconsistent interpretation in the context of a criminal trial. Their conclusion that the declaration power was, effectively, no more than the power to make comments about defects in the law, does not fit with its actual statutory character. If all a declaration amounted to was a comment by a judge about the rights consistency of the relevant law, it might well be characterised as obiter, and therefore inoffensive to the exercise of judicial power. However, a declaration by a court – that is, by a majority – surely cannot be characterised as obiter. Furthermore, the Charter (as Gummow J stressed) places particular obligations on the State Executive, once a declaration is made. These are political obligations. This, in my view, is what makes the declaration power offensive not only to federal jurisdiction (since a declaration, as advice, falls outside a ‘matter’) but also to the exercise of State jurisdiction, under the Kirk test: the Charter effectively requires a State court to act as a policy adviser to government. This is incompatible with the court’s definitional character as a court.