

**THE APPLICATION OF QUASI-CONSTITUTIONAL LAWS  
SECOND LECTURE IN THE 2008 MCPHERSON LECTURES**

**STATUTORY INTERPRETATION & HUMAN RIGHTS**

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There is a tendency in Australia to identify constitutional law with the exegesis of a specific text. Such an approach does not take into account our inheritance of a Westminster system of government. As a joint judgment of the High Court once pointed out:

“To say of the United Kingdom that it has an ‘unwritten constitution’ is to identify an amalgam of common law and statute and to contrast it with a written constitution which is rigid rather than fluid. The common law supplies elements of the British constitutional fabric.”<sup>1</sup>

The British Constitution, and to a substantial degree our own, has evolved over the course of the centuries through a process of historical accretion and, sometimes, historical accident. To give only one example, George I and George II spoke no, or little, English. For this reason, and also because of their preoccupation with the affairs of the

Electorate of Hanover, they did not, unlike their predecessors, attend Cabinet meetings. By the time George III took the throne, the convention was firmly established, by almost half a century of practice, that the monarch did not attend Cabinet.<sup>2</sup>

Our constitution, like the British Constitution, is not contained simply in the document called the Constitution of the Commonwealth and the various documents identified as Constitutions of the respective States. There are, as is well-known, critical matters that are the subject only of a constitutional convention. These conventions have developed over long periods of time and continue to adjust to new circumstances in a manner which cannot and does not occur with a written text. Sir Victor Windeyer observed, upon the centenary of responsible government, fifty years ago:

“That the players should be making the rules as the game proceeds may seem strange. Yet this has been the course of much British constitutional history. It may well be inevitable if the organs of government are not to become atrophied; for definition can produce a rigor iuris, only one stage removed from rigor mortis.”<sup>3</sup>

Constitutional significance should be attributed to a number of common law doctrines and a number of statutes. Both are, of course, theoretically able to be amended by Parliament. Nevertheless, the fundamental nature of some of these laws and principles, and the improbability of modifying legislation, is such as to justify treating such statutes and principles of the common law as part of constitutional law.

Many of the principles of interpretation set out in the first lecture under the heading “The Common Law Bill of Rights”, are of constitutional significance. There are a number of references in the case law to various principles of the common law being described as constitutional rights, for example: the right of access to the courts;<sup>4</sup> the right to personal liberty by invoking habeas corpus;<sup>5</sup> the right to a fair trial;<sup>6</sup> the conclusive effect of a criminal acquittal;<sup>7</sup> the principle of open justice.<sup>8</sup> Notwithstanding that legislation can amend these rights, they are of such significance as to justify such characterisation.

Many of the principles characterised under the general rubric of the principle of legality, discussed in my first lecture, are accurately characterised as quasi-constitutional. Each is a rebuttable presumption of Parliamentary intention, but they reflect fundamental assumptions

about the relationship between citizen and state. That is why they will not be rebutted without clear parliamentary intent.

There are many statutes which are also entitled to be characterised as quasi-constitutional, for example, laws creating integrity institutions which, in my opinion, are of a sufficiently wide-ranging and detailed nature to be classified collectively as an “integrity branch of government”.<sup>9</sup> Where a jurisdiction adopts a statutory form of a bill of rights, that legislation is also entitled to be characterised as “quasi-constitutional”.

Four examples of such legislation are of relevance to Australian discourse: the *Bill of Rights Act* 1990 of New Zealand, the *Human Rights Act* 1998 of the United Kingdom, the *Human Rights Act* 2004 of the Australian Capital Territory and the *Charter of Human Rights and Responsibilities Act* 2006 of Victoria. Adopting such legislation is also under active consideration in other Australian jurisdictions, albeit not my own.

### **Nature of the Text**

One of the most fundamental, and frequently overlooked, principles of interpretation is that it is critical to commence with an understanding of

the nature of the document which falls to be interpreted. As Professor Paul Freund once remarked:

“We ought not read the Constitution like a last will and testament lest it become one.”<sup>10</sup>

This is similar to Sir Victor Windeyer’s concept of a “*rigor iuris*”.

There are numerous authorities which emphasise the different approach that is required for the interpretation of a constitution. As O’Connor J put it in the first decade of federation:

“it must always be remembered that we are interpreting a *Constitution* broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.”<sup>11</sup>

The Privy Council quoted with approval the observation of a Canadian constitutional law scholar:

“The Privy Council, indeed, has laid down that courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction being proper in

the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British colony."<sup>12</sup>

Plainly, a formal constitution, whether or not incorporating an express bill of rights, is entitled to a distinctively different approach than that appropriate to other forms of legislation. As the Privy Council once said with respect to the Constitution of Bermuda, which did incorporate a bill of rights:

"It is ... drafted in a broad and ample style which lays down principles of width and generality ... [and which] calls for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give individuals the full measure of fundamental rights and freedoms referred to."<sup>13</sup>

The difficulties that may be occasioned in the task of interpreting a constitutional bill of rights, is illustrated by the narrow five to four majority of the Privy Council that upheld the validity of the mandatory death penalty in some Caribbean nations.<sup>14</sup>

Lord Hoffmann, writing for the majority which upheld the full effect of the statute conferring a mandatory death penalty, noted at [28]:

“Parts of the Constitution, and in particular the fundamental rights provision in Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions ... The text is a ‘living instrument’ when the terms in which it is expressed, in their constitutional context, invite and require periodic examination.”

His Lordship indicated a clear limit to the living instrument approach when he said at [29]: “the Constitution does not confer upon the judges a vague and general power to modernise it”.

He concluded:

“[59] The ‘living instrument’ principle has its reasons, its logic and its limitations. It is not a magic ingredient which can be stirred into a jurisprudential pot together with ‘international obligations’, ‘generous construction’ and other such phrases, sprinkled with a cherished aphorism

or two and brewed into a potion which will make the Constitution mean something which it obviously does not. If that provokes accusations of literalism, originalism and similar heresies, their Lordships must bear them as best they can.”

The dissentients, led by Lord Bingham, were equally forthright, saying that the majority judgment:

“[78] ... puts a narrow and over literal construction on the words used, gives little or not weight to the principles which should guide the approach to interpretation of constitutional provisions, gives little or no weight to the human rights guarantees which the people of Barbados intended to embed in their constitution and puts Barbados in flagrant breach of its international obligations.”<sup>15</sup>

The debate as to the proper approach to constitutional interpretation is not directly relevant to the matters I am now considering, namely, the common law principles of statutory interpretation that I have grouped as a “common law bill of rights” and the statutory human rights acts. Nevertheless, some aspects of

constitutional interpretation may have an analogous application for the interpretation of quasi-constitutional laws. There is some similarity in the approaches that have been adopted between constitutional and quasi-constitutional texts.

In this lecture, I wish to focus on the close analogy between the rules for interpretation contained in the common law bill of rights and the special provisions requiring courts to strive to interpret other legislation to be compliant with human rights. The approach to these matters reflects the quasi-constitutional nature of the two lists of rights.

### **Rights Compliant Interpretation**

The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of the law has escaped statutory modification. It is, perhaps, a little ironic that one of the areas of the law to be least affected by statutory modification is, in fact, the law of statutory interpretation. As a matter of appearance, the introduction into interpretation acts of a requirement for purposive interpretation was substantive. However, by the time that legislation was introduced such an approach had been adopted by the judiciary and replaced the former literalist approach.

The most significant statutory change to the law of statutory interpretation is introduction of the special interpretation provisions in human rights acts which impose an obligation upon courts to interpret *other* legislation so as to be consistent with the rights set out in the human rights act. Those rights can be more extensive, or less extensive, than the common law bill of rights which I discussed in my first lecture. There is, however, a substantial overlap. The rights compliant interpretation provisions are potentially of constitutional significance. Their application raises some fundamental issues about the nature of the interpretive process and the relationship between the judiciary and the Parliament.

There are four rights compliant interpretation provisions relevant for our purposes. The first is s 6 of the *New Zealand Bill of Rights Act* 1990 which provides:

“Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”

The second such provision is s 3 of the *Human Rights Act* 1998 of the United Kingdom which provides:

“3(1) 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 rights.”

The first such Act passed in Australia was the *Human Rights Act* 2004 (ACT) which, in its original form, provided:

“30(1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.

(2) Subsection (1) is subject to the *Legislation Act*, section 139.”

Section 139 of the *Legislation Act* is the common provision of Australian interpretation acts requiring the interpretation that would best achieve the purpose of the law to be preferred to any other interpretation.

In Victoria, the *Charter of Human Rights and Responsibilities Act* provides:

“32(1) 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.”

The legislative history of the ACT *Human Rights Act* is pertinent. The ACT Act was based on a report prepared by the ACT Bill of Rights Consultative Committee which recommended wording based on the New Zealand and United Kingdom approaches as follows:

“A court or tribunal must interpret a law of the Territory to be compatible with human rights and must ensure that the law is given effect to in a way that is compatible with human rights, as far as it is possible to do so.”<sup>16</sup>

The recommendation was not adopted. By reason of the express provision making s 30 subject to the purposive test, Professor Hillary Charlesworth observed:

“At first sight, then, s 30 appears to make a human rights interpretation of legislation available only when it is clear that the Legislative Assembly did not intend otherwise. In this sense it could be read as a codification of the ‘principle of legality’ by which Parliament is assumed not to intend to impinge on basic rights unless it uses clear

words to do so. This may suggest that s 30 is weaker than both its New Zealand and United Kingdom counterparts in promoting a human rights dialogue.”<sup>17</sup>

When the rights compliant interpretation provision is made expressly subject to the purposive requirement, its operation would probably be very similar to the principle of legality. Nevertheless, it can have some additional force when there is doubt about Parliament’s intention in other legislation because it is more likely that the judiciary will apply an express parliamentary authority than a common law principle.

Following a review of the *Human Rights Act* it was recommended that:

“Section 30 should be amended to clarify that a human rights consistent interpretation must prevail unless this would defeat the purpose of the legislation.”<sup>18</sup>

Subsequently, a Bill has been passed which, inter alia, amends s 30, so that it is almost identical to the Victorian Act, to provide:

“So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.”

This change will come into effect on 1 January 2009.

The Explanatory Memorandum for the Bill explained:

“It clarifies the interaction between the interpretive rule and the purposive rule such that as far as it is possible a human rights consistent interpretation has to be taken to all provisions in Territory laws. This means that unless the law is intended to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. This is consistent with the Victorian approach contained in subsection 32(1) of the *Charter of Human Rights and Responsibilities Act* 2006. It also draws on jurisprudence from the United Kingdom such as the case of *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 cited recently by the ACT Supreme Court in *Kingsley’s Chicken Pty Limited v Queensland Investment Corporation and Canberra Centre Investments Pty Limited* [2006] ACTCA 9.”

As I will endeavour to show, *Ghaidan* is an inappropriate source of guidance and its citation by the ACT Supreme Court did not suggest its adoption.

The courts that must apply the interpretation provisions of the ACT and Victorian Acts will draw upon the New Zealand and United Kingdom case law. There are, however, differences in the legislative formulations which may be of significance.

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.

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.

One of the issues that will arise with respect to the interpretation sections in Victoria and the ACT is what, if any, impact they will have on the interpretation of national uniform legislation. For example, in 2004 and 2005 the Commonwealth and all States and Territories enacted interlocking anti-terrorism legislation.

No doubt on the basis of constitutional law advice, the Commonwealth scheme for preventative detention orders was limited to detention for 48 hours, whereas the NSW scheme extended to 14 days. So fine are the distinctions required by the contemporary Chapter 3 jurisprudence of the High Court.

This integrated national scheme permits detention and questioning warrants, control orders, preventative detention orders, covert search warrants and prohibited contact orders raises important issues affecting personal liberty. Although there are differences amongst the State Acts, litigation could well invoke the special interpretation sections available only in Victoria and the ACT.

Resolution of this issue could turn on the fact that the current ACT provision is expressly made subject to the purposive test and the

Victorian and new ACT provisions refer to “consistency” with purpose. In each case it is arguable that a nationally uniform regime, interconnecting with Commonwealth legislation for constitutional reasons, was part of the “purpose”.

Committing yet again the sin of self-quotation, I once observed:

“The *Commonwealth Places (Administration of Laws) Act* is part of a national collaborative scheme between the Commonwealth and all the States. The proposition that one State has impliedly repealed one of the provisions of this scheme without consultation, lacks even a scintilla of force. There is a strong presumption that a legislature in a federal system would not alter a statute that forms part of a collaborative and uniform national scheme, save in express terms. There is nothing express here.”<sup>19</sup>

Such an issue has already arisen, without being resolved, in the ACT.<sup>20</sup> Such a situation calls for strong clear statement principle. There is no room for implied repeal.<sup>21</sup> For analogous reasons, that also appears to be the situation with respect to the binding effect of legislation in the UK adopting the *European Economic Community* treaty

and the *European Convention on Human Rights*. This result is a manifestation of the quasi-constitutional character of such legislation.<sup>22</sup>

### **English Authority**

The critical issue that arises in the application of rights compliant interpretation provisions is how far a court can go in modifying the application of the statute and still be undertaking a task that can correctly be identified as one of “interpretation”. The existing state of English authority suggests that the law in England in this, as in many other respects, has gone further than we have gone and, perhaps, further than we will ever go.

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

Prior to the adoption of the *Human Rights Act* in 1998, England was the most frequent defendant in the European Court of Human

Rights at Strasbourg. Indeed, generally, it was an unsuccessful defendant. What happened in such litigation was that the State was sued for failing to comply with its Convention obligations. This extended at one stage even to an action for personal injury which had been unsuccessful in England by reason of a particular rule of the law of tort, which the European Court found constituted a failure to implement Article 6 of the *European Convention on Human Rights* providing for a right to a fair and public hearing. Eventually, the European Court backed off this particular interpretation.<sup>23</sup>

Nevertheless, the success of litigants in the European Court meant that it was the government of England that bore the burden of compensation for its failure to implement a remedy in accordance with Convention rights, rather than some English citizen or corporation that had actually done whatever was being complained about. It was the success of a continuing stream of cases in the European Court of Human Rights that served as an important part of the political stimulus to pass legislation implementing the Convention – “bringing rights home” it was said – so that it would be English courts that determined matters of this character.

Significantly, as British judges are well aware, a disappointed litigant in England can still take proceedings in Strasbourg. The House of Lords operates in a system where it can be held to be wrong by higher authority, whose case law it is required by statute to take into account.

Specifically, the formulation of the UK rights compliant interpretation provision was influenced by European Court of Justice judgments on the obligation imposed upon national courts by the European Economic Community treaty.<sup>24</sup> For an Australian audience it is necessary to state that the European Court of Justice is a different body to the European Court of Human Rights.

This background is distinctly different from anything that has been operative in the Australian debate about enacting a statutory Charter of Rights.

At first the rights compliant interpretation provision in s 3 of the UK *Human Rights Act* was characterised as an enactment of the common law principle of legality.<sup>25</sup> Subsequently, two approaches to the deployment of s 3 emerged, referred to as the cautious approach and the radical approach.<sup>26</sup>

The differences arose clearly in a case in which a rape shield law, which restricted cross-examination of a rape victim, was said to be incompatible with the Convention right to a fair trial. The radical approach to s 3 concluded that it was permissible, as a form of interpretation, to construe a section which permitted evidence about sexual behaviour by the complainant by leave in precisely identified circumstances, as if it were subject to an overriding requirement to permit cross-examination, if it was “so relevant to the issue of consent that to exclude it would endanger the fairness of the trial”. The cautious approach rejected this as impermissible, on the basis that “[t]he rule is only a rule of interpretation. It does not entitle the judges to act as legislators”.<sup>27</sup>

Eventually the House of Lords adopted the radical approach in *Ghaidan*, which was explained in *Sheldrake*<sup>28</sup> by Lord Bingham as follows:

“[28] ... First, the interpretative obligation under s 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a convention-compliant interpretation under s 3 is the primary remedial measure and a declaration of

incompatibility under s 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a convention-compliant interpretation is not possible ... In explaining why a convention-compliant interpretation may not be possible, members of the committee 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 (see *Ghaidan* ... at [33], [49], [110]–[113], [116]). All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: 'So far as it is possible to do so ...'. While the House declined to try to formulate precise rules (at [50]), it was thought that cases in which s 3 could not be used would in practice be fairly easy to identify.”

The first matter to which his Lordship referred is, perhaps, the most striking to an Australian lawyer. The proposition that a court can interpret a particular Act other than in accordance with the intention of Parliament at the time of the enactment of that Act is a fundamental change. This conclusion arose from the interpretation of the meaning of the word “possible” in s 3 in the context of “reading and giving effect to” other legislation in a manner compatible with the Convention rights “so far as it is possible to do so”. As Lord Steyn put it:

“This is the intention of Parliament, expressed in s 3, and the courts must give effect to this intention.”<sup>29</sup>

In *Ghaidan*, Lord Nicholls said that the word “possible” is itself ambiguous and posed the issue as what is to be the standard or criterion by which “possibility” is to be judged. His Lordship went on to say:

“[30] ... [T]he interpretative obligation decreed by s 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require

the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, s 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting s 3.

[31] ... Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that s 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of s 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of s 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, s 3 would be available to achieve convention-compliance.

If he chose a different form of words, s 3 would be impotent.

[32] ... [T]he intention of Parliament in enacting s 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation."<sup>30</sup>

The House of Lords purports to accept the traditional judicial role in interpretation, being the implementation of the intention of Parliament. The critical step is, however, that the intention of Parliament expressed in s 3 of the *Human Rights Act* is applied to override the intention of Parliament at the time that the other legislation, including subsequent legislation, is enacted. This is a substantial change in the relationship between Parliament and the judiciary. In substance it constitutionalises the *Human Rights Act*. Such a step had been taken earlier in the course of giving overriding effect to laws of the European Community, which are quite different from the *European Convention on Human Rights* and are adjudicated upon by a different European court.<sup>31</sup>

The degree to which Parliament's intention in the non-compliant legislation can be overridden is manifest in *Sheldrake*. In the context of

the anti-terrorism legislation there under consideration, Parliament had expressly listed provisions which imposed only an evidential burden, rather than a burden of proof. The section in issue was not on that list. The House of Lords held, expressly, that it was *not* the intention of Parliament that only an evidential burden be imposed. However, the court concluded that s 3 enabled the court to so find.<sup>32</sup>

More recently, the House of Lords invoked s 3 to qualify the statutory provision for control orders under the *Prevention of Terrorism Act 2005*. Under this scheme the relevant Minister may be permitted by the Court not to disclose material to the subject of an order where the court “considers that the disclosure would be contrary to the public interest”. The House of Lords held that this 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’”.<sup>33</sup>

Lord Bingham expressed doubt about the course taken because of the mandatory language in the Act.<sup>34</sup> This kind of implied term, importing the words of Article 6 of the Convention in its entirety, had earlier been described by Lord Hoffmann as “bold” – probably in the “Yes Minister” sense.<sup>35</sup>

The reading into the Act of a qualification expressed in the terms of the protected right is difficult to distinguish from a legislative amendment. When reading English case law in the future, it will be necessary to bear in mind just how different their approach has become. As the authors of a leading text on the *Human Rights Act* have put it:

“The process of interpretation is no longer dominated by a search for the intention of Parliament. Instead the courts’ first duty is to adopt any possible construction which is compatible with Convention rights.”<sup>36</sup>

In the third lecture, I will discuss how far the English approach can be said to be consistent with the concept of “interpretation” or, to use the English language the concept of “reading and giving effect”. I am, however, sceptical that Australian judges will go as far as the English judges have gone. The New Zealanders have not.

### **New Zealand Authority**

The New Zealand judiciary has, in some respects, adopted a robust approach with respect to the *Bill of Rights Act* 1990. In *Baigent’s* case, the Court of Appeal created a public law remedy by awarding damages against the Crown for breach of the *Bill of Rights Act*.<sup>37</sup> In *Moonen* the Court of Appeal decided that it would, in an appropriate

case, declare that a statute unjustifiably impinges on human rights even though the New Zealand Act, unlike the United Kingdom Act, makes no express provision for any such declaration of incompatibility.<sup>38</sup> Chief Justice Elias has indicated that this approach reflects a recognition that there is a hierarchy of statutes and manifests a process of dialogue between Parliament and the courts.<sup>39</sup>

Notwithstanding this jurisprudence, the New Zealand courts have not adopted the radical approach of the House of Lords to the rights compliant interpretation provision in the New Zealand Act.<sup>40</sup>

An example of the difference in approach is found in cases construing statutory provisions which shift the burden of proof. The House of Lords had no difficulty in deploying s 3 of the United Kingdom Act to that effect.<sup>41</sup> In contrast, the New Zealand Court of Appeal did not apply s 6 of the New Zealand Act in that way.<sup>42</sup> Even at common law, in my opinion, the clear statement principle would apply and such a section would often be interpreted to shift only an evidential burden, not the burden of proof.<sup>43</sup>

The same issue came before the recently established Supreme Court of New Zealand, which upheld the approach of the earlier

judgment that interpreted the formulation “until the contrary is proved” as shifting a burden of proof.<sup>44</sup> The case contained five separate judgments and there are significant differences between them. A majority of three, Justices Blanchard, Tipping and McGrath, with a strong dissent from Chief Justice Elias, affirmed an approach to the New Zealand interpretation clause which is distinctively different from that which has found favour with the English courts.

Before the passage of the United Kingdom *Human Rights Act*, the New Zealand Court of Appeal had interpreted the words “can be given” in s 6 to mean “can reasonably be given”.<sup>45</sup>

In a judgment in the House of Lords, Lord Steyn has said:  
“The draftsman of the 1998 Act had before him the slightly weaker model in s 6 of the New Zealand *Bill of Rights Act* 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation.”<sup>46</sup>

His Lordship was referring to Parliament expressly rejecting such a requirement. An amendment requiring any interpretation under the UK

Act to be “a reasonable” interpretation was moved in the UK Parliament and rejected.

The Supreme Court of New Zealand in *Hansen* expressly affirmed the test of “reasonably possible” interpretation.<sup>47</sup> This may, in part, be explicable by differences in wording, notably the use of the word “possible” in the UK Act, with the emphatic addition of “so far as” and “must be read”, compared to the somewhat weaker formulation in the New Zealand Act of “can be given”. The ACT and Victorian provisions appear to be analogous to the UK provision in this respect. Furthermore, the New Zealand Act also contains in s 4 an express preservation of the doctrine of implied repeal.<sup>48</sup>

An important matter is the interrelationship between s 6, the interpretation provision of the New Zealand Act, and s 5 of that Act, which provides:

“5 Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

The majority in *Hansen*, over Elias CJ's dissent, established that the interpretive provision requires the prior application of s 5. That means that if the Court concludes that the apparent inconsistency was justifiable as a "reasonable limit" under s 5, the requirement for a rights compliant interpretation is not engaged. The process of interpretation required a sequence of steps in which the court should first determine whether any inconsistency with a relevant right or freedom is justified. If so, then Parliament's intended meaning would prevail.<sup>49</sup>

Section 5 of the New Zealand Act has no equivalent in the UK Act. It has, however, been adopted in s 28 of the ACT Act and s 7 of the Victorian Act, albeit with specification of a list of relevant factors. It will be necessary for Australian courts to consider whether to follow the New Zealand case law to the effect that these provisions operate anterior to the rights compliant interpretation provision.

### **ACT Authority**

I am unaware of any application of the interpretive provision in the Victorian Charter, which only came into force on 1 January this year. There have been a number of cases in the Australian Capital Territory.

The current ACT provision is distinctive. As noted above, the rights compliant interpretation provision is expressly made subject to the purposive test. I do not see how it could be suggested that, in the light of this factor, the English approach could be applicable, particularly the reasoning that permits a court to override the actual intention of Parliament when passing other legislation.

The same may well be true of the formulation in the current Victorian Charter, and the amendment in the ACT, arising from the words “consistently with their purpose”. These words do not exist in s 3 of the United Kingdom Act. They are words of limitation which, at least, arguably, would not permit the approach that has been adopted in the United Kingdom.

I note that the ACT Court of Appeal has identified both s 139 of the *Legislation Act* (ie the purposive requirement), and s 30(1) of the *Human Rights Act 2004* (ie the rights compliant requirement), as each having a similar form to s 3 of the UK *Human Rights Act 1998*, as explained by the House of Lords in *Ghaidan*. However, the interrelationship between ss 30(1) and 139 of the ACT legislation was not considered.<sup>50</sup>

Chief Justice Higgins of the Supreme Court of the Australian Capital Territory invoked the interpretation provision of the ACT Act when determining the proper interpretation of a section of the *Domestic Violence and Protection Orders Act 2001* (ACT), which had the effect that an interim personal protection order automatically became a final personal protection order, without a hearing and without the prospect of further review. Invoking s 30 of the ACT *Human Rights Act*, his Honour held that the relevant provision empowered, but did not mandate, the making of the final order and did not preclude a respondent to an ex parte order from applying to set it aside as of right, if irregularly made, and as a matter of discretion, if cause be shown.<sup>51</sup>

It may be that the principle of legality would have been deployed to similar effect. However, s 30 was more clearly applicable.

### **The Clear Statement Principle**

The determination that the principle of legality, or that a statutorily adopted human right, applies in a particular case is, regrettably, the easy part of the process. All that we have done at this stage is to identify the two elements – namely the statutory formulation and the right – that may give rise to an incompatibility or tension. The difficult part is determining which must prevail in the particular circumstances. It is at this point that

judicial reasoning often becomes fuzzy when identifying a relevant test and, perhaps more significantly, when applying it. The relevant test is, more often than not, expressed in the conclusion rather than in the reasoning.

The relevant principle of the law of statutory interpretation applicable to each principle in the common law bill of rights is the principle of clear statement. There are a range of verbal formulations, all basically equivalent, as to how the presumption that Parliament does not intend to interfere with rights within the principle of legality has been expressed. I have compiled the following list from the judgments of the High Court of Australia over the years:

“Clear and unambiguous words”, “unambiguously clear”, “irresistible clearness”, “express words of plain intendment”, “clear words or necessary implication”, “unmistakable and unambiguous”, “expressly stated or necessarily to be implied”, “clearly emerges whether by express words or by necessary implication”, “with a clearness which admits of no doubt” and “something unequivocal must be found, either in the context or the circumstances, to overcome the presumption”.<sup>52</sup>

It is often said that a statute which impinges upon the principle of legality, or any of its constituent interpretive principles, must be construed strictly. However, the idea of “strict” construction does not involve a simple standard. There are degrees of strictness. There is very little discussion in the literature or case law about what is meant by strict construction.

I believe we should stop using the language of “strict construction”. It suggests that courts give a restricted interpretation to the language of Parliament and do so irrespective of the intention of Parliament. That that has been the case, and not only in the distant past, is a good reason for ensuring that the terminology more accurately reflects the true judicial role. In my opinion, this approach is more appropriately called ‘the clear statement principle’. All the formulations I have listed reflect this principle.

Whenever rights, liberties and expectations are affected, if Parliament wishes to interfere with them, it must do so with clarity. The clear statement principle is the critical way that the law of statutory interpretation reflects and implements the principle of legality.

A core difficulty remains. Clarity, like beauty, always involves questions of degree and is affected by the eye of the beholder. Significantly the degree of clarity required may vary from right to right and, with respect to any particular right, may vary from time to time.

This was expressly referred to in the joint judgment of the High Court in *Bropho*, in the context of whether a statute binds the Crown, where their Honours said:

“If such an assumption be shown to be or to have become ill-founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed. Thus, if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption of the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear.”<sup>53</sup>

It is equally possible that matters that were once regarded as rights, albeit not of a fundamental character, may come to be regarded as more significant than they once were.

When an international human rights instrument is adopted by statute, it may be that a cognate common law right may be given enhanced salience. Indeed, there is a vibrant debate, into which I do not tread, on whether, and if so to what degree, executive ratification of international human rights instruments has such an effect.

The principle of clear statement that has been applied to the common law bill of rights is reflected in American jurisprudence where there is a clear interaction between constitutional and quasi-constitutional principles.<sup>54</sup> This approach is reflected in the doctrine of “strict scrutiny” developed for applying the Constitutional Bill of Rights. The United States Supreme Court has adopted what are described as three standards of review which, in ascending order of stringency are: the rational relationship test, the intermediate test and the strict scrutiny test.<sup>55</sup>

When determining the constitutional validity of legislation, the court may employ the standard of least stringency, the rational basis test, whereby the court is said to give deference to the legislative decision as to whether or not the legislation falls within a head of power. On the intermediate standard of review, there is less deference and the court will require a substantial relationship to an important government

interest. The strict scrutiny test, which represents the highest level of judicial review, is the one the court applies whenever the legislative scheme involves what the court classifies as fundamental constitutional rights.

On this last standard of review the court independently determines the degree of relationship which the law bears to an objective that is constitutionally sanctioned. It is often applied whenever the exercise of a fundamental right is involved, so that the proponent of the legislation must demonstrate that the statute serves a compelling government interest that could not be served by any less restrictive measure. There is much scope for disputation with respect to the application of these tests.<sup>56</sup>

An American constitutional scholar has recently observed:  
“[I]n its insistence that any infringement of fundamental rights must be necessary or narrowly tailored to compelling governmental interests, the strict scrutiny formula possesses important commonalities with (though possibly also some important differences from) the similarly generic ‘proportionality’ tests applied in Germany, Canada, and Israel and by the European Court

of Justice. Each of these proportionality tests encompasses three doctrinal subtests, all of which must be satisfied for legislation to survive judicial review. The first asks whether a legislative measure restricting basic rights is rationally related to a desired end. The second, called 'the principle of necessity' in Germany and 'the least injurious means test' in Israel, requires that the means, 'even if rationally connected to the objective ... should impair "as little as possible" the right or freedom in question.' The third, called the principle of 'proportionality *stricto sensu*' in Germany and the 'proportionate means test' in Israel, invites the court to balance societal interests against individual rights by asking whether an infringement of rights is proportionate to the desired objective.

I should emphasize, however, that although the strict scrutiny and proportionality tests both aspire to find a middle way between treating rights as absolutes and deferring routinely to legislative compromises of civil liberties, there may be important differences between them. By inviting assessments of all-things-considered

reasonableness, proportionality inquiries may tend to deprive rights of any ‘special force as trumps,’ whereas the American approach, on at least some interpretations, preserves a special, trumping aura for preferred rights.”<sup>57</sup>

The status of a Human Rights Charter as a quasi-constitutional text may lead to reliance upon such constitutional analysis in its application. Just as these are “statutes and statutes”, so are there “rights and rights”. The right to life is not the same kind of right as the right to a speedy trial.

When applying s 3 of the UK Act, it is clear that British judges are not constrained by anything like the principle of clear statement. There is, however, a real issue as to how far beyond that principle the Australian rights compliant interpretation provisions can be said to go.

### **Al-Kateb**

The Australian case that perhaps most directly raises the issues of statutory interpretation that I have been discussing was *Al-Kateb*, where the High Court split four to three. There appears to have developed a habit of deploying in the title and in sections of legislation, terminology that bears the characteristics of a press release or political statement. In that vein the relevant legislation classified the appellant in *Al-Kateb* as

“an unlawful non-citizen”. The issue was whether he could be detained for the purpose of deportation when there was no present prospect of deportation,<sup>58</sup> because he was stateless and no one would take him.

The relevant statutory provisions were in mandatory language:

- An officer “must detain” an unlawful non-citizen.
- An unlawful non-citizen “must be kept in immigration detention until he or she is ... removed from Australia”.
- “An officer must remove, as soon as reasonably practical, an unlawful non-citizen” after a request for removal.

On the facts of the case there was no prospect of Australia receiving international co-operation for the removal of the appellant. By a majority of four to three the High Court held that he could be detained indefinitely. The majority held that there was no room in this context for the application of a “purposive limitation” or of the presumption that Parliament does not intend to interfere with individual rights and freedoms. Detention must continue until deportation, however unlikely that may be. The terminology, the majority concluded, was clear, unambiguous and intractable.<sup>59</sup>

The minority of Gleeson CJ, Gummow and Kirby JJ, a singular and, as far as I am aware, unique concatenation of dissentients, read down the words “must be kept in immigration detention”.

Gleeson CJ applied the principle that, for a statute to justifiably interfere with human rights or freedoms, it must do so in “unambiguous language” which indicates “that the legislature has directed its attention to the rights or freedoms in question and has consciously decided upon abrogation or curtailment”.<sup>60</sup> The majority made no reference to this particular requirement, which was expressly stated in the joint judgment of the Court in *Coco*.<sup>61</sup> The majority reasoning proceeded on the basis that the mandatory requirement – ‘must keep in detention’ – satisfied any such test.

Gummow J construed the provisions as having the purpose of removal and, accordingly, that the power could be read down once that purpose was no longer pertinent.<sup>62</sup>

Kirby J agreed with Gummow J, but also invoked a presumption of the common law “in favour of liberty and against indefinite detention”.<sup>63</sup>

A recent article speculates as to the effect upon the outcome in *Al-Kateb* if a statutory provision equivalent to s 32 of the Victorian Charter had been in place. It is reasonably clear that the author does not regard *Al-Kateb* as the high point of contemporary High Court jurisprudence. She is not alone in this. Subject, perhaps, to the current form of the ACT provision, it appears likely that the author is correct when she concludes that a different result would probably have ensued.<sup>64</sup>

The rights compliant interpretation provisions do go further than the principle of legality. Both the common law bill of rights and the adopted international rights instrument identify personal liberty as a fundamental right, which any system of detention necessarily infringes. The express statutory requirement to interpret the words of other legislation so as to comply with an express statutory right is, in my opinion, more likely to be given effect than a judge-made principle derived only from Parliament's presumed intention. The words of the statute will be assessed by Parliament's express intention.

One does not have to go as far as the English judiciary has gone to give force and effect to an expression of Parliamentary will in a statute entitled to be treated as quasi-constitutional. The inhibition that any judge will feel, albeit to varying degrees, before trespassing into what

may appear to some to be the province of the Parliament, must be allayed to some degree by such an express Parliamentary mandate.

This is particularly so because of the requirement, in the Australian form of the interpretation provision, to have regard to the purpose of the legislation. In *Al-Kateb* it was quite clear that detention for the purpose of deportation could not be attained because, on the facts, deportation could not occur in the foreseeable future. I think it likely that some members of the majority may have found the language less intractable if they had had an express statutory requirement to interpret the statutory language so as to validate the appellant's right to personal liberty.

As the dissentients in *Al-Kateb* show, such a result is well within the permissible scope of interpretation. Whether the English position can be so described will be discussed in the third lecture.

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<sup>1</sup> See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562.

<sup>2</sup> See F W Maitland, *The Constitutional History of England* (1908) Cambridge University Press, Cambridge at 395.

<sup>3</sup> W J V Windeyer, "Responsible Government – Highlights, Sidelights and Reflections" (1957) 42 *Journal and Proceedings of the Royal Australian Historical Society* 257 at 272.

<sup>4</sup> See *Bremer Vulkan Schiffbau & Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909 at 977; *R v Secretary of State for the Home Department; Ex parte Leech* [1994] QB 198 at 198–210; *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 at 585.

<sup>5</sup> *Cox v Hakes* (1890) 15 App Cas 506 at 528; *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36 at 91.

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6        *The King v Macfarlane; Ex parte O’Flanagan* (1923) 32 CLR 518 at 541.

7        *Wall v The King; Ex parte King Won (No 1)* (1927) 39 CLR 245 at 250.

8        *Scott v Scott* [1913] AC 417 at 473, 477.

9        See Spigelman, “The integrity Branch of Government” (2004) 78 *Australian Law Journal* 724.

10       See Eugene W Hickok Jr (ed), *The Bill of Rights: Original Meaning and Current Understanding* (1991) University Press of Virginia, Charlottesville at 21.

11       *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309 at 367–368.

12       *British Coal Corporation v The King* [1935] AC 500 at 518–519. See also *Edwards v Attorney-General for Canada* [1930] AC 124 at 136.

13       *Minster of Home Affairs v Fisher* [1980] AC 319 at 328. See also *Attorney-General (Trinidad and Tobago) v Whiteman* [1991] 2 AC 240 at 247.

14       *Boyce v The Queen* [2005] 1 AC 400.

15       See also *Matthew v Trinidad and Tobago* [2005] 1 AC 433 at [42]–[46], [56]–[58].

16       See ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003) at Appendix 4: *Human Rights Bill* 2003 (ACT), cl 3; Hilary Charlesworth, “Human Rights and Statutory Interpretation” in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (2005) Federation Press, Sydney at 114; Hilary Charlesworth, “Australia’s First Bill of Rights: The Australian Capital Territory’s Human Rights Act” in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance & Reform in Australia* (2006) Ashgate, Aldershot at 293–294.

17       See Charlesworth, “Human Rights and Statutory Interpretation” supra at 115; Charlesworth, “Australia’s First Bill of Rights” supra at 295.

18       See ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report* (2006) Recommendation 5 at 33.

19       *R v Porter* (2001) 53 NSWLR 354 at [59].

20       *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority* (2006) 152 LGERA 132 at [23].

21       I doubt if *McCawley v The King* [1920] AC 691; (1920) 28 CLR 106 would be decided the same way today.

22       See, eg, *Thoburn v Sunderland City Council* [2003] QB 151.

23       See J J Spigelman, “Access to Justice and Human Rights Treaties” (2000) 22 *Sydney Law Review* 141.

24       See *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [45] (‘Ghaidan’); *R (IDT Card Services Ireland Ltd) v IDT Customs & Excise Commissioners* [2006] EWCA Civ 29 at [75]; Francis Bennion, *Statutory Interpretation: A Code* (4<sup>th</sup> ed, 2002) Butterworths, London at Section 410 and Francis Bennion, *Supplement to the Fourth Edition of Statutory Interpretation: A Code* (2005) LexisNexis Butterworths, London at 560. See also Geoffrey Lindell, “The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?” (2006) 17 *Public Law Review* 188.

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25 See *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131–132 per Lord Hoffmann.

26 The divergence is reflected in the contrast between Lord Steyn and Lord Hope who, respectively, adopted the radical and cautious approaches in *R v A (No 2)* [2002] 1 AC 45 (*'R v A'*) at [44] and [108]; see also Daniel Greenberg (ed), *Craies on Legislation* (8<sup>th</sup> ed, 2004) Sweet & Maxwell, London, ch 25; Francesa Klug, “United Kingdom Experience” in Christine Debono and Tanya Colwell (eds), *Comparative Perspectives on Human Rights* (2004) National Institute of Social Science and Law at 5; David Bonner, Helen Fenwick and Sonia Harris-Short, “Judicial Approaches to the Human Rights Act” (2003) 52 *International and Comparative Law Quarterly* 549 at 555–557.

27 *R v A* at [108] per Lord Hope; see also at [44] per Lord Steyn.

28 *Ghaidan; Sheldrake v Director of Public Prosecutions, Attorney-General’s Reference (No 4 of 2002)* [2005] 1 AC 264 (*'Sheldrake'*).

29 *Ghaidan* at [26].

30 *Ghaidan* at [28]–[32].

31 See Lindell *supra* at 24.

32 *Sheldrake* at [5] and [53].

33 *Secretary of State for the Home Department v MB* [2007] 3 WLR 681 at [72].

34 *Ibid* at [44].

35 *R (Hammond) v Secretary of State for the Home Department* [2005] 3 WLR 1229.

36 Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human Rights and Criminal Justice* (2<sup>nd</sup> ed, 2007) Sweet & Maxwell, London at [3–59].

37 *Simpson v Attorney-General (Baigent’s Case)* [1994] 3 NZLR 667.

38 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

39 See Sian Elias, “Sovereignty in the 21<sup>st</sup> Century: Another Spin on the Merry-Go-Round” (2003) 14 *Public Law Review* 148 at 157–162.

40 See J F Burrows, *Statute Law in New Zealand* (2003) LexisNexis, Wellington esp at 242–252; J J Spigelman, “Blackstone, Burke, Bentham and the *Human Rights Act 2004*” (2005) 26 *Australian Bar Review* at 8–10.

41 *R v Lambert* [2002] 2 AC 545 at 563, 574–575, 590, 610; see also *R v Keogh* [2007] 1 WLR 1500.

42 *R v Phillips* [1991] 3 NZLR 175 at 176–177.

43 Spigelman, “Blackstone, Burke, Bentham and the *Human Rights Act 2004*” *supra* at 8.

44 See *R v Hansen* [2007] 3 NZLR 1 (*'Hansen'*).

45 See *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 272.

46 *R v A* at [44]. In my article, “Blackstone, Burke, Bentham and the *Human Rights Act 2004*” *supra* at 10, I incorrectly combined the two propositions in Lord Steyn’s statement. I had the

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impression that he suggested that the New Zealand Act imposed a requirement of a reasonableness. However, that occurred by reason of judicial interpretation.

47 At 157–158, 289–290.

48 When the *Human Rights Bill* was debated in the House of Lords, Lord Simon of Glaisdale suggested an amendment to refer to the doctrine of implied repeal. This was done to ensure that *prior* inconsistent legislation would in fact be taken as overruled without the need for a declaration of incompatibility. That the *Human Rights Act* itself should be insulated from subsequent implied repeal was not the focus of attention: see Great Britain, Parliamentary Debates (Hansard), House of Lords, 18 November 1997 at 509–510, 518–529; 19 January 1998 at 1289–1295.

49 See *Hansen supra* esp at [92] and [192]. See Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) LexisNexis, Wellington esp at [7.19] and Hanna Wilberg, “The Bill of Rights and Other Enactments” [2007] *New Zealand Law Journal* 112.

50 See *Kingsley’s Chicken Pty Ltd v Queensland Investment Corporation* [2006] ACTCA 9 at [49]–[51].

51 See *SI bhnf CC v KS bhnf IS* (2005) 195 FLR 151 esp at [71]–[72], [98], [112]–[113].

52 See *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340 at [44]–[45].

53 See *Bropho v Western Australia* (1990) 171 CLR 1 at 18.

54 See William N Eskridge Jr and Philip P Frickey, “Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking” (1992) 45 *Vanderbilt Law Review* 593; Cass R Sunstein, “Interpreting Statutes in the Regulatory State” (1989) 103 *Harvard Law Review* 405 at 462 (pt IV).

55 See John E Nowak and Ronald D Rotunda, *Constitutional Law* (4<sup>th</sup> ed, 1991) West Publishing Co, St Paul at 574–576; Laurence H Tribe, *American Constitutional Law* (2<sup>nd</sup> ed, 1988) Foundation Press, New York: see esp the index under Rational Relationship Test, Intermediate Scrutiny and Strict Scrutiny.

56 See, eg, Hans A Linde, “The Shell Game of ‘Interest’ Scrutiny: Who Must Know What, When, and How?” (1992) 55 *Albany Law Review* 725 at 734; Peter J Reuben, “Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After *Adarand* and *Shaw*” (2000) 149 *University of Pennsylvania Law Review* 1.

57 Richard H Fallon Jr, “Strict Judicial Scrutiny” (2007) 54 *UCLA Law Review* 1267 at 1295–1296.

58 See *Al-Kateb v Godwin* (2004) 219 CLR 562 (*‘Al-Kateb’*).

59 *Al-Kateb* at [33] per McHugh J; at [241] per Hayne J (with whom Heydon J agreed); and at [298] per Callinan J.

60 *Ibid* at [19].

61 See *Coco* at [437].

62 *Ibid* at [117] and [122].

63 *Ibid* at [15].

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<sup>64</sup>

See Alice Rolls, "Avoiding Tragedy: Would the Decision of the High Court in *Al-Kateb* have been any Different if Australia had a Bill of Rights like Victoria?" (2007) 18 *Public Law Review* 119.