

Why Australia Does Not Have, and Does Not Need, a National *Bill of Rights*

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1. *Introduction*

Although my main topic in this article will be the absence of any sort of national bill of rights in Australia, I think that topic is best approached circuitously, or at least from the side. Put more bluntly, readers in continental Europe may well need some background and context in order to understand why Australia lacks such an instrument and why, in my view, the absence of a bill of rights is a very good thing indeed.

To start, and this will be surprising to some, Australia is one the oldest democracies in the world and its written constitution is likewise one of the oldest continuous democratic written constitutions. Moreover, the biggest influence in drafting the Australian Constitution was the US Constitution. Back in the late nineteenth century the men who devised, argued over, debated about and eventually crafted Australia's written Constitution were extremely well acquainted with the American model.

In fact, they copied key aspects of that US model, albeit in the context of the inherited British Westminster model — or if you prefer, in the context of a parliamentary model where you choose your Prime Minister and Cabinet from the elected legislature unlike in the US. Indeed on key issues the Australian drafters consistently preferred the US model to the Canadian one, both being in front of them¹.

You can see this immediately when you consider the sort of bicameralism chosen in Australia with its potent, *elected* Upper House Senate, something unknown then in Canada and still unknown in Canada, and the United Kingdom, and New Zealand. As in the US each Australian State, regardless of its population, is given the same number of Senators². And again mimicking the American model, only a proportion of Senators contest each election as their terms run longer than those of legislators elected to the Lower House who contest every election³.

The American influence on the form of Australian bicameralism is plain for all to see.

The same can be said for federalism. The Canadian model was rejected in favour of the American one. So the Australian drafters opted for a list of enumerated powers for the central government alone (the residue going to the states), rather than the Canadian style option of enumerating the powers of both the centre and the provinces⁴.

Again, Australia left the choosing of the top State court judges to the States, as in the US, it did not give that power to the centre, as in Canada.

Australia even copied the US in opting to create a national capital city from scratch⁵.

If space allowed I think one could make a powerful case that Australia's written constitution is the closest copy of the US one in existence, the Philippines possibly excepted, and it is certainly the most successful one that owes much to the American predecessor. Indeed I would go so far as to generalise in this way: Australia took the US Constitution as a model, copied chunks of it, and then made it better while fitting the copied bits into a Westminster parliamentary framework.

Of course there are important features of Australia's written Constitution that do not resemble their American counterparts. The Swiss inspired amending provision⁶ is perhaps the second most important of those non-US resembling features, and as will be seen below it is a provision that bears on our topic of the lack of a national bill of rights insofar as no constitutional bill of rights can come into existence without asking the voters. For these introduc-

tory purposes, though, I need only clarify what I said last paragraph.

The Australian Constitution is remarkably democratic⁷. It took those aspects of the US Constitution that increased the input of representatives accountable to the voters (like an elected rather than an appointed or hereditary Upper House), blended them into an inherited Westminster system with parliamentary sovereignty at its core, and then, well aware of the US Constitution and after much debate⁸, rejected the most obviously aristocratic or counter-majoritarian or anti-democratic aspect of the US Constitution, namely its Bill of Rights⁹. This lack of a bill of rights is the most obvious way in which the Australian Constitution differs from the US Constitution.

Moreover, the omission was in no sense an oversight. The decision not to include a bill of rights was made after careful consideration, discussion and debate and on the assumption that the panoply of social policy, line-drawing decisions affected by a bill of rights – almost all of them being ones over which smart, well-informed, even nice people can and do disagree¹⁰ – was better left to elected, accountable-to-the-voters legislators (with bicameralism and federalism safeguards) rather than to a very small number of unelected top judges. Indeed, the consensus was that such line-drawing decisions were better left to the elected legislators even where the issues underlying these decisions had been translated into the language of rights.

Let me round off these prefatory remarks by noting that the highly democratic credentials of Australia's Constitution were arguably even further buttressed when the Commonwealth Parliament legislated to move to compulsory voting in 1924 and, for

Lower House of the Commonwealth Parliament elections, to preferential voting or ATV six years before that in 1918. This combination of voting systems is unique in the world.

2. *Why Australia Does Not Have a National Bill of Rights*¹¹

Various attempts have been made to try to bring in a bill of right nationally in Australia since that initial decision to reject one at federation in 1901. In 1944 and again in 1988 Australians were asked in section 128 constitutional amendment referenda whether they wanted constitutionalised bills of rights. Both times the answer was an emphatic 'no'¹². Indeed, in the more recent of these held only 24 years ago there was not a single Australian State in which the majority of voters was in favour, with no State recording more than 37 percent in favour of even the most popular of the four proposed new rights for entrenchment.

Against that backdrop and after those results, many Australian bill of rights proponents had something of a Damascene conversion. Entrenched, constitutionalised bills of rights were no longer for them. Instead, what was needed was a nice modest little statutory bill of rights, or so they tended to put it. The attraction of this alternative, of course, at least to those of a slightly cynical disposition, is that any statutory option could bypass the need to put the proposal to the Australian people in a referendum. The legislature could do this without asking, as it were.

Entering into the 2007 federal election, the one that then Prime Minister

John Howard's right-of-centre Coalition government lost, the Labor Party did not have as part of its manifesto any pledge to bring in a statutory bill of rights. That said, it was certainly true that the Labor Party looked more likely to try to do this than the opposition Coalition Parties, though even Labor was known to have a significant body of sceptics and opponents amongst its top ranks as far as bills of rights were concerned.

Then, midway through 2009 and rather out of the blue, the Labor government's Attorney General Robert McClelland, an avowed proponent of a statutory bill of rights, announced the establishment of a National Human Rights Consultation Committee (hereinafter 'the NHRCC'). The chair of this committee was to be the Jesuit priest and legal academic Father Frank Brennan, who was trumpeted by the Attorney General as a 'fence-sitter' when it came to the question of a bill of rights. In truth, though, however much Brennan might have been described (and described himself) as a fence-sitter as regards a bill of rights, he had in fact been on the record, in print, more than once before his appointment, as favouring a statutory bill of rights.

On top of that, there was not a single known bill of rights sceptic or opponent appointed to the NHRCC.

Without going as far as saying that the whole NHRCC process was a foregone conclusion as soon as it was set up, one could certainly say that the NHRCC had little seeming legitimacy for those who opposed the enactment of a statutory bill of rights (or constitutionalised one, for that matter). Or perhaps one might just observe that no disinterested outside observer, agnostic as to the substantive merits at play here,

would consider this to be a good process for sounding out the views of Australians. That disinterested observer would label this a terrible process for accurately attempting to assess what actual Australians thought about a statutory bill of rights. Worse, it smacked (whether fairly or not) of being something of a sham, where the conclusion is a foregone one. Certainly it appeared to fall noticeably short of some of the more extravagant and triumphal claims of its defenders along the lines that this was a perfectly acceptable form of democratic consultation.

Leaving aside these deficiencies related to process, the NHRCC's main recommendations were unsurprising. It came out in favour of enacting a statutory bill of rights. (Recommendation 18). It opted to give a power to the judges of the High Court to make declarations of incompatibility. (Recommendation 29). The NHRCC also wanted its recommended statutory bill of rights to include a reading down provision, an interpretive provision analogous to section 3 of the UK's Human Rights Act and to section 6 of New Zealand's Bill of Rights Act, although in this Recommendation 28 the NHRCC did not actually provide any draft version of an interpretive provision that would satisfy its own requirements.

Two more of the main recommendations of the NHRCC are worth mentioning. The Committee urged that statements of compatibility be required for all Bills. (Recommendation 26). The NHRCC also urged that any statutory bill of rights be based on the 'dialogue' model. (Recommendation 19). Together with the earlier NHRCC recommendations that gives us a statutory bill of rights with a reading down provision, a declaration of incompatibili-

ty power in the hands of the High Court, a need for statements of compatibility before Third Reading, and mention of the 'dialogue' model.

In the next section of this paper I will outline briefly why this NHRCC call for a statutory bill of rights along these lines would have enervated parliamentary democracy (in the procedural sense noted above) in Australia. For the purpose of this section's account of why no national bill of rights exists in Australia, though, what followed after the NHRCC report was released was a political battle in the newspapers, within the Labor Party, and between the political parties. Surprising for many, including some opposed to these instruments, the pro bill of rights lobby lost the ensuing political battle.

First off, some senior figures in the Labor Party spoke out against any sort of bill of rights, and they spoke out strongly and vigorously. Former New South Wales Labor Premier Bob Carr (who has subsequently become Australia's Foreign Minister) was probably the most prominent and vociferous of the Labor Party opponents¹³, but he was far from alone in being a left-wing critic of the proposal. And the federal Cabinet clearly was divided on the issue. In addition, some senior judges, including former High Court Justice Ian Callinan and the current Chief Justice of Queensland, went public with their opposition to any sort of bill of rights.

The fact the government sat on the report and did not act immediately also allowed opponents to organise and write books against the mooted bill of rights¹⁴, the anti case slowly gaining support from the churches (who came to the conclusion that their interests would likely not

prevail in any contest between freedom of religion and equality rights, at least where they would be adjudicated on by judges). The one-sided composition of the NHRCC probably did not much help either. And the daily newspaper commentary pieces that ran giving the anti side may have helped move public opinion too¹⁵.

Add to that the fact the Opposition Coalition Party early on signalled it was implacably opposed to this and the difficulties grew. In addition, Labour did not control the Senate (meaning it would probably have to fight an election where a bill of rights was, or would be made, a major issue) so it could not ensure the proposal's quick and easy passage into law. This was magnified by the reality that the union wing of the Labor Party tended to dislike this bill of right proposal, or at least was much, much more sceptical of it than was what might be described as the lawyers' wing of the Labor Party. And, of course, the fact the Coalition Party was recovering in the polls also added to the difficulties for proponents within the government.

In the end, on April 21st, 2010, the Attorney General called a press conference and announced that the government would not be proceeding with any sort of bill of rights, just as it would not be inserting any sort of reading down provision into other legislation¹⁶. For the foreseeable future the campaign to enact a statutory bill of rights in Australia, at the national level, looked to be dead or in forced hibernation. The same was probably true of any such campaigns in all the States that also lacked one, meaning all of them except Victoria – which is the only State jurisdiction to have enacted one.

3. *Why Australia Does Not Need a Bill of Rights*

In the preceding section I briefly recounted why Australia does not have a national bill of rights. In this section I will argue that the absence is a good thing, that Australia is better off without one¹⁷.

Of course many of those pushing for some form or other of a bill of rights instrument like to point to the fact that Australia is one of the very few democracies – depending on how you look at the Basic Laws in Israel and the judiciary's unwillingness to make much of what they have in Japan and a few other non-common law countries, perhaps the only one – without a national bill of rights. On its own, of course, such a 'we differ from everyone else' type of argument tells us nothing. The real question is not whether Australia should emulate others but whether a bill of rights is a good idea in its own right. Would having one deliver better outcomes than Australia achieves without one?

My answer is an emphatic and resounding 'no'. Here is why. To start, notice that any sort of bill of rights enumerates a list of vague, amorphous – but emotively appealing – moral entitlements in the language of rights. It operates at a sufficiently high level of abstraction or indeterminacy that it is able to finesse most disagreement. Ask who is in favour of 'freedom of expression' or 'freedom of religion' or a 'right to life' and virtually everyone puts up his or her hand. And of course this is where bills of rights are sold, up in the Olympian heights of disagreement-disguising moral abstractions and generalities. Nevertheless, that is not where these instruments have real effect. People do not spend hundreds of thousands

of dollars going to court to oppose 'freedom of speech' in the abstract.

Bills of rights have real, actual effect down in the quagmire of social-policy decision-making where there is no consensus or agreement across society at all about what these indeterminate entitlements mean. Rather, there are smart, reasonable, well-informed, even nice people who simply disagree about where to draw the line when it comes to campaign finance rules or hate speech provisions or defamation regimes or whether Muslim girls can or cannot wear veils to school or whether to sanction gay marriage and so much more. One could sit around in groups, holding hands, singing 'Kumbaya', and chanting 'right to free speech' or 'right to freedom of religion' for as long as one wanted and it would help not at all in drawing these contentious, debatable lines.

What a bill of rights does is to take contentious political issues – and I will deliberately say this again, issues over which there is reasonable disagreement between reasonable people – and it turns them into pseudo-legal issues which have to be treated as though there were eternal, timeless right answers. Even where the top judges break 5-4 or 4-3 on these issues, the judges' majority view is treated as *the view* that is in accord with fundamental human rights.

The effect, as can easily be observed from glancing at the United States, Canada and now New Zealand and the United Kingdom, is to diminish politics and (over time) to politicize the judiciary. Meanwhile, the irony of the fact that judges resolve *their* disagreements in these cases by voting is generally missed. The decision-making rule in all top courts is simply that 5 votes beat 4, regardless of the moral depth or rea-

soning of the dissenting judgments, or that they made more frequent reference to J.S. Mill or Milton or the International Covenant on Civil and Political Rights. Only the size of the franchise differs.

None of this deters bill of right proponents from talking repeatedly about how such an instrument 'protects fundamental human rights', as though these things were mysteriously or magically self-defining and self-enforcing. They are not. They simply transfer the power to define what counts as, say, a reasonable limit on free speech over to committees of ex-lawyers (who have no greater access to a pipeline to God on these moral and political issues than anyone else, but who are immune from being removed by the voters for the decisions they reach).

Nor are statutory bills of rights of the sort recommended by the NHRCC immune from this criticism. Of course on one level it is true that non-entrenched, non-constitutionalised, statutory bills of rights do not allow judges to invalidate or strike down legislation. Instead the transfer of power to the judiciary is done more indirectly.

The main tool for increasing the power of the judiciary under a statutory bill of rights is the reading down provision. No provision has more potential to transmogrify the powers available under statutory versions into something approaching those under constitutionalised versions. Indeed (and here is what proponents downplay in the time when they are pushing for the enactment of a statutory bill of rights), if judges take such reading down provisions to be Spike Lee-like licences 'to do the right thing', then these provisions leave open the possibility of affording judges scope to do what the disinterested observer would

characterise as an out-and-out rewriting or redrafting of other statutes.

Consider the reading down provision in the UK's *Human Rights Act 1998* which reads to start:

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 Convention rights¹⁸.

The danger with these sort of reading down provisions – these directions to give the words of other statutes a meaning that you, the point-of-application interpreter, happen to think is more moral and more in keeping with your own sense of the demands of fundamental human rights – is that just about any statutory language (however clear in wording and intent) might possibly be given some other meaning or reading.

Here is how I framed the danger, the scope for abuse, of these provisions in an earlier article:

Put differently, reading down provisions such as these throw open the possibility of 'Alice in Wonderland' judicial interpretations; they confer an 'interpretation on steroids' power on the unelected judges. So although there is no power to invalidate or strike down legislation, the judges can potentially accomplish just as much by rewriting it, by saying that seen through the prism (that is, their own prism) of human rights, 'near black' means 'near white' or 'interim order becomes a final order' means 'interim order does *not* become a final order'¹⁹. They can make bill of rights sceptics half long for the honesty of judges (under constitutionalised bills of rights) who strike down legislation rather than gut it of the meaning everyone knows it was intended to have (rule of law values notwithstanding)²⁰.

Whether that characterization is alarmist or not, indeed how different the judicial approach to interpreting other statutes

will be, is a question of fact. In the United Kingdom we have to look to see how the top judges in the House of Lords (now Supreme Court) – judges who a decade or two ago were widely considered to be the most interpretively conservative judges in the Anglo-American common law world – have used the section 3 reading down provision to alter their former approach to interpretation.

And so let us turn to the *Ghaidan* case, the leading UK case on the section 3 reading down provision. What is remarkable in that case is not what the judges did, but what they were prepared openly and explicitly to admit they believed they could now do with the section 3 reading down provision in place. When interpreting all other statutes they could "depart from the intention of... Parliament"²¹. They could do so when "the meaning admits of no doubt"²². They could "read in words which change the meaning of the enacted legislation"²³. They could assert that "[t]he word 'possible' in s.31(1) is used in a different and much stronger sense"²⁴. They could imply that anything short of outright 'judicial vandalism' is now within their purview at the point-of-application²⁵. They could even use this new interpretive power to overrule one of their own House of Lords authorities – a case on the meaning of exactly the same statutory provision, an authority under four years old, and one that had held the meaning of that same statute to be clear²⁶.

I could go on. I could note again that this *Ghaidan* approach to using the reading down provision is no outlier and continues to be affirmed and re-affirmed in the UK and that the top judges there now see themselves operating under "a new legal order"²⁷ – one in which their views on a host

of political and moral line-drawing exercises are significantly more influential than before. Or I could explore the Rule of Law implications of this new *Chaidan* approach to interpretation – how citizens’ knowledge of what any statute means becomes wholly and inextricably linked to judges’ views of the scope, range, content and reasonable limits on human rights, all or which are contentious and debatable and give rise to reasonable disagreement amongst smart, well-informed and even nice people. Put bluntly, this new *Chaidan* approach to interpretation, whatever other sins it might have, most assuredly magnifies uncertainty from the citizen’s vantage and hence lessens the ability of all non-judges to know what the law demands of them and to be able to shape their conduct and expectations accordingly.

Or I could even note the other ways statutory bills of rights empower judges, most obviously by means of the Declarations of Incompatibility and Statements of Incompatibility powers²⁸.

However, for our present purposes I need only here note that the NHRCC recommended type of statutory bill of rights does have the effect of clearly enhancing the scope for judicial decision-making at the expense of decision-making that would otherwise be made by the elected representatives of the people. It would, to some extent, have diminished democracy.

And having been understood in those terms, and in the context of a country like Australia with superb democratic credentials, the push for a national statutory bill of rights not only did fail, it was also a good thing that it failed in my opinion.

Australia does not need a bill of rights.

4. *What Australia Does Have*

We have now seen that Australia has a long established written constitution with very strong democratic credentials but no national bill of rights, neither an entrenched, constitutionalized one nor a UK-style statutory one. To finish this article I will briefly outline two ways in which a focus on rights does play a role in Australia. The first is parochial, and applies only in one of the six states of Australia, namely in the State of Victoria. This is that State’s *Charter of Human Rights and Responsibilities Act 2006*, or statutory bill of rights. The second is nationwide, though of a fairly bracketed or contained scope of application. This is the series of constitutional cases dating from the early 1990s decided by the High Court of Australia which discovered or created (depending on one’s theory of what qualifies as a defensible approach to constitutional interpretation) an implied freedom of political communication.

The State of Victoria’s *Charter* is an amalgam of the UK’s *Human Rights Act 1998* and *New Zealand’s Bill of Rights Act 1990*. It has a reading down provision (section 32) that borrowed slightly more from the UK Act’s section 3 than from the NZ Act’s section 6. It has a Declaration of Inconsistent Interpretation provision (section 36) that is a reworked version of the UK’s Act’s section 4. Unlike the UK Act, but copying the NZ Act, it has an abridging or ‘reasonable limits’ provision (section 7)²⁹. And as with both of the predecessor statutes it was mimicking, the Victorian *Charter* has a Statements of Compatibility provision (section 28) requiring at Second Reading that the relevant Minister³⁰ make a statement to the legislature that a Bill is, or is not, compatible with the enumerated rights³¹.

To date there is only one High Court of Australia decision interpreting the Victorian *Charter*. This is the 2011 case of *Momcilovic v The Queen*³². This decision split the seven High Court Justices in various shifting permutations across the range of *Charter* issues raised³³, but the main ruling for our purposes was that the leading UK case of *Chaidan*³⁴ was emphatically rejected as regards the meaning of Victoria's reading down provision.

At the time of writing no other State seems likely to try to enact a statutory bill of rights in the near term.

As for Australia's so-called 'implied rights' jurisprudence³⁵, there is no need to canvas this in detail. Suffice it to say that beginning in 1992, most notably in what is known as the *ACTV* case³⁶, the High Court of Australia arrived at the conclusion that the Australian Constitution — one that explicitly and deliberately left out any US-style bill of rights or First Amendment free speech entitlements and protections opting, after much debate and discussion amongst the Founders, to leave these social policy balancing exercises to the elected Parliament — nevertheless implicitly created an implied freedom of political communication. The first step in that reasoning, the only one that drew on the actual text of the Constitution itself, notes that the Australian Constitution provides that elected Members of Parliament are to be 'directly chosen by the people'³⁷. After a series of further inferences the majority Justices concluded that there was an implied freedom of political communication³⁸.

The practical effect of discovering this implied freedom of political communication was that the High Court of Australia justices could then strike down or invali-

date part of the statute in that case. However, also notice that the justices were and are still clear that this implied freedom does not amount to a personal free speech type right vesting in the individual citizen³⁹.

Since then this implied rights jurisprudence has not expanded very widely, and indeed has only very rarely led to statutes being struck down or invalidated⁴⁰. It has, however, been used as the basis for what might be thought of as a limited implied right to vote jurisprudence⁴¹.

Nevertheless, the effects of this implied rights case law on parliamentary sovereignty are considerably less than those of a UK-style statutory bill of rights, and less so again than those of a Canadian or US-style entrenched, constitutionalized bill of rights.

5. *Concluding Remarks*

There is little prospect in the near term of Australia entrenching a constitutionalized bill of rights or even of enacting a statutory UK or NZ-style bill of rights nationally. In this article I have set out not only how that has come about, but also why I believe that absence is a good thing.

Whether or not the reader agrees with that normative position of mine, what is not disputable is that Australia has a written Constitution that copied much from its US predecessor, though not the more counter-majoritarian or anti-democratic features of that predecessor.

Indeed Australia's Constitution is a remarkably democratic one, in the letting-the-numbers-count or 'right to participate' sense.

- ¹ See N. Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution*, Cambridge University Press, 2009, ch. 3, *inter alia* p. 70. See too C. Saunders, *The Constitution of Australia: A Conceptual Analysis*, Oxford, Hart Publishing, 2011, p. 16.
- ² It is currently 12 for each of the six States.
- ³ There are 12 Australian Senators per State but only 6 contest each election on a rolling basis.
- ⁴ The Australian aim was, as in the US, to have strong States. This has not eventuated however. See J. Allan and N. Aroney, *An Uncommon Court: How the High Court of Australia has undermined Australian Federalism*, in «Sydney Law Review», vol. 30, 2008, p. 245.
- ⁵ See T. Winkelman, *Selecting a Capital Territory*, in «Quadrant», vol. 56, May 2012, pp. 80 s.
- ⁶ Australian Constitution, section 128.
- ⁷ By 'democratic' I mean the term in its thin, procedural, 'counting everyone as equal and letting the numbers count' sense. On the competing 'thin' and 'fat' understandings of democracy see J. Allan, *Thin Beats Fat – Conceptions of Democracy*, in «Law & Philosophy», vol. 25, 2006, p. 533.
- ⁸ See A. Reilly, G. Appleby, L. Grenfell and W. Lacey, *Australian Public Law*, Melbourne, Oxford University Press, 2011, pp. 44-45.
- ⁹ And its amending formula too.
- ¹⁰ This is the core basis, the fact of reasonable disagreement, for Jeremy Waldron's critique of constitutionalized bill of rights. See, for example, J. Waldron, *Law and Disagreement*, Oxford, Oxford University Press, 1999, and J. Waldron, *A Right-Based Critique of Constitutional Rights*, in «Oxford Journal of Legal Studies», vol. 13, 1993, p. 18. Waldron there makes his case for a 'right to participate' as the 'right of rights'.
- ¹¹ Parts of this section I have taken from my article: J. Allan, *You Don't Always Get What You Pay For: No Bill of Rights for Australia*, in «New Zealand Universities Law Review», vol. 24, 2010, p. 179.
- ¹² See *Parliamentary Library Department of Parliamentary Services*, *Parliamentary Handbook of the Commonwealth of Australia*, 42nd Parliament, 2008, p. 396 and pp. 407-408, at <http://parlinfo.aph.gov.au/parlInfo/download/handbook/newhandbook/2008-12-19/toc_pdf_repeat/Part%205%20-%20Referendums%20and%20Plebiscites.pdf;fileType=application%2Fpdf>, 24th November 2009.
- ¹³ Carr wrote many op-ed newspaper pieces against the proposed bill of rights. See, for example, B. Carr, *Bill of Rights is the Wrong Call*, *The Australian*, May 9th, 2009.
- ¹⁴ See, for example, J. Leeser and R. Haddrick, *Don't Leave Us With the Bill: The Case Against an Australian Bill of Rights*, Menzies Research Centre, 2009.
- ¹⁵ I confess, here, to having penned several dozen of these newspaper anti bill of rights op-ed pieces myself over the course of the debate.
- ¹⁶ For a commentary on the Attorney General's announcement, see J. Allan, *All's Well that Ends Well*, *The Australian*, April 23rd, 2010. See, also B. Carr's piece in the April 22nd edition of *The Australian*.
- ¹⁷ Parts of this section I have taken from my Invited Australian Senate Occasional Lecture Series Address, Canberra, April, 2008, and from: J. Allan, *Statutory Bills of Rights: You Read Words In*, in T. Campbell, K. Ewing and A. Tomkins (edited by), *The Legal Protection of Human Rights: Septical Essays*, Oxford, Oxford University Press, 2011, pp. 108-126.
- ¹⁸ *Human Rights Act 1998* ch. 42, section 3(1) (italics mine). The broadly similar reading down provision in the New Zealand *Bill of Rights Act 1990* reads:
- “Whenever 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 meanings*”, (section 6, italics mine). And the reading down provision in the Australian State of Victoria's *Charter of Rights* reads: “So far as it is possible to do so consistently with their purpose, all statutory provisions *must be interpreted* in a way that is compatible with human rights”. (section 32(1), italics mine).
- ¹⁹ See *SI by his next friend CC v KS by his next friend IS* (2005) 195 FLR 151 at 154 (Higgins CJ of the Australian Capital Territory using a similar provision in the *ACT Human Rights Act 2004*).
- ²⁰ J. Allan, *The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism*, in «Melbourne University Law Review», vol. 30, 2006, pp. 909-910.
- ²¹ *Ghaidan*, para. 30, per Lord Nicholls. And could do so despite a total lack of ambiguity. For a similar New Zealand example of the relevant statute being blatantly read down, though without the judges explicitly referring to the section 6 reading down provision of the New Zealand Bill of Rights Act, see *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*].
- ²² *Ghaidan*, para. 29, per Lord Nicholls.
- ²³ *Ghaidan*, para. 32, per Lord Nicholls.
- ²⁴ *Ghaidan* AC p. 573, per Lord Steyn.
- ²⁵ *Ghaidan*, paras. 111-112, per Lord Rodger.
- ²⁶ *Fitzpatrick v Sterling Housing Association* [2001] AC 27.
- ²⁷ *Jackson v Attorney-General* [2006] 1 AC 262 at para. 102, per Lord Steyn.
- ²⁸ For fuller arguments to that effect see: Allan, *Statutory Bills of Rights: You Read Words* cit.
- ²⁹ This is section 5 in the *New Zealand Bill of Rights Act* which itself

was modelled on section 1 of the *Canadian Charter of Rights and Freedoms*.

³⁰ In New Zealand it is the Attorney-General.

³¹ For a full analysis of the Victorian Charter see: J. Allan, *The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism*, in «Melbourne University Law Review», vol. 30, 2006, p. 906.

³² [2011] HCA 34.

³³ For instance, the Declaration of Inconsistent Interpretation power was held to be valid at the State level (4-3) but not nationally (7-0), while the question of whether the s.7 abridging provision affects the s.32 reading down provision split the Justices in a way that makes it highly contestable or de-

batable what the answer is, everything depending on how you read Justice Heydon's judgment.

³⁴ *Chaidan v Codin-Mendoza* [2004] 2 AC 557 (HC).

³⁵ I have discussed the cases underlying this jurisprudence a number of times including in *Oh That I Were Made Judge in the Land*, in «Federal Law Review», vol. 30, 2002, p. 561; J. Allan, *Paying for the Comfort of Dogma*, in «Sydney Law Review», vol. 25, 2003, p. 63; and J. Allan, *Implied Rights and Federalism: Inventing Intentions While Ignoring Them*, in «University of Western Australia Law Review», vol. 34, 2009, p. 228.

³⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

³⁷ See sections 7 and 24.

³⁸ See, for instance, the five step reasoning process of Mason CJ in *ACTV* at para. 138.

³⁹ See the *University of Queensland Law Journal* special issue dedicated to the 20th anniversary of this jurisprudence in the volume 30, 2011 issue for considerable detail and analysis of these cases.

⁴⁰ *Ibid.*

⁴¹ See *Roach v Electoral Commissioner* (2007) 233 CLR 162 and *Rowe v Electoral Commissioner* (2010) 273 ALR 1.