

Chapter Six

The Victorian *Charter of Human Rights and Responsibilities Act 2006*

The Case for Repeal

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Some preliminary observations

Former Justice of the High Court, the Hon Michael McHugh, in a speech in 2007, repeated that old saw that “[Australia appears] to be the only Western country in the world without a Bill of Rights”. He added that this “raises questions about [Australia’s] true commitment to . . . human rights standards...”¹ He bolstered his arguments by references to sayings of a number of legal academics² – for example, Professor Hilary Charlesworth had noted a “marked gap” in Australian democracy in that there is not “a coherent system of protection of human rights”³ – and quoted his own observation in *Al Kateb v Godwin* that:

Eminent lawyers who have studied the question firmly believe that the Australian Constitution should contain a Bill of Rights which substantially adopts the rules found in the most important of the international human rights instruments. It is an enduring and many would say a just criticism of Australia that it is now one of the few countries in the Western world that does not have a Bill of Rights.⁴

Leaving to one side the sagacity or otherwise of a sitting High Court judge making such a gratuitous statement, it should be noted that, in that case, where he was in the majority, Justice McHugh immediately went on to say that: “But, desirable as a Bill of Rights may be, it is not to be inserted into our *Constitution* by judicial decisions drawing on international instruments that are not even part of the law of this country.”

This speech illustrates three major themes that have surrounded debate in Australia on “human rights”:

- First, it is primarily lawyers who agitate for a bill of rights;
- Second, that such lawyers believe that Australia’s democracy is somehow second-rate because of the lack of such a bill; and
- Third, that nevertheless, it is not for judges to go about inserting rights from international instruments into the law, especially the law of the Constitution.

I have argued elsewhere that Australia’s robust democracy has been and remains the best protection of individual citizens’ rights, and suggested that much of the support for notions for bills or charters of rights within Australia amounts to no more than a fashion, albeit one that lawyers appear quite desperate to wear.⁵ But, as George Santayana noted, “Fashion is something barbarous, for it produces innovation without reason and imitation without benefit.”⁶

Immediately obvious difficulties with the Charter

Nowhere is this clearer than with the Victorian *Charter of Human Rights and Responsibilities Act 2006*⁷ (hereafter: the Charter).

For all its vaunted title, the responsibilities aspect of the Charter is sadly lacking – “Responsibilities” are mentioned only in relation to section 15(3) concerning freedom of speech, and the only obligations specifically mentioned as such are those referred to in the heading of Part 3, Division 4, “Obligations on public authorities”. The consequent concentration upon “rights” of persons (“Only persons have human rights. All persons have the human rights set out in Part 2”),⁸ as opposed to any “responsibilities” of persons, (there is no equivalent provision stating, “All persons have the responsibilities set out in ...”), is of itself an idicium of either careless drafting, or of a disregard for individual responsibility.⁹

There can be little doubt that the Victorian Charter owes a great deal to imitation. In the Victorian Court of Appeal, the then Victorian Labor Attorney-General¹⁰ and the Victorian Equal Opportunity and Human Rights Commission¹¹ argued that the provision in the Charter owed a great deal to, and was modelled upon, *Ghaidon v Godin-Mendoza*,¹² a United Kingdom case decided in the context of the UK *Human Rights Act 1998* that incorporated the European Convention of Human Rights into the municipal law of the United Kingdom. The then Victorian Attorney also pointed to cases interpreting the New Zealand *Bill of Rights Act 1990*, and the *Constitution of the Republic of South Africa 1990*.¹³ But all those cases clearly occurred in constitutional situations greatly different from those of the State of Victoria within the Commonwealth of Australia. Inevitably this was bound to lead to severe difficulty, and has done so (see the discussion of *Momcilovic v The Queen*,¹⁴ below).

The Charter, in section 5, states that “A right or freedom not included in this Charter that arises or is recognised under any other law (*including international law*, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included” [emphasis added]. This wording implies that by virtue of this particular State statute, all internationally recognized rights (whether under treaty or customary international law) are incorporated into the law of Victoria.¹⁵

The means by which internationally binding obligations are incorporated into municipal law in Australia is through action by the Commonwealth Parliament.¹⁶ Australia does not have any federal clauses in its accession to or ratification of treaties. And while on many occasions complementary Commonwealth-State legislation or activities may occur to implement treaty obligations, in contrast to Commonwealth legislation, it must be doubted whether Victoria off its own bat has the legislative capacity to cause obligations binding on the Commonwealth in international law to be recognized in municipal law. The extent to which the Commonwealth or other States and Territories were consulted¹⁷ on the Charter is not known to the author; but it is noted that the Commonwealth’s *Common Core Document forming part of the reports of States Parties – Australia*, submitted to the United Nations on 25 July 2007, states that the Victorian Charter “seeks to protect and promote civil and political rights *based on*” the ICCPR [emphasis added].¹⁸ That document, however, also notes that:

83. Australia’s strong democratic institutions, the *Constitution*, the common law and current legislation, including anti-discrimination legislation at the Commonwealth, State and Territory levels, protect and promote human rights in Australia. For these reasons, the Australian Government is not convinced of the need for a Bill of Rights in Australia.
84. The Australian Government considers that the best ways to protect human rights are by ensuring that the existing mechanisms described above work effectively, and by educating the community about human rights and responsibilities.¹⁹

In addition, the Victorian Charter purports to confer a discretion on those interpreting “rights” (presumably the courts) to consider “International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right” when interpreting an impugned statutory provision.²⁰ The utility of considering in Australia cases concerning different legislation in different countries in different constitutional circumstances must be doubted; and, indeed, it was this kind of comparison that the High Court itself warned against in the *Engineers’ Case*.²¹ The extent to which even a discretionary direction of this kind would be constitutional remains to be seen: if it amounts to an intrusion into the judicial power of the Commonwealth, then the provision would not be valid (see below).

The Victorian statute purports to grant “all persons” the “human rights set out in Part 2,”²² and to bind not only “the Crown in right of Victoria”, but also, “so far as the legislative power of the [state] Parliament permits, the Crown in all its other capacities.”²³ While, after the passage of the *Australia Act* 1986 (Cth), the right of States to legislate extraterritorially (that is, beyond State borders) has been recognized,²⁴ the extent to which the Charter can lawfully extend cannot be as wide as the provisions mentioned suggest. Can the State of Victoria bind the Commonwealth Crown? or another State Crown? Can it bind people who are not resident in Victoria but in some other State? If so, which people? These were questions that recently exercised Justice Gummow.²⁵

In regard to residents in States, the Commonwealth Constitution requires, in section 117, that:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

This is one of the very few constitutional guarantees, and the extent to which “discrimination” may be distinguished from “disability” in a positive sense may well prove problematic for the future of the Charter if it could be said that the Charter itself sets up a discriminatory regime in relation to residents in States.

The Charter requires that after four years operation, the Attorney-General of Victoria must cause a review to be made of the Charter’s operation, to be laid before both Houses of the Victorian Parliament before 1 October 2011. This review, currently underway, must include consideration of whether additional human rights should be included under the Charter, including but not limited to, rights under the International Covenant on Economic, Social and Cultural Rights (ECOSOC), the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women. Implicit in this provision is that the Charter already includes²⁶ rights under the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), and the International Convention on the Elimination of All Forms of Discrimination against Women (ICEDAW).²⁷ The extent to which a State legislature, unilaterally, may implement international obligations is raised starkly by this review, in so far as any implementation of the aspirational ECOSOC rights are liable to have severe economic ramifications beyond Victoria alone.

The State of Victoria has no constitutional authority to act as if it were a nation state, by virtue of its laws incorporating international obligations into law. This is solely the prerogative of the Commonwealth (though it may choose to do that in tandem with the States). But it is a Commonwealth matter, not a State matter. This was made abundantly clear in *Koowarta*²⁸ and the *Tasmanian Dams Case*.²⁹

The reason the Commonwealth has the responsibility of implementing international obligations is clear: so that the implementation applies equally throughout the Commonwealth. A State has no power to achieve such an end. For a State to attempt selectively to implement international

obligations or to require State courts to require the implementation of international obligations is arguably to usurp Commonwealth power, to undermine the equal application of law, and to cause grave disruption to the Commonwealth legal system.³⁰

The current confusion

Only a few of the most immediately obvious Charter difficulties were outlined above; but the truth of the observations in the previous paragraph is demonstrated in the current High Court appeal in *Momcilovic v The Queen*.³¹

Momcilovic

That case is an appeal³² from the Victorian Court of Appeal. Ms Momcilovic, a resident of Queensland³³ and a former solicitor, was prosecuted and convicted of trafficking in methylamphetamine, and sentenced to imprisonment for two years and three months. The drugs in question were found in the appellant's apartment. Under section 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (the Drugs Act) the appellant was deemed to be in possession of the drugs unless she "satisfie[d] the court to the contrary." Her partner (Markovski) owned another apartment in the same building but mostly lived with the appellant in her apartment; he admitted that he was involved in drug trafficking and said that the drugs were in his possession for that purpose. He denied, as did the appellant in her own evidence, that she had any knowledge of the drugs or the trafficking operation.³⁴

The Court of Appeal upheld the conviction unanimously. In so doing, it made a Declaration of Inconsistent Interpretation pursuant to section 36(2) of the Charter, stating that section 5 of the Drugs Act could not be interpreted consistently with the presumption of innocence right set down in section 25(1) of the Charter.³⁵

The appeal focussed on the reversal of the onus of proof in the Victorian Drug Act, on the approach to interpretation under the Charter adopted by the Court of Appeal, on whether the Charter required judges effectively to amend or repeal legislation, on inconsistency with the Commonwealth Criminal Code pursuant to the Constitution, section 109, on the meaning and efficacy of the Declaration of Inconsistent Interpretation, and on the effect on the judicial power of the Commonwealth of the jurisdiction given to the Supreme Court of Victoria under the Charter.

Twenty-six counsel appeared before the High Court.

Issues touched upon included:

The effect of the "Declaration of Inconsistent Interpretation"

Some judges³⁶ expressed distaste for the word "declaration", no doubt having in mind the pending decision in *M70*.³⁷

- The "declaration" would appear to have no legal effect, as the relevant Minister is not obliged to respond to it (and, in the instant case, the Attorney-General had not)³⁸
- Justice Gummow expressed some disbelief at the Charter scheme,³⁹ noting that the outcome for the State court was akin to "writing in water."⁴⁰
- Whether on an appeal, the High Court could in fact do anything with respect to any such "declaration."

The Charter as Deception

Because there is no real legal remedy, is there "A deception being practised upon the public"?⁴¹

The judicial power of the Commonwealth

Can a State court, vested with the judicial power of the Commonwealth, act in such a fashion?⁴²

- The likely answer would appear to be “no” given the High Court’s findings in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, *Kirk v Industrial Court(NSW)* (2010) 239 CLR 531, *South Australia v Totani* [2010] HCA 39, and *Wainohu v New South Wales* [2011] HCA 24.
- Unless somehow what the Supreme Court was doing under the Charter was not an exercise of judicial power at all
- But if this were to be the case, what power would it be using?

Will the constitutional appellate jurisdiction of the High Court, pursuant to the Constitution, section 73, be engaged, if there is no relevant order, “matter” or “decision” in relation to the “Declaration of Inconsistent Interpretation” on which the High Court constitutionally may decide?

- If there is not, then the High Court had limited jurisdiction to hear the appeal, probably limited solely to the section 109 inconsistency question; and had no jurisdiction to hear anything in relation to the “Declaration”
- Therefore, if this were to be the case, despite ordinarily there being no separation of powers in the States, the reach of the judicial power as interpreted by the High Court means that any State legislation purportedly conferring on a State court capacity to make declarations of the kind in the Charter could well be unconstitutional.

Courts legislating

To adopt the approach first taken by the former (Labor) Attorney-General in the Victorian Court of Appeal could well amount to a court vested with the judicial power of the Commonwealth undertaking legislation, in the sense of amending or repealing statutes passed by the legislature.

- Such an interpretation draws upon the UK case of *Ghaidon*,⁴³ where the House of Lords appeared freely to admit that it was “legislating.”
- This is antipathetic to the judicial power of the Commonwealth in the context of the separation of powers.⁴⁴

Constitutional inconsistency

Adoption of the Charter process of interpretation may lead to inconsistency between Commonwealth and State legislation which would not otherwise exist.

Interpretation

Is it possible to find an approach to “Charter interpretation” that avoids bringing the judicial power of the Commonwealth into disrepute?

- That is, that does not involve the Court in amending or repealing legislation passed by the State parliament
- This will depend on the view the Court takes about the nature of the power being exercised by the Court of Appeal.

Different strokes

On the change of government in Victoria, the Coalition Attorney-General took a different approach to argument than had his Labor predecessor.

- While this approach eschews the “legislating” approach said to have been adopted in *Ghaidon*,⁴⁵

it nevertheless argues for the constitutionality of the Charter approach.

On the other hand, the Solicitor-General for the Commonwealth⁴⁶ appears to be arguing for the constitutionality of the Charter and the approach on the basis that while the judicial power of the Commonwealth may be involved, this is a matter that can be reconciled using an adaptation of the reconciliation process adopted in *Project Blue Sky*,⁴⁷ by looking at the intention(s) of the relevant legislatures; this approach would also be the one used in relation to section 109 inconsistency.

- I am by no means sure that this is an accurate statement of the Solicitor-General's approach.

The change in policies and approach at the State level (and perhaps at the Commonwealth level as well) demonstrates the need for certainty in the law in relation to all individuals.

- This tends to argue against ad hoc State and territory rights legislation.
- But this does not necessarily mean that there is a need for a Commonwealth "bill of rights."

Conclusion

This paper has had a very quick glance at some of the issues that have arisen in the context of the first Declaration of Inconsistent Interpretation by the Supreme Court of Victoria.

It is clear that all that the Charter has been able to do is to muddy the waters, create confusion, earn many lawyers a lot of money, while leaving the individual whose rights were said to be infringed without any remedy.

It is also clear that on the basis of this first venture into Declarations of Inconsistent Interpretation, the Victorian Charter has opened a proverbial can of worms. The Charter is riddled with inexactities, overblown sentiment, overlarge expressions, and is of doubtful effect.

The fact is that there is no need for the Victorian Charter at all. As the Honourable J. J. Spigelman, former Chief Justice of New South Wales, said in the first McPherson lecture, there is a ". . . group of principles of the law of statutory interpretation which constitute, in substance, a common law bill of rights."^{48 49} Why is this not sufficient?

Professor John McMillan, the then Commonwealth Ombudsman, said in 2004:

My own view is that the limited empirical evidence that is available suggests that institutions such as the Ombudsman, together with other innovations in administrative law and government, have had a marked impact over three decades in developing a new culture in public administration that is more attuned to the rights of members of the public.⁵¹ If so, those innovations – which are now strongly rooted in Australian public law – deserve more attention in any discussion about enhancing respect for the rule of law in Australia.⁵⁰

Why are all these measures not sufficient?

Chief Justice Gleeson of the High Court, in *Plaintiff S157*, said:⁵²

courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.⁵³ As Lord Hoffmann recently pointed out in the United Kingdom,⁵⁴ for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual.'

This is all very well, in that courts ensure that legislatures do not override fundamental common law rights and freedoms without the clearest statutory expression. But Spigelman, CJ, speaking in the context of the dangers of “spurious interpretation” undertaken by courts, said:

The task of the court is to interpret the words used by Parliament. It is not to divine the intent of the Parliament.⁵⁵ The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say.⁵⁶

...

... the position in Australia is that identified by Stephen J:

‘It is no power of the judicial function to fill gaps disclosed in legislation.’⁵⁷

Indeed Justice Stephen subsequently said:

‘To read words into any statute is a strong thing and, in the absence of clear necessity, a wrong thing.’^{58,59}

But this is exactly what the Charter is telling judges to do.

Australians already are hedged around with thickets of Rights Commissions, of merits review bodies, Judicial Review Acts, judicial review in the courts, Ombudspersons of all kinds, anti-corruption and pro-integrity bodies, inspectors-general into a range of areas, and royal commissions and judicial inquiries; not to mention the old-fashioned things available to protect rights, scrutinise government activity, and make governments and their agencies accountable like Question Time, Questions on Notice, parliamentary scrutiny committees, your local members and the ministers themselves, and the omnivorous 24-hour news cycle.

Chief Justice Gleeson once said that the rule of law did not mean “rule of lawyers.”

If this is what Australians want (a rule of law), then those who make the laws, the elected representatives, should receive proper support and acknowledgement, not continual cutting down by lawyers, judges and courts. The more statutes there are, and there are now hundreds of thousands, the more work for lawyers and judges. The more statutes there are, the more an Act such as the Charter will provide yet an additional layer of interpretative and quasi- if not outright-legislative work for courts. This may have become the way in the United States and now in the United Kingdom, but it has never been the Australian way. We are an egalitarian bunch, in the past most happy looking after ourselves and giving one another a fair go. And we have not yet arrived at the stage where Australians are happy for unelected judges to make our laws for us – we cannot throw them out.

The Victorian Charter is a very sorry mistake. It must be repealed.

Endnotes

1. Hon Michael McHugh, AC, QC, Speech to the NSW Bar Association, 8 August 2007, available at http://www.nswbar.asn.au/docs/resources/lectures/bill_rights.pdf, 2.
2. Professors George Williams, Hilary Charlesworth and Larissa Behrendt.
3. H Charlesworth, ‘Human Rights in Australian Law,’ (2002) 13 *Public Law Review* 155, 155, as quoted and cited in McHugh, n. 1 above.
4. *Al-Kateb v Godwin* (2004) 219 CLR 562; 78 ALJR 1099; (2004) 208 ALR 124, per McHugh J at [73].
5. MRL Kelly, ‘Australia Without a Bill of Rights,’ *Sydney Papers Online* Issue 7, 4 May 2010,

available at <http://www.thesydneyinstitute.com.au/paper/margaret-kelly-%e2%80%93-australia-without-a-bill-of-rights/>

6. George Santayana, *The Life of Reason; or the Phases of Human Progress*, (Dover Publications Inc., NY: 1982; originally published by Charles Scribner's Sons 1905), Chapter VII, available at The Gutenberg Project, <http://www.gutenberg.org/files/15000/15000-h/vol3.html>
7. *Victorian Charter of Human Rights and Responsibilities Act 2006*(Vic).
8. *Charter*, s. 6(1).
9. C.f. *Momcilovic v The Queen* M134/2010: [\[2011\] HCATrans 15](#); ll. 2642-6 (Gummow J).
10. See *The Queen v Momcilovic* (2010) 200 A Crim R 453, 466 [43]; [2010] VSCA 50 (The Court: Maxwell P, Ashley and Neave JJA).
11. See *The Queen v Momcilovic* , *ibid.*, 466-7 [45].
12. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
13. See *The Queen v Momcilovic* (2010) 200 A Crim R 453, 466 [43]
14. See *Momcilovic v The Queen* M134/2010: [\[2011\] HCATrans 15](#); [\[2011\] HCATrans 16](#); [\[2011\] HCATrans 17](#); [\[2011\] HCATrans 145](#). Heard 8, 9, 10 February 2011, and 7 June 2011, before French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ — *Judgment reserved*.
15. See also text accompanying n. 27.
16. See *Constitution* s. 51(xxix).
17. E.g., through the Treaties Council consisting of the Prime Minister, the Premiers and the Chief Ministers.
18. *Common Core Document forming part of the reports of States Parties— Australia*, June 2006, submitted to the UN 25 July 2007, par. 80 (available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_CommonCoreDocument).
19. *Common Core Document*, *ibid.*, pars. 83-4.
20. *Charter*, s. 32(2). See also Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1293 (Mr Hulls, Attorney-General).
21. *Amalgamated Society of Engineers v Adelaide steamship Co. Ltd (Engineers' case)*, (1920) 28 CLR 129, 146-7 (Knox CJ, Isaacs, Rich and Starke JJ).
22. *Charter*, s. 6(1).
23. *Charter*, s. 6(4).
24. *Australia Act 1986* (Cth) s. 2(1)
25. See *Momcilovic v The Queen* M134/2010: [\[2011\] HCATrans 15](#); 8 February 2011, ll. 1940-1955; [\[2011\] HCATrans 17](#); 10 February 2011, ll. 9450-85.
26. See text accompanying notes 15-22 above.
27. See definition of 'discrimination' in *Charter* s. 3, incorporating the definition in the *Equal Opportunity Act 1995* (Vic.).
28. *Koowarta v. Bjelke Petersen* (1982) 153 CLR 168.
29. *Commonwealth v. Tasmania* (1983) 158 CLR 1.
30. C.f. *Momcilovic v The Queen* M134/2010: [\[2011\] HCATrans 15](#); ll. 2531-3 (Gummow J) – 'The Parliament of Victoria does not have ultimate sovereignty to make laws for the good government of the people of Victoria. It is subject to the federal *Constitution*.'
31. See *Momcilovic v The Queen* M134/2010: [\[2011\] HCATrans 15](#); [\[2011\] HCATrans 16](#); [\[2011\]](#)

- [HCATrans 17](#); [\[2011\] HCATrans 145](#). Heard 8, 9, 10 February 2011, and 7 June 2011, before French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ – *Judgment reserved*..
32. For the short particulars of the appeal, see [2011] HCAASP 4 at <http://www.austlii.edu.au/au/other/HCAASP/2011/4.html>
 33. See [\[2011\] HCATrans 17](#); 10 February 2011, ll. 9450-85.
 34. It has been said that Ms Momcilovic holds a ‘Bachelor of Science Honours degree from Monash University majoring in chemistry as well as a Graduate Diploma in Drug Evaluation and Pharmaceutical Sciences from Melbourne University’ – <http://www.abc.net.au/rn/lawreport/stories/2010/2850808.htm>
 35. *The Queen v Momcilovic* (2010) 200 A Crim R 453, 498.
 36. *Momcilovic v The Queen* M134/2010: [\[2011\] HCATrans 15](#); Gummow J, ll. 1805-1815, 2115-2133.
 37. *Plaintiff M70 v MIAC* [2011] HCAASP 36 at <http://www.austlii.edu.au/au/other/HCAASP/2011/36.html> .
 38. *Momcilovic v The Queen* M134/2010: [\[2011\] HCATrans 15](#); ll. 1527-38.
 39. *Momcilovic v The Queen* M134/2010: [\[2011\] HCATrans 15](#); ll. 2125-9 – ‘It is unthinkable – and of course it has not happened – that the Minister, after M61, would report to the Parliament that the decision is to be ignored, but you seem to accept that can happen under the system of this Victorian statute.’
 40. *Ibid.*, ll. 2153-4.
 41. *Ibid.*, l. 2629 (Gummow J).
 42. *Ibid.*, ll. 2230-3; 2550-2560.
 43. See n. 12 above.
 44. C.f. ll. 2235 (Crennan J); 3455 (Gummow J).
 45. See n. 12 above.
 46. The Solicitor-General acts under instructions from the Attorney-General. The attorney has always favoured a Bill of Rights; but the Cabinet decided against it in April 2010 (see Address to the National Press Club, 21 April 2010, at http://www.ema.gov.au/www/ministers/mcclelland.nsf/Page/Transcripts_2010_SecondQuarter_21April2010-LaunchofAustraliasHumanRightsFramework .
 47. *Project Blue Sky v ABA* (1998) 194 CLR 355.
 48. The terminology common law bill of rights was, so far as I am aware, first deployed by John Willis in “Statute Interpretation in a Nutshell” (1938) 16 *Canadian Bar Review* 17. It has been adopted by others: see, e.g., D. C. Pearce and R S Geddes, *Statutory Interpretation in Australia*, 6th ed, LexisNexis Butterworths, Sydney, 2006, at [5.2].
 49. “*The Common Law Bill of Rights*,” First lecture in the 2008 McPherson Lectures: *Statutory Interpretation & Human Rights* University of Queensland, Brisbane, 10 March 2008.
 50. John McMillan, “The Ombudsman and the Rule of Law,” (2005) 44 *AIAL Forum*, 1-16— *Revised version of a paper presented at ANU Public Law Weekend, Canberra, 6 November 2004*.
 51. That was the clear conclusion in two empirical studies I jointly undertook: see two articles by Creyke and McMillan, above n 24 and n 54. The annual reports of the Commonwealth Ombudsman also describe the steps taken by agencies to improve their systems in response to complaints from members of the public. Similarly, for an explanation of how the creation of an accountability and integrity framework within the executive branch of government transformed the Queensland Police Service (in the view of the Queensland Ombudsman) ‘from a corrupt institution at the highest levels to a professional and respected organisation’ see D Bevan, ‘Queensland’s Public Accountability Framework: Effective Regulation or Effectively Over-Regulated?’ in M Barker (ed), *Appraising the Performance of Regulatory Agencies* (AIAL, 2004) 228.

52. *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 492.
53. *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.
54. *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131.
55. See *State v Zuma* (1995) (4) BCLR 401 at 402; [1995] (2) SA 642; *Matadeen v Pointu* [1999] 1 AC 98 at 108; *R v PLV* (2001) 51 NSWLR 736 at [82]; *La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius* (Unreported, Privy Council, 13 December 1995); *Pinder v The Queen* [2003] 1 AC 620 at [24].
56. *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168–169; *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 at 953d; [1978] 1 WLR 231 at 236G; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 613G, 645C–V; *R v Young* (1999) 46 NSWLR 681 at [5]; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at [10]; *Donselear v Donselear* (1982) 1 NZLR 97 at 114.
57. *Marshall v Watson* (1972) 124 CLR 640 at 648; See also *Council of the City of Parramatta v Brickworks Ltd* (1971) 128 CLR 1 at 12; *Ruzicka* at [6]; *VOAW* at [12]; *Cornwell v Lavender* (1991) 7 WAR 9 at 23.
58. *Western Australia v Commonwealth* (1975) 134 CLR 201 at 251.
59. Hon J. J. Spigelman Chief Justice of NSW, ‘Legitimate and Spurious Interpretation,’ Third Lecture in the 2008 McPherson Lectures: *Statutory Interpretation & Human Rights*, University Of Queensland, 12 March 2008, at <http://acthra.anu.edu.au/resources/McPherson%20Lectures%2012%5B1%5D.3.08%20Third.doc>. Also available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1806738.