

## A FEDERAL HUMAN RIGHTS ACT AND THE RESHAPING OF AUSTRALIAN CONSTITUTIONAL LAW

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### I INTRODUCTION

The National Human Rights Consultation Committee ('NHRCC') in its Report has recommended that Australia should adopt a federal Human Rights Act ('HRA'),<sup>1</sup> even though there was an express acknowledgment of disagreement among members of the NHRCC 'about the need ... and desirability' of such an Act.<sup>2</sup> This key recommendation is a first major step in the long trek towards bringing into existence a HRA<sup>3</sup> which would enable Australia to fall into line with the other western liberal democracies which have been operating either a constitutionally entrenched Bill of Rights or Charter of Rights (as in the case of the United States of America ('US') and Canada), or a mere statutory HRA as in the case of the United Kingdom ('UK') and New Zealand. Given that Australia does not have a federal HRA, its jurisprudence so far has contributed very little to the common spring of jurisprudential developments among the other western liberal democracies. Should a statutory HRA come about, it would be interesting to speculate on what new directions Australian constitutional jurisprudence will take.

In this article, I will engage in an exercise of crystal ball gazing regarding the future shaping of Australian constitutional law, on the *assumption* that a statutory HRA does come into existence. The thrust of this article is to look at how the character of Australian constitutional law will likely be affected or reshaped by the impact of a HRA embodying the key recommendations emanating from the NHRC's Report. I will focus on two main classes of case which are areas of particular interest when a HRA comes into effect. The first class relates to those cases in which the validity of an impugned federal enactment involves the operation of the characterisation process and the scope of the external affairs power, while the second class relates to those cases in which it is asserted that

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1 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) xxix, 378.

2 *Ibid* 278.

3 For a brief account of the failed referendums of 1944 and 1988 and failed federal legislative proposals, see *ibid* 230–6 [10.2].

there is a contravention of a constitutional limitation, whether express or implied. In regard to the second class of cases, the concept of ‘proportionality’ and the various contexts in which the concept is applicable will be considered. I will also examine the significance of Chapter III of the *Commonwealth Constitution* to the proposed ‘declaration of incompatibility’ mechanism and consider how a HRA will impact on Australia’s system of parliamentary democracy.

I have chosen to focus on the two main classes of cases because a challenge to an impugned piece of legislation on the ground that it contradicts the HRA will in the first place cast the spotlight on the constitutional validity of the HRA itself. The Commonwealth Parliament, being a Parliament of enumerated powers or of limited competence, requires the HRA to be ‘characterised’ as a law within one or more of the heads of power under section 51 of the *Commonwealth Constitution*. As the HRA seeks to give effect to an international instrument, the ‘external affairs’ power in section 51(xxix) will be invoked as the main constitutional source of law-making authority to justify its validity. Once the issue of the constitutionality of the HRA is dealt with, the second class of cases relate to the use of the HRA as a yardstick to determine the validity of the impugned legislation and, in this connection, the principle of ‘proportionality’ is invoked as the key test of validity. In my exegesis on this principle, my main aim is to show that the High Court is conversant with the use of this principle in constitutional adjudication, as illustrated especially by the application of this principle in constitutional challenges based on the implied freedom of political communication. I will also examine the use of Chapter III of the *Commonwealth Constitution* as the ‘declaration of incompatibility’ mechanism is a novel feature of the HRA and its constitutional validity will undoubtedly be challenged.

## II SOME PRELIMINARY ASPECTS

It is well known that the framers of the *Commonwealth Constitution* were awed and fascinated by the *United States Constitution* to such an extent that it has been said that ‘its contemplation dampened the smouldering fires of their originality’.<sup>4</sup> Although the framers declined to adopt an Australian equivalent of the US Bill of Rights, the *Commonwealth Constitution* contains a sprinkling of express rights: the guarantee of ‘just terms’ in relation to legislative acquisition of property from any state or person ‘for any purpose in respect of which the Parliament has power to make laws’ (section 51(xxxi)); the mandatory prescription for a jury trial in the case of a trial ‘on indictment of any offence against any law of the Commonwealth’ (section 80); the non-establishment of religion clause (section 116); the protection afforded against discrimination of a person on the basis of interstate residence (section 117).<sup>5</sup>

4 Sir Owen Dixon, ‘The Law and the *Constitution*’ in Judge Severin Woinarski (ed), *Jesting Pilate* (Lawbook, 1965) 44.

5 For a discussion of the relevant cases and analyses of these express rights, see George Winterton et al, *Australian Federal Constitutional Law — Commentaries and Materials* (Lawbook, 2<sup>nd</sup> ed, 2007) ch 8.

From the time of Federation until the early 1900s, the preoccupation in Australian constitutional law was with ‘federalism’ issues – the demarcation of law-making powers between the Commonwealth Parliament on one hand and the state legislatures on the other. Constitutional law developments were dominated by the shaping of the tests of inconsistency in relation to section 109, the metamorphosis of the intergovernmental immunities doctrine, the jettisoning of the ‘reserve’ powers doctrine, the vigorous challenges to the expansion in operation of the corporations power and the external affairs power. Australian constitutional jurisprudence relating to the protection of fundamental rights and freedoms was scanty and was mainly concerned with the interpretation of the express rights provisions of sections 51(xxxi), 80, 116 and 117.

The year 1992 marked a significant shift in the High Court’s shaping of Australian constitutional jurisprudence. The emergence of the ‘implied rights’ doctrine during Sir Anthony Mason’s judicial stewardship of the High Court set the Court on an exciting period of ‘adventurism’ in constitutional law development.<sup>6</sup> The High Court has endorsed an implied freedom of political communication, a development which obtained the unanimous endorsement of the Court in *Lange v Australian Broadcasting Corporation*.<sup>7</sup> However, with changes in the composition of the Court, especially since the retirement of Sir Anthony Mason, the High Court now appears to pay lip service to the implied freedom of political communication. In truth, a number of High Court justices would prefer to consign it quietly to the dustbin of history.<sup>8</sup>

### A Some Key Recommendations

The Report contains a total of 31 recommendations. Those recommendations relevant to the thrust of this article will be considered. Recommendation 18 sets out the essential call for the adoption of a federal HRA.<sup>9</sup> The NHRCC was directed by its terms of reference to ensure that options identified for the protection of human rights ‘preserve the sovereignty of parliament and [do] not

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6 The emergence of the ‘implied rights’ doctrine spawned a burgeoning literature on the topic. See Nicholas Aroney, ‘A Seductive Plausibility: Freedom of Speech in the *Constitution*’ (1995) 18 *University of Queensland Law Journal* 249; A R Blackshield, ‘The Implied Freedom of Communication’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 232; Jeffrey Goldsworthy, ‘The High Court, Implied Rights and Constitutional Change’ (1995) 39(3) *Quadrant* 46; H P Lee ‘The Implied Freedom of Political Communication’ in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 392; Adrienne Stone, ‘The Freedom of Political Communication since *Lange*’ in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, 2000) 1; Adrienne Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25 *Melbourne University Law Review* 374; Jeremy Kirk, ‘Constitutional Implications from Representative Democracy’ (1995) 23 *Federal Law Review* 37; Leslie Zines, ‘A Judicially Created Bill of Rights?’ (1994) 16 *Sydney Law Review* 166.

7 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (‘*Lange*’).

8 See Lee, ‘The Implied Freedom of Political Communication’, above n 6, 383, 401; Nicholas Aroney, ‘Justice McHugh, Representative Government and the Elimination of Balancing’ (2006) 28 *Sydney Law Review* 505, 507 n 17.

9 National Human Rights Consultation Committee, above n 1, xxxiv (Recommendation 18).

include a constitutionally entrenched bill of rights'.<sup>10</sup> The model proposed by it is regarded by the NHRCC as being 'completely consistent' with the sovereignty of Parliament because Parliament 'retains the last word on the content of the legislation'. Recommendation 19 prescribes a 'dialogue' model for the new HRA.<sup>11</sup> The dialogue model requires each branch of government to play its 'specialist role'.<sup>12</sup> Acknowledging the validity of the criticism that the 'dialogue' label is misleading as it conveys an impression of a 'conversation', the Report explains how the proposed model would work:

1. The executive proposes to parliament a Bill the executive has drawn up with an eye to compliance with the relevant listed human rights. The executive provides a statement of compatibility, attesting that any limits on the relevant rights are limits that can be demonstrably justified in a free and democratic society.
2. The parliament considers the Bill through its Parliamentary Committee on Human Rights, which decides whether it agrees with the executive's assessment of the Bill or decides to legislate nonetheless, even though the Bill entails excessive interference with a particular right.
3. When a person claiming an unwarranted infringement of their right applies for a remedy in court, the court interprets the law consistently with human rights and in a manner that is also consistent with the purpose of the law. The court might find that any limitation on the right in the particular instance is demonstrably justified in a free and democratic society, or it can issue a declaration of incompatibility, having given the executive the opportunity to be heard on the question of human rights compliance.
4. The effect of the declaration of incompatibility is that the law remains valid but the executive is required once again to provide to parliament a justification for or explanation of the law.
5. Parliament then has the opportunity to reconsider the legislation in the light of what has transpired during this process.<sup>13</sup>

The dialogue model recommended by the NHRCC is not an original idea. It has already been in operation in a number of countries which have enacted a HRA. Such a scheme ensures that parliamentary sovereignty is not undermined by 'judicial activism' when the courts are called upon to construe the scope of the rights guaranteed by the HRA.

It has been pointed out by Merris Amos that in the UK, a declaration of incompatibility is the only 'viable option' given that the British courts do not possess a power over the decisions of the UK Parliament.<sup>14</sup> However, as such a declaration is not 'binding' on the parties to the proceedings, it is not considered an 'effective remedy'.<sup>15</sup> Amos notes that, as a result of this feature, the declaration of incompatibility 'is not a domestic remedy which must be exhausted in accordance with article 35 of the [*European Convention on Human*

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10 Ibid 383.

11 Ibid xxxiv.

12 Ibid 370.

13 Ibid 370–1.

14 Merris Amos, 'Problems with the *Human Rights Act 1998* and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72 *Modern Law Review* 883, 892–3.

15 Ibid.

*Rights*] prior to an application being brought to the [European Court of Human Rights]’. He adds:

Therefore, where the incompatibility lies in an Act of Parliament, and the only remedy at the domestic level is a declaration of incompatibility, in the view of the [European Court of Human Rights] there is no need for the applicant to air his or her complaint at the domestic level first, thereby defeating one of the main purposes of the [Human Rights Act], to bring rights home, and adding to a number of applications against the UK declared admissible.<sup>16</sup>

However, Australia is not afflicted by such a problem as it is not governed by the *Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>17</sup>

With the exception of a few ‘non-derogable’ rights, most rights would be subject to limitations imposed by law. Instead of a model in which specific limitations are expressly prescribed for each right, (eg the *Human Rights Act 1998* (UK) c 42) the NHRCC recommended the adoption of a general limitation clause similar to that set out in the *Human Rights Act 2004* of the ACT (section 24) and the *Charter of Human Rights and Responsibilities Act 2006* of Victoria (section 7(2)). The general limitation provision in the latter legislation provides:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including —

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.<sup>18</sup>

Another recommendation relevant to the exegesis in this article is Recommendation 29, which provides that any federal HRA would extend ‘only to the High Court the power to make a declaration of incompatibility’.<sup>19</sup> The NHRCC added a proviso to the effect that should this recommendation prove ‘impractical’, the alternative option is not to extend to courts the formal power to make a declaration of incompatibility.<sup>20</sup>

In addition, the NHRCC in Recommendation 28 recommended that a federal HRA should contain an interpretative provision ‘that is more restrictive than the UK provision and that requires federal legislation to be interpreted in a way that is compatible with the human rights expressed in the Act and consistent with

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16 Ibid 13, 892–3.

17 Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) (*‘European Convention on Human Rights’*).

18 National Human Rights Consultation Committee, above n 1, 4, 383. See Julie Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Rights and Responsibilities Act 2006*’ (2008) 32 *Melbourne University Law Review* 422.

19 National Human Rights Consultation Committee, above n 1, xxxvii.

20 Ibid xxxvii, 373–6.

parliament's purpose in enacting the legislation'.<sup>21</sup> The NHRCC also stressed that such an interpretative provision should not apply to economic, social and cultural rights.

A federal HRA, according to the NHRCC, should include certain 'non-derogable' civil and political rights<sup>22</sup> and a host of other civil and political rights.<sup>23</sup> In relation to economic and social rights, the NHRCC simply recommends that if those rights are listed in the HRA, they should not be justiciable.<sup>24</sup> Economic and social rights are not appropriate matters for determination by the courts. The NHRCC noted that most Australians are concerned with the realisation of primary economic and social rights such as 'the rights to education, housing and the highest attainable standard of health'.<sup>25</sup> Inevitably, such matters involve difficult decisions about the allocation of resources. In the Australian federal system, much of the services associated with these rights fall within the jurisdictions of the state and territory governments. Decisions involving allocation of state resources are decisions which courts 'do not have the expertise or information to make'.<sup>26</sup>

### III CHARACTERISATION AND THE EXTERNAL AFFAIRS POWER

There will be a slow build-up in the momentum of challenges based on the new federal HRA once it comes into force. In the first phase of the operation of the HRA, the issue of infringement of the rights listed in the HRA will likely be preceded by the issue of the constitutional validity of provisions of the Act. This issue will involve the constitutional source or sources of authority to justify the enactment of the HRA. The 'characterisation' of federal laws issue will witness an inevitable revisiting of the scope of the external affairs power in section 51(xxix), which clearly will be the main constitutional anchor of the validity of the HRA.

It appears that the thrust of the HRA will be the enactment of provisions which seek to implement part of the *International Covenant on Civil and Political Rights*.<sup>27</sup> If the federal government decides to include social and

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21 Ibid xxxvii.

22 Ibid 366–8.

23 Ibid 368–70.

24 Ibid 365–6. The NHRCC recommended that complaints in relation to economic and social rights should be heard by the Australian Human Rights Commission.

25 Ibid 365.

26 Ibid 366. Observations of Professor Tom Campbell and Dr Nicholas Barry endorsed by the NHRCC.

27 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'). This is inferred from the terms of the request for an opinion sought from the Solicitor-General. See Stephen Gageler and Henry Burmester, *In the Matter of Constitutional Issues Concerning a Charter of Rights: Supplementary Opinion*, Solicitor-General Opinion Nos 40, 68 (2009) [32].

economic rights in the HRA, the Act will seek to implement provisions of the *International Covenant on Economic, Social and Cultural Rights*.<sup>28</sup>

Will a federal HRA lead to significant changes to the contemporary scope of the external affairs power? The pattern of High Court decisions stemming from the landmark case of *Commonwealth v Tasmania*<sup>29</sup> has led to a consolidation of a broad reading of the external affairs power. Any federal law which seeks to implement part of the obligations of an international treaty or convention must pass the characterisation test of a law with respect to external affairs. In *Richardson v Forestry Commission*,<sup>30</sup> the external affairs power was held to extend even to the support of a federal law calculated to discharge ‘reasonably apprehended obligations’. This was put clearly by Mason CJ and Brennan J:

As the external affairs power is a plenary power, it extends to support a law calculated to discharge not only Australia’s known obligations but also Australia’s reasonably apprehended obligations. The power extends to support a law required to discharge a treaty obligation which is known to exist and also a law which is required to ensure the discharge of a treaty obligation which is reasonably apprehended to exist.<sup>31</sup>

Justice Mason in the *Tasmanian Dam Case* said:

I reject the notion that once Australia enters a treaty Parliament may legislate with respect to the subject matter of the treaty as if that subject matter were a new and independent head of Commonwealth legislative power. The law must conform to the treaty and carry its provisions into effect.<sup>32</sup>

The ‘conformity’ test requires that the federal law must be considered by the High Court as ‘reasonably capable of being considered appropriate and adapted’ to the implementation of the treaty or convention obligations. This ‘appropriate’ and ‘adapted’ issue will be considered below in the discussion of the ‘proportionality’ principle.

On the implementation of economic and social rights provisions of the *ICESCR*, the advice from the Commonwealth Solicitor-General is that it would be ‘more problematic’.<sup>33</sup> The main reason stems from the fact that as the rights in the convention are expressed in general terms, they will not meet the test of ‘sufficient specificity’ to underpin the validity of a law made pursuant to the external affairs power.<sup>34</sup> This test was spelt out by Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ in *Victoria v Commonwealth*<sup>35</sup> as follows:

When a treaty is relied on under s 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the

28 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (*ICESCR*).

29 (1983) 158 CLR 1 (*Tasmanian Dam Case*). See Peter Johnston, ‘The Constitution and the Environment’ in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent* (Federation Press, 2009) 79, 91–3.

30 (1988) 164 CLR 261 (*Richardson*).

31 *Ibid* 295.

32 *Tasmanian Dam Case* (1983) 158 CLR 1, 131.

33 Gageler and Burmester, above n 27, [36(a)].

34 *Ibid*.

35 (1996) 187 CLR 416 (*Industrial Relations Act Case*).

treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states.<sup>36</sup>

Although the High Court has indicated that a federal law will be struck down on the basis that the law amounts to a ‘colourable attempt’ to convert a matter of internal concern into an external matter, the reality is that the ‘doctrine of bona fide would at best be a frail shield, and available in rare cases’.<sup>37</sup> A federal HRA will indubitably provide opportunities for the High Court to revisit the earlier decisions on the external affairs power. In terms of constitutional crystal ball gazing, the expansive reach of the external affairs power is unlikely to be reversed or reshaped. It is hard to see any justification for the High Court to reverse the established expansive interpretation of the external affairs power.<sup>38</sup> Even Dawson J who had adopted a narrow view of the external affairs power was opposed to a reversal of the broad reading of the power. In the *Industrial Relations Act Case*<sup>39</sup> his Honour repeated his caution:

Precedents must, however, have a part to play, even in the interpretation of a constitution. Considerations of practicality make it necessary that the law should, as far as possible, take a consistent course. The constant re-examination of concluded questions is incompatible with that aim.<sup>40</sup>

### A Increasing Prominence of the Proportionality Principle

What is indisputably clear is that the proportionality principle, which has gained a foothold in Australian constitutional law,<sup>41</sup> will be of central importance in the operation of a HRA. The proportionality principle in Australia has manifested itself in two broad categories: (i) cases where the characterisation of a law depends on its purpose, so that it becomes relevant to ask whether the means adopted are proportionate to that purpose, and (ii) cases where proportionality to a legitimate objective may save the validity of a law that would otherwise infringe an express or implied limitation on power.

In the first category involving the characterisation process, the proportionality principle is called into play when the validity of a federal law is

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36 Ibid 486.

37 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 200 (Gibbs CJ).

38 See George Winterton, ‘Limits to the Use of the “Treaty Power”’ in Philip Alston and Madelaine Chiam (eds), *Treaty-Making in Australia: Globalisation Versus Sovereignty?* (Federation Press, 1995) 29–51. (1996) 187 CLR 416.

39 Ibid 572. His Honour first said this in *Richardson* (1988) 164 CLR 261, 322.

41 See generally H P Lee, ‘Proportionality in Australian Constitutional Adjudication’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 126; Blackshield, above n 6, 251–7; Bradley Selway, ‘The Rise and Rise of the Reasonable Proportionality Test in Public Law’ (1996) 7 *Public Law Review* 212; Jeremy Kirk, ‘Constitutional Guarantees, Characterisation and the Concept of Proportionality’ (1997) 21 *Melbourne University Law Review* 1; Brian Fitzgerald, ‘Proportionality and Australian Constitutionalism’ (1993) 12 *University of Tasmania Law Review* 263; H P Lee, ‘The “Reasonably Appropriate and Adapted” Test, and the Implied Freedom of Political Communication’ in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 59.



claimed to be based on a ‘purposive’ head of power.<sup>42</sup> In this connection, the defence power provides the best illustration. Because of the ‘ebb and flow’ of the defence power, constitutionality of federal legislation is dependent on determining whether a particular defence measure which is being challenged is ‘appropriate and adapted’ to securing a specified end. At the height of a wartime situation the broadest latitude is given to the Commonwealth Parliament. A law, for example, which imposes severe restrictions on the use of lighting in wartime (to prevent enemy bombers from finding their targets) may in a peacetime period be viewed as no longer appropriate and adapted. Such a law in peacetime will be viewed as disproportionate to the end to be attained and the law will thus fail the test of characterisation in relation to the defence power in section 51(vi).

The proportionality principle is also invoked in the context of the external affairs power, but only in those cases where the external affairs power is relied on for legislation giving effect within Australia to an international treaty. However, this invocation has been made by some judges on the basis that the external affairs power itself is a purposive power. This seemed to be the position adopted by Deane J in the *Tasmanian Dam Case* when he said:

Implicit in the requirement that a law be capable of being reasonably considered to be appropriate and adapted to achieving what is said to provide it with the character of a law with respect to external affairs is a need for there to be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it.<sup>43</sup>

However, Dawson J in the *Industrial Relations Act Case* reiterated a view his Honour had articulated in *Richardson*<sup>44</sup> that the external affairs power is not purposive (he said that the power ‘contains no expression of purpose’) but simply a power to make laws with respect to particular matters, namely, external affairs.<sup>45</sup> Chief Justice Brennan, Toohey, Gaudron, McHugh and Gummow JJ in the *Industrial Relations Act Case* expressed agreement with Justice Dawson’s view. The ‘reasonably appropriate and adapted’ test requires a determination of whether the purpose of the impugned Commonwealth law seeks to implement the treaty if reliance on fulfilling a treaty obligation is the basis for the constitutionality of the Commonwealth law. Therefore ‘purpose’ in the context of the external affairs power is ‘a test for determining whether the law in question is reasonably capable of being considered as giving effect to the treaty and therefore as being a law upon the subject which is an aspect of external affairs’.<sup>46</sup>

If the HRA takes the form of a piece of legislation which sets out guarantees which in substance and form mirror those found in the *ICCPR*, it will satisfy the

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42 For judicial comments on the role of proportionality in the context of constitutional characterisation, see *Leask v Commonwealth* (1996) 187 CLR 579. In the case, Dawson J said: ‘Whatever the position may be in other legal systems, the terms “appropriate and adapted” and “reasonable proportionality” are best avoided when enunciating a test to determine whether a law exceeds a non-purpose head of power under s 51 of our *Constitution*’: at 605.

43 (1983) 158 CLR 1, 260.

44 (1988) 164 CLR 261, 326.

45 (1996) 187 CLR 416, 572.

46 *Ibid* 487.

test of proportionality and therefore will be determined to be ‘reasonably capable of being considered’ as giving effect to Australia’s obligations under the *ICCPR*.

A similar proportionality principle is applicable in the context of determining whether a Commonwealth law can be characterised by reference to the express or the implied incidental power. Chief Justice Mason in *Cunliffe v Commonwealth*<sup>47</sup> elaborated:

Apart from the express grant of incidental power in s 51(xxxix) of the *Constitution*, each specific grant of power carries with it by implication authority to legislate in relation to acts, matters and things control of which is necessary or appropriate to effectuate the main purpose of the specific grant of power.<sup>48</sup>

In the second category, the proportionality principle has featured in the discourse on the operation of section 92 which guarantees that trade, commerce, and intercourse among the states shall be ‘absolutely free’<sup>49</sup> and in the context of the implied freedom of political communication. This category will feature more prominently when the HRA is invoked. In the context of the freedom of political communication cases, the Court ‘applied balancing tests to the question whether a law which somehow interferes with political communication could nonetheless be justified as a proportionate means of achieving some legitimate objective’.<sup>50</sup> The challenges to the validity of an impugned law on the ground of an infringement of a human right guarantee in the HRA will similarly require a judicial determination as to whether such a law could be justified as bearing a reasonable proportionality to a legitimate end. The legal technique or analytical framework adopted in determining the validity of an impugned law (whether federal or state) in the context of an implied right is no different from the determination of its validity in the context of an express right. The High Court cannot therefore be said to be venturing into new jurisprudential territory when it is called upon to operate the HRA. There is a corpus of constitutional law cases relating to the implied freedom of political communication which provides strong evidence that the High Court is adequately equipped when called upon to deal with provisions of the HRA containing guarantees of express rights.<sup>51</sup>

In determining that freedom of political communication is necessarily implied by the *Commonwealth Constitution*, the High Court ‘introduced a new and controversial form of “balancing” into Australian constitutional adjudication’.<sup>52</sup> Suffice it to say, the consensus reached by the High Court in *Lange* has led to the following formulated test:

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47 (1994) 182 CLR 272 (*‘Cunliffe’*).

48 *Ibid* 296. See *Davis v Commonwealth* (1988) 166 CLR 79; *Nationwide v Wills* (1992) 177 CLR 1.

49 Justice Susan Kiefel, ‘Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives’ (Speech delivered at the 17<sup>th</sup> Lucinda Lecture, Monash University, 19 November 2009).

50 Nicholas Aroney, ‘The Implied Rights Revolution – Balancing Means and Ends?’ in H P Lee and Peter Gerangelos (eds) *Constitutional Advancement in a Frozen Continent* (Federation Press, 2009) 173, 185.

51 See generally *Lange* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579; *Langer v Commonwealth* (1996) 186 CLR 302; *Coleman v Power* (2004) 220 CLR 1; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

52 Aroney, above n 50, 185.

When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirements of freedom of communication imposed by ss 7, 24, 64 or 128 of the *Constitution*, two questions must be answered before the validity of the law can be determined. First does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people (hereafter collectively ‘the system of government prescribed by the *Constitution*’). If the first question is answered ‘yes’ and the second is answered ‘no’, the law is invalid.<sup>53</sup>

The test as formulated in *Lange* is essentially one of balancing means and ends and is substantially similar to the test which is applied in jurisdictions with express guarantees of rights. Justices McHugh, Gummow, Hayne and Kirby in *Coleman v Power* agreed that in the second limb of the *Lange* test, the phrase ‘the fulfilment of’ should be replaced by ‘in a manner’.<sup>54</sup> This reformulation adopted in part the rewording of the second limb by Kirby J in *Levy v Victoria*.<sup>55</sup> The reformulation is intended to make it clear that ‘both the end and the manner of its achievement’<sup>56</sup> is to be compatible with the system of representative and responsible government.

It is axiomatic that, with a handful of exceptions, the guarantees in the HRA are not absolute and thus the court will be engaged in a ‘balancing’ process. When *Australian Capital Television Pty Ltd v Commonwealth*<sup>57</sup> is scrutinised, the judgments indicate judicial familiarity with such a process.<sup>58</sup> In the context of a law claimed to infringe the implied freedom of political communication, the High Court balanced the public interest in freedom of communication against the competing public interest which the restriction on the freedom seeks to serve.

The rise in importance of the proportionality principle following the introduction of a HRA will require the High Court to resolve a number of disagreements among the High Court justices over this principle. In the first instance, the High Court will have to decide on the proper ‘label’ to describe this principle. Some judges prefer the label of ‘reasonably appropriate and adopted’; others prefer the expression ‘proportionality’.<sup>59</sup> Chief Justice Gleeson in

53 *Lange* (1997) 189 CLR 520, 567–8.

54 (2004) 220 CLR 1, 51 (McHugh J), 77–8 (Gummow and Hayne JJ), 82 (Kirby J).

55 (1997) 189 CLR 579 (*‘Levy’*). In this case, Kirby J said at 646:

A universally accepted criterion is elusive. In Australia, without the express conferral of rights which individuals may enforce, it is necessary to come back to the rather more restricted question. This is: does the law which is impugned have the effect of preventing or controlling communication upon political and governmental matters in a manner which is inconsistent with the system of representative government for which the *Constitution* provides?

56 *Coleman v Power* (2004) 220 CLR 1, 50 (McHugh J).

57 (1992) 177 CLR 106 (*‘Political Advertising Ban Case’*).

58 See also *Levy v Victoria* (1997) 189 CLR 579; *Langer v Commonwealth* (1996) 186 CLR 302; *Coleman v Power* (2004) 220 CLR 1; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

59 See Lee, ‘The “Reasonably Appropriate and Adapted” Test, and the Implied Freedom of Political Communication’, above n 41, 71–3.

*Mulholland v Australian Electoral Commission*<sup>60</sup> said that either formula would be acceptable to him whereas Kirby J in the same case described the ‘reasonably appropriate and adapted’ formula as an ‘ungainly and unedifying phase’.<sup>61</sup> The enactment of a HRA will wire Australia into the global jurisprudence in which proportionality is the prevailing expression.

The greatest challenge facing the Court in applying the HRA is to clarify and elaborate a coherent proportionality doctrine. In refining the proportionality principle the High Court will no doubt be considering the application of that principle by courts in other jurisdictions. The Court will inevitably be drawn into a study of comparative constitutional jurisprudence. Decisions of courts in jurisdictions which have been operating a HRA or a Bill of Rights will be invoked in submissions before the High Court, and the Court will be called upon to engage in determining the applicability of such decisions to the Australian context. Australian constitutional jurisprudence will be enriched as a result of the HRA.

In particular, the development of the proportionality principle by the Canadian Supreme Court in the context of the *Canadian Charter of Rights and Freedoms*<sup>62</sup> will prove instructive. Under section 1 of the *Canadian Charter of Rights and Freedoms*, the rights and freedoms so guaranteed are ‘subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. Remarking that the invocation of section 1 involves a form of a proportionality test, the Canadian Supreme Court said:

There are ... three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first instance, should impair ‘as little as possible’ the right of freedom in question. ... Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of ‘sufficient importance’.<sup>63</sup>

The Canadian Supreme Court elaborated on the third component of the proportionality test as follows:

Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effect of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.<sup>64</sup>

This three tiered approach involves three levels: ‘the government measure being reviewed must be suitable, necessary and not excessive in achieving its

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60 (2004) 220 CLR 181, 200.

61 Ibid 266.

62 *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’).

63 *R v Oakes* [1986] 1 SCR 103, 139 (emphasis in original).

64 Ibid 140.

claimed end'.<sup>65</sup> In the UK, a test of proportionality derived from a number of decisions has emerged. According to Professor HWR Wade and Professor CF Forsyth, this 'structured proportionality' test requires a decision-maker to address the following four questions:

1. Whether the legislative objective is sufficiently important to justify limiting a fundamental right.
2. Whether the measures designed to meet the legislative objective are rationally connected to it.
3. Whether the means used to impair the right or freedom are no more than is necessary to accomplish the objectives. (This is the 'necessity question'.)
4. Whether a fair balance has been struck between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. (This is sometimes called 'narrow proportionality'.)<sup>66</sup>

It is submitted that the test in the UK, in substance, is not much different from the Canadian test. The first question in the British test is arguably superfluous. In determining whether there is a rational connection between the legislative measure and the legislative objective, the court will inevitably have to examine the importance of the legislative objective. The three components of the Canadian test of proportionality are ample to provide the analytical framework to determine the validity of an impugned law. It may well be the case that the High Court would prefer to frame its own conception of the requirements of the proportionality principle. It will be interesting to see how the High Court can contribute significantly to any further refinement of the principle.

Julian Rivers said that the doctrine of proportionality 'has become the framework within which a new theory of separation of powers must be realised'.<sup>67</sup> He added: 'The doctrine of proportionality needs structuring in such a way that, although applied by the judiciary, it is sensitive to the proper contribution of the other branches of government'.<sup>68</sup>

Rivers' comments are more pertinent to the UK where the doctrine of parliamentary sovereignty is a fundamental tenet of public law. In Australia, the creation of a federal polity under a constitution setting out a demarcation of law-making powers between the states and the Commonwealth resulted in the High Court wielding the power of judicial review of the constitutional validity of legislation. Nevertheless, the High Court in structuring the proportionality test in Australia is conscious of the importance of the role of the other branches of government. In *Levy v Victoria*,<sup>69</sup> Brennan CJ proffered the following explanation of the Court's role when applying the proportionality test:

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65 Kirk, above n 41, 4.

66 Sir H W R Wade and C F Forsyth, *Administrative Law* (Oxford University Press, 10<sup>th</sup> ed, 2009) 306–7. The decisions relied on as set out at 306 n 132 include the following: *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80; *R (Daly) v Home Secretary* [2001] 2 AC 532, 547–8; *Huang v Secretary of State for the Home Secretary* [2007] 2 AC 167, 187.

67 Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174, 176.

68 *Ibid.*

69 (1997) 189 CLR 579.

The courts acknowledge the law-maker's power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose.<sup>70</sup>

In the *Political Advertising Ban Case*, Mason CJ expressed the view that in weighing the respective interests involved and in assessing the necessity for the restriction imposed, 'the court will give weight to the legislative judgment on these issues'.<sup>71</sup> It is clear that the test of proportionality involves a matter of degree and inevitably different judges may reach a different outcome when applying the test.<sup>72</sup> Admittedly, a HRA will lead unavoidably to a shift in the constitutional fulcrum underpinning the separation of powers in favour of the judicial institution.

Justice McHugh in *Coleman v Power* highlighted the forceful argument of Professor Adrienne Stone<sup>73</sup> that both the 'reasonably appropriate and adapted test' and the 'proportionality' test involve 'an "ad hoc balancing" process without criteria or rules for measuring the value of the means (the burden of the provision) against the value of the end (the legitimate purpose)'.<sup>74</sup> Justice McHugh also referred to another critic's assertion that the use of expressions such as 'extreme' measures or 'extraordinary intrusions' by the High Court in past cases to invalidate provisions that infringed the implied freedom has 'a low predictive value'.<sup>75</sup> Justice McHugh explained that the implied freedom is different from freedom of speech provisions expressly spelt out in other constitutions. Since the implication arises by necessity 'it has effect only to the extent that it is necessary to effectively maintain the system of representative and responsible government that gives rise to it'.<sup>76</sup> Additionally, the powers of the Commonwealth, the states and the territories are subject to the implied freedom and therefore the exercise of legislative or executive powers, to the extent it interferes with the effective operation of the freedom, would be rendered invalid.<sup>77</sup> These two features showed that 'no question of ad hoc balancing is involved in the two-pronged test formulated in *Lange* and that the text and structure of the *Constitution* enable the court to determine whether the freedom has been infringed without resort to political or other theories external to the *Constitution*'.<sup>78</sup> Justice McHugh said:

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70 Ibid 598.

71 (1992) 177 CLR 106, 144.

72 Lee, 'Proportionality in Australian Constitutional Adjudication', above n 41, 147.

73 Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668.

74 (2004) 220 CLR 1, 46.

75 Ibid 48; Elisa Arcioni, 'Politics, Police and Proportionality – An Opportunity to Explore the *Lange* Test: *Coleman v Power*' (2003) 25 *Sydney Law Review* 379.

76 *Coleman v Power* (2004) 220 CLR 1, 49.

77 Ibid 49.

78 Ibid 48. See also Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing', above n 8.

The question is not one of weight or balance but whether the federal, State and Territorial power is so framed that it impairs or tends to impair the effective operation of the constitutional system of representative and responsible government by impermissibly burdening communications on political and governmental matters. In all but exceptional cases, a law will not burden such communications unless, by its operation or practical effect, it directly and not remotely restricts or limits the content of those communications or the time, place, manner or conditions of their occurrence. And a law will not impermissibly burden those communications unless its object and the manner of achieving it is incompatible with the maintenance of the system of representative and responsible government established by the *Constitution*.<sup>79</sup>

According to Professor Nicholas Aroney, ‘McHugh J’s proposal to eliminate balancing from freedom of speech adjudication can be defended as an attempt to reduce the reliance on extra-constitutional notions in Australian constitutional law’.<sup>80</sup> Professor Aroney conceded that Justice McHugh’s proposal is ‘a rearguard action’ as the Court’s determination of the existence of the implied freedom of political communication depended on extra-constitutional ideas about representative and responsible government.<sup>81</sup> The reasons were proffered by McHugh J to mount his Honour’s case that no ad hoc balancing is involved in the *Lange* test and therefore are confined to the application of the implied freedom of political communication. They have no relevance to the application of express guarantees in the HRA. The late Professor George Winterton noted the ‘balancing’ of competing rights as a key ingredient of the application of a Bill of Rights. He remarked:

The balancing of these rights can rarely be achieved by neutral principled reasoning, which is what an ideal judiciary offers. It requires the input of community values, policy and public opinion: in other words, *political* considerations, which should be tailored to each application, and may vary over time ...<sup>82</sup>

With the enactment of a HRA, a challenge for the Court is to develop a principled framework to enable the balancing test to operate.

## B Judicial Deference

Contemporary Australian constitutional jurisprudence contains some tentative attempts to bring into play a ‘margin of appreciation’ doctrine. In *Cunliffe*, Brennan J referred to the invalidation of the law in the *Political Advertising Ban Case* because of the impugned law’s infringement of the implied freedom of political communication and remarked:

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79 *Coleman v Power* (2004) 220 CLR 1, 49–50.

80 Aroney, ‘The Implied Rights Revolution — Balancing Means and Ends?’, above n 50, 187.

81 *Ibid.*

82 George Winterton, ‘An Australian Rights Council’ (2001) 24 *University of New South Wales Law Journal* 792, 794. Nicholas Aroney, citing this passage of Winterton’s article, pointed out that the issue of whether ‘judges are indeed able to adjudicate between the kinds of competing rights indicated in this passage in a neutral, principled and rational manner lies at the heart of the debate over Bills or Charters of rights and of the practical operation of the implied freedom of political communication in specific cases’: *ibid* 185.

As a legitimate purpose or object may be achieved by a variety of legislative means, I would adhere to the view that it is essential that this Court, in applying the test of proportionality, allows to the Parliament what the European Court of Human Rights calls ‘a margin of appreciation’ in choosing the means which are appropriate and adapted to the purpose or object.<sup>83</sup>

However, it has been recognised that such a doctrine operated by the European Court of Human Rights seeks to accommodate ‘the substantially differing approaches of the many legal systems within the European Union and the Council of Europe’.<sup>84</sup> Rivers, in noting the emergence of such a doctrine in the UK, pointed out a difference:

The domestic ‘margin of appreciation’ cannot be identical, primarily because the European Court is an international tribunal supervising complete domestic legal systems with legislative, executive and judicial branches. By contrast, the domestic equivalent addresses the relationship of the judiciary to other branches of government, requiring regard to be had at some point to their assessment of proportionality. An international court also has to take account of the cultural diversity of human rights conceptions among nations in a way inappropriate for the courts of a single political community.<sup>85</sup>

Professor Wade and Professor Forsyth explained the position in the UK:

The word commonly used to describe this ... is, however, ‘deference’; The Court is said to show deference to the primary decision-maker. But however it may be phrased, this discretionary area marks the extent to which the decision-maker may exercise an autonomous judgment, ie the extent to which the test of proportionality is not a merits review.<sup>86</sup>

The essence of a ‘deference’ doctrine is that a degree of discretion is accorded to the legislative or executive organ into which a court applying the proportionality principle will not intrude. ‘Deference’ is a highly fluid notion but not an unknown notion as it features prominently in cases involving a national security consideration.<sup>87</sup> How should this notion operate in practice against the backdrop of a federal HRA? The High Court will be confronted with the challenge of developing the contours of a judicial ‘deference’ doctrine to preclude accusations that its application of the proportionality principle amounts to a usurpation of legislative power. The Court will need to bear in mind the observation that in the United Kingdom, ‘the search for a principled measure of scrutiny which will be loyal to the Convention rights, but loyal also to the legitimate claims of democratic power’<sup>88</sup> is ‘not yet over’.<sup>89</sup> Professor Wade and Professor Forsyth also pointed out that a court in assessing a ‘fair balance’ is, as set out in the fourth question in the proportionality test as described by them,

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83 *Cunliffe* (1994) 182 CLR 272, 325.

84 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 262 (Kirby J).

85 Rivers, above n 67, 175.

86 Wade and Forsyth, above n 66, 308.

87 See H P Lee, ‘*Salus Populi Suprema Lex Esto*: Constitutional Fidelity in Troubled Times’ in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent* (Federation Press, 2009) 53, 58–9.

88 *R (Mahmood) v Secretary of State for the Home Secretary* [2001] 1 WLR 840, 854–5 (Laws LJ), quoted in Wade and Forsyth, above n 66, 309.

89 Wade and Forsyth, above n 66, 309.



‘making a value judgment as to whether the balance lies between individual rights and the interests of the community’.<sup>90</sup> Some guidance relating to the ‘deference’ notion may lie in their following observations:

Where the democratic process has led the legislator to adopt a particular compromise between the contending interests, that compromise deserves to be respected and deference shown to it. Similarly, where that value judgment is made with due care by a democratically accountable decision-maker the court shall not substitute its value judgment for that of the decision-maker.<sup>91</sup>

In *Lange*, the High Court pointed out that the impugned law in the *Political Advertising Ban Case* was invalidated because the Court in that case found ‘there were other less drastic means by which the objectives of the law could be achieved’.<sup>92</sup> However, by not insisting that the *least* intrusive or drastic means must be adopted to achieve a legitimate end, the Court accords deference or, in the words of McHugh J, ‘a margin of choice’<sup>93</sup> to the legislatures within the Australian federation. An articulation by the High Court of a meaningful ‘deference’ doctrine may ease concerns that a HRA will result in a fundamental adjustment to the balance of power between the judiciary, legislature and executive.

### C Declarations of Incompatibility and Chapter III

Under the dialogue model proposed by the NHRCC, there is an attempt to ensure that Parliament has the last word on the course of action to be taken regarding an impugned piece of legislation. This is because the High Court is empowered only to issue a declaration of incompatibility, but not to invalidate the impugned law itself. A conundrum will arise if such a restriction placed on the High Court is adjudged by the Court to be unconstitutional. Can such a conundrum be avoided by careful drafting of the HRA as suggested by the Commonwealth Solicitor-General?

In the early invocations of the power of the High Court to issue a declaration of incompatibility pursuant to the HRA, challenges will be directed to the constitutional validity of this power itself. Such challenges will involve the separation of judicial power emanating from Chapter III of the *Australian Constitution*. Will the making of such a declaration be, or be incidental to, an exercise of judicial power? Will the determination of the High Court be made with respect to a ‘matter’? The NHRCC drew on the advice of the Commonwealth Solicitor-General that the making of a declaration would itself be an exercise of judicial power. However, the Solicitor-General’s advice sets out the following provisions which would be ‘desirable’ to support validity:

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90 Ibid.

91 Ibid.

92 (1997) 189 CLR 520, 568.

93 *Coleman v Power* (2004) 220 CLR 1, 52–3.

- (a) the requirement that the Commonwealth law be interpreted so far as possible to be compatible with human rights should be qualified to require consistency with statutory purpose ...
- (b) a declaration of incompatibility should bind the parties to the proceeding in which it is made and the Attorney-General should be joined as a party before it is made.<sup>94</sup>

The Solicitor-General's advice acknowledges the existence of differing opinions among academic and other commentators regarding the validity of the dialogue mechanism, 'principally in relation to the issue of its compatibility with the exercise of federal jurisdiction under Chapter III of the *Constitution*'.<sup>95</sup> Will the High Court concur with the opinion expressed by the Commonwealth Solicitor-General? Opinions of the Commonwealth Solicitor-General may be accorded respect but they will not be accorded binding effect. An opinion furnished by Dr Gavan Griffith, the Commonwealth Solicitor-General at the time of the Justice Lionel Murphy saga, regarding the meaning of 'misbehaviour' under section 72 of the *Commonwealth Constitution* was not persuasive enough to convince the Parliamentary Commission of Inquiry from reaching a contrary view. This is simply to illustrate that even if the views emanated from the Commonwealth Solicitor-General, they will not be regarded as conclusive until the High Court itself has determined the issue.

What is clear is that the decision of the High Court in *Re Judiciary Act*<sup>96</sup> that the High Court lacks the capacity to give advisory opinions has not been questioned by the Court in later decisions. In *O'Toole v Charles David Pty Ltd*,<sup>97</sup> in a joint judgment, Deane, Gaudron and McHugh JJ observed:

It has long been settled that jurisdiction cannot be conferred upon this Court to furnish an advisory opinion to a body other than a court. So much was decided in *In re Judiciary and Navigation Acts*. The reason for that is that a reference requiring the furnishing of an advisory opinion to such a body does not constitute a 'matter' for the purposes of Ch III of the *Constitution* and is therefore beyond the scope of the original jurisdiction which is conferred or can be conferred by or pursuant to ss 75, 76, 77 and 78 of the *Constitution*.<sup>98</sup>

It was emphasised by Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ in *Re Judiciary Act* that there can be no 'matter' within the meaning of those sections 'unless there is some immediate right, duty or liability to be established by the determination of the Court'.<sup>99</sup> They also added that if a 'matter' exists, 'the Legislature may no doubt prescribe the means by which the determination of the Court is to be obtained, and for that purpose may...adopt any existing method of legal procedure or invent a new one'.<sup>100</sup>

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94 Gageler and Burmester, above n 27, [10(3)].

95 Ibid [3].

96 (1921) 29 CLR 257.

97 (1991) 171 CLR 232.

98 Ibid 281–2.

99 (1921) 29 CLR 257, 265.

100 Ibid 266.

Under the HRA, the requirement of a ‘matter’ is satisfied as a declaration is made ‘only in proceedings for some other relief or remedy’.<sup>101</sup> In other words, a declaration cannot be sought ‘divorced from a specific situation involving an application of some other law in the determination of a dispute as to the rights, duties or obligations of the parties’.<sup>102</sup> Even if the definition of ‘matter’ is satisfied in a case before the Court, the incompatibility mechanism under the HRA requires the Court to make a pronouncement on the validity of impugned legislation, but leaves it to Parliament to determine how to respond to the Court’s finding of invalidity. This sits at odds with the definition of ‘judicial power’ as expressed in the classic dictum of Griffith CJ in *Huddart Parker & Co Pty Ltd v Moorehead*.<sup>103</sup> One aspect of that definition stipulates that the exercise of judicial power does not begin ‘until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action’.<sup>104</sup> Given that under the HRA dialogue mechanism Parliament is not bound to comply with the Court’s finding of invalidity, there is a strong case to assert that the HRA proposes to invest the Court with a ‘non-judicial’ power. To enhance the prospects of constitutional validity of the mechanism, the Solicitor-General recommended the insertion into the HRA of a ‘desirable’ provision that a declaration of incompatibility should bind the parties to the proceedings. He also suggested that the Attorney-General must be required to be joined as a party to the proceeding in order for a declaration to be made and that it should also be expressly provided that a declaration would not ‘give rise to any civil remedy other than against the Attorney-General to compel compliance with the express obligations imposed upon him or her’.<sup>105</sup> The Attorney-General would be obliged to make a response to the declaration and present the response to Parliament. To further bolster the constitutional validity of the declaration mechanism the Solicitor-General recommended that there should be a provision that the courts should read legislation consistently with human rights ‘only in so far as that is consistent with the statute’s purpose’.<sup>106</sup> The making of a declaration would accordingly be characterised as an exercise of judicial power and thus would be constitutionally valid.

The device of making the Attorney-General a party to proceedings before the Court and conferring obligations upon the Attorney-General was suggested by the Solicitor-General to bolster the constitutional validity of the declaration of incompatibility mechanism. Litigation involving a challenge to the validity of this mechanism will provide the Court with the opportunity to delineate with greater precision the parameters of the definition of judicial power under Chapter III of the *Constitution*. What can be safely be predicted is that the separation of judicial power is well entrenched and thus it is unlikely that challenges before the

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101 National Human Rights Consultation Committee, above n 1, 428.

102 *Ibid.*

103 (1909) 8 CLR 330.

104 *Ibid* 357.

105 Gageler and Burmester, above n 27, [20].

106 *Ibid* [13].

High Court to the declaration of incompatibility mechanism will lead to any significant alteration of the doctrine. What cannot be safely predicted is that the High Court will necessarily uphold the validity of the declaration of incompatibility mechanism, even though a ‘matter’ may be proven to exist. The reason is that if such a mechanism is upheld it can lead to situations where the Court’s stature may be seen to be diminished by the Parliament choosing not to act in accordance with the declaration of incompatibility.

#### IV PARALLEL RIGHTS

The implied freedom of political communication has cemented its place as a *constitutional* guarantee with its unanimous endorsement in *Lange*. In *Cunliffe*, Deane J described this implied freedom as ‘constitutionally entrenched’.<sup>107</sup> It being a constitutionally mandated, albeit implied, guarantee, it prevails over ordinary legislation which contradicts it. The enactment of a HRA by the Commonwealth Parliament will lead to two parallel streams of rights exegesis by the court. The HRA will contain a provision guaranteeing a general freedom of speech. Although this guarantee is broader than the implied freedom of political communication, it is nevertheless only a *statutory* guarantee. Since it is not constitutionally mandated it lacks the overriding effect of the implied freedom of political communication.

The implied freedom of political communication, being a constitutional guarantee, cannot be amended or expunged by an ordinary Act of the Commonwealth Parliament. It would require an amendment effected via the referendum process embodied in section 128 of the *Constitution* which would involve the interesting scenario of using the amendment process in section 128 to remove a freedom which is not expressly stated in the text of the *Constitution*. As the implied freedom came into existence through recognition by the High Court, it is the Court which has the ability to reverse the earlier decisions recognising the implied freedom. Until this occurs, there can be a situation where an Act can be impugned on the basis of violation of the implied freedom as well as on the basis of infringement of the guarantee in the HRA. If the former basis is asserted, the impugned law can be *invalidated* by the Court, but if the latter basis is asserted, the Court can only issue a declaration of incompatibility.

Following the enactment of a HRA, the constitutionally mandated implied freedom will continue to operate in parallel with the statutory freedom of speech provision in the HRA. If the Court is tempted to reconsider the existence of the implied freedom, the Court will place itself in the invidious position of repudiating established doctrine. If the implied freedom is derived from textual provisions of the *Constitution*, a jettisoning of the doctrine would amount to saying that the doctrine was a serious error in the first place and that just because the textual provisions provide for a representative democracy in Australia they

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107 *Cunliffe* (1994) 182 CLR 272, 340.

should not be extrapolated to yield an implied freedom of political communication to make representative democracy efficacious. This is unlikely to occur.

Another point to note is that the implied freedom of political communication, unlike the federal HRA, can also extend to the invalidation of state legislation. In *Stephens v West Australian Newspapers Ltd*,<sup>108</sup> Mason CJ, Toohey and Gaudron JJ said:

It is desirable that we state our view that there is an implied freedom of communication deriving both from the *Commonwealth Constitution* and from the State Constitution which applies in the present case. First, we consider that the freedom of communication implied in the *Commonwealth Constitution* extends to public discussion of the performance, conduct and fitness for office of members of a State legislature.<sup>109</sup>

If the Court were to jettison the implied freedom of political communication, it would not necessarily constrain the operation of the implied freedom's counterpart at state level if the justification for the latter's existence is based on the text of the state's constitution. Any curtailment of the implied freedom by the High Court will result in a significant reshaping of the Court's jurisprudence on the implied rights doctrine.

## V CONCLUSION

The existence of a HRA will see an increasing shift from questions of federalism to issues of incursions into the rights and freedoms guaranteed by the HRA. The High Court will be engaging in adjudicatory exercises involving a higher degree of comparative constitutional jurisprudence. The seepage of European and Canadian jurisprudence into Australian constitutional law will eventually turn into a flood. Such a development will bring excitement back into the Australian constitutional arena, which has fallen into a comatose state ever since the heady days of the implied freedom of political communication revolution. Concerns about a fundamental shift in the balance of power between the judiciary, legislature and executive may be ameliorated by the fact that the proposed HRA is only 'an ordinary piece of legislation' which therefore enables the Parliament to 'amend it at any time'.<sup>110</sup>

The recent announcement by the Attorney-General of Australia that the current Rudd Labor Government would not be including a legislative Charter of Rights in 'Australia's Human Rights Framework' does not necessarily mean that the trek to a federal HRA has been permanently halted.<sup>111</sup> At most it represents a

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108 (1994) 182 CLR 211.

109 Ibid 232.

110 National Human Rights Consultation Committee, above n 1, 297.

111 See Robert McClelland, 'Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010).

temporary setback. The idea of a federal HRA will be kept alive by its advocates until such time a new reforming government restores it to the national agenda and ultimately brings into existence a HRA. In this article I have sought to canvass the potential impact of such a legislative instrument on the shaping of Australian constitutional law. Gazing into the crystal ball for a longer term projection, it may be the case that after a sufficient period of time has elapsed for the operation of the HRA, advocates of human rights protection will push for the idea of a constitutionally entrenched Bill of Rights. This move would signal a new and revolutionary phase in the metamorphosis of the Australian constitutional polity and, indeed, a significant shift in power from the legislature and executive to the judiciary.