15 June 2009

SUBMISSION TO HUMAN RIGHTS CONSULTATION – CONSTITUTIONAL RIGHTS

Introduction

1. In addressing the questions of whether human rights are currently protected in Australia and whether we need further protections, we think it is important to consider whether the Commonwealth Constitution currently protects human rights.

2. It is commonly assumed, even by most constitutional lawyers, that the Constitution contains a handful of provisions that have the protection of the individual as their object. The provisions that are most often described in this way are s 51(xxxi) (just terms for property acquisitions), 80 (jury trial), 92 (free intercourse), 116 (religious freedoms) and 117 (interstate discrimination). The existence of these provisions is used by both opponents and supporters of charter of rights. On the one hand, it has been argued that we do not need further protections for rights because the Constitution provides sufficient protection. On the other hand, it is said that the limited number of protections and their narrow interpretations by the courts signal a need for greater protections.

Submission

3. In our submission, most of the provisions often identified as constitutional rights are better understood as provisions that form part of the federal architecture of the Constitution. As such, their presence in the Constitution should not be a weighty consideration either way in deciding whether our rights are sufficiently protected or whether they need further protection.

Brief outline of position

4. We will not give a detailed explanation of this argument. We have done that work elsewhere, and have provided that material as attachments to this submission. We simply provide a brief outline of our position.

(i). Section 80

5. Section 80 of the Constitution requires a trial by jury when Commonwealth offences are tried on indictment. Its effectiveness as a provision protective of the individual has been limited by narrow interpretations adopted by the High Court which essentially allow Parliament to determine when a trial will be on indictment. Although often portrayed as a provision that is protective of rights, s 80 can be better seen as a provision that sets out the institutions and processes through which federal judicial
power must be exercised when a federal offence is tried on indictment. The provision has a fully effective and coherent operation as a federal provision without it needing to be given an individual rights reading (see Attachment A: Stellios (2005)).

(ii). Section 92

6. Section 92 provides that trade, commerce and intercourse shall be absolutely free. In *Cole v Whitfield* (1988) 165 CLR 360, the High Court reinvented the trade and commerce limb of s 92. While the prevailing interpretation of that provision prior to that time was an individual rights one, the Court in *Cole* adopted a federal reading of the provision. Only laws that discriminated in a protectionist way were thereafter to be prohibited by s 92. The individual rights interpretation of the intercourse limb was, however, left intact. Cases since *Cole* have revealed a difference of opinion in the Court on how the intercourse limb is to be interpreted. While some judges have interpreted it consistently with a rights reading, other judges have interpreted it, like the trade and commerce limb, as a federal provision that prohibits discriminatory treatment of intercourse. We believe that the latter interpretation is preferable and should prevail (see Attachment B: Stellios (2006)).

(iii). Section 116

7. Under s 116, the Commonwealth cannot establish any religion, impose religious observance, prohibit the free exercise of religion or impose a religious test for Commonwealth office. As George Williams has recognised in his comprehensive study of the history of the provision, ‘section 116 was inserted to ensure that the power to legislate about religious matters remained with the State Parliaments. … Accordingly, the primary object of s 116 is not to protect human rights’ (*Human Rights Under the Constitution* (1999) at 110). There has been little consideration of s 116 by the High Court. While some judges have assumed that the provision protects religious rights, others have held that it does not. In the most recent High Court case to consider the provision, *Kruger v Commonwealth* (1997) 190 CLR 1, Dawson J, recognising the drafting history of the provision, said that ‘the section deals with the division of legislative power between the Commonwealth and the States within the federation’ (at 60). A similar view was expressed by Gaudron J at 124-5. Thus, while s 116 is assumed by many to protect religious rights, its drafting history suggests that it is a provision that operates to divide legislative power between the Commonwealth and the States and, therefore, forms part of the federal architecture.

(iv). Section 117

8. Section 117 of the Constitution provides that a person is not to be discriminated against on the basis of his or her State of residence. For many decades the provision was given a very narrow operation that rendered minimal its protection for individuals. In *Street v Queensland Bar Association* (1989) 168 CLR 461, the High Court reinterpreted the provision to give it more ‘teeth’. However, in doing so, the Court was divided on the question of whether s 117’s rationale is the protection of individuals from discrimination for its own sake or, rather, non-discrimination as a means for promoting a spirit of national unity within the Australian federation. For a number of reasons, set out in our final attachment, we believe that the latter interpretation is correct and will prevail in the High Court; that is, s 117 should be seen first and foremost as federalism-protective, rather than individual rights-protective (see Attachment C: Simpson (2008)).

Conclusion

9. It is, of course, possible for these provisions to be given human rights interpretations. However, it is our submission that these sections are better read as forming part of the
federal architecture. Such interpretations fit better with the drafting history of the provisions, and explain their position in the Constitution and their application by the High Court in a more coherent way. That is not to say that this argument can be applied to all the provisions often referred to as constitutional rights. Section 51(xxxi) is difficult – although not impossible – to understand in a way other than as a provision that protects the property rights of the individual.

10. Nevertheless, it is our submission that most of the provisions often identified as constitutional rights are better understood as provisions that form part of the federal architecture of the Constitution. As such, their presence in the Constitution should not be a weighty consideration either way in deciding whether our rights are sufficiently protected or whether they need further protection.

Yours sincerely

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ATTACHMENTS


Attachment B. James Stellios, 'The Intercourse Limb of Section 92 and the High Court's decision in APLA Ltd v Legal Services Commissioner (NSW)' (2006) 17 Public Law Review 10