

George Williams and Daniel Reynolds***

THE RACIAL DISCRIMINATION ACT AND INCONSISTENCY UNDER THE AUSTRALIAN CONSTITUTION

ABSTRACT

The *Racial Discrimination Act 1975* (Cth) has assumed a special place on the federal statute book in the forty years since its enactment. This is due to it operating as a national guarantee that rights shall be enjoyed equally by all people regardless of their race. This guarantee has, by virtue of s 109 of the *Constitution*, overridden inconsistent state legislation that detracts from such rights, and on one occasion has had a like effect on subsequent federal legislation. However, most such attempts to invoke inconsistency with state laws have failed due to limitations contained within the Act. Further, the effectiveness of the Act is limited at the federal level because the federal Parliament has the power to amend or suspend the Act's operation, something Parliament has done on two occasions. Stronger protection – such as by entrenching the principle of non-discrimination on the basis of race in the *Constitution* – is required to bring about a stronger form of protection against racial discrimination.

I INTRODUCTION

The *Racial Discrimination Act 1975* (Cth) ('*RDA*') is in many ways just another federal statute. It may be repealed or amended by the federal Parliament at will and has no special constitutional status. Despite this, Sir Harry Gibbs, a former Chief Justice of the High Court, went so far as to say that in the *RDA* 'we may already have what appears to be a bill of rights, limited it is true in scope, which is effective[ly] entrenched against the States.'¹

Sir Harry's comment no doubt had a rhetorical tone to it, but it nonetheless highlights how the *RDA* has assumed a special place in the statute book some 40 years after its

* Anthony Mason Professor, Scientia Professor and Foundation Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Australian Research Council Laureate Fellow; Barrister, New South Wales Bar.

** Research Assistant, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales.

¹ Sir Harry Gibbs, 'The Constitutional Protection of Human Rights' (1982) 9 *Monash University Law Review* 1, 13.

enactment. One aspect of this is the political importance attached to it over and above almost any other piece of federal legislation. This no doubt stems from the fact that the *RDA* touches upon fundamental community values in amounting to Australia's most significant national prohibition of racial discrimination. Its importance is highlighted, rather than diminished, when the *RDA* is set in contrast to Australia's lengthy past history of enacting laws that discriminate on the basis of race. The *RDA* marks a key legal and political turning point from laws such as those that denied Aboriginal people the right to marry or move freely, or to cast a vote in federal elections.²

The iconic nature of the *RDA* can be apparent when a federal government proposes that it be amended or wound back. The recent controversy over the proposal by the Abbott Government that s 18C of the Act be amended or repealed is a case in point.³ Similarly, the suspensions of the *RDA* brought about in 1998 in respect of native title⁴ and in 2007 in regard to the Northern Territory intervention⁵ sparked long-running national debates. They also gave rise to a strong sense of grievance amongst Indigenous peoples, who have been the only group in the community ever denied the protection of the Act.

The political and community importance attached to the *RDA* is reflected in the effect given to the Act by the *Australian Constitution*. It is in this respect that the *RDA* comes closest to establishing an overarching, national principle of racial non-discrimination, and so to resemble Sir Harry's description of it as some form of bill of rights. Section 109 of the *Constitution* states:

109. Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The effect of this provision is to render inoperative a section of a state statute that is inconsistent with a federal law. This can typically arise in any one of three ways:

1. If it is impossible to obey both laws.
2. If one law purports to confer a legal right, privilege or entitlement that the other law purports to take away or diminish.

² For example, as to the last, see *Commonwealth Franchise Act 1902* (Cth) s 4.

³ See, eg, the federal Government's exposure draft of a Freedom of Speech (Repeal of s 18C) Bill 2014 at Attorney-General's Department, *Amendments to the Racial Discrimination Act 1975* (30 April 2014) <<http://www.ag.gov.au/Consultations/Pages/ConsultationsonamendmentstotheRacialDiscriminationAct1975.aspx>>.

⁴ *Native Title Amendment Act 1998* (Cth).

⁵ *Northern Territory National Emergency Response Act 2007* (Cth).

3. If the Commonwealth law evinces a legislative intention to ‘cover the field’, and a State law also operates in that same field. In this case there need not be any direct contradiction between the two enactments.⁶

This supremacy of federal law over state law, combined with like rules that operate with respect to territory laws,⁷ has enabled the *RDA* to set down a standard of racial non-discrimination not only at the federal level, but also for state and territory conduct.

This article examines this constitutional dimension to the *RDA*, that is, the extent to which the *RDA* has proved capable of overriding other laws so as to set down a national standard of freedom from racial discrimination. We do so by examining the cases in which it has been argued that the *RDA* overrides a state, territory or federal law. We do not deal with other constitutional questions, such as the source of power that enabled the Commonwealth to enact the *RDA*,⁸ or broader issues such as the efficacy of the *RDA* or whether it has acted as a limited bill of rights in other respects.

II INCONSISTENCY WITH STATE AND TERRITORY LAWS

This Part considers the cases in which a party has sought to invalidate or override a provision of a state or territory Act because of its inconsistency with the *RDA*. Since 1975, such arguments have been raised in 26 cases, of which seven have been successful.⁹

A Covering the field

The *RDA* was enacted by the federal Parliament in 1975 to give effect to the *International Convention on the Elimination of All Forms of Racial Discrimination*

⁶ George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6th ed, 2014), 298.

⁷ In the case of the Australian Capital Territory, see *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 28. No such legislative provision operates with respect to the Northern Territory, however a like principle of inconsistency nonetheless applies (*Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 25 FCR 345, 366–367 (Lockhart J)).

⁸ See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

⁹ These cases were identified by conducting searches on LexisNexis for all cases referencing the *Racial Discrimination Act 1975* (Cth) and containing either of the terms ‘inconsistent’ or ‘override’ (or their variants). All 753 results were considered, though after duplicates and irrelevant cases were excluded, only 26 remained. The seven successful cases are *Viskauskas v Niland* (1983) 153 CLR 280; *University of Wollongong v Metwally* (1984) 158 CLR 447; *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Western Australia v Commonwealth; Wororra Peoples & Biljabu v State of Western Australia* (‘*Second Native Title Act Case*’) (1995) 183 CLR 373; *Western Australia v Ward* (2002) 213 CLR 1; *Jango v Northern Territory of Australia* (2006) 152 FCR 150; *James v Western Australia* (2010) 184 FCR 582.

(*ICERD*).¹⁰ The *Convention* seeks to ensure equality in the enjoyment of human rights by people of all races. The *RDA* implements this object by creating a series of unlawful acts and offences,¹¹ by establishing a Race Discrimination Commissioner¹² and by creating a statutory right to equality before the law.¹³

In *Viskauskas*¹⁴ and *Metwally*,¹⁵ both decided in 1983, the High Court considered whether sections of the *Anti-Discrimination Act 1977* (NSW) dealing with racial discrimination were invalid because of inconsistency with the *RDA*. In *Viskauskas* the Court found that the *RDA* ‘covered the field’ of racial discrimination law in Australia, stating that the Act was ‘intended as a complete statement of the law for Australia relating to racial discrimination’.¹⁶ As a result, the relevant sections of the NSW Act were held to be inoperative.

The Commonwealth Parliament responded to the decision in *Viskauskas* by inserting s 6A(1) into the *RDA*. It states:

This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the *Convention* and is capable of operating concurrently with this Act.¹⁷

This provision establishes that the federal Parliament does not intend the *RDA* to ‘cover the field’ relating to racial discrimination in regard to every state or territory law on the subject. Section 6A(1) is significant in saving the operation of current state and territory laws of this kind, and also in leaving room for future state and territory laws to provide broader protection for racial discrimination, such as in the event that the *RDA* is wound back.

A possible example of this was the Abbott Government’s proposal to amend or repeal s 18C of the *RDA*. If that had occurred, a state or territory could have responded by re-enacting s 18C in its jurisdiction without necessarily encountering a problem of inconsistency with the federal law. It is not possible to be conclusive about the issue of inconsistency because even though ‘covering the field’ inconsistency might

¹⁰ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

¹¹ *Racial Discrimination Act 1975* (Cth) pts II, IIA and IV.

¹² *Ibid* pts III and VI.

¹³ *Ibid* s 10(1).

¹⁴ *Viskauskas v Niland* (1983) 153 CLR 280 (*‘Viskauskas’*).

¹⁵ *University of Wollongong v Metwally* (1983) 158 CLR 447 (*‘Metwally’*).

¹⁶ *Viskauskas* (1983) 153 CLR 280, 292 (Gibbs CJ).

¹⁷ *Racial Discrimination Act 1975* (Cth) s 6A(1).

be precluded, other forms of direct inconsistency can still arise, such as if the two statutes cannot be obeyed simultaneously.¹⁸

Section 6A(1) came under immediate scrutiny in *Metwally*, where the High Court held that it could not operate retrospectively to validate state legislation which, at the relevant time, was still in fact invalid by reason of s 109 of the *Constitution*. However it made no such finding about the *prospective* operation of s 6A, and indeed Gibbs CJ considered that from the day the amending Act came into force all state racial discrimination legislation would ‘thereupon revive’.¹⁹

B *Other forms of inconsistency*

Section 10(1) of the *RDA* provides broad recognition of rights to non-discrimination on the basis of race, and so is an obvious source for inconsistency with other statutes. It provides:

10 Rights to equality before the law

- (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

This section can operate in two ways, as first identified by Mason J in *Gerhardy v Brown*,²⁰ and later adopted by the High Court in *Western Australia v Ward*.²¹ The first is where a state law creates a right which is not universal because it is not conferred on people of a particular race. In such cases, s 10(1) will supply and confer that same right to people of the race previously neglected. Importantly, the state law is not invalidated in this scenario – rather, the federal law complements the state law by filling the gap the latter created.

The second scenario is where a state law imposes a prohibition forbidding the enjoyment of a human right by persons of a particular race, or deprives those people of a right previously enjoyed regardless of race. In that situation, s 10(1) confers the right on the people prohibited or deprived, and because this necessarily results in a direct inconsistency between s 10(1) and the state law, the state law is invalidated to

¹⁸ *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545, 563–564 (Mason J).

¹⁹ *Metwally* (1983) 158 CLR 447, 456 (Gibbs CJ).

²⁰ (1985) 159 CLR 70, 98–9 (Mason J).

²¹ (2002) 213 CLR 1, 99–100 [106]–[107].

the extent of the inconsistency due to s 109 of the *Constitution*. In both cases s 10(1) has a clear rights-protecting function, however, only in the latter case is that function dependent on the constitutional dimension of the *RDA*.

The paradigm example of this second scenario was the High Court's decision in *Mabo v Queensland (No 1)* ('*Mabo No 1*'),²² which established a clear precedent for the interaction between s 10(1) of the *RDA* and state laws on native title. The case also had a broader significance in clearing the way for the High Court to subsequently determine that Aboriginal and Torres Strait Islander peoples retain rights to native title in Australia.²³

The plaintiffs in *Mabo No 1* were Murray Islanders and members of the Miriam people who sought recognition of their traditional rights and interests in relation to the lands, seas, seabeds and reefs of Murray Island. After they had commenced proceedings seeking this, the Queensland Parliament passed the *Queensland Coast Islands Declaratory Act 1985* (Qld), which purported to retrospectively abolish all rights and interests that the Miriam people may have held prior to its enactment. The plaintiffs argued that the 1985 Act was invalid because of s 10(1) of the *RDA*.

The Court, in a 4:3 split, found for the plaintiffs. As Brennan J in the majority explained:

[Section] 10(1) of the *Racial Discrimination Act* clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community ... The attempt by the 1985 Act to extinguish the traditional legal rights of the Miriam people therefore fails.²⁴

This is the most common kind of inconsistency with the *RDA*, that is, where a state law seeks to prohibit or deprive people of a certain race from enjoying a human right, and s 10(1), reinforced by s 109 of the *Constitution*, invalidates the law to the extent of the inconsistency. The same reasoning was again applied in striking down parts of the *Land (Titles and Traditional Usage) Act 1993* (WA) in 1993,²⁵ and parts of the *Mining Act 1978* (WA) in 2010.²⁶

While almost all of the cases dealing with *RDA* inconsistency have involved s 10(1), this is not the only source for a potential clash between federal and state laws. Section 9, which makes 'act[s] involving a distinction... based on race' unlawful, is

²² (1988) 166 CLR 186.

²³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

²⁴ *Mabo No 1* (1988) 166 CLR 186, 218–9 (Brennan, Toohey and Gaudron JJ).

²⁵ *Native Title Act Case* (1995) 183 CLR 373.

²⁶ *James v Western Australia* (2010) 184 FCR 582.

often cited as an alternative.²⁷ Its success rate in such cases is limited, as courts have considered that s 10(1) is the provision more readily designed to deal with legislative inconsistency, while s 9 is directed at non-legislative actions.²⁸ That said, there is the potential for conflict where a state law makes lawful the doing of an act which s 9 forbids.²⁹

Inconsistency may also arise where a state anti-discrimination Act contains provisions that are incapable of operating alongside the federal Act. This was argued in *Central Northern Adelaide Health Service v Atkinson*,³⁰ where a state exception to the prohibition on discriminatory legislation had a broader ambit than the *RDA* equivalent of s 8 (the ‘special measures’ provision).

Brian Atkinson had been refused medical care by the Central Northern Adelaide Health Service, which operated a medical centre providing services exclusively to ethnic minorities, including Indigenous Australians and migrants. Atkinson lodged a complaint under the *Equal Opportunity Act 1984* (SA) (‘*EOA*’), alleging discrimination on the grounds of both age and race. The South Australian Equal Opportunity Tribunal found in his favour and ordered the Health Service to make an apology. The Health Service appealed, arguing that its business fell within s 65 of the *EOA*, which provided: ‘This Part does not render unlawful an act done for the purpose of carrying out a scheme or undertaking for the benefit of persons of a particular race.’³¹

Atkinson argued in the South Australian Court of Appeal that this provision was inconsistent with s 8 of the *RDA* – the ‘special measures’ exemption to racial discrimination – as that exemption, which invoked art 1.4 of *ICERD*, allowed:

Special measures taken for the *sole purpose* of securing adequate advancement of certain racial or ethnic groups or individuals *requiring such protection* as may be necessary... [provided] they shall *not be continued after* the objectives for which they were taken have been achieved.³²

Justice Gray (with whom Kelly J agreed), found that the *RDA* exemption was considerably narrower than its South Australian counterpart, as it was curtailed in both scope and duration. He went on to find:

There is a tension between s 8 of the *RDA* and s 65 of the *Equal Opportunities Act* [sic]. In my view a literal reading of s 65 would lead to an inconsistency with the

²⁷ *Racial Discrimination Act 1975* (Cth) s 9.

²⁸ *Gerhardy v Brown* (1985) 159 CLR 70, 93 (Mason J).

²⁹ *Ibid*, citing *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466.

³⁰ (2008) 103 SASR 89 (‘*Atkinson*’).

³¹ *Equal Opportunity Act 1984* (SA) s 65.

³² *Atkinson* (2008) 103 SASR 89, 103 [66] (Gray J), citing *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 1.4 (emphasis added).

RDA such that s 109 of the *Australian Constitution* would have application, and as a consequence, s 65 would be inoperative.³³

Rather than strike down the *EOA* provision, Gray J observed that ‘a purposive construction is the usual or general approach to be taken to issues of statutory construction’,³⁴ and found that the *EOA* could be construed purposively as permitting ‘a scheme or undertaking for the benefit of persons of a particular race’ so long as, consistently with the *RDA*, that benefit was the sole purpose of the scheme or undertaking, and that it would not be continued after the purpose was achieved.³⁵ In other words, the Court adopted a construction of the *EOA* that removed the inconsistency between the federal and state acts.

C Why do *RDA* inconsistency arguments fail?

Despite these noteworthy wins, in the majority of cases where a party has alleged that a state or territory law is inconsistent with the *RDA*, the argument has failed. There have been three main reasons for this. The first is that the impugned legislation falls within the just mentioned ‘special measures’ exemption in s 8 of the *RDA*, meaning that its sole purpose is to secure the advancement of certain racial groups in order to ensure their equal enjoyment of human rights with other groups.

For example in *Maloney v The Queen*,³⁶ an Indigenous resident of Palm Island in Queensland was charged with possession of more than the prescribed quantity of liquor in a restricted area predominantly inhabited by Indigenous people. While the High Court agreed that Maloney’s ‘right to own property’ had been limited more than that of non-Indigenous persons in Queensland, it found that the Schedule to the *Liquor Regulation 2002* (Qld) curtailing that right was a ‘special measure’ that was reasonably necessary to ensure the equal enjoyment of other human rights by Indigenous people, namely security of person, protection against violence and public health.

The second way these arguments fail is where the statute in question does not discriminate on the basis of race. For example in *Aurukun Shire Council v CEO Office of Liquor*,³⁷ a state Act prohibiting all local governments from selling alcohol was found to operate equally throughout the entire state of Queensland, without differentiation on the grounds of race. The state Act was therefore upheld as consistent with the *RDA*. At times though, legislation which on its face involves no racial discrimination will, in practice, operate in a way that does involve discrimination. For this reason, courts must consider that s 10(1) is directed at ‘the practical operation and

³³ *Atkinson* (2008) 103 SASR 89, 115 [106].

³⁴ *Ibid* 107 [79], citing *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194.

³⁵ *Ibid* 116 [111]–[113].

³⁶ (2013) 298 ALR 308.

³⁷ *Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Dept of Treasury* [2012] 1 Qd R 1 (‘*Aurukun*’).

effect' of an Act and is 'concerned not merely with matters of form but with matters of substance'.³⁸

The third reason such arguments fail is that the party alleging inconsistency cannot identify a valid right that has been affected. This was another weakness in the appellants' case in *Aurukun*, where the Court held that 's 10 requires the identification of a right enumerated in Art 5 of the CERD',³⁹ and that 'the opportunity to have access to a licensed source of alcohol supply provided by local government... has not been recognised as such a human right or fundamental freedom.'⁴⁰ This highlights the importance when embarking on a challenge to a state or territory law to begin with an examination of the 19 rights listed in art 5 of *ICERD* in order to identify a right that the *RDA* will protect.

III INCONSISTENCY WITH FEDERAL LAWS

A Principles

Section 109 of the *Constitution* provides no basis for the *RDA* to override other, inconsistent federal statutes. Indeed, the ordinary rule, which is an incident of parliamentary sovereignty, is that the federal Parliament may by express words, or by implication, amend any of its own statutes through the making of a subsequent statute. This power enables the federal Parliament to amend or repeal the *RDA* as it chooses.⁴¹ Unlike at the state level, where state parliaments can entrench certain statutes from repeal by way of manner and form provisions, such as by requiring a referendum, there is very limited scope for the *RDA* to be protected from the future actions of the federal Parliament.⁴²

Absent a change to the *Australian Constitution*, Parliament cannot be prevented from amending or repealing the *RDA*. So long as Parliament does so by specific and direct amendment, its capacity to do so cannot be doubted. Normally, it is also accepted that subsequent statutes can amend earlier statutes by way of implied repeal, that is, that the earlier statute can have its operation altered when a later statute provides an inconsistent rule, even if that rule is not expressly stated to override the earlier

³⁸ *Western Australia v Ward* (2002) 213 CLR 1, 103 [115] citing *Mabo v Queensland (No 1)* (1989) 166 CLR 186, 230 (Deane J).

³⁹ *Aurukun* [2012] 1 Qd R 1, 65 [139] (Keane JA).

⁴⁰ *Ibid* 67 [148] (Keane JA).

⁴¹ See, eg, *New South Wales v Commonwealth* (2006) 229 CLR 1, 151 [307] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices Case*').

⁴² *Work Choices Case* (2006) 229 CLR 1, 151 [307] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651, 659 [3] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

statute. This rule of implied repeal is so widely accepted that it even applies to the state constitutions, which are themselves merely Acts of parliament.⁴³

There is nevertheless scope to argue that the principles of implied repeal do not apply to the *RDA*, meaning that federal Parliament can only amend the statute if it does so expressly. Reasoning of this kind has gained currency in other comparable nations, with appellate courts in Canada and the United Kingdom considering new approaches to the amendment or repeal of ‘constitutional’ or ‘human rights’ legislation. Thus, in *Winnipeg School Division No 1 v Craton*,⁴⁴ the Supreme Court of Canada held:

Human rights legislation is of a special nature and declares public policy regarding matters of general concern. [It] is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.⁴⁵

Similarly, in the United Kingdom in *Thoburn v Sunderland City Council*,⁴⁶ Laws LJ identified a class of statutes that enlarge or diminish ‘what we would now regard as fundamental constitutional rights’.⁴⁷ He argued that amendment of ‘constitutional statutes’ could not be effected in the same way as any other statute.⁴⁸ Instead, it must be shown ‘that the legislature’s actual – not imputed, constructive or presumed – intention was to effect the repeal’.⁴⁹

⁴³ *Taylor v Attorney-General (Qld)* (1917) 23 CLR 457; *McCawley v The King* [1920] AC 691.

⁴⁴ [1985] 2 SCR 150.

⁴⁵ *Ibid* 156. See the similar argument put by Shaw QC in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 6. The position of the Canadian Supreme Court has been criticised: see Peter W Hogg, *Constitutional Law of Canada: Volume 1* (Carswell, 5th supplemented ed, 2007) 12–17 n 67.

⁴⁶ [2003] QB 151.

⁴⁷ *Ibid* 186 [62].

⁴⁸ This approach and its lack of clarity have been criticised: see, eg, *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 419–20 [62] (Rodger LJ); ‘Editorial – Constitutional Statutes’ (2007) 28(2) *Statute Law Review* iii. See also *Attorney General v National Assembly for Wales Commission* [2013] 1 AC 792, 815 [80] (Lord Hope DP, with whom Lord Clarke, Lord Reed and Lord Carnwath SCJJ agreed) (doubting that the ‘description’ of a statute as ‘constitutional’ could ‘be taken to be a guide to its interpretation’ and holding that ‘the statute must be interpreted like any other statute’).

⁴⁹ *Thoburn v Sunderland City Council* [2003] QB 151, 187 [63]. An Australian court would reject the idea that courts could identify an ‘actual’ intention of Parliament distinct from its imputed, constructive or presumed intention: *Zheng v Cai* (2009) 239 CLR 446, 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

In Australia, while there is no precedent for a distinction between ‘human rights’ or ‘constitutional’ statutes and other statutes, courts might arrive at a similar result by applying existing principles of statutory interpretation governing the implied repeal of statutes.⁵⁰ For instance, if an existing Commonwealth law expressly confers a right, privilege or immunity, there may need to be at least ‘strong grounds’,⁵¹ such as ‘clear words’,⁵² manifesting in ‘actual contrariety’,⁵³ before a later Act will be taken to have impliedly repealed the earlier right, privilege or immunity.⁵⁴ The fact that the right conferred by the earlier statute was discernibly ‘important’ or ‘fundamental’ would strengthen any inference that the later statute did not intend to repeal it.

Similarly, by invoking another tenet of statutory interpretation, the principle of legality, courts will assume that it is ‘improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness’.⁵⁵ While this principle is ordinarily associated with the protection of common law rights,⁵⁶ it has also been applied to statutory rights.⁵⁷

Each of these principles, which might enable the *RDA* to prevail over an apparently inconsistent later federal statute, is a rebuttable presumption. This means that if the federal Parliament decides to unambiguously oust the operation of a rights-protecting statute such as the *RDA*, it can do so. As Gageler and Keane JJ of the High Court explained in *Lee v New South Wales Crime Commission*,⁵⁸ the principle of legality

⁵⁰ Taking this approach would better accord with the view expressed by French CJ in *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195. There, French CJ suggested that questions such as those considered in *Thoburn* were likely to be resolved through the ‘characteristics of a statute’ rather than through the designation of a statute as ‘constitutional’: 218 [56]

⁵¹ *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 137–8 [18] (Gummow and Hayne JJ).

⁵² *Wurridjal v Commonwealth* (2009) 237 CLR 309, 366–7 [114] (French CJ), 378–9 [158]–[159] (Gummow and Hayne JJ).

⁵³ *Putland v The Queen* (2004) 218 CLR 174, 189 [40] (Gummow and Heydon JJ).

⁵⁴ See also *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 33 [98] (Gageler J); cf 18–19 [44]–[48] (Crennan, Kiefel and Bell JJ).

⁵⁵ *Potter v Minahan* (1908) 7 CLR 277, 304 (O’Connor J), quoting Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) 122.

⁵⁶ George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 36–46.

⁵⁷ See Perry Herzfeld, Thomas Prince and Stephen Tulley, *Interpretation and Use of Legal Sources: The Laws of Australia* (Thomson Reuters, 2013) 227, citing *Tassell v Hayes* (1987) 163 CLR 34 (statutory right to elect trial of indictable offence by jury); *Buck v Comcare* (1996) 66 FCR 359 (statutory compensation for workplace injury); *Schofield, Re; Ex parte Rangott v P & B Barron Pty Ltd* (1997) 72 FCR 280 (limitation on admissibility of transcripts of examination of bankrupt); *University of Western Australia v Gray (No 20)* (2008) 246 ALR 603 (superannuation).

⁵⁸ (2013) 251 CLR 196, 310 [313].

exists to protect rights from ‘inadvertent and collateral alteration’, and ‘does not exist to shield those rights ... from being specifically affected in the pursuit of a clearly identified legislative object’.⁵⁹

The Commonwealth Parliament has cleared this hurdle twice with regard to the *RDA*. The first instance was the *Native Title Amendment Act 1998* (Cth), which implemented the Howard Government’s ‘ten point plan’ for native title after the High Court’s decision in *Wik Peoples v Queensland*.⁶⁰ In seeking to achieve, in the words of the Deputy Prime Minister Tim Fischer, ‘bucket-loads of extinguishment’, the Act overrode the *RDA*. This was achieved by introducing a new s 7 into the *Native Title Act 1993* (Cth), which expresses an intention that the *RDA* only overrode the *Native Title Act* where the provisions of the *Native Title Act* were ambiguous. The second suspension of the *RDA* was achieved under the legislation that brought about the Northern Territory intervention in 2007 in response to findings of child sexual abuse within Aboriginal communities.⁶¹

B Cases

It is important to mark a distinction between federal–state inconsistency and federal–federal inconsistency involving the *RDA*. In Part II above we discussed cases where the *RDA* ‘overrode’ or prevailed over state laws to the extent that they were inconsistent with the *RDA*. For the reasons just explained, the *RDA* cannot ‘override’ another federal law, as federal laws emanate from the same Parliament and therefore operate on an equal footing. What the *RDA* can do, however, is compel or constrain the statutory construction of another federal law so that the two laws operate harmoniously, thereby removing the inconsistency between the laws. It is only in very rare cases that the principles of implied repeal or of legality might further render the latter statute inoperative.⁶²

There have been 13 attempts to allege inconsistency between the *RDA* and a subsequent federal law. On 12 occasions, the argument failed. This occurred for the same reasons identified above in respect of the unsuccessful arguments to prove inconsistency between the *RDA* and state and territory laws. The single occasion in which the argument succeeded in regard to a subsequent federal law was *Shi v Minister for Immigration and Citizenship*.⁶³

⁵⁹ Ibid.

⁶⁰ (1996) 187 CLR 1.

⁶¹ *Northern Territory National Emergency Response Act 2007* (Cth).

⁶² *Coco v The Queen* (1994) 179 CLR 427, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ): ‘[I]t would be very rare for general words in a statute to be rendered inoperative or meaningless if no implication of interference with fundamental rights were made, as general words will almost always be able to be given some operation, even if that operation is limited in scope’.

⁶³ (2011) 123 ALD 46.

Mr Shi was a citizen from the People's Republic of China who had lived in Australia for 13 years, eventually obtaining a visa that gave him a right to permanent residency. During that time, he was convicted of three offences – malicious wounding in company, supply of a prohibited drug and detaining a person with intent to obtain an advantage – and spent over six years in prison. A delegate of the federal Minister for Immigration and Citizenship sought to cancel Mr Shi's visa on 'character grounds' under s 501(2) of the *Migration Act 1958* (Cth).

Mr Shi sought review of this decision in the Administrative Appeals Tribunal. The Tribunal was required to have regard to a Direction given by the Minister under s 499(1) of the Act that allowed the person's 'ties and linkages to the Australian community' to be considered. In affirming the decision to cancel Mr Shi's visa, Senior Member Allen held:

The Applicant was aged 14 years when he arrived in Australia. To that extent [sic] this primary consideration weighs in his favour. On the other hand a large part of his upbringing and character formation was in China. Such ties to the Australian community that the Applicant did develop appear to have been ethnically based and with persons who had little regard for the law.

Mr Shi appealed to the Federal Court, arguing that the ethnicity of persons with whom he chose to associate was an irrelevant consideration. In deciding in favour of Mr Shi, Perram J considered the interplay between s 10(1) of the *RDA* and s 499(1) of the *Migration Act 1958* (Cth):

The effect of s 10(1) is ... to require this Court to construe [the *Migration Act*] (and, hence, the Direction) as not permitting decision-making processes in which ethnicity is an integer. It is true, as the Minister submits, that the Tribunal had to consider the links which Mr Shi had to the Australian community. But the effect of s 10 of the *RDA* is that, whatever else that concept denotes, it lacks ethnic features.⁶⁴

In reaching this decision, Perram J noted that 'it would require express words to convey an intention that a general power to make regulations for a stated purpose authorised the repository to repeal or amend the Parliament's own enactments'.⁶⁵ In the absence of such words, the *Migration Act* could not be construed so as to permit a finding that took into account the appellant's ethnicity, and so the Tribunal's decision was quashed. While neither the *Migration Act* nor the Direction made under

⁶⁴ Ibid 50 [19] (Perram J).

⁶⁵ Ibid [20] citing *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207 at 212 (Brennan CJ and Dawson J); Pearce and Argument, *Delegated Legislation in Australia* (LexisNexis, 3rd ed, 2005) [19.21].

it were held to be inoperative, the *RDA* directly affected their operation in such a way that preserved the appellant's rights under s 10(1) of that Act.⁶⁶

IV CONCLUSION

The *RDA* has proved to be a powerful instrument in setting down a national standard of racial non-discrimination. This has been due in large part to the overriding force given to the statute by s 109 of the *Constitution*. This aspect to the *RDA* has been of great legal and political significance, such as in *Mabo No 1* where it led to the overturning of Queensland's pre-emptive strike against the recognition of native title.

This effect of the Act has been important, but it should not be overstated. The potential of the *RDA* to override state and territory laws has not often been realised over the past four decades. Indeed, of the 26 occasions in which such an argument has been put in an Australian court, it has only succeeded seven times. As these statistics make clear, in the majority of cases, attempts to rely upon the *RDA* in this way have failed. These cases have demonstrated the limits of the protection offered by the *RDA*.

A further area in which the *RDA* has had little impact is with respect to federal statutes. Orthodox principles of parliamentary sovereignty and statutory interpretation establish that the *RDA* can be overwritten by subsequent federal statutes, at least so long as the intention to do so is manifested in clear language. This has occurred on two occasions. More generally, other federal statutes may operate despite inconsistency with the *RDA*, although interpretive techniques do exist to mitigate or reduce the possibility of this occurring.

The *RDA* appears to be an unequivocal rejection of racial discrimination. However, its capacity to achieve this is subject to significant constraints, especially in regard to federal statutes. Four decades after its enactment, it is appropriate to consider whether the protection offered by the *RDA* should be strengthened. If the principle of racial non-discrimination is as fundamental as political and community support for the *RDA* might suggest, then that principle should be put beyond the possibility of suspension or repeal by the federal Parliament.

This could be achieved by entrenching the principle of non-discrimination on the basis of race in the *Australian Constitution*. This possibility has arisen in the context of the ongoing debate about whether Aboriginal and Torres Strait Islander peoples should be recognised in that document.⁶⁷ The debate has extended beyond recognition of Indigenous peoples by way of symbolic words inserted into the *Constitution*. It has also encompassed the question of whether the document should be changed

⁶⁶ Although not expressly identified in Perram J's judgment, the right to 'equal treatment before the tribunals and all other organs administering justice' is a protected *ICERD* right under the *RDA*.

⁶⁷ See generally Megan Davis and George Williams, *Everything You Need to Know About the Referendum to Recognise Indigenous Australians* (NewSouth Publishing, 2015).

to expressly prohibit racial discrimination. A number of proposals have been put forward to achieve this, ranging from a freestanding protection against such discrimination,⁶⁸ to a re-drafted federal power with regard to Aboriginal and Torres Strait Islanders that only protects them from such harm.⁶⁹ None of these proposals seek to replicate the terms of the *RDA* in the *Constitution*, nor to incorporate terms of the *ICERD*. Instead, they are more modest and focused in seeking only to prohibit the specified form of discrimination.

Constitutional protection from racial discrimination is commonplace in other nations⁷⁰ and indeed Australia is exceptional not only in lacking such protection, but in having two provisions in its *Constitution* that not only run counter to the objects of the *RDA*, but to the whole idea of racial non-discrimination. These are s 25, which contemplates that states may deny people the vote on the basis of their race, and s 51(xxvi), which enables the federal Parliament to pass laws that both discriminate for and against people on the basis of their race.

The former section was included for the apparently benign purpose of penalising states that maintained pre-Federation policies of disenfranchising people due to their race. However, in so doing, it acknowledged that each state retains the power to disqualify people on that basis.⁷¹ The latter section is in the *Constitution* in order to, in the words of Sir Edmund Barton, Australia's first Prime Minister and one of the first members of the High Court, enable the Commonwealth to 'regulate the affairs

⁶⁸ Most prominently, the Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012), 173 recommended the insertion of the following new section:

Section 116A Prohibition of racial discrimination

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

⁶⁹ For example, the idea that the races power in section 51(xxvi) of the *Constitution* should be replaced with the following words: 'Aboriginal and Torres Strait Islander peoples, but not so as to discriminate adversely against them'. See Rosalind Dixon and George Williams, 'Drafting a Replacement for the Races Power in the *Australian Constitution*' (2014) 25 *Public Law Review* 83, 87; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Progress Report (Commonwealth of Australia, October 2014) 8.

⁷⁰ For example, s 15(1) of the *Canadian Charter of Rights and Freedoms* states: 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability' (*Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*')).

⁷¹ See George Williams, 'Removing Racism from Australia's Constitutional DNA' (2012) 37 *Alternative Law Journal* 151, 151.

of the people of coloured or inferior races who are in the Commonwealth'.⁷² One has to ask just how deep Australia's commitment to racial non-discrimination runs when clauses of this kind remain in the nation's most important law. Indeed, we are not aware of any other constitution in the world that still provides a licence to its national Parliament to discriminate negatively on the basis of race.

It is understandable that people laud the achievements of the *RDA* by way of marking its 40 years of operation. On the other hand, it is also important to reflect upon its limitations. If Australia is serious about eradicating racial discrimination, and especially within the law, the *RDA* should be seen as a stepping stone to even stronger protection. It is appropriate that Australia finally remove clauses from its *Constitution* that enable racial discrimination, while also entrenching the principle that no law or policy, whether at the federal, state or territory level, may discriminate against a person on the basis of their race.

⁷² *Official Record of the Debates of the Australasian Federal Convention: 1891–1898*, vol 4, Melbourne, 27 January 1898, 228–9 (Edmund Barton).