# *The "Constitutional" Value of the Racial Discrimination Act 1975 (Cth)*

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***Abstract***

Since its passage, the *Racial Discrimination Act 1975* (Cth) ('*RDA*') has been considered 'special'. This is despite the fact that it is a piece of ordinary legislation, capable of being amended or limited by the legislature. This article considers the nature of this 'specialness'. I assess whether the *RDA* can be classified as a 'constitutional' statute in the Australian context. I argue that, utilising a range of definitions, the *RDA* can be classed as a piece of 'constitutional' legislation, but that this status has no discernible effect on producing effective and substantive protection from discrimination on the basis of race.

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# I Introduction

The *Racial Discrimination Act 1975* (Cth) ('*RDA*') occupies a special place in Australia's non-discrimination regime. When the *RDA* was proclaimed in 1975, Prime Minister Gough Whitlam commented that while the Bill did not have the same 'rhetorical grandeur' of the rights-protecting documents of the United States, he hoped that it would have the same compelling and lasting force.[1] Whitlam could make this statement because of the *RDA*'s potential as a rights-protecting document. In 1982, Sir Harry Gibbs made this emphasis on rights explicit when he concluded that s 10 of the *RDA* implemented 'a bill of rights …which is effective[ly] entrenched against the States',[2] thereby asserting the Act's almost constitutional status.

The assertion of the 'special' place of the *RDA* in Australia's legislative landscape is also present in academic scholarship. Williams and Reynolds suggest that the *RDA* has 'political importance attached to it over and above almost any other piece of Commonwealth legislation'.[3] Given the *RDA*'*s* political significance, in the context of Indigenous constitutional recognition, Lino has suggested that rather than pursuing constitutional change to incorporate a non-discrimination clause in the *Australian Constitution*, a manner and form provision could be embedded in the *RDA* to give the Act stronger constitutional force.[4] Though acknowledging its limitations, the *RDA* has been cited as an example of Australian 'values' in a consideration of global constitutional values by Saunders and Donaldson,[5] and an example of an Australian 'constitutional' statute by Stephenson.[6]

However, notwithstanding the 'special' nature of the *RDA*, little work has been conducted on whether its political significance has had any discernible effect on the interpretation and effectiveness of the *RDA* in eliminating racially discriminatory conduct and laws. Thus, in this article, I interrogate the 'special' or even 'constitutional' nature and force of the *RDA*. This is to determine two interrelated issues. First, this article will determine whether the *RDA* can be classified as a 'special' or even 'constitutional' form of legislation within the Australian context. Second, it will consider the effect of this possible classification on the interpretation of unlawful racial discrimination. The effect on interpretation is important because in the context of 'constitutional' or 'quasi-constitutional' statutes elsewhere, notably in Canada, the effect of declaring human rights

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1 Gough Whitlam, 'Proclamation of *Racial Discrimination Act*: Speech by the Prime Minister at a Ceremony Proclaiming the *Racial Discrimination Act 1975*' (Speech, Canberra, 31 October 1975) [5].

2 Sir Harry Gibbs, 'Eleventh Wilfred Fullagar Memorial Lecture: The Constitutional Protection of Human Rights' (1982) 9(1) *Monash University Law Review* 1, 13.

3 George Williams and Daniel Reynolds, 'The *Racial Discrimination Act* and Inconsistency under the *Australian Constitution*' (2015) 36(1) *Adelaide Law Review* 241, 242.

4 Dylan Lino, 'Thinking outside the *Constitution* on Indigenous Constitutional Recognition: Entrenching the *Racial Discrimination Act*' (2017) 91(5) *Australian Law Journal* 381, 384 ('Thinking outside the *Constitution*').

5 Cheryl Saunders and Megan Donaldson, 'Values in Australian Constitutionalism' in Dennis Davis, Alan Richter and Cheryl Saunders (eds), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* (Hart Publishing, 2015) 15, 36.

6 Scott Stephenson, 'The Rise and Recognition of Constitutional Statutes' in Richard Albert and Joel Colón-Ríos (eds), *Quasi-Constitutionality and Constitutional Statutes: Forms, Functions and Applications* (Routledge, 2019) 35, n 33.

legislation to be quasi-constitutional has been significant in pursuing a 'broad, beneficial and purposive' interpretation of the legislation.[7] Without such effect on interpretation, the utility of designating the *RDA* as 'constitutional' is questionable.

In this article, I utilise the case law on s 10 of the *RDA* to consider the 'constitutional' value of the *RDA*. Section 10 of the *RDA* prohibits discriminatory laws on the basis of race and it is outlined in the following terms:

> 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.[8]

I consider s 10 for this article because it is a unique provision in the discrimination law landscape. There are no similar provisions in any other Commonwealth discrimination statutes.[9] These statutes are focused on discriminatory conduct rather than laws. And in an international context, provisions like s 10 are generally found in constitutional frameworks rather than ordinary statutes. Consequently, my approach in this article — focusing on one specific aspect of s 10 of the *RDA* — is a narrow one. I have adopted this focus both for practical and conceptual reasons. From a practical perspective, the focus on s 10 allows for a clear, detailed analysis in this article built on a foundation of High Court of Australia jurisprudence. From a conceptual basis, the distinctive place of s 10 within the Australian discrimination law context, with its focus on distinctions made in law rather than discriminatory conduct, provides a solid foundation to assess the 'constitutionality' of the *RDA* given its clear commonality with statutory and constitutional human rights instruments in other jurisdictions.

I argue, utilising a number of prominent definitions, that the *RDA* can be classed as a form of 'constitutional' legislation due to the combination of its subject matter and effect on state legislation-making powers. However, unlike in other jurisdictions such as Canada, I argue such a classification has achieved little due to the lack of purposive interpretation of the rights contained in the *RDA*. As a consequence, few pieces of legislation have been found to be inconsistent.

I present this argument in three parts. First, in Part II, I examine both the aspirational and practical potential of the *RDA* to demonstrate that it has a 'special' place in Australian law. The *RDA*'s history and passage and its treatment by succeeding legislatures demonstrates this. Practically, the Act has a powerful effect on state as well as Commonwealth legislatures in terms of regulating legislative and executive action. In this sense, the *RDA* can be considered a 'special' form of legislation.

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7 John Helis, *Quasi-Constitutional Laws of Canada* (Irwin Law, 2018) 3.

8 *Racial Discrimination Act 1975* (Cth) s 10(1) ('*RDA*').

9 There is no equivalent provision in the *Sex Discrimination Act 1985* (Cth), the *Disability Discrimination Act 1992* (Cth) or the *Age Discrimination Act 2004* (Cth).

However, despite the recognition of the *RDA* as a 'special' piece of legislation more broadly, the interpretation by the judiciary has been a disappointment. Thus, in Part III I consider the case law from the High Court and appellate court decisions from Queensland and the Northern Territory to demonstrate that this special status has had no noticeable effect on the interpretation of the *RDA*, focusing specifically on the interpretation of s 10 of the *RDA* that guarantees equality before the law. In particular, I argue that the interpretation of the terms of s 10 and specifically what is considered a 'distinction on the basis of race', leads to an interpretation of the *RDA* that is disconnected from the lived reality of race-based disadvantage that the *RDA* was designed to combat.[10] In Part IV, I contextualise the approach adopted with respect to s 10 within the broader literature on constitutional culture and the use of values in interpretation, particularly the value of equality to demonstrate that though the interpretation of s 10 is unusual when compared to its foreign counterparts, it is consistent with the interpretation of values in a constitutional setting in Australia.

## II Defining the *Racial Discrimination Act 1975* (Cth) as a 'Constitutional' Statute

Though the concept of 'constitutional' statutes has gained little traction in Australian High Court jurisprudence,[11] the persistent references to the *RDA*'*s* importance and 'special' place in Australian law should give pause to consider whether, through its function or subject matter, the *RDA* has a status above an 'ordinary' statute. In this section, I chart the perceived 'specialness' of the *RDA* against some of the various definitions of 'constitutional' or 'quasi-constitutional' legislation to demonstrate that the *RDA* can be considered a form of 'constitutional' legislation, both in its form and in its effect.

The *RDA* has been presented by politicians and judges extra-curially, as a 'special' form of legislation.[12] The description of the *RDA* as special has been justified on two bases. The first is on the basis of the subject matter, in that discrimination legislation is reflective of fundamental values.[13] The second is due to the fact that, unlike other Commonwealth discrimination legislation, the *RDA* confines lawmaking powers, particularly of state legislatures due to s 10.[14]

In other jurisdictions, such as the United Kingdom ('UK') and Canada, it is more common for judges to declare legislation as 'constitutional' (in the UK),[15] or

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10 Beth Gaze, 'Has the *Racial Discrimination Act* Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000–04' (2005) 11(1) *Australian Journal of Human Rights* 171, 171–2 ('Racial Discrimination Act').

11 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 217–18 (French CJ) ('*Cadia*').

12 See Whitlam (n 1) [5]; Gibbs (n 2) 13.

13 Saunders and Donaldson (n 5) 36; Simon Evans, 'Why is the *Constitution* Binding? Authority, Obligation and the Role of the People' (2004) 25(1) *Adelaide Law Review* 103, 116–17.

14 Williams and Reynolds (n 3) 242.

15 Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37(2) *Oxford Journal of Legal Studies* 461, 464.

as 'quasi-constitutional' (in Canada).[16] In Canada, in particular, there is now a list of statutes that the courts have designated as quasi-constitutional.[17] This list includes the *Canadian Bill of Rights*,[18] the federal and provincial human rights statutes (discrimination laws), privacy legislation, freedom of information legislation and statutes relating to language rights.[19] For the purpose of this article, I start from the position that the terms 'quasi-constitutional' and 'constitutional' used in the scholarship and the case law are ostensibly referring to the same kinds of legislation. Constitutional or quasi-constitutional legislation is legislation that sits at a level between a 'capital-C style' Constitution and an ordinary statute.[20] Nevertheless, judges in both the UK and Canada have often failed to provide a definition or outline of what features give a statute this particular designation.[21] The case law and the literature provide three possible definitions of a constitutional statute, which will be considered here: first, statutes where the subject matter concerns 'fundamental' rights;[22] second, statutes that, due to both their subject matter as well as the political circumstances surrounding their passage, stick in the public consciousness as a statute of great importance;[23] and third, the understanding of constitutional statutes as statutes that operate to regulate the institutions and powers of the State.[24] The purpose of this assessment is not to add to the definitional debates about the nature of 'constitutional' statutes, but to provide a basis to assess whether the *RDA* could be considered a 'constitutional' statute.

## A *Fundamental Values or Rights*

A statute can be designated as 'constitutional' because of its subject matter.[25] Commonly this is because the subject matter relates to fundamental values or rights.[26] This focus on fundamental values reflects an understanding of a constitution as sitting at the top of a normative pyramid that establishes and articulates the social values of a society.[27] Consequently, 'constitutional' statutes are statutes that are designed to guide human behaviour and shape the character of the State.[28] As such, 'constitutional' statutes articulate the State's fundamental social aspirations and values.[29] In the UK context, in *Thoburn v Sunderland City Council* Laws LJ outlined

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16 Vanessa MacDonnell, 'A Theory of Quasi-Constitutional Legislation' (2016) 53(2) *Osgoode Hall Law Journal* 508, 509–10.
17 Helis (n 7) 4.
18 *Canadian Bill of Rights*, SC 1960, c 44.
19 Ibid.
20 Stephenson (n 6) 27–8.
21 Ahmed and Perry (n 15) 465; MacDonnell (n 16) 510.
22 *Thoburn v Sunderland City Council* [2003] QB 151, 186–87 [62] (Laws LJ) ('*Thoburn*').
23 William N Eskridge Jr and John Ferejohn, 'Super-Statutes' (2001) 50(5) *Duke Law Journal* 1215, 1216. This idea is drawn and adapted from Bruce Ackerman, *We the People (Vol 2): Transformations* (Harvard University Press, 1998) 4–5.
24 David Feldman, 'The Nature and Significance of Constitutional Legislation' (2013) 129 (July) *Law Quarterly Review* 343, 357.
25 Helis (n 7) 4–10.
26 Ibid.
27 Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press, 2011) 190.
28 Ibid.
29 Ibid.

two forms of legislation that qualified as 'constitutional' legislation.[30] The first form of 'constitutional' legislation is legislation that outlines the conditions of the legal relationship between the citizen and the State in a general, overarching manner. The second is legislation that either enlarges or diminishes the scope of what are 'fundamental constitutional rights.'[31] The Supreme Court of the United Kingdom has also accepted the existence of constitutional statutes.[32] This second category, in particular, seems to be drawing on the idea that statutes can be 'constitutional' where they draw on fundamental rights and values.

A number of constitutional commentators from the UK including Feldman dispute the categorical distinction described by Laws LJ.[33] Feldman criticises Laws LJ's categorisation because the categories do not have clear and distinct boundaries.[34] Feldman argues that many kinds of legislation change the legal relationship between the citizen and State, and further, will change over time because fundamental constitutional values are not fixed.[35]

The idea that Commonwealth discrimination legislation invokes fundamental values has been raised before. Saunders and Donaldson describe the introduction of discrimination law as implementing the value of equality in the Australian legal system.[36] Evans lists anti-discrimination legislation as one form of 'constitutional' legislation in Australia, drawing on the definition provided in *Thoburn*.[37] In this way, the *RDA*, as well as the other Commonwealth discrimination laws, can have a kind of 'constitutional' status based on the understanding that discrimination law is designed to give legal force to the fundamental values of non-discrimination and equality.[38] The *RDA*, in particular, does so by enlarging a person's rights by giving them the capacity to challenge laws and actions that are based on irrelevant considerations, such as race.[39] As a consequence, the *RDA* and other discrimination legislation have the normative force necessary for a 'constitutional' statute.

## B *Impact on Political Norms and Structures*

A constitutional statute can also be understood as akin to what Eskridge Jr and Ferejohn describe as a 'super-statute'.[40] A 'super-statute' is a statute that establishes a new normative or institutional framework for state practice. Eskridge Jr and Ferejohn describe a super-statute as a statute that embodies a significant normative principle that is adopted after an intense political struggle. Such a statute

30 *Thoburn* (n 22).
31 Ibid 186–7 [62]–[64].
32 *H v Lord Advocate* [2013] 1 AC 413, 435–6 [30] (Lord Hope DPSC); *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] 1 WLR 324, 382–3 [208] (Lord Neuberger PSC and Lord Mance JSC).
33 Feldman, 'The Nature and Significance of Constitutional Legislation' (n 24) 353–4.
34 Ibid 346–8.
35 Ibid 346. See also Ahmed and Perry (n 15) 464.
36 Saunders and Donaldson (n 5) 36.
37 Evans (n 13) 120.
38 Gaze, 'Racial Discrimination Act' (n 10) 178.
39 Through its prohibitions on discrimination in *RDA* (n 8) ss 9–17.
40 Eskridge Jr and Ferejohn (n 23) 1216.

'pervasively affects executive and legislative action'.[41] Such a statute 'sticks' in public culture in a way that the values embedded in the statute have a broad effect on the development of law.[42] Eskridge Jr and Ferejohn point to the *Civil Rights Act of 1964* as an illustration of the kind of statute that they consider is representative of a 'super-statute'.[43] A statute's status as a super-statute is not embedded at the time of passage, but instead is developed over time through a series of contestations surrounding its importance and meaning.[44] In this conceptualisation, constitutionalism is the culmination of a contest about fundamental values and rights. A constitution or 'super-statute' is the outcome of such a struggle.[45]

The *RDA*'s path to passage and its place in the public consciousness since passage also demonstrates the existence of a 'battle over fundamental rights and values' described by Ackerman,[46] and Eskridge Jr and Ferejohn.[47] The *RDA* was the first statute in Australia prohibiting discrimination at the Commonwealth level. In introducing the 1975 Bill, Attorney-General Kep Enderby acknowledged that the purpose of the legislation was to implement Australia's obligations contained in the *International Convention on the Elimination of All Forms of Racial Discrimination*,[48] to remedy the inadequacies of the common law and to educate the public about the 'undesirable and unsocial consequences of discrimination … and make them more obvious and conspicuous'.[49]

There are competing perspectives on whether the *RDA* was the culmination of a struggle for civil rights. The implication of these competing perspectives is that the passage of the *RDA* does not fit neatly within Ackerman's understanding of constitutional statutes as the culmination of a political struggle.[50] On the one hand, the legislation had bipartisan support, and much of the academic commentary from the time, though critical of the *RDA*'s limitations, does not indicate a significant level of controversy about the notion of protection from discrimination.[51] Further, in his analysis of Australians' opinions on race from 1943 onwards, Markus found that there was no specific polling data on the introduction of the *RDA* and that its introduction and passage did not result in public controversy.[52]

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41 Ibid.
42 Ibid.
43 Ibid 1237, citing *Civil Rights Act of 1964*, Pub L No 88-352, 78 Stat 241.
44 Ibid 1216–7.
45 Ackerman (n 23) 5, 170.
46 Ibid 170.
47 Eskridge Jr and Ferejohn (n 23) 1216.
48 *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) ('ICERD').
49 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 1975, 285 (Kep Enderby, Attorney-General).
50 Ackerman (n 23) 170.
51 See, eg, David Partlett, 'The *Racial Discrimination Act 1975* and the *Anti-Discrimination Act 1977*: Aspects and Proposals for Change' (1977) 2(2) *UNSW Law Journal* 152; David Partlett, 'Benign Racial Discrimination: Equality and Aborigines' (1979) 10(3) *Federal Law Review* 238; Brian Kelsey, 'A Radical Approach to the Elimination of Racial Discrimination' (1975) 1(1) *UNSW Law Journal* 56.
52 Andrew Markus, 'Australian Opinion on Issues of Race: A Broad Reading of Opinion Polls, 1943–2014', *Perspectives on the Racial Discrimination Act: Papers from the 40 Years of the Racial Discrimination Act Conference* (Australian Human Rights Commission, 2015) 19–20.

Lino places the *RDA* within the context of a broader effort for Indigenous constitutional recognition.[53] He argues that the *RDA* owes its very existence, in significant part, to Indigenous activism focused on the efforts to end the discriminatory legal regime that operated in Queensland throughout the 1970s.[54] In his view, the enactment of the *RDA* served both to provide a capacity to curtail the operation of the racist legal regime in Queensland and to recognise Indigenous peoplehood in a symbolic sense.[55] As a piece of 'ordinary' legislation, Lino acknowledges that the *RDA* lacks 'big-C' constitutional force.[56] He nevertheless argues it forms part of the 'small-C' constitutional recognition of Indigenous peoples through securing protection from racial discrimination for Indigenous persons at a national level.[57] From this perspective, the *RDA* has had, since its inception, the kind of symbolic status required for a form of constitutional legislation.

The debates surrounding the *RDA* since its inception also show its 'stickiness' in the battle over Australian public values.[58] This is particularly demonstrated through the prolonged efforts to amend s 18C of the *RDA* in light of the 2011 decision in *Eatock v Bolt*.[59] Despite sustained efforts to remove or significantly limit the application of the racial vilification provisions in the *RDA* over a number of years,[60] these have had limited success, demonstrating the force and effectiveness of the *RDA* as a significant and important piece of human rights legislation in public consciousness. Consequently, this 'stickiness' in the public consciousness and the difficulties faced by legislatures in narrowing the *RDA*'s terms with respect to s 18C appears to show commonalities with what Eskridge Jr and Ferejohn describe as a super-statute.

### C *Regulating a Fundamental Feature of the Lawmaking Process*

Instead of a focus on either the subject matter or the public, political and legal debates surrounding a statute, other definitions focus on the form and function of the statute.[61] Preferring a definition focused on the function of the statute, Feldman considers that statutes are 'constitutional' where they establish and regulate the various institutions of the State.[62] He considers that the institutional approach to 'constitutional' statutes is most in keeping with the core function of a constitution. 'Constitutional' statutes are therefore statutes that establish institutions and confer

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53 Dylan Lino, *Constitutional Recognition: First Peoples and the Australia Settler State* (Federation Press, 2018) ch 6.
54 Ibid 174.
55 Ibid 177.
56 Ibid 187–8.
57 Ibid 188.
58 Eskridge Jr and Ferejohn (n 23) 1230–1.
59 *Eatock v Bolt* (2011) 197 FCR 261. See also Williams and Reynolds (n 3) 242.
60 For a discussion of this debate, see Adrienne Stone, 'The Ironic Aftermath of *Eatock v Bolt*' (2015) 38(3) *Melbourne University Law Review* 926, 936–45; Katharine Gelber and Luke McNamara, 'Freedom of Speech and Racial Vilification in Australia: "The Bolt Case" in Public Discourse' (2013) 48(4) *Australian Journal of Political Science* 470; Amanda Porter, 'Words Can Never Hurt Me? Sticks, Stones and Section 18C' (2015) 40(2) *Alternative Law Journal* 86.
61 Feldman, 'The Nature and Significance of Constitutional Legislation' (n 24) 351.
62 David Feldman, 'Statutory Interpretation and Constitutional Legislation' (2014) 130 (July) *Law Quarterly Review* 473, 473.

and confine functions, responsibilities and powers on such institutions.[63] Feldman concludes that this is a preferable definition because such a definition demarcates statutes that state *what the law is* from those that define *how a law is made*.[64] While drawing a distinction between constitutional statutes in jurisdictions with capital-C constitutions and jurisdictions without a capital-C constitution, Stephenson also defines constitutional statutes as those that regulate a fundamental feature of the lawmaking process in terms of the enactment, administration and interpretation of the law.[65] The regulation of the lawmaking process can involve both the making of laws by the legislature, as well as the administration of the laws by the executive and the interpretation of laws by the judiciary.[66] What differentiates a 'constitutional' statute from a capital-C constitution is that these statutes lack some of the attributes of capital-C-style constitutions with respect to entrenchment and superiority.[67]

The *RDA* could be understood as 'constitutional' legislation because of its capacity to constrain all state legislative and executive power.[68] Its capacity to do so goes beyond that which all Commonwealth legislation has the power to do by virtue of s 109 of the *Australian Constitution*. Of particular importance is s 10 of the *RDA*, which provides a right to equality before the law.[69] As highlighted in the introduction, s 10 is distinctive in the discrimination law landscape, with no equivalent provisions in other Commonwealth or state discrimination legislation, which generally have a horizontal effect. Section 10 operates in two ways. It can invalidate state laws that would otherwise operate in a discriminatory manner on the basis of race.[70] Alternatively, where a state law omits to make a right universal, s 10 confers that right on to persons of a particular race.[71] It is the capacity of s 10 of the *RDA* to invalidate state laws that makes it unique in the Australian discrimination landscape.[72] While not focused on discriminatory laws, but discriminatory conduct, s 9 of the *RDA* has also been used to challenge conduct by state executive officers such as police officers in the carrying out of their duties in a racially discriminatory fashion.[73]

Williams and Reynolds identify that the 'constitutional' value of discrimination legislation is demonstrated primarily through the supremacy of federal legislation over state legislation.[74] This supremacy enables federal discrimination legislation to set standards of conduct at both a federal and state

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63 Feldman, 'The Nature and Significance of Constitutional Legislation' (n 24) 350.
64 Ibid.
65 Stephenson (n 6) 28.
66 Ibid 29.
67 Ibid 28.
68 Williams and Reynolds (n 3) 242–3.
69 *RDA* (n 8) s 10.
70 *Gerhardy v Brown* (1985) 159 CLR 70, 98 (Mason CJ) ('*Gerhardy*').
71 Ibid. See also *Western Australia v Ward* (2002) 213 CLR 1, 99–100 (Gleeson CJ, Gaudron, Gummow and Hayne JJ) ('*Ward*').
72 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination & Equal Opportunity Law* (Federation Press, 2018) 264.
73 See, eg, *Wotton v Queensland (No 5)*, a class action claim against the Queensland Government on behalf Aboriginal and Torres Strait Islanders living on Palm Island, which found that the police had unlawfully discriminated against residents: (2016) 352 ALR 146 ('*Wotton*').
74 Williams and Reynolds (n 3) 246.

level.[75] Stephenson also adds other discrimination statutes related to sex, age and disability to the list of Australian 'constitutional' statutes.[76] This is on the basis that discrimination and other human rights legislation function to regulate a fundamental feature of the lawmaking process. This includes not only the enactment of laws by the legislature, but also the actions of the executive and the interpretation of laws by the judiciary.[77] This definition would appear not only to include s 10 of the *RDA*, but also ss 9 and 9(1A) through the capacity to curtail executive action.[78] An example of the use of s 9 in this respect is the case of *Wotton v Queensland (No 5)*, in which it was successfully argued that the conduct of Queensland police after the death of an Aboriginal Australian man in custody was racially discriminatory against members of the Aboriginal community.[79]

Though the *RDA* has not been declared 'constitutional', in some cases of inconsistency, courts have applied similar principles to those applied in jurisdictions that recognise constitutional or quasi-constitutional statutes. In other jurisdictions, this recognitional status can have significant effects on the relationship of that statute with other 'ordinary' statutes. In particular, where there is an inconsistency of terms, the ordinary statute is read-down to ensure consistency with the fundamental rights contained in the 'constitutional' statute, providing a derogation from the general principle of *generalia specialibus non derogant*, or that specific legislation has precedence over general legislation.[80]

Further, the principle of implied repeal does not extend to constitutional statutes, and the legislature must use clear and unambiguous language where a later statute is interpreted to repeal sections of an earlier constitutional statute.[81] In the UK, Lord Neuberger and Lord Justice Sales have both remarked extra-curially that this limitation of the rule of implied repeal is akin to applying the principle of legality to fundamental common law rights.[82] In considering the classification of 'constitutional' statutes in the UK, and its possible application in Australia, French CJ also appeared to share this understanding as to the effect of the limitation on the principle of implied repeal.[83]

In the Canadian context, the interpretive rules that are applied to quasi-constitutional legislation have had a significant impact in expanding the scope and application of human rights principles.[84] The primacy of 'constitutional' legislation is recognised by Canadian courts based on the 'fundamental' character of

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75 Ibid.
76 Stephenson (n 6) 35.
77 Ibid 29.
78 *RDA* (n 8) ss 9, 9(1A), 10.
79 *Wotton* (n 73).
80 Ahmed and Perry (n 15) 463.
81 Ibid 462.
82 Lord Neuberger, 'The Constitutional Role of the Supreme Court in the Context of Devolution in the UK' (Lord Rodger Memorial Lecture 2016, Glasgow, 14 October 2016) [18]–[20]; Lord Justice Philip Sales, 'Rights and Fundamental Rights in English Law' (2016) 75(1) *Cambridge Law Journal* 86, 91.
83 *Cadia* (n 11) 217–18.
84 Claire Mummé, 'At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the *Charter* in Canadian Government Services Cases' (2012) 9(1) *Journal of Law & Equality* 103, 106.

constitutional legislation.[85] Primacy requires that courts adopt a two-stage process when considering inconsistency between a constitutional statute and an ordinary statute.[86] First, the courts attempt to read the ordinary statute in a manner that is consistent with the fundamental rights contained within the quasi-constitutional statute.[87] Helis describes this aspect of primacy as similar to the 'weak-form' model of constitutionalism and judicial review in some other Commonwealth jurisdictions.[88] At the second stage, where a conflict cannot be resolved, the ordinary statute is inoperable to the extent of the inconsistency.[89] The two-stage test was developed pursuant to the *Canadian Bill of Rights*.[90] The Supreme Court of Canada has applied this test to the statutory human rights codes (which are equivalent to Australian anti-discrimination legislation) since its decision in *Insurance Corporation of British Columbia v Heerspink*.[91] This rule applies regardless of whether the statutory human rights codes have an explicit primacy clause or not.[92]

As Chen has recognised, in the context of statutory interpretation more generally, the commentary and Australian jurisprudence recognise that the rule of implied repeal is significantly limited.[93] It is limited because courts start from the proposition that statutes do not contradict each other. Thus, courts seek to apply a principle of harmonious construction so that both statutes can continue to operate unimpeded.[94] Nevertheless, these principles of interpretation with respect to inconsistency and the limitation of implied repeal are evident in the Australian case law on the *RDA*.

In interactions or inconsistencies between the *RDA* and state legislation, due to s 109 of the *Australian Constitution*, the supremacy of the *RDA* over state legislation is clear.[95] While other Commonwealth discrimination Acts can render state schemes that are discriminatory on the basis of sex, disability or age inoperable to the extent of their inconsistency with Commonwealth legislation, the incorporation of s 10 of the *RDA* provides a particularly compelling force in this respect. Section 10 applies to both state and federal laws. The effect of s 10 with respect to state legislation, as was first articulated by Mason J in *Gerhardy v Brown*, is two-fold.[96] Section 10 can invalidate state laws that would otherwise operate in a discriminatory manner on the basis of race.[97] Alternatively, where a state law fails to make a right universal, s 10 confers that right on to persons of a particular race.[98]

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85 *Insurance Corporation of British Columbia v Heerspink* [1982] 2 SCR 145, 157–8 (Lamer CJ) ('*Heerspink*').
86 Helis (n 7) 91–2.
87 Ibid 92–3.
88 Ibid.
89 Ibid 94.
90 *Canadian Bill of Rights* (n 18). See also *R v Drybones* [1970] SCR 282, 305.
91 *Heerspink* (n 85) 157–8 (Lamer CJ).
92 Helis (n 7) 91–2.
93 Bruce Chen, 'The Principle of Legality: Protecting Statutory Rights from Statutory Infringement?' (2019) 41(1) *Sydney Law Review* 73, 89.
94 Ibid.
95 Williams and Reynolds (n 3) 243. See also *Viskauskas v Niland* (1983) 153 CLR 280 ('*Viskauskas*'); *University of Wollongong v Metwally* (1983) 158 CLR 447 ('*Metwally*').
96 *Gerhardy* (n 70) 98–9.
97 Ibid 98.
98 Ibid. See also *Ward* (n 71) 99–100 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

Mason J's interpretation of the effect and application of s 10 was later accepted by a majority of the High Court in *Western Australia v Ward*[99] and in the judgments of French CJ, Hayne J and Bell J in *Maloney v The Queen*.[100]

Further, while in the Commonwealth context the *RDA* cannot override other Commonwealth legislation, the Full Court of the Federal Court of Australia recognised in *Vanstone v Clarke* the need to interpret other Commonwealth legislation consistently with the terms of the *RDA*.[101] In particular, Commonwealth legislation is to be interpreted consistently with the terms of s 10 to ensure harmonious operation.[102] Despite this, the case law demonstrates limited success for claimants seeking to challenge both state and Commonwealth legislation on the basis of inconsistency with s 10 of the *RDA*. With respect to Commonwealth legislation that is potentially inconsistent with the *RDA*, while such an argument has been raised in 11 cases,[103] there is only one decision in which the inconsistency argument was successful: *Shi v Minister for Immigration and Citizenship*.[104]

The focus in *Shi* was s 499(1) of the *Migration Act 1958* (Cth).[105] Section 499(1) empowered the Minister to give directions as to how to exercise the discretion to cancel a visa pursuant to s 501. In one of these directions, 'Direction No 401', a delegate was instructed to give favourable consideration to 'ties and linkages' to Australia.[106] In reviewing and approving the decision to cancel the appellant's visa, the tribunal member focused considerable attention on the fact that 'a large part of his upbringing and character formation was in China'.[107] Perram J concluded that such a determination could not be made pursuant to s 499(1) of the *Migration Act 1958* (Cth) because it was inconsistent with the terms of s 10 of the *RDA*. Consequently, the power granted to the Minister pursuant to s 499(1) had to be interpreted consistently with s 10 of the *RDA*, limiting the scope of operation s 499(1).[108] Interpretation of s 499(1) consistent with the *RDA* was justified on the basis that 'it would require express words to convey an intention that a general power … authorised the repository to repeal or amend Parliament's own enactments'.[109]

One challenge for potential claimants has been that where there is potential inconsistency between different federal statutes, the legislature can choose to

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99 *Ward* (n 71) 99 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

100 *Maloney v The Queen* (2013) 252 CLR 168, 179 (French CJ) 200–1 (Hayne J), 244 (Bell J) ('*Maloney*').

101 *Vanstone v Clarke* (2005) 147 FCR 299, 352–4 (Weinberg J).

102 Ibid.

103 *Vanstone v Clark* (n 101); *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202; *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311; *Department of Veterans' Affairs v P* (1998) 79 FCR 594; *Yildiz v Minister for Immigration and Ethnic Affairs* (1982) 70 FLR 105; *Sremcevic v Gurry* (1994) 51 FCR 194; *Trau v Repatriation Commission* (1998) 88 FCR 349; *Shi v Minister for Immigration and Citizenship* (2011) 123 ALD 46 ('*Shi*'); *Melkman v Federal Commissioner of Taxation* (1988) 20 FCR 331; *Sahak v Minister for Immigration and Multicultural Affairs* (2002) 123 FCR 514; *Naen v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 216.

104 *Shi* (n 103).

105 Ibid.

106 Ibid 47 [5].

107 Ibid 47 [6].

108 Ibid 50 [20]–[21].

109 Ibid 50 [20], quoting *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207, 212 (Brennan CJ and Dawson J).

exclude the operation of the *RDA* with express and clear legislative language, rather than potentially risk a challenge to the validity of the legislation.[110] A well-known example of this type of legislative action was taken with respect to the intervention in the Northern Territory ('NT'). The Commonwealth declared that the package of measures adopted with respect to the intervention were 'special measures' pursuant to s 8 of the *RDA* and explicitly excluded the operation of pt II of the *RDA*.[111] Pt II of the *RDA* prohibits unlawful discrimination. The possibility of such an express exclusion of operability clearly limits the capacity of the *RDA* to facilitate widespread social change.[112] However, the fact that the legislature considered there was a need to exclude pt II of the *RDA* points to a degree of 'specialness' that the *RDA* nevertheless holds. Without such 'specialness', it is difficult to understand why the traditional rules of statutory interpretation would not apply; namely, that the older and more general statute, the *RDA*, would be read-down to ensure consistency with the newer and more specific legislation pertaining to the intervention.

In the context of state legislation, there have been some important and highly significant successful challenges to state legislation. The *RDA* has been crucial in limiting the curtailment of native title rights in cases such as *Mabo v Queensland (No 1)*,[113] the *Second Native Title Act Case*,[114] *Ward*,[115] *Jango v Northern Territory*,[116] and *James v Western Australia*.[117] However, the *RDA*'s effectiveness in other spaces has been significantly limited. Outside the area of native title, courts have only accepted claims of inconsistency where state discrimination laws were more progressive or expansive than the *RDA* in protecting non-discrimination rights.[118]

Though numerous claims have attempted to nullify potentially discriminatory state-based laws, few have been successful.[119] As Williams and Reynolds have identified, there are three reasons such claims have not succeeded.[120] First, claims failed where the court concluded that the state legislation does not discriminate on the basis of race.[121] Second, claims failed where they could not demonstrate that a

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110 Jonathon Hunyor, 'Is it Time to Re-Think Special Measures under the *Racial Discrimination Act*? The Case of the Northern Territory Intervention' (2009) 14(2) *Australian Journal of Human Rights* 39, 61.

111 *Northern Territory National Emergency Response Act 2007* (Cth) ss 132(1)–(2); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) ss 4(2)–(5); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) ss 4(1)–(2).

112 A point that has been made before, see Hunyor (n 110); Lino 'Thinking outside the *Constitution*' (n 4).

113 *Mabo v Queensland (No 1)* (1988) 166 CLR 186 ('*Mabo (No 1)*').

114 *Western Australia v Commonwealth* (1995) 183 CLR 373 ('*Second Native Title Act Case*').

115 *Ward* (n 71).

116 *Jango v Northern Territory* (2006) 152 FCR 150.

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

118 See, eg, *Viskauskas* (n 95); *Metwally* (n 95); *Central Northern Adelaide Health Service v Atkinson* (2008) 103 SASR 89.

119 Williams and Reynolds (n 3) 243.

120 Ibid 248.

121 Ibid. The example given for this reason for failure was *Aurukun Shire Council v Chief Executive Officer, Office of Liquor, Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 ('*Aurukun*'). I would suggest that also with this category is *Bropho v Western Australia* (2008) 169 FCR 59.

'fundamental right or freedom' had been infringed.[122] Third, claims failed where courts accepted that though a provision may operate in a discriminatory manner, it is nevertheless justified and has been 'saved' as a special measure.[123] Though these special interpretive rules with respect to the limitation of the principle of implied repeal and the primacy of the 'constitutional' statute can apply to the *RDA*, there is nevertheless still a lack of success for claimants when making these arguments.

### D *Can the Perceived 'Specialness' of the* Racial Discrimination Act 1975 *(Cth) be Considered 'Constitutional'?*

Part of the difficulty in determining if the *RDA* is 'constitutional' in a definitional sense is the malleability of many of the definitions provided. As Feldman identified, the problem with the definition provided in *Thoburn* is that the list of 'fundamental' rights is not a closed list, allowing for a degree of flexibility as to what can be added to such a list.[124] Similarly, political and legal struggles can emerge in a wide variety of areas of regulation — thus, again, on its own, such struggles would appear to be insufficient to denote any kind of special status. Further, in Australia, the nature of federalism necessarily means that Commonwealth statutes, provided they have a sufficient constitutional head of power, may intrude into areas of state responsibility. If one only considered the impact on legislation-making powers, one could conclude that a wide array of statutes are 'constitutional'. Consequently, applying any of these definitions in the Australian context would appear to be insufficient on their own. Instead, it would seem that an amalgamation of these factors — the normative content, the symbolic and political nature of the legislation, and its role in regulating the lawmaking process — would be more consistent with the Australian experience.

The degree of flexibility attached to each possible definition of 'constitutional' legislation, as well as their specific application to the Australian context, ultimately means that any 'constitutional' force of the *RDA* comes from a combination of factors. These include the constraining influence of Commonwealth law on state legislation and the administration of public services by state governments, as well as the statute's subject matter and its importance in the public consciousness. On their own, these identifying features do not provide significant 'constitutional' force. Instead, it is the combination of these factors that justify the inclusion of discrimination legislation as 'constitutional'.

## III The Interpretation of 'Constitutional' Statutes and the *Racial Discrimination Act 1975* (Cth)

In other jurisdictions that recognise constitutional statutes, there is some divergence as to whether the constitutional status of a statute influences the interpretation of its terms. In this section, I briefly outline the different approaches adopted in Canada

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122 Williams and Reynolds (n 3) 248–9. The example given for the reason for failure was also *Aurukun* (n 121). I suggest that this category also includes *Morton v Queensland Police Service* (2010) 240 FLR 269.

123 Williams and Reynolds (n 3) 248. The authors utilise the example of *Maloney* (n 100) as an example of this kind of case. Similarly, *Gerhardy* (n 70) fits within this category.

124 Feldman, 'The Nature and Significance of Constitutional Legislation' (n 24) 346.

and the UK before considering the interpretive approach adopted in Australia in the context of the *RDA*. I focus particularly on the idea that constitutional statutes should be interpreted in a fashion that is 'broad, liberal and purposive'.[125] The above section highlighted that utilising a variety of definitions, the *RDA* can be considered 'constitutional'. The legislature and the broader community appear to perceive the *RDA* to have a special status and, at times, the *RDA*'s terms have been applied where there is inconsistency between statutes, not only due to inconsistency within s 109 of the *Australian Constitution*, but also where there is inconsistency between Commonwealth statutes. However, my analysis of s 10 jurisprudence in this section will demonstrate that though the interpretation of the *RDA* could be considered 'broad', in contrast to other jurisdictions it is not necessarily liberal or purposive.

## A *Principles of Interpretation and 'Constitutional' Statutes*

In Canada, Helis has observed that a defining characteristic of Canadian quasi-constitutional law is the manner in which the substantive provisions are interpreted.[126] The Supreme Court of Canada interprets 'constitutional' legislation differently from other forms of legislation because 'it is inappropriate to rely solely on a strictly grammatical analysis, particularly with respect to the interpretation of legislation which is constitutional or quasi-constitutional in nature'.[127]

This has resulted in an interpretive style which is 'broad, liberal and purposive' in nature and in practice significantly expands the rights that are contained in quasi-constitutional legislation.[128] Where the Canadian Supreme Court has accepted that legislation is quasi-constitutional, this has led to protective provisions being interpreted broadly, in keeping with the statute's rights-protective quality.[129] Conversely, the defences and justifications are read down to narrow their possible effect.[130]

The importance of a broad, liberal and purposive interpretation on the reach and effect of quasi-constitutional statutes is demonstrated through a contrast between the effectiveness of the *Canadian Bill of Rights* and the human rights codes.[131] Due to the restrictive nature of the interpretation of the *Canadian Bill of Rights*, it was relatively weak in securing any significant change because it was rare that other statutes were inconsistent with its provisions.[132] In contrast, the broad, liberal and purposive approach to interpretation of the human rights codes, combined with primacy of the human rights codes over other statutes, have allowed for an expansive protection of human rights.[133]

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125 Helis (n 7) 3.
126 Ibid 17
127 *Quebec (Commission des Droits de la Personne et des Droits de la Jeunesse) v Montréal (City)* [2000] 1 SCR 665, 684 [30] (citations omitted).
128 Helis (n 7) 17.
129 Ibid 23.
130 Ibid 78.
131 Ibid 230–1.
132 Ibid 215.
133 Ibid 237.

While Canadian human rights statutes are statutes with horizontal effect and a focus on discrimination in employment and the provision of goods and services, their reach is expansive, particularly in the context of government services.[134] Human rights statutes were designated by the Canadian Supreme Court as quasi-constitutional legislation in the 1980s.[135] The effect of this on the interpretation of the non-discrimination rights contained in the legislation has been significant. As Vizkelety has articulated regarding the expanded scope of statutory discrimination law:

> Interestingly, the breakthrough has come as a result of judicial, not legislative, intervention ... As for the courts, there has been an ever-growing tendency especially at the higher levels, to recognize the special nature of human rights legislation. Fortified, perhaps by their heightened responsibilities under the *Canadian Charter of Rights and Freedoms*, courts have shown that they are now prepared to look beyond the narrow and literal constructions of anti-discrimination laws and to give effect to their purpose. It is on the basis of a liberal approach such as this that courts have recognized the effects of the concept of discrimination.[136]

In practice, this has meant that it was through judicial, rather the legislative, intervention that Canada's human rights regime began to incorporate progressive concepts. The Supreme Court expanded the definition of discrimination to include indirect discrimination (where a provision or practice may be non-discriminatory on its face, but is discriminatory in its effect)[137] and to require reasonable adjustments for all grounds of discrimination.[138] In contrast, the Canadian courts have adopted a narrow interpretation of 'bona fide' occupational requirements (in the case of employment) and 'bona fide and reasonable' requirements (in the case of other areas of operation).[139]

In contrast to the Canadian position, in the UK, there is no 'special' interpretive style adopted with respect to 'constitutional' statutes. As the UK Supreme Court explained in *Imperial Tobacco Ltd v Lord Advocate (Scotland)*, the *Scotland Act 1998* (Scot) was to be interpreted in the same way as one would interpret any other UK statute.[140] This was reaffirmed by Lord Hope in *Attorney General v National Assembly for Wales Commission* with whom the other justices agreed.[141] However, in his judgment, Lord Hope acknowledged that:

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134 Mummé (n 84) 106.

135 *Heerspink* (n 85) 157–8 (Lamer CJ).

136 Béatrice Vizkelety, *Proving Discrimination in Canada* (Carswell, 1987) 237–8.

137 *Ontario Human Rights Commission v Simpsons-Sears* [1985] 2 SCR 536.

138 *Bhinder v CN* [1985] 2 SCR 561.

139 *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3; *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868. It should be noted here that the concept of discrimination is unified in Canada (with no distinction between direct and indirect discrimination). Thus, in all claims Canadian courts consider whether the discrimination is justified — as compared to Australian claims, for which the reasonableness is only assessed in indirect claims.

140 *Imperial Tobacco Ltd v Lord Advocate (Scotland)* 2013 SCLR 121.

141 *Attorney General v National Assembly for Wales Commission* [2013] 1 AC 792. Prior to this decision, it was thought that 'constitutional' legislation was to be interpreted 'generously' and 'purposively' due to the decision in *Robinson v Secretary of State for Northern Ireland* [2002] NI 390. See also Stephen J Dimelow, 'The Interpretation of "Constitutional" Statutes' (2013) 129 (October) *Law Quarterly Review* 498, 498; David Feldman, 'Statutory Interpretation and Constitutional Legislation' (n 62) 497.

> The rules to which the court must apply in order to give effect to it are those laid down by the statute, and the statute must be interpreted like any other statute. But the purpose of the Act has informed the statutory language, and it is proper to have regard to it if help is needed as to what the words mean.[142]

Drawing on this statement, Feldman argues that while the interpretation of 'constitutional' statutes is no different from 'ordinary' statutes, by their very nature, the purposes of 'constitutional' statutes are highly general.[143] They are general in nature because they need to apply in a variety of circumstances and introduce general rules. Consequently, such statutes must be understood with a high level of generality and refer to the broader overarching values that such a statute embodies.[144] Thus, though in the UK context, the process of interpretation is not special or different, it nevertheless requires judges to draw on more general and possibly 'aspirational' values in interpreting constitutional legislation.[145]

## B *The Interpretation of s 10 of the* Racial Discrimination Act 1975 *(Cth)*

While Australian courts have been willing to adopt special interpretive rules for limitation of the principle of implied repeal and to give the *RDA* primacy in some cases with respect to both state and Commonwealth legislation, as highlighted in Part II of this article, few cases have been successful. In most cases, courts have concluded that the legislation is not inconsistent with the *RDA*. This is, in part, due to a failure to give the *RDA* a broad, liberal and purposive interpretation. The broader implication of these failures may be that 'constitutional' statutes are only as useful as the interpretation of their provisions permits. It is this interpretive effect, in bringing about a broad, liberal and purposive interpretation, that the *RDA* appears to be lacking.

As the analysis below will demonstrate, though judges extra-curially have emphasised the 'special' nature of the *RDA*, this 'special' status has had little effect in giving effective meaning to the *RDA*'s key terms. In particular, there is a lack of clarity surrounding the meaning of where a law disadvantages or treats persons unequally on the basis of race.[146] In the context of the interpretation of discrimination legislation in Australia more generally, the High Court has accepted that in construing human rights legislation, the courts have a special responsibility to take account of, and give effect to, the statutory purpose.[147] This has been articulated as a 'fair, large and liberal' interpretation.[148] This articulation seems similar to the broad, liberal and purposive approach referred to above in Part III(A). The problem in the interpretation of s 10 is not that it is necessarily narrow, but that though the interpretation is broad, this breadth comes at the expense of any depth of substance

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142 *Attorney General v National Assembly for Wales Commission* (n 141) 815 [80] (Lord Hope DPSC).
143 Feldman, 'Statutory Interpretation and Constitutional Legislation' (n 62) 496–7.
144 Ibid.
145 Ibid.
146 *Gerhardy* (n 70) 83 (Gibbs CJ).
147 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 372 (Brennan J), 394 (Dawson and Toohey JJ) and 407 (McHugh J).
148 D Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2014) 314–15, quoting *IW v City of Perth* (1997) 191 CLR 1, 11 (Brennan CJ and McHugh J).

or purpose to its terms. The High Court first examined s 10 of the *RDA* in *Gerhardy*. In that case, the Court considered whether the *Pitjantjatjara Land Rights Act 1981* (SA) was racially discriminatory where it made it an offence for a person who was not a Pitjantjatjara to enter land without the permission of Anangu Pitjantjatjara.[149] The Court concluded that the Act did create a distinction based on race,[150] but was nevertheless 'saved' as a special measure.[151] Sadurski criticised the judgments in *Gerhardy* for failing to appreciate the differences between a distinction based on race and racial discrimination.[152] He argued the judgments in *Gerhardy*, for the most part, only engaged with the concept of discrimination in a cursory or simplistic manner.[153] This is a failure that has continued, and been exacerbated, since that time. It is in the failure to determine the link between a distinction based on race and discrimination and equality that demonstrates the problems of an interpretation that is neither liberal nor purposive.

### *A Law which Disadvantages Persons based on Race*

A key question when determining whether a law is inconsistent with s 10 is whether it creates a 'distinction on the basis of race' or whether a law disadvantages or creates inequality on the basis of race.[154] In interpreting s 10, the High Court has adopted an interpretation marked by a high level of generality. Since the early 2000s, the case law has demonstrated a reluctance to link the concept of a distinction or disadvantage to the twin notion of discrimination or broader values such as equality.[155] The consequence of this generality is that there is a lack of analysis or exploration of what kinds of behaviours, practices and laws constitute a distinction on the basis of race, especially when such a distinction involves an intermingling of various aspects of disadvantage.

To constitute a distinction or disadvantage pursuant to s 10 of the *RDA*, a complainant must demonstrate that a law distinguishes on the basis of race or ethnic origin. In determining what constitutes a distinction, or creates a disadvantage, or treats persons unequally on the basis of race the High Court in *Gerhardy*,[156] *Mabo (No 1)*,[157] *Ward*,[158] and *Maloney*[159] accepted that laws that conflict with the right contained in s 10 are not simply laws that have a purpose of nullifying a person's rights and freedoms on the basis of race, but also include laws that have the effect of distinguishing on the basis of race.

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149 *Gerhardy* (n 70) 75–8 (Gibbs CJ).
150 Ibid 82–3 (Gibbs CJ), 100–1 (Mason J), 122–3 (Brennan J).
151 Ibid 86–9 (Gibbs CJ), 103–6 (Mason J), 106–8 (Muprhy J), 108–14 (Wilson J), 114–43 (Brennan J), 143–54 (Deane J) and 154–62 (Dawson J).
152 Wojciech Sadurski, '*Gerhardy v Brown* v the Concept of Discrimination: Reflections on the Landmark Case that Wasn't' (1986) 11(1) *Sydney Law Review* 5, 27.
153 Ibid 28–9.
154 *Ward* (n 71) 103 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
155 See *Ward* (n 71) 99 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Maloney* (n 100) 200 (Hayne J).
156 *Gerhardy* (n 70) 99 (Mason J).
157 *Mabo (No 1)* (n 113) 230 (Deane J).
158 *Ward* (n 71) 99 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
159 *Maloney* (n 100) 179 (French CJ), 206 (Hayne J), 244 (Bell J), 284 (Gageler J).

The acceptance that s 10 is focused on the effect, rather than the purpose, of the law in question has meant that s 10 can target legislation that creates distinctions *in effect*, as well as explicit distinctions in the text of the legislation on the basis of race.[160] For example, the High Court decision of *Maloney* considered whether liquor restrictions on Palm Island were racially discriminatory though the regulations did not explicitly target Indigenous people. Five justices of the High Court accepted that though the impugned provisions of the *Liquor Act 1992* (Qld) and its associated regulations did not discriminate on their face, the effect of such regulations on the community of Palm Island, where the residents were overwhelmingly Indigenous, had the effect of impairing a person's fundamental rights and freedoms on the basis of race.[161]

What is noticeable in the judgments on the right contained in s 10 is that the High Court appears resistant to the interpretation or labelling of s 10 as concerned with discrimination on the basis of race.[162] In *Ward*, a case concerning the extinguishment of native title, the majority accepted that s 10 was not concerned with *discrimination* per se, but any distinctions made on the basis of race that could impair fundamental rights and freedoms.[163] In coming to this conclusion, the majority in *Ward* emphasised that s 10 does not use the word 'discriminatory' or any cognate expressions.[164] Later in the same judgment, the majority distinguished s 10 from other Australian anti-discrimination laws, emphasising that unlike other anti-discrimination law, race is not an irrelevant characteristic for the purpose of the *RDA*, but is something that is required to be considered in determining the purpose or effect of the law in question.[165]

These themes are present in Hayne J's judgment in *Maloney*. In *Maloney*, Hayne J emphasised that the subject of s 10 is not 'discrimination',[166] though his Honour noted that the term 'discrimination' is utilised throughout the authorities in which s 10 is discussed.[167] As becomes apparent later in Hayne J's judgment, his Honour's concern with the utilisation of terminology associated with discrimination and anti-discrimination law was that such association would 'inadvertently narrow or confine the operation of s 10' of the *RDA*.[168] This concern appears to be based on an understanding of discrimination law as only being applicable to distinctions that are disproportional or unjustifiable, leaving untouched a range of laws that nevertheless distinguish on the basis of race.[169]

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160 Beth Gaze, 'What Vision of Equality and Racial Discrimination Law Does *Maloney v R* Reveal?' (Paper presented at the Roundtable Making Sense of *Maloney v R* (2013), Melbourne Law School, The University of Melbourne, 31 October 2014).

161 *Maloney* (n 100) 191 (French CJ), 206 (Hayne J), 243 (Bell J) and 302 (Gageler J). On this issue Crennan J agreed with Hayne J at 213.

162 *Ward* (n 71) 99 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

163 Ibid.

164 Ibid.

165 Ibid 105 (Gleeson, Gaudron, Gummow and Hayne JJ).

166 *Maloney* (n 100) 200–2 (Hayne J). For discussion, see Rachel Gear, 'Commentary: Alcohol Restrictions and Indigenous Australians: The Social and Policy Implications of *Maloney v The Queen*' (2014–2015) 21(1) *James Cook University Law Review* 41, 47.

167 *Maloney* (n 100) 200. Though, noticeably there is no authority cited for this statement.

168 Ibid 201–2.

169 Ibid.

These concerns, as to the possible limitations of the concept of discrimination, are not unfounded. There are numerous critiques that other anti-discrimination legislation's complex, artificial and obscure language has unnecessarily stymied the development of non-discrimination principles in Australia.[170] But, the approach to s 10 illustrates the opposite problem. While its broad terms allow for a variety of different kinds of legislation to potentially fall foul of s 10 where there may be a difference in effect based on race, there is no indication in the case law as to what constitutes a distinction *in effect*. Courts have accepted that laws that entirely exclude persons from exercising a right or freedom, or laws that absolutely extinguish a right or freedom for persons based on race are captured by the terms of s 10.[171] In *Maloney*, a majority of justices were willing to accept the liquor regulations created a distinction where the vast majority of the persons affected were Indigenous due to the geographical location of the order.[172] However, where the distinction occurs due to race or ethnic origins *combined* with stereotypes and other facets of socio-economic disadvantage predicated on prolonged and systemic issues of racial injustice, the case law struggles to apply the broad principles of distinction to capture the effect of such laws.

In *Aurukun Shire Council v Chief Executive Officer, Office of Liquor Gaming and Racing in the Department of Treasury*, Keane JA rejected an argument that s 10 could be applied in a manner that was cognisant and reflective of economic and geographical circumstances.[173] *Aurukun* involved the refusal to issue liquor licenses to local councils in circumstances in which the appellant councils operated the only taverns in their respective local areas.[174] Keane JA concluded that while s 10 was concerned with the practical effect of the law, rather than formal expression, the practical effect of the impugned provision was that no resident in Queensland was able to acquire alcohol from their local government. What the appellants were complaining of, according to Keane JA, was not a distinction based on 'race', but a 'consequence of the different geographical and socio-economic conditions which obtain, and which have obtained for many years, in different areas of the State'.[175] As such, his Honour concluded that the purpose of s 10 was not to remedy the 'serious level of relative socio-economic disadvantage which affects the appellants' communities'.[176]

A similar failure to consider in any detail the interplay between racial discrimination and socio-economic disadvantage is also present in the decisions from the NT Supreme Court in *R v Woods*[177] and Court of Appeal in *Munkara v Bencsevich*.[178] In *Woods*, the Full Court of the NT Supreme Court considered whether the *Juries Act 1962* (NT) was inconsistent with ss 9 or 10 of the *RDA*. The

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170 See, eg, the critiques made in *IW v City of Perth* (n 148) 12 (Brennan CJ and McHugh J), 37 (Gummow J).

171 See *Mabo (No 1)* (n 113).

172 *Maloney* (n 100) 191 (French CJ) 206 (Hayne J, Crennan J agreeing at 213), 244 (Bell J), 302 (Gageler J).

173 *Aurukun* (n 121) 73–4 (Keane JA).

174 Ibid 4–5, 7.

175 Ibid 75 (Keane JA).

176 Ibid 76 (Keane JA).

177 *R v Woods* (2010) 246 FLR 4 ('*Woods*').

178 *Munkara v Bencsevich* [2018] NTCA 4 ('*Munkara*').

appellants argued that the Act was inconsistent with the *RDA* on the basis that it disqualified from jury service persons in custody within the previous seven years.[179] The appellants argued that this disqualification disproportionately affected Indigenous Australians.[180] As 83% of the NT prison population was Indigenous, the appellants argued that such a preclusion from jury service created a distinction based on race.[181] The Full Court of the NT Supreme Court rejected the appellants' arguments on the basis that such disqualification of Indigenous jurors would, in any event, not impair the appellants' right to a fair trial.[182] However, the Court also rejected the argument that there was a distinction based on race in any event.[183] This was on the basis that there was no direct evidence as to how many persons in any single case would be captured by such a preclusion, and evidence based on statistics and 'usual experience' did not support such an inference.[184] As such, a 'distinction' based on race could not be supported by the evidence.[185]

In *Munkara*, the appellant challenged provisions of the *Alcohol Protection Orders Act 2013* (NT) on the basis that the practical operation of such provisions meant that Indigenous persons did not enjoy the right to freedom of movement, access to public places, privacy and equal treatment to the same extent as persons of other races.[186] The Act allowed police to issue alcohol protection orders to persons who had committed offences while affected by alcohol.[187] The appellant argued that the impugned provisions created a practical distinction on the basis of race.[188] This was on the basis that, as accepted at first instance, the persons who came 'within the net' of the Act were overwhelmingly Indigenous.[189] It was accepted that Indigenous Northern Territorians were 'overwhelmingly more likely to be arrested, summonsed or served with a notice to appear in court in respect of a qualifying offence'.[190] The primary judge accepted that 86% of the protection orders issued had been issued to Indigenous persons.[191] However, the primary judge and the NT Court of Appeal rejected that the statistical evidence of the practical effect of the law demonstrated a distinction on the basis of race.[192] The Court of Appeal concluded that the distinction in effect was not based on race, but on the consequences of behaviour (the committing of a qualifying offence).[193] The Court of Appeal labelled the arguments made by the appellants regarding the interplay between race, disadvantage, alcohol and interaction with the police as 'simplistic' and 'offensive'.[194]

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179 *Woods* (n 177) 10.
180 Ibid.
181 Ibid 9.
182 Ibid 20.
183 Ibid 19.
184 Ibid 19–20.
185 Ibid 20.
186 *Munkara* (n 178) [9] (Kelly J).
187 Ibid [3] (Kelly J).
188 Ibid [12] (Kelly J).
189 Ibid [95]–[96] (Blokland J).
190 Ibid.
191 Ibid.
192 Ibid [16] (Kelly J), [96], [99] (Blokland J).
193 Ibid [99]–[101] (Blokland J).
194 Ibid [102] (Blokland J).

These decisions give rise to two interrelated problems: one evidentiary and one conceptual. The evidentiary problem is that though judicial decisions relating to s 10 acknowledge that the law is concerned with the practical effect of the challenged provisions, there is little guidance provided as to what kind of evidence a claimant can provide to demonstrate a distinction *in effect* that is singly concerned with race. From *Woods* and *Munkara*, it appears that evidence of a statistical disparity in effect is not sufficient to demonstrate a practical distinction based on race.[195] Nor, drawing on the reasoning of the majority of *Aurukun*, does a distinction exist where it is also justified and explained on the basis socio-economic disadvantage.[196] Instead, these decisions seem to indicate that where a provision applies equally to all persons across a jurisdiction, the distinction must be related to something 'directly' related to race without a consideration of disadvantage to which historical and systemic racial injustice has contributed.[197] The ultimate outcome of such an approach to evidence is that the interpretation of s 10 to include effect is impotent given that effect will invariably have several causes many of which relate indirectly to race.[198] This evidentiary problem is linked to a broader conceptual issue with the constructed tests for demonstrating a breach of s 10. The test developed to determine inconsistency with s 10 of the *RDA* is so broad that it is difficult to identify what distinctions are captured by s 10 and why such distinctions are wrongful and should be prohibited.

## IV The Interpretation of the *Racial Discrimination Act 1975* (Cth) within the Broader Constitutional Culture

The criticism that the interpretation of s 10 makes it ineffectual in preventing or limiting discrimination is consistent with academic criticisms about anti-discrimination law generally in Australia. Much of the academic commentary on the interpretation of discrimination law by the judiciary, in Australia and elsewhere, is often critical and focuses on the courts' failure to give the terms of discrimination law a broad and substantive meaning.[199] However, the interpretation of s 10 is different from the problems associated with other aspects of anti-discrimination law in Australia. In this section I will articulate those differences and place the interpretation of s 10 within Australia's broader constitutional culture and interpretation. I will demonstrate that though the interpretation of s 10 is unusual when compared with its foreign equivalents and other aspects of Australian

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195 *Woods* (n 177) 19 (Full Court); *Munkara* (n 178) [102] (Blokland J).

196 *Aurukun* (n 121) 76 (Keane JA). See also Fiona Campbell, 'Deficit Discourse — The 'Regime of Truth' preceding the Cape York Welfare Reform' (2019) 28(3) *Griffith Law Review* 303, 313.

197 *Munkara* (n 178) [96] (Blokland J); *Woods* (n 177) 19 (The Court). For a discussion of the interpretation of discrimination law with an eye to systemic and historical injustice, see: Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 44–6 ('*The Liberal Promise*'); Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 38.

198 *Maloney* (n 100) 206 (Hayne J).

199 See, eg, Thornton, *The Liberal Promise* (n 197) 212–3; Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325 ('Context and Interpretation in Anti-Discrimination Law'); Rees, Rice and Allen (n 72) 26–7.

anti-discrimination law, it is consistent with the broader approach to values in Australian constitutional law.

Reasons attributed to the judiciary's failure to develop a more substantive account of discrimination law include the prescriptive legislative text,[200] and the joint failure of the legislature and the judiciary to develop a clear account of the aims and purposes of discrimination law.[201] The prescriptive nature of the legislative text has been raised in both the commentary and by the High Court as a rationale for the limited manner in which anti-discrimination statutes have been interpreted. In *IW v City of Perth*, Brennan CJ and McHugh J acknowledged the need to give the legislation a broad interpretation pursuant to both general rules of statutory interpretation and the requirements of the *Acts Interpretation Act 1984* (WA), but cautioned that

> [g]iven the artificial definitions of discrimination in the Act and the restricted scope of their application, the court or tribunal should not approach the task of construction with a presumption that conduct which is discriminatory in its ordinary meaning is prohibited by the Act. The Act is not a comprehensive anti-discrimination or equal opportunity statute. The legislature of Western Australia, like other legislatures in Australia and the United Kingdom has avoided use of general definitions of discrimination.[202]

Considering the interpretation of other discrimination Acts such as the *Sex Discrimination Act 1984* (Cth), Smith suggests a reason that a more substantive or progressive interpretation of discrimination has not emerged is because of the prescriptive and ultimately restrictive nature of the legislative text.[203] This contrasts with the position in Canada, in which the more 'open' nature of the statutory text grants the judiciary a more active and possibly creative role in the construction of terms such as 'discrimination' or 'distinction'. For example, the *Canadian Human Rights Act* does not create a distinction between 'direct' and 'indirect' discrimination in the manner of most Australian discrimination law statutes.[204] Instead, the *Canadian Human Rights Act* outlines the characteristics protected under the Act and prohibits discrimination in a variety of areas of public life, but the term 'discrimination' itself is undefined.[205] Smith argues that it is this more open language of the Canadian Acts that allows the judiciary a greater role in the interpretation and development of discrimination law.[206] While this argument may hold for the other Commonwealth Acts and for other, more prescriptive provisions of the *RDA*, it does not appear to explain the judicial approach with respect to the interpretation of s 10. In contrast to other provisions in Australian anti-discrimination law, s 10 is not prescriptive and its terms are wide and general in nature. Consequently, there is significantly more scope to interpret it in a broad, substantive manner with an eye to

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200 Belinda Smith, 'Rethinking the Sex Discrimination Act' in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 235, 235–6; Rees, Rice and Allen (n 72) 52–3, 88–9.

201 Gaze, 'Context and Interpretation in Anti-Discrimination Law' (n 199) 331–2; Rees, Rice and Allen (n 72) 7.

202 *IW v City of Perth* (n 148) 14.

203 Smith (n 200) 238–9.

204 *Canadian Human Rights Act*, RSC 1985, c H-6, s 3.

205 Ibid.

206 Smith (n 200) 238.

the international conventions that it implements. Nevertheless, a substantive and clear jurisprudence has not been developed.

Another rationale for the limited manner in which discrimination law is often interpreted is due to the notion of a conservative judicial culture.[207] This culture makes judges reluctant to interpret progressive legislation in a way that extends and expands on its progressive aims.[208] To better understand the impact of that conservative judicial culture and its association with a broader constitutional culture, it may again be useful to contrast the interpretation of the *RDA* and its perceived specialness with the interpretation of constitutional statutes in comparable jurisdictions. As highlighted in Part I of this article, one justification for determining that a statute is constitutional is that it is fundamental law and draws on constitutional values.[209] This justification has been particularly pertinent in the context of the Canadian human rights codes. In the interpretation of the codes, the Supreme Court of Canada invokes and expands on the constitutional values, in particular, the constitutional value of equality.[210] In the interpretation of s 10, while the ideas of a law providing distinction or disadvantage on the basis of race which impairs fundamental rights and freedoms is interpreted with a high degree of breadth and generality — consistently with constitutional or quasi-constitutional statutes in other jurisdictions,[211] this interpretation is not with an eye to the underlying fundamental aspirations or values behind it. From the s 10 jurisprudence of both the High Court and state and territory courts of appeal, there is a lack of clarity as to the reasons why race-based distinctions are problematic and as to the way in which such distinctions unfairly impact a person's life. It is in the interpretation of the rights contained in the *RDA* where there is a divergence in approach to 'constitutional' statutes. While in both Canada and the UK, 'constitutional' statutes are interpreted with an eye to fundamental constitutional values, this is not apparent in the interpretation of the *RDA*. While the interpretation of s 10 is broad in scope, it lacks a clear or coherent articulation of the underlying purpose of the prohibition contained within it. This lack of coherence is, however, consistent with the interpretive approach taken to values in the Australian constitutional context.

While the *Australian Constitution* does play a role in defining and preserving fundamental values, the role it plays is often presented as 'thin' or 'muted'.[212] Though, over time, the High Court's constitutional jurisdiction has shifted focus and does, to a degree, articulate and enforce fundamental values underlying the *Australian Constitution*, the role those values play is still limited. As Dixon has highlighted, even in the consideration of explicit rights in the *Australian Constitution* such as the right to trial by jury provided by s 80 or freedom of religion in s 116, the High Court has taken a narrow approach to their interpretation without a focus on

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207 Margaret Thornton, 'Disabling Discrimination Legislation: The High Court and Judicial Activism' (2009) 15(1) *Australian Journal of Human Rights* 1, 3 ('Disabling Discrimination Legislation'); Gaze, 'Context and Interpretation in Anti-Discrimination Law' (n 199) 341.

208 Thornton, 'Disabling Discrimination Legislation' (n 207) 21; Gaze, 'Context and Interpretation in Anti-Discrimination Law' (n 199) 341.

209 See above Part II(A).

210 Helis (n 7) 177, 179–80.

211 Ibid 17.

212 Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the *Australian Constitution*' (2016) 14(1) *International Journal of Constitutional Law* 60, 60.

their underlying 'fundamental' nature.[213] In addition, though there is now a greater focus on fundamental values in the *Australian Constitution*, as Roux has commented, this focus has not necessarily led to a greater candour in the legal reasoning process:

> To the extent that those reforms were aimed at introducing greater candor about the role of extralegal values in the judicial reasoning process, they failed. In times of trouble, High Court justices' instinct is still to fall back on a conception of law as a technically exacting discipline capable of generating political neutral answers to controversial questions. To that extent, a version of democratic legalism premised on the denial of law's politicality still holds sway.[214]

This thinness and lack of transparency is apparent when the High Court considers the twin notions of equality and discrimination in the constitutional context. As Simpson has commented with respect to the term 'discrimination' in a constitutional setting, the High Court's jurisprudence is marked by a high degree of generality, and the concept is defined in 'universal' and 'abstract' terms.[215] In that context, such an approach leads to a preference for a test to determine discrimination that provides inadequate guidance when faced with the reality and contours of a non-discrimination question.[216] More broadly, the general approach to questions of values in Australian constitutional law is to view them as a skeleton without an interrogation of their underlying meaning and application.

Utilising values as a skeleton has meant that while the High Court has drawn on overarching values such as equality and non-discrimination to justify conclusions, this has not led to a significant discussion of what such values entail. For example, the value of non-discrimination was utilised in *Mabo v Queensland (No 2)*.[217] Brennan J, in particular, concluded that it was imperative to ensure that the common law was not 'frozen in an age of racial discrimination'.[218] His Honour argued that the courts were giving effect to 'the enduring community value of non-discrimination, that is, the equality of all people before the law'.[219] This value of non-discrimination was described as 'the skeleton of principle, which gives the body of our law its shape and internal consistency'.[220] At times, there has been an attempt to give the values of equality and discrimination more substantive depth, such as in Gaudron J's judgment in *Street v Queensland Bar Association*,[221] or in the dissenting judgments of Deane and Toohey JJ in *Leeth v Commonwealth*.[222] Nevertheless, while equality is still a value underlying Australian constitutionalism,

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213 Rosalind Dixon, 'An Australian (Partial) Bill of Rights' (2016) 14(1) *International Journal of Constitutional Law* 80, 97.

214 Theunis Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge University Press, 2018) 133.

215 Amelia Simpson, 'The High Court's Conception of Discrimination: Origins, Applications and Implications' (2007) 29(2) *Sydney Law Review* 263, 288.

216 Ibid.

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

218 Ibid 42 (Brennan J).

219 Ibid.

220 Ibid 29.

221 *Street v Queensland Bar Association* (1989) 168 CLR 461, 566 (Gaudron J).

222 *Leeth v Commonwealth* (1992) 174 CLR 455, 486–7 (Deane and Toohey JJ) ('*Leeth*').

it remains a skeleton principle without the content necessary for a substantive interpretation of statutory discrimination law.

Brennan J utilised these values to justify the conclusion in *Mabo (No 2)*.[223] But, in *Dietrich v The Queen*, determined less than five months later, his Honour warned of the use of 'contemporary values' in justifying judicial development:

> The contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community. Even if the perception of contemporary values is coloured by the opinions of individual judges, judicial experience in the practical application of legal principles and the coincidence of judicial opinions in appellate courts provide some assurance that those values are correctly perceived. The responsibility for keeping the common law consonant with contemporary values does not mean that the courts have a general power to mould society and its institutions according to judicial perceptions of what is conducive to the attainment of those values.[224]

This resistance to 'mould[ing] society and institutions according to judicial perceptions of what is conducive to the attainment of those values'[225] has come at the expense of articulating the substance of those values. In particular, there is no articulation of what these values require of other branches of government and private parties. Instead, the values of equality and non-discrimination are referenced in the abstract to justify certain conclusions without any engagement with their content.

While the values of equality and non-discrimination are utilised to justify a particular conclusion, the role of the courts in elaborating, articulating or expanding the scope of these values is limited. In the constitutional context, it is possible to interpret the High Court's jurisprudence as demonstrating a wide variation of values on a continuum.[226] The continuum extends from formal to substantive non-discrimination between individuals, as well as demarcating a divide between a formal and substantive commitment to the equality of citizens within the federal compact.[227] But what is understood as substantive in the constitutional context is similar to the approach adopted pursuant to s 10 of the *RDA* outlined above, in that the High Court considers the *effect* of a distinction or a difference, rather than only its legal form.[228] This 'substantive' approach nevertheless still gives little articulation of the underlying rationale for why such distinctions are problematic, nor does the case law provide a clear test or guidance in determining substantive facets or factors of discrimination.

In the main, the High Court's approach to discrimination and equality in the context of constitutional values is simply to acknowledge their existence and the role they play in legal reasoning. But the Court still fails to give these values any depth

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223 *Mabo (No 2)* (n 217) 30 (Brennan J).
224 *Dietrich v The Queen* (1992) 177 CLR 292, 319 (Brennan J).
225 Ibid.
226 Amelia Simpson, 'Equal Treatment and Non-Discrimination' in Rosalind Dixon (ed) *Australian Constitutional Values* (Hart Publishing, 2018) 195, 197.
227 Ibid.
228 Ibid 200.

or meaning. Particularly with respect to the twin values of non-discrimination and equality, even at its most radical, the jurisprudence concludes the possible existence of legal equality in Australian constitutional law without significant interrogation as to its meaning or application.[229] The Australian approach to overarching values as a kind of skeleton structure means that the articulation of what constitute equality fails to answer any of the key questions that the *RDA* grapples with as to its substance and conceptual underpinnings. Instead, equality is simply associated with a notion of fairness.[230]

The interpretation of s 10 of the *RDA* fails to identify key indicia of discrimination because the jurisprudence on s 10 fails to grapple with the values underlying the *RDA* such as discrimination and equality. Understanding the limitations of the interpretation and the substantive effect of the *RDA* is important to assess the utility in strengthening the 'constitutional' force of the *RDA* as has been suggested by Lino.[231] Ultimately, it is not the lack of 'constitutional' force that has led the *RDA* to have a more limited effect than the rights-protecting documents of comparable jurisdictions, but its interpretation. That interpretation is consistent with the interpretation of values more broadly in Australian law. As a consequence, any attempt to strengthen the force of the *RDA* through providing for manner and form provisions is unlikely to change the underlying problems with its interpretation.

# V Conclusion

At the outset of this article, I highlighted that since its passage, the *RDA* had been considered a special piece of legislation. Its specialness stems from the idea that it provides a form of rights protection by prohibiting race discrimination and from its effect on the lawmaking powers of state legislatures. It is these factors, combined with the *RDA*'s stickiness in public culture that gives it an almost constitutional force. While the *RDA* does demonstrate that the legislative process can be harnessed to achieve a degree of recognition of the importance of non-discrimination and equality, the interpretation of the *RDA* equally demonstrates its limitations. While it is understandable to hope that the *RDA* is reflective of an underlying commitment to non-discrimination and equality, to be effective in actually achieving a commitment to racial equality, there needs to be a more rigorous assessment of the effectiveness of the legislative tools currently in use. In order to be effective, those tools must be interpreted with an eye to systemic and historical issues of disadvantage,[232] and a stricter interrogation of executive and legislative action.

In this article, I interrogated whether the *RDA* could be considered a special or 'constitutional' form of legislation. In the public consciousness and by the legislature, the *RDA* has been treated as a form of special legislation. It has been difficult to amend to limit its terms, and Commonwealth legislatures have explicitly

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[229] *Leeth* (n 222) 486–7 (Deane and Toohey JJ). The judgment was described as 'radical' by Kirk: Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25(1) *Melbourne University Law Review* 24, 24.

[230] Chief Justice Allsop, 'Values in Public Law' (2017) 91(2) *Australian Law Journal* 118, 119–20.

[231] Lino, 'Thinking outside the *Constitution*' (n 4) 384.

[232] For discussion, see Fredman (n 197) 26–7.

excluded its operation where other legislation may fall foul of its provisions. Based on a range of definitions, focused on its purpose, form, function and public consciousness, I concluded that the *RDA* could be considered a form of constitutional legislation. This, in turn, has been reflected, at times, in its interaction with other statutes at both a state and federal level, with courts applying limitations on the principle of implied repeal and a derogation from the general principle of *generalia specialibus non derogant* where there has been inconsistency between the *RDA* and other statutes.

However, though this could provide the *RDA* with a strong protective quality, this is stymied by the manner in which the terms of s 10 have been interpreted. such that few other pieces of legislation have been found to be inconsistent with s 10. While the *RDA* has been given a broad interpretation on its terms, this is nevertheless not necessarily to the benefit of vulnerable groups based on race and ethnic origin. Instead, the breadth in interpretation has led to a failure to interrogate the nature of equality and its capacity to challenge and ameliorate underlying systemic racial disadvantage.

Though I do not deny the symbolic importance of legislation such as the *RDA*, unless this symbolism leads to a purposive interpretation of the legislative text, there appears little value in its classification as special or constitutional in the Australian context. There is a danger in the important symbolic effect of the legislation not being reflected in its legal interpretation.[233] The danger is that while the public and legislatures may believe that the *RDA* has significant force, without a change in interpretation the law will continue to be ineffective in creating broader and more substantive change for claimants in race discrimination claims.

[233] I thank an anonymous reviewer for emphasising this final point.