

## Chapter 3

# The Scope and Application of the Charters

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Perhaps the defining characteristic of the two Australian human rights charters – the *Human Rights Act 2004* (ACT) (the ACT Charter) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Victorian Charter) – is their attempt to foster a ‘dialogue’ about rights between the three branches of government.<sup>1</sup> The drafters of both Australian Charters, like their UK<sup>2</sup> and New Zealand<sup>3</sup> counterparts, were particularly concerned with ensuring that elected parliaments, not judges, retain ultimate responsibility for determining the appropriate balance between competing rights, and between rights and public interests.<sup>4</sup> Thus the documents are quite specific about the role that human rights should play in the way each branch performs its functions – more so than human rights instruments in many other jurisdictions have tended to be.<sup>5</sup> The intention was that the Charters should not alter the existing constitutional functions of each branch, but simply give each responsibility within their existing spheres of power for protecting rights.

Due to the desire to maintain the existing constitutional balance, particularly between legislative and judicial power, the effect of the Australian Charters on the role of legislatures is limited and largely procedural. This is not to suggest that the Charters are not capable of having a significant impact on the way legislatures perform their functions, and instilling a culture of rights protection, only that they do not substantially alter the scope or nature of legislative power. Similarly, through a mixture of cautious drafting and judicial interpretation, the Charters have a limited effect on the role and powers of the judiciary in enforcing the protection of human rights by legislatures. However, the effect of the Australian Charters on the powers and

1 A term coined by PW Hogg and AA Bushell, ‘The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* isn’t Such a Bad Thing After All)’ (1997) 35 *Osgoode Hall Law Journal* 75.

2 *Human Rights Act 1998* (UK) (UK HRA).

3 *New Zealand Bill of Rights Act 1990* (NZ).

4 J Debeljak, ‘Parliamentary Sovereignty and Dialogue Under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-Making’ (2007) 33 *Monash Law Review* 9 at 9-11, citing Government of Victoria, *Statement of Intent* (2005) [8]; ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003) 54-55; ACT, *Parliamentary Debates*, Legislative Assembly, 18 November 2003, 4248 (John Stanhope, Chief Minister).

5 See J Boughey, ‘Rights, Review and Reasonableness: The Implications of Canada’s New Approach to Administrative Decision-Making and Human Rights for Australia’ (2013) 35 *Sydney Law Review* 283 at 283-284.

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