

## The Express Rights Provisions: Form and Substance (or Opportunities Taken and Not Taken?)

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For many years we were colleagues of George at UNSW Law School. We learnt a great deal from him, both from talking to him about constitutional law and from observing his approach to his research; in particular his appetite for disciplined and deep thought. George's zest for academic work was all the more remarkable as he faced serious illness for much of the past 10 years. George often thought of himself as an opponent of fashionable orthodoxy and we would like to think that this spirit is alive in this chapter.

In his writings George was interested in the implied rights rather than the express rights and, speaking generally, he was a critic of too much judicial creativity. But this criticism was based on a contrast, as he saw it, between on the one hand, the speculation inevitably associated with arguments based on structure, or linkages between constitutional terms and basic common law rights and, on the other, judicial work firmly grounded in express provisions and their interpretation through long-standing techniques.<sup>1</sup> Implicit within this criticism was the not unfamiliar view that the Court could work more confidently with express rights as here the starting points for the interpretation were clearly given. But starting points are one thing, end points another. And if there is an orthodox view of the Court's approach to the express rights (more applicable to some rights than others) it is not that it has been too creative but, rather, that it has not been creative enough.<sup>2</sup> The Court, it is said, has failed to take up the possibilities offered by the constitutional text.

Our Constitution has no distinct Bill of Rights and in its history and its text it is focused on other matters – defining the powers of institutions and

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1 See his discussion of (five) levels of constitutional rights in 'Constitutionally Entrenched Common Law Rights' in C Sampford and K Preston (eds), *Interpreting Constitutions* (Sydney: Federation Press, 1996).

2 G Williams, *Human Rights under the Australian Constitution* (Melbourne: OUP, 2002), pp 127-8, 227-44, 249-50.

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