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ZHANG v COMMISSIONER OF AUSTRALIAN FEDERAL POLICE: READING DOWN, PRUDENCE AND CONSTITUTIONAL DOUBT

Tristan Taylor

In Knight v Victoria, a unanimous High Court endorsed an approach to constitutional adjudication which provides that "it is ordinarily inappropriate for the Court to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid". This approach was extended to the context of "reading down" by a unanimous High Court in *Zhang v Commissioner of Australian Federal Police*. This article considers whether that approach is consistent with established principles of reading down in Australian constitutional law. It argues that while it may appear inconsistent with the High Court's rejection of the United States Supreme Court's "canon of constitutional avoidance" at first blush, the approach is ultimately

justified. However, it is important that the effect of the Court's reasoning is not extended to all instances of reading down more generally. 902

DEVELOPMENT OF THE COMMON LAW BY ANALOGY TO STATUTE

Adam Waldman and Michael Gvozdenovic

This article considers whether the common law can be developed by analogy to statute. Part I examines how attitudes across the common law world have shifted towards recognising a stronger interrelationship between statute and the common law, paving the way for the recognition of analogical reasoning to statute in Australia. Part II examines the High Court's jurisprudence on this form of judicial reasoning. It examines the authorities that have explicitly discussed it, which have left the legitimacy of such reasoning open. It identifies numerous High Court cases spanning several decades and different areas of law which have developed the common law by analogy to statute, albeit often without explicitly recognising that they are doing so. Considered together, these cases demonstrate that such reasoning is already legitimate in Australia. Part III compares this Australian jurisprudence to that of the United States. It considers whether the American jurisprudence supports the legitimacy of this reasoning and what lessons might be drawn from it. 912

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