

# **University of Southern Queensland**

## **Courts in a Representative Democracy**

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### **Introduction**

What democratic legitimacy do the judges of Australia have? How is it that in a representative democracy we accept that important decisions affecting the lives, liberties, rights and happiness of people and the interpretation of our laws and Constitution can be made by judges, many of whom would have little, if any, prospect of winning elected office. That is really the subject of tonight's lecture – how do courts fit into a representative democracy? Let us begin by looking at the concepts of representative democracy, responsible government and separation of powers and how they found their way into, and are reflected in, our Constitution. We can then consider the role of our courts, essential to the rule of law, in the protection of rights and freedoms and policing the exercise of official power when it exceeds its legal limits.

### **Democracy, representative democracy and separation of powers**

Democracy is 'government of the people'.<sup>1</sup> In theory there is more than one variety of democracy. For the most part modern democracies are representative democracies in which the people elect those who are to participate directly in government on their behalf. In Australia we elect, at Federal, State and Territory level, members of parliament who are the lawmakers and from whose ranks there will be

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appointed Ministers of the Crown to carry on the administration of government within, and subject to, the laws made by the parliament. Within that framework, our model of government is responsible government, which means that the Ministers of the Crown are accountable to the parliament and hold office only so long as they retain the confidence of the parliament.

Representative democracy and responsible government involve elected officials making and administering the laws of the country. They are the legislature and the executive, the first and second branches of government. The courts and judges make up the third branch of government. They decide the cases that come before them and in so doing are required to interpret and apply the law. Sometimes the law will require them to set aside the decisions of Ministers of the Crown and other public officials when such decisions are beyond power. The law may also require them to direct Ministers and public officials to make decisions or take particular actions which they are legally bound to take. And in Australia where our written Constitution places limits on the law-making power of Commonwealth and State parliaments, the judges may have to decide whether or not a law made by elected representatives in the parliament is valid. In so doing, they may have to interpret the law under challenge and the provision of the Constitution which is said to authorise or justify or in some cases to prohibit such a law.

There is a considerable history behind the function of courts in our society. A lot of it has to do with the idea of separation of legislative, executive and judicial powers and associated with that the independence of the judiciary from the legislative and executive branches.

The notion of a division of governmental functions in society is an old one. It can be traced back to Greek philosophers, including Plato and Aristotle. Aristotle

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<sup>1</sup> Oxford English Dictionary, 2<sup>nd</sup> ed, vol 4, p 442.

identified deliberative, magisterial and judicative elements in State power.<sup>2</sup> While he did not propose that those powers be separated, their identification laid the foundation for our contemporary understanding of separation of powers.

In the United Kingdom from which we take much of our constitutional and institutional heritage, the courts of law found their independence in terms of their relationship with the King. In the 15th century, the Chancellor to King Henry VI, John Fortescue wrote that the King's subjects could only be sued at law before a judge where they would be treated with mercy and justice according to the laws of the land. They could not be arraigned for any capital crime however heinous except before the King's judges and according to the laws of the land.<sup>3</sup>

The notion of separation of judicial and executive power was still developing in the 17th century. King James I believed in the divine right of Kings to govern. On 10 November 1612, Sir Edward Coke, Chief Justice of the Court of Common Pleas and the other judges of that Court were summoned to the King. The Court had made an order preventing a purported expansion of jurisdiction by a 'court of high commission' created by the King. The judges were told by the Archbishop of Canterbury that they were the King's delegates and the King could decide any case for himself. Coke told the King that all cases concerning the life or property of his subjects were to be decided '... by the artificial reason and judgment of the law, which law is an art which requires long study and experience before that a man can attain to the cognisance of it'. He was later removed from office.

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<sup>2</sup> Aristotle Politics, Book 4.

<sup>3</sup> Fortescue, *De Laudibus Legum Angliae* (trans: F Gregor) (c 1470) (reprinted by Legal Classics Library, 1984) pp 139-146.

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Under the *Act of Settlement 1701* judges were given security of tenure during good behaviour and the King's power to remove a judge could be exercised only on an address of both Houses of Parliament. The protection for the judges affected by the *Act of Settlement* is reflected in s 72 of the Constitution of the Commonwealth of Australia and like provisions in State Constitutions. It underpins judicial independence from the Executive.

A sharp separation of the judicial from the legislative and executive powers is established under the Constitution of the Commonwealth. There is no written expression of the separation of judicial from executive and legislative powers in the State Constitutions. There are, however, conventions which underpin a degree of political respect for that principle and the independence of the judiciary. As a former Chief Justice of South Australia, the Honourable Len King said in a paper on separation of powers given in 1994:

The constitutional arrangements which existed in England in the 18th century, being the separation of powers resulting from the post-1688 Settlement upon which responsible government was engrafted, flowed into the constitutions of the Australian colonies and, hence, into the constitutions of the present Australian states.<sup>4</sup>

As we shall see, the Commonwealth Constitution itself also has an effect upon the maintenance of a distinctive judicial character in State courts. Against that background, it is useful to describe briefly the evolution of our own representative democracy.

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<sup>4</sup> King L, 'The Separation of Powers' in Courts in a Representative Democracy: A Collection of the papers from the National Conference Courts in a Representative Democracy presented by the Australian Institute of Judicial Administration, the Law Council of Australian and the Constitutional Centenary Foundation, Canberra, 11-13 November 1994, (AIJA Incorp, 1995) p 5.

## **The making of the Australian Constitution**

Many histories lie across the contemporary Australian landscape and have played, and continue to play, a part in the evolution of our national character and identity. The first of them goes back 40 millennia and is found in the dreamings, the songs, the traditions and ceremonies of indigenous Australians. The second history, in which we find the origins of our constitutional development, is that of the British colonisers and their creation of the Commonwealth. After that there is another set of histories and that is those of the many people of non-British origin who have migrated to this country from all parts of the world, particularly since the second half of the twentieth century. Today, nearly one quarter of people living in Australia were born overseas. Forty three per cent of Australians were either born overseas or have at least one parent who was born overseas. Migrants to Australia in recent years have come from over 180 different countries.<sup>5</sup>

The British colonising history of Australia which shaped our State and Commonwealth Constitutions began with the taking of the possession of the eastern part of the continent by James Cook in 1770. In 1768, New South Wales was designated as a place to which British convicts might be transported.<sup>6</sup> In 1788, Governor Philip arrived in that colony as the embodiment of the authority of the British Crown. It was in that same year that thirteen American colonies voted upon the Constitution of the United States. A local legislative body was appointed in New South Wales in 1823 and in the same year a Supreme Court was established in that colony.<sup>7</sup> In 1825, the Colony

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<sup>5</sup> Australian Immigration Fact Sheet Four - More than Sixty Years of Post War Immigration, revised 30 January 2007. [www.migration.gov.au/media/fact-sheets/0450.htm](http://www.migration.gov.au/media/fact-sheets/0450.htm).

<sup>6</sup> See generally Lumb RV, *The Constitutions of the Australian States*, (University of Queensland Press, 4<sup>th</sup> ed, 1977) ch 1.

<sup>7</sup> Pursuant to Imperial Statute 4 George IV c 96.

of Tasmania was separated out from New South Wales.<sup>8</sup> A partly elective legislative body was created for New South Wales in 1842 under the *Australian Constitutions Act 1842*, an Imperial Statute providing for the establishment of a representative legislative council for New South Wales and Tasmania.<sup>9</sup>

In 1850, the Imperial Parliament enacted the *Australian Constitutions Act 1850* following a report by a committee of the Privy Council in 1849. That Act provided for the separation of Victoria from New South Wales and that separation took effect in January 1851. In 1854, Tasmania enacted a *Constitution Act* and established its own bi-cameral legislature.<sup>10</sup> In 1855, similarly worded Constitutions were established in New South Wales and Victoria. Responsible government was adopted within the framework of those Constitutions as a matter of convention. Under the authority of the Australian Constitution Acts of 1842 and 1850 Queensland was created out of New South Wales by Letters Patent in 1859. An Order in Council in that year created a Constitution for Queensland in terms similar to that of the New South Wales Constitution of 1855. South Australia was created as a province in 1834 by Imperial Statute. In 1855, a South Australian Constitution Act was passed by the South Australian legislature, which itself had been set up in 1842. Western Australia was created as a colony by Imperial Statute in 1829, but did not achieve representative government until 1890 when the *Constitution Act 1890* (WA) was authorised by Imperial Statute.

These colonial Constitutions all derived their legal authority directly or indirectly from Acts of the Imperial Parliament. Each of the colonies also established its own court system and, in particular, each of the colonies had a Supreme Court.

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<sup>8</sup> This occurred by Order in Council pursuant to s 44 of the Act of 1823 which authorised separation of Van Diemens land from New South Wales.

<sup>9</sup> 5 & 6 Vic c 76 (1842).

<sup>10</sup> 18 Vic No 17.

In the 1890s, Conventions of colonial representatives came together to discuss and draft an Australian Federal Constitution. The Conventions were held in 1891 and after a gap, in 1897 and 1898. In March 1898, the delegates adopted a revised Constitution Bill. Ultimately, each of the colonies which were to become the States submitted the proposed Bill to popular referenda in 1899. The Bill was approved by electors in New South Wales, Victoria, South Australia and Tasmania. Queensland approved it in September 1899. Western Australia did not proceed to referendum at that time. The five approving colonies submitted the Bill to the Imperial Parliament requesting that it bring it into force as the Constitution of the newly formed Commonwealth of Australia. Western Australia held its referendum in July 1900 and requested the Queen to include Western Australia as an original State of the Commonwealth in the Proclamation of the Constitution.

In September 1900 Queen Victoria signed a Proclamation which established the Commonwealth as and from January 1901.

### **Separation of powers under the State and Commonwealth Constitutions**

As noted, prior to federation, each of the Australian colonies had its own Constitution and its own court system broadly based upon the governmental system of the United Kingdom. Not only was there no mandated separation of powers under those constitutions, there was a degree of cross-over between judicial and executive functions where the colonial chief justices were concerned. It was not unusual for the Chief Justices of the colonies from time to time to act in the role of governor. That tradition is reflected in the Australian States today where the Chief Justice is the Lieutenant Governor. Chief Justices would also, from time to time, provide advice to Colonial Governors. That practice continued beyond Federation and was adopted on occasion by

Chief Justices of the High Court, including the first Chief Justice, Sir Samuel Griffith.<sup>11</sup> and on the last such occasion by Sir Garfield Barwick who advised Sir John Kerr in 1975 in relation to the dismissal of the Whitlam Government.

The separation of judicial from legislative and executive powers at Commonwealth level is clear from the text of the Commonwealth Constitution. There are three key provisions of the Constitution that define the constitutional positions of the High Court and federal courts and their demarcation from the Legislature and the Executive. The first is s 1 which vests 'the legislative power of the Commonwealth' in 'a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives'. The second is s 61 which vests the executive power of the Commonwealth in the Queen and states that it is exercisable by the Governor-General as her representative. The third is s 71 which vests the judicial power of the Commonwealth 'in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction'. These three sections of the Constitution separate out the powers of the Commonwealth into legislative, executive and judicial elements and distribute them between the key institutions of the Commonwealth, the parliament, the executive and the courts.

In the *Boilermakers'* case, Dixon CJ and McTiernan, Fullagar and Kitto JJ said:

If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel

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<sup>11</sup> Markwell D, 'Griffith, Barton and the Early Governor-Generals: Aspects of Australia's Constitutional Development' (1999) 10 *Public Law Review* 280.



the strength of the logical inferences from Chaps I, II and III and the form and contents of ss 1, 61 and 71.<sup>12</sup>

The question arises why the separation is made explicit in the Commonwealth Constitution and not in the State Constitutions.

Professor Geoffrey Sawer surmised in his text, *Australian Federalism in the Courts*, that Sir Samuel Griffith and Andrew Inglis Clark, who were aware of the separation of powers principle in the Constitution of the United States, may have viewed it as 'in some sense connected with federal ideas'.<sup>13</sup> He wrote:

It is likely that they intended their drafts to create a more rigid separation of powers than applied under the colonial constitutions, and the early commentators assumed this to be so.<sup>14</sup>

For present purposes the separation of power means that federal courts cannot validly undertake executive functions not incidental to their judicial functions. Section 72 of the Constitution, which protects the tenure and remuneration of federal judges, protects them from subjugation to the Executive in the discharge of their judicial responsibilities, and thus supports their independence and impartiality. The two principles, separation of powers and judicial independence, make the High Court and federal courts a distinctive and distinct branch of government, one of the three pillars upon which our Commonwealth polity rests.

The courts of the States derive their existence from the State Constitutions or from laws made under those Constitutions. The absence of explicit separation in their Constitutions of the judicial power from their legislative and executive powers is not the

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<sup>12</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 275.

<sup>13</sup> Sawer G, *Australian Federalism in the Courts*, (Melbourne University Press, 1967) at 153.

<sup>14</sup> *Ibid* at 153.

end of the debate about that topic in the States. As Professor Gerard Carney has observed:

Despite the absence of a binding doctrine of separation of powers at the State level, that doctrine is nonetheless recognised as a powerful *political* doctrine of good government. It is the one constitutional principle often used by media and opposition parties to attack government violations.<sup>15</sup>  
(Original emphasis)

Importantly, because ss 71 and 77 of the Commonwealth Constitution contemplate the use of the State courts as repositories of federal jurisdiction, the High Court has developed a doctrine that their institutional integrity must be protected from laws that would compromise the constitutional scheme. The High Court has described the State courts as 'part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power'.<sup>16</sup> It is not open therefore to a State Parliament to confer powers or functions on State courts which are 'repugnant to or incompatible with their exercise of the judicial power of the Commonwealth'.<sup>17</sup>

Whether by constitutional rule, implication or convention, federal and State courts are essential infrastructure of our representative democracy with functions distinct from those of the legislature and the executive. Let me now say a little about what they do.

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<sup>15</sup> Carney G, *The Constitutional Systems of the Australian States and Territories*, (Cambridge University Press, 2006) at 349.

<sup>16</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 114 and 115.

<sup>17</sup> (1996) 189 CLR 51 at 103 and 104 per Gaudron J; see also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 617 [101] per Gummow J, Hayne J agreeing at 648 [198].

### The functions of the Courts

The core function of all courts is to hear and decide cases which come before them. The decision-making process involves the following basic steps:

1. The judge determines the legal rules or standards applicable to the facts which are in contention.
2. The judge (or a jury directed by the judge) considers the evidence and finds what the facts are.
3. The judge applies the legal rule or standard to the facts as found to determine the rights and liabilities of the parties and to award legal remedies or not as the case may be.

This simple model represents the core of the judicial function undertaken by most judges on a day-to-day basis. It is not the whole story. Historically they have also been given other functions which have been held to be judicial but which do not involve the resolution of disputes. This simple syllogistic model is a useful working guide to the judicial process in the great bulk of cases.<sup>18</sup>

Within that model the courts decide different classes of case. These may broadly be described as follows:

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<sup>18</sup> Other non-judicial functions may be conferred as an incident of judicial power – *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278; see also *R v Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580 per Deane J. And some functions which do not fall within a neat dispute resolution model are treated as judicial because they have historically been functions exercised by courts: *Dalton v New South Wales Crime Commission* (2006) 226 ALR 570 at 575-577 per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ. Still further functions may be seen as judicial or non-judicial by virtue of the body exercising the function: *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 566 [230].

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1. Private disputes between individuals and/or firms including disputes arising under the common law of contract or tort or in equity or involving statutory rights and liabilities.
2. Disputes about compliance with regulatory regimes. Such disputes will usually arise between a statutory regulator and a private individual or firm.
3. Prosecutions for offences against the criminal law.
4. Disputes about the limits of official power conferred by a statute or the validity of its purported exercise. Such disputes typically arise between an official of a Commonwealth or State government (including ministers) with a private individual or firm.
5. Disputes about the limits of legislative or executive power under the Constitution. Such disputes typically arise between the Commonwealth and the States or between the Commonwealth or a State and a private individual or firm.

Some cases may raise legal issues of general public importance. But even in the most routine of cases, the court always discharges a significant public function. For not only is it required to decide the dispute before it, but it is required to decide it in a principled manner. Compliance with that requirement carries with it a reaffirmation of the rule of law generally and of the particular legal rules and standards which govern the relationship between the parties and all parties in like situations. The importance of this aspect of the courts' functions in a democracy was emphasised 25 years ago in a well-known article by Professor Owen Fiss in the *Yale Law Journal* entitled 'Against Settlement':

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate

and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.<sup>19</sup>

There is, of course, today a strong emphasis on encouraging negotiated or mediated dispute resolution to avoid resort to the courts. Professor Fiss' comments, which reflected a principled scepticism about alternative dispute resolution, may be at odds with the prevailing conventional wisdom. But the point he made about the essential character of the judicial function remains valid. That essential character is rooted in our history and tradition and is supportive of our liberties. The public and independent role of the courts as institutions raises a question about how their judges are appointed and why they should not be elected.

### **The appointment of Australia's judges**

Australian judges are not, and never have been, popularly elected. The Commonwealth Constitution provides for the appointment of High Court and other federal judges by the Governor-General in Council, that is to say, by the Governor-General acting upon the advice of the Government of the day. Federal judges, once appointed, cannot be removed except by the Governor-General in Council following an address from both Houses of Parliament in the same session seeking removal on the ground of proved misbehaviour or incapacity. Moreover, their remuneration cannot be diminished during their continuance in office. The appointment of federal judges is for a term expiring when they attain the age of 70 years. All of these provisions are to be found in s 72 of the Constitution. The laws of the various States make similar provisions for the appointment of State judges, although they may vary in detail.

This tradition of an appointed, rather than an elected judiciary is powerfully

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<sup>19</sup> Fiss, "Against Settlement", (1984) 93 *Yale Law Journal* 1073 at 1085.

entrenched in Australia. It is closely related to wide acceptance of the proposition that judges should be independent of influences from governments and political parties and the ebb and flow of public opinion, in deciding cases before them. This is not to say that there is not room for improvement in the processes of judicial appointment in terms of consultation and transparency. There has been considerable discussion of this in recent years and steps have been taken in relation to the appointment of judges to strengthen the application of the merit principle and to widen the range of persons who may be considered for appointment by calling for expressions of interest or nominations.

An obvious reason for the rejection in Australia of the idea of electing judges is that the judicial election process is thought to interfere with judicial independence. Sir Anthony Mason, a former Chief Justice of the High Court, wrote in 1997:

The election of judges is bound to compromise their independence because it entails their campaigning for office and because it exposes the judges to the pressures of possible removal in consequence of popular disapproval of their judicial decisions.<sup>20</sup>

Some of the problems associated with the process of electing judges are illustrated by difficulties that have arisen in the United States in relation to campaign speech by candidates for judicial office and financing of their campaigns.

### **Problems associated with electing judges - the case of the United States**

In the United States, all States originally selected judges by executive or legislative appointment. However, during the mid 19th century there was a marked shift towards popular elections in a significant number of States. The reasons for this change

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<sup>20</sup> Sir Anthony Mason, "The Appointment and Removal of Judges" in Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 1 at 13.

have been said to include the rise of Jacksonian democracy, popular outrage at judicial decisions favouring landlords and creditors and political patronage in appointments made by Governors and legislatures. There are now some 39 States which use popular elections to elect and/or retain judges in at least some courts. Approximately 87% of State judges stand for popular election at least once in their career. However, there is no uniformity in the election methods employed. A former Chief Justice of the Supreme Court of Texas once said: 'America has almost as many different ways of selecting state judges as it has states.'<sup>21</sup>

An important issue surrounding the popular election of judges in the US concerns the extent to which candidates for judicial office can promise to adopt particular policy positions in relation to classes of case as part of an election campaign. The related question of how far campaign speech can be restricted by professional conduct rules without infringing upon freedom of speech arose in *Republican Party of Minnesota v White*.<sup>22</sup> In that case the Supreme Court held by majority that a law which prohibited candidates from stating their views on disputed legal or political issues violated the First Amendment. The judgments of the Court threw into sharp relief some of the issues which arise in relation to campaign speech in judicial elections.

Justice Scalia who wrote for the majority held that impartiality in the judicial context relates to lack of bias for or against either party in a proceeding. The challenged campaign speech restriction was not limited to the preservation of that kind of impartiality. It went beyond restricting statements in favour of or against particular parties, to speech about particular issues. Justice Sandra Day O'Connor, who concurred with the majority, nevertheless raised fundamental concerns about the whole practice of

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<sup>21</sup> Phillips TR, "The Merits of Merit Selection", (2009) 32(1) *Harvard Journal of Law and Public Policy* 67 at 68.

<sup>22</sup> 122 S Ct 2528 (2002); (2002) 536 US 765.

electing judges. She said:

Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.<sup>23</sup>

Justice Ginsburg, who wrote the principal dissenting judgment, drew an important distinction between judges and their counterparts in the political branches, saying:

... judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide "individual cases and controversies" on individual records ... neutrally applying legal principles, and when necessary "stand[ing] up to what is generally supreme in a democracy: the popular will".<sup>24</sup>

Justice Stevens, who also dissented, focussed upon the nature of the judicial task in terms which tell us something about the function of courts in a democracy:

Elected judges, no less than appointed judges, occupy an office of trust that is fundamentally different from that occupied by policymaking officials. Although the fact that they must stand for election makes their job more difficult than that of the tenured judge, that fact does not lessen their duty to respect essential attributes of the judicial office that have been embedded in Anglo-American law for centuries.<sup>25</sup>

He pointed out the difference between the work of the judge and the work of other public officials and said:

In a democracy, issues of policy are properly decided by majority vote; it

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<sup>23</sup> (2002) 536 US 765 at 789.

<sup>24</sup> (2002) 536 US 765 at 803-4 citing Scalia, "The Rule of Law as a Law of Rules", 56 *University of Chicago Law Review* 1175 at 1180 (1989).

<sup>25</sup> (2002) 536 US 765 at 797.



is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity.<sup>26</sup>

An important point to be taken from these comments is that the nature of the judicial task to be carried out by the elected judge in the United States is not different in kind from that of the unelected judge.

The judgments in the White case raise issues about impartiality in relation to elected judges which are also relevant in considering the proper limits on appointed judges speaking publicly about issues of legal or political controversy. Whether a judge is appointed or elected, the need for impartiality and the appearance of impartiality remain.

The issue of campaign financing for judicial elections came before the Supreme Court in a case that was decided on 8 June 2009. In August 2002, a West Virginia jury found against a coal company in a tort case and awarded the plaintiffs the sum of \$50 million in compensatory and punitive damages. At the time elections were pending for vacancies on the West Virginia Supreme Court of Appeals. Mr Don Blankenship, the coal company's chief executive officer and president, decided to support an attorney, Brent Benjamin, who was campaigning for election to that Court. The CEO contributed \$3 million to Mr Benjamin's campaign. His contributions exceeded the total amount spent by all other Benjamin supporters and by Benjamin's own committee. Benjamin won the election by fewer than 50,000 votes.

Before the coal company filed its appeal, the successful party, Caperton, moved to disqualify the newly elected judge under the due process clause and the State's Code of Judicial Conduct based on the conflict caused by Mr Blankenship's campaign

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<sup>26</sup> (2002) 536 US 765 at 798.

involvement. Justice Benjamin denied the motion for his recusal. The Appeal Court on which he sat reversed the \$50 million verdict.

The Supreme Court held by majority that the judge should have disqualified himself. The majority based its opinion, however, on the rather exceptional circumstances of the case before it, which it described as 'extreme'. Justice Kennedy, who delivered the opinion of the majority, said:

Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. ... We conclude that there is a serious risk of actual bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.<sup>27</sup>

The two United States' cases demonstrate why we should not have elected judges. The judicial task remains the same irrespective of the mode of a judge's appointment. But the elected judge's burden of maintaining public confidence and avoiding concerns about impartiality and conflict of interest appears to be more difficult. That is not to say the appointment process for unelected judges is perfect. It has been a matter of public discussion and some degree of change in recent times. Consideration of that process will no doubt continue. In any event, for the foreseeable future, unelected judges will be appointed by elected officials. What those unelected judges decide may or may not have political significance. It may or may not be popular. It may or may not attract the approval of the government or the media of the day. What we expect of our unelected

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<sup>27</sup> *Caperton v AT Massey Coal Co Inc* Docket No 08-22; (2009) 129 S Ct 2252. Docket No 08-22 at 13-14.

judges is that because they are unelected and because they are not beholden and do not appear to be beholden to campaign commitments or campaign financiers, they will be able to discharge the official oath or affirmation requiring that they decide the cases that come before them without fear or favour, affection or ill will.

### **Human rights and the Australian Constitution**

The tension between the powers and functions of democratically elected law-makers and officials on the one hand and those of unelected judges on the other comes to the fore in what might broadly be described as human rights protection. For it is in the application of broadly stated human rights provisions, whether they be found in Constitutions or in statutes, that legislation and executive action can come under scrutiny in a way that involves consideration of conflicting community values. For example, if freedom of association is to be guaranteed subject to reasonable restrictions, what kind of restrictions would be reasonable and what are the principles by which a judgment would be made as to their reasonableness. There are those who say that the judgments involved in such scrutiny are essentially matters for elected officials who may have to juggle many competing policy considerations in deciding where the balance lies. That concern has been an element of the debate about the desirability of national human rights legislation in Australia.

In Australia, only the Australian Capital Territory and Victoria have general human rights statutes which do not themselves limit law-making power. However, Australia does not have a constitutional Bill of Rights, nor does it have national overarching human rights legislation. Despite that absence, its courts and judges do have an important role to play in the protection of such rights and freedoms as are guaranteed in the Constitution and the protection of individual rights and freedoms of a kind long recognised by the common law which the colonists brought with them from England.

The absence of a Bill of Rights in our national Constitution is a function of our history. Sir Owen Dixon, in comparing the United States and Australian Constitutions,

attributed the omission of a Bill of Rights to a readiness on the part of the framers of the Constitution to leave the protection of rights to the legislature and the processes of responsible government. He said:

The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself.<sup>28</sup>

It is sufficient to say that there was probably a variety of reasons behind the absence in Australia's Constitution of a Bill of Rights, some related to the desire to maintain the capacity to discriminate against particular racial groups and others reflecting a loftier vision of the nascent Australian constitutionalism. Hypotheses, however plausible, more than 100 years after the event, are unlikely to yield a single reliable explanation.

There are a number of provisions in the Commonwealth Constitution which answer to some degree the description of rights guarantees. Each of them may be dealt with briefly:

1. Section 51(xxiiiA) of the Constitution authorises the Commonwealth Parliament to make provision, among other things, for medical and dental services but is subject to the limitation that it does not authorise any form of civil conscription. The section was introduced into the Constitution in 1946 after the High Court had struck down a law providing for the supply of pharmaceutical benefits paid for by

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<sup>28</sup> Dixon O, "Two Constitutions Compared" reprinted in *Jesting Pilate* (Melbourne: Law Book, 1965) at 102 cited in Lee HP, "The Implied Freedom of Political Communication" in Lee HP and Winterton G (eds) *Australian Constitutional Landmarks* (Cambridge University Press, 2003) at 386.

the Commonwealth. The limitation on the constitutional power which would exclude any form of civil conscription was proposed by Robert Menzies to avoid the power being used to nationalise the medical and dental professions.

2. Section 51(xxxi) of the Constitution authorises the Commonwealth Parliament to make laws with respect to:

the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

This has been taken as imposing a just terms requirement in respect of any compulsory acquisition by the Commonwealth of property belonging to the State or to a person. In February last year, the Court held by majority that the just terms guarantee extended beyond the States into the Territories and, in particular, the Northern Territory of Australia. As a result, the just terms guarantee applied to the acquisition of property rights conferred upon indigenous people under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*.<sup>29</sup>

3. Section 75(v) of the Constitution confers on the High Court jurisdiction in any matter in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Under that provision the High Court can prevent a public official, including a Minister of the Crown, from exceeding his or her lawful power and may require a Minister or official to discharge a duty imposed upon him or her by law. The Court can also quash a decision which is made in excess of power. Chief Justice Gleeson described s 75(v) as providing in the Constitution '... a basic guarantee of the rule of law'.<sup>30</sup> The section was

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<sup>29</sup> *Wurridjal v The Commonwealth* (2009) 237 CLR 309.

<sup>30</sup> Gleeson AM, *The Rule of Law and the Constitution* (ABC Books, Sydney, 2000) at 67.

inserted in the Constitution at the suggestion of the delegate, Andrew Inglis Clark, to avoid the deficiency in original jurisdiction identified by Marshall CJ in *Marbury v Madison*.<sup>31</sup> Because it is a constitutional provision, the original jurisdiction it confers on the Court cannot be removed by statute.

4. Section 80 of the Constitution provides that:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

The guarantee of trial by jury is contingent upon the offence being tried by indictment. There have been a number of cases in which the scope of this guarantee has been explored. Where it applies it has been held to require a unanimous verdict of the jurors before a conviction can stand.<sup>32</sup>

5. Section 92 of the Constitution provides:

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

There are two elements to this guarantee. One is freedom of trade and commerce and the other is freedom of intercourse. That latter freedom has been relied upon

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<sup>31</sup> (1803) 5 US 137.

<sup>32</sup> *Cheatle v R* (1993) 177 CLR 541.

to strike down national security regulations in 1945 which were found to prohibit interstate movement.<sup>33</sup>

6. Section 116 of the Constitution provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

This guarantee does not apply to the States but only to the Commonwealth.

7. Section 117 of the Constitution prohibits discrimination between residents of States. It provides:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

In an important decision in 1989 the Court struck down Queensland laws which required any legal practitioner wishing to practice in Queensland to have his or her principal practice there. Although on the face of it the law, which was a rule made by the Queensland Bar Association, applied to all legal practitioners, it operated to discriminate against out of State practitioners.<sup>34</sup>

There are other provisions of the Constitution which it may be argued have potential connections to human rights. These include the electoral and franchise

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<sup>33</sup> *Gratwick v Johnson* (1945) 70 CLR 1.

<sup>34</sup> *Street v Queensland Bar Association* (1989) 168 CLR 461.

provisions of the Constitution and other provisions relating to non-discrimination in taxing laws and in trade, commerce or revenue. It is sufficient to say that these linkages with the relevant international human rights provisions are more difficult to make.

In addition to the particular guarantees to which reference has been made, the High Court has also held that there exists an implied freedom of political communication, which will be discussed next.

### **The implied constitutional freedom of political communication in Australia**

In two decisions delivered on 30 September 1992, the High Court recognised an implied constitutional freedom of communication on political matters in Australia. The first case, *Nationwide News Pty Ltd v Wills*<sup>35</sup> involved a prosecution of *The Australian* newspaper which had published an article highly critical of the Australian Industrial Relations Commission. The article said, inter alia:

The right to work has been taken away from ordinary Australian workers. Their work is regulated by a mass of official controls, imposed by a vast bureaucracy in the Ministry of Labour and *enforced by a corrupt and compliant 'judiciary' in the official Soviet-style Arbitration Commission.*<sup>36</sup>  
[emphasis in original]

The newspaper was prosecuted under s 299 of the *Industrial Relations Act 1988* (Cth) which provided that:

A person shall not

...

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<sup>35</sup> (1992) 177 CLR 1.

<sup>36</sup> (1992) 177 CLR 1 at 96.



(d) by writing or speech use words calculated:

...

(ii) to bring a member of the [Industrial Relations] Commission or the Commission into disrepute.

The High Court held the section invalid. A majority of the Court (Brennan, Deane, Toohey and Gaudron JJ) held it was invalid as infringing an implied freedom of political discussion. The minority (Mason CJ, Dawson and McHugh JJ) held it invalid on the basis it was not within the scope of a relevant head of power in the Constitution. Deane and Toohey JJ in their joint judgment, based the implication upon the system of representative government for which the Constitution provides. They said:

The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person. The actual discharge of the very function of voting in an election or referendum involves communication.<sup>37</sup>

They discerned in the doctrine of representative government '... an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealth'.<sup>38</sup> The implication operated at the level of communication and discussion between the people of the Commonwealth and their members of Parliament and other Commonwealth authorities. It also operated at the level of communication between the people of the Commonwealth themselves.

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<sup>37</sup> (1992) 177 CLR 1 at 72.

<sup>38</sup> (1992) 177 CLR 1 at 73.

The other case in which judgment was delivered on 30 September 1992, *Australian Capital Television Pty Ltd v The Commonwealth*,<sup>39</sup> involved a challenge to new Commonwealth legislation proposing to impose a blanket prohibition on political advertisements on radio or television during Federal election periods. The majority (Mason CJ, Deane, Toohey and Gaudron JJ) held that the new provisions were invalid because they infringed the constitutionally guaranteed freedom of political discussion. The scope of the implied freedom has also been considered in a number of cases at common law involving defamation actions brought by politicians against media outlets.<sup>40</sup>

The implied freedom of political communication does not confer enforceable rights on individuals. Rather, it operates to limit the law-making power of the parliament to prevent it from encroaching upon that freedom.

### **The common law – a constitutional legacy**

The phrase "common law" refers to a body of principles or rules of law worked out on a case-by-case basis by courts in England and latterly in this country. That judicial law-making process is incremental. It has been described as being like "the sluggish movement of the glacier rather than the catastrophic charge of the avalanche".<sup>41</sup>

The common law has a constitutional dimension because, amongst other things, as Sir John Latham wrote in 1960:

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<sup>39</sup> (1992) 177 CLR 106.

<sup>40</sup> *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Roberts v Bass* (2002) 212 CLR 1.

<sup>41</sup> Rogers WVH, *Winfield and Jolowicz on Tort* (14th ed, Sweet & Maxwell, 1994) at 17.

... in the interpretation of the Constitution, as of all statutes, common law rules are applied.<sup>42</sup>

That constitutional dimension is also reflected in the institutional arrangements which the common law brings with it. At its core are public courts which adjudicate between parties and which are the authorised interpreters of the law which they administer.<sup>43</sup> As Professor Goodhart said, the most striking feature of the common law is its public law, it being '... primarily a method of administering justice'.<sup>44</sup>

One non-exhaustive list of what might be called rights or freedoms said to exist at common law, includes:<sup>45</sup>

- the right of access to the courts;
- immunity from deprivation of property without compensation;
- legal professional privilege;
- privilege against self-incrimination;
- immunity from the extension of the scope of a penal statute by a court;
- freedom from extension of governmental immunity by a court;

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<sup>42</sup> Latham J, "Australia" (1960) 76 *Law Quarterly Review* 54 at 57.

<sup>43</sup> Pollock F, *The Expansion of the Common Law* (London Stevens, 1904) at 51.

<sup>44</sup> Goodhart AL, "What is the Common Law" (1960) 76 *Law Quarterly Review* 45 at 46.

<sup>45</sup> Corrin J, "Australia: Country Report on Human Rights" (2009) 40(1) *Victoria University of Wellington Law Review* 37 at 41-42.

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- immunity from interference with vested property rights;
- immunity from interference with equality of religion; and
- the right to access legal counsel when accused of a serious crime.

To that list might be added:

- no deprivation of liberty, except by law;
- the right to procedural fairness when affected by the exercise of public power; and
- freedom of speech and of movement.

The existence and content of some of these rights and freedoms may be contested. They are contingent in the sense that, subject to the Constitution, they can be modified or extinguished by Parliament. As appears below however, they can be important in their effects upon the way in which laws made by the Parliament are interpreted by the Courts.

### **Common law rights and freedoms and the interpretation of statutes**

The exercise of legislative power in Australia takes place in the constitutional setting of a 'liberal democracy founded on the principles and traditions of the common law'.<sup>46</sup> This affects the way Australia's courts interpret laws made by the Parliament. The importance of the principles and traditions of the common law in Australia is reflected in the long-established proposition that statute law is to be interpreted consistently with the common law where the words of the statute permit. In a passage

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<sup>46</sup> *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587.

still frequently quoted, O'Connor J in the 1908 decision *Potter v Minahan*<sup>47</sup> said, referring to the 4th edition of Maxwell on *The Interpretation of Statutes*:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.<sup>48</sup> [Footnote omitted]

That statement was based upon a passage in the judgment of Marshall CJ in *United States v Fisher*.<sup>49</sup>

The principle enunciated in *Potter v Minahan* has evolved into an approach to interpretation which is protective of fundamental rights and freedoms. It has the form of a strong presumption that broadly expressed official discretions are to be subject to rights and freedoms recognised by the common law. It has been explained in the House of Lords as requiring that Parliament 'squarely confront what it is doing and accept the political cost'.<sup>50</sup> Parliament cannot override fundamental rights by general or ambiguous words. The underlying rationale is the risk that, absent clear words, the full implications of a proposed statute law may pass unnoticed:

In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words

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<sup>47</sup> (1908) 7 CLR 277 at 304.

<sup>48</sup> Maxwell PB, (*Maxwell*) *On the interpretation of Statutes* (4th ed, Sweet and Maxwell, 1905) at 122.

<sup>49</sup> (1805) 2 Cranch 358 at 390.

<sup>50</sup> *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131. See also *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 and Dyzenhaus D, Hunt M and Taggart M, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 *Oxford University Commonwealth Law Journal* 5.

were intended to be subject to the basic rights of the individual.<sup>51</sup>

Although Commonwealth statutes in Australia are made under a written constitution, the Constitution does not in terms guarantee common law rights and freedoms against legislative incursion. Nevertheless, the interpretive rule can be regarded as 'constitutional' in character even if the rights and freedoms which it protects are not. There have been many applications of the general rule which, in Australia, had its origin in *Potter v Minahan*. It has been expressed in quite emphatic terms. Common law rights and freedoms are not to be invaded except by 'plain words'<sup>52</sup> or necessary implication.<sup>53</sup>

In *Electrolux Home Products Pty Ltd v Australian Workers' Union*<sup>54</sup> Chief Justice Gleeson said of the interpretive presumption:

The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.<sup>55</sup>

The suggestion has sometimes been made that common law rights and freedoms should be regarded as 'residual'. The common law has always adhered to the proposition that '... everybody is free to do anything, subject only to the provisions of the law'.<sup>56</sup> That may, however, suggest that freedom is what is left over when the law is exhausted.

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<sup>51</sup> [2000] 2 AC 115 at 131.

<sup>52</sup> *Re Cuno* (1889) 43 Ch D 12 at 17 per Bowen LJ.

<sup>53</sup> *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206 per Higgins J.

<sup>54</sup> (2004) 221 CLR 309.

<sup>55</sup> (2004) 221 CLR 309 at 329 [21].

<sup>56</sup> *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283 (Lord Gough); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564.

But the interpretive principle applied in Australia and its equivalent in England, suggest that it is more than that. TRS Allan put it thus:

The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.<sup>57</sup>

By way of example, there has long been a particular recognition at common law that freedom of speech and the press serves the public interest. Blackstone said that freedom of the press is 'essential to the nature of a free State'.<sup>58</sup> Lord Coleridge in 1891 characterised the right of free speech as 'one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done'.<sup>59</sup>

Despite its limits and vulnerability to statutory change, the common law gives a high value to freedom of expression, particularly the freedom to criticise public bodies.<sup>60</sup> Courts applying the common law may be expected to proceed on an assumption that freedom of expression is not to be limited save by clear words or necessary implication. The common law can of course only go so far. It does not provide the support for

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<sup>57</sup> Allan TRS, "The Common Law as Constitution: Fundamental Rights and First Principles" in Saunders C (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) at 148.

<sup>58</sup> William Blackstone, *Commentaries on the Laws of England*, (first published 1769), vol 4, at 151-152.

<sup>59</sup> *Bonnard v Perryman* [1891] 2 Ch 269 at 284 and see *R v Commissioner of Police of the Metropolis; Ex parte Blackburn (No 2)* [1968] 2 QB 150 at 155; *Wheeler v Leicester City Council* [1985] AC 1054; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 220.

<sup>60</sup> *Halsbury's Laws of England*, (4th ed, 1989) vol 8(2) par 107.

freedom of expression that would accord it the status of a 'right'. Subject to the implied constitutional freedom of political discussion, it cannot withstand plainly inconsistent statute law.

The common law interpretive principle protective of rights and freedoms against statutory incursion retains its vitality. It has a significant role to play in the protection of rights and freedoms in contemporary society, while operating in a way that is consistent with the principle of parliamentary supremacy. The courts which apply that principle apply it in a way that is consistent with representative democracy because their interpretations of the law can be overcome by parliamentary amendment to the law.

### **Conclusion**

Representative democracy and responsible government operate within the framework of the rule of law. That is to say that nobody is above the law. And in a constitutional democracy with limited legislative powers divided between Commonwealth and States there is no parliament which has unlimited power. It is a corollary of that limitation that no public official can be given unlimited powers. No power exercised by any minister, authority or public officer, is valid unless authorised by a law which is in turn authorised or permitted by the Constitution of the Commonwealth. The courts which, in the context of particular disputes, are asked to interpret and apply our laws, and sometimes to determine their validity and the limits of official powers which those laws create, are essential to the rule of law.

Although the judges who make up Australia's courts are not elected, it is an important feature of the courts that their proceedings are conducted in public, that their decisions are made in public and that they give public reasons for their decisions. It is also an important feature of the operation of the courts that there are appeal provisions which allow their decisions to be reviewed for error. If the courts make decisions about the common law or the statute law which result in consequences that the Parliament thinks are undesirable then, subject to the Constitution, Parliament can change the law. And the Constitution itself can be altered by a referendum of a majority of people, in a



majority of States. Courts are an essential part of the infrastructure of our representative democracy. Ultimately, however, the content of our laws, subject to the Constitution, is a matter for our Parliaments and the content of our Constitution is a matter for the people.