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LAW MAKING IN A REPRESENTATIVE DEMOCRACY: THE DURABILITY OF ENDURING VALUES

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Generally when asked to deliver a lecture named for a distinguished jurist I find that it is someone who is deceased or expected soon to shuffle off his or her mortal coil — in which case the event is a kind of pre-emptive eulogy. The Honourable Catherine Branson, for whom this lecture is named, is younger than me and in what appears to be excellent health.

That being said, I am delighted to be able to honour this leading Australian jurist. We were colleagues on the Federal Court from 1994 when Justice Branson was appointed until 2008 when we both resigned to take up other offices. Apart from her very substantial body of judicial work Catherine Branson has undertaken a large range of important public functions in the service of the Australian and South Australian communities. They have included her presidency of the Australian Human Rights Commission, to which she was appointed in 2008 and in which capacity she served until 2012. It is one of the more demanding and sensitive offices in our polity requiring calculated assertiveness and a high degree of resilience in what can be, from time to time, a sharply adversarial area of public discourse. She demonstrated that she had all of the necessary qualities and discharged her responsibilities with great distinction.

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We sat together on a number of cases in the Federal Court. My fondest memory is of a case in 2008 in which we sat as a Full Court with Justice Margaret Stone, who is now Inspector-General of Intelligence and Security. The case was *Evans v New South Wales*.[1] It concerned the World Youth Day hosted by Sydney at that time and comprising a week-long series of events attended by the Pope and a large number of young pilgrims from around the world. The *Evans Case* makes a convenient study for the topic of this lecture, which nominally concerns the durability but in substance considers the changeability and fragility of what we are sometimes pleased to think of as enduring societal values respected by, reflected in, or underpinning our laws. I will refer to *Evans* later. First, however, there are some general questions about values to be considered.

There is a preliminary definitional question. What meaning of values is relevant to a discussion about the law, be it the Constitution or laws made under it by the Parliament, or the judge-made common law, or the ways in which the courts interpret the Constitution and the laws? They are not written down for us in a convenient list.

It is not unusual to find in national constitutions explicit declarations of shared values at a high level of generality. The Preamble to the United States Constitution commences:

> We the people of the United States, in Order to form a more perfect Union, establish Justice, insure (sic) domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

By way of contrast the Preamble to the *Commonwealth of Australia Constitution Act 1900* (UK) recites that:

> … the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty

[1] (2008) 168 FCR 576.

> God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.

It reads a little like a 19th century version of a joint venture document with a light religious overlay. Justice Patrick Keane famously called our Constitution a 'small brown bird' when compared with the American eagle.[2] It does not entrench fundamental human rights and freedoms. Nor have such general guarantees been implied. In 1992, Sir Anthony Mason observed in his judgment in *Australian Capital Television Pty Ltd v Commonwealth:*

> To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.[3]

There are, of course, express provisions in the Australian Constitution which answer, to some degree, the description of human rights guarantees and can be said to reflect underlying values. One is s 51(xxxi) which impinged upon the popular consciousness through the film *The Castle* and recently surfaced again in relation to changes to the post-retirement benefits of Members of Parliament.[4] It requires, in effect, that laws made by the Commonwealth Parliament for the acquisition of property from any State or person must be on just terms. There is a prohibition in s 51(xxiiiA) against civil conscription in relation to the provision of medical and dental services. There is a requirement under s 80 that the trial on indictment of any offence against any law of the Commonwealth shall be by jury. There is the famous guarantee in s 92 that trade,

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2 Patrick Keane, 'In Celebration of the Constitution' (Speech given to the National Archives Commission, 12 June 2008) <http://archive.sclqld.org.au/judgepub/2008/Keane120608.pdf> 1.

3 (1992) 177 CLR 106, 136.

4 *Cunningham v Commonwealth* [2016] HCA 39.

commerce and intercourse among the States shall be absolutely free — a guarantee which extends to freedom of movement. There is a guarantee of religious freedom and a prohibition against establishing any religion or imposing any religious observance in s 116. There is also a prohibition against discrimination between residents of States and non-residents of States in s 117. There is an entrenched constitutional jurisdiction in the High Court under s 75(v) which means, in effect, that no member of the Commonwealth Executive, no Commonwealth officer and no authority is immune from judicial review for excess of power or, as it is termed, jurisdictional error. Beyond all that there are important implications which have been drawn from the Constitution relating to separation of the judicial and legislative powers at federal level and the maintenance of the independence and essential characteristics of State courts, including the entrenchment of their supervisory jurisdiction over official decisions made under State laws. All of them support a basic concept to the rule of law.

There are those who see the Australian Constitution as a value free zone providing a framework for what is sometimes described as 'exceptionalism' manifested in a dry judicial legalism at least in the context of international human rights discourse and providing frequent disappointment for progressive legal thinkers. Indeed, a few years ago a senior judge from another place, aware of the absence of an entrenched Bill of Rights in Australia, seemed to think that this meant Australia did not have a Constitution. I presented the judge with a copy of the Constitution endorsed with the words ‘No Bill of Rights but it seems to work’.

Two public law academics, Elisa Arcioni and Adrienne Stone, have pointed out in a paper published earlier this year in the *International Journal of Constitutional Law* that:

> To an extent that would surprise many outside observers, the Australian Constitution is not understood to be a repository of shared values, is not thought to contain fundamental principles to which the citizenry agree or

> aspire, and does not frame public debate.[5]

As they acknowledge, however, the written Constitution does not tell the whole story of Australian constitutionalism. They point to 'shared foundational values', most obviously the independence of the judiciary, the rule of law and freedom of speech. They suggest that Australia's constitutional culture is more substantive than appears from the text but requires for its fuller understanding a focus on the unwritten small 'c' Constitution.[6]

The common law, which Sir Owen Dixon described as surrounding and pervading the Australian system in a manner akin to 'the ether', is part of the small 'c' Constitution.[7] Sir John Latham wrote in 1960 'in the interpretation of the Constitution, as of all statutes, common law rules are applied'.[8] The constitutional dimension of the common law is also reflected in the institutional arrangements which it brought with it. At its core are public courts which adjudicate between parties, provide reasoned decisions, and are the authorised interpreters of the laws which they administer. As Professor Arthur Goodhart once wrote, the most striking feature of the common law is its public law, it being primarily a method of administering justice.[9]

The common law itself embodies values. As it develops it confronts courts with choices which may involve the application of existing values or their displacement by a competing value. A dramatic example of common law reasoning by reference to

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5 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.

6 Ibid 75–6.

7 Sir Owen Dixon, 'Marshall and the Australian Constitution' in Judge Woinarski (ed), *Jesting Pilate* (William S Hein & Co, 2nd ed, 1997) 174.

8 Sir John Latham, 'The Migration of the Common Law: Australia' (1960) 76 *Law Quarterly Review* 54, 57.

9 Professor A L Goodhart, 'The Migration of the Common Law: What is the Common Law' (1960) 76 *Law Quarterly Review* 45, 51.

contemporary values appeared in the judgment of the High Court in *Mabo v Queensland (No 2).*[10] Sir Gerard Brennan, with whom Chief Justice Mason and Justice McHugh agreed, said:

> no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.[11]

What was overturned in *Mabo* was the assumption of the Privy Council in *Cooper v Stuart*[12] that the colony of New South Wales had been 'without settled inhabitants or settled law', an assumption applicable to the whole continent, and one which had been applied to the Indigenous people of the Northern Territory by Justice Blackburn in *Milirrpum v Nabalco Pty Ltd*[13] in 1971.

There was much controversy after *Mabo* about the invocation of 'contemporary values'. Those invoked by the Court were values which were plainly not shared by all members of the Australian community. Some critics suggested that the idea of contemporary values was too elusive to legitimately apply to judicial decision-making. At best, one might discern community attitudes which themselves were capable of change from time to time.[14] To say however that resort to values in reading constitutions or statutes or in developing the common law can be contentious is not to say that those processes can be detached from some values even if they be located in the judicial mind. Sir Anthony Mason, writing in 1987, said it is unrealistic to interpret any instrument, whether it be a constitution, a statute or a contract, by reference to words alone

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10 (1992) 175 CLR 1.
11 Ibid 30.
12 (1889) 14 App Case 286, 291.
13 (1971) 17 FLR 141.
14 John Braithwaite, 'Community Values and Australian Jurisprudence' (1995) 17 *Sydney Law Review* 351.

without any regard to fundamental values.[15] That leads us back to the definitional question, which is best answered in as pedestrian a way as the dictionary allows.

A suitably pedestrian meaning of the term 'values', taken from the *Shorter Oxford English Dictionary*, relevant to this discussion is '[t]he principles or moral standards of a person or social group; the generally accepted or personally held judgement of what is valuable and important in life'.[16]

There are many principles which can be thought of as reflecting values of importance in our society. I would not wish to essay an exhaustive list but they fall into various categories. One category comprises common law rights and freedoms — not created or protected by the Constitution or any statute but recognised by the judge-made law which is part of our heritage from the United Kingdom and which has been further developed in this country. They include: freedom of speech and movement; no deprivation of liberty except by law; access to the courts; access to legal counsel when accused of a serious crime; legal professional privilege; privilege against self-incrimination; the presumption of innocence; a fair trial; immunity from deprivation of property without compensation; the right to procedural fairness when affected by the exercise of public power. Many of these 'rights' and 'freedoms' have a procedural rather than a substantive character about them. All of them are subject to abrogation or impairment by statute except to the extent that they may be subsumed in an expressed or implied constitutional limitation on legislative power.

In relation to courts, there are widely held values. We expect our judges and courts to be — independent of executive government and

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[15] Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 158–9.

[16] *Shorter Oxford English Dictionary*, (Oxford University Press, 5th ed, 2002) 3500.

private sector power, impartial, fair, open, faithful to the law and reasoned in their decision-making, accessible to the public and providing equal justice to all who come before them. Equal justice is a value to which most if not all members of our community would be expected to assent. Its content, however, is not easy to define. Its application can be difficult, particularly when courts are asked to take account of individual or cultural differences in the application of the law. The concept has arisen in the context of sentencing for criminal offences. In a decision in 2011 about parity in sentencing of co-offenders, Justices Crennan, Kiefel and myself observed that:

> Equal justice' embodies the norm expressed in the term 'equality before the law'. It is an aspect of the rule of law ... It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law.[17]

A question of equal justice arose in the High Court in 2013 in a case concerning the extent to which a person's indigenous background should be taken into account in sentencing. In *Bugmy v The Queen*[18] it was argued that sentencing courts in New South Wales should take into account the unique circumstances of all Aboriginal offenders as relevant to the moral culpability of an individual Aboriginal offender and that courts should take into account the high rate of incarceration of Aboriginal Australians. The Court rejected the notion that Aboriginality in itself could be treated as a mitigating factor but said:

> An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence.[19]

In a case decided at about the same time, *Munda v Western*

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17 *Green v The Queen* (2011) 244 CLR 462, 472–3 (footnotes omitted).
18 (2013) 249 CLR 571.
19 Ibid 592.

Australia[20] six Justices of the Court added that it would be wrong to accept that Aboriginal offending was to be viewed systemically as less serious than offending by persons of other ethnicities. In doing so it quoted from the judgment of Brennan J in *Neal v The Queen:*

> The same sentencing principles are to be applied ... in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group.[21]

There are what might be called 'judicial values' derived from the constitutional design of our representative democracy in which Members of Parliament are chosen directly by the people. Those values inform the interpretation of the Constitution and statutes and the development of the common law. For example, a strained interpretation of a statute which is not really consistent with any fair reading of its text, even if it yields a sensible result, may be unfair and lack legitimacy. Justice Gaudron said in *Corporate Affairs Commission (NSW) v Yuill* that the rule that the words of a statute should be taken to bear their natural and ordinary meaning is a rule 'dictated by elementary considerations of fairness'.[22] Her Honour went on to say that 'those who are subject to the law's commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage'.[23] That approach to interpretation is underpinned by a value of fairness which lies at the heart of common conceptions of justice. It also has democratic legitimacy.

There are other values derived from the role of the judiciary in our representative democracy which affect the way in which laws are interpreted or the common law developed. They include respect

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20 (2013) 249 CLR 600.
21 Ibid 618 citing *Neal v The Queen* (1982) 149 CLR 305, 326.
22 (1991) 172 CLR 319, 340.
23 Ibid.

for the proper boundaries between the judicial and the legislative functions. Judges are not elected. Although they may make law in the limited sense I have outlined, they will hold back from doing so when they see it as more appropriate to leave it to the legislature to bring about change than to do so by judicial decision. There is no bright line to mark the boundaries between restraint and activism. It is a question of judgment in the borderlands between the judiciary and the Parliament.

A recent example of restraint may be seen in the case of *Commonwealth Bank of Australia v Barker*.[24] The High Court declined to follow English case law importing a term of mutual trust and confidence into employment contracts. That implication would have been of considerable significance to employer/employee relations throughout the country in a setting which is extensively regulated by legislative schemes reflecting public policy choices made by governments and parliaments. The decision of the High Court last year[25] that gene sequences bearing mutations indicative of susceptibility to breast cancer were not patentable also involved considerations of the proper limits of the judicial function. In a joint judgment four of the Justices held that to treat the gene sequence as patentable would have extended existing concepts of patentability. It would have been likely to result in the creation of important public rights in private hands, to involve far-reaching questions of public policy and to affect the balance of important conflicting interests. Ultimately, the question was one left to the Parliament to determine.

Moving from judicial to other forms of official power, there is a generalised concept of the rule of law which expects that the exercise of power will be authorised by law and will be subject to judicial supervision where its limits are exceeded. There is a related concept of administrative justice, which requires that the exercise of public power be rational, reasonable, fair and undertaken in good faith. Its essential elements have been developed by the common law

[24] (2014) 253 CLR 169.
[25] *D'Arcy v Myriad Genetics Inc* (2015) 325 ALR 100.

but they inform the ways in which the courts approach the exercise of their supervisory jurisdiction. That is because those elements of administrative justice themselves define limits on official power.

There is a general acceptance at governmental level of the importance of human rights and freedoms of the kind recognised in the *International Covenant on Civil and Political Rights*, even though there is a vociferous lobby against entrusting the courts with their application. It is also generally accepted today that discrimination in the application of the law, or in the provision of goods or services, based upon inherent characteristics such as race, colour, ethnic or national origin, religion, gender, disability or sexuality is wrong.

The field of discrimination provides a strong historical example of change in societal values informing the development of the law. Racial discrimination makes the point. When the Australian Constitution came into force, s 51(xxvi) conferred on the Commonwealth Parliament the power to make laws for the peace, order and good government of the Commonwealth with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. The provision was directed to the control, restriction, protection and possible repatriation of people of 'coloured races' living in Australia. The exclusion of Aboriginal people was designed to leave them to the not so tender mercies of the States. The overwhelming tenor of the Convention Debates which led to the inclusion of the race power, with the notable exceptions of Dr John Quick and Charles Kingston, indicated a desire for laws applying discriminatory controls to 'coloured races' in Australia. In 1967, after a campaign spanning decades, the Constitution was amended to delete the exclusion of Aboriginal people from the race power. This meant that the Commonwealth would have power to make special laws for Aboriginal people. The race power was now informed by two sets of values in tension. The 1967 amendment was beneficial in purpose. However, the race power after the amendment was still

capable of being applied to make laws adversely discriminating against the people of any race.[26] Any contemporary constraint upon adverse discriminatory action is therefore more likely to be political than constitutional.

Another recent and contentious example of the way in which shifting community attitudes may inform the exercise of constitutional power is in relation to the marriage power and its potential application to same sex marriage.[27]

As appears from what I have said, those things which we can call 'values' under our pedestrian definition are, in some cases, long-standing, but in others relatively recent. The significance attached to them by law-makers and by courts is changeable according to societal attitudes and circumstances. It is probably not too bold to say that as a general proposition such values, when they take hold, tend to stick unless displaced by some perceived existential threat or powerful political imperative. That leads me back to the case on which Catherine Branson and I sat in 2008. It usefully illustrates an important point about the relationship between courts and law-makers and the way in which values play a part in the interpretation of the law.

The New South Wales Parliament had enacted a *World Youth Day Act 2006* (NSW) and the executive government had made the *World Youth Day Regulation 2008* (NSW) under that Act. One of the clauses of the Regulation gave authorised persons the power to direct people in 'World Youth Day declared areas' to cease engaging in conduct causing 'annoyance or inconvenience' to participants in a World Youth Day event. Members of a body called the 'No to Pope Coalition' challenged the validity of certain provisions of the Act and the Regulation in the Federal Court. They wanted to communicate to participants in World Youth Day their views about

[26] See *Kartinyeri v Commonwealth* (1998) 195 CLR 337.
[27] See *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

sexual tolerance, contraception and reproductive freedom and to handout t-shirts, leaflets, flyers, stickers and condoms.

Provisions of the Act and of the Regulation were challenged on the basis that they impermissibly burdened the implied constitutional freedom of political communication. That implication, derived from ss 7 and 24 of the Constitution, limits the powers of Australian parliaments to make laws burdening the freedom of people to communicate on political and governmental matters unless the laws are made for a legitimate purpose and are reasonably and appropriately adapted to serve that purpose.

In the event, the 'No to Pope' activists succeeded on one aspect of their challenge, but not on the basis of the implied constitutional freedom. The Court held that the Regulation under which an authorised person could direct someone to cease engaging in conduct causing annoyance to participants in a World Youth Day event was so broad that it was not within the Regulation-making power created by the Act.[28] The Court reached that conclusion by applying a principle known as the principle of legality, which is protective of the common law values to which I referred earlier. Broadly speaking, where a law can be interpreted in a way that does not encroach upon common law rights and freedoms, or which minimises encroachment upon them**,** it should be so interpreted. On that basis the power which the Parliament had granted to the Governor to make regulations under the Act was interpreted by the Court as not authorising a regulation imposing a very broad restriction on free speech defined by reference only to what might annoy a particular class of person.

The principle of interpretation, called the principle of legality, has been set out in many cases in the High Court. In one of them, *Coco v The Queen*[29] decided in 1994, the Court put it this way: '[t]he courts

[28] *Evans v New South Wales* (2008) 168 FCR 576, 597 [83].
[29] (1994) 179 CLR 427.

should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language'.[30] That is a statement about the value attached by the courts to common law rights and freedoms. It was expressed out of respect for the Parliament as an assumption about the legislative approach to those rights and freedoms.

In 2004, Chief Justice Gleeson described the principle as a presumption against the modification or abrogation of fundamental rights and added:

> 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.[31]

In so saying, Chief Justice Gleeson cautioned that modern legislatures regularly enact laws that take away or modify common law rights.[32]

Justice McHugh in an earlier case in 2001 questioned the assumption and the principle of legality about parliamentary intention, saying that it had become an interpretive fiction. He said '[s]uch is the reach of the regulatory state that it is now difficult to assume that the legislature would not infringe rights or interfere with the general system of law'.[33] Justice Paul Finn in like vein, in an

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30 Ibid 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) (footnote omitted).

31 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21].

32 Ibid 328 [19].

33 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 299 [29].

essay entitled 'Statutes and the Common Law' published in 2005,[34] observed that a similar rule of interpretation had been adopted and had demonstrated remarkable staying power in United States jurisdictions but had been the subject of a great deal of criticism. The more we expose the bases of our interpretive principles and evaluate them in light both of contemporary legislative practice and modern understandings of interpretation as a process, the greater is the likelihood of continuing reappraisal of the validity and vitality of those principles.

The empirical evidence of legislative encroachments on common law rights, freedoms and immunities is amply demonstrated by the recent report of the Australian Law Reform Commission entitled *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, which was commissioned by the present Attorney-General, Senator Brandis, and published earlier this year. In an extensive review, the Law Reform Commission found that a range of Commonwealth laws appear to warrant what it called 'further consideration or review'. It set out a list of laws affecting freedom of speech, freedom of movement, association and assembly, fair trial, the burden of proof, the privilege against self-incrimination, legal professional privilege, procedural fairness, property rights, access to judicial review, retrospective laws, and laws imposing strict or absolute liability.[35]

In the *Evans Case*, Justices Branson, Stone and myself acknowledged that what we think of as enduring rights may not be as durable as we would wish. We acknowledged Justice McHugh's observation that when community values are undergoing radical change and few principles or rights are immune from legislative amendment or abolition, as is in the case of Australia today, few

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[34] Paul Finn, 'Statutes and the Common Law: The Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52, 57.

[35] Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachment by Commonwealth Laws*, Report No 129 (2016), 23–5 [1.81].

principles or rights can claim to be so fundamental that it is unlikely that the legislature would want to change them.[36] We nevertheless observed that the legislature, through the expert parliamentary counsel who prepare draft legislation, could be taken to be aware of the principle of legality and the need for clear words to be used before long-established rights and freedoms were taken away. We asserted, perhaps boldly, that there is little scope even in contemporary society for disputing that personal liberty, including freedom of speech, is regarded as fundamental subject to reasonable regulation for the purposes of an ordered society. We pointed to the special recognition that freedom of speech and of the press had long enjoyed at common law and its characterisation long ago by Sir William Blackstone as 'essential to the nature of a free State'.[37]

The assumption about legislative intention embedded in the principle of legality may be rendered implausible in the face of the realities of the regulatory State. In light of more recent developments, however, that assumption may, to some extent, be taken out of the equation. The High Court has revisited the concept of legislative intention in recent years and specifically in the context of the principle of legality. In *Lacey v Attorney-General (Qld)*[38] six Justices of the High Court said of the presumed legislative intention that it 'is not an objective collective mental state' and described it as 'a fiction which serves no useful purpose'. The joint judgment added:

> Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.[39]

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[36] *Evans v New South Wales* (2008) 168 FCR 576, 593 [69] citing *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298 [28].

[37] *Evans v New South Wales* (2008) 168 FCR 576, 594–5 [72]–[74] citing Blackstone, *Commentaries on the Law of England*, vol 4, 151–2.

[38] (2011) 242 CLR 573.

[39] Ibid 592 [43] (footnote omitted).

The values attached by the common law to basic rights, freedoms and immunities may attract greater protection under that approach than by an assumption about the values that legislators actually accord to them, which may be quite diverse. The practical effect of the principle, coupled with the High Court's recent approach to legislative intention, might be seen as a statement to legislators — we won't assume anything about your intention but if you want to override basic rights, freedoms and immunities you must be crystal clear about it in the language you use and thus be at least politically accountable. To that extent, the values attached to those common law rights, freedoms and immunities are protected by the courts against casual incursion by the legislature. They are not, however, invulnerable — ultimately, parliamentary sovereignty — within the scope allowed to the Parliament by the Constitution, will have its way.

In the end, the courts cannot be the ultimate protectors of all our rights and freedoms. The value we attach to those things must be part of a public and political culture which requires the Executive and the Parliament to think about them when making our laws. An important development in this respect has been the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). The Act requires that as soon as practicable after the commencement of the first session of each Parliament, a joint committee of members of the Parliament, to be known as the Parliamentary Joint Committee on Human Rights, is to be appointed.[40] The function of the Committee is to examine bills and legislative instruments coming before the Parliament for compatibility with human rights and to report to the Parliament on that issue. It has further functions of examining existing Acts for compatibility with human rights and reporting on them, and to inquire into any matter relating to human rights referred to it by the Attorney-General.[41]

The Committee's reports and conclusions do not bind the

[40] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 4.
[41] Ibid s 7.

Parliament and will take their place in the mix of political factors relevant to the passage of the legislation which it has examined.

This mechanism is important and should not be under-rated. It will, however, be a toothless tiger if there is no persistent public input which reminds law-makers of the values which I have described. As a general proposition, of course, if the political imperatives of the day lead the Parliament, at the instigation of the Executive, to consider legislation or to accept delegated legislation which infringes on rights, freedoms and immunities, there is in place a more powerful mechanism than used to be the case for directing its attention to those infringements and for providing input from interested individuals and bodies, by way of submission to the Committee, about those effects.

By way of conclusion there are few values so deep-rooted in our societal infrastructure, including our constitutional arrangements, that we can take their durability for granted. However, there are vocal and articulate proponents within and outside our parliaments who will ensure that they continue to be debated. As for those we regard as fundamental, I would be inclined not to be alarmed, but nevertheless to be wary and alert.