

# THE PRINCIPLE OF LEGALITY: ISSUES OF RATIONALE AND APPLICATION

BRUCE CHEN\*

*The term 'principle of legality' has most commonly been associated with one particular common law interpretive principle — the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms and immunities. The rationale is that it is in the last degree improbable that Parliament would abrogate or curtail such matters without clear and unambiguous language. The principle of legality is concerned with actual legislative intention.*

*In recent times, it has been argued that a competing rationale has emerged, and the rationale of the principle is also facing contemporary challenges. In light of this, the nature and conceptual basis of the principle is briefly discussed. Moreover, the principle of legality, despite being long established, has been criticised for lacking clarity in its scope and operation. The purpose of this article is to comprehensively examine the principle's scope and operation, having regard to the above-mentioned issues of rationale. This article focuses on the subject matter protected by the principle and the principle's strength, including whether justification and proportionality considerations can have any role to play. It identifies and analyses methodological issues which remain unsettled, reaches conclusions as to methodological inconsistencies between the principle's rationale and its application in practice, and provides some suggestions as to how this might be rectified.*

\* PhD Candidate, Monash University. The author would like to express his gratitude to Professor Jeffrey Goldsworthy, Associate Professor Julie Debeljak and the two reviewers for their insightful comments on earlier versions of this article. Thanks also to Alison P K O'Brien and Joanna Davidson for thought-provoking discussions with the author on the principle of legality. The views expressed in this article are the personal views of the author.

## I INTRODUCTION

The term ‘principle of legality’ is a ‘unifying concept’ in Australia said to encompass a broad range of common law principles of statutory interpretation.<sup>1</sup> Nevertheless, it has most commonly been associated with the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms and immunities except by clear and unambiguous language. As a principle of the common law, this presumption operates in other common law jurisdictions, including the United Kingdom and New Zealand.

By way of introduction, the High Court of Australia in *Coco v The Queen* (*‘Coco’*)<sup>2</sup> said the following in respect of the presumption (ie the principle of legality in its narrow context):

The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts 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. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.<sup>3</sup>

This passage has been taken as an authoritative exposition of the principle of legality in that narrow context.<sup>4</sup>

1 See Chief Justice J J Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 *Australian Law Journal* 769, 774–5; D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2014) ch 5; Wendy Lacey, ‘Liberty, Legality and Limited Government: Section 75(v) of the Constitution’ (Speech delivered at the 12th Annual Public Law Weekend, Australian National University, 9 November 2007) 17–22; Justice Susan Crennan, ‘Statutes and the Contemporary Search for Meaning’ (Speech delivered at the Statute Law Society, London, 1 February 2010) 19–20; *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ) (*‘Electrolux’*), citing *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587, 589; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 134–5 [30] (French CJ, Crennan and Keifel JJ); *R v JS* (2007) 175 A Crim R 108, 119–20 [33]–[34] (Spigelman CJ) (Mason P, McClellan CJ at CL, Hidden and Howie JJ agreeing). See also Chief Justice James Spigelman, *The McPherson Lecture Series: Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) vol 3, 36–7; Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2012) 206; Philip Sales, ‘Three Challenges to the Rule of Law in the Modern English Legal System’ in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis, 2011) 201 for a discussion of the United Kingdom context.

2 (1994) 179 CLR 427.

3 *Ibid* 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted).

4 This passage continues to be cited with approval by the High Court. For recent examples, see *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 271 [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 60–1 [119] (Gummow J); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 153 [158] (Kiefel J) (*X7*); *Lee v NSW Crime Commission* (2013) 251 CLR 196, 265 [172]–[173] (Kiefel J).

However, as will be seen in this article, the scope of the principle encompasses not only fundamental common law rights, freedoms and immunities, but also fundamental common law principles and departures from the general system of law (herein referred to collectively as ‘fundamental common law protections’). That is not to say that the principle of legality cannot be expanded in future. While exploration of such possibilities is beyond the scope of this article, some questions have been raised as to whether the principle can be extended to or otherwise informed by statutory rights,<sup>5</sup> human rights,<sup>6</sup> substantive rights under the rule of law<sup>7</sup> and constitutional rights.<sup>8</sup> The principle of legality is not fixed in nature.

The substantive analysis in this article is divided into two main parts. Part II provides an overview of the nature and conceptual basis of the principle of legality. It is important to comprehend the rationale of the principle since, as two members of the High Court have recently said, the principle ought not ‘be extended beyond’ it.<sup>9</sup> A new and competing rationale has emerged, argues one academic commentator,<sup>10</sup> and there are also contemporary challenges to the rationale. This part concludes that the rationale of the principle of legality has not been overtaken (at least, not yet). Part III examines the various aspects of the scope and operation of the principle of legality. It clarifies whether ambiguity is required before the principle of legality can operate, and the threshold for rebutting the principle. Having regard to the issues of rationale outlined above, this part goes on to consider the subject matter protected by the principle and the strength of the principle, including whether justification and proportionality considerations can have any role to play. Part IV then concludes that the way in which the principle of legality is currently being applied gives rise to unsettled methodological issues, as well as several methodological inconsistencies with the

- 5 See Pearce and Geddes, above n 1, 245; Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37 *Melbourne University Law Review* 372; *DPP (Vic) v Kaba* [2014] VSC 52 (18 December 2014) [188]–[193] (Bell J) (in obiter). As to ‘constitutional’ statutes, see Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35 *Melbourne University Law Review* 449, 457; Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 312; *Thoburn v Sunderland City Council* [2003] QB 151, 185–9 [60]–[67]; *H v Lord Advocate* [2013] 1 AC 413, 435–6 [30] (Lord Hope) (Baroness Hale and Lord Kerr agreeing) (in obiter).
- 6 See Spigelman, *The McPherson Lecture Series*, above n 1, 29; Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion & Use of Unincorporated Conventions* (Presidian Legal Publications, 2008) 105–6; Chief Justice R S French, ‘Oil and Water? — International Law and Domestic Law in Australia’ (Speech delivered at The Brennan Lecture, Bond University, 26 June 2009) 20–1; Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 5, 465–8; Bryan Horrigan, ‘Reforming Rights-Based Scrutiny and Interpretation of Legislation’ (2012) 37 *Alternative Law Journal* 228, 230; *DPP (Vic) v Kaba* [2014] VSC 52 (18 December 2014) [179]–[187], [188]–[193] (Bell J).
- 7 See George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 37, 132–3.
- 8 See Dan Meagher, ‘The Common Law Principle of Legality’ (2013) 38 *Alternative Law Journal* 209; *Monis v The Queen* (2013) 249 CLR 92, 209 [331] (Crennan, Kiefel and Bell JJ) cf *Tajjour v New South Wales* (2014) 313 ALR 221, 235 [30] (French CJ), 276–7 [224] (Keane J). See also *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 317 ALR 279, 296 [67] (Gageler J), regarding ch III of the *Constitution*.
- 9 *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310 [313] (Gageler and Keane JJ).
- 10 Lim, above n 5.

principle's rationale. It provides, as a starting point, some suggestions on how those methodological inconsistencies might possibly be rectified, and canvasses the alternate possibility that the rationale may ultimately be abandoned.

## II NATURE AND CONCEPTUAL BASIS

### A *Rationale for the Principle of Legality*

#### 1 *Improbability of Abrogation or Curtailment*

The rationale of the principle of legality was first set out in Australia by O'Connor J of the High Court in the 1908 case of *Potter v Minahan* ('*Potter*').<sup>11</sup> His Honour stated<sup>12</sup> that 'it is always necessary, in cases ... where a Statute affects civil rights, to keep in view the principle of construction stated in *Maxwell on Statutes*'.<sup>13</sup> His Honour went on to quote from that authoritative text:

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>14</sup>

The views of O'Connor J were subsequently quoted with approval by six members of the High Court in *Bropho v Western Australia* ('*Bropho*').<sup>15</sup> In that case, the Court spoke of the rationale for clear and unambiguous language for certain common law 'rules' of statutory interpretation before turning specifically to fundamental common law protections:

The rationale of all such rules lies in an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear. Thus, the rationale of the presumption against the modification or abolition of fundamental rights or principles is to be found in the assumption [set out in *Potter*] ...<sup>16</sup>

The majority judgment in *Bropho* was cited with approval in the aforementioned case of *Coco*.<sup>17</sup>

11 (1908) 7 CLR 277.

12 Ibid 304.

13 J A Theobald (ed), *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 4<sup>th</sup> ed, 1905).

14 *Potter* (1908) 7 CLR 277, 304 (citations omitted).

15 (1990) 171 CLR 1 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

16 Ibid 18, citing *Potter* (1908) 7 CLR 277, 304; *Ex parte Walsh and Johnson*; *Re Yates* (1925) 37 CLR 36, 93.

17 (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

Another oft-cited passage is that of Gleeson CJ in *Al-Kateb v Godwin* (*Al-Kateb*).<sup>18</sup> Gleeson CJ (dissenting) pointed to the well-established history of the principle of legality — tracing it back to *Potter*:

In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms ... unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases. It is not new. In 1908, in this Court, O'Connor J referred to a passage from the fourth edition of *Maxwell on Statutes* [as set out in *Potter*] ...<sup>19</sup>

In summary, the rationale for the principle is that it is ‘in the last degree improbable’ that Parliament would abrogate or curtail fundamental common law protections without indicating by ‘unmistakable and unambiguous language’ that it has gone further than simply having ‘directed its attention’ to the question of abrogation or curtailment — Parliament must have ‘consciously decided’ upon abrogation or curtailment. However, this proffered rationale does not of itself provide a complete explanation. Why is the starting point that Parliament is unlikely to have intended to enact legislation that interferes with fundamental common law protections? This can be explained by the institutional relationship between Parliament and the courts.

## **2 Institutional Relationship Between Parliament and the Courts**

In common law jurisdictions, Parliament, as one of the three ‘arms of government’ — together with the judiciary and the executive — does not operate ‘in a vacuum’,<sup>20</sup> nor does it ‘legislate on a blank sheet’.<sup>21</sup> As such, Parliament is taken to be aware of standing principles of statutory interpretation; enact legislation with those principles borne in mind; and understand that the courts will interpret the legislation according to such principles. One of those principles is, of course, the principle of legality. The notion that the principle of legality arises from the institutional relationship between Parliament and the courts has been affirmed by the High Court.<sup>22</sup> Recent High Court judgments have described the principle as

18 (2004) 219 CLR 562.

19 *Ibid* 577 [19] (citations omitted).

20 Philip Sales, ‘A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*’ (2009) 125 *Law Quarterly Review* 598, 600, citing Rupert Cross, John Bell and George Engle, *Cross: Statutory Interpretation* (Oxford University Press, 3<sup>rd</sup> ed, 1995) 165. See also *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587 (Lord Steyn).

21 Lord Johan Steyn, ‘The Intractable Problem of the Interpretation of Legal Texts’ (2003) 25 *Sydney Law Review* 5, 18.

22 *Electrolux* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

‘a working assumption about the legislature’s respect for the law’<sup>23</sup> and ‘known to both the Parliament and the courts as a basis for the interpretation of statutory language’.<sup>24</sup>

Nevertheless, Parliament remains sovereign, and fundamental common law protections, as products of the common law, are not sacrosanct. The presumption is entirely rebuttable. Thus, Jeffrey Goldsworthy has described the principle of legality as ‘giving effect to Parliament’s “standing commitments” ... to preserve basic common law rights and freedoms, which it should not be taken to have repudiated absent very clear evidence such as express words or necessary implication’.<sup>25</sup> That precisely reflects the rationale propounded in *Potter, Bropho, Coco* and *Al-Kateb*. Seen in this way, the principle of legality can be said to be directed at ascertaining Parliament’s actual legislative intention.<sup>26</sup>

### 3 Aspect of the Rule of Law and Constitutional Dimension

Additionally, the High Court has, in referring to this institutional relationship between Parliament and the courts, drawn a link between the principle of legality and the rule of law — such that the former is considered an aspect of the latter. The judgments of Gleeson CJ have been particularly influential in this regard. In *Al-Kateb*,<sup>27</sup> his Honour expressed the following:

A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, *under the rule of law*, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.<sup>28</sup>

Gleeson CJ went further in *Electrolux*.<sup>29</sup> His Honour described the principle of legality as:

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>30</sup>

23 *X7* (2013) 248 CLR 92, 109 [24] (French CJ and Crennan J), quoting Chief Justice Murray Gleeson, ‘Legality — Spirit and Principle’ (Speech delivered at the Second Magna Carta Lecture, New South Wales Parliament House, 20 November 2003).

24 *Monis v The Queen* (2013) 249 CLR 92, 209 [331] (Crennan, Kiefel and Bell JJ).

25 Goldsworthy, *Parliamentary Sovereignty*, above n 5, 305.

26 See Sales, ‘A Comparison of the Principle of Legality’, above n 20, 605.

27 (2004) 219 CLR 562.

28 *Ibid* 577 [20] (dissenting, but not on this point) (emphasis added).

29 (2004) 221 CLR 309.

30 *Ibid* 329 [21] (emphasis added).

The notion that the principle of legality is an aspect of the rule of law has retained favour in the High Court.<sup>31</sup> It has also been taken further, so as to say that the principle has a ‘constitutional’ dimension. In particular, French CJ has considered that the principle of legality can be regarded as “‘constitutional” in character even if the rights and freedoms it protects are not’.<sup>32</sup> This is because:

The common law in its application to the interpretation of statutes helps to define the boundaries between the judicial and legislative functions. That is a reflection of its character as ‘the ultimate constitutional foundation in Australia’. It also underpins the attribution of legislative intention on the basis that legislative power in Australia, as in the United Kingdom, is exercised in the setting of a ‘liberal democracy founded on the principles and traditions of the common law’. It is in that context that this Court recognises the application to statutory interpretation of the common law principle of legality.<sup>33</sup>

This perhaps makes more explicit Gleeson CJ’s comments in *Electrolux*, where his Honour cited Lord Steyn of the House of Lords in describing the principle of legality as governing ‘the relations between Parliament, the executive and the courts’.<sup>34</sup> Indeed, the subsequent approval of Gleeson CJ’s statement by the High Court in *Saeed v Minister for Immigration and Citizenship*<sup>35</sup> has been interpreted by academic commentators as the Court having accorded ‘constitutional’ status on the principle.<sup>36</sup> While not entirely clear, the above suggests (at the very least) that the principle of legality is a bedrock principle of strong application.

- 31 See *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 622 [182] (Crennan, Kiefel and Bell JJ) (*‘Stoddart’*); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [43] (French CJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Lee v NSW Crime Commission* (2013) 251 CLR 196, 264 [171] (Kiefel J). See also Crennan, above n 1, 18, where her Honour (extra curially) went on to further describe fundamental common law freedoms as ‘part and parcel of ... the rule of law’.
- 32 Chief Justice R S French, ‘The Common Law and the Protection of Human Rights’ (Speech delivered at the Anglo Australasian Lawyers Society, Sydney, 4 September 2009) 8. See also Chief Justice Robert French, ‘Protecting Human Rights Without a Bill of Rights’ (2010) 43 *John Marshall Law Review* 769, 788; Chief Justice Robert French, ‘The Courts and the Parliament’ (2013) 87 *Australian Law Journal* 820, 827.
- 33 *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [42] (French CJ) (citations omitted) (*‘Momcilovic’*). See also French, ‘The Common Law and the Protection of Human Rights’, above n 32, 2–3, 6–7; French, ‘Protecting Human Rights Without a Bill of Rights’, above n 32, 786–8; French, ‘The Courts and the Parliament’, above n 32, 820.
- 34 (2004) 221 CLR 309, 329 [21].
- 35 (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
- 36 Pearce and Geddes, above n 1, 3. See also Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 5, 455; Dan Meagher, ‘The Common Law Presumption of Consistency with International Law: Some Observations from Australia (and Comparisons with New Zealand)’ [2012] *New Zealand Law Review* 465, 470.

#### 4 *Enhancing Parliamentary Process and Electoral Accountability*

In light of the preceding discussion, the principle of legality is said to be ‘of long standing’;<sup>37</sup> possessing a ‘rich’ and ‘significant’ common law heritage or lineage.<sup>38</sup> However, it has been argued that a contemporary shift has occurred with respect to the rationale underlying the principle. Brendan Lim argues with some force that the principle of legality has a ‘myth of continuity’.<sup>39</sup> He considers that there have been two main attempts by the High Court to revise the ‘original rationale’ of the principle. The first is in *Coco*, and the second relates to the High Court’s adoption of comments by Lord Hoffman in the House of Lords case of *R v Secretary of State for the Home Department; Ex parte Simms* (‘*Simms*’).<sup>40</sup>

In *Coco*, the High Court approved the ‘original rationale’ but made a further observation:

At the same time, curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.<sup>41</sup>

These thoughts were ‘echoed’<sup>42</sup> by Lord Hoffman in *Simms* in this powerfully stated passage:

the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.<sup>43</sup>

37 Stephen Gageler, ‘Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process’ (2011) 37(2) *Monash University Law Review* 1, 13. See also Spiegelman, *The McPherson Lecture Series*, above n 1, 780; Justice J D Heydon, ‘Are Bills of Rights Necessary in Common Law Systems?’ (Speech delivered at the Oxford Law School, 23 January 2013) 42.

38 Dan Meagher, ‘The Principle of Legality and the Judicial Protection of Rights — *Evans v New South Wales*’ (2009) 37 *Federal Law Review* 295, 310 n 82; Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 5, 453. See also Steyn, above n 21, 18 in the United Kingdom context.

39 Lim, above n 5, 379–82. Meagher agrees that the principle ‘has, arguably, changed or at least evolved’: Dan Meagher, ‘The Principle of Legality as Clear Statement Rule: Significance and Problems’ (2014) 36 *Sydney Law Review* 413, 418–21.

40 [2000] 2 AC 115.

41 *Coco* (1994) 179 CLR 427, 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ).

42 *Lee v NSW Crime Commission* (2013) 251 CLR 196, 309 [311] (Gageler and Keane JJ). Cf Lim, above n 5, 392–4.

43 *Simms* [2000] 2 AC 115, 131.



This passage has gained widespread support both in Australia<sup>44</sup> and overseas.<sup>45</sup> It posits that while Parliament is able to legislate to interfere with fundamental common law protections, there must be ‘political constraints’<sup>46</sup> on the exercise of such power arising in the democratic process. Hence, the ‘onus’<sup>47</sup> is on Parliament to, in Lord Hoffman’s words, squarely confront what it is doing and accept the political cost. It is only then that the legislation being enacted will have ‘the necessary democratic seal of approval’<sup>48</sup> and members of Parliament will have ‘assumed electoral accountability before the community for what [they are] doing’.<sup>49</sup>

It is true, as Lim has observed, that the emergence of *Simms* as representing (at least, arguably) a new and different rationale for the principle of legality has not been sufficiently appreciated in the majority of academic commentary.<sup>50</sup> It is also true that Lord Hoffman’s statement is a ‘normative’ claim,<sup>51</sup> in the sense that it is not so much focused on ascertaining actual legislative intention but, rather, enhancing electoral accountability.<sup>52</sup> In this way, the principle of legality could be described as imposing a ‘manner and form’ requirement on Parliament in order to abrogate or curtail fundamental common law protections.<sup>53</sup> This can be contrasted with the ‘positive’ claim<sup>54</sup> in the ‘original rationale’ first set out in

- 44 See, eg, *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 582 [106] (Kirby J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 66 [148] (Heydon J). See also Heydon, above n 37, 42; *Lee v NSW Crime Commission* (2013) 251 CLR 196, 309 [311] (Gageler and Keane JJ).
- 45 See, eg, the United Kingdom Supreme Court in *Ahmed v Her Majesty’s Treasury* [2010] 2 AC 534, 631 [61] (Lord Hope) (Lord Walker and Lady Hale agreeing), 646 [111] (Lord Phillips), 664 [193] (Lord Brown) (dissenting), 682 [240] (Lord Mance), citing *Simms* with apparent approval; United Kingdom House of Lords in *B (A Minor) v DPP* [2000] 2 AC 428, 470 (Lord Steyn) (Lords Mackay and Hutton agreeing); *R v Secretary of State for the Home Department* [2004] 1 AC 604, 621 [27] (Lord Steyn) (Lords Hoffman, Millett and Scott agreeing); the New Zealand Court of Appeal in *R v Pora* [2001] 2 NZLR 37, 50–1 [53] (Elias CJ and Tipping), 73 [157] (Thomas J); the Hong Kong Court of Final Appeal in *A v Commissioner of the Independent Commission against Corruption* (2012) 15 HKCFAR 362, 380 [28]–[29] (Bokhary and Chan PJ).
- 46 Julie Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006’ (2008) 32 *Melbourne University Law Review* 422, 444.
- 47 Pearce and Geddes, above n 1, 212–13.
- 48 *R v Parole Board* [2005] 2 AC 738, 780 (Lord Woolf CJ), cited in Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5<sup>th</sup> ed, 2013) 177.
- 49 *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, 262 [106] (Kirby J).
- 50 See Lim, above n 5, 376–7 n 16, for some exceptions. See also Gageler, ‘Common Law Statutes and Judicial Legislation’, above n 37, 13.
- 51 Lim, above n 5, 390–4.
- 52 Goldsworthy, *Parliamentary Sovereignty*, above n 5, 185, 308–9; Lim, above n 5, 374–5.
- 53 See French, ‘The Courts and the Parliament’, above n 32, 827; Jeremy Webber, ‘A Modest (but Robust) Defence of Statutory Bills of Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 269–70; Goldsworthy, *Parliamentary Sovereignty*, above n 5, 307–9; Jeffrey Goldsworthy, ‘The Constitution and Its Common Law Background’ (2014) 25 *Public Law Review* 265, 279–80. See also *South Australia v Totani* (2010) 242 CLR 1, 29 [31] (French CJ). But see Goldsworthy, *Parliamentary Sovereignty*, above n 5, 182–4.
- 54 Lim, above n 5, 374.

*Potter* that Parliament does not intend to abrogate or curtail such matters without clear and unambiguous language (and thus concerned with actual legislative intention).

At least at present, the ‘*Simms* rationale’ is better characterised as a corollary of the ‘original rationale’. There are several bases for this. First, while Lord Hoffman’s statement in *Simms* has no doubt enjoyed prominence, the High Court has not resiled (at least, not yet) from the ‘original rationale’. It has continued to rely on the presumption that Parliament is unlikely to have intended to enact legislation that interferes with fundamental common law protections except by clear and unambiguous language.<sup>55</sup> Secondly, the enhancement of the parliamentary process (*Coco*) and the acceptance of electoral accountability by Parliament (*Simms*) are both ‘additional’<sup>56</sup> benefits arising from Parliament having to direct its attention to the issue of abrogation or curtailment, which it is already required to do. Thirdly, the recognition of the ‘*Simms* rationale’ does not in any event detract from the ‘original rationale’. The two so-called competing rationales are not mutually exclusive; the principle of legality is more than capable of serving both purposes.<sup>57</sup> They are, in fact, closely related.<sup>58</sup> As Gageler and Keane JJ said in *Lee v NSW Crime Commission*:

More recent statements of the principle in this Court do not detract from the rationale identified in *Potter*, *Bropho* and *Coco* but rather reinforce that rationale. That rationale not only has deep historical roots; it serves important contemporary ends. It respects the distinct contemporary functions, enhances the distinct contemporary processes, and fulfils the shared contemporary expectations of the legislative and the judicial branches of government.<sup>59</sup>

Indeed, the ‘*Simms* rationale’ has been astutely incorporated by French CJ into his Honour’s description of the principle of legality, arguably without affecting its original premise. According to French CJ, it is ‘a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the

55 See *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 578 [94] (Kirby J); *Al-Kateb* (2004) 219 CLR 562, 577 [19] (Gleeson CJ); *Coleman v Power* (2004) 220 CLR 1, 97 [250] (Kirby J); X7 (2013) 248 CLR 92, 131–2 [86] (Hayne and Bell JJ); *Lee v NSW Crime Commission* (2013) 251 CLR 196, 264 [171] (Kiefel J), 308–10 [308]–[312] (Gageler and Keane JJ).

56 See Goldsworthy, *Parliamentary Sovereignty*, above n 5, 309.

57 See Sir Anthony Mason, ‘Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power’ (2011) 9 *New Zealand Journal of Public and International Law* 1, 9; Sir Anthony Mason, ‘Human Rights and Development in Australian Jurisprudence’ (Speech delivered at the Victorian Government Solicitor’s Office Government Law Conference, Melbourne, 20 April 2011) 4 [8]; Horrigan, above n 6, 229; Will Bateman, ‘The *Constitution* and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review’ (2011) 39 *Federal Law Review* 463, 484; *DPP (Vic) v Kaba* [2014] VSC 52 (18 December 2014) [174] (Bell J).

58 See Williams and Hume, above n 7, 37, although they further delineate the principle of legality into four (or potentially five) rationales.

59 (2013) 251 CLR 196, 309–10 [312], cited in *DPP (Vic) v Kaba* [2014] VSC 52 (18 December 2014) [172] (Bell J).

*electorate*'.<sup>60</sup> Nevertheless, it should be noted that if the principle of legality is to continue to be directed at ascertaining the actual intention of the legislature, it 'must still be justified primarily on [the] more orthodox grounds'.<sup>61</sup> It remains to be seen whether this can be sustained in Australia, and it cannot be ruled out that the '*Simms* rationale' will ultimately reach ascendancy.

## B Contemporary Challenges to the Rationale

The emergence of Lord Hoffman's comments in *Simms* is not the only contemporary development which might be said to present challenges for the rationale of the principle of legality. Indeed, one could speculate that it is a response to such other contemporary developments — two of which present direct and significant implications for the 'original rationale'. They are briefly summarised as follows.

Much has changed since the 'original rationale' was first set out in *Potter* in 1908. The 1970s onwards has witnessed 'the proliferation of statutes which have entrenched directly upon areas of governmental, commercial and social life which for the most part were regulated, if at all, by common law doctrines'.<sup>62</sup> There is no doubt that Australia, like much of the common law world, is now a statute-oriented society. The criticism, which therefore arises, is that it is not tenable to continue to rationalise that Parliament is so unlikely to abrogate or curtail fundamental common law protections.<sup>63</sup> It now frequently legislates for their abrogation or curtailment. It appears that taken on its own, the '*Simms* rationale' would be less troubled by such criticism. In any event, the High Court appears unperturbed by the implications of such observations for the principle's 'original rationale'.

The second significant challenge to the 'original rationale' arises from contemporary approaches to legislative intention. The High Court has in relatively recent times brought the notion of actual legislative intention into doubt — labelling it a 'fiction' or 'metaphor'.<sup>64</sup> The most illuminating exposition of this approach was provided by six judges of the High Court in *Lacey v Attorney-*

60 *Momcilovic* (2011) 245 CLR 1, 46 [43] (French CJ) (emphasis added). See also *South Australia v Totani* (2010) 242 CLR 1, 29 [31] (French CJ), cited with approval in *Tajjour v New South Wales* (2014) 313 ALR 221, 276 [221] (Keane J).

61 Goldsworthy, *Parliamentary Sovereignty*, above n 5, 309.

62 Paul Finn, 'Statutes and the Common Law' (1992) 22 *University of Western Australia Law Review* 7, 11.

63 Lim, above n 5, 374, 383–4; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298–9 [27]–[29] (McHugh J) ('*Malika*'). However, it has been noted that McHugh J did not explicitly distinguish between the principle of legality and another common law principle — the presumption against altering common law doctrines: Spigelman, 'Principle of Legality and the Clear Statement Principle', above n 1, 778; Spigelman, *The McPherson Lecture Series*, above n 1, 41–2.

64 See Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Sydney Law Review* 39, 41; *Potter* (1908) 7 CLR 277. See also Murray Gleeson, 'Legal Interpretation: The Bounds of Legitimacy' (Speech delivered at the Sydney University Law School, 16 September 2009) 10.

*General (Qld)*<sup>65</sup> who said that the ‘[a]scertainment 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’.<sup>66</sup> Seen in this way, legislative intention is not something that is pre-existing<sup>67</sup> and subsequently ascertained by the courts by utilising orthodox techniques of statutory interpretation. Rather, it is a product of the statutory interpretation process itself<sup>68</sup> and ‘nothing more’.<sup>69</sup> This gives rise to several issues canvassed by Richard Ekins and Jeffrey Goldsworthy.<sup>70</sup> Most significantly, it undermines the principle’s foundational basis, by removing the notion that the principle is directed at ascertaining Parliament’s pre-existing and actual legislative intention.<sup>71</sup> As they say: ‘If legislative intention is a product of applying the principles of statutory interpretation, but those principles direct the courts to infer the legislature’s intention, then the dog is chasing its own tail’.<sup>72</sup>

Having established the nature and conceptual basis of the principle of legality, this article now turns to consider the various aspects of the scope and operation of the principle.

### III SCOPE AND OPERATION

#### A Ambiguity

It has been said, generally speaking, that ‘the most well established circumstance calling for a process of interpretation is where the legislative will is not apparent and there is ambiguity’.<sup>73</sup> It is now somewhat better understood<sup>74</sup> that ambiguity in the *strict or technical* sense (ie a lexical, verbal, grammatical or syntactical

65 (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (some footnotes omitted). See also *Momcilovic* (2011) 245 CLR 1, 85 [146] (Gummow J), 133–4 [315], 135 [321], 136 [327], 141 [341] (Hayne J), 175 [441] (Heydon J) (dissenting, but not on this point); French, ‘The Courts and the Parliament’, above n 32, 824–6.

66 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (citations omitted).

67 Ekins and Goldsworthy, above n 64, 41.

68 *Ibid.*

69 *Momcilovic* (2011) 245 CLR 1, 141 [341] (Hayne J).

70 Ekins and Goldsworthy, above n 64. See further in response to the notion that legislative intention is a fiction or metaphor: Goldsworthy, *Parliamentary Sovereignty*, above n 5, 229–66; Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012); Jeffrey Goldsworthy, ‘Legislative Intention Vindicated?’ (2013) 33 *Oxford Journal of Legal Studies* 821; Oliver Jones, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6<sup>th</sup> ed, 2013) 441–6. See also the discussion in Stephen Gageler, ‘Legislative Intention’ (Speech delivered at the 20th Lucinda Lecture, Monash University, 15 September 2014).

71 Ekins and Goldsworthy, above n 64, 43. See also Lim, above n 5, 376.

72 Ekins and Goldsworthy, above n 64, 44.

73 Spigelman, ‘Principle of Legality and the Clear Statement Principle’, above n 1, 771.

74 As to previously, see Spigelman, *The McPherson Lecture Series*, above n 1, 37–8.

ambiguity)<sup>75</sup> is not required to trigger the principle of legality's operation.<sup>76</sup> Moreover, in *Project Blue Sky v Australian Broadcasting Authority*,<sup>77</sup> it was recognised that the principle of legality may require the words of a statutory provision 'to be read in a way that does not correspond with the literal or grammatical meaning'.<sup>78</sup> That is not to say however, that the meaning of the term 'ambiguity' is now always made apparent when being utilised in the context of the principle of legality.

The courts are to begin with the presumption that the legislature does not interfere with fundamental common law protections.<sup>79</sup> If a fundamental common law protection is identified by the courts as 'being engaged upon an ordinary construction of legislation', then that 'brings the principle of legality into play'.<sup>80</sup> If the statute contains any ambiguity in a *broad* sense, then the principle will operate such that the ambiguity is 'resolved in favour of the protection of'<sup>81</sup> those fundamental common law protections. According to the Hon James Spigelman, ambiguity in the broad sense arises where the 'scope and applicability of a particular statute is, for whatever reason, doubtful'.<sup>82</sup> French CJ has put the operation of the principle in slightly different language — it influences the statutory interpretation process where 'constructional choices are open',<sup>83</sup> having regard to the statute's text, context and purpose.<sup>84</sup> All of this is consistent with the proposition that 'general words' in a statute — which may not give rise to

75 Spigelman, 'Principle of Legality and the Clear Statement Principle', above n 1, 771.

76 See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ); cited by the Victorian Court of Appeal in *R v Momcilovic* (2010) 25 VR 436, 464–5 [103] (Maxwell P, Ashley and Neave JJA): 'As this passage makes clear, the presumption does not depend for its operation on the existence of any ambiguity in the statutory language.' The Victorian Court of Appeal's citation of *R v Hansen* [2007] 3 NZLR 1, 12 [13] (Elias CJ) — who in turn cited UK authorities — clarifies that this is a reference to 'textual ambiguity' (ie ambiguity in its strict or technical sense). See also Spigelman, 'Principle of Legality and the Clear Statement Principle', above n 1, 779 (read with 772); Williams and Hume, above n 7, 44; Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' (1992) *Public Law* 397, 405–7 in the United Kingdom context.

77 (1998) 194 CLR 355.

78 *Ibid* 384 [78] n 56 (McHugh, Gummow, Kirby and Hayne JJ).

79 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 562–3 [43] (McHugh J).

80 Meagher, 'The Common Law Principle of Legality', above n 8, 210. See also *PJB v Melbourne Health & Anor (Patrick's case)* (2011) 39 VR 373, 433 [270] (Bell J); Spigelman, 'Principle of Legality and the Clear Statement Principle', above n 1, 779.

81 *Attorney-General (NT) v Emmerson* (2014) 307 ALR 174, 196 [86] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

82 Spigelman, 'Principle of Legality and the Clear Statement Principle', above n 1, 772.

83 *Momcilovic* (2011) 245 CLR 1, 46 [43]; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 30 [42]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47]; *Hogan v Hinch* (2011) 243 CLR 506, 535 [27]; *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [43]; *South Australia v Totani* (2010) 242 CLR 1, 28 [31]; *Tajjour v NSW* (2014) 313 ALR 221, 233 [28]. According to his Honour, '[c]onstructional choice subsumes the concept of ambiguity [presumably in its strict or technical sense] but lacks its negative connotation. It reflects the plasticity and shades of meaning and nuance that are the natural attributes of language and the legal indeterminacy that is avoided only with difficulty in statutory drafting': *Momcilovic* (2011) 245 CLR 1, 50 [50].

84 *Lee v NSW Crime Commission* (2013) 251 CLR 196, 203 [3].

ambiguity in the strict or technical sense — are to be construed in accordance with the principle.<sup>85</sup>

## B Rebutting the Principle of Legality

Since the principle of legality operates to resolve ambiguity in the broad sense, it can conversely be rebutted by clear and unambiguous language. To use French CJ's terminology, if the statutory language gives rise to only one 'constructional choice' which interferes with fundamental common law protections, or several constructions which equally interfere with such protections, then the principle of legality is 'of no avail against such language'.<sup>86</sup> Parliament's decision to abrogate or curtail fundamental common law protections 'must be respected'.<sup>87</sup> This proposition of itself is uncontroversial.<sup>88</sup>

In *Coco*, the High Court said that the principle of legality may be rebutted by 'unmistakable and unambiguous language'.<sup>89</sup> Nonetheless, the test for rebuttal has been expressed in a variety of ways over the years,<sup>90</sup> and judges of the High Court continue to rely on differing formulations.<sup>91</sup> The Court does not appear overly concerned to consistently prefer one formulation over another. In any event, it seems that the various tests are intended to convey the same meaning<sup>92</sup> and have been used interchangeably. While not all of the High Court authorities explicitly acknowledge that the principle may be rebutted by 'necessary implication', that this is possible is beyond doubt.<sup>93</sup> This article will continue to use the phrase 'clear and unambiguous language' to encompass express words or words of necessary implication.

85 See *Coco* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Potter* (1908) 7 CLR 277, 304 (O'Connor J), citing Maxwell, above n 13; *Bropho* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ), citing *Potter* (1908) 7 CLR 277, 304; *Simms* [2000] 2 AC 115, 131 (Lord Hoffman).

86 *Momcilovic* (2011) 245 CLR 1, 47 [45] (French CJ).

87 *Lee v NSW Crime Commission* (2013) 251 CLR 196, 203 [3] (French CJ).

88 See *Momcilovic* (2011) 245 CLR 1, 182–3 [452] (Heydon J) (dissenting), 221 [579] (Crennan and Kiefel JJ).

89 *Coco* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

90 See those collected by Spigelman CJ in *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340, 353–4 [44]. See also Spigelman, 'Principle of Legality and the Clear Statement Principle', above n 1, 779.

91 See, for example, *X7* (2013) 248 CLR 92, 109 [24] (French CJ and Crennan JJ): 'clear words or necessary implication', 603 [119], 604 [125] (Hayne and Bell JJ): 'by express words or necessary intendment', 612 [158] (Kiefel J): 'irresistible clearness'. See also in recent instances, where majority or unanimous joint judgments have been given: *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 582–3 [17]–[20] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ): 'clear language'; *Lee v R* (2014) 308 ALR 252, 259 [31] (French CJ, Crennan, Kiefel, Bell and Keane JJ): 'clear words or those of necessary intendment'; *Attorney-General (NT) v Emmerson* (2014) 307 ALR 174, 196 [86] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ): 'clear and unambiguous'.

92 Spigelman, 'Principle of Legality and the Clear Statement Principle', above n 1, 779.

93 See *Coco* (1994) 179 CLR 427, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ), 446 (Deane and Dawson JJ).

On any formulation, the test is ‘weighty’.<sup>94</sup> It is not of ‘a low standard’.<sup>95</sup> However, as will be seen later, some judges have adopted a contextual approach to the principle of legality, such that the test might be applied more stringently in respect of certain fundamental common law protections, compared to others. Moreover, it will often be uncertain whether or not a court will find that there is clear and unambiguous language, and reasonable minds may differ in this regard.<sup>96</sup>

## C Subject Matter of the Principle of Legality

### 1 Scope of Protection

As recognised in some early High Court authorities,<sup>97</sup> the scope of the principle extends beyond rights, freedoms and immunities to include fundamental common law principles. Two examples are the presumption against retrospectively changing legal rules which affect rights, liabilities and obligations,<sup>98</sup> and the presumption that the principles of natural justice apply to statutory powers which adversely affect a person’s rights and interests.<sup>99</sup> In the same way, Parliament is taken by the courts to be aware of and committed to such principles, which are presumed not to be interfered with except by clear and unambiguous language.<sup>100</sup> It is in this sense that the principle of legality can be described as a ‘unifying concept’ encompassing a broad range of common law principles of statutory interpretation.

A number of commentators have attempted to identify the fundamental common law protections covered by the principle of legality.<sup>101</sup> However, no two lists are identical. Judicial attempts to construct a list of fundamental common law

94 Williams and Hume, above n 7, 43.

95 *X7* (2013) 248 CLR 92, 153 [158] (Kiefel J).

96 See *Al-Kateb* (2004) 219 CLR 562 (express words). See *X7* (2013) 248 CLR 92 cf *Lee v NSW Crime Commission* (2013) 251 CLR 196 (necessary implication). The approach of the High Court majority in *Lee v NSW Crime Commission* might further be said to represent a less stringent approach than what one may have previously thought was required to rebut the principle.

97 See *Potter* (1908) 7 CLR 277, 304; *Bropho* (1990) 171 CLR 1, 18.

98 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 134–5 [30] (French CJ, and Crennan and Keifel JJ).

99 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [12]–[15] 258–9, [58]–[59] 271 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). For further commentary, see Matthew Groves, ‘Exclusion of the Rules of Natural Justice’ (2013) 39 *Monash University Law Review* 285, 290, 294–9.

100 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 271 [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310 [313] (Gageler and Keane JJ).

101 See Perry Herzfeld, Thomas Prince, and Stephen Tully, *Interpretation and Use of Legal Sources: The Laws of Australia* (Thomson Reuters, 2013) 226; Spigelman, *The McPherson Lecture Series*, above n 1, 27–9; Williams and Hume, above n 7, 41–3; Sanson, above n 1, 211–12; Jennifer Corrin, ‘Australia: Country Report on Human Rights’ (2009) 40 *Victoria University of Wellington* 37, 42; Pearce and Geddes, above n 1, 255–9; Alexis Henry-Comley, ‘The Principle of Legality: An Australian Common Law Bill of Rights?’ (2013) 15 *University of Notre Dame Australia Law Review* 83, 88–90. See further The Rt Hon Hary Woolf et al, *De Smith’s Judicial Review* (Sweet & Maxwell, 7<sup>th</sup> ed, 2013) 264–7 in the United Kingdom context.

protections have been rarer.<sup>102</sup> In *Momcilovic v The Queen*,<sup>103</sup> Heydon J considered that the principle of legality protected:

freedom from trespass by police officers on private property; procedural fairness; the conferral of jurisdiction on a court; and vested property interests ... rights of access to the courts; rights to a fair trial; the writ of habeas corpus; open justice; the non-retrospectivity of statutes extending the criminal law; the non-retrospectivity of changes in rights or obligations generally; mens rea as an element of legislatively-created crimes; freedom from arbitrary arrest or search; the criminal standard of proof; the liberty of the individual; the freedom of individuals to depart from and re-enter their country; the freedom of individuals to trade as they wish; the liberty of individuals to use the highways; freedom of speech; legal professional privilege; the privilege against self-incrimination; the non-existence of an appeal from an acquittal; and the jurisdiction of superior courts to prevent acts by inferior courts and tribunals in excess of jurisdiction.<sup>104</sup>

While the application of the principle of legality has focused most frequently on fundamental common law rights,<sup>105</sup> '[i]n its original form ... [it] embraced maintenance of fundamental elements of existing law and the legal system too'.<sup>106</sup> Indeed, the High Court in *Potter* said that it is 'in the last degree improbable' that the legislature would 'depart from the general system of law'.<sup>107</sup>

In the recent case of *X7 v Australian Crime Commission*,<sup>108</sup> a majority of the High Court recognised that the compulsory examination of a person charged with an indictable offence and pending trial, where the questions concerned the subject matter of the offence charged, would depart from the general system of law 'in a marked degree'.<sup>109</sup> It would alter a 'defining characteristic of the criminal justice system' — namely, its 'accusatorial nature'.<sup>110</sup> The legislation was not to be construed to that effect unless the departure was expressed in clear and unambiguous language. The High Court applied the principle of legality to a departure from the general system of law.<sup>111</sup>

102 But see *Momcilovic* (2011) 245 CLR 1, 177 [444] (Heydon J) (dissenting, but not on this point); *Malika* (2001) 204 CLR 290, 298 [28] (McHugh J) (non-exhaustive). See also French, 'The Common Law and the Protection of Human Rights', above n 32, 3–4; French, 'Protecting Human Rights Without a Bill of Rights', above n 32, 786.

103 (2011) 245 CLR 1.

104 Ibid 177 [444] (Heydon J) (footnotes omitted) (dissenting, but not on this point). See also Heydon, above n 37, 42–3.

105 *X7* (2013) 248 CLR 92, 132 [87] (Hayne and Bell JJ); Horrigan, above n 6, 229.

106 Horrigan, above n 6, 229.

107 *Potter* (1908) 7 CLR 277, 304 (O'Connor J).

108 (2013) 248 CLR 92.

109 Ibid 131–32 [85]–[87] (Hayne and Bell JJ), 152–4 [157]–[160], [162] (Kiefel J) (agreeing with Hayne and Bell JJ).

110 Ibid 132 [87], 140–1 [118]–[119], 142–3 [124]–[125] (Hayne and Bell JJ), 153 [160] (Kiefel J).

111 See also the approach of the New South Wales Court of Criminal Appeal in *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 (Spigelman CJ, Hidden and Latham JJ); Western Australia Court of Appeal in *Western Australia v BLM* (2009) 40 WAR 414, 428–9 [35]–[38] (Wheeler and Pullin JJA) (Owen JA agreeing).



## 2 No Authoritative Statement of Fundamental Common Law Protections

At least at first glance, compiled lists of fundamental common law protections appear to be wide-ranging and comprehensive. However, it must be borne in mind that there is no authoritative statement of such matters. That is because the principle of legality is a *common law* principle involving *common law* protections and so the recognition of rights as fundamental is ‘ultimately a matter of judicial choice’.<sup>112</sup> Significant implications flow from this.

First, there is uncertainty about which common law protections are actually fundamental and thus protected by the principle.<sup>113</sup> It has been said that ‘[s]ome common law rights and freedoms are readily identifiable, others less so’.<sup>114</sup> Moreover, as Pearce and Geddes have observed, it ‘seems unlikely’ that any such categorisation of protections as either fundamental or non fundamental ‘can be based on a bright line’.<sup>115</sup> As to departures from the general system of law, this has come under particularly strong criticism and was the cause for ‘alarm’ in *Bennion on Statutory Interpretation*:

It is submitted that such a vague criterion is inappropriate for such a robust approach to statutory interpretation. The draftsman, and indeed the Parliament, is entitled to know with far greater precision what will lead to the pronounced judicial interference of the principle of legality.<sup>116</sup>

Secondly, a court’s recognition of a common law protection as fundamental, or that it even exists under common law, may be contestable or controversial.<sup>117</sup> One example is the ‘privilege’ against spousal incrimination. In *Australian Crime Commission v Stoddart*,<sup>118</sup> the High Court held that no such privilege existed under the common law. This decision was controversial, as it was said to overturn ‘hundreds of years of generally accepted legal thought’.<sup>119</sup> Another example is the freedom of expression. This freedom has been described by French CJ as

112 Meagher, ‘The Common Law Principle of Legality’, above n 8, 211; Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 5, 459.

113 Sir Anthony Mason, ‘Foreword: Human Rights and Courts’ in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012) xxii; Herzfeld, Prince and Tully, above n 101, 227 and the examples provided by the authors; Pearce and Geddes, above n 1, 250–1; Stephen Gageler (Speech delivered at the Australia-New Zealand Scrutiny of Legislation Conference, Canberra, July 2009). See also *DPP v Kaba* [2014] VSC 52 (18 December 2014) [177]–[178] (Bell J).

114 Mason, ‘Human Rights and Development in Australian Jurisprudence’, above n 57, 3.

115 Pearce and Geddes, above n 1, 218.

116 Jones, above n 70, 754–5.

117 Herzfeld, Prince and Tully, above n 101, 227; Meagher, ‘The Principle of Legality and the Judicial Protection of Rights’, above n 38, 308; Gleeson, ‘Legal Interpretation’, above n 64, 17.

118 (2011) 244 CLR 554.

119 Edward Fearis, ‘*Australian Crime Commission v Stoddart*: The End of Common Law Spousal Privilege’ (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 97, 97. See also Henry-Comley, above n 101, 98–100.

‘long recognised by the common law’<sup>120</sup> and applied as fundamental.<sup>121</sup> However, some have disputed this long standing common law heritage of the freedom of expression<sup>122</sup> (there is of course a well-established but confined implied freedom of political communication under the *Australian Constitution*).<sup>123</sup> A most recent example is the ‘general principle’ recognised by the Full Court of the Federal Court that ‘it is not normally to be expected that an administrative body ... will determine whether or not particular conduct constitutes the commission of a relevant offence’.<sup>124</sup> Rather, that role is ‘vested in courts exercising criminal jurisdiction’.<sup>125</sup> The Full Court invoked the principle of legality in respect of the above principle.<sup>126</sup> However, on appeal, the High Court found that there was no such ‘general principle’.<sup>127</sup>

As these examples highlight, questions as to the legitimacy of a court’s finding that there is a fundamental right at common law, or there is not, may be raised. Since the principle of legality ‘requires judges to construct common law values’,<sup>128</sup> they may be prone to accusations of judicial activism—namely, that they are impermissibly expanding or confining the scope of the principle and thereby undermining actual Parliamentary intention and sovereignty, and the democratic nature of law making.<sup>129</sup> Depending on the range of the fundamental common law protections recognised, the principle of legality can potentially change the outcome of the statutory interpretation process. The same issue may arise with respect to the scope of a recognised fundamental common law protection. If the

120 French, ‘Oil and Water?’, above n 6, 21. See also French, ‘The Courts and the Parliament’, above n 32, 827.

121 Particularly in more recent cases: see *Coleman v Power* (2004) 220 CLR 1 (Gummow and Hayne JJ), 75 [185], (Heydon J) (dissenting), 76 [188], 117 [313]; *Evans v NSW* (2008) 168 FCR 576 (French, Branson and Stone JJ); *Hogan v Hinch* (2011) 243 CLR 506 (French CJ), 5 [526], 535–6 [27], [29], 537 [32], 538 [36], 540 [41]; *Monis v The Queen* (2013) 249 CLR 92 (French CJ), 127–8 [59]–[60]; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 (French CJ), 30–3 [43]–[46], (Heydon J) (dissenting) 67–8 [151]–[152], 70 [158]–[159].

122 Sarah Joseph, ‘What Does Freedom Mean in Australia?’ (Speech delivered at the Castan Centre for Human Rights Freedom Forum, Melbourne, 9 April 2014); Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 5, 472. See also Eric Barendt, ‘Freedom of Expression in the United Kingdom under the *Human Rights Act 1998*’ (2009) 84(3) *Indiana Law Journal* 851 in the United Kingdom context.

123 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

124 *Today FM (Sydney) Pty Ltd v Australian Communications and Media Authority* (2014) 307 ALR 1, 18 [76] (Allsop CJ, Robertson and Griffiths JJ).

125 *Ibid* 29 [114].

126 *Ibid* 26–9 [106]–[114].

127 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 317 ALR 279, 288 [32]–[34]; see also 291 [48] (French CJ, Hayne, Kiefel, Bell and Keane JJ); cf 296 [68] (Gageler J).

128 David Dyzenhaus, Marray Hunt, and Michael Taggart, ‘The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation’ (2001) 1 *Oxford University Commonwealth Law Journal* 5, 6.

129 See Williams and Hume, above n 7, 44, 34; Meagher, ‘The Common Law Principle of Legality’, above n 8, 213; Andrew Geddis, and Bridget Fenton, ‘“Which is to be Master?” Rights-friendly Statutory Interpretation in New Zealand and the United Kingdom’ (2008) 25(3) *Arizona Journal of International and Comparative Law* 733, 747; Sales, ‘A Comparison of the Principle of Legality’, above n 20, 606. See also Goldsworthy, *Parliamentary Sovereignty*, above n 5, 309.

scope of the protection itself is unclear or otherwise expanded or restricted by the courts, this too can lead to arguments of judicial illegitimacy.<sup>130</sup>

Thirdly, the fact that there is no authoritative statement of fundamental common law protections draws attention to the question of *how* courts determine to recognise one as such. The process by which courts determine whether a common law protection is fundamental is ‘never really made clear’<sup>131</sup> (and we have already seen the criticisms regarding departures from the general system of law). The courts have been criticised for offering insufficient guidance in his respect.<sup>132</sup> Given the significant practical implications and issues of legitimacy, the courts need to exercise care when recognising fundamental common law protections.<sup>133</sup> What limited guidance has been offered by the High Court is discussed below.

### 3 Recognition of Fundamental Common Law Protections — Static or Evolving?

The most pertinent High Court authority on how fundamental common law protections are recognised is the aforementioned case of *Stoddart*.<sup>134</sup> A 6:1 majority held that a privilege against spousal incrimination was not recognised at common law, let alone fundamental. In a joint judgment, Crennan, Kiefel and Bell JJ said in obiter:

It would appear to accord with [the principle of legality] and hypothesis that the fundamental right, freedom, immunity or other legal rule which is said to be the subject of the principle’s protection, is *one which is recognised by the courts and clearly so*.<sup>135</sup>

In dissent, Heydon J — holding that a right to privilege against spousal incrimination did exist at common law — considered that it was not relevant whether the right had been specifically recognised in the jurisprudence as fundamental. His Honour stated, ‘a right does not become fundamental merely because cases call it that’.<sup>136</sup> Despite this, in finding that the privilege was

130 See, eg, Meagher, ‘The Principle of Legality and the Judicial Protection of Rights’, above n 38, 435–9.

131 Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 5, 458, 456–7, 459, 464. See also Meagher, ‘The Common Law Principle of Legality’, above n 8, 211; Williams and Hume, above n 7, 45–6; Matthew Groves, ‘Before the High Court: Reviewing Reasons for Administrative Decisions—*Wingfoot Australia Partners Pty Ltd v Kocak*’ (2013) 35 *Sydney Law Review* 627, 637; Groves, ‘Exclusion of the Rules of Natural Justice’, above n 99, 297; Pearce and Geddes, above n 1, 250.

132 Williams and Hume, above n 7, 45; Meagher, ‘The Common Law Principle of Legality’, above n 8, 211, 213.

133 Sir Anthony Mason, ‘Courts, Constitutions and Fundamental Rights’ in Richard Rawlings (ed), *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science 1895–1995* (Clarendon Press, 1997) 281; Malika (2001) 204 CLR 290, 298 [28] (McHugh J); Sales, ‘A Comparison of the Principle of Legality’, above n 20, 606; *R v Lord Chancellor; Ex parte Lightfoot* [2000] QB 597 608–9 (Laws J).

134 (2011) 244 CLR 554.

135 *Ibid* 622 [182] (emphasis added).

136 *Ibid* 619 [166].

fundamental,<sup>137</sup> Heydon J seemed to take that very approach or something similar to it. His Honour said: ‘[i]n any event, its sibling, spousal non-compellability, *has been described in language pointing to the fundamental character* of both spousal non-compellability and spousal privilege’.<sup>138</sup> Heydon J provided no further explanation on this issue.

The obiter dicta of Crennan, Kiefel and Bell JJ has been summarily criticised by Mark Aronson and Matthew Groves. Those authors have described the assumption — that the principle of legality only protects those rights which have been given clear recognition as fundamental in the past — as ‘dubious’.<sup>139</sup> A fuller critique is given by George Williams and David Hume:

There are few, perhaps no, occasions outside the context of the application of the principle of legality where a court declares and applies a fundamental common law right. A condition of clear and prior recognition [if taken literally] would entail that, in any given case where it was sought to apply the principle of legality, the court could not recognise a *new* right — because such a right would fail the condition of clear prior recognition. That would leave few, perhaps no, circumstances in which a new right could be recognised.<sup>140</sup>

On this reading of *Stoddart*, the range of common law protections covered by the principle of legality would remain ‘static’.<sup>141</sup>

However, it is trite to say that the common law develops incrementally and on a case-by-case basis. Self-evidently, those fundamental common law protections which are clearly recognised at present would have been recognised at some point for the first time, and not all at the same time. Moreover, a common law protection might be tentatively considered by a court to be ‘fundamental’ in obiter. This may be cited with approval by other courts and, with greater confidence, gradually adopted as a finding. It may develop to a point where there is a clear consensus, such that the protection can be said to be ‘recognised by the courts [as fundamental] and clearly so’. Thus, it is possible for new fundamental common law protections to be recognised and such a literal reading of the obiter dicta in *Stoddart* is probably not warranted.

Also, a static approach would not accord with the notion previously espoused by the High Court that fundamental common law protections may not always continue to be recognised as such. In *Bropho*,<sup>142</sup> six members of the Court stated that if the assumption — that it is in the last degree improbable that the legislature

137 Ibid 619 [165] citing *Hawkins v Sturt* [1992] 3 NZLR 602.

138 Ibid 619 [166] (emphasis added).

139 Aronson and Groves, above n 48, 178.

140 Williams and Hume, above n 7, 46.

141 Lim, above n 5, 396.

142 *Bropho* (1990) 171 CLR 1. This notion is also implicit in Heydon J’s remarks in *Stoddart* (2011) 244 CLR 554 where his Honour said ‘a right does not cease to be fundamental merely because cases do not call it that’: at 619 [166].

would overthrow or infringe fundamental common law protections without expressing its intention with irresistible clearness — be:

shown to be or to have become ill-founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed. Thus, if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption that the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear.<sup>143</sup>

Additionally, McHugh J in *Malika Holdings Pty Ltd v Stretton*<sup>144</sup> expressed that ‘times change’, such that ‘[w]hat is fundamental in one age or place may not be regarded as fundamental in another age or place’.<sup>145</sup> Similarly, no guiding principles or criteria have been developed to identify how and when such matters can be considered ‘weakened’ or ‘removed’.<sup>146</sup> Although it could perhaps be said that fundamental common law property rights have weakened over time,<sup>147</sup> there does not appear to be an instance where the High Court has recognised that a fundamental common law protection has ‘cease[d] to be so regarded’.<sup>148</sup> Nevertheless, if it is accepted that fundamental common law protections might subsequently lose their fundamentality, ‘then the opposite process must also be possible’.<sup>149</sup>

More recently in *Momcilovic*,<sup>150</sup> French CJ took tentative issue with the use of the term ‘fundamental’.<sup>151</sup> ‘There are difficulties with that designation.’<sup>152</sup> It might be better to discard it altogether in this context. The principle of legality, after all,

143 *Bropho* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

144 (2001) 204 CLR 290.

145 *Ibid* 298 [28]. However, this statement may have been affected by his Honour’s failure to explicitly distinguish between the principle of legality and the presumption against altering common law doctrines.

146 Williams and Hume, above n 7, 45.

147 Benedict Coxon, ‘Human Rights at Common Law: Two Interpretive Principles’ (2014) 35 *Statute Law Review* 35, 41; cf Lord Devlin, ‘Judges and Lawmakers’ (1976) 39 *Modern Law Review* 1, 14. There are also common law principles that have weakened over time, such as the presumption that the Crown is not bound by legislation unless there is clear and unambiguous language to that effect: *Bropho* (1990) 171 CLR 1, 18–24 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); and the strict construction of taxation legislation: see The Hon Murray Gleeson AC, ‘The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights’ (2009) 20 *Public Law Review* 26, 34; cf Browne-Wilkinson, above n 76, 397–8.

148 *Bropho* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

149 Goldsworthy, *Parliamentary Sovereignty*, above n 5, 306. See also Gageler, ‘Common Law Statutes and Judicial Legislation’, above n 37, 13; Mason, ‘Courts, Constitutions and Fundamental Rights’, above n 133, 281.

150 (2011) 245 CLR 1.

151 *Ibid* 46 [43]. See also *Tajjour v NSW* (2014) 313 ALR 221, 233–4 [28].

152 Citing Paul Finn, ‘Statutes and the Common Law: The Continuing Story’ in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 56–7, which in turn cited *Malika* (2001) 204 CLR 290, 298–9 [27]–[29] (McHugh J).

does not constrain legislative power'.<sup>153</sup> French CJ gave no further explanation. However, the transcript of the *Stoddart* hearing records an exchange with counsel during which French CJ said: '[t]he problem with the use of terms like "fundamental" is they may shift in their content with the times'.<sup>154</sup> Moreover, French CJ has said (extra-curially) that '[t]he term "fundamental" offers little substantive guidance to the class of rights and freedoms which inform' the principle of legality.<sup>155</sup> Notably, French CJ has elsewhere utilised the term 'important' (rather than 'fundamental') common law protections.<sup>156</sup>

Brendan Lim has argued that there is a distinction to be drawn between 'fundamental' and 'important' in this context. According to Lim, under the 'original rationale', the term "'fundamental" engages not abstract or idiosyncratic notions of what might be thought to be "important", but rather the genuine "standing commitments" of legislatures'.<sup>157</sup> Those standing commitments are in regards to common law protections which are well-established, so that it can be said that Parliament does not intend to abrogate or curtail them without clear and unambiguous language. The problem that arises is that 'it becomes difficult for courts to enforce a view that Parliament has adopted new standing commitments or discarded old ones, even as attitudes to rights and their scope might evolve'.<sup>158</sup>

However, it is not correct to delineate between rights 'thought to be important' and those recognised under Parliament's 'genuine' standing commitments, under the 'original rationale'. Parliament is presumed by the courts to be aware of and committed to respecting certain common law protections. That is precisely because of the importance of those rights — they are not recognised and respected for the mere sake of it; otherwise it could plausibly be said that all common law protections could fall under the scope of the principle of legality (which is clearly not the case). It is true though, as Lim has said, that there is some difficulty for courts in dealing with fundamental common law protections which can vary over time. Hence, Lim has argued in favour of the '*Simms* rationale', which is said to work 'perfectly well without reliance on' fundamentality (because it is not so concerned with actual legislative intention and more so with how courts can hold Parliament to account).<sup>159</sup>

153 Citing *South Australia v Totani* (2010) 242 CLR 1, 29 [31] (French CJ), *Momcilovic* (2011) 245 CLR 1, 215–6 [562] (Crennan and Kiefel JJ); BV Harris, 'Government "Third-Source" Action and Common Law Constitutionalism' (2010) 126 *Law Quarterly Review* 373.

154 Transcript of Proceedings, *Australian Crime Commission v Stoddart* [2011] HCATrans 44 (1 March 2011) 1210. See also *Evans v NSW* (2008) 168 FCR 576, 593–4 [69]–[70] in which French J was a member of the Court.

155 R S French, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 40.

156 *X7* (2013) 248 CLR 92, 109 [24] (French CJ and Crennan J). By contrast, in *Momcilovic*, his Honour went on to refer to the principle of legality as protecting 'commonly accepted' rights and freedoms: *Momcilovic* (2011) 245 CLR 1, 47 [43].

157 Lim, above n 5, 395.

158 *Ibid* 396.

159 *Ibid* 397.

#### 4 Fundamental Upon Enactment or Interpretation?

Given the courts' continued reliance on the 'original rationale' of the principle of legality, if this 'orthodox justification ... is taken seriously, the relevant question is what rights were generally accepted as fundamental when the statute in question was enacted'.<sup>160</sup> It would be entirely inconsistent for Parliament to be held accountable for legislation interfering with fundamental common law protections, when it could not have known at the time that such matters were fundamental. The 'necessary contextual backcloth'<sup>161</sup> must exist at the time of enactment, so that Parliament is put 'squarely on notice'.<sup>162</sup> Otherwise, the principle of legality's application would 'undermine rather than promote'<sup>163</sup> actual legislative intention.

However, relatively little has been said about such issues by the High Court, which does not take this approach to interpreting statutes. It applies the principle of legality having regard to the fundamental common law protections as at the time of interpretation, rather than enactment. Stephen Gageler<sup>164</sup> (now Gageler J of the High Court) and Leeming J of the New South Wales Court of Appeal (speaking extra-curially)<sup>165</sup> have both identified legal professional privilege as providing the clearest illustration of the High Court's position. In the 1983 case of *Baker v Campbell*,<sup>166</sup> legal professional privilege was first recognised by the Court as not being confined to judicial and quasi-judicial proceedings, and protected by the principle of legality (and so applied to the execution of a search warrant).

A different outcome was reached in the ensuing case of *Corporate Affairs Commission (NSW) v Yuill* ('Yuill').<sup>167</sup> A 3:2 majority of the High Court found that the statutory power of an inspector to compel documents under the *Companies (New South Wales) Code* was not subject to legal professional privilege. The Code was enacted in 1981. This was two years prior to the decision in *Baker v Campbell*. Brennan J (who was in the majority but alone on this point) invoked a rule of statutory interpretation that the 'best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up'.<sup>168</sup> According to his Honour, the Code was therefore to be 'construed in the light of the law as it stood when the Code came into force — that is, the law as it stood before *Baker v Campbell* was decided'.<sup>169</sup> Thus, Brennan J considered

160 Goldsworthy, *Parliamentary Sovereignty*, above n 5, 306.

161 *R v Secretary of State for the Home Department; Ex parte Stafford* [1999] 2 AC 38, 49 (Lord Steyn).

162 Sales, 'A Comparison of the Principle of Legality', above n 20, 604–5. See also Jones, above n 70, 754.

163 Sales, 'A Comparison of the Principle of Legality', above n 20, 605.

164 Gageler, 'Common Law Statutes and Judicial Legislation', above n 37.

165 Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36 *University of New South Wales Law Journal* 1002.

166 (1983) 153 CLR 52.

167 (1991) 172 CLR 319.

168 *Ibid* 322–3 citing *Broom's Legal Maxims* (10<sup>th</sup> ed, 1939) 463.

169 *Ibid* 323.

Parliament's 'true' legislative intention to be determinative,<sup>170</sup> and Parliament needed to be squarely on notice regarding the privilege.<sup>171</sup>

Finally, in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*,<sup>172</sup> the High Court unanimously decided not to follow the majority in *Yuill*, in interpreting a statutory power of the respondent to compel documents under the *Trade Practices Act 1974* (Cth). The Court held that the power could not be construed consistently with the principle of legality as abrogating legal professional privilege, in the absence of clear and unambiguous language. Most of the judges considered that *Yuill* was probably wrong at law.<sup>173</sup>

As Gageler has remarked, 'any strong application' of the rule invoked by Brennan J disappeared following the decision in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*.<sup>174</sup> The High Court was at pains in that case to express that the outcome in *Yuill* — including Brennan J's judgment<sup>175</sup> — was an aberration in respect of the principle of legality's application.<sup>176</sup> Thus, the courts construe legislation having regard to fundamental common law protections at the time of interpretation. On this approach, it does not matter what the actual legislative intention or the legislature's state of knowledge was at the time of enactment.<sup>177</sup> Practically speaking, one does not need to consider at what point a relevant common law protection became recognised as fundamental, to ascertain whether the principle of legality can apply. The right, whilst recognised, will apply to all statutes currently enacted. Clearly, none of this is consistent with the principle's 'original rationale'.<sup>178</sup>

A comparable issue has arisen in respect of the common law presumption of consistency with international law, which provides that a statute should be interpreted and applied, as far as its language permits, so that it conforms with Australia's obligations under international treaties.<sup>179</sup> Whether legislation should be construed consistently with international treaties where Australia became a party sometime *after* the statute's enactment has been the subject of considerable

170 Ibid 322 citing *Potter* (1908) 7 CLR 277, 304 (O'Connor J).

171 Ibid 323.

172 (2002) 213 CLR 543.

173 Ibid 560 [35] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 567 [58] (Kirby J).

174 Gageler, 'Common Law Statutes and Judicial Legislation', above n 37, 14.

175 See *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 571 [71] (Kirby J).

176 Ibid 553 [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 567 [58], 575 [85], 576 [88], 577 [90], 584 [113] (Kirby J), 596 [142] (Callinan J).

177 See, eg, Transcript of Proceedings, *Australian Crime Commission v Stoddart* [2011] HCATrans 44 (1 March 2011) 1210–35, which records an exchange with counsel during which Heydon J said: 'It does not matter what Parliament's knowledge was. Is it not really a question of what the words say?'

178 Although it could be said to be broadly consistent with another common law presumption — that statutes are 'always speaking': Pearce and Geddes, above n 1, 154–60; *Commissioner of Police v Eaton* (2013) 252 CLR 1, 33 [97] (Gageler J).

179 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).



debate. In particular, Gleeson CJ<sup>180</sup> and McHugh J<sup>181</sup> have raised concerns that it is contrary to the rationale of the presumption. The rationale being that ‘Parliament, prima facie, intends to give effect to Australia’s obligations under international law’.<sup>182</sup> But, say those judges, how can that be so where such obligations do not exist at the time the relevant statute was enacted?<sup>183</sup> More recently, French CJ has described the presumption of consistency as involving the construction of statutory provisions ‘consistently with international law and international legal obligations *existing at the time of its enactment*’.<sup>184</sup> These issues relate to actual legislative intention and are unresolved. They are analogous to the issues raised in the context of the principle of legality. For some reason though, the High Court has been far more dismissive in that respect.

## 5 Interim Conclusion

This section raises a number of issues in light of the principle’s ‘original rationale’. In summary, how can Parliament be taken to be aware of and committed to fundamental common law protections, where: it is unclear, contested or controversial as to whether a protection exists at common law and is recognised as fundamental; it is not clear the method by which courts determine to recognise fundamental common law protections; and the courts have applied the principle in respect of rights not previously recognised as fundamental upon the enactment of a statute? Moreover, how do parliamentary drafters do their work, and practitioners and decision makers interpret and apply legislation, with some semblance of certainty? The principle of legality is ostensibly concerned with actual legislative intention. The state of Parliament’s knowledge at the time of a statute’s enactment ought to matter (that is unless the connection between the principle of legality and actual parliamentary intention is dropped).<sup>185</sup> This is no abstract issue.<sup>186</sup> It affects the scope and operation of the principle of legality.

180 *Coleman v Power* (2004) 220 CLR 1, 27–8 [19] (Gleeson CJ); cf 95 [245] (Kirby J).

181 *Al-Kateb* (2004) 219 CLR 562, 589–90 [62]–[63], in the context of interpreting the *Constitution* in light of *subsequently* established international law, although his Honour rejected entirely the proposition that the *Constitution* ought be construed consistently with international law; cf 624 [174]–[175] (Kirby J).

182 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

183 See also *ibid* 287 (Mason CJ and Deane J) — the presumption of consistency applies ‘at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument’.

184 *CPCF v Minister for Immigration and Border Protection* (2015) 89 ALJR 207, 216 [8] (emphasis added). See also *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 355–6 [76]–[77] (French CJ), where in construing the *Constitution*, his Honour took the approach that ‘its interpretation can be informed by common law principles in existence *at the time of federation*’ (emphasis added), including the principle of legality in respect of non-alienation of property without compensation.

185 See Lim, above n 5, 409.

186 See also the discussion in Williams and Hume, above n 7, 46; Meagher, ‘The Common Law Principle of Legality’, above n 8, 213.

## D Strength of the Principle of Legality

### 1 Binary or Not?

As to the strength of the principle of legality, Dan Meagher has contended that the principle's application is 'binary' in nature.<sup>187</sup> It is an 'all-or-nothing' proposition — 'if the principle can be applied then the full content of the right ... is enjoyed by its holder; if not, the right is abrogated'.<sup>188</sup> Meagher cited several case authorities that apparently support this proposition.<sup>189</sup> One of those is the judgment of French CJ in *R & R Fazzolari Pty Ltd v Parramatta City Council*.<sup>190</sup> French CJ's approach to the principle of legality is discussed further below. It is sufficient for present purposes to say that the passage of his Honour's judgment relied on by Meagher<sup>191</sup> does not, in fact, provide that the principle of legality applies so that a fundamental common law protection will either be abrogated or fully protected.

Meagher does not acknowledge that the clear and unambiguous language of a statute will not always express a legislative intention for abrogation; but rather curtailment. The operation of the principle of legality is 'not spent'<sup>192</sup> upon curtailment. For example, in *Coleman v Power*,<sup>193</sup> Gummow and Hayne JJ said the following regarding the interpretation of a statutory provision prohibiting the use of 'insulting' words in a public place:

Once it is recognised that fundamental rights are not to be cut down save by clear words, it follows that the *curtailment* of free speech by legislation directed to proscribing particular kinds of utterances in public will often be read as '*narrowly limited*'.<sup>194</sup>

Moreover, the interpretation of legislation will not always involve a binary choice. Although the words of a statute might be clear as to the infringement of a fundamental common law protection, they may nevertheless be less clear as to the precise extent of the abrogation or curtailment. As Tate JA of the Victorian Court of Appeal has noted, this leaves open some options in construing legislation:

Where the intention to encroach upon rights is not manifest with 'irresistible clearness' a court must interpret the legislation, consistent with the principle of legality, as not abrogating or curtailing the rights in question. This may be seldom an all-or-nothing matter. Legislation may be

187 Meagher, 'The Common Law Principle of Legality in the Age of Rights', above n 5, 460–2.

188 Ibid 460.

189 *S v Boulton* (2006) 151 FCR 364; *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.

190 (2009) 237 CLR 603.

191 Ibid 618–9 [40], [42]–[43].

192 *R v JS* (2007) 175 A Crim R 108, 121–2 [45] (Spigelman CJ, Mason P, McClellan CJ at CL, Hidden and Howie JJ agreeing).

193 (2004) 220 CLR 1.

194 *Coleman v Power* (2004) 220 CLR 1, 76 [188] (emphasis added), cited with apparent approval in *Monis v The Queen* (2013) 249 CLR 92, 209–10 [331]–[332] (Crennan, Kiefel and Bell JJ). See also *Hogan v Hinch* (2011) 243 CLR 506, 535 [27] (French CJ).

enacted which unequivocally interferes with rights; the extent to which it permits such interference may remain a matter of constructional choice.<sup>195</sup>

So how ‘strictly’ does one construe the legislation? The degree to which courts are required by the principle of legality to construe the statute so as to not to interfere with fundamental common law protections is unsettled.

## 2 A ‘Least Infringing’ Approach

In more recent times, French CJ has expressed the view that where constructional choices are open, the principle of legality requires the statutory construction which *least infringes* fundamental common law protections, so as to ‘avoid or minimise their encroachment’.<sup>196</sup> This encompasses both the notion that where there is insufficiently clear and unambiguous language to abrogate or curtail a fundamental common law protection, the principle is not rebutted, and where there is clear and unambiguous language, the abrogation or curtailment should be minimised. In *R & R Fazzolari Pty Ltd v Parramatta City Council*,<sup>197</sup> his Honour sought to interpret legislation dealing with compulsory land acquisition, ‘where capable of more than one construction’, so that it ‘interferes least’ with private property rights.<sup>198</sup> His Honour thus envisaged that there might be some curtailment of those rights. As to non-publication orders in court proceedings, his Honour favoured ‘a construction which, consistently with the statutory scheme, has the least adverse impact upon the “open justice” principle and common law freedom of speech’.<sup>199</sup> Furthermore, where a legislative provision required a court to privately hear evidence or argument in respect of confidential ‘criminal intelligence’, such a statute should be ‘construed, where constructional choices are open, so as to minimise its impact upon the [“open court”] principle and to maximise the power of the court to implement the statutory command conservatively’.<sup>200</sup>

Other members of the current High Court have been less explicit in this regard (perhaps pointedly so). However, in *Momcilovic*,<sup>201</sup> Crennan and Kiefel JJ did state that the principle of legality ‘would require that a statutory provision affecting the presumption of innocence be construed, so far as the language of the provision allows, to minimise or avoid the displacement of the presumption’.<sup>202</sup> This statement speaks to both the clear and unambiguous language requirement and the interpretation of legislation where there is such language but constructional choices remain open. The reference to ‘so far as the language of the provision

195 *Victorian Toll & Anor v Taha & Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37 (4 March 2013) [192]. See also *PJB v Melbourne Health & Anor (Patrick’s case)* [2011] VSC 327 (19 July 2011) [247] (Bell J); *DPP v Kaba* [2014] VSC 52 (18 December 2014) [196]–[197] (Bell J).

196 *Momcilovic* (2011) 245 CLR 1, 46 [43].

197 (2009) 237 CLR 603.

198 *Ibid* 619 [43].

199 *Hogan v Hinch* (2011) 243 CLR 506, 526 [5].

200 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 521 [49].

201 (2011) 245 CLR 1.

202 *Ibid* 200 [512].

allows' could be taken to mean that the principle involves a 'least infringing' approach.

On this approach, where a statute potentially interferes with fundamental common law protections, and is capable of more than one meaning, it must be interpreted stringently to avoid or minimise the interference. According to French CJ (and probably Crennan and Kiefel JJ), the correct construction will be that which *least* interferes with fundamental common law protections within the range (if any) of possible constructions. This stringent approach might appear to introduce a second limb into the principle of legality, considering that the principle's rationale says nothing about its strength where there is some intended interference. It might also be bordering on a 'manner and form' requirement or an overriding 'rule' imposed by the courts, rather than a rebuttable presumption concerned with Parliament's actual legislative intention. However, provided that the construction remains consistent with the statute, then the principle of legality approached in this way could still be said to be concerned with actual legislative intention — in the sense that it is simply respecting the presumption that Parliament does not intend to interfere with fundamental common law protections.<sup>203</sup>

### 3 A Contextual Approach

Some previous members of the High Court appear to have adopted a far more contextual (and conservative) approach to the strength of the principle of legality. As noted earlier, McHugh J in *Malika*<sup>204</sup> said that '[w]hat is fundamental in one age or place may not be regarded as fundamental in another age or place'.<sup>205</sup> His Honour's views have been taken as expressing the proposition that the clear and unambiguous language test may be applied more or less stringently in a given context, depending on the fundamentality of the common law protection in question.<sup>206</sup>

As to the principle's strength where there is clear and unambiguous language but the precise extent of abrogation or curtailment is unclear, that too may depend upon the context in which the principle is operating. In *Electrolux*,<sup>207</sup> Gleeson CJ qualified the assertion that the interference should be narrowly interpreted. His Honour stated:

It is true that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language ... However, as McHugh J pointed out in *Gifford v Strang Patrick Stevedoring Pty Ltd*<sup>208</sup> modern legislatures regularly enact laws that take away or modify common law rights. *The assistance to be gained from a presumption*

203 Cf Meagher, 'The Principle of Legality as Clear Statement Rule', above n 39, 426–9.

204 (2001) 204 CLR 290.

205 Ibid 298 [28].

206 Pearce and Geddes, above n 1, 217.

207 (2004) 221 CLR 309.

208 (2003) 214 CLR 269, 284 [36].

will vary with the context in which it is applied. For example, in *George Wimpey & Co Ltd v British Overseas Airways Corporation*,<sup>209</sup> Lord Reid said that in a case where the language of a statute is capable of applying to a situation that was unforeseen, and the arguments are fairly evenly balanced, “it is ... right to hold that ... that interpretation should be chosen which involves the least alteration of the existing law”. *That was a highly qualified statement and, if it reflects a presumption, then the presumption is weak and operates only in limited circumstances.*<sup>210</sup>

Following this passage, Gleeson CJ went on to cite the High Court majority in *Coco* in respect of the principle’s original ‘rationale’.<sup>211</sup>

In *Gifford v Strang Patrick Stevedoring Pty Ltd* (*‘Gifford’*),<sup>212</sup> McHugh J had said that:

The presumption of non-interference is strong when the right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular course of action. Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend ‘ordinary’ common law rights, the ‘presumption’ of non-interference with those rights is inconsistent with modern experience and borders on fiction. *If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced.*<sup>213</sup>

It appears that Gleeson CJ in *Electrolux* and McHugh J in *Gifford* do not demand a ‘least infringing’ approach to the principle of legality. Gageler and Keane JJ recently cited the passage of Gleeson CJ with apparent approval in discussing the rationale of the principle of legality, quoting particularly that “modern legislatures regularly enact laws that take away or modify common law rights” and that the assistance to be gained from the principle “will vary with the context in which it is applied”.<sup>214</sup>

The remarks made in the above High Court authorities suggest that the strength of the principle’s application is contextual, both before it will be considered rebutted and where there is clear and unambiguous language of some intended interference. The contextual approach includes consideration of the nature of the common law protection and its ‘fundamentality’. This is relative — some are ordinary common law protections, some are fundamental, and perhaps, some are more ‘fundamental’ than others. One example of a common law protection

209 [1955] AC 169, 191.

210 *Electrolux* (2004) 221 CLR 309, 328–9 [19] (emphasis added) (some footnotes omitted).

211 *Ibid* 329 [20]–[21].

212 (2003) 214 CLR 269.

213 *Ibid* 284 [36] (emphasis added).

214 *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310 [312].

considered most fundamental is the right to liberty.<sup>215</sup> ‘Fundamentality’ also includes a contextual consideration of the extent of legislative activity occurring in the sphere of that protection.

### (a) Critique of the Contextual Approach

Such an approach can be criticised on several grounds. First, arguably the correct approach ‘does not involve ranking or prioritising common law rights, privileges or immunities’.<sup>216</sup> Only those common law protections which are fundamental are protected by the principle; otherwise, they are not.<sup>217</sup> For the same reason, it may be said that the threshold test of clear and unambiguous language for rebutting the principle should be applied in the same manner for all fundamental common law protections. However, as with the ‘least infringing’ approach, this can arguably be defended pursuant to the ‘original rationale’. It could be said that some fundamental common law protections are more highly valued by Parliament and are therefore intended to be more stringently protected.

Secondly, by contrast, the notion that the principle of legality’s application may be weakened in respect of certain fundamental common law protections due to subsequent legislative incursions is inconsistent with the ‘original rationale’. That is because this approach involves — at the time of interpreting the statute — a consideration of the legislative developments which have taken place post-enactment, and whether the common law protection is currently classed as fundamental, and if so, how fundamental.

Thirdly, the views of Gleeson CJ and McHugh J can arguably be attributed to a blurring of the principle of legality with another common law principle — the presumption that Parliament does not intend to alter common law doctrines. Arguably, these two principles of statutory interpretation are separate.<sup>218</sup> The distinction is between common law doctrines generally and fundamental common law protections.<sup>219</sup> As Kirby J has said, ‘[t]he key word is “fundamental”’.<sup>220</sup> In this way, the principle of legality is ‘narrower and, arguably, deeper’ than the

215 See *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J): ‘The law of this country is very jealous of any infringement of personal liberty and a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right’ (citations omitted). See also *Al-Kateb* (2004) 219 CLR 562, 577 [19] (Gleeson CJ, dissenting): ‘personal liberty is the most basic’ of human rights or freedoms; Spigelman, ‘Principle of Legality and the Clear Statement Principle’, above n 1, 782; Steven Churches, ‘The Silent Death of Common Law Rights’ (2013) 20 *Australian Journal of Administrative Law* 64, 64; Coxon, above n 147, 40–1.

216 *Stoddart v Boulton* (2010) 185 FCR 409, 431 [93] (Greenwood J): this case was overturned on appeal, but not on this point. See also, Horrigan, above n 6, 229.

217 Indeed, in *Gifford* (2003) 214 CLR 269, 284 [37], McHugh J went on to simply conclude that the ‘right to bring an action for psychiatric injury is an ordinary legal right’, unlike the right to a fair trial which is ‘a fundamental right of our society or legal system’.

218 See also Lacey, above n 1, 21; Spigelman, ‘Principle of Legality and the Clear Statement Principle’, above n 1, 777–8, 781; Spigelman, *The McPherson Lecture Series*, above n 1, 39–41; Williams and Hume, above n 7, 44–5; *R v XY* (2013) 84 NSWLR 363, 379–80 [58] (Basten JA); cf Coxon, above n 147, 39–40.

219 Sanson, above n 1, 207.

220 *Malika* (2001) 204 CLR 290, 328 [121]. See also Spigelman, ‘Principle of Legality and the Clear Statement Principle’, above n 1, 781: ‘The word “fundamental” has work to do’.

presumption against altering common law doctrines.<sup>221</sup> In the above authorities, neither Gleeson CJ nor McHugh J seem to clearly distinguish between these two common law interpretive principles.

### (b) *The Contextual Approach Adopted*

Nevertheless, the State and Federal courts have often adopted as representative of the current state of affairs in Australia, the contextual approach to the principle of legality,<sup>222</sup> encompassing the notion of the relative fundamentality of common law protections.<sup>223</sup> For example, in *Roe v D'Costa*<sup>224</sup> the Western Australian Court of Appeal accepted that '[t]he more fundamental the right, doctrine or principle, the clearer Parliament's intention must be to abrogate it'.<sup>225</sup> As to the principle's strength where there is clear and unambiguous language of abrogation or curtailment but constructional choices remain open, a fuller case study is warranted.

In *WBM v Chief Commissioner of Police*,<sup>226</sup> the Victorian Court of Appeal considered whether the appellant was caught by the *Sex Offenders Registration Act 2004* (Vic), such that he would be subject to a sex offender registration scheme under that Act. The scheme would have prohibited him from child-related employment. The appellant, amongst other things, invoked the principle of legality, arguing that the principle required a particular construction of the Act which would have captured fewer offenders (and excluded the appellant), in the absence of clear and unambiguous language to the contrary.

221 Williams and Hume, above n 7, 45.

222 See *WBM v Chief Commissioner of Police* (2012) 230 A Crim R 322 (*'WBM'*); *Roe v D'Costa* (2014) 47 WAR 434, 440–1 [24] (Mazza JA, McLure P and Buss JA agreeing); *Ulan Coal Mines v Minister for Mineral Resources* (2008) 161 LGERA 391, 407 [55] (Bell JA, Hodgson and Tobias JA agreeing); *R v Sellar* (2013) 273 FLR 155, 187–8 [130]–[131] (Rothman J); *Edwards v Edwards* (2009) 25 VR 40, 57–8 [59]–[61] (Forrest J).

223 See *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 76–7 [86]–[88], 78 [92], 84 [118] (Black CJ, Sundberg and Weinberg JJ) (overruled in *Al-Kateb* (2004) 219 CLR 562, but not on the relative fundamentality point) (*'Al Masri'*); *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456, 482–3 [103]–[111] (Spigelman CJ, Hidden and Latham JJ agreeing); *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340, 353 [43] (Spigelman CJ, Handley and Giles JJA agreeing in obiter); *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 66 [49], 67 [51] (Basten JA, Bathurst CJ and Whealy JA agreeing); *Herald & Weekly Times Ltd v Correctional Services Commissioner* (2001) 18 VAR 316, 333, 334, 335 [72]–[73], [79], [82] (Eames J); *Stoddart v Boulton* (2010) 185 FCR 409, 432 [96]–[97], 433 [102] (Greenwood J, dissenting); *Minister for Immigration and Multicultural and Indigenous Affairs v VFAD* (2002) 125 FCR 249, 268–9 [108]–[113] (Black CJ, Sundberg and Weinberg JJ); *Uittenbosch v Chief Executive, Department of Corrective Services* [2006] 1 Qd R 565, 568–70 [12]–[18] (Atkinson J); *Bowden v The Queen* (2014) 240 A Crim R 59, 69 [45] (Redlich and Coghlan JJA, Dixon AJA); *NOM v DPP* (2012) 38 VR 618, 641 [69] (Redlich and Harper JJA, Curtain AJA); *Yeo v Attorney-General* (2012) 1 Qd R 276, 296–7 [54] (McMurdo P), citing with approval *Attorney-General v Fardon* [2003] QSC 331 (Atkinson J); *Mastwyk v DPP* (2010) 27 VR 92, 95 [10] (Maxwell P), 107 [61] (Redlich J), see also 103 [45] (Nettle JA).

224 (2014) 47 WAR 434.

225 Ibid 440–1 [24] (Mazza JA, McLure P and Buss JA agreeing), citing *Bahar v The Queen* (2011) 45 WAR 100, 112 [51]; D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2011) 168–71. In saying this, the Court appears to have conflated the principle of legality and the presumption against altering common law doctrines.

226 (2012) 230 A Crim R 322.

The Court of Appeal (Warren CJ, Hansen JA and Bell AJA) unanimously dismissed the appeal. In doing so, the Court essentially found that no constructional choice was available under the Act.<sup>227</sup> Nevertheless, Warren CJ, on the assumption that this finding was wrong, considered whether the Act ought to be construed in the way sought by the appellant. Her Honour considered that the Act clearly intended to curtail certain fundamental common law rights,<sup>228</sup> and had regard to the ‘recognised’ right at common law of a citizen ‘to carry on his or her business in his or her own way’.<sup>229</sup> Warren CJ substantially reproduced the above passages of Gleeson CJ in *Electrolux* and McHugh J in *Gifford*. Her Honour considered that these authorities supported the proposition that the principle of legality is not necessarily ‘strictly applied in the same manner each time’ to the abrogation of a fundamental common law protection.<sup>230</sup> Her Honour also cited *Bropho*, highlighting that the strength of the principle ‘may vary over time’.<sup>231</sup>

Warren CJ was ultimately less definitive about whether a right to carry on a business or to work in a trade of one’s choosing actually existed at common law. In any event, that did not matter. Applying those High Court authorities, Warren CJ (Hansen JA agreeing) stated:

While there may be a common law right to carry on a business or to work in a trade of one’s choosing, such a right has now been qualified across the States and Territories by the introduction of legislation requiring checks and certificates to work with children in Australia. Working with children has become a “privilege” rather than a right. ... The [Act] in and of itself only abrogates the right of a person to work with children.<sup>232</sup>

I would conclude that if there was ever a right at common law as the appellant argues, it has been weakened by legislative change such that the legislative intention of the [Act] should not be cut down. I do not accept the appellant’s constructions.<sup>233</sup>

While Warren CJ here simply referred to the ‘common law right’ to carry on a business or to work in a trade of one’s choosing, her Honour considered it in the context of fundamental common law rights and the principle of legality. This is made clear throughout her Honour’s judgment.<sup>234</sup> Thus, a majority of the Court (Warren CJ and Hansen JA, agreeing)<sup>235</sup> found in obiter that, assuming there was a fundamental common law right to carry on a business or to work in a trade of

227 Ibid 338–9 [61]–[63] (Warren CJ, Hansen JA agreeing), 365 [192]–[193], 369 [209] (Bell AJA).

228 Ibid 341 [77] (Warren CJ, Hansen JA agreeing), see also 357 [157] (Bell AJA).

229 Ibid 343 [83] (Warren CJ, Hansen JA agreeing) quoting *Commonwealth v Progress Advertising and Press Agency Company Pty Ltd* (1910) 10 CLR 457, 464. See also, *WBM* (2012) 230 A Crim R 322 359–60 [168], 361 [174] (Bell AJA).

230 *WBM* (2012) 230 A Crim R 322, 343 [84]–[85].

231 Ibid 343 [86].

232 Ibid 343–4 [87].

233 Ibid 344 [88].

234 See *ibid* 333 [42], 341 [76] n 70 citing *Al-Kateb* (2004) 219 CLR 562, 577; *Coco* (1994) 179 CLR 427, 437–8.

235 Cf *WBM* (2012) 230 A Crim R 322, 361–2 [175], 368 [207] (Bell AJA).



one's choosing, and this was interfered with, the right had been qualified and weakened by legislative developments in the *context* of working with children.<sup>236</sup> Thus, the principle of legality could not require a more restrictive interpretation of the Act.

### (c) *Interim Conclusion on the Contextual Approach*

In addition to the criticisms outlined earlier, the contextual approach to the principle of legality is not methodologically clear.<sup>237</sup> One cannot say with certainty which fundamental common law protections Parliament respects more than others, and the strength with which those protections are to be brought to bear. This is a matter of 'instinctive synthesis'<sup>238</sup> undertaken by the courts. It has been said that the principle is 'distinctly fuzzy' in its application,<sup>239</sup> 'with the true reasoning being inherent in the conclusion but not explained'.<sup>240</sup> Common law presumptions, including the principle of legality, have also been described as 'slippery, contentious and elusive beasts that have been invoked with varying degrees of forcefulness depending on time, place, surrounding circumstance, the particular value that is being protected, and the proclivities of particular judges'.<sup>241</sup>

However, the State and Federal courts have not always applied the statements of Gleeson CJ in *Electrolux* and McHugh J in *Gifford* and *Malika* in support of the contextual approach. In some cases, those statements have been interpreted as being applicable to the presumption against altering common law doctrines, rather than the principle of legality.<sup>242</sup> There are also a few recent instances

236 As to the notion that statutes should be read in light of fundamental common law protections recognised as at the time of enactment so as to comply with the 'original rationale' of the principle of legality, cf *ibid*, 343–4 n 84 where her Honour provides examples of State and Territory legislation requiring checks and certificates to work with children, some of which were enacted *post*-enactment of the *Sex Offenders Registration Act 2004* (Vic).

237 Cf *S v Boulton* (2006) 151 FCR 364, 383–4 [121]–[127] (Jacobson J, Greenwood J agreeing). Cited with approval in *Stoddart v Boulton* (2010) 185 FCR 409, 413 [23] (Spender J), 420–1 [55] (Greenwood J), 441–2 [138] (Logan J) (overturned on appeal, but not on this point). See also Meagher, 'The Common Law Principle of Legality in the Age of Rights', above n 5, 460. However, the points made in the judgment of Jacobson J in *S v Boulton* are more in the form of general principles rather than an interpretive methodology.

238 The author attributes the use of this phrase in the context of the principle of legality to Alison P K O'Brien.

239 Spigelman, 'Principle of Legality and the Clear Statement Principle', above n 1, 779.

240 See *PJB v Melbourne Health & Anor (Patrick's case)* (2011) 39 VR 373, 428 n 319 (Bell J), interpreting Spigelman, 'Principle of Legality and the Clear Statement Principle', above n 1, 779.

241 Claudia Geiringer, 'The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*' (2008) 6 *New Zealand Journal of Public and International Law* 59, 83.

242 See *Gumana v Northern Territory of Australia* (2007) 158 FCR 349, 374–5 [97]–[98] (French, Finn and Sundberg JJ); *Harrison v Melhem* (2008) 72 NSWLR 380, 382–3 [2]–[8] (Spigelman CJ, Beazley JA agreeing), 407–9 [214]–[219] (Basten JA); *Martino Developments Pty Ltd v Doughty* (2008) 51 MVR 365, 368–72 [18]–[28] (Vickery J); on appeal, *Doughty v Martino Developments Pty Ltd* (2010) 27 VR 499, 507 [16]–[17] (Nettle JA, Mandie JA and Emerton AJA agreeing); *Tuohey v Freemasons Hospital* (2012) 37 VR 180, [27]–[30] (Redlich JA, Mandie JA and Kyrou AJA agreeing).

where the courts have adopted the equivalent of French CJ's 'least infringing' approach.<sup>243</sup>

## 4 Justification and Proportionality

### (a) The Concept of Justification and Proportionality

Questions have also arisen as to whether the operation of the principle of legality accommodates justification and proportionality considerations. The concept of justification and proportionality 'may generally be said to require that any statutory limitation or restriction upon a right or freedom having a particular status be proportionate to the object or purpose which it seeks to achieve'.<sup>244</sup> For example, s 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') provides that human rights protected by the *Charter* may be 'subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society'. Relevant factors include: (a) 'the nature of the right'; (b) 'the importance of the purpose of the limitation'; (c) 'the nature and extent of the limitation'; (d) 'the relationship between the limitation and its purpose'; and (e) 'any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'. Thus, justification and proportionality relate to 'the identification and weighting of the conflicting interests and the evaluation of the extent to which the conflict may be minimised by careful choice of means'.<sup>245</sup> It 'involves a "balancing" — the making of a judgment — as to the importance of competing interests'.<sup>246</sup>

### (b) No Role to Play?

However, Dan Meagher has observed that the principle of legality does not involve such considerations<sup>247</sup> — it 'does not balance or weigh other rights and interests in the relevant legislative context'.<sup>248</sup> This view was cited with approval by Warren CJ in *WBM*:<sup>249</sup>

When applying the principle of legality one takes the right at its highest. It is not appropriate to consider whether any abrogation of a common law

243 *RJE v Secretary, Department of Justice* (2008) 21 VR 526, 537 [37], 542 [54] (Maxwell P and Weinberg JA) citing *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 635–6 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ). See also *Nigro v Secretary to the Dept of Justice* (2013) 41 VR 359, 379–80 [73], 401–2 [154]–[155] (Redlich, Osborn and Priest JJA). However, Fraser JA in *Queensland v Allen* [2012] 2 Qd R 148, [20] rightly points out that '[n]o question about the scope or extent of the abrogation' of fundamental common law protections arose in *Balog*.

244 *Momcilovic* (2011) 245 CLR 1, 212 [549] (Crennan and Kiefel JJ).

245 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615, 740 [550] (Redlich JA) (citations omitted).

246 *Ibid* 740–1 [550].

247 Meagher, 'The Common Law Principle of Legality in the Age of Rights', above n 5, 462–4; Dan Meagher, 'The Significance of *Al-Kateb v Godwin* for the Australian Bill of Rights Debate' (2010) 12 *Constitutional Law and Policy Review* 15, 22.

248 Meagher, 'The Common Law Principle of Legality in the Age of Rights', above n 5, 463.

249 (2012) 230 A Crim R 322.

fundamental right or freedom is justified. It must be kept in mind the fact that the principle of legality does not require one to look at whether the intended end justifies the proposed means. In other words, the principle of legality is engaged when fundamental rights and freedoms are threatened even where the Parliament had a good reason to abrogate them such as to promote an overall increase in rights and freedoms for all.<sup>250</sup>

In *Momcilovic*,<sup>251</sup> the High Court considered whether justification and proportionality considerations under s 7(2) of the Charter formed part of the interpretive process under s 32(1) of that Act.<sup>252</sup> French CJ's findings are of particular interest for present purposes. His Honour found that s 7(2) did not have a role to play in interpreting statutes under s 32(1).<sup>253</sup> French CJ accepted that 'a proportionality assessment of the reasonableness of legislation is not an interpretive function'.<sup>254</sup> Rather, 'the justification of limitations on human rights is a matter for the Parliament. That accords with the constitutional relationship between the Parliament and the judiciary'.<sup>255</sup>

As seen earlier, the principle of legality is also said to reflect the institutional relationship between Parliament and the courts. It can be deduced from the above that French CJ is of the view that the principle of legality does not involve justification and proportionality considerations. Tellingly, French CJ went on to find in *Momcilovic* that s 32(1) of the Charter 'requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms'.<sup>256</sup> And in a previous case, French CJ stated, in considering the principle of legality's application, that the 'effect' of the legislation 'on personal freedoms was a matter for consideration by the ... Parliament which enacted it. Its merit as a legislative measure is not a matter for this Court to judge'.<sup>257</sup> The appropriate role of the courts in interpreting statutes is discussed further below.

250 Ibid 342 [80] (footnotes omitted). See also 352 [133] (Hansen JA, agreeing), 357 [159] (Bell AJA) (but see his Honour's approach in the subsequent case of *DPP v Kaba* [2014] VSC 52 (18 December 2014)). See also Justice Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the Charter — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online Journal* 43, 44, 58; John Basten, 'Constitutional Law in the Federal and State Courts in 2014: The Judiciary and the Legislature' (Speech delivered at the Gilbert & Tobin Centre of Public Law Constitutional Law Conference, Sydney, 13 February 2015) 29.

251 (2011) 245 CLR 1.

252 Ibid. Section 32(1) of the Charter provides: 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.

253 *Momcilovic* (2011) 245 CLR 1, 38–44 [21]–[36].

254 Ibid 43–4 [34].

255 Ibid 44 [36].

256 Ibid 50 [51].

257 *South Australia v Totani* (2010) 242 CLR 1, 28 [31] (footnote omitted).

Returning to *Momcilovic*, doubts have been raised as to the correctness of French CJ's findings and whether they represent the Court majority.<sup>258</sup> It is at least clear that the Court did not reach a binding view on whether s 7(2) has any role to play in s 32(1).<sup>259</sup> Nevertheless, even where others have adopted a different view as to the construction of those *Charter* provisions, what is usually said of the principle of legality remains unchanged — justification and proportionality considerations do not form part of the principle.<sup>260</sup>

It is arguable that the principle of legality, at least on its face, does not lend itself to justification and proportionality considerations. The principle does not expressly direct Parliament and the courts to such matters. The question is whether Parliament has directed its attention to the fundamental common law protections in question and 'consciously decided upon abrogation or curtailment'.<sup>261</sup> The 'original rationale' of the principle says nothing about taking into account competing interests (or even competing fundamental common law protections). The formulation of the principle does not say that Parliament does not intend to *unjustifiably* or *disproportionately* interfere with fundamental common law protections except by clear and unambiguous language.

### (c) *Countervailing Arguments*

Despite the predominant view outlined above, it is not entirely clear that justification and proportionality cannot or does not form part of the principle of legality's operation. Since the principle of legality is concerned with actual legislative intention, it is arguably perfectly apt to take into account matters such as the extent and severity of the interference in ascertaining whether the interference was really intended. If the interference is justified and proportional, is it not *more likely* for Parliament to have intended it? Conversely, if it is unjustified and disproportionate, is it not *more improbable* for it to have been intended? On this view, the strength of the principle of legality may vary depending on a justification and proportionality analysis. It may be that in some circumstances, even clearer and more unambiguous statutory language must exist to result in a particularly severe interference.<sup>262</sup>

258 See Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities: the Momcilovic* Litigation and Beyond' (2014) 40 *Monash University Law Review* 340; *Victorian Police Toll Enforcement v Taha*; *Victoria v Brookes* [2013] VSCA 37 (4 March 2013) [188]–[190] (Tate JA, in obiter); Tate, above n 250; Sir Anthony Mason, 'Statutory Interpretive Techniques under the *Charter*: Section 32' (2014) 2 *Judicial College of Victoria Online Journal* 69; cf the approach of the Victorian Court of Appeal in case authorities discussed in Bruce Chen, 'Making Sense of *Momcilovic*' (2013) 74 *Australian Institute of Administrative Law Forum* 67.

259 *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc & Ors* (2012) 38 VR 569, 575–6 [27]–[29] (Warren CJ and Cavanough AJA), 608–9 [140]–[142] (Nettle JA); *Kerrison v Melbourne City Council* (2014) 228 FCR 87, 124 [151], 127–8 [172] (Flick, Jagot and Mortimer JJ).

260 See, eg, Mason, 'Human Rights and Development in Australian Jurisprudence', above n 57, 3. See also Meagher, 'The Significance of *Al-Kateb v Godwin* for the Australian Bill of Rights Debate', above n 247, 22.

261 *Al-Kateb* (2004) 219 CLR 562, 577 [19] (Gleeson CJ, dissenting, but not on this point) (footnotes omitted).

262 The author attributes this potential line of reasoning to Professor Jeffrey Goldsworthy.

We have already seen that the courts often adopt a contextual approach to the principle of legality. This can have a similar effect to justification and proportionality type considerations. It has been shown to influence the strength with which the principle is applied. In addition, fundamental common law protections are not absolute.<sup>263</sup> The content of such protections can be ‘highly contextual’.<sup>264</sup> The courts have stated that ‘it is often the case that one person’s freedom ends where another person’s right begins’,<sup>265</sup> and ‘there is little scope, even in contemporary society, for disputing that ... [common law protections are] regarded as fundamental subject to reasonable regulation for the purposes of an ordered society’.<sup>266</sup> Elsewhere, it has been said that the common law approach ‘carves out a space for justified interference in fundamental rights by limiting the scope of the rights themselves’.<sup>267</sup> The common law freedom of expression provides a good example. The courts in several cases have had to decide, often with much difficulty, where to draw the boundaries of the scope of that freedom.<sup>268</sup> That is particularly so where the expression is regulated by statute because it may, for example, be unsolicited,<sup>269</sup> insulting<sup>270</sup> or offensive<sup>271</sup> to others, or it may affect the enjoyment of other people’s fundamental common law protections,<sup>272</sup> particularly where that expression occurs in public spaces<sup>273</sup> or through public communication services.<sup>274</sup> It is arguable that in striking this balance, the principle of legality inherently involves justification and proportionality considerations. Accordingly, it is highly doubtful that justification and proportionality considerations have

263 *Coleman v Power* (2004) 220 CLR 1, 75 [185] (Gummow and Hayne JJ).

264 Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 5, 462; Meagher, ‘The Principle of Legality as Clear Statement Rule’, above n 39, 434.

265 *Coleman v Power* (2004) 220 CLR 1, 32 [32] (Gleeson CJ, dissenting).

266 *Evans v NSW* (2008) 168 FCR 576, 594 [72].

267 Heinz Klug, *The Constitution of South Africa: A Contextual Analysis* (Hart Publishing, 2010) 117, cited in *Momcilovic* (2011) 245 CLR 1, 41–2 [27] (French CJ). See also David M Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Carswell, 1990) 83 regarding the comparison drawn between the United States Bill of Rights, which does not contain a clause like s 7(2) of the Charter, and the *Canadian Charter of Rights and Freedoms 1982*, which does in s 1.

268 See Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 5, 472; Meagher, ‘The Principle of Legality as Clear Statement Rule’, above n 39, 432–4, although I disagree that freedom of speech is ‘essentially a ... political or moral claim’ and thus different from other fundamental common law protections. See also George Williams, ‘Protecting Freedom of Speech in Australia’ (2014) 39 *Alternative Law Journal* 217.

269 *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 32–3 [45]–[46] (French CJ); cf 65–8 [145]–[152], 70–1 [158]–[160] (Heydon J, dissenting); *Evans v NSW* (2008) 168 FCR 576, 596–7 [81]–[84].

270 *Coleman v Power* (2004) 220 CLR 1, 75–6 [185]–[188] (Gummow and Hayne JJ), 87 [225]–[226], 96–8 [250]–[253] (Kirby J). See also 32 [32] (Gleeson CJ, dissenting) although that was in the context of the implied freedom of political communication, which involves proportionality type considerations.

271 *Monis v The Queen* (2013) 249 CLR 92, 112–3 [20], 126–7 [56]–[59] (French CJ), 209–10 [331]–[334] (Crennan, Kiefel and Bell JJ).

272 *Evans v NSW* (2008) 168 FCR 576, 596–7 [83]–[84].

273 See, eg, *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1; *Coleman v Power* (2004) 220 CLR 1; *Evans v NSW* (2008) 168 FCR 576.

274 See, eg, *Monis v The Queen* (2013) 249 CLR 92.

been completely excluded in practice from the principle of legality's operation<sup>275</sup> (on either a 'least infringing' or 'contextual' approach).

In any event, set out below are clear examples where the courts have reasoned in favour of an approach which contrasts with the predominant view that the principle does not encompass justification and proportionality.

#### **(d) Justification and Proportionality Applied**

The first example is *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*.<sup>276</sup> That case dealt with the question of whether a stateless person could be indefinitely detained under the *Migration Act 1958* (Cth). In construing that Act, the Full Court of the Federal Court (Black CJ, Sundberg and Weinberg JJ) said:

In considering the application of the principle of construction it is appropriate to take into account not only the fundamental nature of the right that may be abrogated or curtailed, but also the extent to which, depending upon the construction adopted, that may occur. Although all interferences with personal liberty are serious in the eyes of the common law, it may be said that the more serious the interference with liberty, the clearer the expression of intention to bring about that interference must be. Where the right in issue is the fundamental right of personal liberty, it is appropriate to consider the nature and duration of the interference.<sup>277</sup>

The above passage was cited with approval by the Hon James Spigelman (extra-curially), who said that '[w]hat is required to overcome the interpretive principle is not only affected by the nature of the right, freedom or immunity. It is also affected by the extent of the intrusion'.<sup>278</sup> The Full Court in *Al Masri* went on to state:

It can therefore be seen that if, on its true construction, the legislation in question here were to provide for mandatory administrative detention, irrespective of personal circumstances, for a period that had no reasonably foreseeable end and might last for a very long time, it would indeed have the potential to curtail to a very severe extent the fundamental common law right to liberty.<sup>279</sup>

This, the Court said, was 'not to express criticism of the policy but, rather, to demonstrate the impact of the construction contended for by the appellant and to do so for the purpose of asking whether such an intention should be imputed to the Parliament'.<sup>280</sup> Given the common law right to liberty was 'unquestionably

275 See, Geiringer, above n 241, 91–2. See also, Tate, above n 250, 58.

276 (2003) 126 FCR 54.

277 Ibid 78 [92].

278 Spigelman, 'Principle of Legality and the Clear Statement Principle', above n 1, 782.

279 (2003) 126 FCR 54, 79 [94].

280 Ibid 79 [95] (emphasis added).

amongst the most fundamental of all rights',<sup>281</sup> and the severe extent of interference with that right, the Court held that the words of the statute were 'not powerful enough' so as to be construed as authorising indefinite detention.<sup>282</sup> The Act 'does not suggest that the Parliament did turn its attention to the curtailment of the right to liberty in circumstances where detention may be for a period of potentially unlimited duration and possibly even permanent'.<sup>283</sup> While the Full Court's finding was subsequently overruled by the High Court in *Al-Kateb*,<sup>284</sup> the High Court did not dispel the notion that the relative fundamentality of the common law protection and extent of infringement can be taken into account.

In *PJB v Melbourne Health* ('*PJB*'),<sup>285</sup> Bell J of the Supreme Court sought to construe the scope of a statutory discretion to appoint an administrator under guardianship and administration legislation. The exercise of that power would clearly interfere with the fundamental common law protections of the person to whom the administrator was appointed. Bell J stated that in circumstances where the statute clearly interferes with fundamental common law protections but leaves the scope of permitted interference unclear:

it is surely necessary to go beyond stating an oracular conclusion that a 'strict' interpretation means the legislation does not authorise the drastic interference or that the legislation unmistakably permits it. That is not the nature of the interpretative problem. It is hardly pertinent to say the legislation should be interpreted strictly when it unmistakably authorises some or even a substantial interference with rights. It is equally unhelpful to say the legislation contains provisions having that unmistakable effect when there is legitimate dispute about the scope of operation of those provisions, properly interpreted. It is necessary to engage more intensely and explicitly with the purposes of the legislation and its impact on individual rights and freedoms and then determine where, on a proper interpretation of the provisions, the legislative balance has been struck. The principle of legality allows this to be done, and transparently.<sup>286</sup>

His Honour went on to identify and apply several justification and proportionality considerations, which bear a striking resemblance to the factors set out in s 7(2) of the Charter:

it is first necessary to identify the right or freedom which is said to be infringed and consider the importance of the interests which it protects in the particular circumstances. Then it is necessary to identify the nature and extent of the interference by, and the purposes of, the statutory provisions in question. If the interference complained of goes beyond what is shown to be reasonably necessary to meet a substantial and pressing need or

281 Ibid 76–7 [86]–[88], 84 [118].

282 Ibid 84 [118].

283 Ibid 84 [120].

284 (2004) 219 CLR 562.

285 (2011) 39 VR 373.

286 Ibid 428 [248] (citation omitted).

legitimate aim, the proper interpretation will be that the interference is beyond the scope of the provision. In that regard, the more substantial is the infringement with the right or freedom, the more is required to show that the interference is necessary to meet the aims postulated and the interference should be the least necessary for that purpose.<sup>287</sup>

Support for this approach can be found in the United Kingdom jurisprudence, which is discussed below.<sup>288</sup> Unlike *Al Masri*, Bell J in *PJB* did not articulate justification and proportionality in terms of Parliament's intention, nor address how it could otherwise be accommodated under the principle's rationale. Moreover, his Honour's approach sought to introduce into the principle of legality a more methodological and structured approach to justification and proportionality.

In the more recent case of *DPP v Kaba*,<sup>289</sup> Bell J refined his views in *PJB*, reiterating that justification and proportionality play a role, but only where the legislation plainly infringes fundamental common law protections.<sup>290</sup> This time his Honour did so by reference to Parliament's intention, albeit bound by the High Court's contemporary approach to legislative intention as a product of the statutory interpretation process.<sup>291</sup> His Honour once again seemingly sought to address issues of transparency and methodology in the principle of legality's operation, having noted that the principle is 'still expressed in broad terms', which 'allow[s] considerable scope for the exercise of individual judicial preference and, potentially, unpredictability and inconsistency of application'.<sup>292</sup> Although in obiter, Bell J referred to *Al Masri* and other intermediate appellate authorities.<sup>293</sup> His Honour observed that the courts:

determined the scope or extent of a rights-infringing provision by applying the principle of legality in a way that engaged with the nature and importance of the right infringed, the purpose of the interference in question and the relation between the two.<sup>294</sup>

However, aside from *Al Masri*, those intermediate appellate authorities do not consider and rationalise the role of justification and proportionality under the principle of legality at any great length. In any event, those authorities support the notion that such considerations have not been completely excluded in practice from the principle.

287 Ibid 434 [271].

288 See also Tate, above n 250, 58, 58 n 90. Her Honour noted that this issue is unresolved, but tentatively suggested that '[t]he assessment *may* demand more rigour when it is patently clear that a statute authorises an interference with rights and the interpretive contest is focused upon the degree of interference authorised' (emphasis added).

289 [2014] VSC 52 (18 December 2014).

290 Ibid 188–93 [194]–[207]. See also *ibid* 186–7 [186]–[187].

291 Ibid 171–3 [136]–[139].

292 Ibid 184 [177].

293 *Mastwyk v DPP* (2010) 27 VR 92; *DPP v Piscopo* (2011) 33 VR 182; *Evans v New South Wales* (2008) 168 FCR 576; *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.

294 *DPP v Kaba* [2014] VSC 52 (18 December 2014) [205].



Bell J also referred to his analysis in *PJB* of the United Kingdom jurisprudence, said to be supportive of his views as to justification and proportionality, and approved by the High Court.<sup>295</sup> However, those High Court authorities that his Honour referred to did not actually endorse the United Kingdom approach to justification and proportionality.<sup>296</sup> The High Court only cited the United Kingdom jurisprudence with approval insofar as that jurisprudence dealt with the principle of legality's general nature and conceptual basis, including the principle as an aspect of the rule of law.

### (e) *Altering the Principle's Rationale?*

It is arguable that 'some test of what constitutes a legitimate type or level of restriction must be developed'.<sup>297</sup> There is some attraction in introducing an explicit justification and proportionality analysis, so as to make the process of applying the principle more transparent and methodologically clear. A conceivable counter-argument is that this would 'balance ... away'<sup>298</sup> the principle and the fundamental common law protections it protects (although this may be readily responded to — as noted above, these protections are not absolute and it is arguable that the principle inherently involves justification and proportionality considerations). Another possible counter-argument is that Parliament cannot be taken to be aware that the principle would operate in such a way, when the conventional understanding was that it did not.<sup>299</sup>

If the role of justification and proportionality is to become broadly accepted, it ought to be made clear by the courts whether this is pursuant to the 'original rationale' of the principle of legality, or some new understanding of the principle (and why). As to the former, justification and proportionality could be encompassed within the *improbability* of Parliament's intention to interfere with fundamental common law protections. As to the latter, the 'original rationale' could be altered to make clearer that Parliament does not intend to unjustifiably or disproportionately abrogate or curtail fundamental common law protections without clear and unambiguous language. Alternatively, a second limb of the principle of legality could be introduced, to the effect that Parliament intends for interferences with fundamental common law protections, if any, to be justified and proportional (so that these considerations come into play in more limited circumstances; both *Al Masri* and *PJB* dealt with instances where there

295 Ibid 189–90 [198].

296 *Al-Kateb* (2004) 219 CLR 562, 577 (Gleeson CJ); *Electrolux* (2004) 221 CLR 309, 329 (Gleeson CJ).

297 *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 136 [444] (Kiefel J) in the context of constitutional freedoms. See also Justice Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85, 89. See Tate, above n 250, 47 in the context of the Charter.

298 See discussion in Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 488–90; Mattias Kumm and Alec D Walen, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing' in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds) *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014) 67–8.

299 See *Yuill* (1991) 172 CLR 319, 322 (Brennan J), citing *Re Jordison; Raine v Jordison* [1922] 1 Ch 440; *Sorby v The Commonwealth* (1983) 152 CLR 281, 322.

was clearly some intended interference but the extent of the interference was in question). Another option would be to adopt the ‘*Simms* rationale’ and abandon any connection with actual legislative intention. It can be foreshadowed that all of the above developments would likely be subjected to accusations of judicial activism.<sup>300</sup>

**(f) Justification and Proportionality in Broader Statutory Interpretation**

Further, there is reluctance amongst some members of the judiciary in Australia to engage in justification and proportionality analyses in statutory interpretation, which would also need to be overcome. This reluctance manifested in the judgments of some members of the High Court in *Momcilovic*, including that of French CJ.<sup>301</sup> It is also evident in some of the academic commentary.<sup>302</sup> Such reluctance stems predominantly from the view that it is a matter for Parliament, not the courts, to strike the balance ‘between the full range of competing rights and interests that inevitably arise in complex issues of social policy’.<sup>303</sup> That position is highly contestable. For example, in *Momcilovic*, three members of the High Court took no issue with the constitutionality of a justification and proportionality analysis in statutory interpretation pursuant to the Charter.<sup>304</sup> Bell J said that the criteria under s 7(2) are ‘of a kind that are readily capable of judicial evaluation’.<sup>305</sup>

Moreover, the Australian courts have brought to bear some kind of justification and proportionality analysis in other contexts of statutory interpretation where legislation or sub-ordinate legislation is being impugned.<sup>306</sup> For example, where legislation is potentially invalid under the Constitution in respect of the external

300 See, eg, Meagher, ‘The Principle of Legality in the Age of Rights’, above n 5, 468–9; Aronson and Groves, above n 48, 377–8.

301 See *Momcilovic* (2011) 245 CLR 1, 43–4 [34]–[36] (French CJ), 218–20 [568]–[576] (Crennan and Kiefel JJ), 164 [409], 170–5 [428]–[439] (Heydon J) (who found that ss 7(2) and 32(1) of the Charter were invalid).

302 In the context of the principle of legality, see in particular Meagher, ‘The Principle of Legality and the Judicial Protection of Rights’, above n 38, 310–11; Meagher, ‘The Significance of *Al-Kateb v Godwin* for the Australian Bill of Rights Debate’ above n 247, 21–2; Meagher, ‘The Principle of Legality in the Age of Rights’, above n 5, 464; Meagher, ‘The Principle of Legality as Clear Statement Rule’, above n 39, 439–42.

303 Meagher, ‘The Principle of Legality in the Age of Rights’, above n 5, 470. See also Meagher, ‘The Principle of Legality as Clear Statement Rule’, above n 39, 440.

304 *Momcilovic* (2011) 245 CLR 1, 92 [168] (Gummow J, with Hayne J agreeing), 249–50 [683]–[684] (Bell J).

305 *Ibid* 250 [684] citing *Thomas v Mowbray* (2007) 233 CLR 307, 331–4 [20]–[28] (Gleeson CJ), 344–8 [71]–[82], 350–1 [88]–[92] (Gummow and Crennan JJ), 507 [596] (Callinan J); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 553–4 [14] (Gummow J), 597 [168]–[169] (Crennan and Kiefel JJ).

306 See generally Kiefel, above n 297; HP Lee, ‘Proportionality in Australian Constitutional Adjudication’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 126–49.

affairs power in s 51(xxix);<sup>307</sup> freedom of interstate trade in s 92;<sup>308</sup> and where it burdens the implied freedom of political communication,<sup>309</sup> or the constitutional requirement that Parliament be directly chosen by the people,<sup>310</sup> derived from ss 7 and 24 of the Constitution (the ‘reasonably appropriate and adapted to achieve a legitimate object or end’ test). There is a well-established common law principle that an enactment should be interpreted, so far as the language permits, so as to make it consistent with the Constitution, unless the intention is clear that the statute is to operate in a way that results in constitutional invalidity.<sup>311</sup> It is now enshrined in statute that legislation may be read down or parts of it severed, where possible, so as to avoid or minimise constitutional invalidity.<sup>312</sup> In this way, justification and proportionality *does* play a role in the interpretation process. Proportionality also plays a role where the validity of sub-ordinate legislation purportedly made under an enabling statute is under question (the ‘reasonable and proportionate exercise of power’ test);<sup>313</sup> and where the legislation is said to be a ‘special measure’ under discrimination law (the ‘such protection as may be necessary’ test).<sup>314</sup>

While there is no ‘overarching ideology of proportionality’<sup>315</sup> in Australian law, it is far from clear why legislation is amenable to justification and proportionality in these circumstances, but not with respect to fundamental common law protections (or potentially human rights under a statutory bill of rights). One distinction that may be drawn is that the principle of legality, as it presently stands, does not protect constitutional rights,<sup>316</sup> and does not constrain legislative power.<sup>317</sup>

307 *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1.

308 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 472–4 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Befair Pty Ltd v Western Australia* (2008) 234 CLR 418, 476–7 [98], [101]–[103], 479 [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

309 *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1; *Monis v The Queen* (2013) 249 CLR 92; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. See also Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 177–8. This test was reformulated in *Unions NSW v New South Wales* (2013) 252 CLR 530, 556 [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) as ‘reasonably appropriate and adapted, or proportionate, to serve a legitimate end’ (emphasis added).

310 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199 [85], 204 [101] (Gummow, Kirby and Crennan JJ).

311 *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J). See also *Monis v The Queen* (2013) 249 CLR 92, 208 [327], [329] (Crennan, Kiefel and Bell JJ).

312 *Acts Interpretation Act 1901* (Cth) s 15A; *Legislation Act 2001* (ACT) s 120; *Interpretation Act 1987* (NSW) s 31; *Interpretation Act 1978* (NT) s 59; *Acts Interpretation Act 1954* (Qld) s 9; *Acts Interpretation Act 1915* (SA) s 22A; *Acts Interpretation Act 1931* (Tas) s 3; *Interpretation of Legislation Act 1984* (Vic) ss 6, 22; *Interpretation Act 1984* (WA) s 7.

313 *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1; *South Australia v Tanner* (1989) 166 CLR 161, 167–8 (Wilson, Dawson, Toohey and Gaudron JJ).

314 *Maloney v R* (2013) 252 CLR 168; *Gerhardy v Brown* (1985) 159 CLR 70, 133, 137 (Brennan J).

315 Williams and Hume, above n 7, 137.

316 Cf *Momcilovic* (2011) 245 CLR 1, 214–5 [556]–[561] (Crennan and Kiefel JJ), where their Honours noted that all the case authorities on proportionality they cite relate to a ‘freedom which is the subject of a constitutional guarantee’.

317 *Ibid* 46 [43] (French CJ). See also *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 136 [444], 139–40 [457]–[458] (Kiefel J), where her Honour stated that proportionality, in the context of constitutional rights, is directed at ‘determin[ing] the limit of legislative power’.

However, that does not fully explain why justification and proportionality pursuant to the principle should be considered ‘not an interpretive function’,<sup>318</sup> and why courts would ‘often lack the institutional resources and expertise to properly undertake this sort of polycentric decision-making’<sup>319</sup> — given its application in other scenarios.

### (g) *The United Kingdom Position*

Finally, the predominant position in Australia can be contrasted with the United Kingdom, where it has been accepted that justification and proportionality considerations inform the operation of the principle of legality. In this regard, *R (Daly) v Secretary of State for the Home Department* (*‘Daly’*)<sup>320</sup> is considered the ‘landmark decision’.<sup>321</sup> That case involved the question of whether prison legislation — which provided for the making of rules to regulate and control prisoners — authorised a policy that prisoners were to be absent while officials conducted cell searches; during such time officials could examine (but not read) any legal correspondence found in the cells. The purpose of excluding prisoners was to prevent intimidation and prisoners gaining familiarity with search techniques. In challenging the exclusion of prisoners from such searches, the applicant prisoner raised, amongst other things, the fundamental common law right to legal professional privilege.

The House of Lords decided the matter by applying the principle of legality, without resorting to human rights law.<sup>322</sup> It unanimously held that fundamental common law protections ‘may be curtailed only by clear and express words, *and then only to the extent reasonably necessary to meet the ends which justify the curtailment*’.<sup>323</sup> This requirement of justification and proportionality was not expressed in terms of Parliament’s intention. It was framed in terms of the court’s expectations imposed on the legislation enacted. Lord Bingham, who gave the leading judgment, went on to apply a three-step<sup>324</sup> justification and proportionality analysis, before finding that the policy could not be justified in its ‘blanket form’.<sup>325</sup> There was no justification for routinely excluding all prisoners,

318 *Momcilovic* (2011) 245 CLR 1, 43–4 [34] (French CJ).

319 Meagher, ‘The Principle of Legality in the Age of Rights’, above n 5, 470. See also Meagher, ‘The Principle of Legality as Clear Statement Rule’, above n 39, 440.

320 [2001] 2 AC 532.

321 Michael Taggart, ‘Proportionality, Deference, *Wednesbury*’ (2008) *New Zealand Law Review* 423, 437.

322 The facts giving rise to this case preceded the *Human Rights Act 1998* (UK) predominantly coming into force on 2 October 2000. The House of Lords’ decision was handed down after this date.

323 *Daly* [2001] 2 AC 532, 538 [5] (Lord Bingham) (Lord Steyn, Lord Cooke, Lord Hutton and Lord Scott agreeing) (emphasis added). See also 548 [31] (Lord Cooke).

324 The three steps Lord Bingham applied in the context of this proceeding were: (1) does the policy infringe in a significant way a prisoner’s fundamental common law right to legal professional privilege?; (2) were there any grounds for infringing in any way this right of a prisoner?; and (3) to the extent that it infringes this right of a prisoner, can the policy be justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline in prisons and to prevent crime?

325 *Daly* [2001] 2 AC 532, 543 [19].

regardless of whether they were intimidatory or disruptive or not, while those searches were being conducted.<sup>326</sup> The infringement was greater than ‘necessary to serve the legitimate public objectives’.<sup>327</sup> His Lordship therefore concluded that the policy ‘violates the common law rights of prisoners’, and was not authorised by the legislation.<sup>328</sup>

To hypothesise, the willingness of the United Kingdom courts to incorporate justification and proportionality considerations in statutory interpretation is probably due to at least two factors. The first is the prevalence of the ‘*Simms* rationale’ in the United Kingdom. The second is the influence of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>329</sup> on the common law, particularly leading up to the Convention’s incorporation into domestic law by the *Human Rights Act 1998* (UK). This is exemplified by case authorities around that time, where the courts progressively developed the common law freedom of expression to expressly incorporate justification and proportionality — to the point that they were able to assert there was ‘in principle no difference’<sup>330</sup> compared to the equivalent human right under the European Convention.<sup>331</sup> There are examples of similar developments in respect of other common law protections.<sup>332</sup> As such, the House of Lords in *Daly* was able to methodically apply justification and proportionality considerations to achieve the same result it would have otherwise reached if relying on the European Convention.<sup>333</sup> By contrast, in Australia the ‘*Simms* rationale’ has not reached ascendancy, and there is no bill of rights at the federal level<sup>334</sup> or uniformly across the State and Territories.<sup>335</sup>

#### IV CONCLUSION

In summary, the principle of legality is a common law interpretive principle that presumes it is in the last degree improbable that Parliament would abrogate or

326 Ibid.

327 Ibid.

328 Ibid 545 [21].

329 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

330 *Simms* [2000] 2 AC 115, 125–6, 130 (Lord Steyn) citing *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283–4 (Lord Goff); *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 550–1 (Lord Keith). See also Brown-Wilkinson, above n 76, 405.

331 The Convention right requires that any restrictions be ‘of a pressing social need’ and ‘no more than is proportionate to the legitimate aim pursued’.

332 See *R v Secretary of State for the Home Department; Ex parte Leech* [1994] QB 198, 212–3, 217 (Neill, Steyn and Rose LJ) (prisoner’s mail and legal professional privilege); *Marcel v Commissioner of Police* [1992] Ch 225, 234 (Sir Nicolas Brown-Wilkinson) (Dillon and Nolan LJ agreeing) (search and seizure and common law right to privacy and property).

333 See *Daly* [2001] 2 AC 532, 545 [23] (Lord Bingham), 548 [30] (Lord Cooke).

334 Save for legislation which provides for pre-legislative scrutiny of Bills for compatibility with international human rights: *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

335 Only two Australian jurisdictions have enacted such legislation: *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

curtail fundamental common law protections without clear and unambiguous language. This is the ‘original rationale’ of the principle. More recent pronouncements arguably represent a new and different rationale — the ‘*Simms* rationale’. That rationale is not concerned with actual legislative intention, but rather the enhancement of electoral accountability. However, as argued in Part II of this article, the courts have not resiled from the ‘original rationale’ and the ‘*Simms* rationale’ can be accurately characterised, at least at present, as a corollary of the former. That is not to ignore however, that contemporary challenges to the ‘original rationale’ exist, and it may be that the ‘*Simms* rationale’ ultimately reaches ascendancy.

In respect of the strength of the principle of legality, Part III of this article has identified two methodological issues that remain unsettled. The first is whether the courts should adopt an approach which ‘least infringes’ the fundamental common law protection. Alternatively, the courts often adopt a ‘contextual’ approach that takes into account the nature of the common law protection and its relative fundamentality, including the extent of relevant legislative activity occurring in the sphere of that protection. The latter approach is more conservative and not methodologically clear. However, both competing approaches are arguably consistent with the principle’s ‘original rationale’. The second issue is whether justification and proportionality can have any role to play under the principle of legality. The predominant view is that it cannot. The formulation of the principle does not say that Parliament does not intend to unjustifiably or disproportionately interfere with fundamental common law protections. However, the courts apply the principle in a way that, arguably, inherently involves justification and proportionality considerations (which is also not methodologically clear). A contrasting view which may nevertheless be consistent with the ‘original rationale’ is that it is more improbable for Parliament to have actually intended the interference if it is unjustified and disproportionate.

A number of methodological inconsistencies have also been revealed in Part III of this article regarding how the principle of legality is currently being applied by the courts, when compared to its ‘original rationale’. In all, Parliament, when enacting legislation, cannot possibly know what fundamental common law protections the courts will apply, nor be able to have ‘directed its attention’,<sup>336</sup> and where intended, ‘consciously decided’<sup>337</sup> upon abrogation or curtailment of those protections. The application of the principle is clearly not in adherence to the principle’s ‘original rationale’. In order for this to be rectified, the courts would need to: develop guiding principles and criteria for the recognition of fundamental common law protections, so that Parliament can be put squarely on notice (which at least partly addresses issues of uncertainty or controversy as to the range of protections recognised); develop similar guidance for identifying when and how common law protections are considered to be weakened or removed; and identify and apply fundamental common law protections recognised at the time of enactment, rather than at the time of interpretation. If the contextual approach

336 *Coco* (1994) 179 CLR 427, 437.

337 *Al-Kateb* (2004) 219 CLR 562, 577 [19] (Gleeson CJ).

to the principle is to be applied, then further guidance should also be provided as to how the courts identify which fundamental common law protections are more highly valued by Parliament (and therefore more stringently protected), and once again, the courts need to have regard to the protection's relative fundamentality at the time of enactment.

Although the principle is said to reflect the institutional relationship between Parliament and the courts, it is the courts that will have the final say on how the principle ultimately develops.<sup>338</sup> If reliance on the 'original rationale' is ultimately abandoned by the courts, and the '*Simms* rationale' wholeheartedly adopted as the sole justification for the principle of legality in Australia, then actual legislative intention will no longer be central to the principle's application. The principle becomes more like a 'manner and form' requirement for Parliament to use clear and unambiguous language in order to abrogate or curtail fundamental common law protections. Freed of the constraints of actual legislative intention, the principle of legality would no longer be troubled by the contemporary challenges to rationale, nor the methodological inconsistencies (even so, a lack of clarity may still persist in terms of, for example, the fundamental common law protections within its scope). The principle could also freely incorporate a methodology of justification and proportionality based on expectations imposed by the courts rather than Parliament's intention, similar to the House of Lords in *Daly*.<sup>339</sup> However, the developments immediately above would undoubtedly lead to accusations of judicial activism and illegitimacy, and that actual Parliamentary intention and sovereignty, and the democratic nature of law-making, is being undermined.

## V POSTSCRIPT

In November 2015, the High Court handed down a further decision of significance to the principle of legality. *North Australian Aboriginal Justice Agency Limited v Northern Territory*<sup>340</sup> related to a so-called 'paperless arrest' regime, whereby police were authorised by statute to arrest and detain a person for certain minor offences without a warrant. The proceeding was predominantly a challenge on constitutional grounds. Nevertheless, there was a question of statutory interpretation. The laws capped the period of detention at four hours. The question was whether: (1) police had discretion to detain the person for any period up to this maximum; or (2) police were required to detain a person only for so long as is reasonable within that maximum.

In a joint judgment, French CJ, Kiefel and Bell JJ treated the notion expressed in *Coco* — that the principle of legality enhances the parliamentary process by securing a greater measure of attention to the impact of legislative proposals —

338 Unless Parliament were to exhaustively codify the principle of legality in statute, but that is unlikely.

339 [2001] 2 AC 532.

340 (2015) 90 ALJR 38.

as entirely consistent with the ‘original rationale’. Their Honours also adopted a ‘least infringing’ approach to the principle’s operation in regards to the right to liberty. Emphasising the principle of legality, they held that ‘[t]he common law does not authorise the arrest of a person or holding an arrested person in custody for the purpose of questioning or further investigation of an offence’.<sup>341</sup> In the absence of clear words to the contrary, the second construction above was to be preferred. Nettle and Gordon JJ reached the same outcome. Gageler J, dissenting, considered that the principle of legality had been rebutted. Keane J did not consider the issue of statutory construction necessary to determine in the circumstances.

341 Ibid 50 [23].