

**THE HON T F BATHURST AC**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**ADDRESS TO NSW LEGISLATIVE DRAFTERS ON THE PRINCIPLE OF**  
**LEGALITY**  
**30 OCTOBER 2018\***

**Introduction**

1. I would firstly like to acknowledge the traditional owners of the land on which we meet, the Gadigal People of the Eora nation, and pay my respects to their elders, past, present and emerging.
2. In an article on “legislative intention”, Justice Stephen Gageler commented that “a relationship in which one party is only ever allowed to speak and in which another party is only ever allowed to interpret is destined to lead to some awkward moments”.<sup>1</sup> You all of course represent the party entitled to speak, and I the one which must interpret. I was delighted to have the opportunity to speak in this forum, and turn the traditional model on its head.
3. It may be the case that some of this “awkwardness” is based on simple misunderstandings — assumptions on the part of drafters that judges necessarily understand why provisions are expressed in a certain way when perhaps we do not. Similarly, there may be assumptions on our part, that drafters understand why we interpret particular expressions in certain ways, when perhaps you do not.
4. These informal meetings are one way in which we can, consistently with our constitutionally separated roles, improve this communication. The ultimate goal would be a situation where both parties are always “singing from the same hymn-

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\* I express thanks to my Research Director, Ms Naomi Wootton, for her assistance in the preparation of this address.

<sup>1</sup> Stephen Gageler, ‘Legislative Intention’ (2015) 41(1) *Monash University Law Review* 1, 16.

sheet”.<sup>2</sup> In that spirit, I aim to leave plenty of time at the end for questions or discussion, whether related to the present topic or not.

5. Now, as pleased as I was to be asked to speak, I was less thrilled with what I was asked to speak about: the principle of legality. This topic has generated innumerable articles,<sup>3</sup> an entire book,<sup>4</sup> and many pages of both Supreme and High Court judgments – and yet still remains vexed with unresolved questions as to rationale, scope and application.<sup>5</sup> It is probably, aside from instances of constitutional invalidity, the cause of the most figurative awkward moments between our respective institutions.
6. I have begun on that uninspiring note with the hope that it will get better from here. I will start by outlining the waxing and waning of the principle over the years, before turning to where the law currently resides on what should be, but are not, simple questions as to rationale, scope, application, the test for rebuttal, the approach to “necessary implication”, and finally, how the principle applies to legislation expressly directed at infringing rights. I will consider this last point by

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<sup>2</sup> Stephen Gageler, (Speech delivered at the Australia-New Zealand Scrutiny of Legislation Conference, Canberra, 6-8 July 2009)

<sup>3</sup> See, eg, Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37 *Melbourne University Law Review* 372; Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35 *Melbourne University Law Review* 449; Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010); Dan Meagher, ‘The Common Law Principle of Legality’ (2013) 38 *Alternative Law Journal* 209; Dan Meagher, ‘The principle of legality as clear statement rule: significance and problems’ (2014) 36 *Sydney Law Review* 413; 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); James Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 *Australian Law Journal* 769; James Spigelman, *The McPherson Lecture Series: Statutory Interpretation and Human Rights* (University of Queensland Press, 2008); Susan Crennan, ‘Statutes and the Contemporary Search for Meaning’ (Speech delivered at the Statute Law Society, London, 1 February 2010); Robert French, ‘The Courts and Parliament’ (Speech delivered at the Queensland Supreme Court Seminar, Brisbane, 4 August 2012); Robert French, ‘The Common Law and the Protection of Human Rights’ (Speech delivered at the Anglo Australasian Lawyers Society, Sydney, 4 September 2009).

<sup>4</sup> See Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017).

<sup>5</sup> See generally Bruce Chen, ‘The Principle of Legality: Issues of Rationale and Application’ (2015) 41(2) *Monash University Law Review* 329.

reference to the case of *Attorney General for NSW v XX*,<sup>6</sup> which concerned the interpretation of statutory exceptions to the rule against double jeopardy<sup>7</sup> a case on which I sat and in which judgment was delivered last month. As I mentioned, there will be ample time for discussion at the end, where I hope we can avoid any awkward moments or silences.

## Waxing and waning

7. In commenting on statutory interpretation ten years ago, former Chief Justice Spigelman said that “law is a fashion industry”.<sup>8</sup> The waxing and waning of the principle of legality is illustrative of this tendency no less than any other area. Its strength and popularity have varied significantly over the years.
8. It is often traced back to the words of O’Connor J in the 1908 case of *Potter v Minahan*.<sup>9</sup> The task of interpretation there related to the word “immigrant” in the *Immigration Restriction Act 1901* (Cth), and the question was whether it meant any person “entering” Australia was “immigrating” for the purposes of that Act. Mr Minahan was born in Australia, had resided in China for some time, and was attempting to return. O’Connor J stated that it must “be assumed that the legislature did not intend to deprive any Australian-born member of the Australian community of the right after absence to re-enter Australia *unless it has so enacted by express terms or necessary implication*”.<sup>10</sup> He justified this by reference to a principle of construction now known as the principle of legality, stating that it was “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”.<sup>11</sup>

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<sup>6</sup> [2018] NSWCCA 198.

<sup>7</sup> *Crimes (Appeal and Review) Act 2001* (NSW) pt 8 div 2.

<sup>8</sup> James Spigelman, ‘From Text to Context: Contemporary Contractual Interpretation’ (Speech delivered at the Risky Business Conference, Sydney, 21 March 2007) 1.

<sup>9</sup> (1908) 7 CLR 277.

<sup>10</sup> *Ibid* 305 (emphasis added).

<sup>11</sup> Quoting from the 4<sup>th</sup> edition of *Maxwell on Statutes*. It should be noted that Justice Basten of the NSW Court of Appeal suggested in *Nightingale v Blacktown City Council* [2015] NSWCA 423 that

9. While *Potter v Minahan* is often referred to as authority for the “long-standing” and “orthodox” nature of the principle,<sup>12</sup> it really began its “contemporary reassertion and strengthening”,<sup>13</sup> in the time of the Mason Court, with cases like *Coco v The Queen*,<sup>14</sup> *Re Bolton; Ex parte Beane*,<sup>15</sup> *Balog v ICAC*,<sup>16</sup> and *Bropho v Western Australia*.<sup>17</sup> In *Coco*, which is perhaps the high-water mark for the principle during the Mason Court, it was stated that “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”.<sup>18</sup>
10. The principle continued to be applied throughout the Gleeson Court era, with the oft-quoted dicta of that time being of Gleeson CJ in *Electrolux Home Products Pty*

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“age and repetition” have given the statement from *Maxwell on Statutes* a “patina of authority which may not be warranted” and that its application in *Potter v Minahan* was “in fact quite muted”. Basten JA stated that “the question was whether a person, once a member of the Australian community, who departed temporarily and sought to return, was an “immigrant” for the purposes of the *Immigration Restriction Act 1901* (Cth). O’Connor J stated that “the meaning of the word ‘immigrant’ must not be extended beyond its ordinary signification if such interpretation would affect rights of Australian-born subjects to a greater extent than the scope and purpose of the Act require.” There is an important distinction between reading down and not extending the ordinary meaning of a word”: at [34]-[35].

<sup>12</sup> It should be noted that Brendan Lim has argued that a “myth of continuity” traces the principle to *Potter v Minahan*, illustrating the “common lawyer’s tendency” to be “reluctant revolutionaries” who “rationalise change within a framework of continuity”. He suggests that the principle of legality now bears a “complexion of coherence” and *Potter v Minahan* has been synthesised with more recent decisions: Lim, ‘The Normativity of the Principle of Legality’, above n 3, 378-81.

<sup>13</sup> Dan Meagher and Matthew Groves, ‘The Common Law Principle of Legality and Secondary Legislation’ (2016) 39(2) *University of New South Wales Law Journal* 450, 462 quoted in Bruce Chen, ‘The French Court and the Principle of Legality’ (2018) 41(2) *University of New South Wales Law Journal* 401, 404.

<sup>14</sup> (1993) 179 CLR 427 (*‘Coco’*).

<sup>15</sup> (1987) 162 CLR 514.

<sup>16</sup> (1990) 169 CLR 625.

<sup>17</sup> (1990) 171 CLR 1.

<sup>18</sup> (1993) 179 CLR 427, [10] (Mason CJ, Brennan, Gaudron and McHugh JJ).

*Ltd v Australian Workers' Union*,<sup>19</sup> who described it as “a working hypothesis, the existence of which is known both to Parliament and the courts, upon which the statutory language will be interpreted”.<sup>20</sup> However, notes of caution also emerged during this time. In that same case, Gleeson CJ warned that “the generality of that assertion of principle requires some qualification”<sup>21</sup> and “the assistance to be gained from a presumption will vary with the context in which it is applied.”<sup>22</sup>

11. During this time the Court started to draw a sharper distinction between “fundamental” rights and other common law rights or the “general system of law”.<sup>23</sup> In the passage I just quoted from *Electrolux*, the Chief Justice cited the comments of McHugh J in the earlier case of *Gifford v Strang Patrick Stevedoring Pty Ltd*.<sup>24</sup> He was considering the application of the principle in relation to what he described as “ordinary common law rights” to “take or not take a particular course of action”.<sup>25</sup> He stated that “modern legislatures regularly enact laws that take away or modify common law rights” such that courts “should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights”, by relying on the presumption.<sup>26</sup>

12. These comments, however, were all directed towards the application of the principle to the “general system of law” or the common law, as opposed to

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<sup>19</sup> (2004) 221 CLR 309 (*Electrolux*).

<sup>20</sup> *Ibid* [21].

<sup>21</sup> *Ibid* [19].

<sup>22</sup> *Ibid*.

<sup>23</sup> For a general discussion of this issue see Stephen McLeish and Olaf Ciolek, ‘The Principle of Legality and ‘The General System of Law’” in Dan Meagher and Mathew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 15.

<sup>24</sup> (2003) 214 CLR 269.

<sup>25</sup> *Ibid* [36].

<sup>26</sup> *Ibid*, citing McHugh J’s earlier comments in *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 (*Malika*) where he stated that “[h]allowed though the rule of construction referred to in *Potter v Minahan* may be, its utility in the present age is open to doubt in respect of laws that ‘infringe rights, or depart from the general system of law’. In those areas, the rule is fast becoming, if it is not already, an interpretative fiction. Such is the reach of the regulatory state that it is now difficult to assume that the legislature would not infringe rights or interfere with the general system of law”: at [28]-[30].

“fundamental rights and principles”. Spigelman CJ later concluded that there is a “clear distinction between legislation which invades fundamental rights and legislation which alters common law doctrines”.<sup>27</sup> I will return to this distinction in more detail shortly.

13. To finish the survey of history, however, we come to the French Court. It is uncontroversial that the principle of legality arose in prominence significantly throughout this time.<sup>28</sup> It was discussed or applied in 33 separate decisions.<sup>29</sup> It is probably not a coincidence that its rise corresponded with French CJ’s time on the bench; he referred to it in at least 27 of the publically available speeches he gave during his 8.5 year tenure.<sup>30</sup> Jeffrey Goldsworthy put it as follows: “it is as if the traditional presumptions now collectively labelled the principle of legality have been injected with steroids”.<sup>31</sup>

14. Two cases best illustrate the strictness with which the principle sometimes came to be applied under the French Court. The first is *Lacey v Attorney General (Qld)*,<sup>32</sup> which concerned a section of the *Criminal Code* providing that the Attorney-General of Queensland could appeal against any sentence imposed by a trial court dealing with an indictable offence, and stated the court hearing such an appeal “may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper”. The word “unfettered” had been inserted into the section in response to an adverse court decision.<sup>33</sup> By a majority of 6:1, with Heydon J dissenting, the Court referred to the common law rule against double jeopardy and held that, applying the principle of legality, the provision

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<sup>27</sup> Spigelman, ‘Principle of Legality and the Clear Statement Principle’, above n 3, 777.

<sup>28</sup> See generally Chen, ‘The French Court and the Principle of Legality’, above n 13.

<sup>29</sup> *Ibid* 402-3, and see also Appendix 1 summarising the 33 identified cases.

<sup>30</sup> *Ibid* 410.

<sup>31</sup> Jeffrey Goldsworthy, ‘The Principle of Legality and Legislative Intention’ in Dan Meagher and Mathew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 46, 50.

<sup>32</sup> (2011) 242 CLR 573 (*‘Lacey’*).

<sup>33</sup> *R v Liekefett; Ex parte Attorney-General* [1973] Qd R 355. See further *ibid* [30].

should be construed as requiring “error on the part of the sentencing judge be demonstrated before the Court’s ‘unfettered discretion’ to vary the sentence is enlivened”.<sup>34</sup> In dissent, Heydon J considered that the language was clear and “incontestable”,<sup>35</sup> stating that a discretion which only exists after error is found is “not an unfettered discretion”.<sup>36</sup>

15. The second case is *North Australian Aboriginal Justice Agency Ltd v Northern Territory*.<sup>37</sup> A differently constituted bench – four judges having retired and been replaced<sup>38</sup> — were asked to decide the constitutional validity of the “paperless arrest” regime introduced under the *Police Administration Act 1978* (NT). Section 133AB of the Act set out a procedure for when an officer arrested a person without a warrant. The person could be taken into custody and held for “up to four hours”, and then on expiry of that four-hour period police could (among other options) “under s 137, bring the person before a justice or court for the infringement notice offence or other offence allegedly committed”. Section 137(1) provided that “a person taken into lawful custody under this or any other Act shall ...be brought before a justice or court of competent jurisdiction as soon as is practicable...”. The question was whether police had a discretion to detain the person for up to four hours, or whether they were required to detain a person only for so long as was reasonable within that maximum of four hours.<sup>39</sup>

16. The plurality held that “the common law” did not authorise the detention of someone for the purpose of questioning or investigation,<sup>40</sup> and in what they described as an “obvious application of the principle of legality”<sup>41</sup> found that the

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<sup>34</sup> (2011) 242 CLR 573, [60] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>35</sup> *Ibid* [79] (Heydon J).

<sup>36</sup> *Ibid* [83].

<sup>37</sup> (2015) 256 CLR 569 (*NAAJA*).

<sup>38</sup> Gummow, Heydon, Crennan and Hayne JJ being replaced by Gageler, Keane, Nettle and Gordon JJ.

<sup>39</sup> As described by Chen, ‘The French Court and the Principle of Legality’, above n 13, 416.

<sup>40</sup> *NAAJA* (2015) 256 CLR 569, [23].

<sup>41</sup> *Ibid*.

four-hour period did “no more than impose a cap”.<sup>42</sup> Gageler J, in dissent, found this construction “strained”,<sup>43</sup> stating there was a tension between the two sections which could be naturally reconciled by finding the requirement to bring a person before a court applied only after the four-hour period had expired. He considered that this construction fit the statutory language, purpose, and extrinsic material.<sup>44</sup> While Nettle and Gordon JJ formed part of the majority, they placed less emphasis on the principle of legality than the plurality, treating it as one relevant consideration amongst others.<sup>45</sup>

17. There are, however, signs of waning. Generally, what goes up must come down, or more academically speaking, principles that garner support tend to be followed by critical dissection and consequent tempering. In terms of individual judges, Gageler and Keane JJ, since their respective appointments, have together written judgment, suggesting they are inclined to give the principle a more “constrained” role.<sup>46</sup>

18. A decision handed down in February this year also suggests the Kiefel Court as a whole might be less enthusiastic than the French. I am referring to the matter of *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*,<sup>47</sup> in which none of the judges invoked the principle despite the legislation in question infringing the “fundamental” right of access to the courts. I should make the disclaimer that I sat on that case when it was before the NSW Court of Appeal. The statute under consideration was the *Building and Construction Industry Security of Payment Act 1999* (NSW),<sup>48</sup> which establishes a scheme for the receipt and recovery by

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<sup>42</sup> Ibid [28].

<sup>43</sup> Ibid [75].

<sup>44</sup> Ibid [84]-[90]. Gageler J would have found provisions unconstitutional on the basis it impaired the institutional integrity of courts of the Northern Territory contrary to Ch III of the *Constitution*: at [136].

<sup>45</sup> See *ibid* [215]-[229].

<sup>46</sup> See Chen, ‘The French Court and the Principle of Legality’, above n 13, 443, referring to *ibid*, *Independent Commission against Corruption v Cunneen* (2015) 256 CLR 1, and *R v Independent Broad-Based Commission Against Corruption* (2016) 256 CLR 459.

<sup>47</sup> [2018] HCA 4 (*‘Probuild’*).

<sup>48</sup> ‘*Security of Payment Act*’.



contractors of progress payments for construction work. The question was whether it ousted the Supreme Court's jurisdiction to make an order in the nature of certiorari to quash a determination by an adjudicator for error of law on the face of the record, not amounting to jurisdictional error. The High Court said that it did oust that jurisdiction.

19. What is of note is that there was no privative clause expressly doing so.<sup>49</sup> The right of access to the courts has traditionally been one which calls for strict application of the principle of legality.<sup>50</sup> Nevertheless, the plurality stated that the Act as a whole evinced a clear intention to exclude such review, referring to its purpose in "stamp[ing] out the practice of developers and contractors delaying payment"<sup>51</sup> and the fact that the parties' contractual rights were preserved.<sup>52</sup> Gageler J based his concurring judgment on the history of the availability of certiorari for non-jurisdictional error on the face of the record.<sup>53</sup>

20. Edelman J, on the other hand, expressly acknowledged that if the principle of legality were to apply with its "usual force" to the *Security of Payment Act* then it would have to be concluded that it had not excluded review for non-jurisdictional error of law.<sup>54</sup> However, he concluded that the principle applied with varying force, and in a case where the adjudicator was only determining parties' rights on an interim basis, he said "there should be little constraint on the ordinary rules of construction".<sup>55</sup> He concluded that "the less need there is for the rationale for the

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<sup>49</sup> [2018] HCA 4 [34].

<sup>50</sup> See D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2014) 246-8.

<sup>51</sup> *Probuild* [2018] HCA 4, [36].

<sup>52</sup> *Ibid* [38].

<sup>53</sup> *Ibid* [78].

<sup>54</sup> *Ibid* [90].

<sup>55</sup> *Ibid*.

narrow approach to construction, the weaker will be the operation of the narrow approach to construction”.<sup>56</sup>

21. So, despite the apparent prominence of the principle, there remain significant unresolved questions in relation to its rationale, scope and application. I am probably preaching to the choir here. My aim in the remainder of this address is to consider where the law currently stands in each of these areas and how these unresolved areas might be determined into the future.

## Rationale

22. First, what is the rationale, or rationales, for the principle of legality? Perhaps an anterior question might be, why do we care? It was recently stated by Gageler and Keane JJ that the principle should not be “extended beyond its rationale”.<sup>57</sup> It follows that rationale is anterior to understanding its permissible scope and operation. More broadly, as Brendan Lim has pointed out, construction should involve “application of rules of interpretation accepted by all arms of government”.<sup>58</sup> The extent to which these rules are systematically accepted depends on their rationales “being clearly articulated and agreed”.<sup>59</sup>

23. The traditional and “factual”<sup>60</sup> rationale was articulated in *Potter v Minahan* as based on legislative intention – that “it is in the last degree improbable”<sup>61</sup> that the legislature would overthrow fundamental rights and principles. It presupposes something of a “rule of thumb” that legislatures generally do not mean to interfere with those rights.

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<sup>56</sup> Ibid [103].

<sup>57</sup> *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, [313] (*Lee*).

<sup>58</sup> Brendan Lim, ‘The Rationales for the Principle of Legality’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (2017, Federation Press) 2, 4 quoting *ibid*.

<sup>59</sup> *Ibid* 4-5.

<sup>60</sup> See *Elliott v Minister administering Fisheries Management Act 1994* [2018] NSWCA 123, [36] (Basten JA).

<sup>61</sup> (1908) 7 CLR 277, 305 (O’Connor J).

24. The other, “normative” rationale is that the principle will “enhance the parliamentary process”,<sup>62</sup> as articulated by Lord Hoffmann in the case of *Ex parte Simms* who stated that “the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost”.<sup>63</sup> This rationale was reflected in *Coco*, where the majority stated that “curial insistence on a clear expression” would “enhance the parliamentary process”.<sup>64</sup> The concerns here are around transparency and democratic scrutiny. Lim has pointed out “that has nothing to do with reflecting the authentic intentions of the legislature”,<sup>65</sup> that is, there is quite a significant difference between the factual intention-based and normative rationales.<sup>66</sup>

25. More recently, Gageler and Keane JJ have re-emphasised its rationale as being based in legislative intention.<sup>67</sup> They stated that later statements of the principle,<sup>68</sup> citing *Electrolux*<sup>69</sup> among other cases,<sup>70</sup> do not detract from that identified in *Potter* but rather “reinforce” it, by ensuring it “serves important contemporary ends”.<sup>71</sup> They seem to be suggesting that what Lim and others have identified as “competing rationales” are just “additional benefits” arising from Parliament having to direct its attention to the issue.<sup>72</sup>

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<sup>62</sup> Lim, ‘The Rationales for the Principle of Legality’, above n 58, 7.

<sup>63</sup> *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131.

<sup>64</sup> *Coco* (1994) 179 CLR 427, [12].

<sup>65</sup> Lim, ‘The Rationales for the Principle of Legality’, above n 58, 7.

<sup>66</sup> Note that Lim separates the normative justification into two, one being concerned with enhancing the parliamentary process and the other with transparency, such that legislative decisions to abrogate rights are made explicitly so that there is a sufficient opportunity for democratic discipline: Lim, ‘The Rationales for the Principle of Legality’, above n 58, 7.

<sup>67</sup> *Lee* (2013) 251 CLR 196, [309].

<sup>68</sup> *Ibid* [312].

<sup>69</sup> (2004) 221 CLR 309.

<sup>70</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562, [19]-[20]; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, [28]-[32].

<sup>71</sup> *Lee* (2013) 251 CLR 196, [312].

<sup>72</sup> Chen, ‘The French Court and the Principle of Legality’, above n 13, 338.

26. So, it seems that at this stage the rationale is still very much based in the idea of legislative intention. However, this does sit uncomfortably with the contemporary debate as to the “fictionalisation” of legislative intention. This is the idea that legislative intention is “not something that exists before judicial interpretation, but instead, is a product or construct of interpretation”.<sup>73</sup>
27. A majority of the High Court in *Lacey* adopted this theory, stating legislative intention is simply “a statement of compliance with the rules of construction”.<sup>74</sup> On the other side of the debate, argued by Ekins and Goldsworthy, legislative intention is found in “what a reasonable audience would conclude was the author’s ‘subjective’ intention, given all the publicly available evidence of it”.<sup>75</sup> They argue that “while statutory interpretation is objective, its object is the actual intention of Parliament.”<sup>76</sup>
28. If we accept the rationale for the principle of legality is what parliament would have intended, and we rebut it by looking for a contrary intent, but that intent is found in an application of principles of construction. then as Ekins and Goldsworthy have concluded: “the dog is chasing its own tail”.<sup>77</sup> If the majority High Court view continues to be that legislative intention is an unhelpful “fiction” then the justification for the principle as based in the “existence and content of an authentic intention”<sup>78</sup> perhaps requires some reassessment.
29. At present, however, it appears that Gageler and Keane JJ’s description retains its force, having subsequently been cited by inferior courts at least 37 times since

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<sup>73</sup> Richard Ekins and Jeffery Goldsworthy, ‘The Reality and Indispensability of Legislative Intentions’ (2014) 36 *Sydney Law Review* 39, 41.

<sup>74</sup> (2011) 242 CLR 573, [43].

<sup>75</sup> Ekins and Goldsworthy, above n 73, 46.

<sup>76</sup> *Ibid* 51.

<sup>77</sup> *Ibid* 44. I have elsewhere expressed views as to the continued usefulness of legislative intention as a touchstone for interpretation: see ‘Icecream is not “meat”: literal meaning and purpose in statutory interpretation in private law’ in *Statutory Interpretation in Private Law* (Federation Press, forthcoming 2018).

<sup>78</sup> Lim, ‘The Normativity of the Principle of Legality’, above n 3, 376.

their judgment five years ago.<sup>79</sup> They used the rationale as a touchstone to guide its application, stating that “it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law.”<sup>80</sup>

30. Two questions then arise: first, when does the principle apply, and second, to what rights, freedoms, immunities, principles or values does it apply?

### **Scope: “ambiguity” in the broad sense**

31. The principle of legality, on one view, sits uncomfortably with the primary rule of statutory construction – that the “starting point” is the “text”, to find “the natural and ordinary meaning of a word” in context and with regard to the purpose of the statute.<sup>81</sup> In *Project Blue Sky*<sup>82</sup> it was said that while “ordinarily” the grammatical and legal meaning of a statute will correspond, in some cases the principle of legality “may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning”.<sup>83</sup>

32. First, it is important to be clear that the primary “duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have”.<sup>84</sup> It is not to selectively deploy presumptions of interpretation to support whatever meaning the court prefers on its own policy grounds.<sup>85</sup> Second, the “modern approach”<sup>86</sup> to statutory construction is that it is

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<sup>79</sup> The cases were identified using the citation function on JADE Professional.

<sup>80</sup> *Lee* (2013) 251 CLR 196, [313].

<sup>81</sup> *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34, [14].

<sup>82</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*‘Project Blue Sky’*).

<sup>83</sup> *Ibid* [78] (McHugh, Gummow, Kirby and Hayne JJ).

<sup>84</sup> *Ibid*.

<sup>85</sup> Ekins and Goldsworthy, above n 73, 43.

<sup>86</sup> *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, [88] (Brennan CJ, Dawson, Toohey and Gummow JJ).

the natural and ordinary meaning in “context”, and that context includes the principle of legality.<sup>87</sup>

33. However, for the principle of legality to operate, there must be some ambiguity, not necessarily in the “syntactic or semantic” sense, but the “broad sense”.<sup>88</sup> French CJ has explained that the principle operates where “constructional choices are open”.<sup>89</sup> Practically this can be seen simply as the mirror of what is necessary to rebut the principle: clear and unambiguous language. I think perhaps the perception that it is inconsistent with the ordinary approach to construction comes from a misreading of *Project Blue Sky* – which as I have mentioned, stated the principle might “require the words” to be read in a way that does “not correspond with the literal meaning”.<sup>90</sup> It is important not to read “literal” as “clear”: there is a distinction. The principle of legality does not operate to displace the clear meaning of the statutory text.<sup>91</sup>

34. What does ambiguity in the broad sense look like? Former Chief Justice Spigelman has described it as where the “scope and applicability of a particular statute is, for whatever reason, doubtful”.<sup>92</sup> It may also incorporate a need for specific rather than general words, described in *Coco* as being insufficient to rebut the principle because “they will often be ambiguous on the aspect of interference with fundamental rights”.<sup>93</sup> I will return to this in more detail momentarily.

35. My point is that the principle is reconcilable with the ordinary rules of construction because ambiguity, or “constructional choices”, are a necessary pre-condition to

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<sup>87</sup> See, eg, *R v Home Secretary; Ex parte Pierson* [1998] AC 539, 587 (Lord Steyn) noting that “Parliament does not legislate in a vacuum”. See generally Pearce and Geddes, above n 50, 3-4.

<sup>88</sup> Francis Cardell-Oliver, ‘Parliament, The Judiciary and Fundamental Rights: The Strength of the Principle of Legality’ (2017) 41 *Melbourne University Law Review* 30, 50.

<sup>89</sup> *R & R Fazzolari Pty Limited v Parramatta City Council* (2009) 237 CLR 603, [43].

<sup>90</sup> (1998) 194 CLR 355, [78].

<sup>91</sup> *McLeod-Dryden v Supreme Court of Victoria* [2017] VSCA 60, [35].

<sup>92</sup> Spigelman, ‘Principle of Legality and the Clear Statement Principle’, above n 3, 771-2.

<sup>93</sup> *Coco v The Queen* (1993) 179 CLR 427, [10]. See generally Cardell-Oliver, above n 88, 50.

its application, even though ordinarily the identification of this ambiguity occurs after the presumption is applied, implicit in the test for rebuttal. The task of the Court is not to find in the legislation one clear meaning based on a clear statutory purpose on the ordinary principles of construction and then proceed to rebut that intention by reference to the principle of legality. The principle does not “constrain legislative power”<sup>94</sup> and legislation should not be “read down” so as to be consistent with it.

### **Application: “fundamental” rights and principles**

36. The next question is what rights does the principle protect? The most honest answer would perhaps be that no-one really knows. This probably causes you all some consternation, given that the principle is apparently a “working hypothesis, the existence of which is known both to Parliament and the courts”.<sup>95</sup> The most useful source is probably the list compiled by Pearce and Geddes in their text, of examples where courts have required a clear intention for the right to be abrogated.<sup>96</sup> The latest edition lists over 60 examples.<sup>97</sup> There is however no authoritative statement as to what is protected, which is ultimately a “matter of judicial choice”.<sup>98</sup> In the case of *Stoddart*,<sup>99</sup> for example, Crennan, Kiefel and Bell JJ stated 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>100</sup>

37. In recent years it appeared that the High Court might move away from the requirement of “fundamentality”. In *Momcilovic*, French CJ suggested that the use of the adjective as a qualifier of the rights and freedoms covered might better be

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<sup>94</sup> *Momcilovic v The Queen* (2011) 245 CLR 1, [43] (French CJ) (*‘Momcilovic’*).

<sup>95</sup> *Electrolux* (2004) 221 CLR 309, [21] (Gleeson CJ).

<sup>96</sup> Pearce and Geddes, above n 50, 255-9.

<sup>97</sup> *Ibid.*

<sup>98</sup> Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 3, 459.

<sup>99</sup> *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 (*‘Stoddart’*).

<sup>100</sup> *Ibid* [182] (Crennan, Kiefel and Bell JJ) (emphasis added).

discarded.<sup>101</sup> In the case of *R v IBAC*, the plurality appeared to drop the qualifier, stating that the principle applied simply to “common law rights”, although no mention was made of the distinction.<sup>102</sup>

38. A related question arises about what is meant by the “general system of law” in *Potter v Minahan*.<sup>103</sup> The matter of *X7*,<sup>104</sup> a case decided in 2013, concerned the *Australian Crime Commission Act 2002* (Cth) which allowed an examiner to summon a person and require them to give evidence under pain of penalty. The question was whether the legislation authorised the compulsory examination of a person who had been charged with an offence about the subject matter of the offence. As part of the majority which held that it did not, Hayne and Bell JJ stated that the principle was not confined to legislation “which may affect rights” but extended to “defining characteristics” of the “criminal justice system”.<sup>105</sup> Kiefel J also stated that “a statutory intention ... to depart from the general system of law” had to be expressed with “irresistible clearness”.<sup>106</sup>

39. Subsequently in *Lee v NSW Crime Commission*, which involved the interpretation of similar state legislation, Gageler and Keane JJ stated that it was “not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law” but “extends to the protection of fundamental principles and systemic values”.<sup>107</sup> However, in the later matter of *ACMA v Today FM*, Gageler J, writing separately, noted that “outside its application to established categories of protected common law rights and immunities, that principle must be approached with caution” and

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<sup>101</sup> *Momcilovic* (2011) 245 CLR 1, [43].

<sup>102</sup> *R v Independent Broad-Based Commission Against Corruption* (2016) 256 CLR 459, [40] (*R v IBAC*).

<sup>103</sup> (1908) 7 CLR 277.

<sup>104</sup> *X7 v Australian Crime Commission* (2013) 248 CLR 92 (*X7*).

<sup>105</sup> *Ibid* [87].

<sup>106</sup> *Ibid* [158].

<sup>107</sup> *Lee* (2013) 251 CLR 196, [313].



“should not be extended to create a common law penumbra around constitutionally imposed structural limitations on legislative power”.<sup>108</sup>

40. Two questions arise from what I have just outlined. First, is it “fundamental” rights or all common law rights? Second, does the principle extend to the “general system of law”?

41. In my opinion, “fundamental” probably does still have some work to do. In *X7*, where French CJ appeared to drop the requirement of fundamentality, it was replaced by the qualifier “important”.<sup>109</sup> In practical terms I cannot see much of a difference between the two.<sup>110</sup> It would be impossible to define all the rights and principles which are “fundamental”, but I think in many cases it will be obvious: the right to liberty, speech, the privilege against self-incrimination or the rule against double jeopardy hardly need explanation. In other cases it might be harder. However, this need not cause as much concern as you might otherwise think. I will turn to why in a moment, but first I want to consider the second question, as to whether it in fact still applies to the “general system of law”.

42. In cases like *Electrolux*<sup>111</sup> there was scepticism around whether the principle of legality applied in relation to “lesser” common law rights or the “general system of law”. There is, I think, a tendency to confuse it with another related principle, which is that “where two alternative constructions of legislation are open, the one which is consonant to the common law is to be preferred”.<sup>112</sup> This principle does not require irresistibly clear language. It is a much weaker presumption than the

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<sup>108</sup> *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, [67]. The joint judgment noted that the respondent had relied on certain statements in *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, based on the principle of legality but it is not otherwise clear how the principle of legality was relevant to their reasoning: at [31]. See also the treatment of the principle by the majority in *Independent Commission against Corruption v Cunneen* (2015) 256 CLR 1, [54] as compared to the dissenting judgment of Gageler J at [87]-[88].

<sup>109</sup> *X7* (2013) 248 CLR 92, [24].

<sup>110</sup> Cf Brendan Lim, who has argued that there is a distinction to be drawn between “fundamental” and “important” in this context: Lim, ‘The Normativity of the Principle of Legality’, above n 3, 395-7.

<sup>111</sup> (2004) 221 CLR 309. See also *Malika* (2001) 204 CLR 290.

<sup>112</sup> *Balog v ICAC* (1990) 169 CLR 625, [23] (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

principle of legality.<sup>113</sup> It is probably the case that “ordinary” common law rights as opposed to “fundamental” ones fit within this category. The comments made in *X7*<sup>114</sup> and *Lee*<sup>115</sup> that could be read as suggesting a broader view can be understood on the basis that they concerned the accusatorial system of criminal justice combined with the privilege against self-incrimination: no ordinary common law right.<sup>116</sup>

43. This accords with the comments of Basten JA in a case in the Court of Appeal<sup>117</sup> that it would be a “bizarre fiction” if the the principle of legality were “read as a presumption that legislation does not abrogate or alter common law rights absent irresistible clarity”.<sup>118</sup> He stated that it is doubtful that the concept of “infringing rights” referred to in *Potter*<sup>119</sup> should be given such a “broad and unconfined reading”.<sup>120</sup>

44. The fact that a much weaker presumption applies to ordinary rights or the “general system of law” deals with the problem of defining the scope of “fundamentality”. The less important the right, the more likely it will be regarded as an “ordinary” common law right, to which the weaker presumption applies. The more fundamental a right, the stricter the interpretation will be, moving on a spectrum towards the principle of legality and away from the ordinary principle which guides a choice between two equally open constructions. Middleton J has made a similar point, writing extra-curially that “what is necessary to displace an assumption will depend upon the legislation itself and its context. This will include

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<sup>113</sup> See McLeish and Ciolek, above n 23.

<sup>114</sup> (2013) 248 CLR 92.

<sup>115</sup> (2013) 251 CLR 196.

<sup>116</sup> Cf McLeish and Ciolek, above n 23.

<sup>117</sup> *McElwaine v The Owners - Strata Plan 75975* [2017] NSWCA 239.

<sup>118</sup> *Ibid* [2].

<sup>119</sup> (1908) 7 CLR 277.

<sup>120</sup> *McElwaine v The Owners - Strata Plan 75975* [2017] NSWCA 239, [2].

the nature of the right or freedom in question”.<sup>121</sup> In the Court of Appeal judgment in *Probuild*, Basten JA (with whom Macfarlan and Leeming JJA agreed),<sup>122</sup> similarly stated that “[a]lthough it has not been expressed in such terms, it seems likely that the level of clarity required ... will depend upon the nature of the perceived infringement [and] the nature of the rights or general principles infringed.”<sup>123</sup>

45. There is one final matter to be considered, which is the relationship between the principle of legality and equity. This arose in *Plaintiff S99/2016*,<sup>124</sup> a matter relating to the transfer of a refugee from Nauru to Australia for the purpose of undergoing an abortion. Bromberg J found that the privative clause in the *Migration Act*<sup>125</sup> did not apply to actions in tort against the Minister, such that an injunction could issue to preclude the Minister procuring an abortion for the plaintiff in Papua New Guinea.<sup>126</sup> He stated that “consistently with the principle of legality, ‘irresistibly clear words’ would be required before I would construe s 474 as precluding the issue of injunction relief in the case of a tortious wrong”.<sup>127</sup> He found that the construction advanced by the Minister would “markedly depart from the general system of the common law so far as it pertains to apprehended or continuing torts”,<sup>128</sup> by overthrowing fundamental equitable principles such as “equity suffers not a right without a remedy” and “it is better to restrain in time than to seek a remedy after the injury has been inflicted”.<sup>129</sup> As Bruce Chen has

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<sup>121</sup> John Middleton, ‘Statutory Interpretation: Mostly Common Sense?’ (2016) 40 *Melbourne University Law Review* 626, 637.

<sup>122</sup> Bathurst CJ and Beazley P also agreed with Basten JA but with the caveat that it was not necessary to deal with the scope of the principle of legality: (2016) 95 NSWLR 157, [1].

<sup>123</sup> *Ibid* [46].

<sup>124</sup> *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17 (*Plaintiff S99/2016*).

<sup>125</sup> *Migration Act 1958* (Cth) s 474.

<sup>126</sup> *Plaintiff S99/2016* (2016) 243 FCR 17, [14].

<sup>127</sup> *Ibid* [459].

<sup>128</sup> *Ibid* [458].

<sup>129</sup> *Ibid*.

noted,<sup>130</sup> the proposition that the principle of legality covers maxims of equity is yet to find support in the High Court, but has been approved in intermediate courts of appeal.<sup>131</sup> Equitable principles probably fall within the concept of the “general system of law” as opposed to “fundamental rights”, which begs the earlier question of whether the principle of legality or in fact a weaker presumption applies.

### **Rebuttal: generality and specificity**

46. The next question is what is necessary to rebut the presumption. There are the well-worn tests of “clear and unambiguous words”,<sup>132</sup> “irresistible clearness”<sup>133</sup> and “unmistakeable and unambiguous”<sup>134</sup> language, among other formulations.<sup>135</sup> However, of particular interest is the issue of specificity. This arises in cases where the legislature uses clear and unmistakable, but general words, that do not deal specifically with the issue of the abrogation of rights. Lord Browne-Wilkinson adverted to this issue in 1992, asking “[b]ut how are the courts to approach the construction of general words, in themselves clear, which on their face authorise almost any action including actions interfering with basic freedoms?”.<sup>136</sup>

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<sup>130</sup> Bruce Chen, ‘Plaintiff S99/2016 and the Extension of the Principle of Legality’ (2016) 27 *Public Law Review* 167, 179.

<sup>131</sup> See *Minister for Lands v McPherson* (1991) 22 NSWLR 687, 699-701 (Kirby P, Mahoney and Meagher JJA agreeing); *Re Brighton Hall Securities (in liq)* [2013] FCA 970, [153] (McKerracher J); *Registrar of Titles v Mrsa* [2015] WASC 204, [32] (Martin CJ); *Binetter v BCI Finances Pty Ltd (in liq)* [2015] FCAFC 122, [32]-[34] (Besanko, McKerracher and Pagone JJ); *Commissioner of State Revenue v Can Barz Pty Ltd* [2016] QCA 323 (*‘Can Barz’*). In *Can Barz*, Philippides JA stated that “The legal assumption is now understood as part of the principle of legality. There can be no doubt that the legal assumption acts to protect both the common law and equitable principles from being overridden by the operation of relevant legislation unless there is a clear intention to do so. That follows from the reference to “the general system of law” in *Potter*”: at [17].

<sup>132</sup> *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343, 359.

<sup>133</sup> *Potter v Minahan* (1908) 7 CLR 277, 304 quoted in *X7* (2013) 248 CLR 92, [158] (Kiefel J).

<sup>134</sup> *Coco* (1994) 179 CLR 427, [10].

<sup>135</sup> See Pearce and Geddes, above n 50, 215. See also *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340, [44] (Spigelman CJ).

<sup>136</sup> Lord Browne Wilkinson, ‘The Infiltration of a Bill of Rights’ [1992] *Public Law* 297, 405.

47. In *Coco*, it was said that “general words will rarely be sufficient ... 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>137</sup> The need for specificity accords with the comments of Gageler and Keane JJ which I mentioned earlier, that the principle exists to protect rights from “inadvertent and collateral alteration”.<sup>138</sup>

48. However, there are points to be made on the other side. Legislation is written so as to apply to a broad range of unforeseeable circumstances. Is specificity inconsistent with the very nature of legislative drafting? It does not help that the cases have not always been consistent. One commentator has highlighted the issue by reference to *X7* and *Lee*.<sup>139</sup> In *X7*, Hayne and Bell JJ relied on the fact that the legislation did “not deal specifically with the case of the person being examined having also been charged with an offence”.<sup>140</sup> They said that while the words were “sufficiently general to include that case ... they do not deal directly or expressly with it”.<sup>141</sup> They concluded that it “is the generality of the words used ... and the absence of specific reference ... which presents the issue for determination”.<sup>142</sup> Kiefel J emphasised the strictness of the principle, stating it is “not a low standard” and requires “that it be manifest from the statute in question that the legislature has directed its attention to the question whether to so abrogate or restrict and has determined to do so.”<sup>143</sup>

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<sup>137</sup> *Coco* (1994) 179 CLR 427, [10].

<sup>138</sup> *Lee* (2013) 251 CLR 196, [313].

<sup>139</sup> Cardell-Oliver, above n 88, 51-4.

<sup>140</sup> (2013) 248 CLR 92, [83].

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid* [76]. See also Kiefel J stating: “[h]as it directed its attention to the effect of an examination in such circumstances on the fundamental principle which informs the criminal justice system, and to whether the examination may pose a real risk of interference with the administration of criminal justice? The answer to each must be “no” for the reasons given by Hayne and Bell JJ”: at [162].

<sup>143</sup> *Ibid* [158].

49. In *Lee*, a differently composed bench took what seems to be the opposite approach. The majority there considered the fact that the provision expressly made no distinction between pending or future criminal proceedings as of “particular significance” in their conclusion that it did abrogate the privilege.<sup>144</sup>

50. While I would agree there is some difficulty in reconciling the two approaches, one point should be made. It was also made by Justice Hayne in his dissenting judgment in *Lee*, which is that between *X7* and *Lee* there was a change in the composition of the bench, and it is possible the two decisions are inconsistent on that basis.<sup>145</sup> However, the decision in *Lee* may also be part of a broader tempering of the principle that puts greater emphasis on legislative purpose.

51. In *Lee*, French CJ made extensive reference to the “public policy”<sup>146</sup> or “purpose” to be served by the statute.<sup>147</sup> Gageler and Keane JJ went further, stating that “the principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked”.<sup>148</sup> They explained that this was for the “simple reason is that “[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve”.<sup>149</sup>

52. The conclusion was that the purpose of the statute, which was to require persons to answer questions about criminal activity, meant that even in the absence of clear words, it was necessarily implied that the privilege against self-incrimination was abrogated in relation to persons facing pending charges. This also

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<sup>144</sup> (2013) 251 CLR 196, [331] (Gageler and Keane JJ). See also [132]-[133] (Crennan J).

<sup>145</sup> Ibid [70].

<sup>146</sup> Ibid [56].

<sup>147</sup> Ibid [30], [42]-[45].

<sup>148</sup> Ibid [314].

<sup>149</sup> Ibid.

represents a slight shift in the approach taken by the Court in relation to the test for “necessary implication”, to which I will now turn.

### **Rebuttal: necessary implication**

53. Two approaches to the test of necessary implication have emerged. The first has been described as “stultification”,<sup>150</sup> the second a “purposive” or “contextual” approach.<sup>151</sup>

54. Under the “stultification” approach, fundamental rights may only be set aside in the pursuit of a statutory purpose if there is “no other way” that the legislation can achieve its purpose.<sup>152</sup> This appears to be the approach that *Coco* prescribes, where the majority stated that rights would only be abrogated by implication where “necessary to prevent the statutory provisions from becoming inoperative or meaningless”.<sup>153</sup>

55. This was adopted by Hayne and Bell JJ in *X7*, who stated that “the implication must be necessary, not just available or somehow thought to be desirable”.<sup>154</sup> The test they imposed was whether the purpose of the Act “would be defeated” by reading its provisions as not applying to a person with pending charges.<sup>155</sup> Kiefel J, as part of the minority in *Lee*, applied this principle again, stating that the rights-infringing construction could not “be said to be required by necessary implication” because the Act’s purpose would not be “frustrated”, noting that “there are other methods of investigation and proof”.<sup>156</sup>

56. As I have already indicated, the majority in *Lee* took a different approach. French CJ said that abrogation “may be required, as a matter of necessary implication,

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<sup>150</sup> Pearce and Geddes, above n 50, 239.

<sup>151</sup> Cardell-Oliver, above n 88, 41-8.

<sup>152</sup> *Ibid* 34.

<sup>153</sup> (1993) 179 CLR 427, [8].

<sup>154</sup> (2013) 248 CLR 92, [142].

<sup>155</sup> *Ibid*.

<sup>156</sup> (2013) 251 CLR 196, [223].

by the clear purpose of the statute”.<sup>157</sup> Gageler and Keane JJ’s dicta that the principle was of “little assistance” in cases directed to abrogating rights, which I quoted from earlier, “represents a less stringent approach than what was once thought required to rebut the principle”.<sup>158</sup>

57. In my opinion, the approach taken in *Probuild* this year to the test for necessary implication is far closer to the “purposive” than the “stultifying”. While the statute contained no express terms providing that an adjudicator’s determination was not to be quashed by way of certiorari for error of law on the face of the record, the plurality held that “read as a whole” the Act nevertheless had that effect.<sup>159</sup> They stated that to hold otherwise would “frustrate the operation and evident purposes of the statutory scheme”.<sup>160</sup> However, as was noted by Edelman J, there was merely impairment to statutory objects of certainty of cash flow, speed, and efficiency, “falling short of rendering the Security of Payment Act inutile”.<sup>161</sup> It appears that the statutory purpose was given significant weight, as well as the nature of the infringed right, as the parties’ underlying contractual rights were left intact by the scheme. This highlights the point I made earlier, that the assistance to be gained from the principle will vary with the context in which it is applied.<sup>162</sup>

### **The “least infringing” interpretation**

58. Finally, I want to consider the case of statutes expressly directed at infringing rights. As I mentioned earlier, in the case of *Lee*, Gageler and Keane JJ stated the principle would not apply in relation to statutes that are specifically directed at the abrogation of fundamental rights.<sup>163</sup> In the later case of *NAAJA*, Gageler J

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<sup>157</sup> Ibid [30].

<sup>158</sup> Chen, ‘The French Court and the Principle of Legality’, above n 13, 431.

<sup>159</sup> [2018] HCA 4, [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>160</sup> Ibid [48].

<sup>161</sup> Ibid [100].

<sup>162</sup> *Electrolux* (2004) 221 CLR 309, [19] (Gleeson CJ). Cf Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 3, 460.

<sup>163</sup> (2013) 251 CLR 196, [314].



again maintained that that it was “of little assistance given that the evident statutory object is to authorise a deprivation of liberty”.<sup>164</sup>

59. The plurality comprising of French CJ, Kiefel and Bell JJ seemed to respond directly to that proposition and rejected it, stating “it is a principle of construction which is not to be put to one side as of “little assistance” where the purpose of the relevant statute involves an interference with the liberty of the subject”.<sup>165</sup> Rather, they said it “is properly applied in such a case to the choice of that construction, if one be reasonably open, which involves the least interference with that liberty”.<sup>166</sup> Their view seems to be that even where the statutory object is to abrogate a fundamental right, but there is a constructional choice open on the text, the principle of legality still has work to do in that the construction which “least infringes” on the right will be adopted.<sup>167</sup>

60. This issue arose for consideration recently by the Court of Criminal Appeal, in the matter of *Attorney General (NSW) v XX*.<sup>168</sup> This case was the first judicial consideration of the provisions of the *Crimes (Appeal and Review) Act* which wind back the common law rule against double jeopardy.<sup>169</sup> The provisions in question enable an acquitted person to be retried for a criminal offence in certain, strictly prescribed circumstances, relevantly where is both “fresh” and “compelling” evidence against them.<sup>170</sup> I should again make the disclaimer that I was one of the three members of the Court who decided the case.

61. There were a number of issues of statutory construction; however the main one was the meaning of the term “adduced”. The term “fresh” evidence is defined in the legislation as evidence that “was not adduced” in the proceedings in which

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<sup>164</sup> (2015) 256 CLR 569, [81].

<sup>165</sup> *Ibid* [11].

<sup>166</sup> *Ibid*.

<sup>167</sup> Chen, ‘The French Court and the Principle of Legality’, above n 13, 437.

<sup>168</sup> [2018] NSWCCA 198.

<sup>169</sup> *Crimes (Appeal and Review) Act 2001* (NSW) pt 8 div 2.

<sup>170</sup> *Ibid* s 100.

the person was acquitted.<sup>171</sup> The Attorney submitted that “adduced” meant “admitted” while the respondent argued that it meant “tendered”.

62. Now in that case it was obvious that the common law right not to be subjected to double jeopardy was intended to be abrogated by the provisions. Nevertheless, constructional choices were open on the legislation which respectively made greater or lesser inroads into that abrogation. On the Attorney’s view of the legislation, someone could be retried as a result of a change in the laws of evidence where previously inadmissible evidence becomes admissible.<sup>172</sup> On the respondent’s view, the admissibility of evidence was not relevant, and the definition of “fresh” was directed to whether the evidence was “available”.<sup>173</sup>

63. In relation to the relevance of the principle of legality, the Attorney submitted that it was not relevant to construction, as “the whole purpose of the legislation was to remove the principle of double jeopardy”.<sup>174</sup> The respondent submitted by contrast that rather than abrogating the rule against double jeopardy, the legislature had qualified it, so if there was “any doubt as to the meaning of particular words or provisions”, the principle of legality would assist in determining where the line was to be drawn.<sup>175</sup>

64. Ultimately we agreed with the respondent that it was appropriate to take into account the principle of legality in determining the extent to which the provisions were intended to abrogate double jeopardy where it was not otherwise clear from the text or context of the provisions.<sup>176</sup> We found that the word “adduced” meant

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<sup>171</sup> Ibid s 102.

<sup>172</sup> [2018] NSWCCA 198, [181]-[196].

<sup>173</sup> Ibid [200]-[222].

<sup>174</sup> Ibid [132].

<sup>175</sup> Ibid.

<sup>176</sup> Ibid, stating that “[w]hile the principle cannot be used to frustrate that intention, as noted in *Lee* at [314], it is, in our view, of assistance in determining the extent to which CARA was intended to abrogate the rule against double jeopardy where it does not otherwise appear clearly from the text or context of the statutory provisions”: at [148].

“tendered” as distinct from “admitted” without regard to the principle of legality, simply on the ordinary and natural meaning of the word, read in context and with regard to its purpose.<sup>177</sup>

65. However, we noted that the principle of legality provided support for the conclusion we reached. The potential curtailment of the rule against double jeopardy as a result of inadmissible evidence becoming admissible was not stated in “unmistakeable or unambiguous language”,<sup>178</sup> and there was no indication that the legislature intended the curtailment of the right to extend that far.<sup>179</sup> As it stands, a special leave application to the High Court is pending on the basis of our construction of “adduced”, and it may be that if the case is ultimately heard by the Court they will have something to say about the ongoing authority of the “least infringing” approach. For the present time, however, it seems to be good law.

## **Conclusion**

66. So, out of the six or so contested issues around the principle of legality I have covered this afternoon, I think I was able to give you a concrete answer on one, or perhaps two, with the caveat that this last one might be reconsidered by the High Court in the near future. In an address aimed to facilitate better communication between our institutions, I hope I have not just added to the confusion. If I have, now is the time to heckle me for it, as I’ll stop talking and open up to any questions or discussion points you might have.

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<sup>177</sup> Ibid [231].

<sup>178</sup> Ibid [247].

<sup>179</sup> Ibid.