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**THE FRENCH COURT AND THE PRINCIPLE OF LEGALITY**

BRUCE CHEN\*

*With the recent retirement of Robert French as Chief Justice of the High Court of Australia, this article provides a retrospective on the French Court's treatment of the principle of legality. The principle of legality is a common law interpretive principle most commonly associated with the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms and immunities. This article demonstrates that the principle of legality has greatly risen in prominence during the French Court era. The article draws a narrative of the most significant principle of legality cases decided by the French Court. It identifies the unprecedented developments that have taken place, the areas in which divisions have emerged, and the implications for the principle going forward.*

**I INTRODUCTION**

The retirement of the Hon Robert Shenton French AC as Chief Justice of the High Court of Australia in January 2017 marked the end of the 'French Court', which lasted about eight years and five months. During this time, a number of significant cases were decided on the principle of legality – a common law interpretive principle which stands for the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms, immunities and principles, or to depart from the general system of law (herein referred to collectively as 'fundamental common law protections'), except where rebutted by clear and unambiguous language. French himself showed an undoubted interest in the principle of legality. There is a consensus amongst academics and

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\* PhD candidate, Monash University. The author thanks Emeritus Professor Jeffrey Goldsworthy, Associate Professor Julie Debeljak, the three anonymous reviewers and the editors for their insightful comments on an earlier draft of this article. This research work was supported through an Australian Government Research Training Program Scholarship.

practitioners alike that the principle has greatly risen in prominence in recent times.<sup>1</sup>

Much has been written about the principle of legality, but there is yet to have been a comprehensive review of the French Court's contributions. This article seeks to provide that analytical review. Its purposes are twofold. The first aim is to demonstrate and attempt to explain the increased prominence and robustness with which the principle of legality has been applied by the French Court. The second is to identify several points of contention that arose in principle of legality cases decided by the French Court, and the varying approaches that members of that Court brought to bear on the principle's operation.

The selected cases for discussion are: *Saeed v Minister for Immigration and Citizenship*;<sup>2</sup> *Lacey v Attorney-General (Qld)*;<sup>3</sup> *Momcilovic v The Queen*;<sup>4</sup> *Monis v The Queen*;<sup>5</sup> *X7 v Australian Crime Commission*;<sup>6</sup> *Lee v NSW Crime Commission*;<sup>7</sup> *Independent Commission Against Corruption v Cunneen*;<sup>8</sup> *North Australian Aboriginal Justice Agency v Northern Territory*;<sup>9</sup> and *R v Independent Broad-based Anti-corruption Commissioner*.<sup>10</sup> These cases have been chosen on the basis that they particularly illuminate the French Court's treatment of the principle. The cases also highlight the divisions within the French Court (most of these cases were decided by a majority, rather than unanimously). They are drawn from a larger pool of 33 cases<sup>11</sup> in which the principle of legality was discussed by the French Court, summarised in Appendix I.

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1 See Justin Gleeson, 'Gilbert + Tobin Conference After Dinner Speech' (Speech delivered at the Gilbert + Tobin Centre of Public Law 2016 Constitutional Law Conference, Sydney, 12 February 2016) 6: 'at the coalface where cases are being run and decided, my experience is that ... [the principle of legality] is one of the most powerful principles at play'; Richard Niall, 'The Principle of Legality in Administrative Decision-Making' (Speech delivered at the Australian Institute of Administrative Law, Melbourne, 16 August 2016) 10: the principle of legality has been 'played as a card that trumps other interpretative rules'; Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36 *Sydney Law Review* 413, 413: 'the common law principle of legality has hardened into a strong clear statement rule that is applied when legislation engages common law rights and freedoms'; Dan Meagher, 'The Judicial Evolution (or Counter-revolution) of Fundamental Rights Protection in Australia' (2017) 42 *Alternative Law Journal* 9, 12, discussing cases decided by the French Court: 'In these cases, the principle of legality has operated as "a kind of manner and form requirement imposed on Parliament" requiring "clear and unequivocal [statutory] language" to interfere with fundamental rights' (citations omitted); Jeffrey Goldsworthy, 'The Principle of Legality and Legislative Intention' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 46, 50: 'It is as if the traditional presumptions now collectively labelled the principle of legality have been injected with steroids'.

2 (2010) 241 CLR 252 ('*Saeed*').

3 (2011) 242 CLR 573 ('*Lacey*').

4 (2011) 245 CLR 1 ('*Momcilovic*').

5 (2013) 249 CLR 92 ('*Monis*').

6 (2013) 248 CLR 92 ('*X7*').

7 (2013) 251 CLR 196 ('*Lee*').

8 (2015) 256 CLR 1 ('*Cunneen*').

9 (2015) 256 CLR 569 ('*NAAJA*').

10 (2016) 256 CLR 459 ('*R v IBAC*').

11 These 33 cases were identified through a series of steps. First, the author conducted a search of the term 'principle of legality' in AustLii. This was done by way of an 'Advanced Search', with the filter 'Commonwealth: High Court of Australia'. Thirty-two search hits were obtained. Next, seven cases were discarded as they were decided prior to the French Court. Two further cases were discarded on the basis

The discussion will consider the selected cases thematically, taking into account the changing composition of the French Court. Part II provides a brief introduction to the principle of legality. Part III outlines some contemporary developments which it is argued underlie the French Court's treatment of the principle. The core of this article is Parts IV to IX, which examine the above-mentioned cases.

Part IV analyses the robustness with which the French Court applied the principle of legality. Part V examines the relationship between the principle of legality and constitutional law, including the interaction between the former and the presumption of constitutionality – the presumption that so far as the language permits, a statute should be interpreted so it is consistent with the *Constitution*. Part VI considers what insights might be drawn from the French Court's approach to interpretation under section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*'), which has been equated with the principle of legality. Part VII reviews a set of cases where the appointments of Gageler and Keane JJ created a division amongst the High Court bench with respect to the principle's rebuttal by reference to statutory objects. Part VIII focuses on whether extrinsic materials can be drawn upon to evince Parliament's intention that the principle is rebutted. Part IX considers an instance in which the principle was applied to a provision so as to narrow its scope, despite the provision itself not curtailing or abrogating any fundamental common law protection.

Part X draws together the above. This article finds that the principle of legality became a dominant principle of statutory interpretation under the French Court. It was determinative in several cases, resulting in interpretive outcomes which go beyond a statute's literal and grammatical meaning, and in direct contradiction to explanations in extrinsic materials about how a statute should operate. At the same time, fundamental disagreements amongst members of the French Court arose, which were not entirely resolved. The principle of legality is

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that the reference to 'principle of legality' was in a different context – *Green v The Queen* (2011) 244 CLR 462 ('equal justice'): see 472–3 [28] (French CJ, Crennan and Kiefel JJ); and *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213, 225–6 [24] (French CJ) ('retroactive criminal law' under international law). Not all cases which raised the principle of legality made express reference to that term, thus falling outside of the search parameters. Some cases referred only to the specific common law protection protected by the principle of legality. Other cases cited case authorities clearly in contemplation of the principle of legality, but again made no express reference to the term 'principle of legality'. As such, an additional 10 cases were added: *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (procedural fairness); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (procedural fairness); *Newcrest Mining Ltd v Thornton* (2012) 248 CLR 555 (right to recover against concurrent tortfeasors); *DPP (Cth) v Keating* (2013) 248 CLR 459 (presumption against retrospectivity); *Daly v Thiering* (2013) 249 CLR 381 (compensation for motor vehicle accidents); *Li v Chief of Army* (2013) 250 CLR 328 (soldier having same fundamental rights as other citizens); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 (procedural fairness); *R v Beckett* (2015) 256 CLR 305 (right to liberty); *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (parties' entitlement in civil penalty proceedings to make submissions on relief); *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 (procedural fairness). This brought the total number of cases to 33.

not new – it is said to be ‘well-established’<sup>12</sup> and of ‘long standing’.<sup>13</sup> But despite this, there was actually limited consensus among the justices of the French Court about how the principle should operate. Part X concludes with where the changes to the composition of the High Court leave us now.

Finally, Appendix I summarises all principle of legality cases decided by the French Court.

## II THE PRINCIPLE OF LEGALITY

The principle of legality is a common law principle of statutory interpretation. As early as 1908 in *Potter v Minahan*,<sup>14</sup> O’Connor J quoted approvingly from *Maxwell on the Interpretation of Statutes*, which said:

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>15</sup>

Another authoritative exposition of the principle of legality was set out during the Hon Sir Anthony Mason’s time as Chief Justice. The majority of the High Court said:

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>16</sup>

It has been said that the Mason Court was the era in which the principle of legality ‘began its contemporary reassertion and strengthening’,<sup>17</sup> thus ‘herald[ing] this common law (rights) renaissance’.<sup>18</sup> The Mason Court decided significant and regularly-cited authorities on the principle of legality –

12 *X7* (2013) 248 CLR 92, 131 [86] (Hayne and Bell JJ). See also *NAAJA* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ).

13 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 31 [42] (French CJ). See also *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 620 [44] (French CJ).

14 (1908) 7 CLR 277 (‘Potter’).

15 *Ibid* 304 (citations omitted) quoting J A Theobald (ed), *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 4<sup>th</sup> ed, 1905) 122.

16 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted).

17 Dan Meagher and Matthew Groves, ‘The Common Law Principle of Legality and Secondary Legislation’ (2016) 39 *University of New South Wales Law Journal* 450, 462.

18 *Ibid*.

particularly *Re Bolton; Ex parte Beane*;<sup>19</sup> *Balog v Independent Commission Against Corruption*;<sup>20</sup> *Bropho v Western Australia*;<sup>21</sup> and *Coco v The Queen*.<sup>22</sup>

The judgments of Gleeson CJ have also proven highly influential. His Honour pointed to the ‘institutional relationship between Parliament and the courts’, and drew a link between the principle of legality and the rule of law.<sup>23</sup> For example, in *Electrolux Home Products Pty Ltd v Australian Workers’ Union*,<sup>24</sup> Gleeson CJ described the principle of legality as:

govern[ing] the relations between Parliament, the executive and the courts. The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.<sup>25</sup>

Since the principle of legality’s existence is ‘known both to Parliament and the courts’, Parliament is taken to enact legislation with the principle in mind; and the courts will interpret the legislation according to that principle. Nevertheless, there is no clear demarcation between the judicial role and the legislative role. It is a separation of powers issue. The difficult question is: ‘Where does the constitutionally permissible territory of judicial “interpretation” end and the constitutionally impermissible territory of judicial “legislation” begin?’<sup>26</sup> According to French CJ, the principle of legality ‘has a significant role to play in the protection of rights and freedoms in contemporary society, while operating in a way that is entirely consistent with the principle of parliamentary supremacy’.<sup>27</sup>

### III DEVELOPMENTS UNDERLYING THE FRENCH COURT’S TREATMENT OF THE PRINCIPLE OF LEGALITY

There is a consensus that the principle of legality has in recent times been given prominence and robustly applied.<sup>28</sup> This is concurrent with the French Court era. French himself has described the principle of legality as ‘a strong presumption’.<sup>29</sup> As will be demonstrated in Part IV, the French Court has in some cases deployed the principle of legality to adopt a strained construction which is

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19 (1987) 162 CLR 514.

20 (1990) 169 CLR 625.

21 (1990) 171 CLR 1.

22 (1994) 179 CLR 427.

23 Bruce Chen, ‘The Principle of Legality: Issues of Rationale and Application’ (2015) 41 *Monash University Law Review* 329, 333–4.

24 (2004) 221 CLR 309.

25 *Ibid* 329 [21], citing *R v Home Secretary; Ex parte Pierson* [1998] AC 539, 587, 589 (Lord Steyn).

26 Claudia Geiringer, ‘The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*’ (2008) 6(1) *New Zealand Journal of Public and International Law* 59, 64, albeit posed in the slightly different context of s 6 of the *New Zealand Bill of Rights Act 1990* (NZ).

27 Chief Justice Robert French, ‘The Common Law and the Protection of Human Rights’ (Speech delivered at the Anglo-Australasian Lawyers Society, Sydney, 4 September 2009) 17.

28 See above n 1.

29 French, ‘The Common Law and the Protection of Human Rights’, above n 27, 7.

inconsistent with the literal and grammatical meaning of the statute, and inconsistent with what has been expressed in the extrinsic materials accompanying the statute. So why has the principle of legality reached ascendancy under the French Court? One may speculate that there are several related factors.

The first probable factor is that a “rights revolution” has swept the globe, bills of rights have been advocated on the ground that even elected legislatures in liberal democracies are prone to violate the rights of unpopular minorities<sup>30</sup>. Despite several campaigns to enact a federal bill of human rights for Australia,<sup>31</sup> the Commonwealth Parliament has so far proven highly resistant to this revolution. At the state and territory level, only the Australian Capital Territory<sup>32</sup> and Victoria<sup>33</sup> have enacted bills of rights. The failure to enact a federal bill of human rights has isolated Australia. Australia is said to be the only democratic nation in the world without a national bill of human rights;<sup>34</sup> it is an outlier among Western countries.<sup>35</sup> Jurisdictions which share our common law pedigree have enacted national bills of human rights – Canada,<sup>36</sup> New Zealand,<sup>37</sup> Hong Kong,<sup>38</sup> South Africa,<sup>39</sup> the United Kingdom,<sup>40</sup> and Ireland.<sup>41</sup>

The judiciary have been grappling with how to protect an individual’s rights in the absence of a federal bill of human rights. For example, French CJ (extra-curially) has acknowledged that debate over a bill of human rights for Australia was ‘being pursued vigorously around the country’.<sup>42</sup> His Honour considered that the debate provided an ‘opportunity to reflect about’, amongst other things, the way in which ‘the common law is used to interpret Acts of Parliament and regulations made under them so as to minimise intrusion into those rights and freedoms’.<sup>43</sup> French CJ has also addressed audiences in the United States of

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30 Goldsworthy, ‘The Principle of Legality and Legislative Intention’, above n 1, 49.

31 See Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 24–36.

32 *Human Rights Act 2004* (ACT).

33 *Victorian Charter*.

34 George Williams, ‘The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope’ (2006) 30 *Melbourne University Law Review* 880, 883.

35 Michael McHugh, ‘Does Australia Need a Bill of Rights?’ (Speech delivered at the 2007 Law Week Oration, Melbourne Law School, University of Melbourne, 15 May 2007) 2.

36 *Canada Act 1982* (UK) c 11, sch B pt I, (*Canadian Charter of Rights and Freedoms*’).

37 *New Zealand Bill of Rights Act 1990* (NZ).

38 *Hong Kong Bill of Rights Ordinance* (Hong Kong) cap 383, together with the *Basic Law of Hong Kong Special Administrative Region of the People’s Republic of China*.

39 *Constitution of the Republic of South Africa 1996* (South Africa).

40 *Human Rights Act 1998* (UK) c 42.

41 *European Convention on Human Rights Act 2003* (Ireland).

42 French, ‘The Common Law and the Protection of Human Rights’, above n 27, 1. His Honour made these comments in the same month that a report on how Australia could better protect and promote human rights was delivered by the National Human Rights Consultation Committee. The report, commissioned by the Commonwealth government, recommended the enactment of a federal statutory bill of human rights: National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009).

43 French, ‘The Common Law and the Protection of Human Rights’, above n 27, 1–2.

America<sup>44</sup> and the United Kingdom,<sup>45</sup> which have bills of rights, where his Honour again pondered on human rights protection in Australia without a bill of human rights. His Honour acknowledged that ‘Australia is exceptional among Western democracies in not having a Bill of Rights in its *Constitution*, nor a national statutory Charter of Rights’.<sup>46</sup>

Typically, a bill of rights will require (either explicitly or implicitly) that legislation be interpreted compatibly with human rights. For example, section 32(1) of the *Victorian 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’. Robustly applying the principle of legality allowed the French Court to fill the void. It has been suggested that ‘the prominence of the principle of legality is at least in part owing to the lack of a federal ... bill of rights’;<sup>47</sup> and that the courts ‘may have used the principle to deal themselves into the business of enforcing rights’.<sup>48</sup> The French Court ‘has sought to fill the lacuna in formal rights protection in Australia’.<sup>49</sup> However, this explanation can be criticised for being a ‘backdoor means’<sup>50</sup> of introducing a bill of human rights without a democratic mandate.

The second possible factor relates to the judicial treatment of an existing common law interpretive principle relevant to human rights – the presumption of consistency with international law. That presumption 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 – including international human rights treaties.<sup>51</sup> The French Court’s expansive deployment of the principle of legality to protect rights is therefore curious. Perhaps it is an attempt to minimise the application of the presumption of consistency with international law, with the concomitant controversy that attaches to judicial enforcement of human rights. Moreover, it may also reflect an inclination by some members of the French Court towards the common law,<sup>52</sup> rather than human rights law.<sup>53</sup>

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44 Chief Justice Robert French, ‘Protecting Human Rights without a Bill of Rights’ (Speech delivered at the John Marshall Law School, Chicago, 26 January 2010), republished as Chief Justice Robert French, ‘Protecting Human Rights Without a Bill of Rights’ (2010) 43 *John Marshall Law Review* 769.

45 Chief Justice Robert French, ‘Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons’ (Speech delivered at the Anglo-Australasian Lawyers Society and Constitutional and Administrative Law Bar Association, 5 July 2012, London).

46 Ibid 1.

47 Hanna Wilberg, ‘Common Law Rights Have Justified Limits: Refining the “Principle of Legality”’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 139, 142.

48 Goldsworthy, ‘The Principle of Legality and Legislative Intention’, above n 1, 53.

49 Meagher, ‘The Judicial Evolution (or Counter-revolution) of Fundamental Rights Protection in Australia’, above n 1, 9.

50 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J).

51 Ibid 287 (Mason CJ and Deane J).

52 For example, French CJ has said (extra-curially):

One area which awaits further exploration is the interface between human rights norms in Conventions to which Australia is a party or in customary international law and the presumption against statutory displacement of fundamental rights and freedoms of the common law [ie, the principle of legality]. If the

The third potential factor is the ‘worrying trend [which] has emerged whereby parliaments at all levels have become increasingly willing to enact laws that impinge upon basic rights and freedoms’.<sup>54</sup> Recent studies have shown that Parliaments across Australia now frequently legislate for the abrogation or curtailment of fundamental common law protections. In a survey of Australian Commonwealth, state and territory statute books, George Williams found 350 instances of laws that infringe upon freedom of speech, freedom of the press, freedom of association, freedom of movement, the right to protest, and basic legal rights.<sup>55</sup> Most of these laws have been enacted since the September 11, 2001 terrorist attacks.<sup>56</sup> Williams concluded that:

Past conventions and practices that lead parliamentarians to exercise self-restraint with regard to democratic principles were put aside in the name of responding to the threat of terrorism. Ultimately, this has come to affect not only the enactment of laws in that area, but has created a sense of permissiveness in a range of other areas as well, such as by enabling the enactment of stringent laws at the state level directed at organised crime and bikies.<sup>57</sup>

The French Court, in deploying the principle of legality to significant effect, may be responding to this pervasive rights-limiting environment. Interestingly though, this is incongruous with the rationale of the principle of legality. As stated in *Potter*, the rationale for the principle is that it ‘is in the last degree improbable’ that the legislature would overthrow fundamental common law protections without clear and unambiguous language.<sup>58</sup> But put crudely,

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former can inform the latter through developmental processes ... then the content of the so-called principle of legality may be deepened.

Chief Justice Robert French, ‘Oil and Water? International Law and Domestic Law in Australia’ (Speech delivered at The Brennan Lecture, Bond University, 26 June 2009) 20. As has rightly been pointed out, in French’s passage:

the international norms expressly noted were human rights norms, and the interpretive vehicle to be used in their application to Australian law is the principle of legality, *not* the presumption of consistency. This enthusiasm for, and willingness to apply and develop, the principle of legality (but refraining to do likewise for the presumption of consistency) reflects a conscious judicial decision.

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, 474 (emphasis in original).

53 Or in the case of Heydon J, downright hostility towards human rights law: see *Momcilovic* (2011) 245 CLR 1, especially 183–4 [453]–[455].

54 George Williams, ‘The Legal Assault on Australian Democracy’ (2016) 16(2) *Queensland University of Technology Law Review* 19, 40.

55 *Ibid* 37. See also Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws: Final Report*, Report No 129 (2015), where the Commission, despite limitations in the report’s terms of reference, identified a lengthy list of Commonwealth laws that may interfere with common law rights and freedoms. The report paid particular attention to counter-terrorism and national security laws, and migration laws: 21–3 [1.72]–[1.80]. Many of these laws were enacted in contemporary times.

56 Williams, above n 54, 37.

57 *Ibid* 40.

58 *Potter* (1908) 7 CLR 277, 304 (O’Connor J). It has been argued that a contemporary shift has occurred with respect to the rationale underlying the principle: Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37 *Melbourne University Law Review* 372; see also Meagher, ‘The Principle of Legality as Clear Statement Rule’, above n 1, 418–21. However, the High Court has not resiled from the original rationale set out in *Potter*: see Chen, ‘The Principle of Legality’, above n 23, 336–9. There continues to



Parliament can no longer, based on its track record, be presumed to be committed to preserving fundamental common law protections – ‘[i]t now frequently legislates for their abrogation or curtailment’.<sup>59</sup> *Potter* was decided at a time when the ‘legal culture [was] sceptical of the inroads being made by statute on judge-made law’.<sup>60</sup> Nowadays, a strongly-applied principle of legality ‘fails to have due regard to the fact that the significance of the common law is diminished in the modern legal framework’.<sup>61</sup> In *Lee*, Gageler and Keane JJ quoted approvingly of Gleeson CJ’s statement 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>62</sup>

A fourth likely factor was the personal influence of French CJ, who expressed enthusiasm towards the principle and was keen to develop its jurisprudence. As the ‘first among equals’,<sup>63</sup> the position of Chief Justice is well placed to shape the intellectual direction of the High Court.<sup>64</sup> There were early indicators that the principle of legality would be a focus for French CJ. In a matter of months into his appointment,<sup>65</sup> French CJ discussed the principle in *K-Generation Pty Ltd v Liquor Licensing Court*<sup>66</sup> and *R & R Fazzolari Pty Ltd v Parramatta City Council*.<sup>67</sup> Notably, French CJ cut a lone figure; while his Honour was in the majority in both cases, the remaining members had no regard to the principle of legality.

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be a lively debate on the issue of rationale in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017).

59 Chen, ‘The Principle of Legality’, above n 23, 339. See further 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* (Federation Press, 2017) 2, 5; Justice of Appeal John Basten, ‘The Principle of Legality: An Unhelpful Label?’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 74, 77; Stephen McLeish and Olaf Ciolek, ‘The Principle of Legality and “The General System of Law”’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 15, 23.

60 *Nightingale v Blacktown City Council* (2015) 91 NSWLR 556, 564 [35] (Basten JA).

61 Niall, above n 1, 10.

62 *Lee* (2013) 251 CLR 196, 310 [312], quoting *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309, 328 [19].

63 Although French CJ preferred to call himself ‘one among equals’: Damien Carrick, ‘Retiring Chief Justice Robert French Stands by Silence on Asylum Seeker Ruling’, *ABC News* (online), 12 December 2016 <<http://www.abc.net.au/news/2016-12-12/retiring-chief-justice-stands-by-silence-on-asylum-seeker-ruling/8111576>>.

64 Although it has been acknowledged that being appointed Chief Justice does not always ‘equate to being an intellectual leader of the Court’: see Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2016 and French Court Statistics’ (2017) 40 *University of New South Wales Law Journal* 1468, 1487.

65 Even prior to being appointed Chief Justice, his Honour sat on the Full Court of the Federal Court bench which decided *Evans v New South Wales* (2008) 168 FCR 576. This was a leading case on the principle of legality, common law freedom of speech, and the making of subordinate instruments: see discussion in Meagher and Groves, ‘The Common Law Principle of Legality and Secondary Legislation’, above n 17, 469–72; Bruce Chen, ‘Section 32(1) of the *Charter*: Confining Statutory Discretions Compatibly with Charter Rights?’ (2016) 42 *Monash University Law Review* 608, 618.

66 (2009) 237 CLR 501, 520 [47]–[48].

67 (2009) 237 CLR 603, 619–20 [43]–[44].

One year after his elevation, French CJ devoted an entire speech to the principle of legality.<sup>68</sup> French CJ saw the principle of legality as having a ‘constitutional’ dimension. His Honour observed how the common law had been referred to as ‘the ultimate constitutional foundation in Australia’.<sup>69</sup> Thus, ‘[t]he exercise of legislative power in Australia takes place in the constitutional setting of a “liberal democracy founded on the principles and traditions of the common law”’.<sup>70</sup> But while ‘the *Constitution* does not in terms guarantee common law rights and freedoms against legislative incursion’, the principle of legality ‘can be regarded as “constitutional” in character even if the rights and freedoms which it protects are not’.<sup>71</sup>

French CJ espoused the principle of legality in extra-curial writings over the course of his tenure. A search of available speeches on the High Court website<sup>72</sup> reveals that his Honour referred to the principle of legality in no fewer than 27 speeches.<sup>73</sup> Clearly, the principle of legality was of much interest to French. His

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68 French, ‘The Common Law and the Protection of Human Rights’, above n 27.

69 Ibid 6, quoting *Wik Peoples v Queensland* (1996) 187 CLR 1, 182 (Gummow J).

70 Ibid, citing *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587 (Lord Steyn).

71 Ibid 8.

72 High Court of Australia, *Speeches/Articles by the Hon Robert French AC* <<http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac>>. A search of the term ‘principle of legality’ was undertaken within each of the speeches listed at this source.

73 Chief Justice Robert French, ‘Oil and Water?’, above n 52; ‘International Law and Australian Domestic Law’ (Speech delivered at the Supreme Court of New South Wales Annual Conference, Hunter Valley, 21 August 2009); ‘The Common Law and the Protection of Human Rights’, above n 27; ‘The *Constitution* and the Protection of Human Rights’ (Speech delivered at the Edith Cowan University Vice-chancellor’s Oration, Perth, 20 November 2009); ‘Constitutional Review of Executive Decisions: Australia’s US Legacy’ (Speech delivered at the Chicago Bar Association, John Marshall Law School, January 2010); ‘Protecting Human Rights without a Bill of Rights’, above n 44; ‘Courts in a Representative Democracy’ (Speech delivered at the University of Southern Queensland, Toowoomba, 25 June 2010); ‘Procedural Fairness – Indispensable to Justice?’ (Speech delivered at the Sir Anthony Mason Lecture, Melbourne Law School, University of Melbourne, 7 October 2010); ‘The Interface between Equitable Principles and Public Law’ (Speech delivered at the Society of Trust and Estate Practitioners, Sydney, 29 October 2010); ‘Liberty and Law in Australia’ (Speech delivered at the Washington University in St Louis School of Law, St Louis, 14 January 2011); ‘What Were They Thinking? Statutory Interpretation and Parliamentary Intention’ (Speech delivered at the Sir Frank Kitto Lecture, University of New England, Armidale, 23 September 2011); ‘The Judicial Function in an Age of Statutes’ (Speech delivered at the Goldring Memorial Lecture, Wollongong, 18 November 2011); ‘Litigating in a Statutory Universe’ (Speech delivered at the Victorian Bar Association 2<sup>nd</sup> Annual CPD Conference, Melbourne, 18 February 2012); ‘Unelected Judges in a Representative Democracy’ (Speech delivered at the St Thomas More Society, Sydney, 22 June 2012); ‘Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons’, above n 45; ‘The Courts and the Parliament’ (Speech delivered at Queensland Supreme Court Seminar, Brisbane, 4 August 2012), republished as ‘The Courts and the Parliament’ (2013) 87 *Australian Law Journal* 820; ‘Property, Planning and Human Rights’ (Speech delivered at the Planning Institute of Australia National Congress, Canberra, 25 March 2013); ‘If They Could See Us Now – What Would the Founders Say?’ (Speech delivered at the John Curtin Prime Ministerial Library 2013 Anniversary Lecture, Perth, 18 July 2013); ‘The Rule of Law as a Many Coloured Dream Coat’ (Speech delivered at the Singapore Academy of Law 20<sup>th</sup> Annual Lecture, Singapore, 18 September 2013); ‘Bending Words: The Fine Art of Interpretation’ (Speech delivered at the Guest Lecture Series, University of Western Australia Faculty of Law, Perth, 20 March 2014); ‘Legal Practice in a Global Neighbourhood’ (Speech delivered at the Sir Ninian Stephen Lecture, University of Newcastle, 8 August 2014); ‘Common Law Constitutionalism’ (Speech delivered at the Robin Cooke Lecture, Wellington, 27 November 2014); ‘Statutory Interpretation and Rationality in Administrative

Honour was acutely aware of the Australian context in which the principle of legality operated – a jurisdiction without a federal bill of human rights. This, together with French’s description of the principle in weighty terms, reinforces the view that the principle of legality’s prominence under his stewardship was no mere coincidence.

#### IV ROBUSTNESS OF THE PRINCIPLE

The principle of legality applies to a statutory provision where there is ambiguity in the broad sense,<sup>74</sup> such that the ambiguity is ‘resolved in favour of the protection of’<sup>75</sup> a fundamental common law protection. Conversely, the principle may be rebutted by clear and unambiguous language – either by express words or necessary implication. But what is considered clear and unambiguous? And is this affected by the principle of legality’s heightened ‘constitutional’ status? This is where the grey area lies, and the principle’s resistance to rebuttal can be seen. According to Jeffrey Goldsworthy, the principle of legality ‘is sometimes used to rationalise judicial resistance even to relatively clear legislative decisions’.<sup>76</sup> He cites *Lacey*, and ‘arguably’ *Saeed*, as examples.<sup>77</sup> This Part examines the extent to which the principle of legality was applied to preserve fundamental common law protections.

##### A *Saeed v Minister for Immigration and Citizenship*; *Lacey v Attorney-General (Qld)*

These two cases were decided in the earlier years of the French Court. *Saeed*<sup>78</sup> was decided by French CJ, Gummow, Hayne, Heydon, Crennan and Kiefel JJ (Kirby J had retired by this time). In a joint judgment, their Honours –

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Law’ (Speech delivered at the Australian Institute of Administrative Law National Administrative Law Lecture, Canberra, 23 July 2015); ‘The Fine Art of Giving and Taking Offence’ (Speech delivered at the Birkenhead Lecture, Gray’s Inn, London, 18 November 2015); ‘Beyond our Borders: A Judiciary and Profession Looking Outwards’ (Speech delivered at the Australian Bar Association/Victorian Bar National Conference, Melbourne, 27 October 2016); ‘Law Making in a Representative Democracy: The Durability of Enduring Values’ (Speech delivered at the Catherine Branson Lecture Series, Adelaide, 14 October 2016); ‘Criminal Law in the 21<sup>st</sup> Century: The High Court and Criminal Law’ (Speech delivered at the 15<sup>th</sup> International Criminal Law Congress, Adelaide, 15 October 2016).

74 See Chen, ‘The Principle of Legality’, above n 23, 341–2.

75 *A-G (NT) v Emmerson* (2014) 253 CLR 393, 439 [86] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

76 Goldsworthy, ‘The Principle of Legality and Legislative Intention’, above n 1, 50. See also Meagher, ‘The Judicial Evolution (or Counter-revolution) of Fundamental Rights Protection in Australia’, above n 1, 11.

77 Goldsworthy, ‘The Principle of Legality and Legislative Intention’, above n 1, 50 n 27. Admittedly, this is not a criticism unique to the French Court: see Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 306–9; John Doyle and Belinda Wells, ‘How Far Can the Common Law Go towards Protecting Human Rights?’ in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999) 17, 55–6; John Willis, ‘Statutory Interpretation in a Nutshell’ (1938) 16 *Canadian Bar Review* 1, 17.

78 (2010) 241 CLR 252.

with the exception of Heydon J<sup>79</sup> – approved the previous dicta by Gleeson CJ in *Electrolux* about the principle of legality governing ‘the relations between Parliament, the executive and the courts’ and being ‘a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted’.<sup>80</sup>

In *Saeed*, the constructional issue was whether the *Migration Act 1958* (Cth) excluded the common law natural justice (otherwise known as procedural fairness) hearing rule in relation to offshore visa applicants. Section 51A provided that subdivision AB of division 3, part 2 of the Act is ‘taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with’. Section 51A was inserted following a prior High Court decision. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*<sup>81</sup> (itself a case on the exclusion of natural justice), the Gleeson Court held that subdivision AB did not exclude common law procedural fairness to an onshore visa applicant. The Commonwealth Parliament responded by inserting the new section 51A.

French CJ, and Gummow, Hayne, Crennan and Kiefel JJ acknowledged that section 51A was ‘plainly a response’<sup>82</sup> to *Ex parte Miah*. Nevertheless, that case was about an *onshore* applicant. Their Honours decided that, applying the principle of legality,<sup>83</sup> the natural justice hearing rule was not excluded by the new section 51A in relation to *offshore* visa applicants.<sup>84</sup> This turned upon the meaning of the phrase ‘in relation to the matters it deals with’ in section 51A. Section 57, which fell within subdivision AB, provided that certain relevant information must be given to the applicant, but that provision only applied to onshore visa applicants. The ‘matter’ which section 57 deals with was in respect of onshore visa applicants only.<sup>85</sup> No other provision in subdivision AB dealt with the position for offshore visa applicants. As such, the giving of information to offshore visa applicants was not a ‘matter’ dealt with by subdivision AB.<sup>86</sup> The common law natural justice hearing rule had not been excluded for offshore applicants.

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79 Heydon J wrote a separate judgment reaching the same outcome. However, as Matthew Groves has said, his Honour ‘only went so far as to say that one principle of statutory construction was that legislation is not lightly to be construed as abolishing the natural justice hearing rule’: ‘Exclusion of the Rules of Natural Justice’ (2013) 39 *Monash University Law Review* 285, 298 n 72.

80 *Saeed* (2010) 241 CLR 252, 259 [15], citing *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309, 329 [21]. It has been said that Gleeson CJ’s passage ‘has since been cited with approval so many times by different members of the High Court that it now can be said to reflect orthodoxy’: Matthew Groves and Dan Meagher, ‘The Principle of Legality in Australian and New Zealand Law: Final Observations’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 258, 261. Cf Sir Anthony Mason, ‘The Interaction of Statute Law and Common Law’ (2016) 90 *Australian Law Journal* 324, 329.

81 (2001) 206 CLR 57.

82 *Saeed* (2010) 241 CLR 252, 263 [26].

83 *Ibid* 259 [14]–[15].

84 *Ibid* 271 [58]–[59].

85 *Ibid* 267 [42].

86 *Ibid*. See also 281 [83] (Heydon J).

*Lacey*<sup>87</sup> is also illustrative of the strength with which the principle of legality was applied by the French Court. The composition of the Court was the same as in *Saeed*, but with the addition of Bell J (replacing Kirby J). The Court considered the scope of section 669A(1) of the *Criminal Code* (Qld). Section 669A originally provided:

The Attorney-General may appeal to the Court against any sentence pronounced by the court of trial and the Court may in its discretion vary the sentence and impose such sentence as to the said Court may seem proper.

It was then repealed and replaced. Section 669A(1)<sup>88</sup> now provides:

The Attorney-General may appeal to the Court against any sentence pronounced by

...

(a) the court of trial; or

(b) a court of summary jurisdiction in a case where an indictable offence is dealt with summarily by that court; and the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper.

The legislative change at issue here was the insertion of the word ‘unfettered’ before ‘discretion’. Like *Saeed*, this was in response to a court decision<sup>89</sup> which Parliament considered to be adverse.

A 6:1 majority (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J dissenting) referred to the common law rule against double jeopardy,<sup>90</sup> as well as the more amorphous notion of ‘common law principles governing the administration of [criminal] justice’.<sup>91</sup> The majority held that, as a ‘specific application of the principle of legality’, in the absence of clear language the ‘unfettered discretion’ should be more narrowly construed so that error on the part of the sentencing judge was required before the discretion was enlivened.<sup>92</sup> Otherwise, it ‘tips the scales of criminal justice in a way that offends “deep-rooted notions of fairness and decency”’.<sup>93</sup>

*Saeed* and *Lacey* are considered high watermark cases for the principle of legality.<sup>94</sup> *Saeed* has been taken by commentators as the Court having accorded ‘constitutional’ status on the principle,<sup>95</sup> just as French CJ did in his earlier

87 (2011) 242 CLR 573.

88 Pursuant to *The Criminal Code and the Justices Act Amendment Act 1975* (Qld) s 34.

89 *R v Liekefett; Ex parte A-G (Qld)* [1973] Qd R 355.

90 *Lacey* (2011) 242 CLR 573, 582–3 [17]–[19].

91 *Ibid* 583 [18], quoting *Byrnes v The Queen* (1986) 161 CLR 119, 129 (Deane J).

92 *Ibid* 583–4 [20]. See also 594 [50], 598 [62].

93 *Ibid* 584 [20], quoting *Malvaso v The Queen* (1989) 168 CLR 227, 234 (Deane and McHugh JJ).

94 See Goldsworthy, ‘The Principle of Legality and Legislative Intention’, above n 1, 50 n 27; Louise Clegg, ‘ICAC v Cunneen and Legality’ (Speech delivered at the Gilbert + Tobin Centre of Public Law 2016 Constitutional Law Conference, Sydney, 12 February 2016) 4, 6; Meagher, ‘The Principle of Legality as Clear Statement Rule’, above n 1, 425–6; Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35 *Melbourne University Law Review* 449, 461; Jeremy Gans, ‘Legality and Lenity’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 189, 202.

95 See Chen, ‘The Principle of Legality’, above n 23, 335. Cf John Dyson Heydon, ‘The “Objective” Approach to Statutory Construction’ (Speech delivered at the Current Legal Issues Seminar Series, Supreme Court of Queensland, Brisbane, 8 May 2014) 30.

speech.<sup>96</sup> The French Court – in endorsing Gleeson CJ’s passage about the principle governing ‘the relations between Parliament, the executive and the courts’<sup>97</sup> – has ‘clothed the principle of legality in Australian constitutional garb’,<sup>98</sup> or ‘termed the principle a constitutional safeguard’.<sup>99</sup> Such a weighty status appears linked to the increased willingness of the French Court to apply the principle of legality powerfully. It is as if the ‘constitutional’ designation of the principle has afforded it ‘special judicial protection’,<sup>100</sup> and ‘strengthen[ed] its normative force’.<sup>101</sup> As Matthew Groves has said, if the principle of legality is:

somehow attributed to the *Constitution*, or even if it is just an interpretative hypothesis that the *Constitution* indirectly requires to make institutional arrangements more workable, it becomes harder to criticise as an exercise in judicial law making or a defiance of Parliament.<sup>102</sup>

In both cases, the French Court displayed a strict, robust approach to the principle’s application. The French Court was unforgiving of the legislative drafting. *Saeed*, however, was arguably still an orthodox application of the principle of legality. The statutory words in the *Migration Act 1958* (Cth) were ambiguous. There was scope for the principle to operate. As the French Court reasoned, the phrase ‘in relation to the matters it deals with’ lent itself to a more restrictive, rights-protective construction. If the intention was to exclude the natural justice hearing rule for offshore applicants, this was not clearly and unambiguously conveyed in the legislative drafting. Their Honours ‘hearkened to the actual terms of s 51A’.<sup>103</sup>

*Lacey* arguably highlights the lengths to which the French Court was willing to stretch statutory language, so as not to abrogate or curtail fundamental common law protections. The words ‘appeal’ and ‘unfettered discretion’ were key in construing section 669A(1) of the *Criminal Code* (Qld). The majority saw ambiguity in the word ‘appeal’ – associating it with an appeal by way of rehearing, which requires error.<sup>104</sup> It was only once an error had been identified that ‘unfettered’ came into play, in the form of an ‘unfettered discretion’ to vary the sentence. ‘Unfettered’ was interpreted so that the discretion did ‘not actually mean without limits’.<sup>105</sup>

This was a departure from the provision’s literal and grammatical reading. The majority’s construction was both strained and disjointed. First, a

96 French, ‘The Common Law and the Protection of Human Rights’, above n 27.

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

98 Matthew Groves, ‘The Principle of Legality and Administrative Discretion: A New Name for an Old Approach?’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 168, 169.

99 Philip A Joseph, ‘The Principle of Legality: Constitutional Innovation’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 27, 33.

100 Goldsworthy, *Parliamentary Sovereignty*, above n 77, 314.

101 Philip A Joseph, ‘Parliament, The Courts, and the Collaborative Enterprise’ (2004) 15 *King’s College Law Journal* 321, 341, in the context of fundamental common law rights as ‘constitutional’.

102 Groves, ‘The Principle of Legality and Administrative Discretion’, above n 98, 178.

103 Justice Geoffrey Nettle, ‘Justice Hayne’s Contribution to Public Law: An Overview’ (2015) 26 *Public Law Review* 282, 283.

104 *Lacey* (2011) 242 CLR 573, 596–8 [56]–[60] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

105 Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 1<sup>st</sup> ed, 2012) 206.

literal meaning of ‘unfettered’ is ‘[n]ot confined or restrained by fetters ... Unrestrained, unrestricted’.<sup>106</sup> Therefore, a discretion that requires error in sentencing is not ‘unfettered’. Second, the provision was not structured into two stages – identification of error and variation of sentence. Rather, the word ‘unfettered’ applied to the discretion in its totality. In a powerful dissent, Heydon J considered that the provision ‘amounted to clear language’.<sup>107</sup> His Honour described the majority’s construction as an ‘artificial’<sup>108</sup> reading: ‘A discretion which exists only in relation to the second stage and does not exist in relation to the first is not an unfettered discretion’.<sup>109</sup> That construction was also ‘otiose’<sup>110</sup> – the legislative insertion of the word ‘unfettered’ had ‘achieved precisely nothing’.<sup>111</sup> As to the word ‘appeal’, Heydon J found it ‘unsound’ to assume that all appeals ‘must involve the correction of error’.<sup>112</sup>

Arguably, the words of the statute were clear and unambiguous enough to completely rebut the principle of legality. Yet the 6:1 majority did not think so. Relying on a perceived ambiguity of the word ‘appeal’, the majority was able to apply the principle to reach what was undoubtedly a strained meaning. But the majority must have considered this manner of the principle of legality’s application to be a legitimate outcome of statutory interpretation – one that did not frustrate legislative intention; and fell within the parameters of what is judicial interpretation, rather than judicial rewriting.

### **B North Australian Aboriginal Justice Agency v Northern Territory**

Another example of the straining of statutory language was *NAAJA*,<sup>113</sup> decided in the final years of the French Court. By this time, Gummow, Heydon, Crennan and Hayne JJ had retired. They had been replaced by Gageler, Keane, Nettle and Gordon JJ. The main issue was the constitutional validity of a so-called ‘paperless arrest’ regime under division 4AA of part VII of the *Police Administration Act 1978* (NT), whereby police were authorised to arrest and detain a person for certain minor offences without a warrant. Nevertheless, there arose a constructional issue. Section 133AB (emphasis added) provided the procedure for when a member of the police has arrested a person without a warrant:

- (2) The member may take the person into custody and:
  - (a) hold the person for a period *up to 4 hours* ...
- (3) The member, or any other member, *on the expiry of the period* mentioned in subsection (2), may:

106 Michael Proffitt (ed), *Oxford English Dictionary* (online ed, at 15 June 2017) [www.oed.com](http://www.oed.com). [www.proxy1.library.unsw.edu.au/view/Entry/213313?redirectedFrom=unfettered#eid](http://www.proxy1.library.unsw.edu.au/view/Entry/213313?redirectedFrom=unfettered#eid) ‘unfettered’.

107 Jeffrey Goldsworthy, ‘Is Legislative Supremacy under Threat? Statutory Interpretation, Legislative Intention and Common-Law Principles’ (2015) 60(11) *Quadrant* 56, 58.

108 *Lacey* (2011) 242 CLR 573, 604 [83].

109 *Ibid*.

110 *Ibid* 603–4 [81].

111 *Ibid*, citing the Court of Appeal decision being appealed: *R v Lacey* (2009) 197 A Crim R 399, 407 [127] (de Jersey CJ, Keane, Muir and Chesterman JJA). See also Gans, ‘Legality and Lenity’, above n 94, 202.

112 *Lacey* (2011) 242 CLR 573, 607 [94].

113 (2015) 256 CLR 569.

- (a) release the person unconditionally; or
- (b) release the person and issue the person with an infringement notice in relation to the infringement notice offence; or
- (c) release the person on bail; or
- (d) *under section 137*, bring the person before a justice or court for the infringement notice offence or another offence allegedly committed by the person.

Section 137(1) relevantly provided:

a person taken into lawful custody under this or any other Act shall ... be brought before a justice or a court of competent jurisdiction as soon as is practicable after being taken into custody, unless he or she is sooner granted bail under the *Bail Act* or is released from custody.

The question was whether, as the plaintiffs argued, police had a discretion to detain the person for any period up to this maximum of four hours, or as the Northern Territory argued, they were required to detain the person only for so long as is reasonable within that maximum of four hours. A majority of the French Court (French CJ, Kiefel, Bell, Nettle and Gordon JJ) held in favour of what Gageler J called the Northern Territory's 'strained but benign construction'.<sup>114</sup> Gageler J preferred the plaintiffs' 'literal and draconian construction'.<sup>115</sup> This favoured their respective arguments about constitutional validity (see Part V below). Keane J did not consider the issue necessary to determine in the circumstances.<sup>116</sup>

Beginning with Gageler J, his Honour considered that the structure of section 133AB was 'plain enough'.<sup>117</sup> Section 133AB(2) provided for the detention of a person for up to four hours, with four options under section 133AB(3) regarding how to deal with the person at the end of this period.<sup>118</sup> The fourth option, under section 133AB(3)(d) was to bring the person before a justice of the peace or court under section 137.<sup>119</sup>

There was, however, a tension between section 133AB(2) and section 137(1),<sup>120</sup> the latter of which required that the person be brought before a justice of the peace or court *as soon as is practicable* after being taken into custody. According to Gageler J, this could be naturally reconciled – the requirement to bring the person before a justice of the peace or court as soon as is practicable applied *only after* the four hour period had expired, and where the member of police had decided to take the fourth option.<sup>121</sup> His Honour found additional support for this construction in the purpose underlying division 4AA,<sup>122</sup> identified by reference to extrinsic materials<sup>123</sup> (see Part VIII below).

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114 Ibid 604 [75].

115 Ibid.

116 Ibid 628 [153].

117 Ibid 601 [62].

118 Ibid.

119 Ibid 602 [67].

120 Ibid 606 [83].

121 Ibid 606–7 [84]. See also 609 [91].

122 Ibid 609 [90].

123 Ibid 608–9 [88]–[89].



Gageler J considered that the Northern Territory's construction – and by implication, that adopted by the majority – was a strained one.<sup>124</sup> It was a 'distortion' of the words of section 133AB,<sup>125</sup> and that construction was not 'reasonably open'.<sup>126</sup>

French CJ, and Kiefel and Bell JJ 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>127</sup> It was an 'obvious application of the principle of legality' that, in the absence of clear words, a person must be taken before a justice of the peace or court as soon as practicable if not earlier released on bail or custody.<sup>128</sup> Their Honours found that '[a]s a matter of textual analysis', this common law obligation was not modified by section 133AB.<sup>129</sup> The four hour period 'does no more than impose a cap' and 'should be regarded as a maximum rather than the norm'.<sup>130</sup> This was regardless of whether or not section 137(1) had been enacted.<sup>131</sup> The Northern Territory's construction was to be preferred.

Nettle and Gordon JJ reached the same outcome as French CJ, Kiefel and Bell JJ.<sup>132</sup> On the principle of legality, their Honours stated that:

s 137(1) reflects the basic common law tenet that a person must be taken before a court as soon as reasonably practicable following arrest. A statute that departs from that fundamental position would need to be expressed in unmistakably clear terms.<sup>133</sup>

Their Honours considered a number of further supportive textual and contextual factors.<sup>134</sup> Their Honours were also more willing than French CJ, Kiefel and Bell JJ<sup>135</sup> to consider the interaction between the provisions, finding that their construction of section 133AB(3) was 'capable of operating harmoniously, and simultaneously, with s 137(1)'.<sup>136</sup>

Although *NAAJA* resulted in a 5:1 majority on the statutory interpretation issue, the case evinced a number of diverging approaches to the principle of legality. French CJ, Kiefel and Bell JJ greatly emphasised the principle, with their Honours' construction turning solely upon the principle of legality. It was determinative, in the same way that it was determinative in *Lacey*. Nettle and

124 Ibid 604 [75], 604–5 [77]–[78].

125 Ibid 606 [82].

126 Ibid 605 [80].

127 Ibid 587 [23].

128 Ibid.

129 Ibid 589 [28].

130 Ibid.

131 That was because '[a]bsent s 137, the common law would have imposed the like requirement that a person arrested under s 123 be taken before a justice of the peace as soon as practicable after arrest': ibid 587 [24].

132 Ibid 646 [215], 651 [232].

133 Ibid 648 [223].

134 See ibid 646–9 [216]–[228].

135 Their Honours described that debate as a 'rather arid one', stating that '[e]ven if s 137(1) did not apply, the common law obligations' did. Section 137 simply gave 'statutory form' to that obligation: ibid 589 [28].

136 Ibid 646 [215].

Gordon JJ also raised the principle of legality, but placed much less emphasis on it. It was only one principle of statutory construction out of several relevant interpretive factors. This may ultimately signal a shift from the dominant role given to the principle for which the French Court is known. Gageler J (dissenting) was sceptical of using the principle of legality to strain the statutory words, instead giving a literal meaning to the words ‘up to 4 hours’ and ‘on the expiry of the period’.

## V RELATIONSHIP WITH CONSTITUTIONAL LAW

The principle of legality interacts closely with constitutional law. Never has this relationship been as prominent as under the French Court. Logically, the meaning of a statutory provision must firstly be ascertained, before it can be determined whether the provision as interpreted is constitutionally invalid. Thus, the more forcefully the principle of legality is deployed in statutory interpretation, the less resort is ultimately had to constitutional principles. The application of the principle of legality can head off the issue of constitutional invalidity at the pass. This is ‘a dynamic at work in many recent constitutional cases’.<sup>137</sup>

### A *NAAJA*

As Gageler J explained in *NAAJA*, with a heavy dose of scepticism:

The arguments divide along battlelines not unfamiliar where questions about the constitutional validity of a law are abstracted from questions about the concrete application of that law to determine the rights and liabilities of the parties. The party seeking to challenge validity advances a literal and draconian construction, even though the construction would be detrimental to that party were the law to be held valid. The party seeking to support validity advances a strained but benign construction, even though the construction is less efficacious from the perspective of that party than the literal construction embraced by the challenger. The constructions advanced reflect forensic choices: one designed to maximise the prospect of constitutional invalidity; the other to sidestep, or at least minimise, the prospect of constitutional invalidity. A court should be wary.<sup>138</sup>

*NAAJA* was such an example. The plaintiffs argued for a construction which was harsh on their clients’ right to liberty. This was to maximise the likelihood of constitutional invalidity being found, on the basis of breach of the separation of powers<sup>139</sup> and undermining or interfering with the institutional integrity of the Northern Territory courts.<sup>140</sup> The Northern Territory argued for a less restrictive construction, so as to minimise the chances of constitutional invalidity. Only Gageler J accepted the plaintiffs’ construction. His Honour considered it

<sup>137</sup> Gleeson, above n 1, 4–5.

<sup>138</sup> (2015) 256 CLR 569, 604 [75]. See also 627–8 [152] (Keane J). For an equally pessimistic view, see *Wainohu v New South Wales* (2011) 243 CLR 181, 238 [146] (Heydon J).

<sup>139</sup> A submission based on *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1: *NAAJA* (2015) 256 CLR 569, 573.

<sup>140</sup> A submission based on *Kable v DPP (NSW)* (1996) 189 CLR 51: *NAAJA* (2015) 256 CLR 569, 593 [39] (French CJ, Kiefel and Bell JJ); 640 [192] (Nettle and Gordon JJ).

necessary for the Court to ‘face up to the constitutional consequences’.<sup>141</sup> Gageler J in dissent found that the legislation was constitutionally invalid. French CJ, and Kiefel and Bell JJ, and Nettle and Gordon JJ, having applied the principle of legality to accept the Northern Territory’s construction, were able to find the legislation constitutionally valid.

A litigation strategy similar to the plaintiffs’ in *NAAJA* was adopted by the appellants in *Monis*.<sup>142</sup> However, three Justices of the Court treated the interaction between the principle of legality and constitutional law in a notably different manner.

### B *Monis v The Queen*

Although the principle of legality has been accorded ‘constitutional’ status, the implications of this characterisation are not entirely clear. The predominant view is that the principle of legality is ‘small c’ constitutional,<sup>143</sup> in the sense that it reflects the institutional relationship between Parliament and the courts. The question is whether it will develop to extend to ‘large C’ constitutional issues?<sup>144</sup> Could it apply directly to Constitutional provisions which protect ‘rights’?<sup>145</sup> That is an issue which arose in *Monis*.<sup>146</sup>

There is another principle of statutory interpretation which already traverses this subject matter. The presumption of constitutionality is the ‘presumption that Parliament did not intend to pass beyond constitutional bounds’.<sup>147</sup> So far as the language permits, an enactment should be interpreted so it is consistent with the *Constitution*, unless the intention is clear that the statute is to operate in a way that results in constitutional invalidity.<sup>148</sup>

Nevertheless, in *Monis*, Crennan, Kiefel and Bell JJ considered that – quite apart from this presumption – the principle of legality ‘may be applied to constitutionally protected freedoms’.<sup>149</sup> In that case, section 471.12 of the *Criminal Code* (Cth)<sup>150</sup> prohibited the use of a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. *Monis* was charged with contraventions of section 471.12.<sup>151</sup> Droudis was *Monis*’ girlfriend, who allegedly aided and abetted him. *Monis* and Droudis submitted that ‘offensive’ in section 471.12

141 *NAAJA* (2015) 256 CLR 569, 610 [93].

142 (2013) 249 CLR 92.

143 The author attributes the use of this phrase in this context to one of the anonymous reviewers.

144 *Ibid.*

145 Chen, ‘The Principle of Legality’, above n 23, 331.

146 (2013) 249 CLR 92.

147 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 180 (Isaacs J).

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

149 (2013) 249 CLR 92, 209 [331], see also 210 [334] (Crennan, Kiefel and Bell JJ): ‘The principles of construction referred to above require that s 471.12 be read down’.

150 *Criminal Code Act 1995* (Cth) sch 1.

151 He was subsequently the gunman involved in the Sydney Lindt café siege in 2014, leading to the tragic deaths of two hostages.

should be construed as including ‘hurt or wounded feelings’<sup>152</sup> – a low threshold. Although this would more severely infringe on their free speech and mean they would more likely be found guilty of the offence, such a construction aided their further submission – that section 471.12 was invalid for infringing the implied constitutional freedom of political communication.

In the New South Wales Court of Criminal Appeal, Bathurst CJ construed ‘offensive’ as meaning ‘calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances’.<sup>153</sup> Rejecting Monis and Droudis’ submission, his Honour held that it was not enough that it ‘would only hurt or wound the feelings of the recipient, in the mind of a reasonable person’.<sup>154</sup>

Turning to the High Court’s decision, Crennan, Kiefel and Bell JJ agreed with Bathurst CJ’s construction. ‘Offensive’ should be ‘confined to more seriously offensive communications’;<sup>155</sup> ‘at the higher end of the spectrum’.<sup>156</sup> Significantly, their Honours applied the principle of legality to reach this construction. Crennan, Kiefel and Bell JJ extended the principle to the implied freedom of political communication. Their Honours applied both the presumption of constitutionality and the principle of legality to ‘read down’ section 471.12.<sup>157</sup> This was said to have been done with ‘an eye’<sup>158</sup> to the *Lange* test,<sup>159</sup> but before their Honours fully engaged with that test. In other words, this spanned both the principle of legality and constitutional validity analyses.

This reasoning has numerous implications. There are differences in operation between the principle of legality and the presumption of constitutionality that would be overlooked by essentially merging these two principles. For example,<sup>160</sup> Crennan, Kiefel and Bell JJ acknowledged that ‘[g]eneral words and expressions may sometimes give rise to difficulties’ in applying the presumption of constitutionality. That is because ‘[s]uch words may be capable of applying a provision to cases where it is within power as well as to cases where it is beyond power’.<sup>161</sup> In those circumstances, it has previously been said there must be

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152 *Monis* (2013) 249 CLR 92, 94. See also *Monis v The Queen* (2011) 256 FLR 28, 33 [13] (Bathurst CJ); and on appeal in *Monis* (2013) 249 CLR 92, 158 [161] (Hayne J).

153 (2011) 256 FLR 28, 39 [44]. See also Allsop P agreeing at 50 [91]. Cf 54–5 [118] (McLellan CJ at CL).

154 *Ibid* 39 [44].

155 *Monis* (2013) 249 CLR 92, 208 [327].

156 *Ibid* 210 [336].

157 *Ibid* 208–10 [327]–[334], 210–11 [336].

158 *Ibid* 210 [334].

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

160 Another example – in *NAAJA* (2015) 256 CLR 569, 605 [79], Gageler J said:

Only if each were reasonably open in the application of ordinary principles of statutory construction could the prospect of constitutional validity or invalidity legitimately bear on the choice between competing constructions; and only then if the court were satisfied that one construction would lead to validity and the other to invalidity.

The presumption of constitutionality applies where there is a ‘binary’ choice: at 604 [76]. By contrast, the principle of legality is not restricted to a binary operation: Chen, ‘The Principle of Legality’, above n 23, 354–5; cf Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 94, 460–2; and Gageler and Keane JJ’s approach to rebuttal of the principle by necessary implication (see Part VII below).

161 *Monis* (2013) 249 CLR 92, 209 [330].

legislative intention that the general words are to be read down, ‘based upon some particular standard criterion or test [that] can be discovered from the terms of the law itself or from the nature of the subject matter with which the law deals’.<sup>162</sup> By contrast, under the principle of legality ‘it may not be necessary to find a positive warrant for preferring a restricted meaning’.<sup>163</sup> Presumably this is because of the well-established notion that Parliament is aware that the principle of legality applies to read down general words.

It is also unclear how the principle of legality would sit with the broader constitutional law jurisprudence. How does one know when to read down the legislation pursuant to a constitutionally protected ‘right’, before having properly determined that the legislation is unconstitutional?<sup>164</sup> What other constitutional ‘rights’ might the High Court extend the principle of legality to?<sup>165</sup> And why did their Honours not simply apply the principle to the common law freedom of expression?<sup>166</sup>

By contrast, French CJ applied the principle of legality in a more conventional manner. His Honour held that the Court of Criminal Appeal’s narrower construction of ‘offensive’ ‘accorded with the principle of legality in its application to freedom of expression’<sup>167</sup> as a *common law* freedom.<sup>168</sup> Amongst other things, the principle indicated ‘a high threshold to be surmounted before the content of a communication ... can be characterised as “offensive”’.<sup>169</sup> His Honour approached the principle of legality as an ‘anterior’ step of statutory interpretation, prior to determining constitutional validity.<sup>170</sup>

Subsequently in *Tajjour v New South Wales*,<sup>171</sup> Keane J stated:

Before any question arises of the [constitutional] validity of legal regulation of an activity, one must determine whether a given piece of legislation affects the activity at all; and it is in relation to this step in the analysis that the presumption

162 *Pidoto v Victoria* (1943) 68 CLR 87, 111 (Latham CJ).

163 *Monis* (2013) 249 CLR 92, 209 [331] (Crennan, Kiefel and Bell JJ).

164 Gageler J said in *NAAJA* (2015) 256 CLR 569, 604 [76]: ‘a court has no warrant for preferring one construction of a statutory provision over another merely to avoid constitutional doubt’.

165 For examples of other express or implied ‘rights’ under the *Australian Constitution*, see Cheryl Saunders, ‘The Australian Constitution and Our Rights’ in Helen Sykes (ed), *Future Justice* (Future Leaders, 2010) 117, 120–4; George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 112–13. Cf Gageler J in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 382 [67]:

Outside its application to established categories of protected common law rights and immunities, that principle must be approached with caution. The principle should not be extended to create a common law penumbra around constitutionally imposed structural limitations on legislative power [referring to Chapter III of the *Australian Constitution*].

166 On the common law heritage of freedom of expression, see Chen, ‘The Principle of Legality’, above n 23, 345–6.

167 (2013) 249 CLR 92, 127 [59]. See also 116 [28].

168 *Ibid* 128 [60], 116 [28]. See also the Gleeson Court case of *Coleman v Power* (2004) 220 CLR 1, 75 [185], 76 [188] (Gummow and Hayne JJ), 87 [225], 96–8 [250]–[253] (Kirby J) where their Honours applied the principle of legality with the common law freedom of expression to read down ‘insulting’ under s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) to mean intended to or reasonably likely to provoke unlawful physical retaliation.

169 *Monis* (2013) 249 CLR 92, 113 [20].

170 *Tajjour v New South Wales* (2014) 254 CLR 508, 542 [23], 546 [30].

171 *Ibid*.

against interference with the [overlapping fundamental common law protection] is to be taken into account.<sup>172</sup>

This appears to reject the approach of Crennan, Kiefel and Bell JJ in *Monis*. Ultimately, no member of the French Court expressed disagreement with Bathurst CJ's restrictive construction of section 471.12.<sup>173</sup>

## VI RELATIONSHIP WITH SECTION 32 OF THE *VICTORIAN CHARTER*

Another area for examination is the French Court's approach to interpretation pursuant to the *Victorian Charter*. Section 32 is directed at the interpretation of legislation to protect and promote human rights recognised by the *Victorian Charter*. Sub-section (1) states that: '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'. The *Victorian Charter* recognises that it may not always be 'possible' to interpret a statutory provision compatibly with human rights.<sup>174</sup>

This Part shows that there was an inconsistency in approach and attitude towards section 32(1) by certain members of the French Court in *Momcilovic*,<sup>175</sup> when compared with the principle of legality.

### A *Momcilovic v The Queen*

*Momcilovic* is the only significant High Court case to date on section 32(1).<sup>176</sup> It was decided in the earlier years of the French Court, prior to the appointments of Gageler, Keane, Nettle and Gordon JJ. The French Court drew comparisons between section 32(1) and the ordinary principles of statutory interpretation (of which the principle of legality is one).

Six separate judgments were produced in *Momcilovic*, creating considerable difficulty in identifying the exact precedent set by the French Court.<sup>177</sup> In respect

172 Ibid 601 [224] (Keane J). See also *NAAJA* (2015) 256 CLR 569, 625–6 [149] (Keane J).

173 Of the remaining members of the High Court, Hayne J accepted Bathurst CJ's construction for the purposes of the proceeding: *Monis* (2013) 249 CLR 92, 138 [90]–[91], 157–8 [160]–[162]; whereas Heydon J went directly to the issue of constitutional validity (agreeing with French CJ): 178 [236], 178 n 285.

174 See *Victorian Charter* ss 32(3)(a), 36.

175 *Momcilovic* (2011) 245 CLR 1.

176 The case of *Hogan v Hinch* (2011) 243 CLR 506 was decided prior to *Momcilovic* and applied s 32(1) of the *Victorian Charter*. However, that case was in some respects a precursor to *Momcilovic*, in that the issues associated with the operation of s 32(1) were not fully explored by the Court until the *Momcilovic* decision.

177 As has been observed in 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, 341: 'Even where there was apparent agreement on one provision, the reasoning underlying that agreement differed, and/or opinions on other interconnecting provisions differed'. One of those interconnecting provisions was s 7(2) of the *Victorian Charter*. Section 7(2) provides:

of section 32(1), a 6:1 majority held that it did not replicate the extensive effects of section 3 of the United Kingdom *Human Rights Act 1998* ('UK HRA'). The United Kingdom approach was legislating rather than interpreting; going beyond the proper role of the courts in interpreting statutes in the Australian context. Although one may ask: could similar accusations not be levelled at the principle of legality?

Section 3(1) of the *UK HRA* provides that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. The United Kingdom courts have held that section 3(1) is 'very strong and far reaching'.<sup>178</sup> It may 'require a court to depart from the unambiguous meaning the legislation would otherwise bear';<sup>179</sup> 'require the court to depart from ... legislative intention, that is, depart from the intention of the Parliament which enacted the legislation';<sup>180</sup> and 'involve a considerable departure from the actual words'.<sup>181</sup>

The majority of the Court (Heydon J dissenting) sought to differentiate section 32(1) from section 3(1) of the *UK HRA*. Each member of the Court spoke of the orthodoxy of statutory interpretation.<sup>182</sup> French CJ spoke to the limits of statutory interpretation:

if the words of a statute are clear, so too is the task of the Court in interpreting the statute with fidelity to the Court's constitutional function. The meaning given to the words must be a meaning which they can bear ... In an exceptional case the common law allows a court to depart from grammatical rules and to give an usual or strained meaning to statutory words where their ordinary meaning and grammatical construction would contradict the apparent purpose of the enactment. The court is not thereby authorised to legislate.<sup>183</sup>

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A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including— (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (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.

However, the French Court left no binding majority on whether s 7(2) had a role to play in interpreting legislation compatibly with human rights under s 32(1): see discussion in Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (Report, September 2015) 137–55; Bruce Chen, 'Making Sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the *Charter of Human Rights and Responsibilities Act 2006*' [2013] (74) *Australian Institute of Administrative Law Forum* 64.

178 *Sheldrake v DPP* [2005] 1 AC 264, 303 [28] (Lord Bingham); approved in *R v Commissioner of Police of the Metropolis* [2011] 3 All ER 859, 878 [54] (Lord Phillips); *R v Waya* [2013] 1 AC 294, 308 [14] (Lord Walker and Hughes LJ).

179 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571 [30] (Lord Nicholls).

180 *Ibid.*

181 *Ibid* 600 [119] (Lord Rodger).

182 See *Momcilovic* (2011) 245 CLR 1, 44–5 [37]–[38] (French CJ), 85 [146(v)] (Gummow J, Hayne J agreeing), 175–8 [441]–[444] (Heydon J), 210 [544]–[545], 217 [565]–[566] (Crennan and Kiefel JJ), 250 [684] (Bell J).

183 *Ibid* 45 [39]–[40].

French CJ was the only member of the majority to expressly find similarities between the operation of the principle of legality and section 32(1)<sup>184</sup> (Heydon J *contrasted* them in dissent). Echoing his Honour's earlier speeches, the principle was 'constitutional' in character, in that '[t]he common law in its application to the interpretation of statutes helps to define the boundaries between the judicial and legislative functions'.<sup>185</sup> As to the principle's operation, '[i]t requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law'.<sup>186</sup> It was a 'powerful' principle.<sup>187</sup> But it operated 'within constitutional limits'.<sup>188</sup> It will only afford such protection 'as the language of the statute will allow'.<sup>189</sup> Where the statutory language leaves open 'only an interpretation or interpretations which infringe one or more rights or freedoms', the principle of legality 'is of no avail against such language'.<sup>190</sup>

French CJ equated section 32(1) with the principle of legality. It 'applies ... in the same way as the principle of legality but with a wider field of application'.<sup>191</sup> His Honour expressly endorsed the Victorian Court of Appeal when it observed that if Parliament had intended to make a change in the rules of statutory interpretation 'its intention to do so would need to have been signalled in the clearest terms'.<sup>192</sup> Interestingly, this was French CJ applying the principle of legality – an interpretative principle protecting fundamental common law protections – to interpret section 32(1), an interpretive provision protecting human rights.

Crennan and Kiefel JJ found that section 32(1) 'does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes'.<sup>193</sup> It could not 'be said that s 32(1) requires the language of a section to be strained to effect consistency with the Charter'.<sup>194</sup> Any inconsistent legislation prevails. Their Honours said this 'reaffirms the role of the legislature and makes clear that a court's role in ascertaining the meaning of the legislation remains one of interpretation'.<sup>195</sup>

As for Gummow J (Hayne J agreeing), his Honour also said that section 32(1) confers an interpretive power, rather than 'a law-making function of a

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184 Crennan and Kiefel JJ only went so far as to say that some of the human rights protected by the *Victorian Charter* 'are fundamental freedoms which have for some time been recognised and protected by the principle of legality at common law': *ibid* 203 [522].

185 *Ibid* 46 [42].

186 *Ibid* 46 [43], citing *Potter* (1908) 7 CLR 277, 304 (O'Connor J); *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Coco v The Queen* (1994) 179 CLR 427, 436–7 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

187 *Momcilovic* (2011) 245 CLR 1, 46 [43] (French CJ).

188 *Ibid* 46–7 [43].

189 *Ibid* 47 [44].

190 *Ibid* 47 [45].

191 *Ibid* 50 [51].

192 *Ibid* 48 [46], quoting *R v Momcilovic* (2010) 25 VR 436, 464 [100] (Maxwell P, Ashley and Neave JJ).

193 *Ibid* 217 [565].

194 *Ibid* 217 [566].

195 *Ibid*.



character which is repugnant to the exercise of judicial power'.<sup>196</sup> Gummow J aligned section 32(1) with ordinary principles of statutory interpretation. His Honour also cited *Project Blue Sky Inc v Australian Broadcasting Authority* ('*Project Blue Sky*'), directly quoting this authoritative passage:

the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction<sup>197</sup> 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>198</sup>

Gummow J may have left some room to move as to section 32(1) operating more strongly than ordinary principles of statutory interpretation.<sup>199</sup> His Honour said that the above reasoning 'applies a fortiori where there is a canon of construction mandated, not by the common law, but by a specific provision such as s 32(1)',<sup>200</sup>

Gummow J's view is quite different from that of French CJ. French CJ would give an unusual or strained construction '[i]n an exceptional case', only where the ordinary and grammatical meaning 'would contradict the apparent purpose of the enactment'.<sup>201</sup> But such a restrictive approach is not justified by the passage in *Project Blue Sky*. That passage, which footnotes the principle of legality as an example of 'the canons of construction',<sup>202</sup> recognises that such canons may require statutory words to be read in a way that does not correspond with a literal or grammatical meaning.<sup>203</sup>

Bell J considered that, applying section 32(1), where the literal or grammatical meaning of a statutory provision unjustifiably limited human rights under the *Victorian Charter*, then this apparent conflict needed to be resolved 'by giving the provision a meaning that is compatible with the human right if it is

196 Ibid 85 [146(vi)].

197 The High Court said in this reference: 'For example, the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities: *Coco v The Queen* (1994) 179 CLR 427 at 437'.

198 (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ), quoted in *Momcilovic* (2011) 245 CLR 1, 92 [170] (Gummow J).

199 See Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations', above n 177; 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; Sir Anthony Mason, 'Statutory Interpretive Techniques under the *Charter* – Section 32' (2014) 2 *Judicial College of Victoria Online Journal* 69; *Victorian Police Toll Enforcement v Taha* [2013] VSCA 37 [188]–[190] (Tate JA, in obiter).

200 *Momcilovic* (2011) 245 CLR 1, 92 [170].

201 Ibid 45 [40].

202 *Project Blue Sky* (1998) 194 CLR 355, 384 [78] n 56 (McHugh, Gummow, Kirby and Hayne JJ).

203 In the New Zealand context, the equivalent to s 32(1) is s 6 of the *New Zealand Bill of Rights Act 1990* (NZ). In *R v Hansen* [2007] 3 NZLR 1, Elias CJ expressed that s 6 'may as equally entail an interpretation which "linguistically may appear strained": 11 [13]. Significantly, her Honour said: 'Nor is this heretical. Apparent "linguistic" interpretation is not uncommonly displaced by context. Where fundamental rights are affected ... apparent meaning yields to less obvious meaning under common law presumptions protective of bedrock values': 11–12 [13]. This reference to common law presumptions protective of bedrock values was clearly inclusive of the principle of legality.

possible to do so consistently with the purpose of the provision'.<sup>204</sup> This includes legislation enacted prior to the *Victorian Charter*, which 'may yield different, human rights compatible, meanings in consequence of s 32(1)'.<sup>205</sup> However, the task was 'one of interpretation and not of legislation' – '[i]t does not admit of "remedial interpretation" ... as a means of avoiding invalidity'.<sup>206</sup>

Heydon J was the only judge to find that section 32(1) duplicated section 3(1) of the *UK HRA*. However, this was one reason for his Honour to find that section 32(1) was constitutionally invalid.<sup>207</sup> Section 32(1) '[i]n effect' permitted the courts to 'disregard the express language of a statute'.<sup>208</sup> Heydon J repeatedly emphasised that section 32(1) crossed over into Parliament's legislative function.<sup>209</sup> Following his retirement from the High Court, Heydon expressed the view that the principle of legality was 'likely to be more effective'<sup>210</sup> than section 3(1) of the *UK HRA* in protecting rights – the former 'can achieve a similar purpose without involving the courts in the dangers of creating new legislative rules'.<sup>211</sup> Undoubtedly, Heydon would think the same in the *Victorian Charter* context.

On the one hand, the general tenor of *Momcilovic* is a reassertion of *common law* statutory interpretation techniques as entirely orthodox (including, according to French CJ, the principle of legality). On the other hand, straining the statutory language and departing from the literal meaning of the text to ensure *human rights* compatibility was looked down upon by French CJ, Crennan, Kiefel and Heydon JJ.

Drawing from the above, did the constructions reached in *Lacey* and *NAAJA* not involve a considerable departure from the actual words? Did they not disregard the express language of the statute? Was the language not strained to effect consistency with fundamental common law protections? Were they really exceptional cases where an ordinary or grammatical meaning would contradict the apparent purpose of the statute? Did they not involve a kind of remedial interpretation? Heydon J certainly thought the majority's construction in *Lacey* was 'artificial'.<sup>212</sup> Gageler J described the majority's construction in *NAAJA* as

204 *Momcilovic* (2011) 245 CLR 1, 250 [684].

205 *Ibid.*

206 *Ibid.* The reference to "'remedial interpretation" ... as a means of avoiding invalidity' (emphasis added) is somewhat cryptic: see Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations', above n 177, 379–81. Bell J referred to the Hong Kong approach under the *Hong Kong Bill of Rights Ordinance* (HK). The *Hong Kong Bill of Rights Ordinance* is quasi-constitutional and can lead to legislation inconsistent with human rights being declared unconstitutional and invalid. It is curious as to why Bell J referred to the Hong Kong approach (rather than the approach to the *UK HRA*, being a statutory bill of human rights, where s 3(1) has also been described as 'remedial'). The *Victorian Charter* is not a constitutional bill of human rights, and cannot invalidate primary legislation. So it seems self-evident that s 32(1) cannot be utilised as a means of avoiding invalidity, at least for primary legislation.

207 *Momcilovic* (2011) 245 CLR 1, 184 [456].

208 *Ibid* 181 [450], quoting Lon L Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616, 633.

209 See, eg, *Momcilovic* (2011) 245 CLR 1, 182 [450], 183 [452], 184 [454], 184 [456].

210 J D Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (2014) 130 *Law Quarterly Review* 392, 407.

211 *Ibid* 408–9.

212 *Lacey* (2011) 242 CLR 573, 603 [80], 604 [83].

‘strained’<sup>213</sup> and a ‘distortion’.<sup>214</sup> Is there a disconnect between what the French Court was saying about the principle of legality, and what it was doing with it? It appears that the principle’s operation was being promoted and applied expansively, whilst section 32(1) was being restricted and minimised – whatever gap there may have been between the two, the French Court sought to narrow it.<sup>215</sup>

As identified earlier, the prominent status of the principle of legality under the French Court may be, in part, a response to the lack of a federal bill of human rights in Australia. However, if this is an underlying reason, then it reveals a great irony. The *Victorian Charter* protects democratically sanctioned rights and section 32(1) is a statutory command given by Parliament. The function of section 32(1) was ‘to make up for the putative failure of the common law rules’.<sup>216</sup> Indeed, the prevailing view prior to *Momcilovic* was that section 32(1) was more far reaching in its strength than the principle of legality.<sup>217</sup> Instead, the Victorian Court of Appeal and French CJ used the principle of legality, a judicially sanctioned interpretive principle, to read down section 32(1), a democratically sanctioned interpretive provision.

Post-*Momcilovic*, the Victorian courts have predominantly interpreted the French Court’s decision as equating section 32(1) with the principle of legality.<sup>218</sup>

213 *NAAJA* (2015) 256 CLR 569, 604 [75], 605 [78].

214 *Ibid* 606 [82].

215 The distinction between s 3(1) of the *UK HRA* and the principle of legality is clearer: see *Ahmed v HM Treasury* [2010] 2 AC 534, 646–7 [112]–[117] (Lord Phillips); Philip Sales, ‘A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*’ (2009) 125 *Law Quarterly Review* 598.

216 *Momcilovic* (2011) 245 CLR 1, 181 [450] (Heydon J dissenting). See also Kris Gledhill, ‘Rights-Promoting Statutory Interpretive Obligations and the “Principle” of Legality’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 93.

217 See, eg, Alice Rolls, ‘Avoiding Tragedy: Would the Decision of the High Court in *Al-Kateb* Have Been Any Different if Australia Had a Bill of Rights like Victoria?’ (2007) 18 *Public Law Review* 119, 124; Julie Debeljak, ‘Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line Between Judicial Interpretation and Judicial Law-Making’ (2007) 33 *Monash University Law Review* 9; Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 89–90. See also Julie Debeljak, ‘Who is Sovereign Now? The *Momcilovic* Court Hands Back Power over Human Rights that Parliament Intended it to Have’ (2011) 22 *Public Law Review* 15, 47 n 260, 48–50. Cf Dan Meagher, ‘The Significance of *Al-Kateb v Godwin* for the Australian Bill of Rights Debate’ (2010) 12 *Constitutional Law and Policy Review* 15; Dan Meagher, ‘The Principle of Legality and the Judicial Protection of Rights – *Evans v New South Wales*’ (2009) 37 *Federal Law Review* 295, 306–9.

218 See *Slaveski v Smith* (2012) 34 VR 206, 215 [23], 219 [45] (Warren CJ, Nettle and Redlich JJA); *Noone v Operation Smile (Aust) Inc* (2012) 38 VR 569, 608 [139] (Nettle JA); *Victorian Toll v Taha* (2013) 49 VR 1, 12–13 [25] (Nettle JA); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383 [85] (Redlich, Osborn and Priest JJA); *Carolyn v The Queen* (2015) 48 VR 87, 103–4 [46] (Ashley, Redlich and Priest JJA). It appears that the Court of Appeal is now more cautious about repeating the proposition that s 32(1) is a mere codification of the common law principle of legality, with ‘a wider field of application’. In the most recently decided case of *R v DA* [2016] VSCA 325, the Court of Appeal (Ashley, Redlich and McLeish JJA) declined to approve the judgment of French CJ. In a passing footnote, their Honours said that in the particular case: ‘It is not necessary to decide whether s 32(1) of the Charter is a statutory articulation of the common law “principle of legality” as applied to the rights set out in the Charter’ – acknowledging that Tate JA ‘has taken a different view’: [44] n 47.

This seems to be based on the judgment of French CJ. However, doubts have been raised in the academic commentary<sup>219</sup> and by Tate JA of the Victorian Court of Appeal<sup>220</sup> as to the correctness of this interpretation of *Momcilovic*.<sup>221</sup> It is true that section 32(1) and the principle ‘both require Parliament to express itself particularly clearly if its intention is to override’<sup>222</sup> human rights or fundamental common law protections respectively. But what differences in strength they possess before each is displaced is yet to be authoritatively resolved.

## VII ROLE AND WEIGHT OF STATUTORY OBJECTS

The appointments of Gageler and Keane JJ marked a critical juncture for the principle of legality under the French Court. Their Honours adopted a more contextual (and conservative) approach to the principle of legality.<sup>223</sup> This Part illustrates a divide amongst the Court about the role and weight that should be given to the objects of the statute, where it might be said that those objects are directed at the abrogation or curtailment of the fundamental common law protection. The approach of Gageler and Keane JJ has the effect of relaxing the test for rebuttal by necessary implication.

### A *X7 v Australian Crime Commission*

In *X7*,<sup>224</sup> the constructional question was whether the *Australian Crime Commission Act 2002* (Cth) (*ACC Act*) authorised compulsory examination of the plaintiff about the subject matter of an indictable offence for which he had been charged and was pending trial.

A majority of the French Court (Hayne and Bell JJ, Kiefel J agreeing) recognised that such questioning would depart from the general system of law ‘in a marked degree’.<sup>225</sup> It would alter a ‘defining characteristic of the criminal justice system’ – namely, its ‘accusatorial nature’.<sup>226</sup> This was ‘critical to the question of statutory construction which must be answered in this case’,<sup>227</sup> and thus attracted the principle of legality.<sup>228</sup> As to whether the principle was

219 See Debeljak, ‘Proportionality, Rights-Consistent Interpretation and Declarations’, above n 177; Mason, above n 199. Although according to another commentator, Crennan and Kiefel JJ were also of the view that s 32(1) ‘codified the common law approach’, ‘equal[ing] it to the process of legality’: Gledhill, ‘Rights-Promoting Statutory Interpretative Obligations’, above n 216, 110.

220 See *Victorian Toll v Taha* (2013) 49 VR 1, 61–3 [188]–[191] (in obiter); Tate, above n 199.

221 Some commentators have argued that, regardless, this finding by French CJ is wrong: Debeljak, ‘Proportionality, Rights-Consistent Interpretation and Declarations’, above n 177; Gledhill, ‘Rights-Promoting Statutory Interpretative Obligations’, above n 216; Kris Gledhill, *Human Rights Acts: The Mechanisms Compared* (Hart Publishing, 2015) 434–9, see further discussion at 432–4.

222 Sales, above n 215, 609.

223 See Chen, ‘The Principle of Legality’, above n 23, 356–8.

224 (2013) 248 CLR 92.

225 *Ibid* 132 [87].

226 *Ibid*.

227 *Ibid* 131 [85].

228 This reliance on the general system of law was not inconsistent with the early exposition of the principle of legality by O’Connor J in *Potter*. His Honour had agreed with the sentiment that it is ‘in the last degree

rebutted, Hayne, Kiefel and Bell JJ noted that there were no express words in the *ACC Act* to depart from the accusatorial nature of the criminal justice system.<sup>229</sup> Hence, the outcome turned upon whether there was a necessary implication.

Hayne and Bell JJ (with Kiefel J agreeing) reiterated that ‘the implication must be necessary, not just available or somehow thought to be desirable’.<sup>230</sup> Previous High Court authority had established that displacement of the principle by necessary implication would only occur to ‘prevent the statutory provisions from becoming inoperative or meaningless’.<sup>231</sup> To determine this, one looks to the purpose of the statute and its provisions. Consistently with this approach, Hayne and Bell JJ considered whether the purpose of the *ACC Act* and its provisions would be ‘defeated’ if the principle was not otherwise rebutted.<sup>232</sup> The statutory functions of the Australian Crime Commission were the gathering and dissemination of criminal information and intelligence for the purposes of investigating ‘serious and organised’ crime. Hayne and Bell JJ held that the Commission’s investigative function was ‘in no way restricted or impeded if the power of compulsory examination’ did not extend to a person already charged and who was pending trial about the subject matter of that charge.<sup>233</sup> Their Honours, together with Kiefel J, held that the principle of legality was not rebutted by necessary implication.<sup>234</sup>

French CJ and Crennan J dissented. Their Honours found the principle rebutted, by reference to the text of the provisions and existence of safeguards in the *ACC Act*, the extrinsic materials, and the ‘public interest’ served by the statutory functions of the Australian Crime Commission.<sup>235</sup>

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improbable that the legislature would ... depart from the general system of law’: (1908) 7 CLR 277, 304, quoting J A Theobald (ed), *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) 122. Nevertheless, the majority in *X7*, in relying upon the general system of law to *independently* invoke the principle of legality, ‘appears to have broken new ground’: McLeish and Ciolek, above n 59, 20. See further *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, 509–10 [64] (French CJ, Kiefel, Bell, Nettle and Gordon JJ). As to the implications of this, see Chen, ‘The Principle of Legality’, above n 23, 345; McLeish and Ciolek, above n 59; Dan Meagher, ‘The Common Law Principle of Legality’ (2013) 38 *Alternative Law Journal* 209, 212–13.

229 *X7* (2013) 248 CLR 92, 129 [76], 131 [83], 148–9 [142] (Hayne and Bell JJ, Kiefel J agreeing); 152–3 [157] (Kiefel J).

230 *Ibid* 149 [142], cited with approval in *Lee* (2013) 251 CLR 196, 265 [173] (Kiefel J). See also *Plenty v Dillon* (1991) 171 CLR 635, 654 (Gaudron and McHugh JJ): ‘inconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights’.

231 *Coco v The Queen* (1994) 179 CLR 427, 436, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ), see also at 446 (Deane and Dawson JJ): ‘rendered either inoperative or nonsensical’; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 563 [43] (McHugh J) (*‘Daniels’*): ‘rendered inoperative or its object largely frustrated in its practical application’, citing *Coco v The Queen* (1994) 179 CLR 427, 438. In *Daniels*, McHugh J held that the statutory provision ‘would neither become inoperative nor be rendered practically useless’ if the common law legal professional privilege was not displaced: at 563–4 [45].

232 *X7* (2013) 248 CLR 92, 149 [142].

233 *Ibid* 150 [147].

234 *Ibid* 150 [147]–[148] (Hayne and Bell JJ), 154 [162] (Kiefel J).

235 *Ibid* 109–12 [24]–[30].

## B *Lee v NSW Crime Commission*

However, the 4:3 decision in *Lee*,<sup>236</sup> which was decided a few months after *X7*, calls into doubt the established approach, applied by Hayne, Kiefel and Bell JJ, to rebutting the principle of legality by necessary implication. As in *X7*, the appellants had been charged with offences and were awaiting trial. The relevant legislation was the *Criminal Assets Recovery Act 1990* (NSW) ('*CAR Act*'). The bench included Gageler and Keane JJ. The High Court majority – which now comprised of French CJ and Crennan J (who were in the minority in *X7*), together with Gageler and Keane JJ – held that the *CAR Act* permitted the compulsory examination of the appellants about the subject matter of those charges.<sup>237</sup>

A substantial (but not the sole) ground relied upon by the majority to distinguish *X7* was the statutory objects under the *CAR Act*. Here, the objects of the statute and compulsory examination provisions were the identification and confiscation of profits and proceeds gained from serious crime (which did not require a conviction). The majority took the approach that the clearly identified objects of the *CAR Act* and its provisions involved the abrogation or curtailment of fundamental criminal process rights, such that the principle of legality was rebutted.<sup>238</sup> For example, Crennan J considered that the purposes of the compulsory examination powers – to identify and confiscate criminal profits and proceeds – 'subsist irrespective of whether a person has been charged with ... an offence' and was pending trial.<sup>239</sup> Gageler and Keane JJ (Crennan J agreeing)<sup>240</sup> stated that the principle of legality:

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; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.

The principle of construction is fulfilled in accordance with its rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed. 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. 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>241</sup>

236 (2013) 251 CLR 196.

237 Ibid 204 [4], 230–1 [55]–[56] (French CJ), 257 [144] (Crennan J), 294 [268]–[269] (Gageler and Keane JJ).

238 Ibid 204 [6], 226 [45], 229–31 [53]–[56] (French CJ), 249–50 [126], 250 [129], 251 [131]–[132] (Crennan J), 310–11 [313]–[314], 317–18 [326]–[328] (Gageler and Keane JJ).

239 Ibid 251 [131].

240 Ibid 249–50 [126].

241 Ibid 310–11 [313]–[314], quoting *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321, 340 [43] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

French CJ accepted that '[w]here the public policy of a statute and its purpose are identified with sufficient clarity, the option of making a constructional choice protective of common law rights may be precluded'.<sup>242</sup> Nevertheless, this comment did not go as far as the approach of Gageler and Keane JJ. French CJ did not say that the principle of legality will *always* be of little assistance if the statutory objects are abrogation or curtailment of fundamental common law protections. Sometimes, even despite the statutory purpose, there will still be constructional choice. French CJ would adopt a 'least infringing' approach, whereby the correct construction is that which *least* interferes with fundamental common law protections within the range (if any) of possible constructions.<sup>243</sup> This distinction in approach between French CJ, and Gageler and Keane JJ, is made clearer in *NAAJA*, discussed below.

The majority's finding in *Lee* that the principle of legality was rebutted was stridently criticised on several fronts by the minority, which now comprised Hayne, Kiefel and Bell JJ – a reversal from *X7*. First, Hayne J opined that 'no relevant distinction' had been identified between the two statutory schemes,<sup>244</sup> and '[a]ll that has changed ... is the composition of the Bench'.<sup>245</sup> Secondly, the minority judges criticised the majority for 'assuming' the answer to the 'central question', namely, that the authorisation of compulsory powers extended to situations where an accused is pending trial.<sup>246</sup> The *CAR Act* implied nothing to that effect. Thirdly, as Kiefel and Bell JJ observed, the objects would not be 'frustrated' (ie, the statute rendered inoperative or meaningless)<sup>247</sup> by the delay in confiscating profits and proceeds until after the concurrent criminal proceedings against the appellants had been concluded.<sup>248</sup>

Whilst it is open to debate whether the majority decisions in *X7* and *Lee* are contradictory, or whether they can be justified on the basis of their respective statutory contexts,<sup>249</sup> the former view is the correct one.<sup>250</sup> In particular, the

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242 *Lee* (2013) 251 CLR 196, 230 [56].

243 See Chen, 'The Principle of Legality', above n 23, 355–6.

244 *Lee* (2013) 251 CLR 196, 233 [69]. See also Edward Greaves, 'To What Extent Does *X7 v Australian Crime Commission* Remain "Useful" Law?' (2013) 40(11) *Brief: The Law Society of Western Australia* 35.

245 *Lee* (2013) 251 CLR 196, 233 [70].

246 *Ibid* 234 [75] (Hayne J), 265 [173], 280 [220]–[221], 283 [230] (Kiefel J; Bell J agreeing).

247 Cf Goldsworthy, 'The Principle of Legality and Legislative Intention', above n 1, 61–2, who is of the view that Kiefel J in *Lee* does not adopt such a test. However, it should be noted that at 265 [173], Kiefel J refers back to the joint judgment of Hayne and Bell JJ in *X7* (2013) 248 CLR 92, 148–9 [142], to which her Honour had agreed in that case: at 152 [157]. That joint judgment cites *Daniels* (2002) 213 CLR 543 by way of example, including the judgment of McHugh J at 562–3 [43], who espoused the inoperative or meaningless test.

248 *Lee* (2013) 251 CLR 196, 281 [223] (Kiefel J), 291–2 [261]–[262] (Bell J); cf 251 [131] (Crennan J).

249 Although the *ACC Act* has since been amended in response to the High Court's decision in *X7*: Jeremy Gans, 'News: Federal Parliament Axes the Court's Crime Commission Cases' on Melbourne Law School, *Opinions on High* (28 July 2015) <<https://blogs.unimelb.edu.au/opinionsonhigh/2015/07/28/news-federal-parliament-axes-the-courts-crime-commission-cases/>>.

250 See also Anna Dziedzic, 'Digging Down to the Principle of Legality: *Lee v New South Wales Crime Commission*' on Melbourne Law School, *Opinions on High* (3 February 2014) <<http://blogs.unimelb.edu.au/opinionsonhigh/2014/02/03/dziedzic-lee/>>; D F Jackson and J C Conde, 'Statutory Interpretation in the First Quarter of the Twenty-First Century' (2014) 38 *Australian Bar Review* 168, 177–8, 180;

approach of Gageler and Keane JJ represents a less stringent approach than what was once thought required to rebut the principle by necessary implication. On the previous approach, one must consider whether the provision would be rendered ‘inoperative or meaningless’<sup>251</sup> by reference to purpose. But on the approach of Gageler and Keane JJ, if it is considered that the objects of the legislation are to infringe fundamental common law protections, then the principle of legality has little effect.

### C *NAAJA*

Gageler J maintained his approach in *NAAJA*.<sup>252</sup> One will recall that Gageler J dissented in finding that police had a discretion under the *Police Administration Act 1978* (NT) to detain a person for certain minor offences without a warrant for any period up to a maximum of four hours. In his Honour’s view, the principle of legality was rebutted. This was based partly on the text of the operative provisions, but also on the statutory objects. In respect of the latter, Gageler J considered that the principle of legality was ‘of little assistance given that the evident statutory object is to authorise a deprivation of liberty and that the statutory language in question is squarely addressed to the duration of that deprivation of liberty’.<sup>253</sup>

On the other hand, French CJ, Kiefel and Bell JJ adopted a ‘least infringing’ approach to the principle of legality. Their Honours searched for ‘a construction, if one be available, which avoids or minimises the statute’s encroachment upon fundamental principles, rights and freedoms at common law’.<sup>254</sup> Hence, their Honours favoured a construction that a person could be detained only for so long as is reasonable within the maximum of four hours. Their Honours responded directly to Gageler J’s position and rejected it. The principle of legality:

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. 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>255</sup>

If the position of Gageler and Keane JJ in *Lee* and Gageler J in *NAAJA* were to eventually gain traction, this would represent a significant relaxation to rebutting the principle of legality by necessary implication. It would also have ramifications when the exact extent to which a provision infringes a fundamental common law protection is unclear. If a range of constructions is available, including a more restrictive, rights-protective construction, the principle of

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

251 *Coco v The Queen* (1994) 179 CLR 427, 436, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ).

252 (2015) 256 CLR 569. As did Keane J in the case of *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 635–6 [422].

253 *NAAJA* (2015) 256 CLR 569, 605–6 [81].

254 *Ibid* 581 [11].

255 *Ibid* 582 [11].



legality is unlikely to help where the statutory objects are abrogation or curtailment of that fundamental common law protection.<sup>256</sup>

## VIII RELEVANCE OF EXTRINSIC MATERIALS

Another contestable issue is the relevance of extrinsic materials. The question is to what extent may extrinsic materials be relied upon to demonstrate Parliament's intention to abrogate or curtail fundamental common law protections. This Part demonstrates that the predominant view of the French Court was that extrinsic materials are given little weight in the context of the principle of legality. This is neither new nor inappropriate, when regard is had to the principle's operation. Gageler J, however, took a different view.

### A *Saeed and Lacey*

Perhaps the real controversy with *Saeed* (where the natural justice hearing rule was not excluded for offshore visa applicants),<sup>257</sup> which also played a part in *Lacey* (where the discretion of an appellate court to vary a sentence still required an error),<sup>258</sup> was that the French Court endorsed a construction protective of fundamental common law protections despite extrinsic material which was clearly to the contrary. For example, in *Saeed* five members of the Court said: 'Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning'.<sup>259</sup>

Louise Clegg considered that this eschewing of extrinsic materials with respect to the principle of legality is 'a move by the Court back towards literalism in statutory interpretation'.<sup>260</sup> Dan Meagher has observed that there has been a reassertion of the primacy of the statutory text, but particularly in respect of the principle of legality, a strict textualism has emerged<sup>261</sup> 'to the exclusion of near all else'.<sup>262</sup> The principle of legality has trumped legislative history.<sup>263</sup> It is true that the French Court has sought to emphasise the primacy of the text when interpreting legislation. Certain commentators have suggested that extrinsic

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256 In this sense, the approach of Gageler and Keane JJ could be described as both contextual and binary: cf Chen, 'The Principle of Legality', above n 23, 354, 356–8.

257 See *Saeed* (2010) 241 CLR 252, 264 [30] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) and the Full Court of the Federal Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Lat* (2006) 151 FCR 214, 225 [65] (The Court): 'We agree with the observation ... that the drafters of the Explanatory Statement and the Minister could hardly have made the intention of the 2002 amendments any clearer'.

258 See *Lacey* (2011) 242 CLR 573, 605–7 [86]–[93] (Heydon J dissenting).

259 (2010) 241 CLR 252, 264–5 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

260 Clegg, above n 94, 7.

261 Dan Meagher, 'The Rise of Textualism in Australia' (Paper presented at the Australian Society of Legal Philosophy Workshop, Melbourne Law School, University of Melbourne, 20 July 2017). The author thanks Professor Meagher for providing access to a copy of this paper.

262 *Ibid*, adopting the words of Nettle, above n 103, 282.

263 *Ibid*.

materials should be sufficient – perhaps even more so than the legislative text – to demonstrate Parliament’s intention to abrogate or curtail fundamental common law protections.<sup>264</sup> Yet given the emphasis on legislative text, courts generally are cautious or reluctant to utilise such materials in this way.<sup>265</sup> This caution or reluctance is not a new development under the French Court.

In *Lacey*, the French Court did controversially determine that the concept of legislative intention is a product of the statutory interpretation process itself, rather than something that is pre-existing and subsequently ascertained through the statutory interpretation process.<sup>266</sup> This questions the authenticity of legislatures having intentions,<sup>267</sup> and perhaps also the argument that such intentions are reflected in extrinsic materials.

But even before this notion gained favour, the approach was that legislative intention involved ascertaining the objective intention of Parliament, rather than the subjective intention of, for example, an individual Minister or parliamentarian.<sup>268</sup> Therefore, ‘[t]he words of the statute, not non-statutory words seeking to explain them, have paramount significance’.<sup>269</sup> Where the words are clear and unambiguous, extrinsic materials cannot be used to displace them.<sup>270</sup> Conversely, extrinsic materials cannot be used to supply clear meaning to the text in order to abrogate or curtail fundamental common law protections.<sup>271</sup> So much

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264 Lim, ‘The Normativity of the Principle of Legality’, above n 58, 393–4. See further Goldsworthy, ‘The Principle of Legality and Legislative Intention’, above n 1, 53–4.

265 Lim, ‘The Normativity of the Principle of Legality’, above n 58, 393; Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 94, 461–2; Doyle and Wells, above n 77, 57–8; Basten, above n 59, 78.

266 (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

267 Commentators have argued that *Lacey* rejects traditional understandings of legislative intention, and undermines the rationale of the principle of legality: see Richard Ekins and Jeffrey Goldsworthy, ‘The Reality and Indispensability of Legislative Intentions’ (2014) 36 *Sydney Law Review* 39, 42–5, discussed in Chen, ‘The Principle of Legality’, above n 23, 339–40. See also Goldsworthy, ‘The Principle of Legality and Legislative Intention’, above n 1, 55–6.

268 Chief Justice J J Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 *Australian Law Journal* 769, 770; Chief Justice J J Spigelman, ‘The Intolerable Wrestle: Developments in Statutory Interpretation’ (2010) 84 *Australian Law Journal* 822, 828.

269 *Nominal Defendant v GLG Aust Pty Ltd* (2006) 228 CLR 529, 538 [22] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

270 See *Parramore v Duggan* (1995) 183 CLR 633, 649 (Toohey J); *Pyramid Building Society (in liq) v Terry* (1997) 189 CLR 176, 211 (Kirby J); *Commonwealth v Yarmirr* (2001) 208 CLR 1, 117 [261] (Kirby J); *Royal Botanic Gardens and Domain Trust v South Sydney* (2002) 240 CLR 45, 80 [102] (Kirby J); *Purvis v New South Wales* (2003) 217 CLR 92, 122–3 [92] (McHugh and Kirby JJ); *Insurance Commission (Western Australia) v Container Handlers Pty Ltd* (2004) 218 CLR 89, 103 [33] (McHugh J); *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, 265 [38] (Kirby J); *DPP (Vic) v Le* (2007) 232 CLR 562, 573 [29] (Gummow and Hayne JJ); *Northern Territory v Collins* (2008) 235 CLR 619, 642 [99] (Crennan J); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Newcrest Mining Ltd v Thornton* (2012) 248 CLR 555, 581 [70] (Crennan and Kiefel JJ); *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

271 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518, 520 (Mason CJ, Wilson and Dawson JJ), see also 532 (Deane J); *Minister for Immigration and Ethnic Affairs v Tang Jia Xin* (1994) 125 ALR 203, 207 (Brennan, Dawson, Toohey, Gaudron and McHugh JJ); *Wik Peoples v Queensland* (1996) 187 CLR 1, 168–9 (Gummow J); *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 95 [132] (McHugh J), 109 [173], 111–12 [178], 112–13 [181] (Kirby J). See also Mark

was recognised in the principle of legality case of *Re Bolton; Ex parte Beane*,<sup>272</sup> where Mason CJ, Wilson and Dawson JJ said that a Minister's words 'must not be substituted for the text of the law'.<sup>273</sup> Such principles continued to be applied by the French Court in *Lacey*.<sup>274</sup>

### B *X7 and Lee*

That is not to say that extrinsic materials have been completely excluded when the principle of legality is being considered. French CJ and Crennan J were both part of the majority in *Lacey*. But in *X7*, their Honours made reference to the extrinsic materials, saying there was 'nothing' which 'throws any doubt on the conclusion, based on the text and purpose of the provisions' that the compulsory examination powers under the *ACC Act* can be exercised after charges have been laid.<sup>275</sup> In *Lee*, Crennan J referred not only to the expressly stated objects of the *CAR Act*, but also the second reading speech in identifying that Act's purpose, before going on to find that applying the principle of legality would frustrate the Act's objects.<sup>276</sup> In these cases, extrinsic materials were used by their Honours as supportive, rather than determinative, factors for rebuttal of the principle – an outcome which they would have likely reached in any event.

Meagher has questioned the coherence of 'privileging' the principle of legality over extrinsic materials.<sup>277</sup> Both sit external to the statute.<sup>278</sup> Moreover, he has noted that in general statutory interpretation, where the principle of legality is not engaged or at issue, extrinsic materials are used liberally.<sup>279</sup> Elsewhere, the French Court has unanimously said that '[t]he statutory text must be considered in its context. That context includes legislative history and extrinsic materials'.<sup>280</sup> With respect to the principle of legality though, extrinsic materials hold lesser weight. Meagher has argued that this 'might be justified if the principle of legality is understood as a quasi-constitutional clear statement rule the application of which to legislation vindicates important Australian constitutional

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Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6<sup>th</sup> ed, 2017) 189:

unclear drafting will fail to achieve a repugnant Ministerial purpose which the Bill's supporting materials had made abundantly clear ... What really matters, in our view, is whether the statutory drafting has left sufficient interpretive wriggle room, not whether the Minister had confessed all in the Second Reading speech.

272 (1987) 162 CLR 514.

273 Ibid 518 (Mason CJ, Wilson and Dawson JJ), see also 532 (Deane J).

274 *Lacey* (2011) 242 CLR 573, 598 [61] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), applying *Re Bolton; Ex parte Beane* (1987) 162 CLR 514; cf 605 [86] ff (Heydon J dissenting). See also Chief Justice Robert French, 'The Courts and the Parliament' (2013) 87 *Australian Law Journal* 820, 826.

275 (2013) 248 CLR 92, 111 [27].

276 (2013) 251 CLR 196, 217–18 [29], 239–40 [94], 250 [129], 251 [131].

277 Meagher, 'The Rise of Textualism in Australia', above n 261.

278 Ibid.

279 Ibid.

280 *Federal Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

principles and values'.<sup>281</sup> But the principle of legality need not go so far. Its *modus operandi* is that intention for rebuttal must be 'manifested'<sup>282</sup> or 'express[ed]'<sup>283</sup> in clear and unambiguous language in the statute. Where resort is necessary to extrinsic materials, this is indicative that the requisite language is lacking.

### C NAAJA

Gageler J in *NAAJA* took a different approach to *Saeed* and *Lacey*. As discussed above, Gageler J dissented on the basis that the 'evident statutory object'<sup>284</sup> of the legislation was to infringe a fundamental common law protection. His Honour identified this object by reference to extrinsic materials.<sup>285</sup> By contrast, while French CJ, Kiefel and Bell JJ referred to extrinsic materials, their Honours did so only for the question of constitutional validity of the legislation.<sup>286</sup> Their Honours did not refer to the extrinsic materials when considering the operation of the principle of legality. The remainder of the majority, Nettle and Gordon JJ, expressly rejected giving weight to the extrinsic materials,<sup>287</sup> citing *Re Bolton; Ex parte Beane*.

The contrasting approaches of the majority, and Gageler J in the minority, reflect a difference in attitude towards extrinsic materials in the context of the principle of legality. It also reflects a more recent divergence regarding the use of extrinsic materials in statutory interpretation generally to identify the statute's object. In Gageler J's view, extrinsic materials can freely be used to ascertain purpose. By contrast, the predominant approach of the French Court is far more cautious – '[t]he purpose of a statute is not something which exists outside the statute. It resides in its text and structure'.<sup>288</sup> Despite such language,<sup>289</sup> once again this has not led to complete exclusion of extrinsic materials under the principle of legality<sup>290</sup> or in general statutory interpretation.<sup>291</sup> Nevertheless, it is fair to say that for the purposes of rebutting the principle of legality, the predominant

281 Meagher, 'The Rise of Textualism in Australia', above n 261.

282 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

283 *Potter* (1908) 7 CLR 277, 304 (O'Connor J); *Coco v The Queen* (1994) 179 CLR 427, 436, 438, 439 (Mason CJ, Brennan, Gaudron and McHugh JJ).

284 *NAAJA* (2015) 256 CLR 569, 605 [81].

285 *Ibid* 608–9 [88]–[90].

286 *Ibid* 589–91 [30]–[33].

287 *Ibid* 649–50 [229].

288 *Lacey* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), see further 596 [56]. For a critique of this approach, see Goldsworthy, 'The Principle of Legality and Legislative Intention', above n 1, 62; Ekins and Goldsworthy, above n 267, 57–8. See also Justice Stephen Gageler, 'Legislative Intention' (2015) 41 *Monash University Law Review* 1, 10–11; Meagher, 'The Rise of Textualism in Australia', above n 261.

289 Strangely, the French Court in *Lacey* still said that 'identification of a statutory purpose ... may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials': (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added). See also *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389–90 [25] (French CJ and Hayne J).

290 See, eg, the discussion of Crennan J's approach in *Lee* above.

291 See *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 405 [70] (Crennan and Bell JJ), 412 [89] (Kiefel J).

approach very much de-emphasises the identification of statutory objects by reference to extrinsic materials. In *NAAJA*, the majority did not even consider them relevant.

Gageler J's approach to the use of extrinsic materials can be linked to Gageler and Keane JJ's approach to statutory objects, which is in turn linked to a less robust principle of legality. Gageler J considers it permissible to rely heavily on extrinsic materials to identify a statutory object, and if those materials make clear that the object is to abrogate a fundamental common law protection, then the principle of legality has little (if any) role to play. On the other hand, according to the majorities in *Lacey* and *NAAJA*, identification of a statutory object is predominantly text-based, and rebuttal of the principle of legality is also text-based. Even where the statutory object according to the text is to abrogate a fundamental common law protection, but the text leaves constructional choices open, there is still work for the principle of legality to do, with a 'least infringing' construction being adopted.

### D R v IBAC

There is a further, related issue with respect to extrinsic materials: where the legislation is enacted in jurisdictions which provide for a pre-legislative scrutiny process against human rights standards. Can 'statements of compatibility' influence the operation of the principle of legality?

As part of the human rights frameworks provided by the *Victorian Charter* and the Australian Capital Territory's *Human Rights Act 2004* (ACT), what are known as 'statements of compatibility' are to be prepared for Parliament when a Bill is introduced.<sup>292</sup> This is usually by the relevant Minister or the Attorney-General.<sup>293</sup> The statement of compatibility must state whether, in that person's opinion, the Bill is compatible with human rights; or if the Bill is not compatible with human rights, how it is not.<sup>294</sup> At the federal level, a standalone scrutiny process has been enacted under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).<sup>295</sup> Statements of compatibility prepared for Commonwealth Bills<sup>296</sup> are measured against seven major international human rights treaties,<sup>297</sup> rather than domestically incorporated human rights.

292 *Victorian Charter* s 28; *Human Rights Act 2004* (ACT) s 37, which applies to government Bills only.

293 Under the *Human Rights Act 2004* (ACT), it must be the Attorney-General: ss 37(2)–(3).

294 As to subordinate legislation, see *Subordinate Legislation Act 1994* (Vic) ss 12A, 12D.

295 See s 8.

296 As to subordinate legislation, see *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 9.

297 See the s 3(1) definition of 'human rights', being the rights and freedoms recognised or declared by the following instruments: *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990);

There is a possibility that statements of compatibility, as extrinsic materials,<sup>298</sup> may influence statutory interpretation.<sup>299</sup> Taken further, the analysis in statements of compatibility could potentially affect the operation of the principle of legality. Where there is an overlap between a human right and a fundamental common law protection, and a statement of compatibility considers the human right, the question is whether this can be relied on to find that Parliament intended (or conversely, did not intend) to abrogate or curtail the *equivalent* fundamental common law protection.

This issue has yet to be decided by the High Court. It was raised solely by Gageler J in *R v IBAC*.<sup>300</sup> As we have seen from *NAAJA*, his Honour is willing to give significant weight to extrinsic materials.

*R v IBAC* was another case about the common law privilege against self-incrimination and compulsory examination powers (further to *X7* and *Lee*) – this time pursuant to Victorian legislation. Gageler J considered that the statement of compatibility to the relevant Bill<sup>301</sup> ‘explained the balance struck ... to be compatible with’ the human right not to be compelled to testify against himself or herself or to confess guilt, ‘in part by reference to the express abrogation of the privilege against self-incrimination’.<sup>302</sup> His Honour expressed concerns about resort to the principle of legality where the legislation has been developed within a human rights framework. Gageler J said:

An interpretative technique which involves examining a complex and prescriptive legislative scheme designed to comply with identified substantive human rights norms in order to determine whether, and if so to what extent, that legislative scheme might butt up against a free-standing common law principle is inherently problematic.<sup>303</sup>

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*Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

298 See *Interpretation of Legislation Act 1984* (Vic) s 35(b)(iii); *Legislation Act 2001* (ACT) s 142, Table 142; *Acts Interpretation Act 1901* (Cth) s 15AB(2)(e). See further Commonwealth, *Parliamentary Debates*, House of Representatives (30 September 2010) 272 (Robert McClelland).

299 Regarding statements of compatibility under the *Victorian Charter*, see Debeljak, ‘Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*’, above n 217, 53–4; Jeremy Gans, ‘Reverse Onus Provisions and Statements of Compatibility in the Courtroom’ (2017) 28 *Public Law Review* 8, 10–12; Emrys Nekvapil, ‘Using the Charter in Litigation’ in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) 84, 95–6. As to statements of compatibility under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), see James Stellios and Michael Palfrey, ‘A New Federal Scheme for the Protection of Human Rights’ (2012) 69 *Australian Institute of Administrative Law Forum* 13, 18; Bryan Horrigan, ‘Commonalities, Intersections, and Challenges for the Scrutiny and Interpretation of Legislation in Trans-Tasman Jurisdictions and Beyond’ (2012) 27(2) *Australasian Parliamentary Review* 4, 21–2; David Kinley and Christine Ernst, ‘Exile on Main Street: Australia’s Legislative Agenda for Human Rights’ (2012) 1 *European Human Rights Law Review* 58, 68; Dan Meagher, ‘The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the Courts’ (2014) 42 *Federal Law Review* 1, 5–7, 11–12; George Williams and Lisa Burton, ‘Australia’s Exclusive Parliamentary Model of Rights Protection’ (2013) 34 *Statute Law Review* 58, 77–8.

300 (2016) 256 CLR 459.

301 Independent Broad-based Anti-corruption Commission Amendment (Examinations) Bill 2012 (Vic).

302 *R v IBAC* (2016) 256 CLR 459, 479 [72].

303 *Ibid* 480–1 [76].

Not dissimilarly, the Solicitor-General for Victoria, Richard Niall QC, has suggested that an ‘over-zealous reliance’ on the principle of legality ‘fails to recognise that legislation today is often about the balance between rights and interests and the application of the principle may distort the balance that Parliament has struck’.<sup>304</sup> While it is arguable that the principle of legality inherently does, or should, involve justification and proportionality considerations,<sup>305</sup> the predominant judicial viewpoint is that such considerations have no role to play.<sup>306</sup> This can be contrasted with bills of human rights, such as the *Victorian Charter*, which ‘provides a clear and effective framework for considering the limits that may be placed on human rights, having regard to competing public interests and policy objectives’.<sup>307</sup>

The reliance on statements of compatibility by the lower courts is relatively rare and has been mixed.<sup>308</sup> But since the dicta of Gageler J in *R v IBAC*, it appears the Victorian courts have become more willing to give weight to them.<sup>309</sup> Nevertheless, statements of compatibility are not binding on courts and tribunals.<sup>310</sup> They represent the subjective intention of a Minister or parliamentarian introducing a Bill, rather than any actual intention of Parliament. Based on past practice, it seems unlikely that the High Court (Gageler J aside) would greatly rely on a statement of compatibility so as to affect the principle of legality’s operation.

## IX APPLICATION TO NON-INFRINGEMENT PROVISIONS

Traditionally, the principle of legality is raised where a statutory provision has the potential to abrogate or curtail fundamental common law protections. In each of the cases analysed in this article, the statutory provisions in question potentially had a direct impact upon a fundamental common law protection.<sup>311</sup>

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304 Niall, above n 1, 10.

305 See Chen, ‘The Principle of Legality’, above n 23, 364–73; Wilberg, above n 47.

306 See Chen, ‘The Principle of Legality’, above n 23, 362–4; Dan Meagher, ‘The Principle of Legality and Proportionality in Australian Law’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 114.

307 Victorian Equal Opportunity and Human Rights Commission, Submission No 90 to the Victorian Department of Justice and Regulation, *2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, 75, referring to s 7(2) of the *Victorian Charter*. But see above n 177, as to the unresolved state of s 7(2)’s applicability to s 32(1).

308 See *Magee v Delaney* (2012) 225 A Crim R 151, 172–3 [96] (Kyrou J); *AJH Lawyers v Mathieson Nominees Pty Ltd* [2015] VSCA 227, [61]–[62] (Hansen and McLeish JJA).

309 See *Chief Commissioner of Police v Nikolic* (2016) 338 ALR 683, 707–8 [93]–[94] (Maxwell P, Osborn and Kaye JJA); *R v DA* [2016] VSCA 325, [45]–[46] (Ashley, Redlich and McLeish JJA). See also *R v Independent Broad-based Anti-corruption Commission* (2015) 253 A Crim R 35, 72 [81(b)], which led to the subsequent appeal to the High Court.

310 *Victorian Charter* s 28(4); *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8(4).

311 With the exception of *R v IBAC* (2016) 256 CLR 459, where the principle of legality was found to not be engaged.

### A *Independent Commission Against Corruption v Cunneen*

However, in *Cunneen*<sup>312</sup> a majority of the French Court applied the principle of legality in support of a narrow construction of a definitional provision which did not of itself abrogate or curtail fundamental common law protections. That case was decided towards the end of the French Court, by French CJ, Hayne, Kiefel, Gageler and Nettle JJ. The question was whether the jurisdiction of the Independent Commission Against Corruption ('ICAC'), an investigatory commission under the *Independent Commission Against Corruption Act 1988* (NSW) ('*ICAC Act*'), extended to conduct that adversely affected the mere efficacy of an official function by a public official. Could a Crown prosecutor – who allegedly counselled her son's de facto partner to pretend to have chest pains so as to prevent police officers from obtaining the partner's blood alcohol level at the scene of a car accident – be investigated under the *ICAC Act*? Resolution of this issue turned upon the definition of 'corrupt conduct' under section 8(2), which ICAC's jurisdiction relevantly hinged on. A definition cannot of itself have the potential to abrogate or curtail fundamental common law protections. However, a broad construction of section 8(2) would mean ICAC had jurisdiction to conduct the investigation, which would attract the coercive powers provided for by the *ICAC Act*.

A 4:1 majority (French CJ, Hayne, Kiefel and Nettle JJ; Gageler J dissenting) held that 'corrupt conduct' did not extend to conduct that adversely affects the mere efficacy of an official function by a public official, and so ICAC had no jurisdiction.<sup>313</sup> In a joint judgment, the majority identified several interpretive factors. One of them was the principle of legality. The principle was treated as one of several equally applicable principles – discussed briefly in only a couple of sentences. This stands in sharp contrast to the approach taken by the French Court in *Saeed, Lacey, X7, Lee, and NAAJA*.

The majority did not prefer a broad construction which would:

enable the [ICAC] to exercise its extraordinary coercive powers (with consequent abrogation of fundamental rights and privileges) in areas ranging well beyond the ordinary understanding of corruption in public administration and the principal objects of the ICAC Act.

...

The principle of legality, coupled with the lack of a clearly expressed legislative intention to override basic rights and freedoms on such a sweeping scale as ICAC's construction would entail, points strongly against an intention that ICAC's coercive powers should apply to such a wide range of kinds and severity of conduct.<sup>314</sup>

Gageler J dissented once again. His Honour noted that no attempt had been made to identify any fundamental common law protection 'said to be put in

312 (2015) 256 CLR 1.

313 Ibid 10 [1]–[3]. As to developments flowing from the outcome of this case, see John Emmerig et al, 'The Jurisdiction of the Independent Commission Against Corruption after High Court Challenges and Legislative Amendment in 2015' (2016) 27 *Public Law Review* 10.

314 *Cunneen* (2015) 256 CLR 1, 10 [3], 27 [54] (French CJ, Hayne, Kiefel and Nettle JJ), citing *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 30–1 [42] (French CJ); *Lee* (2013) 251 CLR 196, 217–18 [29] (French CJ), 264–5 [171]–[173] (Kiefel J), 307–11 [307]–[314] (Gageler and Keane JJ).



jeopardy<sup>315</sup> by the broader construction of the definition of ‘corrupt conduct’. The fact that ICAC could exercise coercive powers in conducting investigations was ‘no reason for straining to adopt a narrow interpretation of the provisions of the ICAC Act which define the scope of the corrupt conduct ICAC is empowered to investigate’.<sup>316</sup> Ominously, his Honour warned that ‘[u]nfocused invocation’ of the principle of legality ‘can only weaken its normative force, decrease the predictability of its application, and ultimately call into question its democratic legitimacy’.<sup>317</sup>

The majority’s approach widens the principle of legality’s potential application in a way perhaps not previously seen. As Clegg has identified, the ‘obvious implication’ is that the principle ‘could – arguably should – now be invoked to assist in the interpretation of any disputed provision (whether it alters a right or not) in any rights altering statute’.<sup>318</sup> This ‘appears to be a big shift in the circumstances in which it can be invoked’.<sup>319</sup>

## X CONCLUSION

The principle of legality has become central to the process of statutory interpretation under the French Court. A number of contentious issues may be drawn from this article’s review of the French Court’s jurisprudence.

First, the French Court has, for the most part, applied the principle of legality quite robustly, in cases such as *Saeed*, *Lacey* and *NAAJA*. This is reflected in the description of the principle of legality in weighty terms. It is ‘constitutional’ in character – the principle ‘governs the relations between Parliament, the executive and the courts’,<sup>320</sup> or as French CJ put it, helps to ‘define the boundaries between the judicial and legislative functions’.<sup>321</sup> The principle is ‘a powerful one’;<sup>322</sup> its threshold for rebuttal is ‘not a low standard’.<sup>323</sup> The 6:1 majority decision in *Lacey* and joint judgment of French CJ, Kiefel and Bell JJ in *NAAJA* are instances where the language of the statute was strained so as to mitigate infringement of fundamental common law protections. This was against the objections of Heydon J and Gageler J dissenting in *Lacey* and *NAAJA* respectively.

Second, there is a recent trend whereby the principle of legality has become central to cases about constitutional law. The more forceful the application of the principle in statutory interpretation, the less likely that constitutional invalidity

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315 *Cunneen* (2015) 256 CLR 1, 35 [86].

316 *Ibid* 35 [87].

317 *Ibid* 35–6 [88].

318 Clegg, above n 94, 9.

319 *Ibid*.

320 *Saeed* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), quoting *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

321 *Momcilovic* (2011) 245 CLR 1, 46 [42].

322 *Ibid* 46 [43] (French CJ).

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

will be found. At the same time, there may be a movement towards effectively merging the principle of legality and the presumption of constitutionality. Three members of the French Court in *Monis* extended the principle of legality to the implied freedom of political communication. However, the implications of this development have yet to be fully explored. None of the other justices applied that approach.

Third, *Lacey* and *NAAJA* can be contrasted with *Momcilovic*, when the French Court was confronted with the novel interpretive mechanism that is section 32(1) of the *Victorian Charter*. In *Momcilovic*, some members of the Court considered that no strained meaning was permissible when applying section 32(1). This is an inconsistency, especially given that section 32(1) has, disputably, been equated with the principle of legality.

Fourth, there is now a divide as to the approach which should be taken with respect to rebuttal of the principle of legality by necessary implication. The established approach is to ask whether rebuttal is necessary to ‘prevent the statutory provisions from becoming inoperative or meaningless’<sup>324</sup> by reference to their purpose. But Gageler and Keane JJ are of the view that if the objects of the legislation are to infringe fundamental common law protections, then the principle of legality is ‘of little assistance’.<sup>325</sup> Their Honours’ approach is a less stringent one. It reflects the differences in outcome in *X7* and *Lee*. Moreover, French CJ, Kiefel and Bell JJ in *NAAJA* adopted a ‘least infringing’ approach, whereby if there still remains a choice of ‘reasonably open’<sup>326</sup> constructions, the principle of legality demands that which ‘involves the least interference’<sup>327</sup> with the fundamental common law protection.

Fifth, the strongest proponent in favour of the use of extrinsic materials when it comes to the principle of legality is Gageler J. However, the French Court has predominantly given little or no weight to the extrinsic materials in this context. This is entirely consistent with the operation of the principle and past practice of the High Court. The words of the statute speak most loudly – clear and unambiguous language is meant to abrogate or curtail a fundamental common law protection. For the same reasons, human rights statements of compatibility issued in Victoria, ACT and the Commonwealth should have little impact on the operation of the principle, although this issue remains to be finally decided.

Sixth, a four-member majority of the French Court in *Cunneen* applied the principle of legality in support of a narrow construction of a definitional provision which did not of itself abrogate or curtail fundamental common law rights. This approach broadens the principle’s potential application, extending it to provisions which do not directly impact on fundamental common law provisions but which may bring into play other provisions that do so impact. In

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324 *Coco v The Queen* (1994) 179 CLR 427, 436, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ).

325 *Lee* (2013) 251 CLR 196, 311 [314] (Gageler and Keane JJ); *NAAJA* (2015) 256 CLR 569, 605 [81] (Gageler J); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 635–6 [422] (Keane J).

326 (2015) 256 CLR 569, 582 [11].

327 *Ibid.*

dissent, Gageler J warned against the pressure points that this ‘[u]nfocused’<sup>328</sup> approach may create.

On 30 January 2017, the Hon Justice Susan Mary Kiefel AC was appointed as Chief Justice. Assuming Kiefel CJ continues in the position until the mandated retirement age of 70 years,<sup>329</sup> her Honour will be at the helm for approximately seven years. Kiefel CJ’s views on the principle of legality are already well known – having sat during the entirety of the French Court (and prior). Her Honour’s views could be said to be representative of the French Court – she was rarely in dissent in major cases on the principle of legality. Her Honour was in the unanimously decided *Saeed*, the majority in *Lacey* and *NAAJA*, and one of the three judges in *Monis* whose joint judgment led to the lower court decision being upheld.<sup>330</sup> Her Honour formed the majority in *X7*, but exceptionally, was in the minority in *Lee* – maintaining a high threshold before the principle of legality can be rebutted by necessary implication.

The retirements of Gummow, Heydon, Crennan and Hayne JJ, and French CJ, have led to a significant change in the composition of the Court.<sup>331</sup> Together with Kiefel CJ (as her Honour now is), these retired Justices all sat in *Saeed* and were in the majority for *Lacey* (except Heydon J). Hayne J fell on the same side of the fence as Kiefel J in both *X7* and *Lee*. Of those in *NAAJA* who gave the principle of legality a central role to play, only Kiefel CJ and Bell J now remain.

With retirements of course, comes new appointees. We have seen that Gageler and Keane JJ were outliers in their approach to rebutting the principle of legality by necessary implication (but having said that, they formed part of the majority in *Lee*). Both Gageler and Keane JJ may be potential agents of change. Their Honours are inclined to give the principle of legality a constrained role. Gageler J also dissented as to the principle’s operation in *NAAJA* and *Cunneen*, and stood apart in obiter remarks in *R v IBAC*. For Nettle and Gordon JJ it is early days. It may be that they view the principle of legality as only one of the principles of statutory interpretation, which has no special prominence. This can perhaps be seen from their joint judgement in *NAAJA* and, arguably, in their willingness to join the majority judgment in *Cunneen*. But this is far from clear. It at least appears from *NAAJA* that their Honours do not subscribe to the Gageler and Keane JJ approach to necessary implication, and unlike Gageler J, eschew reliance on extrinsic materials to ascertain Parliament’s intention to abrogate or curtail fundamental common law protections. On the same date of Kiefel CJ’s appointment, the Hon Justice James Joshua Edelman was appointed to fill the remaining High Court vacancy. It remains to be seen what position his Honour will adopt on aspects of the principle of legality.

328 *Cunneen* (2015) 256 CLR 1, 35 [88].

329 *Australian Constitution* s 72.

330 Ultimately, the proceeding turned on the issue of constitutional validity – for which there was an even 3:3 split. In such rare scenarios, the decision appealed from is affirmed: *Judiciary Act 1903* (Cth) s 23(2)(a). As such, it was the joint judgment of Crennan, Kiefel and Bell JJ which led to the New South Wales Court of Criminal Appeal’s decision being upheld.

331 Kirby J retired in February 2009, subsequent to Robert French’s appointment as Chief Justice, but aside from *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, did not partake in any cases where the principle of legality was considered by the French Court.

In conclusion, the principle of legality has been recognised in Australian law from at least 1908. However, this article shows that various aspects of the principle are highly contestable. They are also closely interrelated. Such matters only recently came into focus in cases decided by the French Court. Despite the principle's long history, unanimity has been lacking in its operation. The principle of legality may have reached ascendancy under the French Court, in part, in rectification of the lack of human rights protections in Australia. Clearly though, the principle of legality presents its own complexities.

Appendix I: The French Court and Cases on the Principle of Legality

No	Case name and citation	Description	Date of decision	Treatment of principle
1	<i>K-Generation Pty Ltd v Liquor Licensing Court</i> (2009) 237 CLR 501	Issue as to constitutional validity of section 28A of <i>Liquor Licensing Act 1997</i> (SA), which required the licensing authority, Licensing Court and Supreme Court to take steps to maintain confidentiality of information classified by police as 'criminal intelligence'. French CJ considered that section 28A infringed the common law 'open court' or 'open justice' principle, and procedural fairness. Consisted to authorise but not require courts to exclude legal representatives when receiving evidence or hearing submissions about criminal intelligence: 512 [10], 520–1 [47]–[49], 524–5 [65], 526 [73].	2 February 2009	Not central to proceeding.
2	<i>R &amp; R Fazzolari Pty Ltd v Parramatta City Council</i> (2009) 237 CLR 603	Issue as to lawfulness of respondent Council's exercise of power to compulsorily acquire appellant's land without approval under the <i>Local Government Act 1993</i> (NSW). Section 188(1) provided that acquisition without approval could not occur if for purpose of re-sale. French CJ applied the principle of legality in relation to private property rights. Scope of section 188(1) broadly construed – requires focus on purpose of acquisition in relation to each individual parcel of land, rather than larger developmental objectives involving other parcels of land: 608 [5]–[6], 620 [45], 621–2 [53].	2 April 2009	Not central to proceeding.
3	<i>Seeed v Minister for Immigration and Citizenship</i> (2010) 241 CLR 252	Issue as to whether common law natural justice hearing rule excluded in relation to offshore visa applicants. Section 51A of the <i>Migration Act 1958</i> (Cth) provided that subdivision AB of division 3, part 2, was an 'exhaustive statement' of the natural justice hearing rule 'in relation to the matters it deals with'. Section 57 provided that certain relevant information must be given to the applicant, but that provision only applied to onshore visa applicants. Applying the principle of legality, French CJ, Gummow, Hayne, Crennan and Kiefel JJ held that natural justice hearing rule maintained in respect to offshore visa applicants: 259 [14]–[15], 271 [58]–[59].	23 June 2010	Central to proceeding. Principle applied.
4	<i>Cadia Holdings Pty Ltd v New South Wales</i> (2010) 242 CLR 195	Issue as to amount of royalties Minister entitled to for recovery of copper by appellants under mining leases. English law had recognised the Crown had prerogative right to mines. However, appellants argued that <i>Royal Mines Act 1688</i> (Imp) removed this prerogative. Dissenting judge in Court of Appeal had referred to this Act as 'constitutional' and should be construed broadly, French CJ observed in obiter that: the classification of some statutes as 'constitutional' in the United Kingdom has been used, albeit not without controversy, to attract to them the protection of a rule constraining their amendment by mere implication in a way which is analogous to the operation of the principle of legality in respect of common law rights and freedoms. At 217–18 [55] (citations omitted).	25 August 2010	Not central to proceeding.
5	<i>South Australia v Tolari</i> (2010) 242 CLR 1	Issue as to whether control order scheme for members of 'declared organisation' under <i>Serious and Organised Crime (Control) Act 2008</i> (SA) was constitutionally valid. Obiter dicta by French CJ on general rationale and operation of the principle of legality: [31]. Reliance on principle of legality by Heydon J (dissenting): 139–9 [362], 139–40 [365].	11 November 2010	Not central to proceeding.
6	<i>Plaintiff M61/2010E v Commonwealth</i> (2010) 243 CLR 319	Section 46A of <i>Migration Act 1958</i> (Cth) provided that Minister may determine that a person in the plaintiffs' position not prevented from making a valid visa application (known as 'lifting the statutory bar'). Section 195A provided that the Minister could grant a visa to a person detained in the plaintiffs' position. Minister had no duty to consider whether to exercise these powers. However, had decided to consider every case. Unanimously held no exclusion of procedural fairness by 'plain words of necessary intentment' – Minister obliged to accord procedural fairness upon deciding to consider whether to exercise these powers: 352 [74], 353–4 [78] (The Court). Procedural fairness breached.	11 November 2010	Central to proceeding. Principle applied.

No	Case name and citation	Description	Date of decision	Treatment of principle
7	<i>Hogan v Hinch</i> (2011) 243 CLR 506	Issue as to constitutional validity of section 42 of <i>Serious Sex Offenders: Monitoring Act 2005</i> (Vic), which empowered a court to make suppression orders in sex offender supervision proceedings. French CJ applied the principle of legality in relation to the common law 'open court' principle and freedom of speech, to narrowly construe the power to make suppression orders: 526 [5], 534–5 [27], 535–6 [29], 536–7 [32], 538 [36], 539–40 [41].	10 March 2011	Not central to proceeding.
8	<i>Lacey v Attorney-General (Qld)</i> (2011) 242 CLR 573	Issue as to construction of section 669A(1) of <i>Criminal Code</i> (Qld), which provided that the Attorney-General may appeal against sentence for an indictable offence, and Court of Appeal had 'unfettered discretion' to vary the sentence. Majority (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) applied the principle of legality, referring to the common law rule against double jeopardy and 'common law principles governing the administration of [criminal] justice': 583 [18]. 'Unfettered discretion' construed as requiring error on part of sentencing judge, before sentence may be varied: 583–4 [20], 598 [62].	7 April 2011	Central to proceeding. Principle applied.
9	<i>Momcilovic v The Queen</i> (2011) 245 CLR 1	Issue as to the interpretation of section 5 of the <i>Drugs, Poisons and Controlled Substances Act 1981</i> (Vic), a reverse onus provision, pursuant to section 32(1) of the <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic). Also issue as to whether section 5 applied to the offence of trafficking under section 71AC. Obiter dicta on the principle of legality by French CJ and Heydon J (dissenting) in ascertaining the operation of section 32(1). French CJ, Gummow and Hayne JJ applied principle of legality and section 32(1) in respect of the presumption of innocence, such that section 5 did not apply to section 71AC: 58 [73] (French CJ), 98–9 [197] (Gummow J, Hayne J agreeing).	8 September 2011	Central to proceeding. Principle applied.
10	<i>Australian Crime Commission v Stoddart</i> (2011) 244 CLR 554	Issue as to whether 'privilege' against spousal incrimination existed at common law and protected by principle of legality, and if so, whether abrogated by <i>Australian Crime Commission Act 2002</i> (Cth). Majority (French CJ, Gummow, Crennan, Kiefel and Bell JJ) held that there was no such privilege: 571 [41] (French CJ and Gummow J), 624 [191] (Crennan, Kiefel and Bell JJ). Decision of Full Court of Federal Court reversed.	30 November 2011	Central to proceeding. Principle not engaged.
11	<i>Australian Education Union v General Manager of Fair Work Australia</i> (2012) 246 CLR 117	Challenge by the appellant of another organisation's registration under the <i>Workplace Relations Act 1996</i> (Cth). Registration had previously been found invalid due to a deficiency in its rules. Section 26A of the <i>Fair Work (Registered Organisations) Act 2009</i> (Cth) subsequently enacted and purported to retrospectively validate registration. French CJ, Crennan and Kiefel JJ and Heydon J (in obiter) found that the presumption against retrospectivity was expressly rebutted: 133 [25], 134–5 [30], 137–8 [37]–[40] (French CJ, Crennan and Kiefel JJ), 157–8 [105] (Heydon J).	4 May 2012	Central to proceeding. Principle rebutted.
12	<i>Plaintiff S10/2011 v Minister for Immigration and Citizenship</i> (2012) 246 CLR 636	Distinguishes <i>Plaintiff M61/2010E v Commonwealth</i> . Four non-citizens who had been unsuccessful in obtaining visas to remain in Australia had variously sought for Minister to exercise powers, including section 195A, to dispense with certain requirements under the <i>Migration Act 1958</i> (Cth). Minister declined to consider exercising powers. Gummow, Hayne, Crennan and Bell JJ held that procedural fairness rebutted by necessary intent: 667–8 [98]–[100].	7 September 2012	Central to proceeding. Principle rebutted.
13	<i>Plaintiff M47/2012 v Director-General of Security</i> (2012) 251 CLR 1	Plaintiff sought to reopen High Court's finding in <i>Al-Kateb v Godwin</i> (2004) 219 CLR 562, that a person could be indefinitely detained under the <i>Migration Act 1958</i> (Cth). Majority (French CJ, Hayne, Crennan, Kiefel) considered it unnecessary and inappropriate to reconsider that decision. Gummow and Bell JJ in dissent considered that <i>Al-Kateb</i> was incorrectly decided: 61 [120] (Gummow J), 193 [533] (Bell J).	5 October 2012	Not central to proceeding.

No	Case name and citation	Description	Date of decision	Treatment of principle
14	<i>Newcrest Mining Ltd v Thornton</i> (2012) 248 CLR 555	Issue as to whether respondent barred from bringing second claim for damages for injuries suffered as a result of tort. Section 71(1)(b) of the <i>Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947</i> (WA) provided that if bringing separate actions against concurrent tortfeasors, cannot recover an aggregate sum of damages exceeding amount awarded by the judgment first given'. The first claim was settled by consent judgment, without determination of liability. Majority held this was not damages awarded by the judgment first given', and there was no bar on the second claim. French CJ held section 71(1)(b) infringes a plaintiff's common law rights to recover against concurrent tortfeasors, and should not be broadly construed: 566-7 [22], 570 [30]. Bell J held that '[t]he Court of Appeal was right to eschew a construction' which further confines a plaintiff's common law right to fully recoup against concurrent tortfeasors: 600 [126].	13 December 2012	Not central to proceeding.
15	<i>Attorney-General (SA) v Corporation of the City of Adelaide</i> (2013) 249 CLR 1	Section 667(1)(9)(XVI) of <i>Local Government Act 1934</i> (SA) conferred power on council to make by-laws 'generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants'. Council made by-laws relevantly prohibiting a person from preaching, canvassing, haranguing, and giving out or distributing printed matter, on a road without a permit. Second and third respondents preached religious and political beliefs. Challenged by-laws on basis they fell outside power, and constitutionally invalid. Majority held by-laws fell within power. French CJ found section 667(1)(9)(XVI) was sufficient to support making of the by-laws, applying the principle of legality and freedom of speech: 33 [46]. Heydon J (dissenting) found section 667(1)(9)(XVI) insufficiently clear to permit adverse effect on free speech: 70-1 [158]-[160].	27 February 2013	Not central to proceeding.
16	<i>Moris v The Queen</i> (2013) 249 CLR 92	Issue as to constitutional validity of section 471.12 of <i>Criminal Code</i> (Cth), which prohibits use of a postal or similar service in a way that reasonable persons would regard as menacing, harassing or offensive. Court of Appeal had construed 'offensive' as conduct 'calculated or likely to arouse significant anger, significant resentment, outrage, disgust or hatred'. Brennan, Kiefel and Bell JJ agreed, extending the principle of legality to implied freedom of political communication under the <i>Constitution</i> : 208-10 [327]-[334], 210-11 [336]. French CJ found the Court of Appeal's relatively narrow construction accorded with the principle of legality and common law freedom of expression: 127-8 [59].	27 February 2013	Central to proceeding. Principle applied.
17	<i>DPP (Cth) v Keating</i> (2013) 248 CLR 459	Defendant received social security payment from Centrelink. Defendant's income fluctuated, but did not inform Centrelink. Section 66A(2) of <i>Social Security (Administration) Act 1999</i> (Cth) subsequently enacted. Provided that person receiving social security payment must inform within 14 days of an event or change of circumstances that might affect payment. Section 66A(2) purported to operate from a past date. Issue as to whether defendant could be liable under <i>Criminal Code</i> (Cth) for failure to inform of change in circumstances. Unanimously held presumption against retrospectivity not rebutted by section 66A(2): 478-9 [47]-[49] (The Court).	8 May 2013	Central to proceeding. Principle applied.
18	<i>X7 v Australian Crime Commission</i> (2013) 248 CLR 92	Plaintiff charged with indictable offences and pending trial. Summoned to a compulsory examination pursuant to the <i>Australian Crime Commission Act 2002</i> (Cth). Declined to answer questions concerning the subject matter of the charges. Majority (Hayne, Bell, Kiefel JJ) held that to permit such examination would alter the 'accusatorial nature' of the criminal justice system. This would be a departure from the general system of law. It was not expressly or impliedly authorised by the Act: 131-2 [85]-[87] (Hayne and Bell JJ), 152-3 [157]-[160], [162] (Kiefel J, agreeing with Hayne and Bell JJ).	26 June 2013	Central to proceeding. Principle applied.
19	<i>Lee v NSW Crime Commission</i> (2013) 251 CLR 196	Appellants charged with offences and pending trial. Respondent sought Supreme Court orders pursuant to the <i>Criminal Assets Recovery Act 1990</i> (NSW) for compulsory examination of the appellants. High Court majority (French CJ, Crennan, Gageler and Keane JJ) distinguished <i>X7 v Australian Crime Commission</i> . Such examination was impliedly authorised by the Act: 203-4 [4], 230 [55]-[56] (French CJ), 257 [144] (Crennan J), 294 [268]-[269] (Gageler and Keane JJ).	9 October 2013	Central to proceeding. Principle rebutted.

No	Case name and citation	Description	Date of decision	Treatment of principle
20	<i>Daly v Thiering</i> (2013) 249 CLR 381	Issue as to whether appellant liable for damages for negligence for respondent's injuries in motor vehicle accident. Section 130A of the <i>Motor Accidents Compensation Act 1999</i> (NSW) barred recovery of damages for economic loss for treatment and care. Court of Appeal held section 130A did not bar recovery of voluntary services provided by respondent's mother. Explicit language would otherwise have to be used. Decision overturned by High Court. Principle of legality did not apply. In obiter dicta, 'jealous scrutiny' to preserve common law rights should not be applied to section 130A. Legislative intervention in the area of compensation and care for motor vehicle accidents is now 'commonplace'. 392 [32]–[33] (The Court).	6 November 2013	Not central to proceeding.
21	<i>Li v Chief of Army</i> (2013) 250 CLR 328	Military lawyer convicted of creating a disturbance on service land under section 33(b) of <i>Defence Force Discipline Act 1982</i> (Cth). Issue as to whether violence or threat of violence necessary for a 'disturbance' under the Act. Unanimously held not necessary. Rejected notion that narrower construction requiring violence or threat of violence should be preferred because of principle of legality. 336 [15], 337 [17] (The Court).	27 November 2013	Central to proceeding. Principle rebutted.
22	<i>Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship</i> (2013) 251 CLR 322	Plaintiff sought to reopen High Court's finding in <i>Al-Kateb v Godwin</i> , that a person could be indefinitely detained under the <i>Migration Act 1958</i> (Cth). Unanimous finding that the decision should not be reconsidered. Kiefel and Keane JJ considered there was much force in the view that the majority in <i>Al-Kateb</i> was correct. 381 [189]–[190].	12 December 2013	Not central to proceeding.
23	<i>Attorney-General (NT) v Emmerson</i> (2014) 253 CLR 393	Issue as to the constitutional validity of a drugs offences forfeiture scheme for property subject to a restraining order. Section 52(3) of the <i>Criminal Property Forfeiture Act 2002</i> (NT) governed when a restraining order ceased to have effect. A precondition of forfeiture was that the person be declared a drug trafficker by the Supreme Court. The first respondent raised the principle of legality and property rights to argue for a construction of section 52(3) that the restraining order had ceased, prior to the declaration being made. Thus, he could not be subject to the forfeiture scheme. Majority (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) held this construction would frustrate the objectives of the scheme. 440 [88].	10 April 2014	Central to proceeding. Principle rebutted.
24	<i>Tajjour v NSW</i> (2014) 254 CLR 508	Issue as to whether the offence of consorting under section 93X of the <i>Crimes Act 1900</i> (NSW) was constitutionally valid. Obiter dicta on principle of legality by French CJ (dissenting), and Keane J on its protection of freedom of speech and freedom of association. 544–7 [27]–[31] (French CJ), 600–1 [221]–[224] (Keane J).	8 October 2014	Not central to proceeding.
25	<i>Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd</i> (2015) 255 CLR 352	Issue as to whether statutory regulatory authority had power under the <i>Broadcasting Services Act 1992</i> (Cth) to make finding that offence was committed by commercial radio broadcasting licensee. Majority (French CJ, Hayne, Kiefel, Bell and Keane JJ) held there was no 'general principle' protected by the principle of legality that an administrative body does not determine whether conduct constitutes the commission of an offence. 371–2 [32]–[34].	4 March 2015	Central to proceeding. Principle not engaged.
26	<i>CPCF v Minister for Immigration and Border Protection</i> (2015) 255 CLR 514	Section 72(4) of <i>Migration Act 1958</i> (Cth) provided that a maritime officer may detain a person and take them to a place outside the migration zone, including a place outside Australia. Section 74 provided a maritime officer must not place a person in a place, unless the officer is satisfied that it is safe for the person to be there. Issue as to whether plaintiff's detention on Commonwealth vessel so as to take him to India was lawful, including whether section 72(4) required maritime officer give the plaintiff opportunity to be heard. Majority (French CJ, Crennan, Gageler and Keane JJ) held section 72(4) authorised the detention.	28 January 2015	Central to proceeding. Principle rebutted.



No	Case name and citation	Description	Date of decision	Treatment of principle
27	<i>ICAC v Curmeen</i> (2015) 256 CLR 1	Issue as to whether the appellant investigatory commission had jurisdiction under the <i>Independent Commission Against Corruption Act 1988</i> (NSW) in relation to conduct that adversely affects the mere efficacy of the exercise of an official function by a public official. Majority (French CJ, Hayne, Kiefel and Nettle JJ) held it had no such jurisdiction, relying on the principle of legality, since the commission's coercive powers would otherwise apply to a wide range of kinds and severity of conduct: 27–8 [54].	15 April 2015	Central to proceeding. Principle applied.
28	<i>R v Beckett</i> (2015) 256 CLR 305	Respondent had given forged documents and false evidence at compelled interview under <i>Taxation Administration Act 1996</i> (NSW). No judicial proceeding had been commenced. Issue of whether section 319 of <i>Crimes Act 1900</i> (NSW) requires tendency to pervert course of justice determined by Nettle J. Tentatively held that tendency to pervert is a necessary element of the offence, consistently with the principle of legality and the right to liberty: 324–5 [62].	23 October 2015	Not central to proceeding.
29	<i>North Australian Aboriginal Justice Agency Ltd v Northern Territory</i> (2015) 256 CLR 569	Issue as to the constitutional validity of so-called 'paperless arrest' regime under division 4AA of part VII of the <i>Police Administration Act</i> (NT), whereby police were authorised to arrest and detain a person for certain minor offences without a warrant. Period of detention 'up to 4 hours'. Majority (French CJ, Kiefel, Bell, Nettle and Gordon JJ) held that police were required to detain a person only for so long as is reasonable within that period. The common law did not authorise arresting or holding a person for questioning or further investigation of an offence, and a person must be taken before a justice of the peace or court as soon as reasonably practicable following arrest: 587 [23] (French CJ, Kiefel and Bell JJ), 648 [223] (Nettle and Gordon JJ).	11 November 2015	Central to proceeding. Principle applied.
30	<i>Commonwealth v Director, Fair Work Building Industry Inspectorate</i> (2015) 258 CLR 482	Issue as to whether regulator in civil penalty proceedings may make submissions on appropriate civil penalties. <i>Barbaro v The Queen</i> (2014) 253 CLR 58 unanimously distinguished. French CJ, Kiefel, Bell, Nettle and Gordon JJ held that party's entitlement in civil penalty proceedings, to make submissions as to relief sought, formed part of long-established general system of law. The Act did not expressly or impliedly exclude this entitlement: 509–10 [64].	9 December 2015	Central to proceeding. Principle applied.
31	<i>Tabcorp Holdings Ltd v Victoria</i> (2016) 328 ALR 375	Appellant granted long-term wagering and gaming licences. State Government restructured gaming industry, with appellant's licences not being renewed upon expiry. Appellant claimed entitled to a 'terminal payment' 'in the grant of new licences' under section 4.3.12(1) of the <i>Gambling Regulation Act 2003</i> (Vic). However, licences had been replaced under the restructure with 'gaming machine entitlements'. Unanimously held section 4.3.12(1) did not engage the principle of legality. Appellant's right to terminal payment was contingent, as distinct from vested. Right to terminal payment never arose: 389 [68] (The Court).	2 March 2016	Central to proceeding. Principle not engaged.
32	<i>R v Independent Broad-based Anti-corruption Commissioner</i> (2016) 256 CLR 459	Independent Broad-based Anti-corruption Commission investigation into conduct of certain police officers at a police station. Appellant police officers summonsed to public examination under <i>Independent Broad-based Anti-corruption Commission Act 2011</i> (Vic). Appellants had not yet been charged. Unanimously held Commission authorised by Act to examine appellants about subject matter of investigation. French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ distinguished <i>X7 v Australian Crime Commission</i> . The principle that an accused person cannot be required to testify does not extend to persons not charged: 471–2 [41]–[42], 473 [48].	10 March 2016	Central to proceeding. Principle not engaged.
33	<i>Minister for Immigration and Border Protection v SZSSJ</i> (2016) 259 CLR 180	Data breach whereby identities of thousands of asylum seekers in immigration detention disclosed via Departmental website. External consultant prepared report on data breach. Two asylum seekers requested unabridged version of report as a matter of procedural fairness. Procedural fairness 'operates unless clearly displaced by the particular statutory scheme': 669 [75] (The Court). But no denial of procedural fairness on the facts: 672 [92] (The Court).	27 July 2016	Central to proceeding. Principle applied.