THE COMMON LAW PRINCIPLE OF LEGALITY AND SECONDARY LEGISLATION

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I INTRODUCTION

The most famous contemporary exposition of the common law principle of legality comes from the judgment of Lord Hoffman in *R v Secretary of State for the Home Department; Ex parte Simms* ('*Ex parte Simms*'):

> the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[1]

Interestingly enough, the case itself concerned the application of the principle to secondary not primary legislation. There is an irony that a leading modern principle that has proved so influential in statutory interpretation arose in a case about the scope of a clause in secondary legislation but the courts have long exercised supervisory control over delegated legislation.[2] In modern times, *Ex parte Simms* is one of many English cases in which the principle of legality has been used to determine the validity of secondary legislation.[3] Important

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1 [2000] 2 AC 115, 131.

2 In *Toussaint v A-G (St Vincent and the Grenadines)* [2007] 1 WLR 2825, 2833 [18], the Privy Council traced the power (and duty) of courts to review delegated legislation to at least the *Bill of Rights 1688*, 1 Wm & M sess 2, c 2, art 9.

3 See, eg, *Ahmed v Her Majesty's Treasury* [2010] 2 AC 534 ('*Ahmed*') (Order in Council which allowed freezing of assets of people and banks without any rights of fairness or recourse to the courts held invalid because empowering statute did not authorise the executive to override such basic common law rights). English cases prior to *Ex parte Simms* used a very similar methodology but no express reference to the principle of legality. See, eg, *Raymond v Honey* [1983] 1 AC 1 ('*Honey*') (prison rule restricting prisoners' right of access to the courts held invalid because empowering statute did not clearly authorise such restrictions on such a basic common law right); *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 ('*Ex parte Witham*') (rule of court that greatly raised court fees held invalid because empowering statute did not clearly authorise such a restriction on a basic common law right).

Australian cases have also involved the application of the principle of legality to secondary legislation.[4] In one sense such cases reflect a longstanding tradition by which the courts will declare delegated legislation invalid if, for some reason, it conflicts with the terms of the statute under which it is made.[5] Relevantly, the leading Australian treatise on delegated legislation states that:

> the courts have adopted a number of basic assumptions with which they approach the interpretation of legislation. It is assumed, for example, that legislation will not allow the acquisition of property without compensation or deprive a person of the right to appeal against an adverse judicial decision. The assumptions are also applicable to delegated legislation, but their effect in regard to such legislation is very different from their effect in relation to Acts … with delegated legislation, if an assumption and the terms of the legislation are incompatible, it is the delegated legislation which must give way. Unless there is clear authority in an empowering Act for delegated legislation to override an assumption, the delegated legislation will be invalid.[6]

This correctly states the general common law approach (and interpretive principle) in our view – that legislation will only succeed in infringing fundamental common law rights and freedoms if expressed in unmistakably clear language – and how that approach applies to delegated legislation which infringes such common law rights. In these cases, the question is not whether the delegated legislation is expressed with sufficient clarity but whether the statutory power under which it is made is expressed with the clarity the courts require.[7] According to this view, delegated legislation may only infringe common law rights, freedoms and principles *if the empowering statute provides that power expressly or by necessary implication*. But the cases noted above (and others to be discussed below) suggest that the proper relationship between the principle of legality and secondary legislation remains equivocal, if not contested, in Australia.

In this article we aim to outline what that relationship is in Australia presently and what it ought to be as a matter of precedent, principle and logic. In order to do so, the article will proceed as follows. Part II examines the nature of delegated legislation and its capacity to infringe rights, freedoms and principles considered fundamental at common law. In Parts III–V we trace a long line of common law authorities and the contemporary renovation of the principle of legality in order to articulate what, in our view, is the proper relationship between

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4 See, eg, *Evans v New South Wales* (2008) 168 FCR 576 ('*Evans*') in the Federal Court and *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1 ('*City of Adelaide*') in the High Court.

5 H W R Wade and C F Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014) 724–5. Wade and Forsyth suggest that courts became much more willing to rigorously examine secondary legislation in the second half of the 19th century, when the volume and influence of secondary legislation expanded.

6 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 308 (citations omitted).

7 It has been suggested that there is 'an important distinction between reading down and not extending the ordinary meaning of a word' in legislation: *Nightingale v Blacktown City Council* (2015) 212 LGERA 99, 108 [34] (Basten JA). We note that this distinction is not relevant to our discussion because the clarity required by the principle of legality can be explained as either reading down the words of the relevant statute, or not extending them, or perhaps both.

the principle and secondary legislation. Our conception of that relationship is then considered and assessed in light of the approach to secondary legislation taken recently by senior appellate courts in Australia. Then, in Part VI, we highlight two interpretive issues that arise when the construction of secondary legislation implicates both the common law (the principle of legality) and the *Constitution* (the implied freedom of political communication). We conclude in Part VII with observations on some important issues regarding the proper relationship of the principle of legality and secondary legislation and how that interpretive approach might be further developed in light of the principle's contemporary normative justification.

II THE NATURE OF SECONDARY LEGISLATION (AND ITS CAPACITY TO INFRINGE FUNDAMENTAL RIGHTS)

Secondary legislation has many forms and many different names. Yet a quality common to all is that it is not debated in or enacted by Parliament. Secondary legislation is something else, though precisely what it is has long provoked debate. An influential early term used by Megarry was that of 'quasi-legislation', which he thought could cover the administrative rules, policies and announcements that proliferated in the post-war period.[8] A more recent term is 'soft law', which is used to describe policies, rules, guidelines, administrative manuals, disciplinary codes and the like which are promulgated by administrative agencies and bodies.[9] As with quasi-legislation, soft law is a description that can cover an extremely wide range of instruments used or promulgated by departments and agencies of government.[10] Soft law is generally accepted to extend beyond those instruments which are made under direct parliamentary authority.[11]

The clear basis of parliamentary authority is a key feature of the secondary legislation examined in this article. We are concerned with those instruments made under legislative authority to promulgate non-statutory rules, whether by the name of statutory rule,[12] legislative instrument,[13] subsidiary legislation,[14]

8 R E Megarry, 'Administrative Quasi-Legislation' (1944) 60 *Law Quarterly Review* 125.

9 This list draws on Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 3. The concept is examined in detail in Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Hart Publishing, 2016).

10 Robin Creyke and John McMillan note that the meaning of soft law remains vague and suggest that a definition should focus on the effect rather than status of such instruments: Robin Creyke and John McMillan, 'Soft Law v Hard Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 377, 380.

11 Greg Weeks, 'The Use and Enforcement of Soft Law by Australian Public Authorities' (2014) 42 *Federal Law Review* 181, 182–3.

12 A term used in the *Subordinate Legislation Act 1989* (NSW) s 3(1); *Subordinate Legislation Act 1994* (Vic) s 3(1).

13 A term used in the *Legislation Act 2003* (Cth) s 8; *Subordinate Legislation Act 1994* (Vic) s 3(1).

14 A term used in the *Interpretation Act 1984* (WA) pt VI.

council by-law,[15] or other such local government rules.[16] These and other forms of secondary legislation are made under parliamentary authority because the power to make such legislation is provided by laws which expressly allow the making of it. Parliament may provide the authority to make such instruments but does not itself make the law. The power to make secondary legislation is almost always accompanied by a parliamentary power to disallow that legislation.[17] There are, moreover, various forms of parliamentary scrutiny of the making of secondary legislation, but these oversight functions normally operate *after* secondary legislation has been made.[18]

Secondary or delegated legislation has long been used by governments but the concept of legislation made by a body other than Parliament does not sit easily with notions of parliamentary sovereignty or democratic accountability. Strong criticisms about the use of delegated legislation arose in the first part of the last century, mainly in response to the perceived growth of bureaucratic power. The influential work of Lord Hewart railed against the use of delegated legislation, which he saw as a key part of the bureaucratic plot to seize parliamentary power and create a 'new despotism' that would place administrative might above the sovereignty of Parliament and beyond the jurisdiction of the courts.[19] Those concerns sparked a parliamentary review, known as the Donoughmore Committee,[20] which rejected all of his criticisms. The report of that committee identified the following reasons to support the use of delegated legislation: the pressure on Parliament's time was so great that it needed relief from the detail required in legislation; modern legislation was often required to include a level of technicality that was thought better managed outside the proceedings of Parliament;[21] the legislative process was often not the best means of official response to urgent or unforeseen issues; the process to make delegated legislation was more flexible; delegated legislation provided a

15 A term used in many local government statutes such as the *Local Government Act 1999* (SA) ch 12 pt 1.

16 See, eg, *Local Government Act 1989* (Vic) pt 5, which terms such instruments as 'local laws'.

17 The most novel instance is the *Legislation Act 2012* (NZ) ss 4, 38. Section 4 defines 'legislative instrument' very broadly, to include rules, by-laws, various official notices, regulations and Orders in Council made under a statute. Section 38 enables all legislative instruments to be disallowed. The effect is to make virtually any instrument that is made under a statute and has general application disallowable by Parliament.

18 Secondary legislation is normally subject to disallowance by either House of Parliament. See, eg, *Interpretation Act 1984* (WA) s 42(2) (either House of Parliament may disallow any secondary legislation within 14 days of it being tabled).

19 Lord Hewart, *The New Despotism* (Ernest Benn, 1929) 14, 20. Influential criticisms of delegated legislation were also made by the Canadian scholar Willis, though he ultimately conceded the necessity of delegated legislation: John Willis, 'The Delegation of Legislative and Judicial Powers to Administrative Bodies: A Study of the Report of the Committee on Ministers' Powers' (1932) 18 *Iowa Law Review* 150.

20 United Kingdom, *Report of the Committee on Ministers' Powers*, Cmd 4060 (1932).

21 A refined version of this argument often used nowadays is that secondary legislation allows use of the expertise of officials outside Parliament, which can be essential in technical rules such as those needed for specialist regulation of financial markets, complex manufacturing industries etc: Andrew Green, 'Regulations and Rule Making: The Dilemma of Delegation' in Colleen M Flood and Lorne Sossin (eds), *Administrative Law in Context* (Emond Montgomery Publications, 2nd ed, 2013) 125, 127.

means for governments to experiment with novel approaches; and delegated legislation was especially suited to times of emergency.[22]

Many of these arguments are now made against primary legislation because there is increasing criticism about the volume and complexity of the legislation that Parliaments routinely enact.[23] The potential of many such laws to remove or restrict basic rights was recently the subject of a major inquiry by the Australian Law Reform Commission about the encroachment of rights and freedoms by federal legislation.[24] But the debate over the merit of secondary legislation raises further difficulties and has continued in modern times, though the issues have arguably refined. While many remain concerned about the rise of executive and administrative power, few would agree with Lord Hewart's suggestion that delegated legislation is the main or only source of that problem.[25] The modern criticisms of secondary legislation note that it 'often has more impact on the lives of ordinary citizens than do most full-blown acts of Parliament'.[26] Secondary legislation is also regularly criticised for its poor drafting, its great variety and vast number, and the related problem that it is often difficult to access.[27]

We add a further criticism that secondary legislation can adversely affect basic rights and freedoms. It should do so only in exceptional circumstances but such cautions may often not be observed. This possibility arises partly from the sheer volume of secondary legislation.[28] It permeates every level of modern government, particularly local government where the amount and influence of secondary legislation usually outstrips that of primary legislation. As a result, secondary legislation can infringe rights and freedoms and do so without attracting significant attention because it can easily pass unnoticed as one small aspect of the large amount of secondary legislation created by central and local governments. In our view, that raises a concern related to, but distinct from, the longstanding criticisms that the powers to make secondary legislation allow an impermissible delegation of legislative authority. Even if one fully accepts the virtues of secondary legislation, such as to provide technical or administrative

22 Very similar reasons for the use of delegated legislation are given in Pearce and Argument, above n 6, 6–9.

23 See, eg, D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 2–3. Pearce and Geddes briefly track the enormous growth in federal legislation in recent decades.

24 See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015).

25 See, eg, Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2012) 41, who concludes that the 'modern redistribution of legislative power from parliament to government is attributable to more than just the growth of subordinate legislation'.

26 Michael Taggart, 'From "Parliamentary Powers" to Privitization: The Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 *University of Toronto Law Journal* 575, 575.

27 Pearce and Argument, above n 6, 16–20. Many such arguments are made against primary legislation. See, eg, Alec Samuels, 'Ensuring Standards in the Quality of Legislation' (2013) 34 *Statute Law Review* 296, in which longstanding problems about the quality of legislation in the United Kingdom are examined.

28 Though it has also been noted that the growth of legislation has continued at a great pace, which may have fostered an increased use of the principle of legality. See *DPP v Kaba* (2014) 44 VR 526, 576 [175] (Bell J), citing Paul Finn, 'Statutes and the Common Law' (1992) 22 *University of Western Australia Law Review* 7, 11.

detail in particular areas of government, the willingness to accept such legislation may lessen when it infringes basic rights and freedoms. Secondary legislation which does so also sits uneasily with Lord Hoffmann's requirement in *Ex parte Simms* that Parliament must '*squarely* confront what it is doing'[29] when seeking to remove or narrow fundamental rights. Parliament hardly does so in secondary legislation because its role is typically limited to considering that legislation at some point after it is made. Our concern is therefore not that secondary legislation cannot remove or restrict basic rights and freedoms but that, as a general rule, it should not.

Parliaments and governments offer a range of indirect guidance on this issue. Parliamentary guidance takes the form of statutes which provide some standards for secondary legislation but none clearly prohibit secondary legislation from removing or restricting basic rights or freedoms. In some instances this guidance makes clear that legislative removal or restriction of important rights should, as a matter of principle, be done by statute rather than secondary legislation. The *Legislation Handbook* issued by the Department of Prime Minister and Cabinet notes that, while 'it is not possible or desirable to provide a prescriptive list of matters that should be included in primary legislation and matters that should be included in subordinate legislation', matters which 'have a significant impact on individual rights and liberties' should be implemented by statute rather than secondary legislation.[30] The *Legislation Handbook* also makes clear that this principle is a general one that should be decided by the relevant circumstances of each case.[31] Another example is the *Legislative Standards Act 1992* (Qld) which affirms several 'fundamental legislative principles' that underpin parliamentary democracy, including whether legislation 'has sufficient regard to rights and liberties of individuals'.[32] One indicator of the observance of that guiding principle is that secondary legislation 'does not adversely affect rights and liberties, or impose obligations, retrospectively'.[33] Separate legislation makes this and other fundamental legislative principles ones by which parliamentary committees should gauge the lawfulness of secondary legislation.[34] A similar arrangement prevails in Victoria, requiring the Scrutiny of Acts and Regulations Committee to report on whether secondary legislation '*unduly* trespasses on

29 [2001] 2 AC 115, 131 (emphasis added).

30 Department of Prime Minister and Cabinet, *Legislation Handbook* (1999) 3 <https://www.dpmc.gov.au/sites/default/files/publications/Legislation_Handbook.pdf>. In our view, the *Legislation Handbook* provides the framework within which more recent documents from other agencies must be understood. See, eg, Office of Parliamentary Counsel, *Guide to Reducing Complexity in Legislation* (17 May 2011) <https://www.opc.gov.au/about/docs/ReducingComplexity.pdf>. While that document might be seen to encourage placing more matters within secondary legislation, it does not detract from the guidance in the *Legislation Handbook* that legislation should be the vehicle to remove or restrict basic rights.

31 Department of Prime Minister and Cabinet, above n 30, 4. The *Legislation Handbook* elsewhere makes clear that secondary legislation is suited for matters of detail: at 34–5. A more elaborate explanation is given in Administrative Review Council, 'Report to the Attorney-General: Rule Making by Commonwealth Agencies' (Report No 35, 25 March 1992) 12–16.

32 *Legislative Standards Act 1992* (Qld) ss 4(1), (3).

33 *Legislative Standards Act 1992* (Qld) s 4(3)(g).

34 *Parliament of Queensland Act 2001* (Qld) s 93.

rights and liberties of the person previously established by law'.[35] A similar but very sparse example is the Senate Standing Order which guides the equivalent federal parliamentary committee. That Order provides that the Commonwealth Senate Standing Committee on Regulations and Ordinances should scrutinise secondary legislation to ensure 'that it does not unduly trespass on personal rights and liberties'.[36]

In recent times, many Australian Parliaments have created committees and procedures to scrutinise legislation for compliance with human rights.[37] These committees are primarily directed to the scrutiny of bills but typically also examine secondary legislation. The activities of these committees suggest that they can force government departments to clearly explain why secondary legislation that adversely affects basic rights was thought necessary. In some instances, the work of those committees can extract detailed information and explanation from government departments.[38]

There are similar processes governing the making and parliamentary scrutiny of secondary legislation in every Australian jurisdiction.[39] In our view, these parliamentary processes and statutes governing secondary legislation contain several apparent shortcomings. The guiding principles often say little about the rights and freedoms they are expressed to protect. While many statutes governing the making and review of secondary legislation list specific rights and freedoms,[40] none are exhaustive. It is also notable that these guiding principles for secondary legislation are exactly that – they indicate how secondary legislation *ought* to be made and reviewed. None have the force of law or automatic operation. In other words, these principles discourage rather than prohibit governments and their agencies from making secondary legislation removing or infringing basic rights. They similarly encourage parliamentary committees to examine secondary legislation to ensure that it does not remove or infringe basic rights but leave any decision on whether secondary legislation should be disallowed for contravening these guiding principles to the

35 *Subordinate Legislation Act 1994* (Vic) s 21(1)(f) (emphasis added). The same principle is contained in *Legislation Review Act 1987* (NSW) s 9(1)(b)(i).

36 Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, August 2015, O 23(3)(b) <http://www.aph.gov.au/Parliamentary_Business/Chamber_documents/Senate_chamber_documents/standingorders>.

37 The federal committee is examined in George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 *Statute Law Review* 58.

38 See, eg, the lengthy correspondence on a piece of secondary legislation, the *Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015* (Cth), in Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: 35th Report of the 44th Parliament* (2016) app 1 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2016/Thirty-fifth_report_of_the_44th_Parliament>.

39 Many are usefully examined by Pearce and Argument, above n 6, 59–126.

40 A common principle is the one against retrospective legislation. Many regimes governing secondary legislation require scrutiny and reporting of legislation that has retrospective effect, though usually only if this is done under a statute that does not clearly authorise the creation of secondary legislation with such an effect. See, eg, *Subordinate Legislation Act 1994* (Vic) s 21(1)(b)(i).

committee.[41] In many instances, that may mean that parliamentary committees undertake detailed inquiries but hesitate to recommend disallowance of secondary legislation.[42]

The value of parliamentary scrutiny should not be assumed without question. While it is clear that potential disallowance provides a 'powerful incentive' to ensure that secondary legislation does not breach principles that may make it unlawful,[43] the utility of parliamentary scrutiny processes is often doubted. A former Clerk to the House of Lords Committee responsible for the oversight of secondary legislation suggests there was 'widespread agreement that Parliament's consideration of secondary legislation is second rate'.[44] While many of the mechanisms just discussed can and do provide useful review, it is clear that the focus of Parliament is on primary rather than secondary legislation and this appears unlikely to change.[45]

The most notable feature of the guiding principles is that they presume secondary legislation can remove or narrow basic rights. An example is the Victorian provision noted above, which requires the Scrutiny of Acts and Regulations Committee to report on secondary legislation that unduly trespasses on rights and liberties. A mandate that the Committee is to report when secondary legislation unduly infringes rights and liberties implies that secondary legislation may duly, or perhaps the better term is 'appropriately', infringe basic rights. When can such an infringement by secondary legislation be appropriate? The statutes and rules governing secondary legislation and the parliamentary committees which review secondary legislation provide no clear answer. In our view, at least some of the solution is judicially provided by the principle of

41 This problem is not limited to the parliamentary scrutiny of secondary legislation because other parliamentary scrutiny committees, such as those which examine bills according to human rights principles, are also ultimately required to decide questions of compliance according to their own judgment. Importantly, this approach excludes any meaningful role for the courts. See Williams and Burton, above n 37, 91–2. But for an argument that the court may still have an important role in this context see Dan Meagher, 'The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the Courts' (2014) 42 *Federal Law Review* 1, 13–24.

42 The example mentioned above in Parliamentary Joint Committee on Human Rights, above n 38, is a useful illustration. The report of the Parliamentary Joint Committee on Human Rights concluded that the *Telecommunications (Interception and Access) Amendment (Public Interest Advocates and Other Matters) Regulation 2015* (Cth) might be incompatible with Australia's obligations under international human rights law but the report neither recommended disallowance of the regulation nor any further action: at 25.

43 Jonathan Hunt, 'The Regulations Review Committee' [1999] *New Zealand Law Journal* 402, 404.

44 Philippa Tudor, 'Secondary Legislation: Second Class or Crucial?' (2000) 21 *Statute Law Review* 149, 150.

45 See, eg, Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015). That detailed work examines how Parliaments can better protect rights and concludes by providing a lengthy statement of draft principles and guidelines that essentially provide a 'best practice' model for Parliaments' consideration and protection of rights. The sole mention of secondary legislation, states that '[i]f resources permit' a suitable committee 'could also scrutinise secondary legislation for human rights compatibility'. They further state that 'parliaments should also ensure that mechanisms exist for identifying significant human rights issues raised by secondary legislation' if '*resources permit*': at 492 (emphasis added). Such statements confirm that many scholars regard secondary legislation as something of an afterthought.

legality. The next Part explains the longstanding authority to support that proposition.

III THE PROPER RELATIONSHIP BETWEEN THE PRINCIPLE OF LEGALITY AND SECONDARY LEGISLATION

Pearce and Argument note that, while the jurisdiction of the courts to review and declare invalid secondary legislation is longstanding, the courts were traditionally reluctant to exercise that power over secondary legislation made by those such as ministers and local councils 'whose primary accountability lay to their electors'.[46] At the same time, however, many key cases about secondary legislation concerned local council by-laws and left no doubt that courts could and would, if necessary, strike down secondary legislation promulgated by local councils.[47] An important early case from 1922 was the High Court's decision in *City of Melbourne v Barry* ('*Barry*').[48] It involved a successful challenge to the validity of a council by-law that provided:

> No processions of persons or of vehicles … shall, except for military or funeral purposes, parade or pass through any street unless with the previous consent in writing of the Council given under the hand of the Town Clerk and by the route specified in such consent, and unless and until the recipient of such consent has given at least twenty-four hours' notice with particulars of such consent and route to the officer in charge of the City Police.[49]

The by-law was held ultra vires the lawmaking powers provided by section 6 of the *Police Offences Act 1915* (Vic) and section 197 of the *Local Government Act 1915* (Vic), even though the latter permitted the making of council by-laws for the purpose of regulating traffic and processions.

There were at least three reasons offered by the Court for the by-law's invalidity. First, Isaacs J held that the power to *regulate* processions did not authorise the Council to *prohibit* processions except those it might allow.[50] Justice Higgins added that this complete prohibition of processions (save for military or funeral processions) was in excess of the power conferred by section 197 of the *Local Government Act 1915* (Vic) because 'if valid, the Council will be enabled to prohibit a procession because of its nature or purpose'.[51] Secondly, Higgins J held that even if section 197 did authorise a by-law that prohibited a procession on account of its nature or purpose, it was still invalid for impermissibly delegating this power to an 'ordinary council meeting' contrary to the terms of the rule making power.[52] Finally, and most relevantly for present

46 Pearce and Argument, above n 6, 174.
47 The willingness of courts to do so has a long history. An early such example is *City of London v Wood* (1702) 12 Mod 669, 678; 88 ER 1592, 1597 (Holt CJ).
48 (1922) 31 CLR 174.
49 Ibid 175.
50 Ibid 199–200.
51 Ibid 207–8.
52 Ibid 208.

purposes, Isaacs J and Higgins J noted that the by-law infringed the common law right to free use of the highway and both reasoned that the interference with such a right raised different, harder-edged concerns than conventional notions of ultra vires. Justice Higgins held 'that any interference with a common law right cannot be justified except by statute – by express words or necessary implication'.[53] Justice Isaacs said that 'citizens are entitled to know to what extent their common law rights are restricted'.[54] He reasoned:

> Common justice … dictates that except where the Legislature has clearly empowered a council to make its own unfettered and unregulated will at the moment the test of legality or illegality, a council having the power of 'regulating by by-law' should state its requirements in the by-law as explicitly as circumstances reasonably permit. Otherwise, how are individuals to attempt to conform to law without a total surrender of their right innocently and unaggressively to use the King's highway in company on occasions that frequently represent great and important national, political, social, religious or industrial movements or opinions? It would require very explicit words in an Act of Parliament to induce me to believe the Legislature, in the name of regulation, contemplated such unregulated authority as is assumed by the by-law before us.[55]

In contemporary parlance, once the relevant by-law engaged a common law right both Justices directly applied the principle of legality to the lawmaking power. And in the absence of express words or necessary implication in the empowering statute to prohibit the free use of highways, that common law right could not be infringed by a regulation made under a power that was expressed in only general terms. That, in our view, is the correct approach to the construction of a lawmaking power when secondary legislation sourced to it engages fundamental common law rights and freedoms.

Instructive also is the 1960 High Court case of *Lynch v Brisbane City Council* ('*Lynch*').[56] In it Dixon CJ outlined the proper scope of lawmaking authority conferred on local councils empowered to make ordinances for promoting and maintaining the peace, comfort, welfare, and convenience of the city and its inhabitants.[57] The empowering statute provided that ordinances could be made on

> generally all … matters, and things in [the Council's] opinion necessary or conducive to the good government of the City and the wellbeing of its inhabitants.[58]

This power was held to support the validity of an ordinance that provided:

> A person shall not use a stall on any land, for the display or sale of goods, unless there is subsisting licence under this Ordinance for that stall on that land …[59]

The appellant owned and operated an unlicensed fruit and vegetable stall in a private laneway in Brisbane and failed in his challenge to the ordinance.

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53 Ibid 206.
54 Ibid 200.
55 Ibid 197.
56 (1961) 104 CLR 353.
57 *The City of Brisbane Acts 1924–1958* (Qld) s 36(2).
58 *The City of Brisbane Acts 1924–1958* (Qld) s 36(3).
59 Brisbane City Council, *Ordinances of the Brisbane City Council*, ch 23 ordinance 33a.

Lynch is significant for a number of reasons. It is considered the leading Australian authority on the proper scope of '[t]he general power to make by-laws for "the good rule and government" of a municipality' which is 'a frequent empowering provision found in local government legislation'.[60] Chief Justice Dixon acknowledged that 'they are expressions of a kind which in such contexts have caused courts difficulty for a very long time' and contain words that are 'wide and indefinite'.[61] Even so, they should be given an ordinary (not narrow) construction which *in the context of the relevant statute under consideration* 'gave a power to lay down rules in respect of matters of municipal concern'.[62] He continued:

> The words are not to be applied without caution nor read as if they were designed to confide to the city more than matters of local government. They express no exact limit of power but, directed as they are to the welfare and good government of a city and its inhabitants, they are not to be read as going beyond the accepted notions of local government.[63]

To ascertain the proper scope of such lawmaking powers (and by-laws made pursuant to them), Dixon CJ emphasised the centrality of statutory context. That is a sound approach to the interpretation (and characterisation) of secondary – indeed all – legislation. It was endorsed recently in the judgments of Hayne J and Bell J in *Attorney-General (SA) v City of Adelaide City Corporation* ('*City of Adelaide*').[64] But what is interesting for present purposes is that in *Lynch* Dixon CJ did not consider whether the common law rights presumption (now termed the principle of legality) had any role to play in construing the scope of the relevant lawmaking power. That is the logically prior interpretive issue in our view. There may of course have been a simple explanation for this. If there was no common law right to engage in trade and commerce, the city ordinance did not engage the rights presumption. There was, however, High Court authority at the time suggesting otherwise.[65]

There is, then, a clear basis to suggest that Dixon CJ in *Lynch* ought to have considered the applicability of the rights presumption (principle of legality) to the relevant parts of the empowering statute noted above. And that is so notwithstanding the soundness of the general approach to the interpretation and characterisation of secondary legislation that his Honour outlined. Moreover, it may well have been the case that the subject matter of the empowering statute in *Lynch* and the purposes for which it conferred lawmaking power on the Brisbane City Council *necessarily implied* that some interference with common law rights and freedoms – such as the freedom to carry on one's own business and trade – *was* authorised. That is, Chief Justice Dixon's construction of the scope of the lawmaking power in *Lynch* may have been correct in that local government

60 Pearce and Argument, above n 6, 231.
61 *Lynch* (1961) 104 CLR 353, 362.
62 Ibid 364.
63 Ibid.
64 *City of Adelaide* (2013) 249 CLR 1, 52–4 [101]–[106] (Hayne J), 90 [224] (Bell J).
65 *Commonwealth v Progress Advertising and Press Agency Co Pty Ltd* (1910) 10 CLR 457, 464 (O'Connor J).

context in any event. Indeed, the necessary implication point in the context of empowering statutes that provide lawmaking powers to local councils is an important one. We will consider it in more detail below. The issue is not whether common law rights and freedoms can be limited or abrogated by secondary legislation – clearly enough they can be. But as the High Court made clear in *Barry*, in order to do so the empowering statute must provide that power by express words or necessary implication.

The High Court employed a similar approach to Dixon CJ in *Lynch* in its 1984 decision in *Foley v Padley* ('*Foley*').[66] The case involved an unsuccessful challenge to a by-law made by the City of Adelaide Council pursuant to section 11(1)(a) of the *Rundle Street Mall Act 1975* (SA). This gave the Council power to make by-laws

> regulating, controlling or prohibiting any activity in the Mall or any activity in the vicinity of the Mall that is, in the opinion of the Council, likely to affect the use or enjoyment of the Mall …

The appellant was charged with giving out an item of printed material to a passer-by in the Rundle Mall without the Council's permission contrary to the following by-law:

> 8. No person shall give out or distribute anything in the Mall or in any public place adjacent to the Mall to any bystander or passer-by without the permission of the council.

The by-law operated to interfere with the appellant's common law rights to liberty and free expression. Chief Justice Gibbs noted that effect and also that a 'principle of legality'-style argument was made by counsel for the appellant, who submitted 'that a statutory provision will not be construed as interfering with the liberty of the individual unless an intention to do so clearly appears, and as a general proposition that is correct'.[67] But Gibbs CJ was concerned that 'the unrestrained exercise in or near the Mall of the freedom to speak or communicate opinions might, in some circumstances, have an adverse effect on the use or enjoyment of the Mall'.[68] That was surely correct as a factual and practical matter. It led to the following construction of the lawmaking power conferred by section 11:

> The legislature has left it to the Council to decide whether it should regulate, control or prohibit an activity if, in the opinion of the Council, it is likely to affect the use or enjoyment of the Mall, even if the regulation, control or prohibition will to some extent limit the freedom of speech or communication of those engaging in the activity … In the end, the question for the courts is simply whether the Council could reasonably have formed the opinion that the activity is likely to affect the use or enjoyment of the Mall.[69]

But as the by-law engaged fundamental common law rights (as Gibbs CJ himself noted) that was *not* the only interpretive question that required judicial determination. The logically prior question was whether the lawmaking power

66 (1984) 154 CLR 349.
67 Ibid 355.
68 Ibid.
69 Ibid.

conferred on the Council by section 11 permitted the infringement of common law rights and freedoms. And as the High Court made clear in *Barry*, the empowering statute must do so by express words or necessary implication. There was certainly nothing express in the wording of section 11 that did so. On the contrary, the defining characteristic of section 11 was the breadth of the lawmaking power it conferred on the Council. Justice Murphy noted as much in his dissenting judgment when he explained that '[i]f freedom of expression is to be maintained by-laws which may be used to restrict expression must be clearly authorized by the enabling legislation'.[70] But, again, one might reasonably argue that it is necessarily implied from the very nature and purpose of this species of local government lawmaking power that at least *some* interference with common law rights (such as speech, communication and liberty) is authorised to regulate, control or prohibit activities that may jeopardise the use and enjoyment of the Mall. Even so, this kind of 'principle of legality'-style analysis, which was required in our view, was entirely absent from the majority judgments in *Foley*.

On the other hand, it might be argued that *Foley* was decided before (what is now termed) the principle of legality began its contemporary reassertion and strengthening. That is certainly true. It was a trio of cases decided by the High Court between 1987 and 1992 when Sir Anthony Mason was Chief Justice that, arguably, heralded this common law (rights) renaissance.[71] But the (strong) interpretive presumption that legislation is not intended to interfere with common law rights and freedoms had long been part of Australian law.[72] It is usually traced to the following passage in the judgment of O'Connor J in the High Court case of *Potter v Minahan* decided in 1908,[73] where his Honour stated:

> 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.[74]

And as noted, Isaacs J and Higgins J applied that principle in 1922 to the lawmaking power considered in *Barry* when the impugned by-law engaged the common law right to free use of the highway. But perhaps *Foley* was decided at the time when judges (in Australia at least) were on the cusp of extending the catalogue of rights beyond the traditional common law concerns of life, liberty and property to include civil and political rights such as freedom of speech. As

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70 Ibid 362.

71 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514; *Bropho v Western Australia* (1990) 171 CLR 1; *Coco v The Queen* (1994) 179 CLR 427 ('*Coco*').

72 We leave aside the suggestion by Australian judges that this presumption has greatly weakened in the face of the increasing tendency of Parliaments to pass rights infringing legislation. See, eg, *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298–9 [27]–[30] (McHugh J); *R v Janceski* (2005) 64 NSWLR 10, 23–4 [62]–[68] (Spigelman CJ).

73 (1908) 7 CLR 277. Although the principle is generally traced in Australia to *Potter v Minahan*, Basten JA recently noted that its application in that case 'was in fact quite muted': *Nightingale v Blacktown City Council* (2015) 212 LGERA 99, 108 [34].

74 *Potter v Minahan* (1908) 7 CLR 277, 304 (citations omitted).

Lord Browne-Wilkinson observed extra-judicially in 1992, 'the courts when construing statutory powers to interfere with personal freedoms, have not strictly applied the same strict criteria applied to penal or taxing statutes'.[75] For a good part of the 20th century the principle of legality was applied by common law judges 'in favour of a narrow vision of classical economic liberalism and against incursions from a modern, collectivist state'.[76]

However, at the time *Foley* was decided there was very recent English authority that considered (and correctly applied in our view) the principle of legality in the context of secondary legislation. That was the 1983 case of *Honey*,[77] where the House of Lords examined a prison rule. A prisoner was involved in legal proceedings and sent a letter to his solicitors about the case. The prison governor read the letter and decided it should not be sent as it contained in his view material not relevant to the proceedings. He did so under prison rules that among other things provided that

> every letter or communication to or from a prisoner shall be read or examined by the governor or an officer deputed by him, and the governor may, at his discretion, stop any letter or communication on the ground that its contents are objectionable or that it is of inordinate length.[78]

The prisoner then tried to send another letter to his solicitors containing material to begin an application for leave to commit the governor to prison for contempt of court for halting the first letter.[79] The prison governor stopped that correspondence as well.[80]

In *Honey* the rule-making power was conferred by section 47 of the *Prison Act 1952* (UK), which allowed the Home Secretary to 'make rules for the regulation and management of prisons … and for the classification, treatment, employment, discipline and control of persons required to be detained therein'.[81] The case seemed hopeless because even recent English cases had poured scorn on legal actions from 'disgruntled prisoners'[82] but the House of Lords approached the case as one of high principle.[83] In order to determine whether the prison rules

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75 Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] *Public Law* 397, 398.

76 Claudia Geiringer, 'The Principle of Legality and the *Bill of Rights Act*: A Critical Examination of *R v Hansen*' (2008) 6 *New Zealand Journal of Public and International Law* 59, 88.

77 [1983] 1 AC 1.

78 This was the (now repealed) r 33(3) of the *Prison Rules 1974* (UK).

79 That application ultimately failed for a lack of clear evidence: *Honey* [1983] 1 AC 1, 13–14 (Lord Wilberforce), 15–16 (Lord Bridge).

80 The (also now repealed) r 34(8) of the *Prison Rules 1964* (UK) prohibited prisoners from communicating 'with any person' about legal or other business except with leave of the Home Secretary. These main rules remain in force but rules restricting prisoners' correspondence were amended then abolished due to a series of cases that occurred after *Honey*.

81 The section remains in force and almost unchanged.

82 A phrase used by Lord Denning MR in *Becker v Home Office* [1972] 2 QB 407, 418.

83 There was emerging support for that because in *R v Board of Visitors of Hull Prison; Ex parte St Germain* [1979] QB 425, 455, Shaw LJ stated that 'despite the deprivation of his general liberty, a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration'. The right of prisoners to have access to lawyers and the court was subsequently accepted in *R v Secretary of State for the Home Department; Ex parte Anderson* [1984] QB 778, 790G, 793–4 (Robert Goff LJ).

authorised the actions of the prison governor, the House of Lords *first* had to ascertain the scope of this lawmaking power. Relevantly, Lord Wilberforce noted that the prisoner had a (common law) right 'to have unimpeded access to a court'.[84] To this Lord Bridge added 'that a citizen's right to unimpeded access to the courts can only be taken away by express enactment'.[85] This led Lord Wilberforce to construe the rule-making power as

> a section concerned with the regulation and management of prisons and, in my opinion, is quite insufficient to authorise hindrance or interference with so basic a right. The regulations themselves must be interpreted accordingly, otherwise they would be ultra vires.[86]

Lord Bridge similarly held that the 'rule-making power is manifestly insufficient for such a purpose and it follows that the rules, to the extent that they would fetter a prisoner's right of access to the courts, and in particular his right to institute proceedings in person, are ultra vires'.[87] In contemporary parlance, once the prison rules were held to engage a fundamental right at common law, the House of Lords applied the principle of legality to section 47. This reasoning operated to interpretively protect the prisoner's common law right to access the courts as the lawmaking power lacked the express words or necessary implication required to allow its interference by prison rules. The decision in *Honey* demonstrates the potency of the principle of legality in the context of secondary legislation.

It is fascinating to note in this regard that something similar was emerging in the common law of South Africa when the apartheid regime still held power. It was outlined by Mureinik in his 1985 article 'Fundamental Rights and Delegated Legislation' and termed (by him) 'the rule requiring specific authority'.[88] Mureinik argued that basic rights could be overridden by secondary legislation (which he termed 'inferior law') only when that legislation was made under statutory authority that clearly authorised such override. He explained:

> legislative consent to the destruction of a fundamental right cannot be inferred from a general power: it can be inferred only from an empowering provision that envisages the destruction of that right. In other words, an inferior law that destroys a fundamental right is intra vires its empowering statute only if that statute, whether expressly or impliedly, specifically envisages the destruction of that fundamental right by an inferior law and, although this almost inevitably follows, acquiesces in that destruction. We might call this version of the doctrine that protects fundamental rights the rule requiring specific authority.[89]

Unsurprisingly, Mureinik cited *Honey* as compelling (English) common law authority for the rule.[90] He then traced its emergence and status in South African common law through the analysis of a series of cases decided between

84 *Honey* [1983] 1 AC 1, 12.
85 Ibid 14.
86 Ibid 13.
87 Ibid 15.
88 Etienne Mureinik, 'Fundamental Rights and Delegated Legislation' (1985) 1 *South African Journal on Human Rights* 111, 112.
89 Ibid.
90 Ibid.

1958 and 1983.[91] The common feature of these cases, at least to our eyes, was the government's use of general lawmaking powers to enact secondary legislation to deprive native (or black) South Africans of their fundamental rights. In each of the cases the rule requiring specific authority was endorsed as a matter of common law principle.[92] Yet Mureinik was alarmed at how it was applied in *Mandela v Minister of Prisons*,[93] a case that involved interference with a prisoner's fundamental right of access to their legal adviser by regulation.[94] Another common feature of these cases is that they concerned prisoners and arguably show the germs of the normative element of the principle of legality recently identified by Lim. He argued that the principle was not triggered by fundamental rights but certain 'vulnerable' rights which were not sufficiently protected by the political process.[95]

A useful illustration of Mureinik's arguments was provided by an English case which also shows the evolution of the House of Lords reasoning from *Honey* to *Ex parte Simms*. That case was *Ex parte Witham*,[96] where the Divisional Court declared invalid a rule which increased court filing fees and removed various powers for courts to reduce or waive fees for litigants in person on the ground of financial hardship. The Divisional Court held that the right of access to the courts was a fundamental one and that the power under which the relevant rule was made was not expressed with sufficient clarity to enable the making of a rule that significantly restricted that basic right. That part of the case sits comfortably with *Honey* but Laws J made two further important findings. First, the right of access to the courts was so important that its removal could never be authorised by implication. Secondly, it was near impossible to conceive 'a form of words capable of making it plain beyond doubt … that the provision in question prevents [someone] from going to court'.[97] This approach is reflected partly in the unmistakable clarity of words demanded by *Ex parte Simms* because that requirement essentially precludes the removal of basic rights by implication. The important refinement of *Ex parte Simms* was to accept the possibility that suitably clear words could authorise the removal or restriction of basic rights.

91 The cases were *R v Slabbert* [1956] 4 SA 18 (Provincial Division); *R v Heyns* [1959] 3 SA 634 (Appellate Division); *Singapi v Maku* [1982] 2 SA 515 (Local Division); *Mandela v Minister of Prisons* [1983] 1 SA 938 (Appellate Division).

92 The rule requiring specific authority is now constitutionalised in South Africa. See *Dawood v Minister of Home Affairs* [2000] 3 SA 936 (Constitutional Court). Thanks to Theunis Roux for bringing this case to our attention.

93 *Mandela v Minister of Prisons* (1983) 1 SA 938 (Appellate Division). The prisoner concerned was the future President of South Africa, Nelson Mandela.

94 Mureinik, above n 88, 121–3.

95 Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372. Our brief description of Lim's argument does not do full justice to his subtle analysis.

96 [1998] QB 575.

97 Ibid 586 (Laws J).

Lord Hoffmann did not explain what words might achieve that result but, unlike Laws J, he could at least conceive the possibility.[98]

In this Part we have argued that when the ordinary or grammatical meaning of secondary legislation engages fundamental rights this brings (what is now termed) the principle of legality into interpretive play. If possible, it *must* be applied to lawmaking powers in statute. The upshot is that fundamental common law rights, freedoms and principles can only be infringed by secondary legislation if the empowering statute provides that power by express words or necessary implication. The stream cannot rise above its source in this regard. In the absence of this specific authority secondary legislation is either ultra vires the statutory lawmaking power or, if possible, must be read down to protect the common law right or freedom in play. That, as a matter of principle and logic, is the proper relationship between the principle of legality and secondary legislation in our view.

The analysis above demonstrates that in *Barry* and *Honey* we have clear and high authority that this interpretive approach has long been recognised at common law in Australia and the United Kingdom. It may be difficult to reconcile the decisions of *Lynch* and *Foley*, or least their interpretive reasoning, with that approach. The majority judges in *Lynch* and *Foley* did not consider the applicability of the rights presumption though the impugned secondary legislation in both cases did engage fundamental common law rights. We did, however, suggest that one might reasonably make the following argument: that in the local government context it *may* be the case that it is *necessarily implied* from the nature and purposes for which lawmaking power is provided that at least *some* interference with common law rights is authorised to promote and maintain the convenience, comfort and safety of the area and its inhabitants. A more generous assessment is that the High Court decided *Lynch* and *Foley* before the renaissance of the principle of legality in contemporary Australian law. As concern about rights has risen, tolerance for their infringement has lessened, so *Lynch* and *Foley* are weakened if not overtaken by history. It is to the significance of this common law development in the construction of secondary legislation that we now turn.

98 Interestingly, *Ex parte Witham* was not mentioned by the Lords in *Ex parte Simms* but it was expressly approved in *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 575 (Lord Browne-Wilkinson) ('*Ex parte Pierson*').

IV THE CONTEMPORARY RENOVATION OF THE PRINCIPLE OF LEGALITY AND SECONDARY LEGISLATION

The contemporary renovation and strengthening of the principle of legality in Australian law is well documented.[99] Chief Justice Gleeson, for example, said that '[i]n a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament'.[100] And French CJ, writing extra-judicially, has said 'the interpretive rule can be regarded as "constitutional" in character even if the rights and freedoms that it protects are not'.[101] The authoritative contemporary statement as to the nature and scope of the principle in Australian law comes from the joint judgment of Mason CJ, Brennan, Gaudron and McHugh JJ in *Coco v The Queen* ('*Coco*'):

> 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.[102]

But its most famous exposition, as noted, comes from the judgment of Lord Hoffman in *Ex parte Simms*. That case involved a successful challenge to prison rules that infringed the common law right to freedom of expression of the relevant prisoners. The principle of legality was applied to the same lawmaking power – section 47 of the *Prison Act 1952* (UK) – considered in *Honey* and with the same result. Relevantly, Lord Hoffman concluded:

> What this case decides is that the principle of legality applies to subordinate legislation as much as to Acts of Parliament. Prison regulations expressed in general language are also presumed to be subject to fundamental human rights. The presumption enables them to be valid. But, it also means that properly construed, they do not authorise a blanket restriction which would curtail not merely the prisoner's right of free expression, but its use in a way which could provide him with access to justice.[103]

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99 See, eg, *Lacey v A-G (Qld)* (2011) 242 CLR 573; *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449; Lim, above n 95; Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36 *Sydney Law Review* 413.

100 *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [20].

101 Chief Justice Robert French, 'Protecting Human Rights without a Bill of Rights' (2010) 43 *John Marshall Law Review* 769, 788.

102 (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted), 446 (Deane and Dawson JJ).

103 *Ex parte Simms* [2000] 2 AC 115, 132.

This approach to the construction of empowering statutes when common law rights and freedoms are in play was outlined by the House of Lords in the earlier, important, decisions of *R v Secretary of State for the Home Department; Ex parte Leech* ('*Ex parte Leech*')[104] and *R v Secretary of State for the Home Department; Ex parte Pierson* ('*Ex parte Pierson*').[105] The former case, again, concerned whether prison rules that infringed a prisoner's common law rights to legal professional privilege and access to the courts were authorised by section 47 of the *Prison Act 1952* (UK). The impugned prison rule provided the governor with an unrestricted power to read and examine prisoner letters on the ground that its contents are objectionable or of inordinate length.[106] Steyn LJ, for the Court, held

> that section 47(1) … by *necessary implication* authorises some screening of correspondence passing between a prisoner and a solicitor. The authorised intrusion must, however, be the minimum necessary to ensure that the correspondence is in truth bona fide legal correspondence.[107]

The interpretive issue was the *extent* to which section 47 authorised by necessary implication prison rules to interfere with the common law rights and freedoms of the prisoners in order to achieve their purpose. In this regard, the Court held that the rule went considerably beyond what was necessary to ensure that letters between a prisoner and their lawyer were bona fide legal correspondence.[108] It found no 'demonstrable need' for such an unrestricted power and held the rule ultra vires the lawmaking power as a consequence.[109] In doing so, a form of balancing and justification analysis was undertaken by Steyn LJ. For example, the State had to justify why such a broad prison rule was necessary to achieve the legitimate statutory objective of ensuring the letters of prisoners were bona fide legal correspondence.[110] In addition, the State had to establish that the rule did so with the 'minimum necessary' interference with the common law rights of the prisoners.[111] It failed on both counts.

In *Ex parte Pierson* – a case decided just prior to *Ex parte Simms* – the House of Lords confirmed once more the proper relationship between the principle of legality and secondary legislation. Lord Browne-Wilkinson traced the relevant line of authorities (including *Honey* and *Ex parte Leech*) and said they established the following proposition:

> A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.[112]

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104 [1994] QB 198.
105 [1998] AC 539.
106 *Prison Rules 1964* (UK) r 33(3).
107 *Ex parte Leech* [1994] QB 198, 217 (emphasis added).
108 Ibid 214 (Steyn LJ).
109 Ibid 213 (Steyn LJ).
110 Ibid.
111 Ibid 217 (Steyn LJ).
112 *Ex parte Pierson* [1998] AC 539, 575.

In Australia there is also recent authority for the proposition that the principle of legality is applied to primary *and* secondary legislation where interpretively possible.[113] In *City of Adelaide*, for example, French CJ noted that the principle 'is of long standing and has been restated over many years. It can be taken to be a presumption of which those who draft legislation, regulations and by-laws are aware'.[114] Justice Heydon also made the following observation:

> The principle of legality can apply both to parliamentary legislation creating a power to make delegated legislation, and to the delegated legislation itself. The consequence of applying the principle of legality to a power in parliamentary legislation to make delegated legislation will tend to be a relatively narrow construction of that power.[115]

Interestingly this view – that a relatively narrow construction of the lawmaking power is the consequence of applying the principle of legality – may be at odds with the approach (and judgment) of Dixon CJ in *Lynch*. But, as noted, no 'principle of legality'-style analysis was undertaken in *Lynch* even though the impugned ordinance, arguably, engaged a fundamental common law right. In any event, this line of United Kingdom cases and the recent statements of the High Court noted above confirm, in our view, the proper relationship between the principle of legality and secondary legislation: common law rights and freedoms can only be infringed by secondary legislation if the empowering statute provides that power by express words or necessary implication. Otherwise the secondary legislation must be read down to protect the common law right or freedom in play or it will be ultra vires the lawmaking power if that is not interpretively possible. We now turn to consider two recent Australian cases where it was argued that the common law right to freedom of speech was impermissibly infringed by secondary legislation. We do so to consider how appellate courts in Australia have articulated the relationship between the principle of legality and secondary legislation and the interpretive approach applied as a consequence.

V THE PRINCIPLE OF LEGALITY AND SECONDARY LEGISLATION: RECENT AUSTRALIAN CASES

A *Evans v New South Wales*

Evans v New South Wales ('*Evans*')[116] arose from World Youth Day, an event held in Sydney in July 2008 involving hundreds of thousands of young Catholic pilgrims from around the world. The applicants were protesters who opposed Catholic Church doctrine on abortion, contraception and sexuality and wished to directly communicate these views to the World Youth Day pilgrims. The applicants were concerned that their planned activities would be prevented by the *World Youth Day Act 2006* (NSW) ('the Act') and the *World Youth Day*

113 See *Evans* (2008) 168 FCR 576, 594 (The Court).
114 *City of Adelaide* (2013) 249 CLR 1, 31 [42].
115 Ibid 66–7 [150].
116 (2008) 168 FCR 576.

Regulation 2008 (NSW) ('the Regulation'). To this end, the applicants sought declarations in the Full Court of the Federal Court that section 46(3) of the Act and clauses 4 and 7 of the Regulation were invalid.

Justices French, Branson and Stone rejected the challenge to section 46(3) of the Act. But relevantly for present purposes, they held clause 7(1)(b) of the Regulation

> invalid to the extent to which it applies to conduct which 'causes annoyance' to participants in World Youth Day events. This provision affects freedom of speech in a way that is not supported by the statutory power conferred by section 58 of the Act.[117]

Section 58 provided the governor with a wide regulation-making power. The relevant parts were expressed as follows:

> (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
>
> (2) In particular, regulations may be made for or with respect to the following:
>
> (a) the fees and charges that may be imposed for the purposes of this Act,
>
> (b) regulating the use by the public of, and the conduct of the public on, World Youth Day venues and facilities…

Clause 7 of the Regulation was made pursuant to section 58 and provided:

> (1) An authorized person may direct a person within a World Youth Day declared area to cease engaging in conduct that:
>
> (a) is a risk to the safety of the person or others, or
>
> (b) causes annoyance or inconvenience to participants in a World Youth Day event, or
>
> (c) obstructs a World Youth Day event.
>
> (2) A person must not, without reasonable excuse, fail to comply with a direction given to the person under subclause (1).
>
> Maximum penalty: 50 penalty units.

The Court noted that

> [u]nconstrained by any limiting principle of construction, the power conferred by s 58(2)(b), taken in isolation, could be used to make a regulation enjoining silence at World Youth Day venues and facilities or mandating prayer. However there are constraints.[118]

But once it was recognised that section 58 'may encompass acts and some or all forms of speech and communication'[119] it brought the (limiting) principle of legality into play. Importantly, the Court observed that

> the legislature, through the expert parliamentary counsel who draft legislation, may be taken to be aware of the principle of construction in *Potter* and later authorities such as *Bropho* and *Coco* and the need for clear words to be used

117 Ibid 597 [83]; 599 [88].
118 Ibid 592 [67].
119 Ibid 592 [68].

> before long established (if not 'fundamental') rights and freedoms are taken away.[120]

Moreover, '[i]n Australia, the exercise of legislative power, *whether primary or delegated*, takes place, as it does in England, in the constitutional setting of "a liberal democracy founded on the traditions and principles of the common law"'.[121] The application of the principle of legality to section 58 operated to limit the 'conduct' that could be validly enjoined by regulation. This led the Court to conclude:

> The conduct regulated by cl 7(1)(b) so far as it relates to 'annoyance' may extend to expressions of opinion which neither disrupt nor interfere with the freedoms of others, nor are objectively offensive in the sense traditionally used in State criminal statutes. Breach of this provision as drafted affects freedom of speech in a way that, in our opinion, is not supported by the statutory power conferred by s 58 properly construed. Moreover there is no intelligible boundary within which the 'causes annoyance' limb of [cl 7] can be read down to save it as a valid expression of the regulating power.[122]

The interpretive approach in *Evans* is, arguably, consistent with *Barry*, *Honey* and, most relevantly, *Ex parte Simms*, the latter having been cited with approval by the Court.[123] There was no statutory mandate in section 58(2) through express words or necessary implication to authorise the infringement of the applicants' common law right to freedom of speech – *at least to this extent* – by regulation. Nevertheless the Court held that prohibiting conduct which caused 'inconvenience' to World Youth Day participants *was* authorised by section 58(2): 'Such inconvenience may arise, for example, where protestors by their locations or actions hinder or obstruct the movement of participants or are so loud in their protest as to impair communications between groups of participants and officials'.[124]

This clearly contemplated that at least *some* interference with the common law free speech rights of the protestors was permissible by regulation. That is, to the extent that clause 7(1)(b) sought to regulate a protest (a quintessential form of free speech) when it caused inconvenience (in the manner defined) to World Youth Day participants, it was valid. In doing so, the Court appeared to undertake some form of balancing analysis when it determined that only the 'annoyance' component of clause 7(1)(b) was beyond power. It did not do so expressly but in our view the Court *must* have done so based on the following assumption: the very nature of the lawmaking power conferred by section 58(2) in the context of organising and hosting World Youth Day authorised by *necessary implication* at least some interference with the common law free

120 Ibid 593–4 [70] (citations omitted). But see Abbe R Gluck and Lisa Shultz Bressman, 'Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I' (2013) 65 *Stanford Law Review* 901, where the authors found that in the United States congressional drafters were mostly unaware of the substantive interpretive canons (clear statement rules) and the judicial assumptions that underpinned them were not reflected in drafting practices.

121 *Evans* (2008) 168 FCR 576, 594 [71] (emphasis added).

122 Ibid 597 [83].

123 Ibid 594 [72].

124 Ibid 597 [84].

speech rights of the protestors. That is, to facilitate the regulation of a very large series of public events on the streets of Sydney necessarily implied that some interference with the common law rights and freedoms of those wishing to attend and protest was authorised. But the *extent* of that interference had to be determined, for section 58 did not make this clear. In this way, the broad and general wording of the lawmaking power left interpretive scope for the protection of the common law free speech rights of the protestors to the extent that it was compatible with what the statute was trying to achieve. If so, the interpretive approach in *Evans* is consistent with the proper relationship between the principle of legality and secondary legislation as detailed in Parts II and III.

B *Attorney-General (SA) v Adelaide City Corporation*

City of Adelaide involved two brothers (Caleb and Samuel Corneloup) who were preaching about their religious beliefs and associated political convictions on the streets of Adelaide without a permit.[125] The core of the case concerned the validity of local council by-laws that prohibited any person from undertaking the following activities on a road without a permit:

- 'preach, canvass, harangue, tout for business or conduct any survey or opinion poll';[126] and
- 'give out or distribute to any bystander or passer-by any handbill, book, notice, or other printed matter'.[127]

The Council considered that the preaching activities of the Corneloup brothers, which were undertaken without a permit, violated these by-laws. The brothers, on the other hand, argued that the by-laws were ultra vires the lawmaking power which authorised local councils to make by-laws 'generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants'.[128] It was this broad and common species of local council lawmaking authority – termed the 'convenience power'[129] by Hayne J – that was considered also in *Lynch* and *Foley*.

Importantly, Hayne J rejected the argument that past authority (including *Barry* and *Lynch*) *required* that the convenience power must be construed narrowly:

> Isaacs J and Higgins J each held that the express power to make a by-law 'regulating' processions did not authorise making a by-law that *prohibited* processions unless consent was given … That being so, it is unsurprising that each concluded that the power to make by-laws '[g]enerally for maintaining the good

125 (2013) 249 CLR 1.

126 City of Adelaide, *By-Law No 4 – Roads*, 27 May 2004, cl 2.3. The equivalent provision is now contained in City of Adelaide, *By-Law No 4 – Roads*, 24 August 2015, cl 2.7.

127 City of Adelaide, *By-Law No 4 – Roads*, 27 May 2004, cl 2.8. The equivalent provision is now contained in City of Adelaide, *By-Law No 4 – Roads*, 24 August 2015, cl 2.2C.

128 *Local Government Act 1934* (SA) s 667(1)(9)(XVI). The regulation making power for local councils in SA is now contained in *Local Government Act 1999* (SA) s 303.

129 (2013) 249 CLR 1, 48 [85] (adopting the phrase used by the Full Court of the Supreme Court of South Australia).

> rule and government of the municipality' could not support the by-law in question.[130]

The interpretive approach of the High Court in *Barry* (and of Isaacs J in particular) to the relevant convenience power was said to provide 'no support for a general proposition that a general conferral of by-law making power *must* be construed narrowly when the Act specifically lists other purposes for which by-laws may be made'.[131] Then followed a careful analysis of *Lynch* and other relevant convenience power cases[132] which led Hayne J (Bell J agreeing) to conclude:

> These cases … demonstrate the need to read a general provision like the convenience power in its statutory context. They demonstrate that particular aspects of statutory context may show that some applications of the provision otherwise available must yield to competing contextual indications (as was the case in *Barry*).[133]

The 'importance of the statutory setting in construing a provision of this kind' was emphasised also in the judgment of Crennan and Kiefel JJ.[134] These judges were clearly correct to note the centrality (indeed primacy) of context to the proper construction of statutory provisions, including convenience powers expressed in broad and general terms. This much is clear from the High Court's authoritative contemporary statement on statutory interpretation in *Project Blue Sky Inc v Australian Broadcasting Authority* ('*Project Blue Sky*'):

> [T]he 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 may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.[135]

There are, however, at least three points to be made here. First, Hayne J was correct to distinguish the approach of Isaacs J and Higgins J in *Barry* regarding the regulation/prohibition issue from the relevant legislative context in *City of Adelaide*. But as noted, *in addition* both judges found that the by-law infringed the common law right to free use of the highway. Consequently, (what is now termed) the principle of legality came into play in *Barry*. And in the absence of express words or necessary implication in the lawmaking (convenience) power, that common law right could not be infringed by regulation. Indeed *this* – to ascertain the proper scope of the lawmaking authority conferred by the relevant convenience power – was the logically prior interpretive issue. And the finding of Isaacs J and Higgins J on this issue *alone* would have invalidated a by-law that infringed the common law right to free use of the highway *whether or not*

130 Ibid 52 [100] (emphasis in original).
131 Ibid (emphasis in original).
132 See *Leslie v City of Essendon* [1952] VLR 222, cited in ibid 53 [104] (Hayne J).
133 *City of Adelaide* (2013) 249 CLR 1, 53 [105] (Hayne J), 90 [224] (Bell J).
134 Ibid 81 [190], citing Chief Justice Dixon's judgment in *Lynch* (1961) 104 CLR 353.
135 (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted).

prohibiting processions without council consent was intra vires that power. This makes the silence of Hayne J (and Bell J and Crennan and Kiefel JJ) on this logically prior interpretive issue in *City of Adelaide* puzzling. If the ordinary and grammatical meaning of the impugned by-laws in *City of Adelaide* engaged a common law right or freedom of the Corneloup brothers – and for reasons discussed shortly (and in their own judgments) they clearly did – then this *required* the principle of legality to be applied to the construction of the relevant convenience power if interpretively possible. And this is so even if Hayne J was correct (and we think he was) to observe (and reject) the argument that these prior authorities *require* the narrow construction of convenience powers irrespective of the relevant statutory context. We do not suggest that the ultimate construction of the lawmaking power given by Hayne J, Bell J and Crennan and Kiefel JJ – and the concomitant finding of the by-law's validity – was, necessarily, in error. For as noted in regards to the similar lawmaking power and context in *Foley*, there is a strong argument that it is *necessarily implied* from the nature and purpose of this kind of local government lawmaking power that at least *some* interference with common law rights (such as speech, association and liberty) is authorised to ensure 'the convenience, comfort and safety of its inhabitants'.

Secondly, the above statement from *Project Blue Sky* makes clear that statutory context may include 'the canons of construction'. Indeed the Court cited the principle of legality as applied in *Coco* as authority for that point.[136] In other words, if the *City of Adelaide* by-laws engaged a common law right or freedom then the principle of legality forms a necessary and important part of the relevant context in which they and the convenience power *must* be construed. The final (and related) point is that the Court, unanimously, found that the by-laws effectively burdened freedom of communication about government or political matters. The Justices did so in the course of holding that the by-laws did *not* offend the implied constitutional freedom of political communication ('the implied freedom'). We will consider this important issue in more detail below. But the relevant point for present purposes is that – in so finding – the by-laws *must* also have engaged the common law right to freedom of speech of the Corneloup brothers. That, *necessarily*, followed as Heydon J observed: 'The common law right of free speech which the principle of legality protects is significantly wider, incidentally, than the constitutional limitation on the power to enact laws burdening communications on government and political matters'.[137]

Clearly enough the common law to freedom of speech, prima facie, includes 'preaching about the Christian religion in the streets of Adelaide'.[138] And so too a by-law that 'prohibit[s] persons preaching on any road and distributing printed matter on any road to any bystander or passer-by without permission'[139] interferes with that right. Consequently, it *required* the principle of legality to be applied to

136 Ibid 384 [78] n 56 (McHugh, Gummow, Kirby and Hayne JJ).
137 *City of Adelaide* (2013) 249 CLR 1, 68 [152].
138 Ibid 45 [70] (Hayne J).
139 Ibid.

the construction of the relevant convenience power if interpretively possible. Yet only two members of the Court – French CJ and Heydon J (the latter in dissent) – did so. One possible explanation for this omission in the judgments of Hayne J, Crennan and Kiefel JJ and Bell J is the (unarticulated) view that the disposal of the implied freedom issue necessarily disposes of the common law (fundamental rights) issue as well; or that the characterisation issue – as to whether or not the by-laws were a 'reasonable' exercise of the lawmaking power – necessarily involved assessing the impact on fundamental rights. Neither view is sound, however, as we will explain below. Moreover, as noted, it is not sufficient or decisive that 'the words of the convenience power are well able to support a by-law governing whether and when there may be activities on a road which may diminish the convenience of using the road'.[140] That characterisation proposition is clearly correct. But the applicability of the principle of legality was a separate and logically prior interpretive issue in *City of Adelaide* that required consideration and clarification *before* the process of characterising whether or not the by-law was intra vires the convenience power.

To add to this already complex interpretive mix, French CJ and Heydon J both applied the principle of legality in *City of Adelaide* but came to opposite conclusions as to the validity of the by-laws. Chief Justice French noted that '[s]tatutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law'.[141] In this regard his Honour said the by-law was intra vires the convenience power if used to control *only* the mode or circumstances of the proposed preaching and haranguing but not its content. That is, the validity of the by-laws as applied required content neutrality:[142]

> the subject matter of By-law No 4 and the discretion which it created to grant permissions to engage in the conduct which it otherwise proscribed, had to fall within the scope of matters of municipal concern or 'accepted notions of local government'. Control of the expression of religious or political opinions per se is not within that subject matter. According to the circumstances, control sub modo may be within it. By-law No 4, so understood, involved the least interference with freedom of expression that its language could bear.[143]

This construction of the by-laws – and the scope of the lawmaking power of its empowering statute – involved a similar kind of balancing process to that undertaken by the Federal Court in *Evans* (which included French J, in its judgment). The lawmaking power did not expressly authorise interference with common law rights and freedoms as Heydon J noted in dissent.[144] In our view, then, French CJ *must* have reached this construction on the assumption that the very nature of the convenience power in this local government authorised by *necessary implication* at least some interference with the common law free speech rights of persons (like the Corneloup brothers) on the streets of Adelaide.

140 Ibid 54 [108] (Hayne J).
141 Ibid 30 [42] (citations omitted).
142 Ibid 33 [46] (French CJ).
143 Ibid.
144 Ibid 70 [159].

In other words, the lawmaking power authorised the least interference with freedom of expression necessary to ensure the convenience, comfort and safety of the local inhabitants. In this way the 'constructional choice' made by French CJ in *City of Adelaide* was, arguably, in accordance with *Coco* if the lawmaking power met or displaced the principle of legality by necessary implication.

Justice Heydon, in his dissenting judgment, outlined the proper relationship between the principle of legality and secondary legislation: common law rights and freedoms can only be infringed by secondary legislation if the empowering statute provides that power by express words or necessary implication.[145] In this regard, he noted that 'the crucial issue [was] the impact of the principle of legality on the width of the [convenience] powers to make delegated legislation'.[146] Justice Heydon, then, examined the statutory text to determine whether Parliament had considered and consciously decided to confer a lawmaking power which authorised the abrogation of curtailment of common law rights and freedoms. It led him to conclude:

> it cannot be inferred from the form of s 667(1)(9)(XVI) that the legislature appreciated the question of free speech, or that the legislature intended s 667(1)(9)(XVI) to permit by-laws of the kind challenged in this appeal, or that, in Lord Hoffmann's words, the legislature 'squarely confront[ed] what it [was] doing and accept[ed] the political cost'. … [I]t is clear that they are too general, ambiguous and uncertain to grant a power to make by-laws having the adverse effect on free speech of the challenged clauses.[147]

The upshot is that Heydon J disagreed with French CJ as to *how* the principle of legality was to be applied but not with the content of the principle itself or its relationship to the proper scope of secondary lawmaking powers. Relevantly, as the empowering statute in *City of Adelaide* did not expressly authorise interference with common law rights and freedoms, their disagreement was about whether such a power was conferred on local councils by *necessary implication*. So considered we would argue that the approach of French CJ *and* Heydon J in *City of Adelaide* and the Federal Court in *Evans* confirm the proper relationship between the principle of legality and secondary legislation.

We turn now to consider two recent Federal Court cases where it was argued that the relevant secondary legislation was invalid for infringing the implied freedom. The constitutional challenges failed in both cases. But what is interesting for present purposes is that consideration of the principle of legality did not feature in the reasoning of either decision. We will suggest that the interpretive approach taken in both cases was in error for two reasons. For if, as in these instances, the impugned secondary legislation engages the implied freedom then, by definition, so too does it engage the common law right to freedom of speech. The latter is considerably wider than the former as Heydon J noted in *City of Adelaide*. This brings the principle of legality into play. And, as an important aspect in the *construction* of the secondary legislation, the High

145 Ibid 66–7 [148]–[150].
146 Ibid 67 [150].
147 Ibid 70 [158] (citations omitted).

Court has made clear that it must first be considered (and applied if interpretively possible) before moving to the constitutional (implied freedom) issue. The distinction is an important one, as the disposal of the implied freedom issue does not, necessarily, do likewise for the common law (freedom of speech) issue.

VI THE IMPLIED CONSTITUTIONAL FREEDOM OF POLITICAL COMMUNICATION, THE PRINCIPLE OF LEGALITY AND SECONDARY LEGISLATION

We noted above that in *City of Adelaide*, Hayne J, Crennan and Kiefel JJ, and Bell J assessed the compatibility of the impugned by-laws with the implied freedom but did not consider the principle of legality. This was curious in our view as these judges accepted that the impugned secondary legislation *did* effectively burden political speech. If so, then the relevant by-laws *necessarily* engaged the common law right to freedom of speech and should have bought the principle of legality into interpretive play. The same pattern (and absence) of reasoning occurred in the recent Federal Court cases of *O'Flaherty v City of Sydney Council* ('*O'Flaherty*')[148] and *Muldoon v Melbourne City Council* ('*Muldoon*').[149] These cases arose out of the 'Occupy Movement' protests in Sydney and Melbourne respectively.

In *O'Flaherty*, the impugned laws were local government notices that prohibited camping or staying overnight in a public place being Martin Place in the Sydney CBD. The empowering statute made it an offence for a person to fail to comply with the terms of a notice erected by the City of Sydney.[150] It also provided that the terms of any such notice may relate to any one or more of the following: 'the payment of a fee for entry to or the use of the place'; 'the taking of a vehicle into the place; the driving, parking or use of a vehicle in the place'; 'the taking of an animal or thing into the place'; 'the use of any animal or thing in the place'; 'the doing of any thing in the place'; and 'the use of the place or any part of the place'.[151]

Similarly, the most important of the impugned local laws in *Muldoon* provided that no person without a permit must 'camp in or on any public place in a vehicle, tent, caravan or any type of temporary or provisional form of accommodation'.[152] This secondary legislation – the *Activities Local Law 2009* ('Local Law') – was made pursuant to the convenience power provided to the Melbourne City Council by the *Local Government Act 1989* (Vic):

148 (2013) 210 FCR 484. The judgment and reasoning of Katzmann J was upheld on appeal by the Full Court of the Federal Court in *O'Flaherty v City of Sydney Council* (2014) 221 FCR 382 by Edmonds, Tracey and Flick JJ.

149 (2013) 217 FCR 450.

150 *Local Government Act 1993* (NSW) s 632(1).

151 *Local Government Act 1993* (NSW) s 632(2).

152 Melbourne City Council, *Activities Local Law 2009*, cl 2.11 (emphasis altered). The equivalent provision is now contained in Melbourne City Council, *Activities Local Law 2009*, cl 2.8.

> A Council may make local laws for or with respect to any act, matter or thing in respect of which the Council has a function or power under this or any other Act.[153]

The relevant public places to which the Local Law applied were the Treasury and Flagstaff Gardens and Gordon Reserve on the fringes of the Melbourne CBD.[154] The Local Law further provided that its proscriptions could be enforced by oral or written directions from an authorised officer or the serving of a notice to comply.[155]

The applicants in *O'Flaherty* and *Muldoon* were both involved in protests that involved extended occupation of these public places. They erected tents, signs and facilities (including a kitchen and areas for first aid and community education) and would camp at night during the occupation. The primary mode of these 'Occupy Movement' protests was 'to maintain a continuous presence in public places … [which] allowed the protesters to continually convey the political message to the public'.[156] Importantly, as North J observed in *Muldoon*, '[t]he occupation of public space was part of the political message because it allowed the protesters to enact and demonstrate the alternative political and governmental structures it sought to promote for Australia'.[157]

Interestingly, the incompatibility or otherwise of the secondary legislation and the empowering statutes with the implied freedom was the *exclusive* focus of the analysis undertaken by Katzmann J in *O'Flaherty* and dominated the reasoning of North J in *Muldoon* as well. The characterisation analysis that was central to the judgments of Hayne J and Crennan and Kiefel JJ in particular in *City of Adelaide* and Dixon CJ in *Lynch* was absent in both cases. In *Muldoon*, for example, North J did not first seek to ascertain the proper scope of the lawmaking authority conferred on the Melbourne City Council by the convenience power and whether the impugned local laws were intra vires that power. Instead he went straight to the construction of the local laws pursuant to which the notices to comply were issued.[158] In *O'Flaherty*, Katzmann J did not consider whether the local government notices were ultra vires the empowering statute before turning to the constitutional issue. On the interpretive issue, both Justices may have assumed that the breadth of the lawmaking provisions were clearly sufficient to sustain the validity of the relevant secondary legislation. If so, we agree that as a characterisation matter the local laws in *Muldoon* and the notices in *O'Flaherty* were within power. But closer attention to the proper construction of the empowering statutes (before turning to the implied freedom) may have alerted both Justices to the possibility of the otherwise open-ended statutory language being limited in both contexts once the common law right to free (political) speech was in legislative play.

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153 *Local Government Act 1989* (Vic) s 111(1).
154 See *Muldoon* (2013) 217 FCR 450, 457 [11] (North J).
155 Melbourne City Council, *Activities Local Law 2009*, cls 14.12–14.18.
156 *Muldoon* (2013) 217 FCR 450, 464 [29] (North J).
157 Ibid 464 [30].
158 Ibid 495–500 [216]–[241].

In any event, as was the case with *City of Adelaide*, the constitutional analysis undertaken in *O'Flaherty* and *Muldoon* was perfectly sound in our view. The continuous act of occupation in these public places was itself political communication protected by the *Constitution* as both Katzmann J and North J noted.[159] And in both cases, this political communication was effectively burdened by the prohibitions and restrictions on that occupation contained in the secondary legislation.[160] But that burden was indirect or incidental to the pursuit of other legitimate ends such as 'maintaining public health, safety and amenity in a high use public area, and preserving the ability of all members of the public to use the area'.[161] And those prohibitions and restrictions were reasonably appropriate and adapted to serving those ends in manner that was compatible with the Australian constitutional system of representative and responsible government.[162]

However the disposal of the implied freedom issue is not, necessarily, sufficient to answer the common law (fundamental rights) issue. Indeed to consider the former before the latter is contrary to the High Court's routine warning that the first step in constitutional cases (including those where the implied freedom is argued) is to properly construe the impugned legislation.[163] And as was demonstrated by the Federal Court in *Evans* and the High Court in *Coleman v Power*, the construction of a broadly framed statute (such as the convenience power in *Muldoon*) that burdens free (political) speech brings the principle of legality into play. The important point is that a successful common law rights argument does *not* turn upon the success or otherwise of the constitutional (implied freedom) issue. Indeed, the focus of the relevant analysis is quite different depending on which issue is being judicially considered. As Hayne J explained in a widely-cited passage from *APLA Ltd v Legal Services Commissioner (NSW)*:

> The implied freedom of political communication is a limitation on legislative power; it is not an individual right. It follows that, in deciding whether the freedom has been infringed, the central question is what the impugned law does, not how an individual might want to construct a particular communication …[164]

But the common law right to freedom of speech *is* an individual right so the judicial concern is to protect the relevant instance of (political) speech from legislative encroachment if interpretively possible. Though clearly related, they are separate issues with different core inquiries. It demonstrates why courts must

159 *O'Flaherty* (2013) 210 FCR 484, 491–5 [31]–[49] (Katzmann J); *Muldoon* (2013) 217 FCR 450, 523–4 [359]–[360] (North J).

160 *O'Flaherty* (2013) 210 FCR 484, 491–5 [31]–[49] (Katzmann J); *Muldoon* (2013) 217 FCR 450, 523–4 [359]–[360] (North J).

161 *O'Flaherty* (2013) 210 FCR 484, 495 [51] (Katzmann J). See also *Muldoon* (2013) 217 FCR 450, 527 [377]–[380] (North J).

162 *O'Flaherty* (2013) 210 FCR 484, 497–501 [59]–[84] (Katzmann J); *Muldoon* (2013) 217 FCR 450, 527–34 [376]–[412] (North J).

163 *Coleman v Power* (2004) 220 CLR 1, 21 [3] (Gleeson CJ), 36–41 [49]–[68] (McHugh J), 68 [158] (Gummow and Hayne JJ), 80–1 [207] (Kirby J), 103 (Callinan J), 115 [306] (Heydon J).

164 (2005) 224 CLR 322, 451 [381].

consider the common law *and* constitutional issues in that order whenever impugned (secondary) legislation engages freedom of (political) speech. In this regard it may not be entirely accurate to claim, as North J did in *Muldoon*, that '[t]he distinction between the implied freedom of political communication and a personal right to free communication is largely a theoretical distinction'.[165]

In *O'Flaherty* and *Muldoon*, the Federal Court upheld the validity of secondary legislation that either prohibited or limited the continuous occupation of public places (including camping overnight) without local council consent. As noted, the impugned local laws were authorised by a broadly framed notice power in the former and a local government convenience power in the latter. It was recognised that the local laws in both cases effectively burdened political communication. If so, then the common law right to freedom of (political) speech is *necessarily* engaged and the principle of legality comes into play. However, in neither case was this logically prior issue addressed. If this analysis was undertaken, it may have been the case that the empowering statutes, though lacking express authorisation for the infringement of common law rights and freedoms, did provide such a power by necessary implication. That is, one might reasonably argue that the convenience powers in *O'Flaherty* and *Muldoon* necessarily implied the power to restrict the common law rights to speech and liberty to the extent necessary to preserve the public health, safety and amenity of those public places.

In any event, it was certainly the case that the terms of the impugned local laws in *O'Flaherty* and *Muldoon* were broad enough to proscribe the continuous occupation (as political protest). But it is that very breadth, generality and non-specificity that can be problematic from a regulatory perspective when the principle of legality is in play.

VII THE PRINCIPLE OF LEGALITY AND SECONDARY LEGISLATION: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENT

In our introduction we attributed the modern form of the principle of legality to *Ex parte Simms*. While the principle of legality clearly has much older lineage,[166] *Ex parte Simms* marked a watershed on several counts. The most notable was Lord Hoffmann's suggestion that Parliament must squarely confront the issues whenever it sought to legislate to remove or narrow basic rights.[167] We also noted earlier in this article that the suggestion of Lord Hoffmann arguably provides a more measured approach than the initial one offered by Laws J, who accepted that Parliaments could legislate to remove or narrow fundamental

165 *Muldoon* (2013) 217 FCR 450, 525 [365] (North J).

166 Taggart noted that the principle was 'ages old' but got a new 'snappy name' in 1995: Michael Taggart, 'Administrative Law' [2003] *New Zealand Law Review* 99, 110, citing Sir Rupert Cross, John Bell and Sir George Engle, *Statutory Interpretation* (London Butterworths, 3rd ed, 1995) 165–6.

167 *Ex parte Simms* [2000] 2 AC 115, 131.

rights but suggested that in some cases the rights to which this possibility applied could be an illusion.[168] Lord Hoffmann's conception of the principle of legality therefore incorporates an important concession: legislation may remove or restrict fundamental rights and freedoms at common law if it is expressed in suitably clear terms. The judicial acceptance of that possibility is an orthodox expression of the traditional relationship between the courts and Parliament – Parliament enacts, courts interpret.[169] Chief Justice Gleeson was clearly influenced by similar considerations when he explained that the principle of legality 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.[170]

Many aspects of the rule of law express principles governing the relationship between the courts and Parliament.[171] The principle of legality also expresses an aspect of that relationship and was rightly identified within that broader arrangement by Gleeson CJ. But in our view, distinct issues arise when the principle of legality may be called upon to determine the validity of secondary legislation. The most obvious is Lord Hoffmann's requirement that Parliament must squarely confront problems 'and accept the political cost' associated with removing or restricting basic rights by enacting the relevant legislation in unmistakably clear terms.[172] Although that requirement was explained in a case involving secondary legislation, it sits uneasily with secondary legislation. That is because Parliament can only squarely confront and accept clear political responsibility for what it directly considers and enacts. The fragmented processes to make and review secondary legislation do not provide a clear point at which Parliament must adhere to the stringent requirements of Lord Hoffmann. Secondary legislation is typically devised by one part of government, perhaps a government department or an autonomous agency, approved by Cabinet, then formally given effect by the Executive Council and finally placed before Parliament but only after it has been made. Responsibility within such lengthy processes is inevitably diffuse.

In *Ahmed v Her Majesty's Treasury* ('*Ahmed*'),[173] which was decided a decade after *Ex parte Simms*, Lord Phillips accepted that the approach of Lord

168 *Ex parte Witham* [1998] QB 575, 585–6.

169 We accept this statement greatly simplifies constitutional fundamentals, though we also suggest our simplicity on this issue is consistent with the approach recently used by one member of the High Court who explained that many key constitutional concepts were 'commonly expressed in binary terms': Stephen Gageler, 'Deference' (2015) 22 *Australian Journal of Administrative Law* 151, 151. A similar binary approach to the one we have used is also often used in England. See, eg, *Duport Ltd v Sirs* [1980] 1 WLR 142, 157 (Lord Diplock); *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513, 567–8 (Lord Mustill).

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

171 A view endorsed in *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28] (The Court).

172 *Ex parte Simms* [2000] 2 AC 115, 131.

173 [2010] 2 AC 534.

Hoffmann made clear 'that the principle of legality applied as much to subordinate legislation as to Acts of Parliament'.[174] The secondary legislation in issue in *Ahmed* was an Order in Council that was made under the *United Nations Act 1946* (UK) and designed to give effect to a resolution of the UN Security Council that was designed to prevent the financing of terrorist activities.[175] The UK government used the 1946 Act to make Orders to give effect to the Security Council resolutions. Those Orders operated to freeze the assets and bank accounts of the people or organisations to which they applied. The Orders imposed wide-ranging and very stringent prohibitions on designated people, which precluded designated people from drawing on or dealing with their own assets, bank accounts or any sort of financial resource. The key question before the Supreme Court was whether a statutory power to make instruments 'necessary or expedient'[176] to enable decisions of the UN Security Council to be given effect could support an instrument that had such drastic effect on the property and other rights of a person who 'is or may be' involved in supporting terrorism.[177]

The Supreme Court set aside the Order on the basis that it adopted a test of 'reasonable suspicion' that was not included in the UN Security Council resolution the Order purported to give effect, so it was outside what was 'necessary or expedient' to comply with the resolution.[178] That finding could easily have been made as one of ultra vires but the Supreme Court also gave important signals about the principle of legality and secondary legislation. It was equally important that these signals were not uniform. These differences arose about the underlying question in *Ahmed* – what is the proper scope of delegated legislation? That question was central to *Ahmed* because the Order froze the assets of designated people and stripped their rights to question that designation. Importantly, Orders could be made simply on the basis of suspicion. The parties opposing the Order argued that such drastic measures should only take the form of statute rather than secondary legislation. The important related argument they made for our purposes was that the principle of legality operated to preclude such drastic measures being taken in the form of secondary legislation. Lord Phillips held that there was no clear authority 'supporting the proposition that the principle of legality raises a general presumption against Parliament delegating to the executive the power to make regulations that call for legislative design'.[179]

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174 Ibid 646 [112]. Lord Phillips' statement bears an uncanny resemblance to the submissions made in another case concerning the principle of legality and secondary legislation: *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 534 (Tim Owen QC) (during argument). Owen QC also appeared in *Ahmed*.

175 In fact, the Orders were designed to give effect to more than one UN Security Council Resolution: *Ahmed* [2010] 2 AC 534, 615–17 [17]–[22] (Lord Hope).

176 *United Nations Act 1948* (UK) s 1(1).

177 The instrument in question was *Terrorism (United Nations Measures) Order 2006*, SI 2006/2657.

178 *Ahmed* [2010] 2 AC 534, 626–7 [47]–[48], 630–1 [58]–[61] (Lord Hope), 659–61 [171]–[177] (Lord Rodger), 677 [230]–[231] (Lord Mance).

179 Ibid 648–9 [122].

According to this view, there are not necessarily 'no-go' areas for secondary legislation. If there are such boundaries, Lord Phillips suggests that they are not to be policed by the courts, at least not through the guise of the principle of legality.[180] It follows that secondary legislation can remove or narrow fundamental rights so long as this occurs under a suitably expressed power to do so. But Lord Phillips made clear that the benchmark for such a power remained the stringent level of clarity of *Ex parte Simms*. He explained:

> a statutory provision which delegates to the executive the power to make regulations should be strictly construed and that, where the power is conferred in general terms, it may be necessary to imply restrictions in its scope in order to avoid interference with individual rights that is not proportionate to the object of the primary legislation.[181]

In reaching the same broad conclusion, Lord Brown identified the problem with invoking the principle of legality in the case at hand, namely that 'almost any' Order made under the statute in question was 'likely to interfere with somebody's fundamental rights'.[182] If so, the core of the statute assumed that the principle of legality could not preclude secondary legislation which removed or infringed basic rights. That may explain why Lord Brown conceded that '[o]bviously, the *Simms* principle cannot operate to emasculate the [rule-making] power entirely'.[183] He held that the reach of the power to make secondary instruments should instead be gauged by the 'degree of specificity of the UN decision which the UK is called upon to implement' and also 'the extent to which the implementing measure will interfere with fundamental human rights'.[184] Lord Brown concluded that secondary legislation could impose 'very considerable restrictions' so long as it was 'in all important respects clearly and categorically mandated by the UN measure which it is purporting to implement'.[185] If such an Order went beyond the scope of the UN measure, the *Ex parte Simms* principle meant 'it can only properly be introduced by primary legislation'.[186]

There are several common threads in the reasoning of Lord Hope and Lord Phillips. The first is their clear rejection of any notion that the principle of legality necessarily precludes secondary legislation that removes or narrows basic rights. In our view, that rejection is clearly correct. Lord Phillips identified the reason when he conceded that no part of 'the principle of legality permits a court to disregard an unambiguous expression of Parliament's intention'.[187] It follows that, if a statute leaves no doubt that it creates or confers a power to make

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180 His Lordship stated that such a power should be strictly construed and 'where the power is conferred in general terms it may be necessary to imply restrictions in its scope in order to avoid interference with individual rights that is not proportionate to the object of the primary legislation': ibid 649 [122]. That statement implies that any limiting principle might take the form of proportionality rather than legality.

181 Ibid.

182 Ibid 665 [196].

183 Ibid (citations omitted).

184 Ibid.

185 Ibid.

186 Ibid.

187 Ibid 647 [117].

secondary legislation which undermines basic rights, the statute must be given effect to the extent that it clearly grants that power. But Lord Phillips and Lord Brown were each clearly reluctant to construe such powers expansively, whether by requiring very precise alignment between a UN Security Council resolution (as Lord Brown suggested) or simply falling back on the core of *Ex parte Simms* and reading the power to make secondary legislation with great strictness (as Lord Phillips suggested).

That same level of interpretive strictness was not, arguably, applied in the Australian cases of *Evans* and the judgment of French CJ in *City of Adelaide* considered above. In both instances the broad lawmaking powers at issue did not expressly provide the authority to infringe fundamental rights but were held to support the validity of the impugned secondary legislation which did so. We argued that such a construction was consistent with the proper relationship between the principle of legality and secondary legislation *if* the relevant powers authorised by *necessary implication* the infringement of fundamental rights in those contexts. In *City of Adelaide*, for example, the application of the principle of legality to the local government (convenience) power by French CJ meant that the relevant by-law was only within power if it sought to regulate the mode or circumstances of the proposed speech not its content. That approach struck a sensible balance between freedom of speech and the use and enjoyment of public roads in that context. It reduced also the legal complexity of councils discharging their core local government functions and probably saved from invalidity a myriad of similar by-laws as a consequence.

However, as the case analysis undertaken above makes clear, the principle of legality is often applied, and with some strictness, to the construction of secondary lawmaking powers. When Lord Hoffmann restated and reinvigorated the principle in *Ex parte Simms*, he did so in just such a case. That may explain Lord Hoffmann's rationale of the principle, namely that a strict and cautionary approach to legislation affecting rights was necessary because there was 'too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process'.[188] That concern is especially pronounced in cases involving secondary legislation. Parliament may authorise the making of secondary legislation, scrutinise secondary legislation and exercise a power of disallowance over secondary legislation but it does not directly consider or make it. Accordingly, secondary legislation is made without the benefit of parliamentary debate and the political and public attention that often accompanies those debates. The fact that Parliament's gaze over secondary legislation is not as strong as it is over primary legislation may go some way to explaining why the principle of legality has come to the fore in so many cases concerning secondary legislation. Perhaps the courts are drawing attention to, and to some extent undertaking themselves, the level of scrutiny that might have occurred at the parliamentary level if the secondary legislation under consideration had proceeded as primary legislation.

188 *Ex parte Simms* [2000] 2 AC 115, 131.

There is, then, in our view some merit in the argument that the principle of legality ought to be applied more strictly in the circumstances of secondary legislation. What might that mean as an interpretive and practical matter for the courts and Parliament? Judges may well be justified in giving the necessary implication aspect of the principle a very narrow sphere of operation in the construction of secondary lawmaking powers. Such an approach would, arguably, be consistent with the High Court's authoritative pronouncement on this point in *Coco* in any event:

> Sometimes it is said that a presumption about legislative intention can be displaced only by necessary implication but that statement does little more than emphasize that the test is a very stringent one … [I]n some circumstances the presumption may be displaced by an implication if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless. However, it would be very rare for general words in a statute to be rendered inoperative or meaningless if no implication of interference with fundamental rights were made, as general words will almost always be able to be given some operation, even if that operation is limited in scope.[189]

If this approach was routinely taken by Australian courts it would require as a practical matter that Parliaments expressly provide in secondary lawmaking powers the extent to which the infringement of fundamental rights is authorised. To do so as a drafting matter would not be especially difficult. In the local council context, for example, the relevant (convenience) power might read as follows:

1. A Council may make by-laws for or with respect to any act, matter or thing of which the Council has a discretion, duty, function or power under this or any other Act.
2. Where it is reasonable and appropriate, the power under (1) may be exercised by Council to make by-laws which remove or restrict any or all common law rights or freedoms, including any or all rights or freedoms recognised as fundamental at common law.

Such a clause would authorise the making of by-laws that removed rights including ones that were regarded at common law to be basic or fundamental, as well as other 'lesser' common law rights. As the clause refers to rights in the plural sense, the principle of legality could not be invoked to interpret the clause as allowing the restriction or removal of only one right. That caution seems sensible as one can reasonably assume that, if such by-laws were thought necessary, they would not be narrow in focus because it is very likely that by-laws would have to exclude more than one right in order to achieve the desired objective. Moreover, a judicial approach that required this level of specificity in secondary lawmaking powers makes good on Lord Hoffman's exhortation that 'the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost'.[190] This may, as a consequence, improve the clarity and rights sensitivity of primary lawmaking powers and the secondary

189 *Coco* (1994) 179 CLR 427, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted).
190 *Ex parte Simms* [2000] 2 AC 115, 131.

legislation that it authorises. In doing so, it would serve to promote the democracy and rule of law values that now, arguably, underpin the contemporary justification for the principle of legality as articulated in the seminal cases of *Coco* and *Ex parte Simms*.[191]

VIII CONCLUSION

The principle of legality has assumed a central role in statutory interpretation and the protection of common law rights, freedoms and principles. While the principle has been identified as a longstanding one, the judicial sharpening of it has a more modern pedigree. The principle is generally thought of as one that governs the interpretation of statutes – or primary legislation, as statutes may be contrasted to the secondary legislation examined in this article – but the principle is very often called into play in the interpretation of secondary legislation that is made under primary legislation.

This article has sought to clarify that the proper relationship between the principle of legality and secondary legislation in contemporary Australian law is as follows: rights, freedoms and principles considered fundamental at common law can only be infringed by secondary legislation if the empowering statute provides that power expressly or by necessary implication. Otherwise the secondary legislation must be read down to protect the right, freedom or principle in play or it is ultra vires the lawmaking power if that is not interpretively possible. Further, we suggested that the courts might well be justified in giving the necessary implication aspect of the principle a very narrow sphere of operation in the construction of secondary lawmaking powers. The common feature of all forms of secondary legislation is that Parliament itself does not consider or enact it. So to require a high level of specificity in the context of secondary lawmaking powers recognises that fact of the (secondary) legislative process and compels Parliament, if it wishes to authorise the infringement of fundamental rights, to meet the challenge posed by Lord Hoffmann, of plainly facing its action and assuming the necessary political responsibility. This interpretive approach would promote the democracy and rule of law values that underpin the contemporary justification for the principle of legality in Australian law by requiring Parliaments to consider and then consciously decide whether or not it wishes to authorise the infringement of fundamental rights by secondary legislation.

We consider that the role of the principle of legality in cases concerning secondary legislation can be explained by something akin to the 'traditional role' of the courts in statutory interpretation.[192] That approach is neither radical nor at odds with basic constitutional principles. It is not radical because the application

191 See Lim, above n 95, 385–94.

192 Though we accept the suggestion of Heydon J, that the 'traditional role' of the court in statutory interpretation is a 'Delphic' expression: *Momcilovic v The Queen* (2009) 245 CLR 1, 178 [445].

of the principle to secondary legislation was well settled within Australian law long before its modern reinvigoration. It is entirely consistent with constitutional principles because it ultimately requires the courts to interpret legislation and ensure that those who act under statutory powers remain within the limits of that power. If that approach also enables, indeed requires, the courts to carefully examine both powers to make secondary legislation and whether secondary legislation remains within the scope of that power, the approach is unremarkable. What is remarkable is that this approach not only allows a rigorous judicial principle to regulate Parliament in its lawmaking function, but also the other agencies of government, such as local councils, which exercise a somewhat similar role in their secondary lawmaking function. The reach of the principle of legality over that function, to ensure the protection of rights, freedoms and principles considered fundamental at common law, is surely correct.