Introduction

Statutory interpretation by courts is decision-making. Statutory language, when meaning is reasonably contested, almost always presents constructional choices, a term to be preferred to ‘ambiguity’. Where one construction involves the destruction or impairment of rights, freedoms and immunities recognised and protected at common law, courts tend to choose another which avoids or mitigates impairment. That approach is currently referred to as the ‘Principle of Legality’. However, the statutory text may leave no room for such choice – where it uses clear preclusionary language or where consideration of the structure and purpose of the statute precludes such a choice.

Historically, the courts’ rights protective approach to the construction of statutes was justified by reference to a presumed legislative intention not to affect rights, freedoms and immunities, or indeed the general law, absent clear language.
Legislative intention, long integral to the rhetoric of construction, is not a state of anybody’s mind. It is invoked as a statement that the outcome of the court’s constructional choices lies within the constitutional boundaries of the judicial function. It has been called a constitutional courtesy. The historical presumption of a legislative intention protective of common law rights, freedoms and principles has evolved into the Principle of Legality. There is contention about its scope and content and whether its justification by reference to a presumed legislative intention is redundant. A legislative culture particularly sensitive to the protection of rights and freedoms is not always apparent in our times. As McHugh J said in *Malika Holdings Pty Ltd v Stretton*:

Such is the reach of the regulatory state that it is now difficult to assume that the legislature would not infringe rights or interfere with the general system of law.¹

The general proposition of this paper is that given the significance of the executive government in the legislative process and its tendency to infringe upon rights, freedoms and immunities and associated principles of the common law, the Principle of Legality, however unsatisfactory it may be to the tidy mind, does provide a judicial damage control mechanism which is compatible with representative democracy and the ultimate supremacy of parliament.

¹ (2001) 204 CLR 290, 299 [29].
That mechanism does not require a justifying fig leaf of legislative intention to cover the court’s constructional choices. When the text of a statute leaves constructional choices open, the purported ascertainment of legislative intention, which on orthodox principle is expressed by the text, is indistinguishable from the decisional act of choosing the preferred construction. If the text does not leave a relevant constructional choice open, the invocation of legislative intention seems unnecessary. Against that general background, this paper offers some observations about the constructional process, its small ‘c’ constitutional character, the boundaries between judicial construction and the legislative function, the presumption which evolved into the Principle of Legality and its connection with legislative intention.

**Interpreting the ‘interpreter’**

In May 2012, I attended a brief sitting of the Supreme Court of the United States as a guest of Justice Ginsburg. The Court delivered judgment in *Taniguchi v Kan Pacific Saipan, Ltd.*,\(^2\) which concerned the interpretation of a statute providing for costs recoverable in civil litigation. The provision considered by the Court entitled a successful party to recover the costs of ‘an interpreter’. The question was whether ‘interpreter’ was confined to a translator of oral testimony or extended to a translator of written texts. Circuit Courts of Appeal had given conflicting answers. The Ninth Circuit, from which the

\(^2\) 566 US 560 (2012).
appeal was brought, had held that, according to dictionary definitions and common usage, the term did extend to the translator of written texts. The Seventh Circuit on the other hand, had said:

Robert Fagles made famous translations into English of the *Iliad*, the *Odyssey*, and the *Aeneid*, but no one would refer to him as an English-language ‘interpreter’. ³

That observation was quoted with evident approval by the majority in the Supreme Court which allowed the appeal from the Ninth Circuit by 6 votes to 3. Little research is necessary to find a reference in a review of Fagles’ work to his ‘interpretive choices’, and the position he has taken ‘in contemporary debates about Homeric interpretation’. ⁴ It must be acknowledged that the term ‘interpretation’ was used in that review in a loftier sense than the term ‘interpreter’ in the federal costs statute. Nevertheless, those uses illustrate two things – the nuanced meanings of the word ‘interpretation’ and the creative character of the process it denotes.

The contending opinions in the Supreme Court marshalled duelling dictionaries. It was open to read ‘interpreter’ as extending to a translator of text. However, the majority, noting that costs recoverable under statute were

generally a fraction of the actual costs incurred, said ‘we see no compelling reason to stretch the ordinary meaning of the costs items Congress authorized …’.

The minority, approaching their contrary conclusion asymptotically, with a double negative, held that the term ‘interpreter’ was not so clear as to leave no room for interpretation and said:

Given the purpose served by translation and the practice prevailing in district courts … there is no good reason to exclude from taxable costs payments for placing written words within the grasp of parties, jurors, and judges.

The reasoning on both sides involved normative views about the proper scope of costs recovery. It did not involve any anterior invocation of congressional ‘intention’. The case offers an occasion for relevant reflection upon a statutory word coincidentally applicable to those who had to decide its meaning. It directs attention to the volitional character of statutory construction – less a process of discovery than a process of decision-making, subject to constraints.

The majority and minority opinions do not move their readers to extended reflection upon the meaning of ‘meaning’. Nor is such reflection generally

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6 Ibid.
7 By way of footnote Justice Alito, who delivered the oral summary of the majority opinion, said that a copy of the opinion would be available from the Court’s Registry but that anybody who wanted it translated would have to pay for it themselves.
undertaken by judges and lawyers in their day to day work of interpreting and applying statutes. Putting it simply, and no doubt simplistically, the meaning attributed to a statutory word, phrase or provision is generally a substitute extracted from a population of possible substitutes relevant to the case before the court and at least intelligible to the classes of person who draft and read statutes and people who have to comply with or enforce them.

In an interesting article about ‘meaning’ in the context of literary education, Professor Peter Smagorinsky, at the University of Georgia, has described the reading of texts generally as a ‘constructive act’, in which meaning emerges from the reader’s choice in a ‘transactional zone’ between reader and text – a zone defined by common conventions and codes. It may not be too much of a stretch to characterise statutory interpretation, in similar terms, as a constructive act in a transactional zone defined in part by legal culture and associated principles, practices and rules. Justice Michael McHugh’s frequently quoted passage from his judgment in Theophanous v Herald & Weekly Times Ltd supports that characterisation:

The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or

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understood, without conscious advertence by reason of their common language or culture.\(^9\)

Relevantly to the part played by ‘legislative intention’ he added, in relation to constitutional interpretation:

To take into account the background circumstances that were present in the mind of the makers of the Constitution is not to assert that the actual intentions of the makers control the meaning of the Constitution.\(^10\)

The same observation may be made in relation to the actual intentions of the legislators who make statute law, not that it seems even the most ardent proponents of the utility of legislative intention would argue to the contrary.

**Ordinary meaning**

One of the constraints observed by the courts in statutory construction, albeit a little spongy, is the priority accorded to the ‘ordinary meaning’ of words. It was a constraint honoured in the interpretation of ‘interpreter’ in the *Taniguchi* decision in the Supreme Court of the United States. Isolated from other considerations it may beguile or even be used to beguile. It has a pleasingly democratic resonance. What are characterised as ‘ordinary


\(^10\) Ibid 197.
meanings’ seem to be privileged as the kinds of meaning with which ‘ordinary people’ (a poorly defined subset of people generally) are familiar. Justice Mary Gaudron, in a frequently quoted passage from a judgment she wrote in 1991, essayed a democratic justification for the rule that the ordinary and grammatical sense of statutory words is a starting point for interpretation:

that rule is dictated by elementary considerations of fairness, for, after all, those who are subject to the law’s commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.\(^{11}\)

That said, the meaning of words in a statute, ordinary or otherwise, are not always easy to nail down, a fortiori, if taken in isolation from their context.

In a moment of sunny optimism in 1925, another High Court Justice, later to become Chief Justice, Sir Isaac Isaacs, drew a distinction between ordinary meaning as ‘fact’ and the legal effect of a word as law:

The ‘meaning of the words’ is what I call interpretation … Their effect when translated into complete English is construction. If that distinction be borne in mind very little difficulty remains.\(^{12}\)

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\(^{12}\) *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60, 78.
His Honour’s optimism was not shared by his successors on the High Court 70 years later in *Collector of Customs v Agfa-Gevaert Ltd*\(^{13}\) when they described the distinction as seeming ‘artificial, if not illusory’.\(^{14}\) After quoting Lord Hoffman’s observation in *R v Brown* that ‘[t]he unit of communication by means of language is the sentence and not the parts of which it is composed’\(^{15}\), their Honours said:

> If the notions of meaning and construction are interdependent … then it is difficult to see how meaning is a question of fact while construction is a question of law without insisting on some qualification concerning construction that is currently absent from the law.\(^{16}\)

The Court referred to Glanville Williams’ distinction between ordinary or primary meaning and secondary meaning, albeit in the particular context of trade-related language. The two classes reflected a dichotomy between ‘the most obvious or central meaning’ of words and ‘a meaning that can be coaxed out of the words by argument’.\(^{17}\) That reference might be thought to have suggested that discovery of primary meaning is cognitive, a little like finding a fact, and that anything else is volitional. *Agfa-Gevaert* was not concerned with

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\(^{13}\) (1996) 186 CLR 389.

\(^{14}\) Ibid 396.

\(^{15}\) Ibid 397 citing *R v Brown* [1996] 1 AC 543, 561.

\(^{16}\) Ibid.

common law rights, freedoms or principles. It was a case about photographic paper and whether it involved the use of a ‘silver dye bleach reversal process’ within the meaning of a Customs Tariff Concession Order. The Court’s observations confirm, however, that in reading statutory words, phrases and provisions, which are capable of being read in more than one way, the court undertakes a creative or constructive process which ultimately assigns a ‘meaning’ from a range of permitted options.

The qualifying term ‘ordinary’ seems to serve more as an instrumental caution than a definition of a subset of possible meanings of words, phrases or provisions. A very recent article in the *Yale Law Journal* on the topic ‘Judging Ordinary Meaning’ pursues the definitional inquiry. The authors translate the term ‘ordinary meaning’ to the elusive collocation ‘ordinary communicative content’. Whether a particular meaning is ‘ordinary’ is treated as a question of ‘legislative fact’ which can be answered by the use of computer-assisted ‘corpus linguistics’. That process involves computerised searches ‘for patterns of meaning and usage of databases of actual written language.’

The utility of electronic inquiry into databases of usage to determine ‘ordinary meaning’ is debatable. In statutory interpretation the term, although often designating more than one meaning and although accompanied by a penumbral zone of shades of meaning, has its uses. It directs the judges to those

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19 Ibid 791.
ways of reading a word or statutory phrase or provision which are unlikely to be surprising to those who drafted and enacted the law or indeed to intelligent non-lawyers — of whom a very large number are to be found in the general population. It may be seen as a restraining guide to judicial choice. It accommodates the reality that words and phrases may be read in more than one way, each of which can be said to accord with common usage. Common usage, in the area of what are sometimes called ‘general words’, may embrace a sliding scale of meaning. In such a case the judicial interpreter will be confronted not so much with a choice of meanings as a decision about where on the sliding scale the preferred register of meaning is to be located.

‘Meaning’ on a sliding scale

An example of a word with a sliding scale of meaning is the word ‘offensive’. Its dictionary definition covers conduct which is vexing, annoying, displeasing, angering, causing resentment or disgust. It is often found in statutes in the company of cognate terms like ‘insult’ or ‘humiliate’. It has a large range of potential applications. A leading Australian decision on its interpretation was made by Justice John Kerr, as a Judge of the Supreme Court of the Australian Capital Territory in 1966.  

A student at the Australian National University, Desmond Ball, protesting against Australia’s involvement in the Vietnam War, climbed on to a statute of King George V outside

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20 Justice Kerr later became Governor-General of Australia whose dismissal of the Prime Minister, Gough Whitlam in 1975 was a major event in Australia’s constitutional history.
Parliament House in Canberra. He wore on his head a placard which read, ‘I will not fight in Vietnam’. He was charged by police with behaving in an offensive manner in a public place contrary to s 17 of the Police Offences Ordinance 1930-1961 (ACT).\(^{21}\)

Nobody was actually offended by Mr Ball’s behaviour. Nor were subjective responses the criterion of offensiveness. So Justice Kerr called in aid the judge’s imaginary friend in its then gendered manifestation as the ‘reasonable man’. He concluded that to be offensive within the meaning of the Ordinance, behaviour must be ‘calculated to wound feelings, arouse anger, resentment, disgust or outrage in the mind of a reasonable man’.

A similar approach was taken to the word ‘insulting’ by the House of Lords in 1971. Young Mr Brutus interrupted a tennis match involving a South African player during the Wimbledon Tennis Championships. He threw leaflets around and blew a whistle as a protest against the apartheid regime then in force in South Africa. He was charged with engaging in insulting behaviour contrary to the Public Order Act 1936 (UK). The Divisional Court held that the offence creating section extended to behaviour which reasonable persons would foresee as likely to cause resentment or protest.\(^{22}\) The House of Lords held that the

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\(^{21}\) The student, Desmond Ball, became an international scholar in strategic studies, a Professor at the Australian National University and the recipient of many honours, including appointment as an Officer of the Order of Australia. President Carter praised his advice to the United States Government on strategic studies including the uncontrollability of limited nuclear exchanges: Brendan Taylor, Nicholas Farrelly and Sheryn Lee (eds) *Insurgent Intellectual: Essays in Honour of Professor Desmond Ball* (ISEAS, 2012) 18.

\(^{22}\) *Brutus v Cozens* [1972] 1 WLR 484, 487 (Melford Stevenson J)
Divisional Court had set the bar too low. On its correct interpretation the statutory prohibition would not cover vigorous, distasteful or unmanly speech or behaviour as long as it was not threatening, abusive or insulting. It might show disrespect or contempt for people’s rights but it did not follow that it must always be characterised as insulting behaviour. Moreover there could be many manifestations of behaviour which could cause resentment or protest without being insulting.

As these two cases show, statutory prohibitions on expressive conduct formulated by reference to words on a sliding scale of meaning tended to be read down well before the Principle of Legality rose to prominence under that title. That said, those cases turned upon the interpretation of single words. Statutory construction does not always or even often turn upon the chosen meaning of a single word. As Lord Hoffman said in Brown’s Case the unit of communication by means of language is the sentence and not the parts of which it is composed. And whatever the unit of communication, determination of its meaning will require consideration of the factors, well familiar to Australian lawyers, of text, context and purpose.

Other examples of sliding scale meanings are to be found in relational terms such as ‘in relation to’, ‘in connection with’ and the term ‘association’ which is mentioned later in this paper.

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Interpretation and quantum theory

Statutory construction in relation to contested meanings is not usefully described as the resolution of ambiguity. Ambiguity suggests some textual deficiency in the nature of imprecision. The term itself is ambiguous. It covers doubt or uncertainty but is also attributable to words with more than one meaning. The reality is that statutory interpretation is all about choice of available meanings.

Choosing the preferred meaning of a statutory provision is not like solving a simple linear equation. Nor is it to be determined by computer-aided searches of usage databases with acceptable answers provided according to some inscrutable algorithm. For those who may still want to lace their law with a bit of science, the choice of meaning of a statutory word, phrase or provision might be likened to the observation of a quantum system. Unobserved the system occupies a number of states — superposed and limited by reference to a probabilistic wave function. Observation does not discover which state the system is in — it determines it. The superposed states collapse into one. A statutory word, phrase or provision, whose interpretation in a particular kind of case has not been finally settled, brims with all the constructional possibilities that its ‘ordinary’ and not so ordinary meanings and shades of meaning offer but under an umbrella of legislative and common law assumptions, presumptions,

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rules and principles. The umbrella covers possibilities from highly probable and frequently used core meanings to permissible but less used and less probable meanings. It is loosely equivalent to the quantum mechanical wave function. Interpretation, like observation, collapses the possibilities into one outcome. It does not discover the one true result nor the true ‘legislative intention’.

Another analogy drawn from quantum theory is that of zero point energy. It is a manifestation of Heisenberg’s Uncertainty Principle\(^\text{26}\) which, translated into ordinary English, says that nothing in the universe can be nailed down. Even a particle in its lowest energy state jiggles – with inherent uncertainty about its momentum and location. Words, taken individually or in combination, have their own equivalent of zero point energy – inescapable shades of meaning and often multiple alternative meanings. Absolute precision, nailing down one single, narrow, unique meaning is generally unachievable.

**Assumptions and presumptions**

‘Interpretation’ may involve the application of assumptions and presumptions. Their role is explained in the 8\(^{th}\) edition of Pearce and Geddes *Statutory Interpretation in Australia*:

\[\Delta p \Delta x > \hbar/4\pi\]

\(\Delta p\) is uncertainty in momentum, \(\Delta x\) uncertainty in position and \(\hbar\) is Planck’s constant.
The courts approach the interpretation of legislation with a number of basic assumptions or presumptions in mind … The assumptions referred to are sometimes designated ‘rules’, but this is misleading … They are but assumptions and give way in the face of an indication in the legislation that it is to operate contrary to them. These assumptions are based on the expectation that certain tenets of our legal system will be followed by the legislature. They are grounded in the liberal values shared by lawyers and legislators with members of the broader community. These values are based on the abstract concepts of freedom and the sanctity of private property that people living in parliamentary democracies under the rule of law expect to be recognised and upheld.27

That passage rather reflects the passage quoted earlier from the judgment of McHugh J in *Theophanous*. It also reflects an underlying assumption about liberal values shared by lawyers and legislators with members of the broader community based on abstract concepts of freedom and the sanctity of private property. That underlying assumption may be called into question by the plethora of laws and regulations produced by our legislatures and the executive in the exercise of delegated legislative power, which affect rights and freedoms including freedom of speech, association and assembly. McHugh J’s comment about the increasingly intrusive regulatory state, referred to in the Introduction to this paper, is in point. The Australian Law Reform Commission in December 2015 produced a Report on encroachments by Commonwealth laws on traditional rights and freedoms, particularly in the areas mentioned. The Report

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disclosed a wide range of Commonwealth laws interfering with freedoms of association, assembly, speech and movement.

Assumptions as to shared liberal values in western democracies generally are under challenge. In May 2017, the Secretary-General of the Council of Europe published a report entitled ‘State of Democracy, Human Rights and the Rule of Law’. It focused on the topic of populism and the strength of Europe’s checks and balances. The Secretary-General noted that following the Second World War the nations of Europe had worked to build constitutional parliamentary systems protecting individuals and minorities from arbitrary power. He expressed concern about European societies today moving to a position less protective of their pluralism and more accepting of populism. He expressed most concern about governments openly challenging constitutional constraints and disregard international obligations in relation to human rights.\(^\text{28}\) The Secretary-General emphasised the significance of impartial and independent judiciaries in constraining powerful interests according to the laws of the land.

Where the existence or continuance of important liberal values and associated respect for human rights and freedoms are called into question, courts must decide whether the abandonment of assumptions about their general acceptance would necessitate the abandonment of protective interpretations of

statute law. The answer to that question may be that the protective approach of the common law in relation to rights and freedoms and long-established principles has a small ‘c’ constitutional character which is proof against the ebb and flow of populist tides. But even the common law in its constitutional character cannot propel the courts across the boundary which separates the judicial from the legislative function.

**Common law constitutionalism and statutory interpretation**

The Australian colonies prior to federation were the beneficiaries of what Blackstone called ‘the ancient doctrine’ that the liberties of English subjects were the birth-right of English subjects at least in English colonies uninhabited at the time of settlement.\(^{29}\) Courtesy of the Privy Council in *Cooper v Stuart*\(^ {30}\) the Australian colonies were treated, in their pre-colonisation state, as ‘practically unoccupied’ even though they were patently inhabited. The historical fiction, rested, at least in part, upon the perceived lack of an established indigenous legal system cognisable by the common law. The fiction was dispelled by the High Court in *Mabo v Commonwealth (No 2).*\(^ {31}\) Justice Gummow in his judgment in the latter case of *Wik Peoples v Queensland* said of the *Mabo* decision:

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\(^{30}\) [1888] 14 App Case 286, 291.
\(^{31}\) (1992) 175 CLR 1.
To the extent that the common law is to be understood as the ultimate constitutional foundation in Australia, there was a perceptible shift in that foundation away from what had been understood at federation.32

The reference to the common law as the ‘ultimate constitutional foundation in Australia’ harked back to the words used by Sir Owen Dixon in a paper presented at the Australian Legal Convention in 1957 under the title ‘The Common Law as an Ultimate Constitutional Foundation’.33 Dixon spoke of the common law as ‘a jurisprudence antecedently existing into which our system came and in which it operates’.34 He described it as the source of the supremacy of the Parliament at Westminster manifested in the proposition that an English court could not question the validity of a statute. He quoted Salmond’s question ‘whence comes the rule that acts of parliament have the force of law?’ He answered in Salmond’s words ‘[i]t is the law because it is the law and for no other reason that it is possible for the law to take notice of.’35 On the function of statutory interpretation and the way in which common law rules of interpretation are protective of common law principles, he posed the rhetorical question:

34 Ibid.
Would it be within the capacity of a parliamentary draftsman to frame, for example, a provision replacing a deep-rooted legal doctrine with a new one?\textsuperscript{36}

In response to a challenge at the Convention by Lord Morton of Henryton, Dixon said that he was really speaking about what a draftsman was capable of doing. He mentioned attempts in various statutes in Australia over the years to reverse the presumption of innocence and said ‘they have not managed it very well in the face of what courts have done.’\textsuperscript{37} This was a reference to the interpretive approach of the common law.

Sir Owen Dixon did not go so far as to assert the existence of a common law constitution, beyond the limits of the written Constitution, and applying judge-made limits to the supremacy of parliament. The question whether such a thing existed was adverted to in 1988 in \textit{Union Steamship Co of Australia Pty Ltd v King}\textsuperscript{38} in which the High Court said of the legislative power of the New South Wales State Parliament:

\begin{quote}
Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law … a view which Lord
\end{quote}

\begin{itemize}
\item \textsuperscript{36} Ibid 241.
\item \textsuperscript{37} Ibid 253.
\item \textsuperscript{38} (1988) 166 CLR 1.
\end{itemize}
Reid firmly rejected in *Pickin v British Railways Board*, is another question which we need not explore.\(^{39}\)

Debates about common law constitutionalism involving judge-made limitations on legislative power have arisen in New Zealand\(^ {40}\) and in the United Kingdom. Lord Woolf raised the possibility of fundamental common law constraints on the Parliament in an essay published in *Public Law* in 1995. While acknowledging the supremacy of Parliament he seemed nevertheless to draw a line at legislative action which would undermine in a fundamental way the rule of law on which the unwritten constitution depends. His example was the removal or substantial impairment of the judicial review jurisdiction of the court. Lord Justice Laws, writing in the same edition of *Public Law*, was more explicit when he said:

> As a matter of fundamental principle, it is my opinion that the survival and flourishing of a democracy in which basic rights (of which freedom of expression may be taken as a paradigm) are not only respected but enshrined requires that those who exercise democratic, political power *must have limits set to what they may do: limits which they are not* allowed to overstep. If this is right, it is a function of democratic power itself that it be not absolute.\(^ {41}\) (emphasis in original)

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\(^{39}\) Ibid 10 (citation omitted). See also *South Australia v Totani* (2010) 242 CLR 1, 29 [31].


Comments made in judgments in the *Fox Hunting Case* by Lord Steyn, Lord Hope and Baroness Hale, appeared consistent with the views expressed by Lord Woolf.\(^{42}\) Lord Hope also raised the common law constitutionalist flag in 2011 in *AXA General Insurance Ltd v HM Advocate*.\(^{43}\) He said ‘the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based’.\(^{44}\) The case concerned the Scottish Parliament and so did not raise the question of the sovereignty of the United Kingdom Parliament. It was therefore not necessary:

> to resolve the question how these conflicting views about the relationship between the rule of law and the sovereignty of the United Kingdom Parliament may be reconciled.\(^{45}\)

Nevertheless, in relation to the Scottish Parliament he said:

> We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The

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\(^{42}\) *R (Jackson) v Attorney General* [2006] 1 AC 262, 302-3 [102] (Lord Steyn), 308 [120] (Lord Hope), 318 [159] (Baroness Hale).

\(^{43}\) [2012] 1 AC 868, 913 [51].

\(^{44}\) Ibid.

\(^{45}\) Ibid.
rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.\textsuperscript{46}

That may not have been a statement about the sovereignty of the United Kingdom Parliament but was pitched at a level of generality which would seem to give it an application wider than the powers of the Scottish Parliament.

As Professor Jeffrey Jowell has suggested, it would take time, provocative legislation and considerable judicial courage for the Supreme Court to concretely assert the primacy of the rule of law over parliamentary sovereignty.\textsuperscript{47} The primacy of the rule of law in Australia can be asserted as derived from the \textit{Constitution} and particularly Chapter III, the Judicature chapter. In particular, s 75(v) in that Chapter confers upon the High Court original jurisdiction in matters in which a Writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. That jurisdiction, which cannot be removed by legislation, authorises the High Court to adjudicate on challenges to ministerial or Commonwealth official action where the challenge is brought on the basis of jurisdictional error, in effect challenges based on excess of power or failure to comply with a statutory duty. By implication from Chapter III, the High Court has entrenched the analogous

\begin{footnotes}
\item 46 Ibid.
\end{footnotes}
supervisory jurisdiction of the Supreme Courts of the States of Australia. The question whether the common law imposes any direct limitation on legislative power is highly unlikely to arise in Australia.

The common law is reflected in institutional arrangements which were brought with it to the Australian colonies, including public courts which adjudicate between parties and are the authorised interpreters of the law which they administer. Those institutional arrangements were translated into post-federation Australia. Professor Goodhart described the most striking feature of the common law as its public law, it being ‘primarily a method of administering justice.’ And as Sir John Latham wrote in 1960 ‘[i]n the interpretation of the Constitution, as of all statutes, common law rules are applied.’

The common law in Australia has also come to be seen as a repository of important rights and freedoms. A non-exhaustive list includes:

- no deprivation of liberty except by law;
- freedom of speech and of movement;
- the right to procedural fairness when affected by the exercise of public power;
- the right of access to the courts;

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49 F Pollock, The Expansion of the Common Law (Stephens & Sons, 1904) 51
immunity from deprivation of property without compensation;

- legal professional privilege;

- privilege against self-incrimination;

- immunity from interference with vested property rights;

- immunity from interference with equality of religion;

- the right to access legal counsel when accused of a serious crime.\(^52\)

The common law informs the identification of essential and defining characteristics of courts which has played a part in decisions of the High Court limiting, by implication from Chapter III of the *Constitution*, the functions that can be conferred or imposed on State, Territory or Federal courts and their judges.\(^53\)

The Principle of Legality and its antecedent presumption is perhaps the closest the courts of the common law world have come to a quasi-constitutional control over parliament. Although the Principle cannot overcome intractable language in a statute which infringes upon common law rights, freedoms or principles, it imposes a kind of manner and form requirement. That is, a


requirement for clear language before the statute will be taken to have set aside or impaired rights, freedoms and protective principles such as the presumption of innocence and, as the High Court has discussed in recent times, the accusatorial character of the criminal trial.\textsuperscript{54}

**Legislative intention and constitutional boundaries**

The common law approach to interpretation of statutes has a constitutional dimension insofar as it defines the boundary between the functions of the legislature which enacts the law and the courts which interpret and apply it. That boundary is not a bright narrow line. Statutory construction involves law-making within permitted limits to the extent that it involves constructional choice available on the text constrained by common law principles and statutory rules of interpretation.

The concept of legislative intention has been invoked as a boundary marker. In *Zheng v Cai*,\textsuperscript{55} decided in 2009, the High Court said:

It has been said that to attribute an intention to the legislature is to apply something of a fiction. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor. Rather, judicial findings


\textsuperscript{55} (2009) 239 CLR 446, 455–6 [28] (footnotes omitted).
as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*\(^5\), the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.

The constitutional relationship between the legislature and the judiciary reflected in the common law constitution and, in Australia, in the written *Constitution* which is embedded in the common law tradition, imposes limits on the range of constructional choices available to courts in the process of statutory interpretation. In this connection some case law of the last 20 years suggests a divergence between the position of Australia and New Zealand on the one hand and the United Kingdom when it comes to legislation requiring statutes to be interpreted compatibly with human rights. The divergence illustrates, at least from an Australian perspective, the constitutional boundaries of the application of the Principle of Legality.

In *Momcilovic v The Queen*,\(^5\) decided in 2011, the High Court considered s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). That provision requires that, so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is ‘compatible with human rights’. A reverse onus provision in the

\(^{5}\) (2002) 123 FCR 298, 410–12.

\(^{57}\) (2011) 245 CLR 1.
Drugs, Poisons and Controlled Substances Act 1981 (Vic) deemed a person to be in possession of a substance for the purposes of the Act, if the substance was ‘upon any land or premises occupied by [the person] ... unless the person satisfie[d] the court to the contrary.’

It was therefore in tension with the presumption of innocence set out in the Charter. The Court nevertheless rejected an argument that the reverse onus provision could be read down as requiring the accused only to introduce or point to evidence of the fact that she was not in possession of drugs on her premises, rather than having to disprove that fact. That construction was not open on the text. Six Justices held that the interpretive task imposed by the Charter accorded with ordinary principles of statutory interpretation. Section 32 was therefore a statutory analogue of the common law approach to the interpretation of statutes compatibly with common law rights and freedoms. A similar approach to the interpretation of a reverse onus provision affecting the presumption of innocence had been taken four years earlier by the Supreme Court of New Zealand in R v Hansen.

The equivalent provision, s 3 of the Human Rights Act 1998 (UK), provides, by reference to the European Convention on Human Rights:

So far as it is possible to do so ... legislation must be read and given effect in a way which is compatible with the Convention rights.

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58 Drugs, Poisons and Controlled Substances Act 1981 (Vic) s 5.
Section 3 was described by the House of Lords in *Ghaidan v Godin-Mendoza* as ‘apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant’. Lord Steyn described its function as ‘remedial’. Cautionary metaphors were deployed to ensure that the process of remedial interpretation did not get out of hand. The application of s 3 had to be ‘compatible with the underlying thrust of the legislation’. It must ‘go with the grain of the legislation’ and not remove ‘the very core and essence, the “pith and substance”’ nor violate a ‘cardinal principle’ of the legislation. Section 3 did not call for ‘legislative deliberation’. There may be seen in those cautionary metaphors a concern to limit the movement of the boundary between judiciary and parliament effected by the interpretive principle. Nevertheless the interpretive function assumed by the House of Lords in *Ghaidan* travelled beyond the common law principles of interpretation accepted in Australia.

There may be a question whether it was necessary, in that case, to go beyond the common law. In *Ghaidan* the interpretive question was whether the protection accorded the surviving spouse of a deceased residential tenant, whose

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60 [2004] 2 AC 557.  
62 Ibid 577 [49].  
63 Ibid 572 [33] (Lord Nicholls).  
64 Ibid quoting Lord Rodger 601 [121].  
65 Ibid 597 [111] (Lord Rodger).  
66 Ibid 598 [113] (Lord Rodger).  
67 Ibid 572 [33] (Lord Nicholls).
tenure had been protected under the Rent Act 1977 (UK), extended to a same sex partner. The term ‘spouse’ included a person living with the original tenant ‘as his or her wife or husband’.

Counsel intervening for the First Secretary of State in support of the surviving partner, invoked Articles 8 and 14 of the European Convention on Human Rights. Article 14 mandates the enjoyment of the rights and freedoms set forth in the Convention without discrimination on any ground such as sex. Article 8 provides, inter alia, that everyone has the right to respect for his private and family life. Counsel accepted that if the statute were to be interpreted ‘according to its most natural linguistic meaning it would produce an incompatibility with rights under article 14 read with article 8.’ That did not involve any concession that the statute could not be read as covering a surviving same sex partner. Indeed counsel went on to say:

The exercise of the section 3 power is subject only to the compatible interpretation being linguistically possible, consistently with the legislative scheme, and not crossing the boundary between judicial interpretation and the legislative function.  

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70 Ibid.
If the term ‘linguistically possible’ extended no further than permitted readings of the statutory text, it is doubtful that the House of Lords was being invited to do anything that could not be done at common law.

In *R v Secretary of State for the Home Department; Ex parte Simms*, frequently quoted for Lord Hoffman’s statement of the principle of legality, he characterised s 3 as an express enactment of that Principle. Lord Hoffman’s oft quoted passage asserted an instrumental rationale which acknowledged parliamentary supremacy but made it reasonably apparent that the principle was a judge-made imposition:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights … But 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 … 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.

In *Ghaidan*, Lord Roger adopted Lord Hoffman’s characterisation of s 3 as an express enactment of the principle of legality. Later, in *R v Inland*

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72 Ibid 132.
73 Ibid 131.
Revenue Commissioners; Ex parte Wilkinson\(^74\) Lord Hoffman again equated the interpretive rule in s 3 with the Principle of Legality albeit it applied to Convention rights as distinct from common law rights and freedoms. He said:

Just as the ‘principle of legality’ meant that statutes were construed against the background of human rights subsisting at common law, so now, section 3 requires them to be construed against the background of Convention rights. There is a strong presumption, arising from the fundamental nature of Convention rights, that Parliament did not intend a statute to mean something which would be incompatible with those rights.\(^75\)

The other Law Lords agreed with Lord Hoffman. That position was not consistent with the majority in Ghaidan but Ghaidan eventually prevailed. In Ahmed v Her Majesty’s Treasury\(^76\) Lord Phillip said:

I believe that the House of Lords has extended the reach of section 3 of the HRA beyond that of the principle of legality.\(^77\)

The difference in approach has yielded different results in relation to reverse onus provisions. In Sheldrake v Director of Public Prosecutions\(^78\) the House of Lords applied s 3 of the HRA to interpret a reverse onus provision in s 11(2) of the Terrorism Act 2000 (UK) which began with the words ‘[i]t is a

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\(^{74}\) [2005] 1 WLR 171.

\(^{75}\) Ibid 1723 [17].

\(^{76}\) [2010] 2 AC 534.

\(^{77}\) Ibid 646 [112].

\(^{78}\) [2005] 1 AC 264.
defence for a person charged with an offence under subs (1) to prove.’ Applying a proportionality test, the provision was read down to impose an evidential instead of a legal burden. The same approach had been taken in *R v Lambert*[^79] in relation to a reverse onus provision requiring the accused to ‘prove’ want of knowledge or suspicion of certain matters as imposing an evidential rather than a legal burden. Its interpretive approach had also embodied proportionality considerations. There were divided views in the High Court judgments in *Momcilovic* about whether proportionality was a qualifying aspect of the human rights and freedoms the subject of the statutory interpretive rule and therefore to be taken into account in interpreting statutes consistently with those human rights and freedoms. That is a topic for a separate paper.

The distinction between the common law approach to interpretation using the Principle of Legality and the remedial approach adopted in *Ghaidan* was made by Sir Anthony Mason NPJ, writing for the Hong Kong Court of Final Appeal in *HKSAR v Lam Kwong Wai*.[^80] The case concerned a provision reversing the persuasive onus. Common law principles of interpretation could not justify its construction as imposing only an evidential onus. Sir Anthony, adopted, in effect, the remedial interpretation approach in *Ghaidan* described provisions such as s 3 of the HRA and s 6 of the New Zealand Bill of Rights as ‘directed to the situation which arises when a statute on its true interpretation

[^79]: [2002] 2 AC 545.
[^80]: (2006) 9 HKCFAR 574.
derogates from an entrenched or statutory human right of fundamental freedom.’ Such provisions, he said, would require courts:

to give the statutory provision an interpretation that is consistent with the protected rights, even an interpretation that is strained in the sense that it was not an interpretation which the statute was capable of bearing as a matter of ordinary common law interpretation. 81

From an Australian perspective, although there are those who take a different view, the remedial approach to the statutory interpretive rule in the Victorian Charter would seem to confer a delegation by the parliament to the court of a power to rewrite legislation — a delegation which can arguably be seen as conferring on a court a function incompatible with its essential and defining characteristics as a court. Indeed, Heydon J, in dissent in Momcilovic held that there would be no point in s 32 of the Charter unless its function was to go further than the common law principle of legality. It made up for the failure of the common law rules by legitimatising reliance on a much broader kind of ‘purposive’ interpretation going beyond the traditional search for ‘purpose’ as revealed in the statutory words.

Against that background some reference can be made to the origins and content of the Principle of Legality and its connection to legislative intention.

81 Ibid [65].
Legislative intention and the origins of the Principle of Legality

A textual source of the presumption that evolved into the Principle of Legality appeared in a judgment of Marshall CJ in *United States v Fisher.* The question before the Court was whether a section of the Federal Bankruptcy Statute which conferred a priority on the US Government in respect of debts owed to it by ‘any revenue officer or other person’ was applicable to anyone owing money to the federal government or only to government officers. The Court held that the provision extended to debtors generally. In the course of his opinion, Marshall CJ wrote:

> Where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects. 

On the other hand, Marshall CJ went on to eschew the adoption of strained interpretations in order to overcome the inconvenient consequences of legislation.

No doubt some contemporary critics of the principle of legality would also be critics of the principles stated by Chief Justice Marshall. The critic would say that it leaves the lawmaker and draftsperson uncertain about the

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82. 6 US 358 (1805).
83. Ibid 390.
rights, freedoms and principles protected, about what is fundamental and what is not, and about the ways in which ‘the legislative intention must be expressed with irresistible clearness’ to overcome the presumption. It is, however, a reality of our legal system that judges have long formulated general propositions in the development of the common law and in constitutional doctrine, that leave their future application to be worked out case by case. The field of statutory interpretation is no exception to that phenomenon. In the meantime, the informed legislator or legislative draftsman would have a prudent awareness of areas in which a contested interpretation might be taken before the courts.

Marshall CJ’s opinion was footnoted in the 1905 edition of *Maxwell on the Interpretation of Statutes* in support of a passage in that text which was quoted by O’Connor J in *Potter v Minahan*:

> 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.\(^8^4\)

Marshall CJ attached great significance to the concept of legislative intention. In 1819 he wrote, in an anonymous newspaper article, that he could ‘cite from

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\(^8^4\) (1908) 7 CLR 277, 304.
[the common law] the most complete evidence that intention is the most sacred rule of interpretation.\(^8^5\) That does not mean he treated legislative intention as some kind of incorporeal reality. In an interesting article on his approach to statutory interpretation, published in the *Yale Law Journal*, John Yoo pointed to his focus on text as the basis upon which legislative intention was to be inferred ‘[t]he object of language is to communicate the intention of him who speaks.’\(^8^6\) Marshall CJ saw Congress speaking but only in a statutory tongue – an assumption which led him to presume that Congress would always act in accordance with existing laws. Yoo wrote ‘Marshall argued that courts should interpret statutes so as to avoid overriding individual rights or the Constitution.’ He cited *US v Fisher* and the other statement by Marshall that statutes ‘ought never to be construed to violate the laws of the nation if any other possible construction remains.’\(^8^7\)

The approach to construction enunciated in *Potter v Minahan* and derived from the words of Marshall CJ in *Fisher* was not in terms confined to rights and freedoms but extended to ‘fundamental principles’ and ‘the general system of law’. That generality was reflected in the statement of the High Court in 1990:

That where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred.\(^8^8\)

\(^8^7\) Yoo, above n 85, 1618.
The presumption has also been held applicable to principles of equity.\textsuperscript{89} The generality of that interpretive approach in the UK was stated by Devlin J in 1952:

\begin{quote}
It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words which point unmistakably to that conclusion.\textsuperscript{90}
\end{quote}

The statement in the judgment of Devlin J found its way into the 12th edition of \textit{Maxwell on Statutes} and was cited by Lord Simon in 1975 against statutory abrogation of the rule in \textit{Harris v Quine}.\textsuperscript{91} The case was \textit{Black-Clawson International Ltd v Papierwerke AG}.\textsuperscript{92} The relevant rule was that a foreign judgment in personam was a good defence to an action in England for the same matter where the judgment had been in favour of the defendant and was final and conclusive on the merits. The House of Lords was concerned with the \textit{Foreign Judgments (Reciprocal Enforcements) Act 1933}, s 8 of which made certain foreign judgments conclusive between the parties thereto in all proceedings in the United Kingdom courts founded on the same cause of action. Lord Simon observed that not many Members of Parliament in 1933 would have known of the rule in \textit{Harris v Quine}. On the other hand few of the

\textsuperscript{89} \textit{Minister for Lands and Forrests v McPherson} (1991) 2 NSWLR 687.
\textsuperscript{90} \textit{National Assistance Board v Wilkinson} [1952] 2 QB 648, 661.
\textsuperscript{91} [1869] 6 QB 653.
\textsuperscript{92} [1975] AC 591.
Members of the Greer Committee which drafted the Bill would have been ignorant of it.

The general approach to legislative construction enunciated by Lord Simon was encapsulated in the sentence:

"Courts of construction interpret statutes with a view to ascertaining the intention of Parliament expressed therein. But, as in the interpretation of all written material, what is to be ascertained is the meaning of what Parliament has said and not what Parliament meant to say."

That observation reinforced the general and prevailing approach to the meaning of all legal texts by reference to their language, rather than by authorial intention. That approach was emphatically restated in the joint judgment of Heydon and Crennan JJ in *Byrnes v Kendle*.

Specifically in relation to statutory interpretation they referred to O’Connor J’s theory of statutory construction propounded in *Tasmania v Commonwealth* which stressed the irrelevance of the subjective intention of legislators:

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93 Ibid 645.
95 (1904) 1 CLR 329, 358–9.
The construction of the statute depended on its intention, but only in the sense of the intention to be gathered from the statutory words in the light of surrounding circumstances.\textsuperscript{96}

The nature of legislative intention as an imputation based upon the statutory text was affirmed in the joint judgment of four Justices of the High Court in \textit{Project Blue Sky Inc v Australian Broadcasting Authority}:

the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction … may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.\textsuperscript{97}

Ultimately, in \textit{Lacey v Attorney-General (Qld)}\textsuperscript{98} six Justices of the Court brought the principle of legality together with a statement about legislative intention. The Justices referred to \textit{Project Blue Sky} and an example given in that decision of a canon of construction directed to giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have. The example was:

\begin{footnotesize}
\textsuperscript{96} (2011) 243 CLR 253, 283 [97] (footnote omitted).
\textsuperscript{97} (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).
\textsuperscript{98} (2011) 242 CLR 573.
\end{footnotesize}
the presumption that, in the absence of unmistakeable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities.\textsuperscript{99}

The Justices in \textit{Lacey} said:

The legislative intention there referred to is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.\textsuperscript{100}

The joint judgment went on to refer specifically to the concept of ‘purpose’ in statutory provisions:

The application of the rules will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.\textsuperscript{101}


\textsuperscript{100} Ibid 592 [43] (footnotes omitted).

\textsuperscript{101} Ibid 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
Resort to ‘purpose’ in Australia is supported by statutory rules of interpretation as, for example, s 15AA of the *Acts Interpretation Act 1901* (Cth). That provision requires that, in interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not the purpose or object is expressly stated in the Act) is to be preferred to each other construction. It is not necessary to resort to some anterior finding of legislative intention in order to assign a purpose to an Act. In any event, legislative intention used in relation to construction, as its history shows, has been inextricably linked to meaning — once meaning is determined the legislative intention can be announced.

Sometimes, of course, the legislature may expressly state in an Act ‘that the intention of the Parliament is …’. That can probably be taken as a statement of purpose relevant to construction. It cannot itself require the court to give a meaning to the text based upon an erroneous parliamentary opinion which the text will not bear.\(^\text{102}\) Similarly, ministerial statements about meaning in Second Reading Speeches, do not determine the meaning of the statutory text if the statutory text will not bear that meaning.\(^\text{103}\)

\(^{102}\) Any more than a later law based upon a misconstruction of an earlier law can support its misconstruction: *Deputy Federal Commissioner of Taxation (SA) v Elders Trustee & Executor Co* (1936) 57 CLR 610, 625–6.

\(^{103}\) *Re: Bollon; Ex parte Beane* (1987) 162 CLR 514, 518.
The Principle of Legality – alive and well but contested

The antecedents and general content of the Principle of Legality has been discussed. There have been many statements and restatements of the Principle in Australian courts. They have generally referred to a presumed legislative intention. Thus in *Coco v The Queen* six Justices of the Court said:

The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakeable 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.\(^{104}\)

The High Court in its invocation of the Principle of Legality has referred, inter alia, to the proposition that the exercise of legislative power takes place in Australia, as it does in England, in the constitutional setting of ‘a liberal democracy founded on the traditions and principles of the common law’ — a proposition taken from *R v Secretary of State for the Home Department; Ex parte Pierson*.\(^{105}\) In *Electrolux Home Products Pty Ltd v Australian Workers’ Union*\(^{106}\) Gleeson CJ referred to what was said in *Coco* and Lord Steyn’s judgment in *Pierson* in which his Lordship described the presumption against

\(^{104}\) (1994) 179 CLR 427, 437 (footnote omitted).
the infringement of fundamental rights and freedoms as an aspect of the principle of legality governing the relationship between Parliament, the executive and the court. Gleeson CJ said:

The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.107

The language of Gleeson CJ in Electrolux reinforces the proposition that the modern application of the Principle of Legality does not proceed in any formal sense upon an anterior assumption about legislative intention. The same is true of Lord Hoffman’s approach expressed in Simms.

A similar approach was reflected in a judgment of the Full Court of the Federal Court of Australia in Minister for Immigration and Citizenship v Haneef.108 That case concerned the application of a provision of the Migration Act 1958 (Cth) under which the Minister was empowered to cancel a visa on the ground that the visa holder had ‘an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct.’ The interpretive question concerned the scope of

107 Ibid 329 [21].
the word ‘association’. The Minister had applied a wide interpretation which did not require any suspicion that the visa holder was involved in criminal conduct. The conduct in question was that of a terrorist organisation involving two second cousins of the visa holder. The Court held that the association necessary to enliven the cancellation power must be an association involving some sympathy with or support for or involvement in the criminal conduct of a person, group or organisation. In adopting that approach the Court invoked the principle of legality citing Simms and Coco. It also pointed to the substantive character of common law rights and freedoms quoting with approval what TRS Allen wrote in 1996:

Liberty is not merely what remains when the meaning of statutes and the scope of executive powers have been settled authoritatively by the courts. The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.\(^{109}\)

**Legislative intention, the Principle of Legality and their relationship are all the subject of extensive, contemporary discussion and debate. This paper**

has focussed upon the nature of the constructional process, the character of statements about legislative intention and its inutility as a substantive rationale for the rights protective interpretive approach. A point of some importance in the course of debate and discussion is the relationship, defined by principles of statutory construction, between the courts and the other branches of government. That is a boundary to be respected by both.

Among important issues surrounding the further development of the Principle are:

• Its designation as ‘the Principle of Legality’ which is apt to confuse.

• The need for clarity if the Principle is to deliver the desired enhancement of the political process in its application to important human rights and freedoms and protective common law principles.

• The application of the Principle to ‘general or ambiguous words’ referred to by Lord Hoffman in *Simms* and not evidently shared by the other Law Lords, is a necessary requirement of the application of the Principle. This paper does not accept that condition and prefers the concept of ‘constructional choice’ which is routinely available in many statutory texts.
The role, if any, that proportionality has to play in the interpretation of affected rights or freedoms anterior to or as an aspect of the application of the Principle of Legality.\textsuperscript{110}

**Conclusion**

I recently had the pleasure of writing a Foreword to an excellent collection of essays on the topic of the Principle of Legality edited by Dan Meagher and Mathew Groves. An apposite metaphor for the Principle and the disparate perspectives of the contributors in that case and commentators generally comes from W B Yeats’ poem ‘The Second Coming’. Here the poet imagined an image from the desert waste ‘out of spiritus mundi’. The image was of a rough beast with ‘lion body and the head of a man … moving its slow thighs while all about it/wind shadows of the indignant desert birds’.

Commentators, including the contributors to that collection, wind about the rough beast and consider its uncertain origins, its chimeric and evolving rationales, its shifting lineaments and its varying purposes. They look to its parasitic connection with that other fabulous creation — legislative intention. Their examination of and debate about the Principle of Legality has a wider significance for our understanding of statutory construction generally and its place in our Constitutions. It also has a particular significance at a time when a

generally shared acceptance of common law rights and freedoms and fundamental principles cannot be taken for granted.