The Principle of Legality as Clear Statement Rule: Significance and Problems

Dan Meagher*

Abstract

In Australia, the common law principle of legality has hardened into a strong clear statement rule that is applied when legislation engages common law rights and freedoms. It has transformed a loose collection of rebuttable interpretive presumptions into a quasi-constitutional common law bill of rights. However, these developments are not without controversy or issue. The analysis undertaken in this article suggests that the principle of legality as clear statement rule — as mandated by the High Court in Coco v The Queen — can only work legitimately if Parliament has clear and prior notice of the rights and freedoms that it operates to protect. But it is problematic if what a common law right, such as freedom of speech, requires or guarantees in any given legislative context is unclear and contested, and so must be judicially divined at the point of application. In these cases, the principle operates to enforce a (post-legislative) judicial approximation of what best protects and promotes an abstract legal value or principle. It amounts to the illegitimate judicial remaking of prior legislative decisions on rights. This undercuts the normative justifications for the principle of legality as it obscures from Parliament the common law (rights) backdrop against which its legislation is enacted and interpreted.

I  Introduction

In 2005, the Supreme Court of NSW Chief Justice published an important paper on the ‘Principle of Legality and the Clear Statement Principle’.¹ The ideas outlined there by Chief Justice Spigelman were expanded upon in ‘The Common Law Bill of Rights’ and ‘The Application of Quasi-constitutional Laws’, the first two of his 2008 McPherson Lectures.² In these papers, attention was drawn to the congruence

* Associate Professor, School of Law, Deakin University. Thank you to Matthew Groves, Adrienne Stone and the anonymous referees for providing invaluable feedback and suggestions, and to Professor Dan Martin, Loyola Law School (Los Angeles), where much of the research and writing of the article was undertaken.


² These lectures are published as: James Spigelman, Statutory Interpretation and Human Rights (University of Queensland Press, 2008).
between clear statement rules in the United States and the common law principle of legality in Australia. Significantly, it was said that the interpretive approach involved in the application of the principle of legality was more appropriately called ‘the clear statement principle’. It was so as it ‘more accurately reflects the true judicial role’ when determining whether or not the principle of legality can be applied to the construction of a statute:

If Parliament wishes to interfere where rights, liberties and expectations are affected, it must do so with clarity. The clear statement principle is the critical way that the law of statutory interpretation reflects and implements the principle of legality.

In the United States, as Chief Justice Spigelman noted, there has long been ‘a clear interaction between constitutional and quasi-constitutional principles’ and this was facilitated primarily through the collection of substantive interpretive canons known as ‘clear statement rules’. In Australia, there is a developing body of case law where the courts have applied the principle of legality to protect common law rights and freedoms. In important respects, however, the methodology (and so the proper scope) of the principle remains elusive.

When we wish to shed comparative light on the interpretive rights practices of our courts, it is towards similarly placed Commonwealth nations that Australian eyes increasingly turn. This makes perfectly good sense when in Australia, New Zealand and the United Kingdom statutory bills of rights exist and the judicial protection of rights occurs within a common law system of justice and parliamentary system of government. Yet, the defining characteristic of, and influence upon, Australian (public) law is our written and entrenched Constitution. It establishes a federal system and a strict separation of judicial power from the political arms of government. And it is with the United States, not our close Commonwealth brethren, that we share these institutional arrangements.

---

3 Ibid 86–8.
5 Ibid.
6 Ibid 89–90 (citations omitted).
and foundation principles. \textsuperscript{11} It is in this context that the jurisprudence and literature on clear statement rules in the United States may yield some valuable insights for the judicial protection of rights at common law in Australia and the principle of legality in particular.

To this end, this article will explore the normative and methodological parallels that exist between clear statement rules and the principle of legality. This is done in Part II and demonstrates that the principle of legality is a strong Australian species of clear statement rule when legislation engages common law rights and freedoms. Its significance is that in this age of statutes, our courts have developed a common law bill of rights, freedoms and principles that is strongly resistant to legislative encroachment.

Part III then identifies and explores methodological problems that arise with the application of the principle of legality as clear statement rule. It can only operate coherently and legitimately if parliaments in Australia have clear and prior notice as to the content of the common law bill of rights. But the analysis undertaken will suggest that this ‘content’ (ie, what the right, freedom or principle requires or guarantees in the relevant context) is determined or divined by judges at the point of legislative application. This amounts to the courts illegitimately remaking prior legislative decisions on rights.

The article concludes by considering whether or not these problems might be resolved if proportionality was incorporated into the framework of the principle of legality. This will demonstrate that the very nature of rights (indeterminate, highly contextual and subject to reasonable disagreement) makes it difficult, if not impossible, for judges to detail — with precision and in advance — the content of the common law bill of rights, freedoms and principles. If so, the principle of legality as clear statement rule cannot determine rights cases in a manner that is compatible with its normative justification in contemporary Australian law.

\section*{II \hspace{1em} The Principle of Legality as Clear Statement Rule}

In the United States, it is said that clear statement rules can secure robust protection of individual rights in a manner that enhances legislative clarity, democratic government \textsuperscript{12} and promotes constitutional and other important legal values. \textsuperscript{14} The common law principle of legality can perform a similar rights-protective democracy-enhancing role and is the primary means for the judicial

\begin{flushleft}

\textsuperscript{12} \textit{Finley v United States}, 490 US 545, 556 (1989) (Scalia J).


\end{flushleft}
protection of rights in a jurisdiction that lacks a national bill of rights. The difficult challenge of construing an expanding statute book in a rights-protective manner has seen a corresponding increase in the strength and popularity of clear statement rules and the principle of legality. As a consequence, in the United States ‘the common law [has] developed a bill of rights in recognition of the fact that infringement of rights will often occur by statute or by the exercise of powers under statute’. In Australia, Chief Justice Spigelman has outlined a suite of rebuttable presumptions that, taken together, are said to comprise a ‘common law bill of rights’. These rebuttable presumptions are (now) considered fundamental rights and freedoms at common law and are protected to the extent that the courts can apply the principle of legality in the construction of statutes. Relevantly, these common law interpretive developments in Australia and the United States have interesting parallels and it is to these that I now turn.

A The Normative Parallel

In the United States, Eskridge Jr has observed that the courts apply some clear statement rules more vigorously than others. There are, in this regard, said to be ordinary, strong and even super-strong clear statement rules underpinned by values derived from the United States Constitution, statute or the common law. And they serve to protect those values ‘by establish[ing] very strong presumptions of statutory meaning that can be rebutted only through unambiguous statutory text targeted at the specific problem’. There are, for example, clear statement rules of lenity, to avoid constitutional issues, and against the retrospective operation of statutes. And the Supreme Court has developed super-strong rules against the extraterritorial operation of United States law, the waiver of United States sovereign immunity, federal invasion of ‘core state functions’, and the implied repeal of habeas corpus.

These clear statement rules are said to provide an attractive alternative to strong (counter-majoritarian) judicial review when legislation engages constitutional or other important legal rights and values. The rules are ‘an

---

16 For clear statement rules see Eskridge Jr and Frickey, above n 7, 596–8; for the principle of legality see Meagher, above n 8, 453–6.
17 Spigelman, above n 2, 23.
18 Ibid 27.
20 Eskridge Jr and Frickey, above n 7, 612.
expression of the [Supreme] Court’s constitutional values, a way for the Court to conduct an illuminating discourse with the legislature about our nation’s public values, but without obstructing or intruding into the political system’. And ‘[b]y developing … a thick description of its interpretive practice, the Court [can] provide Congress with more certain guidelines as to how it should expect to see its statutes interpreted’. This gives the legislature clear and prior notice as to those rights and values that the courts will protect if interpretively possible and the manner in which they will do so. Scalia J has noted in this regard that ‘[w]hat is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts’.

This can promote rule of law values by requiring greater clarity in the drafting of statutes that engage constitutional rights and values and transparency in the way they will be interpreted by the courts. In doing so, it is said that such rules … provide significant protection for constitutional norms because they raise the costs of statutory provisions invading such norms. Ultimately, such rules may even be democracy-enhancing by focusing the political process on the values enshrined in the Constitution.

However, clear statement rules are not without normative (indeed constitutional) controversy. As will be detailed below, they amount to mandatory rules of interpretation developed by the courts that are imposed on the legislature. In this regard, Larry Alexander and Saikrishna Prakash argue that ‘such rules of interpretation are constitutionally problematic’:

We doubt that the judicial power — the power to decide cases — gives the federal judiciary the power to dictate interpretive rules to Congress. The courts cannot dictate (or constrain) how Congress must express itself.

And notwithstanding the ‘weighty precedential pedigrees’ of most clear statement rules, they are controversial for they ‘reflect judicially articulated policies that are sometimes enforced very vigorously … and thus do affect the allocation of power, rights, and property in [American] society’. To this end, Alexander and Prakash say they ‘should be recognized for what they are: attempts to drag statutes away from their actual meaning and towards the substantive preferences of those who create the rules of interpretation’. Which, in the case of clear statement rules, are the senior members of the judiciary.

---

29 Ibid 276.
30 Ibid.
32 Eskridge Jr, above n 13, 286–7.
33 Larry Alexander and Saikrishna Prakash, ‘Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation’ (2003) 20 Constitutional Commentary 97, 102. Thanks to one of the referees for drawing this article to my attention.
34 Eskridge Jr and Frickey, above n 7, 598.
35 Eskridge Jr, Frickey and Garrett, above n 19, 356.
36 Alexander and Prakash, above n 33, 109.
In Australia, the origins of (what is now termed) ‘the principle of legality’ can be traced to the following passage from the judgment of O’Connor J in the seminal 1908 High Court case of 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.38

This makes clear that the normative justification for applying the principle of legality was, originally, to ascertain the meaning of legislation as intended by the enacting Parliament. But this has, arguably, changed or at least evolved since its initial recognition by the High Court in Potter. It is true that the language of parliamentary intent (at least of the inferred, objective or imputed kind) is still used by our judges in cases and extra-curial commentary.39 But in its modern guise, the principle of legality has come to be recognised as an independent common law principle that is central to the proper functioning of our constitutional system of democratic government and the maintenance of the rule of law.40

This development might be linked to the history of the principle of legality in the common law courts. For a good part of the 20th century the principle was applied by judges ‘in favour of a narrow vision of classical economic liberalism and against incursions from a modern, collectivist state’.41 Consequently, the rights considered fundamental, and therefore protected, by the courts became increasingly at odds with those favoured by the political arms of government and the public who stood to benefit from the socially progressive and economically redistributive legislation.42 The catalyst for the contemporary renaissance, or maybe more accurately the progressive renovation, of the principle of legality was ‘[t]he rise and rise of human rights’ as a core concern of the international legal order in the aftermath of World War II.43 In Australia, it was not only these external developments that came to exert an influence on the rights-protective capacity of the common law. The willingness of the High Court from the 1990s onwards to imply rights and freedoms from the text and structure of the Australian Constitution and to take seriously the few expressly provided should not be underestimated in understanding the contemporary renovation of the principle of legality.44

38 Potter v Minahan (1908) 7 CLR 277, 304 (‘Potter’) (citations omitted).
40 For a detailed argument as to the transformation of the constitutional justification(s) of the principle of legality see Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37 Melbourne University Law Review 372.
42 See Gleeson, above n 39, 33–4.
Chief Justice French, for example, has said that the principle of legality ‘can be regarded as “constitutional” in character’ and ‘that common law freedoms are more than merely residual’. He did so before quoting the following passage from T R S Allan:

[These rights and freedoms] 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.

While Gleeson CJ explained the justification for the principle of legality in the following terms:

The [principle] 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.

The promotion of these values and its rights-protective role is evident in the authoritative contemporary statement as to the nature and scope of the principle of legality, which comes from the joint judgment in Coco v The Queen:

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.

As expressed in X7, ‘[t]he requirement of the principle of legality is that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system of law must be expressed with irresistible clearness’. In this way, the contemporary conception of the principle of legality is now associated more with the promotion of legislative clarity, interpretive

---


48 Coco v The Queen (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted), 446 (Deane and Dawson JJ agreeing) (‘Coco’).

49 X7 v Australian Crime Commission (2013) 248 CLR 92, 153 (citations omitted) (‘X7’).
transparency and its capacity to enhance political accountability and so democratic government.

Parliament may, of course, legislate to the contrary, but must use crystal-clear statutory language in order to do so. As Lord Hoffmann now famously observed in *Ex parte Simms*:

> [T]he 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.\(^{50}\)

Gleeson CJ noted also that

> [a] statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and the acknowledged by the courts to be respected by Parliament.\(^ {51}\)

But the principle of legality is not only ‘an expression of a legal value, respected by the courts’ — it is an expression of a legal value that is made and enforced by the courts. That is why Dyzenhaus, Hunt and Taggart said the principle of legality ‘is controversial, at least in so far as it requires judges to construct common law values, and in respect of the material they can legitimately use in this building exercise’.\(^ {52}\) Common law rights and freedoms are those principles and values *chosen* by the courts as especially worthy and capable of judicial protection in our legal system. J J Doyle QC said that this process ‘has reflected the views of society and judges as to what rights should be accorded to individuals in a just society, or what rights are required to ensure our integrity as individuals’.\(^ {53}\) The important point is that the principle of legality is no longer an ‘interpretive fiction’\(^ {54}\) about likely parliamentary intent, but a clear and prior judicial statement to the elected arms of government as to the common law rights and freedoms that will be jealously guarded from legislative encroachment. In this regard, Goldsworthy has rightly noted that

> [t]hese statements suggest that the presumptions are not really motivated by genuine uncertainty about Parliament’s intentions; instead, they amount to

\(^{50}\) *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (‘*Ex parte Simms*’).

\(^{51}\) *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 (Gleeson CJ) (‘*Al-Kateb*’).


\(^{54}\) *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 299 (McHugh J).
quasi-constitutional ‘manner and form’ requirements, imposed by the judiciary, to enhance Parliament’s accountability to the electorate.55

On this account, the principle of legality is now justified on its own terms and it underpins an interpretive approach of ‘constitutional’ significance. It is no longer primarily a presumption that is deployed in faithful service to parliamentary intent. And, as will be detailed below, its application to the construction of legislation has transformed a loose collection of rebuttable interpretive presumptions into what is properly called a common law bill of rights. However, this normative development, and the interpretive approach it involves, is not without controversy.56 The principle of legality certainly forms an important part of the context (and common law backdrop) in which parliaments legislate and is relevant to the intended meaning of statutes that engage common law rights and freedoms.57 But in Australia, the core interpretive duty of the courts is still to ‘give the words of a statutory provision the meaning that the legislature is taken to have intended them to have’.58 And the means by which the Parliament expresses its ‘will’ or ‘intention’ is through the statutory text that is enacts.59 So it is critical that the application of the principle of legality constitutes statutory interpretation not judicial legislation.60 Of course that line is not a bright one and reasonable judicial minds will differ as to where it lies. In this regard, Sir Philip Sales has usefully observed of the principle that

if Parliament cannot be taken to have been squarely on notice of the existence of [a fundamental common law] principle or right, then the process of ‘reading down’ or modifying the natural meaning of words used would undermine rather than promote Parliament’s intention as expressed in the legislation.61

In any event, the account offered here has identified the similar normative justifications for clear statement rules and the principle of legality in contemporary American and Australian law. It explains also the centrality of these interpretive rules to the construction of the common law bill of rights that has been undertaken by the courts in both the United States and Australia. The judicial choice to use common law interpretive powers, where possible, to advance this rights enterprise is underpinned by a shared conviction that robust protection of individual rights can, indeed should, be provided in a manner that

55 Jeffrey Goldsworthy, Parliamentary Sovereignty: Contemporary Debates (Cambridge University Press, 2010) 308–9. Thanks to one of the referees for this point.
56 See Richard Ekins and Jeffrey Goldsworthy, ‘The Reality and Indispensability of Legislative Intentions’ (2014) 36 Sydney Law Review 39. The authors are critical of the High Court’s recent challenge to the principle that ascertaining the legislature’s intention is the primary object of statutory interpretation; and they suggest that the principle of legality is a ‘possible example’ of this radical development (at 44).
58 Ibid (emphasis added).
promotes legislative clarity, interpretive transparency, democracy and the rule of law. Such an approach is not without controversy, as noted. But it may be inevitable when the ubiquity of statutes and the legalisation of human rights are two of the dominant legal characteristics of our time.\(^{62}\) I now turn to consider in more detail how courts in the United States and Australia do this by outlining the methodological parallel that appears to exist between clear statement rules and the principle of legality. The interpretive significance of this methodology in the Australian context will then be explained.

**B The Methodological Parallel**

In the United States, clear statement rules are interpretive canons that have a rule-like operation as Eskridge Jr, Frickey and Garrett explain:

> If a presumption of statutory meaning is sufficiently powerful, it can rise to the level of a clear statement rule … In such instances, the Court is announcing a rule of law: in the absence of clear statutory text speaking to the precise issue, judges must interpret the statute a certain way. Sometimes the courts impose such a stringent requirement of statutory textual clarity as to require the legislature to draft statutes with highly targeted text containing what amounts to ‘magic language’ if the legislature wishes to overcome the canon. For example, Congress is well advised, after Nordic Village, to include such language as ‘the sovereign immunity of the United States is hereby waived’ in its statutes in addition to more general language indicating that the government is amenable to suit. Such steroidal canons dictating special language might be labeled super-strong clear statement rules.\(^{63}\)

These clear statement rules are strictly applied to the construction of statutes to protect principles and values that have a common law, statutory or constitutional source such as federalism, due process and the separation of powers.\(^{64}\)

The Supreme Court’s decision in *INS v St Cyr* demonstrates the interpretive bite these rules can have when a statute engages core concerns and values of the courts and the judicial process: liberty, access to the courts and the rule of law.\(^{65}\) The case concerned congressional legislation that, on its ordinary or natural meaning, deprived criminal aliens of habeas corpus review of a deportation order. The title of the relevant provisions at issue — ‘Elimination of Custody Review by Habeas Corpus’ — and the detailed legislative history confirmed that the Congress


\(^{63}\) Eskridge Jr, Frickey and Garrett, above n 19, 354–5 (emphasis in original).

\(^{64}\) Ibid 352–5.

\(^{65}\) *Immigration and Naturalization Service v St Cyr*, 533 US 289 (2001) (‘*INS v St Cyr*’).
intended to repeal habeas corpus review in the courts.\textsuperscript{66} The Supreme Court, however, held otherwise:

For the [Immigration and Naturalization Service] to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction. … Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal.\textsuperscript{67}

The clear statement rule required that Congress had to use crystal-clear language — ‘magic words’ — to trump the relevant rights and freedoms engaged on the ordinary and natural meaning of the statute. And ‘in the absence of clear statutory text speaking to the precise issue’,\textsuperscript{68} the Supreme Court had to give the statute in \textit{INS v St Cyr} this rights-protective construction. This amounts to a mandatory rule of interpretation that makes fundamental rights (as discovered and defined by the judiciary) strongly resistant to legislative abrogation. It was, however, a conception of the interpretive requirement that the clear statement rule mandated that was strongly disputed by Scalia J in dissent. Scalia J argued that Congress does not have to use express words to rebut the strong (rights) presumption, so long as that intent is clear on the face of the statute:

\begin{quote}
It fabricates a superclear statement, “magic words” requirement for the congressional expression of such an intent, unjustified in law and unparalleled in any other area of our jurisprudence. … Even in those areas of our jurisprudence where we have adopted a “clear statement” rule (notably, the sovereign immunity cases to which the Court adverts …), clear statement has never meant the kind of magic words demanded by the Court today …\textsuperscript{69}
\end{quote}

In Australia, the principle of legality as articulated in \textit{Coco} protects, to the greatest extent interpretively possible, the common law rights and freedoms engaged by the ordinary or grammatical meaning of legislation.\textsuperscript{70} Our judges do so by proceeding from the interpretive premise that a statute does not disturb or infringe the relevant set of common law rights and freedoms. This first interpretive step is the critical one: the judicial identification of the right or freedom that is engaged by an ordinary construction of the relevant legislation. Once this is done — and absent unmistakably clear statutory language to the contrary — the principle of legality is applied and the legislation given a rights-protective construction. Relevantly, the High Court made clear in \textit{Coco} that judges must construe legislation compatibly with the common law bill of rights unless the terms of the statute make clear ‘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’.\textsuperscript{71}

\begin{flushright}
\textsuperscript{66} Ibid 329 (Scalia J dissenting).
\textsuperscript{67} Ibid 298–9 (citations omitted).
\textsuperscript{68} Eskridge Jr, Frickey and Garrett, above n 19, 354.
\textsuperscript{71} \textit{Coco} (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).
\end{flushright}
As French CJ explained in *Momcilovic*, the principle of legality ‘requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law’. But where ‘statutory language may leave open only an interpretation or interpretations which infringe one or more rights and freedoms’, the principle ‘is of no avail against such language’.

In Australia, the application of this rule-like conception of the principle of legality has protected from legislative encroachment the common law rights to liberty, property, free speech, natural justice, access to the courts and even the defining characteristics of our ‘general system of law’. In this regard, it is worth examining the High Court’s 2011 decision in *Lacey v Attorney-General (Qld)*, which provides a clear account (and application) of this methodology. In *Lacey*, the issue was whether the Court of Appeal of the Supreme Court of Queensland had power under s 669A(1) of the *Criminal Code 1899 (Qld)* ‘to vary a sentence absent any demonstrated or inferred error on the part of the sentencing judge’. Section 669A(1) read:

> The Attorney-General may appeal to the Court against any sentence pronounced by—(a) the court of trial; or (b) a court of summary jurisdiction in a case where an indictable offence is dealt with summarily by that court; and the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper.

It was noted by the High Court that

> [a]n appeal is not a common law remedy. It requires the creation by statute of an appellate jurisdiction and the powers necessary for its exercise. There was, at common law, no jurisdiction to entertain appeals by convicted persons or by the Crown against conviction or sentence.

As a consequence, and in light of the argument of the Attorney-General of Queensland that the provision did confer such a power, the judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ outlined the following rights concerns of the common law:

> The treatment of Crown appeals against sentence as “exceptional” indicated a judicial concern that criminal statutes should not be construed so as to facilitate the erosion of common law protection against double jeopardy.

---

72 *Momcilovic* (2011) 245 CLR 1, 46 (citations omitted).
73 Ibid 47.
74 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J) (‘*Re Bolton*’).
75 *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 (French CJ).
76 *Evans v New South Wales* (2008) 168 FCR 576, 595–6 (French, Branson and Stone JJ) (‘*Evans*’).
77 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 271 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (‘*Saeed*’).
80 *Lacey v A-G (Qld)* (2011) 242 CLR 573 (‘*Lacey*’).
81 Ibid 576.
82 Ibid 578 (citations omitted).
This was reflective of a wider resistance to the construction of statutes, absent clear language, so as to infringe upon fundamental common law principles, rights and freedoms.83

In other words, the construction of s 669A(1) urged by the Queensland Attorney-General infringed upon the common law principle against double jeopardy and ‘tip[ped] the scales of criminal justice in a way that offend[ed] “deep-rooted notions of fairness and decency”’.84 The key constructional issue was, then, the kind of appellate jurisdiction that s 669A(1) conferred on the Court of Appeal — and, specifically, whether the word ‘appeal’ in this legislative context provided the power to ‘vary a sentence absent any demonstrated or inferred error on the part of the sentencing judge’.85 The joint judgment explained how that construction must be undertaken at common law:

In construing a statute which provides for a Crown appeal against sentence, common law principles of interpretation would not, unless clear language required it, prefer a construction which provides for an increase of the sentence without the need to show error by the primary judge. That is a specific application of the principle of legality.86

The provision used the language of ‘unfettered discretion’ as to the Court’s power to vary sentences on appeal. And there was legislative history, specifically statements in the second reading speech of the relevant Minister when s 669A(1) was repealed then re-enacted, that the Court of Criminal Appeal was to have ‘an unfettered discretion to determine the proper sentence to impose when the Attorney-General has appealed against the inadequacy of the sentence’.87 But as was the case with INS v St Cyr in the United States, the High Court held that this was not interpretively decisive:

The Minister’s words … cannot be substituted for the text of the law, particularly where the Minister’s intention, not expressed in the law, affects the liberty of the subject. In any event the Minister’s Speech left open the question of the content to be given to the word “appeal” and thereby to the jurisdiction conferred upon the Court. Neither expressly nor by necessary implication do the words of s 669A(1) define the jurisdiction simply by reference to the power to vary sentences if the Attorney-General chooses to appeal. Such a construction would require clear language to overcome the intention which the common law imputes to the legislature that it does not require the Court to consider an appeal on the basis that it might be persuaded to disagree with a sentence which could not be challenged as manifestly inadequate or excessive or otherwise affected by error.88

The rule-like application of the principle of legality in Lacey — and the strength it provided to the double jeopardy principle in the common law bill of rights — is apparent. Once the High Court identified the common law right in

83 Ibid 582.
84 Ibid 584 (citations omitted).
85 Ibid 576.
86 Ibid 583.
87 Ibid 598 citations omitted) quoting Queensland, Parliamentary Debates, Legislative Assembly, 23 April 1975, 993 (William Knox).
88 Ibid (citations omitted).
legislative play — and in the absence of clear and unambiguous statutory language in s 669A(1) to the contrary — the principle operated to protect the content of that right to the greatest extent interpretively possible. This confirms that ‘[f]undamental rights are not to be overridden by general or ambiguous words’. 89

For, as noted previously, the High Court in Coco stated the courts must be satisfied ‘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’. 90

This curial insistence that Parliament must consider and then decide whether its legislation is to infringe the common law bill of rights is the lynchpin of the principle of the legality in contemporary Australian law. It was, for example, emphatically endorsed in the judgments of Gummow J and Bell J in Plaintiff M47, the recent ASIO adverse assessment case in which they held that the Migration Act 1958 (Cth) ‘does not provide in terms that an unlawful non-citizen is to be kept in immigration detention permanently or indefinitely’. 91 In other words, Parliament had not ‘squarely confronted’ and then decided — using clear statutory language to express that decision — that the common law right to liberty of unlawful non-citizens was to be abrogated in this way. 92 Consequently, the principle of legality was applied to protect their common law right to liberty to the greatest extent interpretively possible in the context of the legislative regime for immigration detention. 93

In these cases, the principle of legality has operated as ‘a kind of manner and form requirement imposed on Parliament’, 94 requiring ‘clear and unequivocal [statutory] language’ 95 to interfere with common law rights and freedoms. But this raises an important question: does the contemporary conception of the principle of legality mandate that only express words can displace fundamental rights or can this still be displaced by necessary implication? This is the precise issue upon which Scalia J so vigorously dissented in INS v St Cyr regarding clear statement rules. In Coco, the High Court said that either would suffice to meet the strong rights presumption erected by the principle of legality. As to the latter, the Court made clear that ‘[s]uch an implication may be made, in some circumstances, if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless’. 96 The ‘necessary implication’ aspect of the principle of legality was used in Plaintiff M47 where it was held that the common law right to liberty of unlawful non-citizens under s 669A(1) was not abrogated in the Migration Act.

---

92 Plaintiff M47 (2012) 292 ALR 243, 276 (Gummow J), 379 (Bell J).
94 Goldsworthy, above n 55, 311.
95 Momcilovic (2011) 245 CLR 1, 46 (French CJ).
96 Coco (1994) 179 CLR 427, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ) (emphasis added). Thanks to one of the referees for drawing this issue to my attention.
confirmed by the High Court in the recent cases of \textit{X7} and \textit{Lee}.\footnote{\textit{X7} (2013) 248 CLR 92, 109–10 (French CJ and Crennan J), 141 (Hayne and Bell JJ), 152–3 (Kiefel J); \textit{Lee} (2013) 302 ALR 363, 380 [29] (French CJ), 395 [84] (Hayne J), 404 [126] (Crennan J), 417 [173] (Kiefel J), 451 [310] (Gageler and Keane JJ).} Kiefel J in \textit{Lee} explained it in the following terms:

The applicable rule of construction recognises that legislation may be taken necessarily to intend that a fundamental right, freedom or immunity be abrogated. As was pointed out in \textit{X7}, it is not sufficient for such a conclusion that an implication be available or somehow desirable. The emphasis must be on the condition that the intendment is “necessary”, which suggests that it is compelled by a reading of the statute. Assumptions cannot be made. It will not suffice that a statute’s language and purpose might permit of such a construction, given what was said in \textit{Coco v R}.\footnote{\textit{Lee} (2013) 302 ALR 363, 417 [173] (citations omitted).}

The High Court did, however, make clear in \textit{Coco} that the infringement of common law rights and freedoms by necessary implication would be exceptional:

\begin{quote}
[\text{IIt 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.}]^{99}
\end{quote}

It may be ‘very rare’, but it is possible, as the High Court’s recent decision in \textit{Plaintiff S10/2011} demonstrates.\footnote{\textit{Plaintiff S10/2011} v Minister for Immigration and Citizenship (2012) 246 CLR 636 (‘\textit{Plaintiff S10/2011}’).} In that case, it was held that the common law rules of natural justice were excluded by necessary implication from the operation of statutory provisions that granted the Minister of Immigration and Citizenship ‘personal, non-compellable, “public interest” powers’ to overturn unfavourable visa decisions.\footnote{\textit{Ibid} 668 (Gummow, Hayne, Crennan and Bell JJ).} The powers ‘[stood] apart from the scheme of tightly controlled powers and discretions’\footnote{\textit{Ibid} 671 (Heydon J).} and were ‘of an exceptional, last resort, or residual kind’.\footnote{\textit{Ibid} 668 (Gummow, Hayne, Crennan and Bell JJ) (citations omitted).}

According to Gummow, Hayne, Crennan and Bell JJ:

\begin{quote}
The cumulative significance of the matters referred to above … is to disclose a situation akin to that identified by Brennan J in \textit{South Australia v O’Shea}, namely where a senior official standing at the peak of the administration of the statute is not required to give an opportunity for a hearing in every case affecting an individual who has had an opportunity of a merits review in the course of the administrative process.\footnote{\textit{Ibid} 668 (Gummow, Hayne, Crennan and Bell JJ) (citations omitted).}
\end{quote}

On the other hand and more typically, in \textit{Coco}, \textit{X7} and \textit{Lee}, the High Court held that the relevant statutory provisions did not infringe the fundamental freedom or principle by necessary implication. In each case, the legislation still had meaningful work to do notwithstanding that the application of the principle of legality protected the common law rights engaged by its ordinary construction.
What these cases demonstrate is that courts are looking for a clear indication that the legislature has directed its attention to the rights and freedoms in question and has consciously decided upon their abrogation or curtailment. That is the requirement (and strength) of the principle of legality as articulated in *Coco*. It may be fulfilled by express words or in exceptional cases by implication ‘if it is necessary to prevent the statutory provisions from becoming inoperative or meaningless’. But as Kiefel J observed in *X7*, ‘[t]hat is not a low standard. It will usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to so abrogate or restrict and has determined to do so’.

This analysis suggests that in Australia, as in the United States, the High Court has ‘announc[ed] a rule of law: in the absence of clear statutory text speaking to the precise issue, judges must interpret the statute a certain way’. It is in this sense that the principle of legality is a strong Australian species of clear statement rule for common law rights, freedoms and fundamental principles. The significance is that the application of the principle has transcended this loose collection of rebuttable presumptions — with their origins as specific rules and immunities, residual freedoms and aspirational judicial values — into a common law bill of rights. This process, which I contend best explains Australian common law developments in the interpretive rights enterprise, is probably at odds with the one given by Rishworth in 2004:

> It was not uncommon to have recourse to rights in legal argument, but they functioned more as broad aspirations … Common law rights were conceptions of generally desirable outcomes, not a tool for defining a baseline of acceptable law and conduct for government.

It is certainly true that common law rights remain, in an important sense, aspirational. It is this quality that has informed (and will continue to inform) the recognition of new rights and freedoms as the principles and values of interest and importance to the common law expand beyond life, liberty and property. But with the rise of human rights as a core concern of our legal order and the principle of legality, arguably a mandatory rule of interpretation, the Australian common law bill of rights is now quasi-constitutional in character like its American counterpart. It reflects ‘fundamental assumptions about the relationship between citizen and state’ by detailing those common law rights, freedoms and

---


106 *X7* (2013) 248 CLR 92, 153 (citations omitted) (Kiefel J).

107 Eskridge Jr, Frickey and Garrett, above n 19, 354.


111 See Spigelman, above n 2, 86–90; Momcilovic (2011) 245 CLR 1, 47 (French CJ).

112 Spigelman, above n 2, 56.
fundamental principles that can only be abrogated or curtailed by clear and conscious legislative decision. So, through the robust application of the principle of legality to the construction of statutes, the common law bill of rights is now used as ‘a baseline of acceptable law and conduct for government’.  

C Provisional Conclusion

Part II of this article has explored the normative and methodological parallels that exist between clear statement rules in the United States and the principle of legality in Australia. The significance of this analysis is that it demonstrated that the principle of legality is a strong Australian species of clear statement rule when legislation engages fundamental rights, freedoms and principles at common law. It exists and operates in much the same way as a rights interpretation provision in a statutory bill of rights: it protects the common law bill of rights so far as interpretively possible. I now turn to consider problems that arguably arise with the application of the principle of legality as clear statement rule.

III Problems with the Principle of Legality as Clear Statement Rule

A The Principle of Legality and the Abstraction of Values

In his valuable paper ‘The Constitution: Ultimate Foundation of Australian law?’, Justice Gummow identified the issue of values abstraction with fundamental common law principles and its problematic nature for constitutional interpretation:

[T]o speak of “fundamental” common law “principles” assumes a level at which these are abstracted but offers little guidance as to the location of that level. Many rights and immunities are reduced by the general law to specific and justiciable principles and remedies; the rule respecting legal professional privilege and the protection of the “Englishman’s castle” against intrusion by the Executive through the action for trespass and the setting aside of “general warrants” are examples; but a general principle or “value” respecting, say, equality before the law, may be another matter.

This (at least partly) explained why ‘the High Court has not embraced any general theory for the implication of restraints upon the legislative powers of the Commonwealth by notions of the supremacy of the common law’. Importantly, as Justice Gummow noted:

[T]here is a contrast between the approach taken by the High Court to the construction of statutes, and the disfavour with which it has come to regard the use of common law principles or values to restrain the reach of heads of

---

113 Rishworth, above n 109, 106; see Doyle, above n 53, 157–60.


115 Ibid 177.
legislative power under the Constitution. It is one thing to deny legislative power and another to encourage clear statements of legislative intent.\textsuperscript{116}

This is certainly true. The High Court has rejected the legitimacy of limiting legislative power by reference to ‘fundamental’ or ‘deeply-rooted’ common law principles.\textsuperscript{117} But it has, arguably, used these same notions to revive and strengthen the principle of legality to erect a common law bill of rights that is strongly resistant to statutory modification. It will be my argument that this process of values abstraction is problematic also at the level of statutory interpretation when the principle of legality is applied. If it is to operate as a clear statement rule — which the High Court’s jurisprudence seems to require\textsuperscript{118} — a problem arises when the ‘content’ of a right (ie, what it requires or guarantees in the relevant context) is determined or divined by judges at the point of legislative application.

The primary source from which the values of the principle of legality are derived is not the Constitution, but the common law and (increasingly) statutes.\textsuperscript{119} As Doyle explained, common law rights and freedoms ‘are referred to as aspects of our legal system emphasising values or norms to which our system does nor should aspire’.\textsuperscript{120} In this regard, for example, the common law rights to fair trial, court access and personal liberty were derived, originally, from English (common) law.\textsuperscript{121} On the other hand, it may well be the case that ‘ancient statutes’\textsuperscript{122} such as the Magna Carta, the Petition of Right 1628 and the Habeas Corpus Act 1679 were even more central to their development.\textsuperscript{123} And in recent times, Australian parliaments have enacted laws that provide a statutory right to non-discrimination on the grounds of a person’s race, gender, age or disability.\textsuperscript{124} Chief Justice Spigelman has suggested that this may lead the common law to recognise a right to non-discrimination.\textsuperscript{125} This is not to deny, however, that the Australian Constitution has inspired certain common law rights and freedoms, and buttressed others. For example, the derivation of the implied constitutional right to freedom of political communication was, arguably, the catalyst for Australian courts to acknowledge unequivocally that freedom of speech was a fundamental right at common law.\textsuperscript{126} And the common law right to access the courts in Australia is now

\textsuperscript{116} Ibid.
\textsuperscript{118} See Part II above.
\textsuperscript{119} See Doyle, above n 53, 147–9; Buck v Comcare (1996) 66 FCR 359, 364–5 (Finn J).
\textsuperscript{120} Doyle, above n 53, 149.
\textsuperscript{121} See, eg, Jacobs v Brett (1875) LR 20 Eq 6 (Jessel MR) (court access); Cox v Hakes (1890) 15 App Cas 506, 527 (personal liberty). Interestingly, the seminal statement regarding the common law right to fair trial in Australia said the right was ‘so elementary as to need no authority to support it’: R v MacFarlane; Ex parte O’Flanagan and O’Kelly (1923) 32 CLR 518, 541–2 (Isaacs J).
\textsuperscript{122} Re Bolton (1987) 162 CLR 514, 520–1 (Brennan J).
\textsuperscript{123} Ibid 520–5; see Meagher, above n 8, 452–6.
\textsuperscript{124} See Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Disability Discrimination Act 1992 (Cth); Age Discrimination Act 2004 (Cth).
\textsuperscript{125} Spigelman, above n 2, 29.
\textsuperscript{126} In 2000, Sir Gerard Brennan wrote that ‘[t]here is no common law right to free speech which trumps other legal rights but there is a general freedom of speech because of the common law
almost constitutional in strength.\textsuperscript{127} The significance of s 75(v) of the Constitution to this development — explored in such detail in the High Court’s recent immigration jurisprudence — is well recognised.\textsuperscript{128}

In any event, the manner in which judges have distilled from the cases those rights and freedoms considered fundamental at common law — a process that has remained somewhat elusive\textsuperscript{129} — appears to involve a process of values abstraction. The rights and freedoms that the principle of legality serves to protect have been judicially identified, or crystallised, when the cases over a considerable period of time highlight that a particular value or principle is central to the concerns and aspirations of the common law.\textsuperscript{130} But as Justice Gummow noted, these cases and the various factual and legal contexts in which they deal often concern the application of specific common law and statutory rules, not the value or principle in the abstract. Consider, for example, the common law rights to personal liberty, fair trial and freedom of speech. The ‘right’ to personal liberty has emerged from cases that involve the law of habeas corpus, bail, arrest, search warrants, assault and slavery amongst others.\textsuperscript{131} The high value that the common law (now) places on freedom of speech, and its status as a common law ‘right’, has emerged from the law of qualified and absolute privilege, the rule that prohibits local and public authorities from suing in defamation,\textsuperscript{132} the implied constitutional freedom of political communication, and those cases where, for example, public order and revenue statutes have been given a speech-protective construction.\textsuperscript{133} Similarly, as Doyle has explained, there is a range of rules, privileges and immunities from which the common law ‘right’ to a fair trial has crystallised:

Increasingly, we see reference to the right to a fair trial. This is a right protected by a specific remedy in some situations (a stay to prevent a trial which is unfair because of unreasonable delay by the prosecution). In other situations a reference to the right to fair trial is the result of a variety of rules

\begin{itemize}
\item See, eg, \textit{Australian Crime Commission v Stoddart} (2011) 244 CLR 554, 619 where Heydon J (in dissent) cryptically observed:

The appellant denied that spousal privilege was a fundamental right. It submitted that whether it was fundamental depended on whether it had “en entrenched and consistent recognition in the decided cases as a fundamental right”. But a right does not become fundamental merely because cases call it that. And a right does not cease to be fundamental merely because cases do not call it that.
\item See Doyle, above n 53, 147–9, 155–60; Meagher, above n 8, 456–64.
\item See \textit{Adelaide City} (2013) 249 CLR 1, 30–1 (French CJ); Chesterman, above n 126, 7–13.
\end{itemize}
affecting the admissibility of evidence in and the conduct of a criminal trial. The right to a fair trial could be described as a value or objective which is the basis or object of a number of quite distinct legal rules. 134

It is perfectly fine, as has traditionally been the case, for the common law to collect (and label) a group of related rules, privileges or immunities as constituting, for example, the fundamental ‘right’ to fair trial, procedural fairness or individual liberty. 135 Moreover, the process of abstracting values and principles from specific common law rules and applying them in new cases is, arguably, the essence of the common law method. 136 But there is a methodological problem with the principle of legality as clear statement rule if the relevant ‘right’ to be protected from legislative encroachment exists more in the nature of an aspirational or abstract value. This requires judges to determine or divine the ‘content’ of a right (ie, what it requires or guarantees in the relevant context) at the point of legislative application.

The common law right to freedom of speech is the classic example in my view, and the decision and reasoning of the Full Federal Court in Evans and the High Court in Coleman v Power are illustrative in this regard. 137 In both cases, the principle of legality was applied to protect the common law ‘right’ to freedom of speech from statutory modification to the greatest extent interpretively possible. In Coleman, for example, Gummow and Hayne JJ and Kirby J applied the principle to protect the free speech rights of a person who used insulting and abusive language in a public place to protest against alleged local police corruption. They did so by reading down the scope of a public order statute that made it an offence to use threatening, abusive or insulting words to a person in a public place. 138 The dissenting judges on the other hand (Gleeson CJ, Callinan J and Heydon J in separate judgments) emphasised the benefit of civility in political discourse and the right of others to use peaceably and enjoy a public place. 139 Gleeson CJ noted in this regard:

Why should the family’s right to the quiet enjoyment of a public place necessarily be regarded as subordinate to the abusers’ right to free expression of what might generously be described as a political opinion? The answer necessarily involves striking a balance between competing interests, both of which may properly be described as rights or freedoms. 140

This makes clear that other important rights and interests were in play both when the statutory provision was drafted and when it was applied in the context of the litigation. So what that common law ‘right’ to free speech required or

---

134 Doyle, above n 53, 148.
135 Ibid 147–9.
139 Ibid 32 (Gleeson CJ), 113–14 (Callinan J), 124–6 (Heydon J).
140 Ibid 32.
guaranteed in the context of Coleman was, necessarily, indeterminate and hotly contested. The problem is that the right to free speech, as Tomkins has rightly noted, is essentially a qualified political or moral claim that has been elevated to the status of a substantive right. It lacks a core content that judges can reasonably and uncontroversially determine and so protect through the rule-like application of the principle of legality.

This conundrum with the common law right to freedom of speech and the principle of legality is evident also in the High Court’s recent decision in Adelaide City. It involved an unsuccessful challenge by two brothers (Caleb and Samuel Corneloup) to the validity of a council by-law that prohibited religious preaching on a public street without permission. The (statutory construction) issue was whether a council by-law that prohibited persons from preaching, haranguing, canvassing or distributing printed material on a road without a permit was beyond the by-law making power of the relevant primary legislation. That power authorised the Council to make by-laws ‘generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants’. French CJ and Heydon J considered whether the principle of legality limited the scope of the by-law making power to preclude the curtailment of the fundamental common law right to freedom of speech. Both judges said it did, but they drew opposite conclusions.

French CJ said that the application of the principle of legality meant that it was only within power for a by-law to control the mode or circumstances of the proposed preaching and haranguing, but not to proscribe or regulate its content — ie, by-laws of this nature must be content neutral. Heydon J (in dissent) disagreed: if that power is to permit the making of by-laws that infringe fundamental common law rights and freedoms, such as freedom of speech, then the principle of legality as outlined in Coco required ‘unmistakable and unambiguous language’ as a clear indication that the legislature has directed its attention to the rights and freedoms in question, and has consciously decided upon abrogation or curtailment:

[I]t 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

141 See Meagher, above n 8, 472–5.
143 Adelaide City (2013) 249 CLR 1.
146 Adelaide City (2013) 249 CLR 1, 30–3 (French CJ), 65–8 (Heydon J).
147 Ibid 32–3.
too general, ambiguous and uncertain to grant a power to make by-laws having the adverse effect on free speech of the challenged clauses. 149

The fundamental disagreement as to the consequence of applying the principle of legality in this legislative context should come as no surprise. At the level of principle, it was clearly important to both judges that the by-law be construed in a way that protected the common law right of the Corneloup brothers to freedom of speech. But, again, what exactly that ‘right’ required or guaranteed in this context was unclear and contested. The reasoning and decisions in these (free speech) cases suggests that the principle of legality does not work as presumed or intended when the common law ‘right’ to be protected is really an aspirational legal value or qualified political claim. The problem is that without further reasoning to delimit the content and proper scope of the relevant common law ‘right’ (such as freedom of speech), the principle of legality as clear statement rule cannot be applied coherently or legitimately.

It may be that the problem with the judicial application of abstract values most clearly arises with essentially indeterminate rights such as freedom of speech. But, arguably, the problem of indeterminacy pertains to all fundamental rights, freedom and principles at common law to some degree. 150 The content and scope of even long-established common law rights such as property, liberty and natural justice are highly contextual and subject to reasonable disagreement. The High Court acknowledged as much in Saeed regarding natural justice in the course of construing the relevant migration provisions:

Section 57(1) and (2) invite comparison with what might ordinarily be required by the hearing rule. It is necessary to bear in mind, in that regard, that what is required to provide procedural fairness according to the rule will vary. Natural justice is flexible and adaptable to the circumstances of the particular case. 151

While the core of the right to natural justice comprises the hearing rule and the bias rule, 152 what that right requires or guarantees turns on the relevant legislative context and the circumstances of the specific case in which it is said to arise. 153 But importantly, as the above passage makes clear, what the common law right to natural justice required in the context of Saeed could and would be judicially determined. It may be that it is suitable and legitimate for the content of some common law rights (eg, those relating to property, liberty, natural justice and fair trial) to be determined by judges due to their professional expertise and institutional experience. But this interpretive proposition — upon which the application of the principle of legality effectively turns — is controversial and problematic. It assumes that judges can determine their content (ie, what a ‘right’ requires in any given context) without recourse to contested political or moral

149 Adelaide City (2013) 249 CLR 1, 70 (Heydon J) (citations omitted).
150 Thanks to one of the referees for this point.
152 See Aronson and Groves, above n 128, ch 7.
claims as to what these rights entail. This is a (common law) controversy that has long been debated in the context of statutory and constitutional bills of rights: the essentially indeterminate nature of rights and the extent to which judges can and should have a role in determining their content.\textsuperscript{154}

This is why the courts use proportionality to mediate and determine cases that involve the constitutional and statutory equivalents of these common law rights and freedoms.\textsuperscript{155} For it is only through this process of internal qualification undertaken through a proportionality analysis that the ‘right’ to be judicially protected in any given context can be identified. But whether or not proportionality has a role to play in the methodology of the principle of legality is an interesting and difficult question. It will be addressed in Part V of this article below, after considering another related problem with the principle of legality as clear statement rule, the origins of which is a recent powerful critique of clear statement rules in the United States.

\textbf{B Does the Principle of Legality Illegitimately Remake Legislative Rights Decisions?}

In an important article in the \textit{Columbia Law Review}, Manning has questioned the legitimacy of constitutionally inspired clear statement rules in the United States. The main thrust of his argument is that they are not legitimate, because ‘[s]uch rules seek to enforce constitutional values in the abstract, standing apart from the constitutional provisions from which they are derived’.\textsuperscript{156} This is problematic, because ‘constitutional values do not … exist in the abstract’.\textsuperscript{157} An important part of this critique is Manning’s argument that ‘clear statement rules flatten out the complexity of constitutional law in a way that denies the fact that doctrine shapes and limits the constitutional values being enforced’.\textsuperscript{158} The focus is the complex body of doctrine that courts develop incrementally when they interpret and apply the \textit{United States Constitution}:

\[ \text{Received constitutional doctrine prescribes means — often, quite elaborate means — of protecting values at stake. Indeed, many such frameworks expressly call upon courts to consider competing values through some specified filter. Within such a doctrinal framework, clear statement rules} \]


\textsuperscript{155} Consider, for example, that in the constitutional sphere there are rights to freedom of (political) speech, religion and (interstate) movement and in statutes, especially the bills of rights that operate in the Australian Capital Territory (ACT) and Victoria, there are rights to life, liberty and private property and the freedoms of speech, religion and movement, among other rights. The methodology used increasingly by our courts to mediate and determine constitutional and statutory rights cases is proportionality: see Justice Susan Kiefel, ‘Proportionality — A Rule of Reason’ (2012) 23 \textit{Public Law Review} 85. But in those cases involving common law equivalents of these rights, the principle of legality is applied in the form of a (clear statement) rule without proportionality-style balancing: see Meagher, above n 8, 460–4.


\textsuperscript{157} Ibid.

\textsuperscript{158} Ibid 450.
tend to slight some values relative to others. Put another way, by focusing on one dimension of often complex doctrinal frameworks, clear statement rules do not supplement, but rather risk contradicting, the premises of the Supreme Court’s common law exegesis of the Constitution’s meaning.\(^{159}\)

If we think about this point in the context of how the principle of legality alters the ordinary or grammatical meaning of legislation and the manner in which it does so, important issues come to light. Let me explain. All statutes, but especially those that engage human rights, represent a compromise between competing rights and interests.\(^{160}\) For example, the statutory provision at issue in \(\textit{Coleman}\) made it an offence to use threatening, abusive or insulting word to a person in a public place. That provision sought to strike a balance between the right of citizens to speak freely and others to use peaceably and enjoy public spaces. The right to freedom of speech in this context was clearly important, but it was not the only right or interest in legislative play as Gleeson CJ noted above.\(^{161}\) The scope of the offence was the legislative decision on, and compromise between, these competing rights and interests. That decision was a legislative judgment as to how these competing rights were best reconciled in that context. It emerged from the process of democratic politics where argument, mediation and compromise are of the essence.\(^{162}\) Whether or not we agree with that judgment is beside the point. But notice what occurs if the principle of legality can be applied to the construction of the offence: it privileges the relevant common law right or freedom, which in that legislative context was freedom of speech.\(^{163}\) This is precisely what occurred in \(\textit{Coleman}\). To do so, arguably ‘flattened’, in the sense described by Manning, the complex legislative (not judicial as with clear statement rules in the United States) process of compromise and mediation that forged the rights compromise which the statutory offence represented; and it did so through the rule-like methodology outlined above, which eschews this kind of balancing process.

I need to be clear that the problem on this account is not that the ordinary or grammatical meaning of a statute is substituted for a preferred judicial one, though the principle of legality clearly does that as was discussed above and is controversial for that reason.\(^{164}\) The methodological issue that arises here is that the application of the principle of legality appears to ‘resolve’ the rights dispute — indeed, arguably, remake the relevant legislative rights decision — by eliding the political process of compromise and mediation that has already occurred in parliament. When the principle of legality is applied in the form of a clear statement rule, it does not balance or weigh other rights and interests in the relevant legislative context. These contested issues are either presumptively determined by the courts (ie, what the common law ‘right’ requires in a particular context) or simply do not arise (ie, whether legislation places a reasonable limitation on a common law right).

\(^{159}\) Ibid 405 (emphasis in original).


\(^{161}\) \textit{Coleman} (2004) 220 CLR 1, 32.


\(^{163}\) The reasoning of the High Court in \textit{Coleman} (2004) 220 CLR 1 illustrates this point: see Meagher, above n 8, 474–5.

\(^{164}\) See Part II A above.
This is especially, or at least more clearly, the case at the Commonwealth level where new forms of pre-legislative rights scrutiny are required by the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth). There is now a legal obligation that bills introduced into the Parliament (and certain legislative instruments) must be accompanied by a statement of human rights compatibility; and the newly established Parliamentary Joint Committee on Human Rights (‘PJCHR’) then makes its own assessment in reports it must provide to Parliament. Under this new Commonwealth model, the displacement of a prior legislative decision on rights may occur even when a statement of compatibility (and the relevant PJCHR report) for a proposed law demonstrates that the Parliament wishes to enact a law that limits a (common law) right. For if the text of the enacted law fails to make that intention crystal clear, then the principle of legality is applied to protect the relevant common law right from legislative encroachment. The principle of legality as clear statement rule is applied without balancing the competing rights and interests that Parliament has already undertaken. In doing so, the courts appear to elide that balancing process in order to read back in and protect a common law right or freedom that, on the ordinary or grammatical meaning of the statute, Parliament has sought (proportionately) to limit. This would involve the courts deploying their interpretive powers to revisit, indeed remake, a legislative decision on rights. It might, then, be argued that courts ought not to second-guess this legislative decision (through interpretation), especially when that decision has emerged from a balancing process that is akin to a proportionality analysis.

So, on this account of how the principle of legality operates as a clear statement rule, does it amount to an inappropriate judicial intrusion into the legislative domain of the democratic arms of government? It might reasonably be argued that if Parliament legislates against a pre-existing common law (bill of rights) backdrop, the principle of legality does not illegitimately remake legislative rights decisions. That is, if Parliament wishes to limit a right, freedom or principle that it knows is considered fundamental at common law, then it must express that intention with unmistakable clarity to displace what it would otherwise require or guarantee in that legislative context. There is, moreover, nothing novel or controversial about this. Sir Owen Dixon and Sir John Latham long ago recognised and emphasised the centrality of the common law, including its interpretive principles, to the proper construction of Australian constitutional and statutory law. In that respect, the principle’s application can improve transparency in

166 Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) ss 8, 9.
167 Ibid ss 4, 7.
judicial interpretation and the clarity — and rights-sensitivity — of legislation, promoting important democracy and rule of law values in the process.170

The essence of, and normative justification for, the principle of legality in contemporary Australian law is that courts are looking for ‘an 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’.171 But that is possible only if parliaments in Australia have prior notice as to the content of the fundamental rights, freedoms and principles at common law. Parliament cannot ‘squarely confront’ and decide the common law rights issue in its legislation if the content of the right, freedom or principle (ie, what it requires or guarantees in a particular context) is highly contextual, indeterminate and contested.172 Take the reasoning in Adelaide City as an example. Both French CJ and Heydon J applied the principle of legality to protect the common law ‘right’ to free speech of the Corneloup brothers. Yet they reached very different conclusions as to its content (ie, what that ‘right’ required or guaranteed in that context) and so the ultimate construction of the relevant council by-law. So Parliament (or, in this case, the local council) is not legislating against a common law backdrop of fundamental rights, freedoms and principles, the content of which is known in advance.

The application of the principle of legality is not, then, asserting the relevant content of the pre-existing common law right, but enforcing a (post-legislative) judicial approximation of what that ‘right’ requires or guarantees in that specific context. It does not operate to protect a common law right, freedom or principle, the content of which Parliament had clear and prior notice at the time of legislating. This point is related to the problem with the judicial application of abstract values detailed in Part IIIA. The upshot in both instances is that the ‘content’ of a common law right, freedom or principle (what it requires or guarantees) is unclear, contested and highly contextual — which it is in most rights cases — the principle of legality does not operate coherently or legitimately as a

170 See above Part IIA; the most famous account of the democratic value of the principle of legality in the common law world is through the lens of parliamentary accountability: see Ex parte Simms [2000] 2 AC 115, 131–2 (Lord Hoffmann).
172 See Sales, above n 61, 605.
173 See for example Al-Kateb (2004) 219 CLR 562 (Gleeson CJ, Gummow and Kirby JJ applied the principle of legality; McHugh, Hayne, Callinan and Heydon JJ did not); Lacey (2011) 242 CLR 573 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ applied the principle of legality; Heydon J did not).
clear statement rule. This is because in rights cases, other competing rights and interests always come into play. So if the courts continue to apply the principle of legality as clear statement rule (which the High Court’s jurisprudence seems to require), they need clearly to articulate and justify the ‘content’ of the common law bill of rights that they are protecting from the ordinary operation of legislation. But as noted, to identify that ‘content’ — what a common law right, freedom or principle requires or guarantees — is context dependent and seems to require consideration and weighing of the other rights and interests necessarily in play. Presently, however, that process of common law rights qualification or limitation is either elided or undertaken, but unarticulated when the principle of legality is applied as clear statement rule. The content of the common law bill of rights is presumed to be self-evident (to legislatures and the citizenry), when that is anything but the case.

C  The Principle of Legality and Proportionality

The problems identified with the principle of legality as clear statement rule in Part IIIA and IIIB raise the interesting and difficult question of whether proportionality may have a role to play in its methodology. It is an issue that Chief Justice French raised extra-judicially in a recent paper on ‘The Courts and the Parliament’. To incorporate proportionality would be an important (though controversial) development. Australian courts do, however, already use proportionality in a variety of constitutional and statutory contexts, including the law of sentencing, characterisation, anti-discrimination and constitutional rights. So, to do so in the context of the common law principle of legality would not involve a novel form of judicial reasoning. It would also provide to the common law a methodology that judges use to determine rights disputes under statutory bills of rights. The principle of legality would, then, perform the same work as the interpretation and limitation provisions in a (statutory) bill of rights. The benefit is that a proportionality analysis ventilates and mediates the competing rights and interests in legislative play and so ensures that the determination of a rights dispute is properly and publicly justified. This would ensure that a process of common law rights qualification and justification is undertaken (not elided or unarticulated) when the principle of legality is applied in rights cases. And through this process, the ‘right’ to be judicially protected from legislative encroachment (if interpretively possible) can be identified.

Such a development would also significantly harmonise the methodology used by courts in Australia to mediate and determine rights disputes. To use a common approach makes good sense when considerable overlap exists already between the catalogue of common law rights, freedoms and principles and those

175 See Kiefel, above n 155.
176 See for example R v Fearnside (2009) 3 ACTLR 25 (ACT); R v Hansen [2007] 3 NZLR 1 (New Zealand); R v A (No 2) [2002] 1 AC 45 (United Kingdom).
protected by statute and the Constitution.\footnote{See Spigelman, above n 2, 29.} It is interesting to note in this regard that a movement towards an integrated rights methodology and jurisprudence (sourced in and to international law, common law and the bill of rights) is well underway in New Zealand.\footnote{See Philip A Joseph and Thomas Joseph, ‘Human Rights in the New Zealand Courts’ (2011) 18 Australian Journal of Administrative Law 80.} There may also be hints at such an approach in the following passage from the judgment of French CJ in Adelaide City:

The common law freedom of expression does not impose a constraint upon the legislative powers of the Commonwealth or the States or Territories. However, through the principle of legality, and criteria of reasonable proportionality applied to purposive powers, the freedom can inform the construction and characterisation, for constitutional purposes, of Commonwealth statutes. It can also inform the construction of delegated legislation made in the purported exercise of statutory powers.\footnote{Adelaide City (2013) 249 CLR 1, 32 (citations omitted).}

To be sure, this does not state that proportionality is now relevant to the application of the principle of legality. But does it posit the integrated nature of rights jurisprudence (and possibly even method) in Australia? That might be drawing a long bow. French CJ may simply have wanted to demonstrate how the long-held judicial concern for freedom of speech in particular has informed the development of common law and constitutional principle and the construction of statutes. But there is an argument that the manner in which French CJ applied the principle of legality in Adelaide City involved balancing the common law free speech rights of the Corneloup brothers against the local council’s right and power to prevent the obstruction of public roads. Importantly, both ‘rights’ were accommodated by construing the by-law in a manner that preserved its validity, but prohibited its enforcement based on the content or message of a person preaching on a public road.\footnote{Ibid 32–3.}

However, to incorporate proportionality into the principle of legality framework would not be without issue or controversy. The difficulty with proportionality is that judges must not only determine whether legislation infringes (common law) rights, but also assess whether that infringement is justified in light of its other legitimate policy aims. This analysis requires courts to review (if not second guess) the difficult balance that must be struck in legislation between the range of competing rights and interest that arise in complex issues of social policy. The questions raised are more political and moral than legal, and judges will often lack the institutional resources and expertise to answer them.\footnote{See Gleeson, above n 39, 36; Tom Campbell, ‘Human Rights Strategies: An Australian Alternative’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia (Ashgate, 2006) 319; Janet L Hiebert, ‘Parliament and Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), Protecting Human Rights: Instruments and Institutions (Oxford University Press, 2003) 231.} This separation of powers based concern may explain why the High Court has not followed its British, Canadian and (to a lesser extent) New Zealand counterparts and adopted proportionality as a new ground for the judicial review of administrative action.\footnote{See Aronson and Groves, above n 128, 373–8.}
There is another separation of powers concern with proportionality, expressed by four members of the High Court in *Momcilovic*. It is that the justification analysis, which proportionality involves, forms no legitimate part of judicial interpretation in the context of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).\(^{184}\) French CJ, for example, stated that ‘the justification of limitations on human rights is a matter for the Parliament. That accords with the constitutional relationship between the Parliament and the judiciary’.\(^{185}\) If so, then there is a constitutional reason in Australia why proportionality should not be incorporated into the principle of legality framework. And as Elias CJ pointed out in the context of the *New Zealand Bill of Rights Act 1990* (NZ), to incorporate proportionality ‘risks erosion of fundamental rights through judicial modification of enacted rights according to highly contestable distinctions and values’.\(^{186}\) To do so for the principle of legality may undermine the strong protection it currently provides to the common law bill of rights, freedoms and principles.

Moreover, even if proportionality ensured that a process of common law rights limitation analysis is undertaken and that the ‘right’ to be judicially protected from legislative encroachment can be identified, does this give legislators clearer (prior) notice as to the content of the common law bill of rights? Proportionality certainly ‘provides an efficient framework for judging restrictions and specifying objections’,\(^{187}\) but the ‘test itself does not give any guidance as to, and consequently does not place any restriction on, how judges assign weight to the competing interests’.\(^{188}\) The upshot is that the application of the proportionality test is very much in the eye of the judicial beholder, as Poole has noted:

> [P]roportionality is plastic and can in principle be applied almost infinitely forcefully or infinitely cautiously, producing an area of discretionary judgement that can be massively broad or incredibly narrow — and anything else in between.\(^{189}\)

And this analysis, by definition, would be undertaken by judges at the point of legislative application in order to determine rights cases. That is, the application of the principle of legality would still amount to a (post-legislative) ‘discretionary judgment’ by courts as to what the relevant common law right, freedom or principle required or guaranteed in the specific context of the case before it. So, it is far from clear that incorporating proportionality will ensure that parliaments legislate against a common law bill of rights, the content of which is reasonably clear and known in advance. If the principle’s application is case-specific, and highly contextual as a consequence, then it is difficult to see how this development

---

\(^{184}\) *Momcilovic* (2011) 245 CLR 1, 40–4 (French CJ), 170–5 (Heydon J), 217–20 (Crennan and Kiefel JJ). Thanks to one of the referees for this point.

\(^{185}\) Ibid 44.


would better enable parliaments to ‘squarely confront’ and ‘consciously decide’ common law rights issues in its legislation. There must be some doubt, then, as to its compatibility with the contemporary normative justification for the principle of legality outlined in Part II of this article.

D Provisional Conclusion

The jurisprudence of the High Court requires the application of the principle of legality as clear statement rule. This Part has outlined methodological and normative problems that arise as a consequence. The core issue is that the ‘content’ of a common law right, freedom or principle (ie, what it requires or guarantees in the relevant content) must be determined or divined by judges at the point of legislative application. This reflects the indeterminacy of rights — a common law manifestation of the controversy that has long attended the judicial role under statutory and constitutional bills of rights. The analysis in Part IIIC of this article suggests that incorporating proportionality into the framework of the principle of legality would provide judges with a methodology to assess whether legislation places a reasonable limitation on a common law right, freedom or principle. That is, the content of the relevant right, freedom or principle is identified through a process that is transparent and publically justified. This would be an improvement on the present situation where that process is either elided or undertaken, but unarticulated, when the principle of legality is applied as clear statement rule. But for the reasons outlined in Part IIIC, such a development will not, necessarily, solve the methodological problems identified in Parts IIIA and IIIB and may well be at odds with the normative justification for the principle of legality in contemporary Australian law outlined in Part II.

IV Conclusion

In an age of statutes, clear statement rules in the United States and the principle of legality in Australia provide for fundamental rights strong protection against statutory modification. They do so by ‘announcing a rule of law: in the absence of clear statutory text speaking to the precise issue, judges must interpret the statute a certain way’. The principle of legality is a strong Australian species of clear statement rule that is applied when legislation engages common law rights, freedoms and principles. The courts are looking for a clear indication that the legislature has directed its attention to the rights and freedoms in question and has consciously decided upon abrogation or curtailment. The significance of this is the construction and protection of a quasi-constitutional common law bill of rights that is now used as ‘a baseline of acceptable law and conduct’ for the political arms of government.

There are, however, methodological problems that arise with the principle of legality as clear statement rule. It can only operate coherently and legitimately if

---

190 Eskridge Jr, Frickey and Garrett, above n 19, 354.
191 Rishworth, above n 109, 106.
parliaments in Australia have prior notice as to the content of the fundamental rights, freedoms and principles at common law. But the content and scope of essentially indeterminate rights (such as freedom of speech) and even long-established common law rights (such as property, liberty and natural justice) are highly contextual and subject to reasonable disagreement. And the case law analysis undertaken in this article suggests that this ‘content’ (ie, what the right, freedom or principle requires or guarantees in the relevant context) must, then, be determined or divined by judges at the point of legislative application. This amounts to the judicial application of abstract values, with the result that when the principle of legality is applied, the courts are illegitimately remaking prior legislative decisions on rights. This is at odds with the normative justification for the principle of legality in contemporary Australian law. Parliament cannot ‘squarely confront’ and decide the common law rights issue in its legislation without clear and prior notice as to the content of the common law bill of rights, freedoms and principles. If the principle of legality operates to obscure from Parliament the common law (rights) backdrop against which it legislates, the clarity or the rights-sensitivity of that legislation cannot be improved. This undercuts, rather than promotes, the democratic and rule of law values that underpin the conception of the principle of legality as clear statement rule articulated by the High Court.

This suggests that to apply the principle of legality as clear statement rule with equal strength whenever legislation engages a common law right or freedoms may be problematic. There is an argument that incorporating proportionality into its methodological framework would ensure that the ‘right’ to be judicially protected from legislative encroachment can be identified through a process that is transparent and publically justified. But it is far from clear that such a development will enable parliaments to legislate against a common law bill of rights, the content of which is reasonably clear and known in advance. It might be that a more nuanced and piecemeal interpretive approach needs to be developed (or revived) depending on the nature and content of the relevant common law right, freedom or principle and the legislative context in which it is in play. But the very nature of rights (indeterminate, highly contextual and subject to reasonable disagreement) makes it difficult, if not impossible, for judges to detail with precision and in advance the content of the common law bill of rights. If so, the principle of legality as clear statement rule cannot determine rights cases in a manner that is compatible with its normative justification in contemporary Australian law. It may well explain why, traditionally, common law rights and freedoms ‘functioned more as broad aspirations [and] … were conceptions of generally desirable outcomes, not a tool for defining a baseline of acceptable law and conduct for government’.192

192 Ibid.