

# PARLIAMENT, THE JUDICIARY AND FUNDAMENTAL RIGHTS: THE STRENGTH OF THE PRINCIPLE OF LEGALITY

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*The principle of legality has in recent years become an increasingly important tool of statutory interpretation. Despite its prominence, it has, I will argue, been applied inconsistently. This article examines two methodological difficulties in the application of the principle: its interaction with the doctrine of purposive construction, and its application to legislation cast in linguistically clear but broad terms. This analysis suggests that Australian courts are applying the principle in different ways without acknowledging emerging doctrinal differences. The last part of the article examines a series of contextual factors which courts have suggested may affect the strength of the presumption, but concludes that these have very limited explanatory or predictive value when charted against the methodological differences discussed earlier.*

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## I INTRODUCTION

The principle of legality is a rule of statutory interpretation which holds that legislation will not be read as abrogating or curtailing fundamental common law rights unless it does so expressly or by necessary implication. The rule is often expressed in terms of a presumption: Parliament is presumed not to have intended to interfere with fundamental rights.<sup>1</sup> The principle has a long historical pedigree in Australia,<sup>2</sup> and has been referred to frequently by the High Court in recent years.<sup>3</sup> It has also attracted considerable academic attention on topics such as the rationale for the principle,<sup>4</sup> how courts do or should identify ‘fundamental’ rights,<sup>5</sup> and the role of international human rights law<sup>6</sup> and proportionality testing<sup>7</sup> in its application.<sup>8</sup>

<sup>1</sup> See, eg, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43] (French CJ).

<sup>2</sup> Dating back to *Potter v Minahan* (1908) 7 CLR 277, 304.

<sup>3</sup> See, eg, *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 619 [43]; *K-Generation* (n 1) 520 [47]; *South Australia v Totani* (2010) 242 CLR 1, 28–9 [31]; *Momcilovic* (n 1) 46 [43]; *Lacey v A-G (Qld)* (2011) 242 CLR 573, 583 [20]; *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 30–1 [42], 66 [148] (‘*Corneloups’ Case*’); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 132 [87], 153 [158]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 202–3 [3]; *Tajjour v New South Wales* (2014) 254 CLR 508, 545 [28]; *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 373–4 [41], 381–2 [67]; *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 27 [54], 35 [86]; *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459, 470–1 [40] (‘*IBAC*’); *Tabcorp Holdings Ltd v Victoria* (2016) 328 ALR 375, 389 [68].

<sup>4</sup> Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37 *Melbourne University Law Review* 372.

<sup>5</sup> Sir Philip Sales, ‘A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998’ (2009) 125 *Law Quarterly Review* 598, 605–6; Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35 *Melbourne University Law Review* 449, 456–9; Lim (n 4) 395–8.

<sup>6</sup> David Dyzenhaus, Murray Hunt and Michael Taggart, ‘The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation’ (2001) 1 *Oxford University Commonwealth Law Journal* 5, 20–3; Meagher, ‘The Common Law Principle of Legality’ (n 5) 464–8.

Despite its continuing prominence, the principle has to date attracted only limited judicial analysis. The topic of this article is the strength of the principle: that is, how hard it is to rebut the presumption against interference with fundamental rights. This is an area where, in the words of Chief Justice Spigelman, ‘judicial reasoning becomes distinctly fuzzy’.<sup>9</sup> The High Court has said that Parliament must speak clearly,<sup>10</sup> and that necessary implication ‘imports a high degree of certainty as to legislative intention’<sup>11</sup> and ‘is not a low standard’.<sup>12</sup> But clarity, as Spigelman has noted, is a question of degree,<sup>13</sup> and to say that the standard is high rather than low hardly elucidates the problem.

This article attempts to remedy some of that lack of analysis by addressing two questions relating to the strength of the principle of legality. First, does the strength of the presumption vary from case to case, and, if so, how? Secondly, are there any patterns or themes in the cases that might assist in explaining why the standard varies? My focus is largely on the first question, which I address by reference to two methodological issues in the application of the principle of legality. The first issue, discussed in Part III, relates to when legislative purpose may give rise to a necessary implication. The case law reveals differing thresholds in this regard. The second issue, discussed in Part IV, arises from the well-established proposition that the principle has no room for operation in the face of unambiguous statutory language — the issue is, what is ambiguity? In particular, is linguistically clear but general language unambiguous? Again, the cases differ.

Lastly, Part V examines four contextual factors identified in the cases as relevant to the strength of the principle, but concludes that in fact these have limited explanatory value. Rather, the divergent lines of authority noted

<sup>7</sup> Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (n 5) 468–70; Dan Meagher, ‘The Principle of Legality as Clear Statement Rule: Significance and Problems’ (2014) 36 *Sydney Law Review* 413, 439–42.

<sup>8</sup> On all of these topics, see Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017).

<sup>9</sup> JJ Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (2005) 79 *Australian Law Journal* 769, 779.

<sup>10</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341; *Bropho v Western Australia* (1990) 171 CLR 1, 17; *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, 252–3. See also *Magrath v Goldsbrough, Mort & Co Ltd* (1932) 47 CLR 121, 128 (Rich J), 134 (Dixon J).

<sup>11</sup> *Hamilton v Oades* (1989) 166 CLR 486, 495 (Mason CJ).

<sup>12</sup> *Lee* (n 3) 278 [216] (Kiefel J).

<sup>13</sup> Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (n 9) 779.

earlier are to a significant extent the product of unrecognised and possibly unintentional methodological differences between individual judges for which no higher level justification has yet been articulated. That is, as I argue in the conclusion, an undesirable state for the law to remain in.

## II SCOPE OF THE PRINCIPLE

Some commentators argue that the principle of legality should be understood as an overarching principle encompassing a long list of interpretive presumptions, including, for example, the presumptions that statutes do not operate extraterritorially or retrospectively, do not bind the Crown, and should be construed consistently with international law.<sup>14</sup> There are, it is submitted, difficulties with this broad conception of the principle. The common feature of the presumptions identified is that they all promote substantive values external to the statutory text, rather than enunciating linguistic or syntactic conventions.<sup>15</sup> But there are important differences in their history and underlying rationales. The presumption against statutes binding the Crown, for instance, was historically premised on assumptions about the dignity of the sovereign and the notion that the royal assent should be informed by the clear language of the statute.<sup>16</sup> In contrast, the leading contemporary explanation for the principle of legality focuses on electoral accountability when Parliament legislates to remove fundamental rights.<sup>17</sup> The risk in grouping these distinct presumptions under the banner of the ‘principle of legality’ is that it may overlook such differences in history and justification. For that reason, this article will use the term as referring only to the presumption that Parliament should not be taken to have intended to abrogate or curtail fundamental rights except by express words or necessary implication.

It is also appropriate to note at this point that the principle protects not only individual rights and freedoms but also important institutional features

<sup>14</sup> Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (n 9) 774–5; DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2014) 218–50 [5.7]–[5.42], 255–9 [5.46]. See also *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 135 [30].

<sup>15</sup> Cf the expressio unius and ejusdem generis maxims.

<sup>16</sup> *Bropho* (n 10) 18.

<sup>17</sup> *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115, 131. This has been cited with approval in Australia: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30]; *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19]; *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, 444 [111]; *Corneloup’s Case* (n 3) 66 [148]. See also Lim (n 4) 394.

of our legal system, such as the accusatorial system of criminal justice.<sup>18</sup> For brevity's sake, I have adopted 'rights' as a compendious shorthand for all the rights, freedoms and institutions protected by the principle. I have also continued to use the adjective 'fundamental',<sup>19</sup> despite some suggestions that the label is unhelpful.<sup>20</sup>

### III PURPOSIVE CONSTRUCTION AND THE PRINCIPLE OF LEGALITY

The principle of legality holds that if a statute does not expressly override fundamental rights, it will not be read as doing so unless there is a necessary implication. A necessary implication does not mean an implication which is merely available: the implication must be compelling.<sup>21</sup> On orthodox principles, statutory purpose is a legitimate interpretive aid from which an implication may arise that fundamental rights have been curtailed.<sup>22</sup> However, the courts have been inconsistent in identifying the threshold test which a purposive argument must pass before it will *compel* that conclusion. The High Court has in the past enunciated a test of strict necessity: fundamental rights may only be set aside in pursuit of a statutory purpose if there is no other way to achieve that purpose. However, there are also cases and individual judgments applying a lower threshold. The different approaches have led to variations in the strength of the principle of legality.

#### A Purposive Construction Generally

Like many tasks of statutory interpretation, the application of the principle of legality is described in terms of a search for legislative intention.<sup>23</sup> The current High Court view is that 'legislative intention' is not an actual, subjective, state

<sup>18</sup> *X7* (n 3) 132 [87], 136–43 [101]–[125].

<sup>19</sup> See generally *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298 [26]–[28]; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 284 [36]; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 328–9 [19]–[21].

<sup>20</sup> *Momcilovic* (n 1) 46 [43] (French CJ); *Tajjour* (n 3) 545 [28] (French CJ). In some recent cases, the High Court appears to have dropped the adjective: *IBAC* (n 3) 470–1 [40]; *Tabcorp Holdings* (n 3) 389 [68] (referring to 'common law rights' and 'a valuable right' respectively).

<sup>21</sup> *Lee* (n 3) 265 [173].

<sup>22</sup> *Ibid* 218 [29]–[30].

<sup>23</sup> See, eg, *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523; *Coco v The Queen* (1994) 179 CLR 427, 437.

of mind.<sup>24</sup> The correctness of that view has been challenged,<sup>25</sup> but it is now well established as a matter of authority.<sup>26</sup> According to the majority in *Lacey v Attorney-General (Qld)*, '[a]scertainment of legislative intention is asserted as a statement of compliance with the rules of construction ... known to parliamentary drafters and the courts'.<sup>27</sup> That is, 'legislative intention' is a label applied to the product of a process of interpretation which is conducted in accordance with established principles.<sup>28</sup>

Parliamentary intention, in the sense just explained, is ascertained by reference to various indicia. The most important of these were listed in *Project Blue Sky Inc v Australian Broadcasting Authority*: text, context, purpose, the consequences of a construction, and various syntactical and substantive rules and presumptions (including the principle of legality).<sup>29</sup>

The High Court has now made clear that the statutory text is pre-eminent: construction must start with the text,<sup>30</sup> and it cannot stray beyond the meanings 'reasonably open' on the text.<sup>31</sup> But the text is not the be all and end all. Context and purpose are relevant even where the text is unambiguous.<sup>32</sup> The role of purpose in particular is now enshrined in interpretation legislation in all Australian jurisdictions.<sup>33</sup> Section 15AA of the *Acts Interpretation Act*

<sup>24</sup> *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28]; *Lacey* (n 3) 591–2 [43]; *Lee* (n 3) 225–6 [45].

<sup>25</sup> See, eg, Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Sydney Law Review* 39. Cf Justice Kenneth Hayne, 'Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?' (2013) 13 *Oxford University Commonwealth Law Journal* 271.

<sup>26</sup> See n 24. See also *Momcilovic* (n 1) 74 [111] (French CJ), 85 [146] (Gummow J); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389–90 [25].

<sup>27</sup> *Lacey* (n 3) 592 [43].

<sup>28</sup> *Certain Lloyd's Underwriters* (n 26) 390 [25].

<sup>29</sup> (1998) 194 CLR 355, 384 [78].

<sup>30</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46 [47]; *Certain Lloyd's Underwriters* (n 26) 388 [23]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39].

<sup>31</sup> *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

<sup>32</sup> *Mills v Meeking* (1990) 169 CLR 214, 235; *CIC Insurance* (n 31) 408.

<sup>33</sup> *Acts Interpretation Act 1901* (Cth) s 15AA; *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1987* (NSW) s 33; *Interpretation Act 1978* (NT) s 62A; *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Interpretation Act 1984* (WA) s 18.

1901 (Cth) is typical.<sup>34</sup> It provides: ‘In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act ... is to be preferred to each other interpretation.’ However, purpose remains subordinate to text in at least two respects. First, a court cannot use purpose to maintain a construction that is not open on the text.<sup>35</sup> Secondly, purpose is itself derived from text: it ‘resides in [the] text and structure’ of a statute.<sup>36</sup>

### B *The Stultification Principle*

The foundational modern authority on the principle of legality is *Coco v The Queen*.<sup>37</sup> In that case, Mason CJ, Brennan, Gaudron and McHugh JJ held that a statute will only be read as curtailing fundamental rights by implication where the implication ‘is necessary to prevent the statutory provisions from becoming inoperative or meaningless’, and that mere inconvenience in attaining a statutory object will not be enough to justify the curtailment of a fundamental right.<sup>38</sup>

Their Honours referred to *Plenty v Dillon*, which concerned the question whether police officers were authorised to commit a trespass on the appellant’s land in order to serve a summons on his daughter.<sup>39</sup> The officers relied on s 27 of the *Justices Act 1921* (SA), which provided: ‘any summons ... required or authorized by this Act to be served upon any person may be served’ by personal service or by leaving it at the person’s usual abode, with a person apparently living there and aged over 16. Gaudron and McHugh JJ said:

If service of a summons *could only be effected* by entry on premises without the permission of the occupier, it would follow by necessary implication that Parliament intended to authorize what would otherwise be a trespass to property. But a summons can be served on a person without entering the property where

<sup>34</sup> Differences in the wording of the New South Wales, Northern Territory, South Australian, Tasmanian, Victorian and Western Australian Acts are probably ‘purely stylistic’: see *Singh v Minister for Immigration and Citizenship* (2012) 199 FCR 404, 420 [63].

<sup>35</sup> *Mills* (n 32) 235; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273, 306 [87]; *Alcan* (n 30) 46–8 [47]–[52].

<sup>36</sup> *Lacey* (n 3) 592 [44]; *Certain Lloyd’s Underwriters* (n 26) 389 [25]. See also *Australian Education Union v Department of Education and Children’s Services* (2012) 248 CLR 1, 14 [28]–[29].

<sup>37</sup> *Coco* (n 23).

<sup>38</sup> *Ibid* 436; see also at 438 (Mason CJ, Brennan, Gaudron and McHugh JJ), 446 (Deane and Dawson JJ).

<sup>39</sup> (1991) 171 CLR 635.

he or she happens to be at the time of proposed service. Of course, inability to enter private property for the purpose of serving a summons may result in considerable inconvenience to a constable wishing to serve the defendant. *But inconvenience in carrying out an object authorized by legislation is not a ground for eroding fundamental common law rights.*<sup>40</sup>

The same test was applied in *Coco*, in which the issue was whether a power conferred on a judge to authorise the ‘use’ of a listening device extended to empower the judge to authorise a trespass on private property to install such a device. The High Court held that the power did not so extend, observing that ‘it has not been suggested that such listening devices as existed at the time the legislation was enacted could not be used without making entry for installation’.<sup>41</sup> The point was perhaps put most clearly in the plurality’s summary of a Canadian case:

Dickson J was not convinced that the interception of communications contemplated by the statute could not have been achieved without a trespass; *interception may well have been more difficult, but it would not have been impossible.*<sup>42</sup>

*Coco* and *Plenty v Dillon* are illustrations of what Professors Pearce and Geddes refer to as the ‘stultification principle’.<sup>43</sup> The principle dictates a test of strict necessity before a statute will be read as overriding fundamental rights. The test will only be satisfied if it can be said that preservation of the relevant fundamental right would defeat the statute’s purpose entirely. According to this test, it is not sufficient that the statute’s purpose could be pursued more conveniently if the right were curtailed, or that the existence of the right impairs the achievement of the purpose to a limited degree. Only complete stultification of the legislative purpose will suffice to compel the conclusion that the right has been abrogated or curtailed by implication.

The stultification principle imposes ‘a very stringent’ test.<sup>44</sup> It imposes a considerably higher burden on the proponent of a purposive construction than s 15AA of the *Acts Interpretation Act 1901* (Cth) and equivalent provisions. Section 15AA permits recourse to statutory purpose whenever it can assist the court to any degree in choosing between, or identifying, competing

<sup>40</sup> Ibid 653–4 (emphasis added).

<sup>41</sup> *Coco* (n 23) 441.

<sup>42</sup> Ibid 440, citing *Re Application for an Authorization* [1984] 2 SCR 697, 710–11 (emphasis added).

<sup>43</sup> Pearce and Geddes (n 14) 239 [5.30].

<sup>44</sup> *Bropho* (n 10) 17; *Coco* (n 23) 438.

constructions.<sup>45</sup> The stultification principle holds that purpose cannot be relied upon unless the construction advanced is the only means available to avoid totally stultifying the statutory object in question.

The stultification principle has been applied by state<sup>46</sup> and federal<sup>47</sup> appellate courts, the Privy Council,<sup>48</sup> and the High Court.<sup>49</sup> The principle has tended to arise in cases involving the assertion of privilege (typically the privilege against self-incrimination or legal professional privilege) in the face of a statutory power of compulsory interrogation.<sup>50</sup> In *Federal Commissioner of Taxation v De Vonk*,<sup>51</sup> for instance, the Commissioner was given a statutory power to require a person to attend and answer questions concerning their income.<sup>52</sup> Refusal to answer was an offence.<sup>53</sup> The privilege against self-incrimination was not expressly mentioned. The Full Court of the Federal Court nonetheless held that, by implication, a person summoned could not rely on the privilege. Importantly, the legislation elsewhere made it an offence to fail to disclose all sources of income in the first place,<sup>54</sup> so if the privilege were available,

it would be impossible for the Commissioner to interrogate a taxpayer about sources of income since any question put on that subject might tend to incriminate the taxpayer by showing that the taxpayer had not complied with the initial obligation to return all sources of income.<sup>55</sup>

<sup>45</sup> *Mills* (n 32) 235.

<sup>46</sup> *Price v McCabe; Ex parte Price* [1985] 2 Qd R 510, 515; *McGee v Gilchrist-Humphrey* (2005) 92 SASR 100, 109 [38]; *Meteyard v Love* (2005) 65 NSWLR 36, 55 [68].

<sup>47</sup> *Re Compass Airlines Pty Ltd* (1992) 35 FCR 447, 455–6; *Federal Commissioner of Taxation v De Vonk* (1995) 61 FCR 564, 583; *Carmody v MacKellar* (1997) 76 FCR 115, 137; *Binetter v Deputy Commissioner of Taxation* (2012) 206 FCR 37, 47 [30].

<sup>48</sup> *B v Auckland District Law Society* [2003] 2 AC 736, 759–60 [59].

<sup>49</sup> *Plenty* (n 39) 653–4; *Coco* (n 23) 440–1 (Mason CJ, Brennan, Gaudron and McHugh JJ), 446–7 (Deane and Dawson JJ).

<sup>50</sup> See, eg, *Price* (n 46); *Compass Airlines* (n 47); *De Vonk* (n 47); *McGee* (n 46); *Meteyard* (n 46); *Binetter* (n 47).

<sup>51</sup> *De Vonk* (n 47).

<sup>52</sup> *Income Tax Assessment Act 1936* (Cth) s 264(1)(b) as repealed by *Treasury Legislation Amendment (Repeal Day) Act 2015* (Cth) sch 2 item 26.

<sup>53</sup> *Taxation Administration Act 1953* (Cth) s 8D.

<sup>54</sup> *Ibid* s 8C.

<sup>55</sup> *De Vonk* (n 47) 583.

That outcome would have ‘totally stultif[ied]’ the operation of the examination provisions.<sup>56</sup> The Full Court has since reaffirmed the reasoning in *De Vonk*.<sup>57</sup>

The stultification principle was applied more recently by a majority of the High Court in *X7 v Australian Crime Commission*.<sup>58</sup> The issue was whether compulsory examination provisions in the *Australian Crime Commission Act 2002* (Cth) permitted the questioning of a person, after they had been charged with a criminal offence, about the subject matter of that offence (‘post-charge questioning’). It was common ground that a construction which authorised post-charge questioning would have to overcome the principle of legality,<sup>59</sup> though the judgments differ on the identity of the fundamental right engaged. (The minority of French CJ and Crennan J referred to the privilege against self-incrimination,<sup>60</sup> while Hayne and Bell JJ, for the majority, concluded that the legislation interfered with the accusatorial system of criminal justice,<sup>61</sup> a concept explained further in Part V.) The legislation did not expressly authorise post-charge questioning, so the respondent argued that it was permitted by necessary implication. The majority rejected that argument.<sup>62</sup> Hayne and Bell JJ (Kiefel J agreeing) suggested that whether a necessary implication could be drawn depended on whether the purposes of the Act (or of the examination provisions in particular) would be defeated if post-charge questioning were not authorised.<sup>63</sup> Their Honours concluded that it would not: the provisions had plenty of work to do outside that specific kind of case.<sup>64</sup>

In *Lee v New South Wales Crime Commission*,<sup>65</sup> essentially the same issue arose in relation to compulsory examination under New South Wales pro-

<sup>56</sup> *Ibid.*

<sup>57</sup> *Binetter* (n 47) 47 [30].

<sup>58</sup> *X7* (n 3).

<sup>59</sup> *Ibid* 108 [24] (French CJ and Crennan J), 132 [87] (Hayne and Bell JJ), 153 [158]–[160] (Kiefel J).

<sup>60</sup> *Ibid* 109 [24].

<sup>61</sup> *Ibid* 127 [71].

<sup>62</sup> A result later reversed by Parliament: see *Australian Crime Commission Act 2002* (Cth) ss 4 (definition of ‘post-charge’ para (c)), 24A(2)(a), as inserted by *Law Enforcement Legislation Amendment (Powers) Act 2015* (Cth) sch 1 items 1, 12.

<sup>63</sup> *X7* (n 3) 149 [142].

<sup>64</sup> *Ibid* 150 [147].

<sup>65</sup> *Lee* (n 3).

ceeds of crime legislation.<sup>66</sup> Despite the similarities with *X7*, the opposite conclusion was reached: post-charge questioning was authorised. The different result followed changes to the High Court Bench.<sup>67</sup> Gageler and Keane JJ were appointed in the interval between the two cases. In *Lee*, their Honours formed a 4:3 majority with French CJ and Crennan J (the dissentients in *X7*), and Hayne, Kiefel and Bell JJ (the *X7* majority) became the *Lee* minority.

The relationship between these two leading cases is discussed further in due course. For present purposes, *Lee* is relevant because Hayne J, Kiefel J and Bell J (this time in the minority) again applied the stultification principle. One express object of the legislation in *Lee* was the confiscation of property where the Supreme Court was satisfied that the property owner had committed one or more of various serious criminal offences (but regardless of whether they had been tried or convicted).<sup>68</sup> Kiefel J (Hayne J and Bell J agreeing) observed that post-charge questioning of the property owner would clearly *assist* in achieving that objective, because it might well produce evidence of the commission of offences, but that there were other means of obtaining information to achieve the statutory purpose. Her Honour concluded:

The examination of an accused person pending his or her trial cannot be said to be required by necessary implication because the ... Act's purposes would otherwise be frustrated. There are other methods of investigation and proof.<sup>69</sup>

*X7* was most recently considered by the High Court in *R v Independent Broad-Based Anti-Corruption Commissioner* ('IBAC').<sup>70</sup> One purpose of the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) was to provide for the investigation of 'police personnel misconduct', which included the commission by police officers of offences punishable by imprisonment.<sup>71</sup> Two police officers were suspected of assaulting a person in custody and were summoned by the Commission to a compulsory examination regarding the incident under pt 6 of the Act. They relied on the principle of legality to argue that the Act should not be read as permitting the compulsory questioning of a person suspected of, but not yet charged with, an offence, regarding that

<sup>66</sup> See *Criminal Assets Recovery Act 1990* (NSW) s 31D(1)(a).

<sup>67</sup> *Lee* (n 3) 233 [70].

<sup>68</sup> *Criminal Assets Recovery Act 1990* (NSW) ss 3(a), 6(1).

<sup>69</sup> *Lee* (n 3) 281 [223] (citations omitted).

<sup>70</sup> *IBAC* (n 3).

<sup>71</sup> *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) ss 5 (definition of 'police personnel misconduct' para (a)), 8(a)(ii).

offence. The High Court unanimously rejected that argument. The ratio of the decision was that the accusatorial system of criminal justice is not engaged until a person is charged with, rather than merely suspected of, an offence. In other words, until they were charged, the officers had no fundamental rights which were abrogated by the legislation, and *X7* was distinguishable.<sup>72</sup> Additionally, the statute expressly abrogated the privilege against self-incrimination,<sup>73</sup> and the Court observed that that provision would have no operation were suspects immune from questioning regarding offences allegedly committed by them.<sup>74</sup> However, the plurality also noted that

[t]he appellants' proposed construction would deny the [Commission] access to precisely the kind of information about matters of grave public interest that may bear upon the discharge of its functions from the very people who are likely to have that information and who may be the only people who do. This would tend to frustrate the statutory objective of identifying and reporting on police misconduct.<sup>75</sup>

That is an application of the stultification principle. The argument is that the police officers involved may be the only people with knowledge of 'police personnel misconduct'. To exempt such persons from examination would therefore stultify the statutory purpose of uncovering such misconduct.

These recent High Court cases provide substantial contemporary support for the stultification principle. Where the principle is applied, it contributes to a strong form of the principle of legality. It excludes statutory purpose as a relevant consideration except where it is totally inconsistent with the subsistence of fundamental rights. That will rarely be the case.<sup>76</sup> However, the stultification principle has not been applied uniformly.

### *C Broader Approaches to Purpose*

Unlike *Hayne*, *Kiefel* and *Bell JJ*, the majority in *Lee* does not appear to have applied the stultification principle. Their Honours rely (at least in part) on arguments that post-charge questioning would further the statutory purpose, or that preservation of the accusatorial dynamic of the criminal justice

<sup>72</sup> *IBAC* (n 3) 471–3 [41]–[48].

<sup>73</sup> *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s 144(1).

<sup>74</sup> *IBAC* (n 3) 474 [53], 480 [75] (Gageler J).

<sup>75</sup> *Ibid* 474 [52]; see also at 481 [77] (Gageler J).

<sup>76</sup> *Coco* (n 23) 438.

process would impair or hamper the achievement of the legislation's objects. As the minority demonstrated, however, it was not the case that preservation of the accusatorial system would have completely defeated any of the legislation's objects.

The reasoning in *Lee* draws on earlier High Court authority which involved a more receptive approach to purposive arguments than cases such as *Coco*, and one inconsistent with the stultification principle. Language such as 'impair' or 'hamper' is used in preference to 'stultify' or 'frustrate'. However, this sort of approach was expressly disapproved by the High Court following *Coco*. The reasoning in *Lee* thus appears to conflict with the earlier state of the authorities and introduces a considerable degree of inconsistency into the case law.

### 1 *The Authorities Prior to Lee*

The first relevant case is *Pyneboard Pty Ltd v Trade Practices Commission*.<sup>77</sup> *Pyneboard* concerned s 155 of the *Trade Practices Act 1974* (Cth) ('TPA'), which empowered the Trade Practices Commission to serve a notice on a person requiring them to furnish information or produce documents, where the Commission believed the person was capable of providing information regarding a possible contravention of the TPA. The privilege against self-incrimination was expressly abrogated,<sup>78</sup> but the appellants argued that s 155 did not abrogate the closely related privilege against exposure to a civil penalty. The High Court unanimously rejected that argument. In a passage often since cited, Mason ACJ, Wilson and Dawson JJ said:

In deciding whether a statute impliedly excludes the privilege much depends on the language and character of the provision and the purpose which it is designed to achieve. The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification.<sup>79</sup>

<sup>77</sup> *Pyneboard* (n 10).

<sup>78</sup> *Trade Practices Act 1974* (Cth) s 155(7).

<sup>79</sup> *Pyneboard* (n 10) 341, cited in: *Sorby v Commonwealth* (1983) 152 CLR 281, 309–10; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385, 394; *Police Service Board v Morris* (1985) 156 CLR 397, 404 (Gibbs CJ), 409 (Wilson and Dawson JJ); *De Vonk* (n 47) 581; *Price* (n 46) 512; *Commissioner of Australian Federal Police v McMillan* (1987) 13 FCR 7, 13–14; *S v Boulton* (2006) 151 FCR 364, 383 [126]; *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456, 476 [71].

That passage raises at least two issues. First, it might be read as suggesting that a court should look for positive indications that a generally expressed obligation is 'qualified' by privilege.<sup>80</sup> The principle of legality works the other way round: the privilege, being a fundamental right, is assumed to apply unless there are positive indications that it is excluded.<sup>81</sup> Secondly, the formulation 'appears from the character and purpose of the provision' could be read as endorsing a broader approach to statutory purpose than the test of necessity enunciated in *Coco*, insofar as it suggests that purpose may be relied on whenever it points to one or another construction.<sup>82</sup> That prompted concern from Murphy J in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs*, where his Honour said:

I am troubled that what was said by the majority in [*Pyneboard*] about exclusion of the privilege by implication will tend to erode the principle that the privilege will not be excluded except by unmistakable language ...<sup>83</sup>

Ultimately, however, *Pyneboard* turned on a fairly uncontroversial application of the stultification principle. The purpose of s 155 was to facilitate proof of contraventions of pt IV of the *TPA*.<sup>84</sup> The nature of such contraventions meant that proof would be 'virtually impossible' unless evidence could be obtained from persons involved in the contraventions.<sup>85</sup> If such persons could claim privilege, they could avoid furnishing evidence and the provision would have become 'valueless'.<sup>86</sup>

Similar reasoning was applied in *Controlled Consultants*, which was the next relevant case to reach the High Court. The Court held that it would be impossible to discover contraventions of the relevant regulatory legislation<sup>87</sup> unless investigators could compel those involved in the contraventions to produce self-incriminating documents. The privilege against self-incrimination was therefore excluded.<sup>88</sup>

<sup>80</sup> Cf *Pyneboard* (n 10) 350–8 (Brennan J).

<sup>81</sup> *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 555 [16]; *Griffin v Pantzer* (2004) 137 FCR 209, 229–30 [52].

<sup>82</sup> See, eg, *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 331–2.

<sup>83</sup> *Controlled Consultants* (n 79) 395.

<sup>84</sup> *Pyneboard* (n 10) 343 (Mason ACJ, Wilson and Dawson JJ).

<sup>85</sup> *Ibid*; see also at 356–7 (Brennan J).

<sup>86</sup> *Ibid* 343, citing *Mortimer v Brown* (1970) 122 CLR 493, 496.

<sup>87</sup> *Securities Industry (Victoria) Code* ss 8, 10.

<sup>88</sup> *Controlled Consultants* (n 79) 394.

The controversial case in this line of authority is *Corporate Affairs Commission (NSW) v Yuill*.<sup>89</sup> The relevant legislation empowered an inspector investigating the affairs of a company to demand production of documents.<sup>90</sup> The High Court held that this power overrode legal professional privilege. Amongst the purposes of the power to require production of documents was the discovery and prosecution of fraud, negligence and breach of duty by company officers.<sup>91</sup> It was said that it would ‘impair’, ‘hamper’ or ‘seriously impede’ the attainment of that purpose if officers could withhold privileged legal documents.<sup>92</sup> That contributed to the conclusion that the privilege was excluded.<sup>93</sup> However, the language used (‘impair’, ‘hamper’ and ‘impede’) indicates that inability to obtain privileged documents would merely have made the investigator’s job harder, not impossible. That differs significantly from the test in *Coco*, which requires that the statute be inoperable unless the relevant fundamental right is abrogated.

The Court revisited *Yuill* in *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*.<sup>94</sup> In the interval between the two cases, *Coco* had been decided. *Daniels* involved the same provision as *Pyneboard* (s 155 of the *TPA*), but a different privilege (legal professional privilege). The respondent ran a *Yuill*-style argument that the purpose of s 155 would be ‘impaired or frustrated’ if the privilege were available.<sup>95</sup> The Court rejected that approach.<sup>96</sup> The judgments emphasised the divergence in approach between *Yuill* and *Coco*. Callinan J referred to the ‘formidable task of attempting to reconcile the reasoning of six judges in *Coco* with that of ...

<sup>89</sup> *Yuill* (n 82).

<sup>90</sup> *Companies (New South Wales) Code* s 295(1).

<sup>91</sup> *Yuill* (n 82) 333.

<sup>92</sup> *Ibid* 327 (Brennan J), 333 (Dawson J, Toohey J agreeing at 337).

<sup>93</sup> *Ibid* 334–6 (Dawson J). Other relevant features of the legislation were: (i) s 308, which provided that a legal practitioner could refuse to disclose privileged communications, but required them to give the name and address of the client by/to whom the communications were made (the obvious implication was that the inspector could go to the client and compel disclosure from them); (ii) s 299(2)(d), which limited the admissibility of privileged material obtained in an examination (the premise was that privileged material could be obtained in an examination in the first place); and (iii) s 296(7), which expressly abrogated the privilege against self-incrimination (it was said to be unlikely that the legislature would then leave legal professional privilege untouched).

<sup>94</sup> *Daniels* (n 81).

<sup>95</sup> *Ibid* 557 [23].

<sup>96</sup> *Ibid* 557–9 [25]–[29].

three judges in *Yuill*.<sup>97</sup> Kirby J observed that the language into which the *Yuill* majority slipped ('hamper', 'impair' or 'seriously impede') was 'far less demanding' than the usual approach to the principle of legality (citing, *inter alia*, *Coco*).<sup>98</sup> Similarly, Gleeson CJ, Gaudron, Gummow and Hayne JJ described *Yuill* as applying a weaker standard than other cases,<sup>99</sup> and suggested that it might 'now be decided differently'.<sup>100</sup> Their Honours also disapproved the treatment of the principle of legality in *Pyneboard*, though they stopped short of saying *Pyneboard* was wrongly decided.<sup>101</sup>

*Daniels* appears, then, to disapprove the broad purposive approach in *Yuill* in favour of the stricter test derived from *Coco*.

## 2 Purpose in Lee

Against that backdrop, the reasoning in *Lee* is surprising. The *Criminal Assets Recovery Act 1990* (NSW) provided for confiscation of a person's property if the Supreme Court was satisfied, on the civil standard, that the person had engaged in 'serious crime related activity'.<sup>102</sup> The definition of that phrase made it clear that the question was whether the person had in fact committed one or more of various serious offences, regardless of whether they had been charged or convicted.<sup>103</sup> Applications for confiscation orders were made by the NSW Crime Commission. At the time of, or any time after, applying for a confiscation order, the Commission could seek an ancillary order under s 31D(1)(a) for the compulsory examination of any person concerning the affairs of the 'affected person' (the person whose property was sought to be confiscated).<sup>104</sup> Examinations were conducted before an officer of the Supreme Court.

X7 (handed down after oral argument in *Lee*)<sup>105</sup> held that post-charge questioning alters the accusatorial nature of the criminal justice system, which

<sup>97</sup> Ibid 596 [142] (citations omitted).

<sup>98</sup> Ibid 577 [90].

<sup>99</sup> Ibid 553 [11].

<sup>100</sup> Ibid 560 [35].

<sup>101</sup> Ibid 559 [29]. Despite this disapproval, the passage of *Pyneboard* set out earlier has continued to be cited in cases after *Daniels*: see n 79.

<sup>102</sup> *Criminal Assets Recovery Act 1990* (NSW) s 22.

<sup>103</sup> Ibid s 6.

<sup>104</sup> As defined in s 31D(4).

<sup>105</sup> *Lee* was heard on 1 May 2013. X7 was handed down on 26 June 2013. Supplementary submissions were then filed in *Lee* before judgment was handed down on 9 October 2013.

is protected by the principle of legality.<sup>106</sup> In *Lee*, while s 13A of the *Criminal Assets Recovery Act* expressly abrogated the privilege against self-incrimination,<sup>107</sup> the legislation did not refer explicitly to the case where an examinee was facing pending charges and the questioning would touch on the subject matter of those charges (ie post-charge questioning). The issue in *Lee* was therefore whether post-charge questioning was authorised (and the accusatorial system altered) by necessary implication.<sup>108</sup>

In holding that there was a necessary implication, French CJ said: ‘A construction of a statute as abrogating the privilege against self-incrimination may be required, as a matter of necessary implication, by the clear purpose of the statute.’<sup>109</sup> His Honour went on to quote *Yuill*.<sup>110</sup> The citation of *Yuill* sits uneasily with the strong disapproval of that case in *Daniels* and may suggest a rehabilitation of the reasoning in *Yuill*.

Exactly how purpose influenced French CJ’s conclusions, however, is unclear, though it is a factor his Honour refers to prominently on several occasions.<sup>111</sup> The same is true of Gageler and Keane JJ’s joint judgment: there is reference to purpose,<sup>112</sup> but its role in the reasoning is not articulated with precision. It seems, however, that the respondent ran a *Yuill*-type argument. The argument was that reading down s 31D so as not to apply to persons facing pending charges would ‘frustrate’ the statutory object of identifying and confiscating proceeds of crime.<sup>113</sup> The argument boiled down to three propositions: (1) if the section were read down, examination would be delayed until the charges had been tried; (2) the unavailability of an examination would make it hard in some cases to obtain evidence to convert suspicion of serious crime-related activity into proof; so (3) the making of a confiscation order would be delayed.<sup>114</sup> Crennan J accepted that argument: ‘To delay an examination ... until criminal proceedings have been completed could

<sup>106</sup> *X7* (n 3) 127 [71], 142–3 [124]–[125] (Hayne and Bell JJ). The ‘accusatorial system of criminal justice’ is a concept explained in more detail in Part V.

<sup>107</sup> Section 13A was made applicable to an examination under s 31D(1) by s 31D(3).

<sup>108</sup> *Lee* (n 3) 208 [14] (French CJ), 231 [59] (Hayne J), 263 [165] (Kiefel J), 291 [260] (Bell J), 307 [304] (Gageler and Keane JJ).

<sup>109</sup> *Ibid* 218 [30]; see also at 230 [56] (first bullet point).

<sup>110</sup> *Ibid* 218 [30].

<sup>111</sup> *Ibid* 209 [14], 218 [29]–[30], 230 [55]–[56].

<sup>112</sup> *Ibid* 310–11 [314].

<sup>113</sup> See *Criminal Assets Recovery Act 1990* (NSW) s 3(c).

<sup>114</sup> Cf *Lee* (n 3) 291–2 [261] (Bell J).

frustrate the objects of identifying and recovering property sourced from serious crime related activity.<sup>115</sup>

There are two answers to that contention. First, although the unavailability of an examination would certainly make it harder to prove on the balance of probabilities that the affected person had committed a serious offence, it would not make it impossible. As Kiefel J observed, '[t]here are other methods of investigation and proof'.<sup>116</sup> Secondly, even assuming that an examination was the only means of obtaining evidence as to the commission of offences, that means was only made unavailable temporarily. At worst, the making of a confiscation order might be delayed. But that alone would not have defeated the object of recovering proceeds of crime. In urgent cases, interim measures were available to preserve property until a confiscation order could be made.<sup>117</sup>

It follows that although Crennan J expressed her conclusion in terms of 'frustration' of the legislative purpose, the point really rose no higher than this: it would have been easier and faster to obtain confiscation orders if the Commission could conduct examinations whenever it wanted.<sup>118</sup> To that extent, the Commission's construction of s 31D better served the purpose of the statute than the appellants' construction. That, however, falls a long way short of the standard in *Coco* and is inconsistent with the majority reasoning in *X7*. Interestingly, this divergence from authority appears to have gone unnoticed by the majority in *Lee*. No party submitted that *X7* was wrongly decided and no judge suggested that it should be overruled. French CJ expressly indicated that he was not 'questioning ... the principles enunciated in *X7*'.<sup>119</sup> The notable exception to this trend was Hayne J, who registered a powerful protest:

All that has changed between the decision in *X7* and the decision in this case is the composition of the Bench. A change in composition of the Bench is not, and never has been, reason enough to overrule a previous decision of this Court.<sup>120</sup>

<sup>115</sup> Ibid 251 [131].

<sup>116</sup> Ibid 281 [223].

<sup>117</sup> See ibid 281 [224]; *Criminal Assets Recovery Act 1990* (NSW) pt 2 (especially ss 10–10A).

<sup>118</sup> Cf *Lee* (n 3) 292 [262] (Bell J).

<sup>119</sup> Ibid 226 [45].

<sup>120</sup> Ibid 233 [70] (citations omitted).

On the other hand, it is not necessarily clear that Hayne J was referring to the departure in *Lee* from the stultification principle, as opposed to defending other aspects of the reasoning in *X7*.<sup>121</sup>

#### D Conclusions on the Role of Legislative Purpose

This article has examined two approaches to purposive construction in the context of the principle of legality: the stultification principle and a broader purposive approach. On the latter approach, most clearly exemplified in *Yuill*, a necessary implication may arise where the statutory purpose would be hampered (but not defeated) if a fundamental right were preserved. That produces a weaker form of the principle of legality than the strict approach reflected in *Coco* because it poses a less demanding threshold for purposive arguments.

Although *Yuill* was strongly disapproved in *Daniels*, which reiterated the need for ‘strict application’ of the principle of legality,<sup>122</sup> elements of *Yuill*-type reasoning are present in the *Lee* majority judgments. On the other hand, in both *X7* and *Lee*, Hayne, Kiefel and Bell JJ seem to apply the stultification principle, as do six judges of the High Court in *IBAC*. That leaves an unresolved tension in the case law. Importantly, with the possible exception of Hayne J, none of the judgments in *Lee* or subsequent cases engages with these differences. If the High Court wished to depart from *Coco*, serious justification would be needed.<sup>123</sup> The majority judgments in *Lee* make no attempt at such justification.

#### IV INTERPRETING GENERAL LANGUAGE: SHADES OF AMBIGUITY

*Coco* held that the principle of legality will be displaced by ‘unambiguous language’.<sup>124</sup> The application of that test most obviously raises questions of degree: how clear must language be to be unambiguous?<sup>125</sup> However, this part will argue that the notion of ambiguity also raises conceptual difficulties. Different judges seem to be looking for two different kinds of ambiguity. The ease with which the presumption against the abrogation of fundamental rights

<sup>121</sup> See his Honour’s detailed criticisms at *ibid* 233 [67]–[71].

<sup>122</sup> *Daniels* (n 81) 553 [11].

<sup>123</sup> *Lee* (n 3) 231–3 [62]–[66] (Hayne J).

<sup>124</sup> *Coco* (n 23) 437.

<sup>125</sup> Cf Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (n 9) 779.

is displaced depends on which kind of ambiguity is sought. As with the different approaches to purpose, the courts do not yet appear to have recognised or addressed this conceptual difference.

### A Ambiguity and Specificity

Difficulties arise when applying the principle of legality to statutes in general terms. *Al-Kateb v Godwin* provides a good example.<sup>126</sup> The *Migration Act 1958* (Cth) provided (and still provides) that an ‘unlawful non-citizen’ found in Australia was to be taken into custody and detained until granted a visa or removed or deported from Australia.<sup>127</sup> The appellant had been refused a visa and had requested his removal. However, he was stateless and no country would agree to take him. There was therefore no real prospect of his being removed in the foreseeable future.

Syntactically and semantically, the relevant provisions were unambiguous. The appellant had to be detained until removed. If he could not be removed, he had to be detained indefinitely. His fundamental right to personal liberty was, for the foreseeable future, extinguished.<sup>128</sup> The majority in *Al-Kateb* thought that was the end of the matter.<sup>129</sup>

However, the provisions were in general terms. In the vast majority of cases, they operated perfectly satisfactorily — people were detained temporarily to facilitate removal, and then detention ceased. The infringement of the right to liberty was limited and its duration ascertainable. But in a case such as Mr Al-Kateb’s, they resulted in indefinite executive detention without any real prospect of release in the foreseeable future. That specific situation was not

<sup>126</sup> *Al-Kateb* (n 17).

<sup>127</sup> *Migration Act 1958* (Cth) ss 189(1), 196(1). Removal was governed by ss 198 and 199, deportation by s 200.

<sup>128</sup> It has since been questioned whether persons such as Mr Al-Kateb have a right to personal liberty: *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 379 [181], 380 [184] (Kiefel and Keane JJ). With respect, that suggestion runs against statements of high authority and fundamental constitutional principles: *Re Bolton* (n 23) 520–1 (Brennan J), 528–9 (Deane J); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 230–1 [24] (French CJ, Hayne, Crennan, Kiefel and Keane JJ). See also Peter Billings, ‘Whither Indefinite Immigration Detention in Australia? Rethinking Legal Constraints on the Detention of Non-Citizens’ (2015) 38 *University of New South Wales Law Journal* 1386, 1406; David Burke, ‘Preventing Indefinite Detention: Applying the Principle of Legality to the *Migration Act*’ (2015) 37 *Sydney Law Review* 159, 179–80.

<sup>129</sup> *Al-Kateb* (n 17) 581 [33] (McHugh J), 643 [241] (Hayne J, Heydon J agreeing at 662–3 [303]), 661 [298] (Callinan J).

one to which Parliament had adverted in the text of the statute. Could the principle of legality operate to prevent such an anomalous result?

In an influential article on the principle of legality, Lord Browne-Wilkinson wrote:

There is no doubt that if the words of the statute either expressly or by necessary implication authorise interference with individual freedom, they must be given their full force. Equally clearly, if the statutory words are ambiguous (in the sense of being capable of bearing more than one meaning) they should be construed in favour of individual freedoms. But how are the courts to approach the construction of general words, in themselves clear, which on their face authorise almost any action including actions interfering with basic freedoms?<sup>130</sup>

In *Coco*, six judges of the High Court referred to Lord Browne-Wilkinson's question and continued:

General words will rarely be sufficient [to abrogate fundamental rights] if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.<sup>131</sup>

Their Honours seem to have meant that general words, though they may be syntactically or semantically unambiguous — ie, capable of bearing only one meaning as a matter of ordinary English — may still be ambiguous in a broad sense<sup>132</sup> if they do not advert specifically to the abrogation of the relevant fundamental right. They may be ambiguous in the sense that they do not make it clear whether or not Parliament has turned its mind to the question of abrogation and decided to abrogate the relevant right.<sup>133</sup>

<sup>130</sup> Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] *Public Law* 397, 405 (citations omitted).

<sup>131</sup> *Coco* (n 23) 436–7 (Mason CJ, Brennan, Gaudron and McHugh JJ, Deane and Dawson JJ agreeing at 446).

<sup>132</sup> On the different senses of the word 'ambiguity' see *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc* (2000) 48 NSWLR 548, 577–8 [116] (Spigelman CJ); JJ Spigelman, 'Statutory Interpretation: Identifying the Linguistic Register' (1999) 4(1) *Newcastle Law Review* 1, 2–3; Spigelman, 'Principle of Legality and the Clear Statement Principle' (n 9) 771–2. Spigelman draws a distinction between 'inexplicitness' and 'ambiguity' which mirrors the two forms of ambiguity discussed here.

<sup>133</sup> *Coco* (n 23) 437. This language sits uncomfortably with the modern, objective approach to legislative intention: Richard Hooker, 'The High Court Decisions in *X7 v Australian Crime Commission* and *Lee v New South Wales Crime Commission*: Do the Real Complexities Arise for Criminal Lawyers or for Public Lawyers?' (Paper, Constitutional Centre of Western Australia Lecture Series 2014, 22 February 2014) 11.

The dicta in *Coco* import a test of specificity.<sup>134</sup> The words must not only be unambiguous in the traditional sense (syntactic/semantic ambiguity) but must also deal specifically with the abrogation of the relevant right. That is a much more demanding test than ambiguity in the traditional sense.

Despite the statement of principle in *Coco*,<sup>135</sup> justices of the High Court have differed in their treatment of clear but general words. *Al-Kateb* reflects such differences. The Court split 4:3. The majority thought the text was ‘unambiguous’.<sup>136</sup> That conclusion is correct so far as it goes, but their Honours must have had in mind syntactic or semantic ambiguity. Gleeson CJ gave the leading dissent.<sup>137</sup> His Honour started by observing that the Act did not deal expressly with the issue of indefinite detention.<sup>138</sup> The provisions assumed that removal from Australia would be possible.<sup>139</sup> They simply didn’t deal with the situation where it was not.<sup>140</sup> That left a ‘legislative silence’ on the critical issue. In filling that silence, resort was had to the principle of legality.<sup>141</sup> Although Gleeson CJ does not use the term ‘ambiguous’, his Honour’s reasoning is consistent with the approach set out in *Coco*. Although the provisions were linguistically clear (even ‘intractable’),<sup>142</sup> they were general rather than specific. Gleeson CJ argued that that lack of specificity left the court with a constructional choice, which should be exercised so as to preserve fundamental rights.<sup>143</sup>

The interpretation of general words forms another point of difference between the various judgments in *X7* and *Lee*. In *X7*, s 28(1) of the *Australian Crime Commission Act 2002* (Cth) empowered an examiner appointed under the Act to summon a person to a compulsory examination.<sup>144</sup> The examinee

<sup>134</sup> *Burke* (n 128) 167–8, 173.

<sup>135</sup> For a more recent restatement, see *McGee* (n 46) 109–10 [39] (Doyle CJ).

<sup>136</sup> *Al-Kateb* (n 17) 581 [33], [35] (McHugh J), 661 [298] (Callinan J); see also at 643 [241] (Hayne J, Heydon J agreeing at 662–3 [303]).

<sup>137</sup> Gleeson CJ’s reasoning was adopted by Gummow J and Bell J (both dissenting) in *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 59–61 [116]–[120], 68 [145], [148] (Gummow J), 193 [533] (Bell J). It also formed the basis of the plaintiff’s challenge to *Al-Kateb* in *Plaintiff M76* (n 128).

<sup>138</sup> *Al-Kateb* (n 17) 572 [1]; see also at 575 [13], 577 [21].

<sup>139</sup> *Ibid* 574–5 [12], 576 [17].

<sup>140</sup> *Ibid* 577 [21].

<sup>141</sup> *Ibid* 576–7 [18].

<sup>142</sup> *Ibid* 643 [241] (Hayne J).

<sup>143</sup> *Ibid* 578 [22].

<sup>144</sup> Section 30(2) made it an offence to refuse or fail to answer a question.

was given some protections: examinations were in private,<sup>145</sup> there was a ‘direct use immunity’,<sup>146</sup> and s 25A(9) empowered the examiner to make directions suppressing the publication of certain information. The subsection went on to provide: ‘The examiner must give such a direction if the failure to do so might prejudice ... the fair trial of a person who has been, or may be, charged with an offence.’

French CJ and Crennan J (dissenting) relied primarily on three textual indicators to conclude that post-charge questioning was permitted: (1) s 28 did not limit who could be summoned; (2) the direct use immunity rendered the consequences of examination the same whether there were charges or not; and (3) the concluding words of s 25A(9) contemplated the examination of a person who ‘has been ... charged’.<sup>147</sup> The first two points rely on general statutory language to overcome the principle of legality. Neither s 28 nor the direct use immunity provision adverted to the specific situation of examination after charges were laid: they applied to examination in any circumstances. The majority, on the other hand, emphasised that the provisions were ‘cast in general terms’:

Because these provisions were expressed generally, they would permit, if read literally, the examination of a person who had been charged ... about the subject matter of the charged offence. But [nothing in the Act] stated expressly that a person charged with an offence may be examined about the subject matter of that charge.<sup>148</sup>

At first glance, the last provision relied on by the minority (s 25A(9)) does seem to advert to the situation of an examinee facing pending charges: ‘*has been ... charged*’. The majority, however, thought it was not specific enough. It was ‘sufficiently general to *include*’ a case of post-charge questioning but did not ‘deal directly or expressly with it’.<sup>149</sup> The argument seems to be that the ‘person who has been ... charged’ (and whose fair trial is being protected) need not be the examinee.

<sup>145</sup> *Australian Crime Commission Act 2002* (Cth) s 25A(3).

<sup>146</sup> Ie, answers given and things or documents produced by an examinee in response to questions were not admissible against the examinee in criminal or civil penalty proceedings: *ibid* ss 30(4)–(5).

<sup>147</sup> *X7* (n 3) 110–11 [25]–[27].

<sup>148</sup> *Ibid* 128–9 [75]–[76]; see also at 134 [94] (Hayne and Bell JJ, Kiefel J agreeing at 152 [157], 154 [162]).

<sup>149</sup> *Ibid* 131 [83] (emphasis in original).

The majority in *X7* placed great weight on ‘the generality of the words used ... and the absence of *specific* reference to examination of a person who has been charged’ in concluding that the legislation did not authorise post-charge questioning.<sup>150</sup> Consistently with that approach, the same three judges in *Lee* reasoned that the key provisions were in general terms, so could not overcome the principle of legality.<sup>151</sup> The *Lee* majority, however, took a different approach. Crennan J thought it significant that s 13A of the *Criminal Assets Recovery Act 1990* (NSW), which abrogated the privilege against self-incrimination, was ‘not expressed to be limited ... by reference ... to whether a charge for an offence has been laid against an examinee’.<sup>152</sup> Gageler and Keane JJ also attached ‘particular significance’ to that factor.<sup>153</sup> Their Honours further relied on the lack of any qualification to the general language of s 31D(1)(a) (the power to order an examination), which was said to be, not a product of legislative inadvertence, but ‘an aspect of a carefully integrated and elaborate legislative design’.<sup>154</sup>

Somewhat confusingly, Kiefel and Keane JJ, who appear to have had quite different views on the principle of legality in *Lee*, participated in a joint judgment dealing with the topic only two months later. *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* involved a challenge to the correctness of *Al-Kateb*, relying on Gleeson CJ’s dissenting reasons.<sup>155</sup> Kiefel and Keane JJ dismissed the challenge.<sup>156</sup> In doing so, their Honours adopted reasoning closely analogous to that of the *Lee* majority:

The circumstance that the language of ss 189, 196 and 198 *is not qualified* by any indication that the mandate requiring detention depends upon the reasonable practicability of removal within any time frame *is eloquent of an intention* that an unlawful non-citizen should not be at large in the Australian community ...<sup>157</sup>

Such reasoning is consistent with the majority in *Al-Kateb*: in effect it takes general, unqualified language and gives it its full literal meaning. It is,

<sup>150</sup> *Ibid* (emphasis in original).

<sup>151</sup> *Lee* (n 3) 231 [59]–[60], 235 [76] (Hayne J), 272 [195], 281–3 [223]–[230] (Kiefel J, Hayne J and Bell J agreeing at 231 [58], 290 [255] respectively), 292 [263] (Bell J).

<sup>152</sup> *Ibid* 251 [132]; see also 252 [133].

<sup>153</sup> *Ibid* 318 [331].

<sup>154</sup> *Ibid* 319 [333]. See also Gageler J’s comments in *IBAC* (n 3) 479–80 [74].

<sup>155</sup> *Plaintiff M76* (n 128). Judgment was delivered on 12 December 2013.

<sup>156</sup> *Ibid* 379–81 [179]–[189].

<sup>157</sup> *Ibid* 379 [182] (emphasis added).

however, inconsistent with *Coco* and the X7 majority. It treats the very fact that the provisions in question did not deal specifically with the relevant situation as indicating that fundamental rights were abrogated, when in X7 the same point led to the opposite conclusion.

The approach mandated by *Coco*, and followed by the majority in X7, demands not only an absence of semantic and syntactic ambiguity, but also a high level of specificity from Parliament before a statute will be read as abrogating fundamental rights. The majorities in *Al-Kateb* and *Lee* applied a different conception of ambiguity: so long as unqualified language is grammatically and linguistically clear, it is capable of overriding fundamental rights. By giving general words their 'plain'<sup>158</sup> meaning, the majorities in those cases removed the additional requirement of specificity and reduced the standard of clarity required for the abrogation of fundamental rights.

B *Conclusions from Parts III and IV:*  
*The Variable Strength of the Principle of Legality*

In summary, there seem to be two important methodological differences in the application of the principle of legality in Australia. These differences manifest themselves particularly clearly in X7 and *Lee*.

First, some decisions give a greater role to statutory purpose than others. The traditional approach requires that the abrogation of a fundamental right be necessary in order to achieve a statutory purpose before the right will be impliedly overridden. The weaker approach subordinates fundamental rights to statutory objects in circumstances where the right hampers but does not stultify the object.

Secondly, some cases have given general words their full literal meaning, even where that would override fundamental rights, provided they are semantically and syntactically clear. Others suggest that general words should be read down unless there is specific reference to the abrogation of the relevant right. In the latter cases, clear but general words are effectively treated as ambiguous, in the sense that they are not conclusive of meaning.

The coexistence of these methodological differences both demonstrates that the principle of legality varies in strength from case to case and explains how. The question that then arises is why.

<sup>158</sup> *Lee* (n 3) 250 [130] (Crennan J).

## V WHY DOES THE STANDARD VARY?

The preceding two parts of this article sought to demonstrate that there is a discernible variation in the forcefulness or strictness with which Australian courts have applied the principle of legality. This final part advances some provisional thoughts on the ‘why’ question. This is an area in need of further research and it is beyond the scope of this article to attempt a comprehensive answer. The issue was stated eloquently by Chief Justice Spigelman in an important paper now published over a decade ago:

It may be that a careful reading of the authorities will identify patterns and themes which repeat themselves in particular contexts, so that it may prove possible to identify circumstances in which the level of strictness varies and to determine why.<sup>159</sup>

Identifying such patterns and themes would provide a principled explanation for variations in the existing case law and enable the making of predictions as to the strength of the principle in future cases.

This article considers four variables which have been identified by Australian courts (and particularly the High Court) as relevant in calibrating the strength of the presumption against the abrogation or curtailment of a fundamental right in a given case. They are the nature of the right affected; the extent of the intrusion on the relevant right; whether there is a history of interference with fundamental rights in the relevant regulatory context; and whether the repository of a statutory power said to override fundamental rights is a court or will be supervised by a court.

The following analysis tends to suggest that the factors identified by judges as relevant to the strength of the principle of legality in fact have limited utility in predicting which of the divergent approaches discussed in Parts III and IV will be applied. Instead, choices between the different approaches appear to a large extent to lack any real explanation or justification. That is consistent with the thesis that the courts are largely unaware that they are in fact applying different approaches to the principle of legality.

### *A More and Less Fundamental Rights?*

There is authority suggesting that the more important a right is, the more difficult it will be to establish that it has been abrogated by necessary implica-

<sup>159</sup> Spigelman, ‘Principle of Legality and the Clear Statement Principle’ (n 9) 779.

tion.<sup>160</sup> That proposition is only helpful, however, if we can identify the relative importance of a given right. There is a well-established conceptual distinction at common law between ‘fundamental’ and ‘ordinary’ rights,<sup>161</sup> but that distinction goes to whether or not the principle of legality applies at all. If a right is less than fundamental, the principle is simply not engaged. The relevant question for present purposes is whether, within the class of ‘fundamental’ rights, some are *more* fundamental than others.

Australian courts have attached special significance to some rights. In *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*, the Full Federal Court described personal liberty as ‘among the most fundamental of all common law rights’.<sup>162</sup> Gleeson CJ in *Al-Kateb* went further, describing liberty as ‘the most basic’ human right.<sup>163</sup> As discussed in Part IV, his Honour went on to apply a particularly strong form of the principle of legality, though he did not explicitly link his interpretive approach to the nature of the right. Similar sentiments appear in *Re Bolton; Ex parte Beane*, where Brennan J stated that ‘[t]he law of this country is very jealous of any infringement of personal liberty’, including by statute.<sup>164</sup>

Another common law right that may be more fundamental than others is freedom of speech. The Full Federal Court said in *Evans v New South Wales* that ‘[f]reedom of speech and of the press has long enjoyed special recognition at common law’.<sup>165</sup> French CJ (who was party to the judgment in *Evans*) expressed similar views in *Attorney-General (SA) v Adelaide City Corporation* (‘*Corneloup’s Case*’), describing free speech as ‘a long-established common law

<sup>160</sup> See, eg, *R v Home Secretary; Ex parte Leech* [1994] QB 198, 209; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 78 [92]. See also, recently, *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583, 610 [83] (EWHC). Although *Al Masri* was overruled by the High Court in *Al-Kateb*, the cases discussed below suggest that the observations in the passage cited remain valid.

<sup>161</sup> See the cases cited at n 19.

<sup>162</sup> *Al Masri* (n 160) 76 [86].

<sup>163</sup> *Al-Kateb* (n 17) 577 [19] (emphasis added). Similar comments were made in *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagar J) and *Williams v The Queen* (1986) 161 CLR 278, 292, 296 (Mason and Brennan JJ), 304 (Wilson and Dawson JJ) in the context of unlawful arrests.

<sup>164</sup> *Re Bolton* (n 23) 523; see also at 518 (Mason CJ, Wilson and Dawson JJ). See also *R v Thames Metropolitan Stipendiary Magistrate; Ex parte Brindle* [1975] 1 WLR 1400, 1410 (Roskill LJ); *Al-Kateb* (n 17) 616–17 [150] (Kirby J); Sir Gerard Brennan, ‘Human Rights, International Standards and the Protection of Minorities’ in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 333, 345.

<sup>165</sup> (2008) 168 FCR 576, 595 [74] (French, Branson and Stone JJ).

freedom'.<sup>166</sup> Heydon J, in the same case, quoted Cardozo J's claim that free speech is 'the matrix, the indispensable condition, of nearly every other form of freedom'.<sup>167</sup> There are important differences (discussed below) between French CJ and Heydon J's reasoning in *Corneloups's Case*, but both seem to agree on the significance of the right affected.

However, while the special importance of some rights is routinely emphasised, it is rare to find other rights described as *less* fundamental. An exception is *Price v McCabe; Ex parte Price*, where it was suggested that it might be easier to abrogate the privilege against exposure to a civil penalty than the privilege against self-incrimination 'because the consequences are less serious'.<sup>168</sup>

One problem in this area is the difficulty (perhaps impossibility) of devising any coherent or consistent methodology or criteria for ranking rights. In *Corneloups's Case*, for instance, Heydon J cited everything from economic and political arguments to considerations of human dignity and self-expression to support his Honour's conclusion that free speech was a fundamental right.<sup>169</sup> The absence of any settled mode of reasoning probably explains why the authorities, while recognising the importance of a handful of uncontroversial rights (eg liberty, free speech), do not present anything like a spectrum of differently weighted rights, correlating to differently weighted presumptions.

Aside from the problem of ranking rights, the other fundamental difficulty with using the nature of the right abrogated to explain variations in the strength of the principle of legality is that some decisions concerning what should have been especially fundamental rights have nonetheless applied weak forms of the principle. In *Al-Kateb*, the majority held that the 'basic' right to personal liberty was abrogated by general words. And in *Lee*, the majority relied heavily on statutory purpose and general words to find that the accusatorial system of criminal justice was substantially altered. The minority, conversely, were at pains to emphasise the significance of the principle affected. Kiefel J explained that the accusatorial system rests on two rules:<sup>170</sup>

<sup>166</sup> *Corneloups's Case* (n 3) 31 [43].

<sup>167</sup> *Ibid* 67 [151], quoting *Palko v Connecticut*, 302 US 319, 327 (1937). See also *Coleman v Power* (2004) 220 CLR 1, 75 [185], 76 [188] (Gummow and Hayne JJ), 96 [248], 97–8 [253] (Kirby J), 117 [313] (Heydon J).

<sup>168</sup> *Price* (n 46) 512. See also *Taciak v Commissioner of Australian Federal Police* (1995) 59 FCR 285, 297–9 in relation to the protection of privacy.

<sup>169</sup> *Corneloups's Case* (n 3) 67–8 [151]–[152].

<sup>170</sup> *Lee* (n 3) 265–6 [174]–[176]; see also at 293–4 [266] (Bell J). See also *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 527 (Deane, Dawson and Gaudron JJ); *X7* (n 3) 135–6 [99]–[101] (Hayne and Bell JJ).

the prosecution bears the onus of proof,<sup>171</sup> and it cannot compel the accused to assist it in discharging that onus (also known as the ‘companion principle’).<sup>172</sup> These rules — the ‘golden thread’ of *Woolmington* and the non-compellability of the accused — are both elementary aspects of the modern system of criminal justice,<sup>173</sup> yet the *Lee* majority found that they were overridden without any specific indication of legislative intention to do so and in circumstances where that result was not necessitated by the statute’s purpose. Such outcomes suggest that particularly important rights (even when they can be identified) do not necessarily attract a strong presumption in favour of their preservation.

### B *Extent of Incursion on Right*

In *Al Masri*, the Full Court of the Federal Court stated that, in applying the principle of legality, it is appropriate to consider the extent of the alleged interference with fundamental rights, including (in the case of personal liberty) the ‘nature and duration of the interference’.<sup>174</sup> *Al Masri* involved the same legislation as *Al-Kateb* and similar facts. Read literally, the legislation authorised indefinite executive detention: a ‘very severe’ interference with liberty.<sup>175</sup> The severity of the interference made it harder for the court to accept that Parliament intended the Act so to operate.<sup>176</sup> Similarly, in *Al-Kateb*, Gleeson CJ emphasised that, on the majority’s construction, the Act would subject a person to indefinite, perhaps lifelong, detention, irrespective of personal circumstances, danger to the community, or any risk of absconding. His Honour could not accept an implication to that effect.<sup>177</sup>

The authority of these two judgments is, however, diminished by the *Al-Kateb* majority, which overruled *Al Masri* and left Gleeson CJ in dissent. The

<sup>171</sup> *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey); *R v Mullen* (1938) 59 CLR 124, 127 (Latham CJ).

<sup>172</sup> *Evidence Act 1995* (Cth) s 17(2); *Evidence Act 2011* (ACT) s 17(2); *Evidence Act 1995* (NSW) s 17(2); *Evidence (National Uniform Legislation) Act 2011* (NT) s 17(2); *Evidence Act 1977* (Qld) s 8(1); *Evidence Act 1929* (SA) s 18(1); *Evidence Act 2001* (Tas) s 17(2); *Evidence Act 2008* (Vic) s 17(2); *Evidence Act 1906* (WA) s 8(1).

<sup>173</sup> Cf *X7* (n 3) 135 [100] (Hayne and Bell JJ).

<sup>174</sup> *Al Masri* (n 160) 78 [92].

<sup>175</sup> *Ibid* 79 [94]; see also at 78 [92].

<sup>176</sup> *Ibid* 79 [94]–[95].

<sup>177</sup> *Al-Kateb* (n 17) 577–8 [21].

majority gave the general language of the provisions full effect despite the seriousness of the incursion on personal liberty.

*Corneloup's Case* involved a by-law that prohibited 'preaching, canvassing, or haranguing' on the streets of the Adelaide CBD. Both French CJ and Heydon J observed that the by-law restricted free speech, so it engaged the principle of legality.<sup>178</sup> The question was whether the relevant by-law-making power authorised such an intrusion on free speech. French CJ first applied the principle of legality to the by-law itself, reading it down to involve 'the least interference with freedom of expression that its language could bear'.<sup>179</sup> His Honour then concluded (in a somewhat cryptic passage) that it was within power:

By parity of reasoning, the power conferred by [the enabling Act], construed in accordance with the principle of legality in its application to the common law freedom of expression, was sufficient to support the impugned by-law.<sup>180</sup>

The argument seems to be that, provided the intrusion on free speech was kept to a minimum, it was possible to read the general language of the by-law-making power as authorising that intrusion; but had the intrusion been greater, the by-law would have been invalid. Implicit in that reasoning is the proposition that the principle of legality was sensitive to the extent of the intrusion on free speech. Had the intrusion been any greater, the principle would have demanded more clarity than the primary legislation possessed. Heydon J, on the other hand, thought that the by-law was too clear to be read down.<sup>181</sup> Consequently, its impact on free speech was 'radical',<sup>182</sup> and the by-law was *ultra vires*.<sup>183</sup>

There is some authority, then, for the proposition that the greater the suggested intrusion on fundamental rights, the harder it will be to displace the principle of legality, but any such general proposition is severely undermined by a lack of consistency in important cases such as *Al-Kateb*.

<sup>178</sup> *Corneloup's Case* (n 3) 31 [43] (French CJ), 66 [146], [148] (Heydon J). None of the other judgments referred to the principle.

<sup>179</sup> *Ibid* 33 [46]; see also at 32–3 [44]–[45].

<sup>180</sup> *Ibid* 33 [46].

<sup>181</sup> *Ibid* 67 [150].

<sup>182</sup> *Ibid* 70 [159]; see also at 66 [146]–[147].

<sup>183</sup> *Ibid* 70 [158]–[159].

### C History of Interference

Gleeson CJ once observed that '[t]he assistance to be gained from a presumption will vary with the context in which it is applied'.<sup>184</sup> There are areas of the law where Parliament has a long history of abrogating individual rights in pursuit of the broader public interest. That history forms part of the context in which modern statutes fall to be construed.<sup>185</sup> So far as the principle of legality is concerned, there is an argument that, in these areas, the courts are less resistant than they might otherwise be to further curtailment of rights.

Two key areas in which Parliament has traditionally abrogated common law rights are bankruptcy and corporate insolvency. Legislation has for some time provided for compulsory examinations of bankrupts and directors of failed companies in which the privilege against self-incrimination is abrogated. As Lord Mustill explained,

statutory interference with the right is almost as old as the right itself. Since the 16<sup>th</sup> century legislation has established an inquisitorial form of investigation into the dealings and assets of bankrupts which is calculated to yield potentially incriminating material ...<sup>186</sup>

The history of the relevant Anglo-Australian provisions was traced by Allsop J (for the Full Federal Court) in *Griffin v Pantzer*.<sup>187</sup> His Honour said:

Thus, from 1856, and certainly by the time of the *Bankruptcy Act 1924* (Cth) ... it was clear that even without express words abrogating the privilege a bankrupt could not take advantage of the privilege against self-incrimination in an examination ...<sup>188</sup>

Jackson J made a similar point in *Re Clyne; Ex parte Deputy Commissioner of Taxation*:

[I]t is clear that the public examination of bankrupts under the enactments in bankruptcy has long been an instance where, *without there being any reference to the exclusion of the privilege against self-incrimination*, a statutory duty of the bankrupt to answer 'all such questions as the Court may put or allow to be put

<sup>184</sup> *Electrolux* (n 19) 328 [19]; see also at 357 [118] (McHugh J).

<sup>185</sup> On the role of legislative history in statutory interpretation generally, see, eg, *R v Lavender* (2005) 222 CLR 67, 83–5 [41]–[50] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>186</sup> *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1, 40.

<sup>187</sup> *Griffin* (n 81) 234–53 [80]–[168].

<sup>188</sup> *Ibid* 244 [126].

to him' has been held to carry with it an exclusion of the privilege against self-incrimination.<sup>189</sup>

Those passages describe a particularly weak form of the principle of legality: the privilege is regarded as excluded even where the statute uses general language, with no specific textual indications at all of an intention to abrogate.

The authorities suggest a similar approach applies to the examination of company officers under corporate insolvency legislation.<sup>190</sup> *Hamilton v Oades* provides a good illustration.<sup>191</sup> Section 541(12) of the *Companies (New South Wales) Code* expressly abrogated the privilege against self-incrimination, but provided no indication whether or not the liquidator could continue to question a company officer once charges were laid against them (ie, post-charge questioning). The High Court considered that post-charge questioning was authorised (though the comments were in obiter, since the parties did not contest the point).<sup>192</sup> The judgments quite explicitly relied on '[t]he absence from sub-s (12) of any qualification or exception by reference to charges pending'.<sup>193</sup> That is, the Court simply gave the general words of the provision their literal, unqualified meaning. For the reasons explained in Part IV, that approach gives the principle of legality a limited operation.

The obiter dicta in *Hamilton* were considered in both *X7* and *Lee*. An issue arose as to whether the reasoning in the bankruptcy and companies cases was referable to their special historical context or was applicable generally. Hayne and Bell JJ, in *X7*, thought that the decision in *Hamilton* 'necessarily depended on the historical pedigree of the legislation being construed'.<sup>194</sup> In particular, the long history of rights abrogation was important when it came to construing the legislation then before the court:

[*Hamilton*] answered particular questions about the construction of the relevant statute in light of the fact that the legislature had, for very many years,

<sup>189</sup> (1986) 15 FCR 128, 135–6 (emphasis in original).

<sup>190</sup> *Rees v Kratzmann* (1965) 114 CLR 63, 80 (Windeyer J).

<sup>191</sup> *Hamilton* (n 11).

<sup>192</sup> *Ibid* 497–8 (Mason CJ), 500–1 (Deane and Gaudron JJ), 508 (Dawson J), 512 (Toohey J).

<sup>193</sup> *Ibid* 501 (Deane and Gaudron JJ); see also at 498 (Mason CJ), 508 (Dawson J), 512 (Toohey J).

<sup>194</sup> *X7* (n 3) 148 [140]. But see Stephen Lloyd, 'X7, Lee and Chancery's Treatment of Self-Incrimination in Insolvency Examination' (2015) 37 *Sydney Law Review* 89.

made special exceptions to the otherwise accusatorial process of the criminal law in respect of bankruptcy and companies examinations.<sup>195</sup>

The *Lee* majority, however, held that the bankruptcy and companies cases ‘cannot ... be characterised as *sui generis*’.<sup>196</sup> With respect, that is inconsistent with both *X7* and references in *Hamilton* itself to the ‘long history’ of the legislation.<sup>197</sup> As Kiefel J argued in *Lee*, the legislation in *Hamilton* ‘had a special historical context and was to be understood by reference to it’;<sup>198</sup> it was therefore inappropriate to transpose the views in *Hamilton* to ‘legislation operating in different spheres’.<sup>199</sup>

The *Lee* majority’s denial that the bankruptcy and companies cases form a special category would seem to undermine what is otherwise a relatively strong correlation between the historical context of legislation and the strength of the principle of legality.

#### D *Judges versus Administrators*

French CJ’s conclusion in *Lee* that the statute authorised post-charge questioning rested in no small part on the circumstance that the questioning would be controlled by the Supreme Court.<sup>200</sup> That factor was referred to variously as ‘important’ and ‘critical’.<sup>201</sup> His Honour set out the following general proposition:

The fact that statutory powers are conferred upon a court to be exercised judicially tends in favour of a more liberal construction of those powers than in the case in which they are conferred on a non-judicial body.<sup>202</sup>

That contradicts some passing remarks made in *Pyneboard*,<sup>203</sup> which seem to have fallen into obscurity.<sup>204</sup>

<sup>195</sup> *X7* (n 3) 148 [140] (Hayne and Bell JJ).

<sup>196</sup> *Lee* (n 3) 228 [50] (French CJ); see also at 312–13 [317] (Gageler and Keane JJ).

<sup>197</sup> *Hamilton* (n 11) 494 (Mason CJ).

<sup>198</sup> *Lee* (n 3) 286 [243]; see also at 234 [72] (Hayne J).

<sup>199</sup> *Ibid* 288 [249].

<sup>200</sup> *Ibid* 222 [38], 223 [40]–[41], 226–7 [47], 228 [49], 230 [56]; see also at 255 [138]–[141] (Crennan J), 311–12 [315], 320–1 [340] (Gageler and Keane JJ).

<sup>201</sup> *Ibid* 223 [40], 227 [47] (French CJ).

<sup>202</sup> *Ibid* 230 [56].

<sup>203</sup> *Pyneboard* (n 10) 343 (Mason ACJ, Wilson and Dawson JJ).

<sup>204</sup> They were referred to by the same three judges in *Sorby* (n 79) 309, but have not been repeated since.

French CJ seems to be suggesting that a statutory power will more readily be held to override fundamental rights where the statute provides for a judicial officer to be present (either exercising the power or supervising its exercise) to ensure the power is not used as ‘an instrument of oppression, injustice, or of needless injury to the individual’.<sup>205</sup> That idea originates in a number of ageing High Court decisions,<sup>206</sup> though there is also some more recent authority.<sup>207</sup>

However, French CJ was the only justice to adopt such reasoning in *Lee*. Kiefel J strongly rejected it.<sup>208</sup> It thus remains to be seen whether his Honour’s approach will achieve more general acceptance.

### E Conclusions

The foregoing factors provide some limited explanation as to why the strength of the principle of legality varies between cases. They cannot, however, explain all the variations. In many cases the choice between the diverging methodological approaches discussed in Parts III and IV seems to be a matter of individual judicial preference.

Such unexplained and apparently random variations are hardly surprising in circumstances where the courts do not yet appear to have recognised either the existence or the importance of methodological differences in the application of the principle. This phenomenon is particularly apparent in the case law since *X7*. Although *X7* and *Lee*, the current leading cases, appear to take quite different approaches to the content and operation of the principle of legality, none of the judgments in the latter case (save perhaps Hayne J’s) appears to recognise the doctrinal inconsistencies with *X7*, let alone attempts to justify them. Subsequent High Court cases, such as *Plaintiff M76* and the *IBAC* case, similarly appear to have ignored the conflicts between *X7* and *Lee*. Another illustration is found in Kiefel J’s reasoning in *X7* and *Lee* on the one hand and *Plaintiff M76* on the other. In the former cases, her Honour argues that legislation in general terms does not evince an intention to override funda-

<sup>205</sup> *Lee* (n 3) 222 [38], quoting *Rees* (n 190) 66 (Barwick CJ).

<sup>206</sup> *Rees* (n 190) 66 (Barwick CJ), 78 (Menzies J), 80–1 (Windeyer J); *Mortimer* (n 86) 495 (Barwick CJ), 499 (Walsh J).

<sup>207</sup> *Hamilton* (n 11) 495; *Talacko v Talacko* (2010) 183 FCR 311, 323–4 [25], 326–7 [36]; *X7* (n 3) 111 [27] (French CJ and Crennan J). In *Lee* (n 3) 223 [40], French CJ himself refers to *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 205 (Gaudron J) and *Mansfield v DPP (WA)* (2006) 226 CLR 486, 492 [10], but those were not cases involving the principle of legality.

<sup>208</sup> *Lee* (n 3) 262–3 [164], 285 [238].

mental rights, yet in *Plaintiff M76* her Honour joins with Keane J in describing the unqualified generality of the *Migration Act* as 'eloquent' of an intention to authorise indefinite detention.

## VI CONCLUSION

Common law presumptions vary widely in their strength.<sup>209</sup> The principle of legality is ostensibly a strong presumption.<sup>210</sup> That is perhaps unsurprising given its importance to the protection of human rights in common law systems without constitutional bills of rights.<sup>211</sup> Lord Hoffmann once described it as 'little different' in its operation from a constitutional restriction on legislative power.<sup>212</sup> The question is whether the cases live up to that judicial rhetoric.

The authorities discussed suggest they do not. As discussed in Parts III and IV, the strength of the principle of legality varies from case to case, depending on how the court deals with purposive indicators of statutory meaning and with general words. The High Court has not yet given authoritative guidance on these issues. Different approaches were adopted by different majorities only a few months apart in *X7* and *Lee*, and the majority view in *Lee* may in turn prove ephemeral, given subsequent changes to the composition of the Court.

Although some variations in the strength of the principle can be explained by reference to the factors identified in Part V, others seem to emerge from unexplained and unjustified differences in methodology. Unfortunately, the courts do not seem to recognise such differences. The majority in *Lee*, for instance, insisted that the outcome in that case was fully reconcilable with *X7*. Left unaddressed, these methodological differences give the case law as it stands a Heraclitean quality, unpredictable and (inferentially) unprincipled. There are two possible solutions for the courts: adopt a unified methodological approach or explain and justify the different lines of authority. Failure to adopt either course leaves a situation which is not only doctrinally messy but

<sup>209</sup> See, eg, the presumption that penal provisions are to be construed strictly: *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J); *Lavender* (n 185) 96–7 [93]–[94] (Kirby J).

<sup>210</sup> George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 43.

<sup>211</sup> Meagher, 'The Common Law Principle of Legality in the Age of Rights' (n 5) 451. See generally Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, 2016) 36–8 [2.27]–[2.34].

<sup>212</sup> *Simms* (n 17) 131.

arguably undermines the legitimacy of a rule of construction the content of which is supposed to be ascertainable by Parliament as well as the courts.<sup>213</sup>

<sup>213</sup> *Electrolux* (n 19) 329 [21] (Gleeson CJ); *Zheng* (n 24) 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).