

# AN INSTITUTIONAL JUSTIFICATION FOR THE PRINCIPLE OF LEGALITY

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*In light of ongoing academic and judicial debate, this article revisits the justification for, and proper application of, the presumption of statutory interpretation known as the principle of legality. It demonstrates that the principle of legality cannot be justified as a tool for ascertaining parliamentary intention, nor a democracy-enhancing device. It proposes an alternative justification, according to which courts are permitted to treat the common law as a relevant part of the context that informs statutory meaning, by reason of their constitutional function and the institutional setting in which statutory interpretation occurs. This justifies a more nuanced approach to the principle of legality, the strength of which will vary from case to case.*

## CONTENTS

I	Introduction.....	2
II	The Inadequacy of the Intentionalist Justification .....	4
III	The Inadequacies of the Democracy-Enhancing Account .....	9
IV	An Alternative Account.....	16
	A The Institutional Setting in Which Statutory Interpretation Occurs.....	17
	B Statute, Common Law and the Judicial Power .....	20
	C Context, Coherence, and the Common Law Method .....	25
	D A Variable Presumption.....	31
V	Conclusion .....	38

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### Cite as:

Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality' (2022) 45(2) *Melbourne University Law Review* (advance)

## I INTRODUCTION

In Australia, as elsewhere, many principles of statutory interpretation are creatures of the common law.<sup>1</sup> The courts' power to create interpretive principles is subject to at least two constraints. First, all judicially constructed principles of statutory interpretation must be justified in a way that coheres with the nature of legislation and the respective constitutional roles of Parliament and the courts.<sup>2</sup> Secondly, the principles must be applied in a way that aligns with their justifications.<sup>3</sup>

One of the most significant principles of statutory interpretation applied by Australian courts is that known as the principle of legality — broadly speaking, a presumption that Parliament does not intend to abrogate fundamental common law rights.<sup>4</sup> Versions of this principle are applied in other common law jurisdictions. In some, the principle has attracted relatively little scholarly attention.<sup>5</sup> That is not the case in Australia, where it has been the subject of relatively extensive debate.<sup>6</sup> Yet, both the justification for and proper application of the principle of legality in Australian law remain unclear.

Historically, the principle was justified as a heuristic for ascertaining Parliament's intent.<sup>7</sup> But in more recent years, it has been justified on other, more explicitly normative, bases. The most prominent of these is the 'democracy-enhancing' account. This account abandons the pretence that Parliament does not actually intend to abrogate fundamental rights. Instead, it asserts that Parliament must 'squarely confront' the question of whether or not to do so, and pay

<sup>1</sup> This article leaves to the side the various interpretive rules laid down in legislation like the *Acts Interpretation Act 1901* (Cth) and state and territory equivalents, and the more specific canons of construction mandated by bills of rights, in those sub-national Australian jurisdictions that have them: see *Human Rights Act 2004* (ACT) ss 30–1; *Human Rights Act 2019* (Qld) s 48; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32.

<sup>2</sup> Justice John Basten, 'Construing Statutes Conferring Powers: A Process of Implication or Applying Values?' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 54, 54.

<sup>3</sup> *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310 [313] (Gageler and Keane JJ).

<sup>4</sup> *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) ('Coco').

<sup>5</sup> For observations on the position in the United Kingdom ('UK'), see Jason NE Varuhas, 'The Principle of Legality' (2020) 79(3) *Cambridge Law Journal* 578, 579.

<sup>6</sup> See below Parts II–III.

<sup>7</sup> Robert French, 'The Principle of Legality and Legislative Intention' (2019) 40(1) *Statute Law Review* 40, 40.

the attendant political cost.<sup>8</sup> So understood, the principle of legality purports to enhance democratic scrutiny of legislation by ensuring that its effect on rights is spelled out in clear words for all to see.<sup>9</sup> While this democracy-enhancing account emerged as a supposedly superior justification for the principle of legality, it suffers from considerable flaws. It also caused the principle to be applied in a more robust way, akin to the ‘clear-statement rules’ that operate in the United States (‘US’).<sup>10</sup> Some commentators and judges expressed discomfort with this approach.<sup>11</sup> And some judges have shifted away from this account in recent case law and advocated for a more ‘nuanced’ approach to the principle of legality, which will sometimes operate only weakly.<sup>12</sup>

In light of this ongoing uncertainty, this article revisits the justification for, and proper operation of, the principle of legality. I argue that the democracy-enhancing justification for the principle of legality is inadequate, as was the intentionalist justification before it, and propose an alternative account. In outline, I argue that courts are permitted to treat existing common law rights and principles as weights on the interpretive scale, which influence the constructional choices they make. If a statute can be interpreted in a way that leaves the common law intact, then, all things being equal, this is the interpretation that the court should prefer. This is not because it is improbable that Parliament would intend to abrogate the common law, nor because it would enhance the democratic process. Rather, this approach reflects the institutional setting in which statutory interpretation takes place, and the dual constitutional role of the courts as both law-interpreters and lawmakers.

While this justifies a version of the principle of legality, it is a far less robust presumption than that which has sometimes been applied by Australian courts — if indeed, it may be called a presumption at all. Rather, it simply forms part and parcel of the modern approach to statutory interpretation, which emphasises that statutory texts must always be read in their context, necessarily including the common law. One consequence of this approach is that the

<sup>8</sup> *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann) (*Ex parte Simms*). As explained in Part II below, this explanation of the principle has been endorsed by Australian courts.

<sup>9</sup> *Ex parte Simms* (n 8) 131 (Lord Hoffmann).

<sup>10</sup> See generally Dan Meagher, ‘The Principle of Legality as Clear Statement Rule: Significance and Problems’ (2014) 36(3) *Sydney Law Review* 413, 422–3 (‘Clear Statement Rule’).

<sup>11</sup> These criticisms are explained in Part III below.

<sup>12</sup> See, eg, *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434, 467 [101] (Edelman J) (*Tomaras*). This approach is explained in Part IV(D) below.

strength of the principle of legality will vary depending upon the part of the law engaged, as some judges have said that it ought.<sup>13</sup>

Parts II and III of this article focus on the inadequacies of existing justifications for the principle of legality, in order to demonstrate the need for a new account. Part II focuses on the intentionalist justification, and Part III the democracy-enhancing account. As the deficiencies of the intentionalist justification are relatively well traversed in the literature, Part II is comparatively brief. The democracy-enhancing account has also been criticised on various bases. Part III weaves these criticisms into a wholesale rejection of the democracy-enhancing account that draws upon theoretical and empirical research into the nature of contemporary legislation. Part IV then explains the alternative justification for the principle of legality introduced above.

Part IV includes analysis of more recent case law in which some judges have endorsed a more nuanced and variable approach to the principle of legality — particularly the judgments of Edelman J and Gageler J in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* ('*Probuild*').<sup>14</sup> These judges do not endorse all of the ideas that I present here. But the approach they take can be justified in the way that I explain, and provides some insight into how a variable principle of legality could be applied in accordance with standard common law method and without engaging in the kind of abstract philosophising (that many consider to be) unbecoming of a judge. Nonetheless, the idea of a variable canon of construction is a challenging one. This article aims to lay the foundations for further discussion of how exactly courts could determine the strength of the principle of legality in any given case.

## II THE INADEQUACY OF THE INTENTIONALIST JUSTIFICATION

Like most interpretive principles, the principle of legality was traditionally conceptualised as a heuristic for ascertaining parliamentary intention.<sup>15</sup> 'It is in the last degree improbable', O'Connor J famously said in *Potter v Minahan*, 'that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law' without making its intention to do so plain.<sup>16</sup>

<sup>13</sup> See, eg, *Tomaras* (n 12) 467 [101] (Edelman J).

<sup>14</sup> (2018) 264 CLR 1 ('*Probuild*').

<sup>15</sup> French (n 7) 40.

<sup>16</sup> (1908) 7 CLR 277, 304, quoting with minor changes Sir Peter Benson Maxwell, *On the Interpretation of Statutes*, ed J Anwyl Theobald (Sweet & Maxwell, 4<sup>th</sup> ed, 1905) 122. This proposition was later quoted in *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). See also Jeffrey Goldsworthy, 'The Principle of

Thus, courts construed legislation so as to preserve those rights unless there was an indication in the statute to the contrary. But many scholars and judges now doubt this explanation: either because it seems quite probable that Parliament intends to abrogate the common law,<sup>17</sup> or because they reject the premise that Parliament intends anything meaningful at all.

As Brendan Lim has explained, this scepticism prompted two reactions.<sup>18</sup> The first was to narrow the ambit of the principle so as to retreat onto apparently safer ground.<sup>19</sup> Thus it was said that, while Parliament often intends to abrogate the common law, it is unlikely to intend to abrogate *fundamental* common law rights and principles, and hence statutes will not be interpreted as doing so without clear words.<sup>20</sup> The principle of legality was thus distinguished from the broader, but far weaker, presumption that Parliament does not intend to abrogate *non-fundamental* parts of the common law.<sup>21</sup>

However, this move was never entirely persuasive for two reasons. First, it was difficult to rank and categorise different parts of the common law in the way that this required, distinguishing between those which are fundamental and those which are not.<sup>22</sup> Secondly, the justification so refined was still premised on an authentic conception of parliamentary intent, and some judges and scholars were sceptical of that broader concept altogether.<sup>23</sup>

The second reaction was to justify the principle of legality on other grounds.<sup>24</sup> Thus, it became more common for courts to assert that the principle of legality aims not to give effect to Parliament's intent, but to enhance the

Legality and Legislative Intention' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 46, 47–50. But see Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329, 339–40 ('Issues of Rationale and Application').

<sup>17</sup> See, eg, *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 299 [29] (McHugh J).

<sup>18</sup> Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372, 374.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Balog v Independent Commission against Corruption* (1990) 169 CLR 625, 635–6 [23] (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

<sup>22</sup> See *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd [No 2]* (2016) 95 NSWLR 157, 167 [46] (Basten JA) ('*Shade Systems*'); Brendan Lim, 'The Rationales for the Principle of Legality' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 2, 10.

<sup>23</sup> While they defend the concept of parliamentary intention against such scepticism, Richard Ekins and Jeffrey Goldsworthy provide the best overview of this development, and recount the numerous cases and scholarly works in which this scepticism has been voiced: Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39, 51–60.

<sup>24</sup> Lim, 'The Normativity of the Principle of Legality' (n 18) 374.

democratic process.<sup>25</sup> This democracy-enhancing account was famously put forward by Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms* ('*Ex parte Simms*'), who stated:

Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. ... The constraints upon [this power] are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.<sup>26</sup>

So stated, the principle of legality purports to enhance the democratic process in two ways. First, it ensures that the potential abrogation of common law rights and principles is brought to the attention of *Parliament*, so that it can be properly scrutinised and debated. As the Court put it in *Coco v The Queen* ('*Coco*');

[C]urial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.<sup>27</sup>

Secondly, the requirement of clear words enhances 'electoral accountability',<sup>28</sup> by ensuring that the abrogation of common law rights and freedoms is brought to the attention of the *people*, so that they can exact the appropriate political cost. As Paul Scott has explained it, the principle 'leverages the legal constitution in service of its political counterpart'.<sup>29</sup>

The democracy-enhancing account has been endorsed by many members of the High Court.<sup>30</sup> It is true that it is sometimes recited in conjunction with the original, intentionalist account, as if the two were cumulative justifications

<sup>25</sup> Lim, 'The Normativity of the Principle of Legality' (n 18) 374. See also Lim, 'The Rationales for the Principle of Legality' (n 22) 7–8.

<sup>26</sup> *Ex parte Simms* (n 8) 131.

<sup>27</sup> *Coco* (n 4) 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ).

<sup>28</sup> Lim, 'The Normativity of the Principle of Legality' (n 18) 374.

<sup>29</sup> Paul F Scott, 'Once More unto the Breach: *R (Privacy International) v Investigatory Powers Tribunal*' (2020) 24(1) *Edinburgh Law Review* 103, 107. This statement was made with respect to the equivalent canon of construction applied by UK courts; while there may be important differences in the jurisprudence of these two countries, they are not relevant to the point being made here.

<sup>30</sup> Lim, 'The Normativity of the Principle of Legality' (n 18) 391–2.

for the principle of legality, rather than rivals.<sup>31</sup> Perhaps there are circumstances in which the two could coincide. But the democracy-enhancing account seemed to arise because the premises of the intentionalist approach were rejected, suggesting that they are better understood as alternatives.

Moreover, the democracy-enhancing account seemed to cause, or at least coincide with, a more robust application of the principle of legality. Dan Meagher has likened this approach to the clear-statement rules applied in the US.<sup>32</sup> While there were some inconsistencies,<sup>33</sup> it came to operate as something far stronger than a tool of disambiguation. As Perry Herzfeld and Thomas Prince explain:

The clarity of language needed to interfere with a fundamental right, freedom, immunity or principle has been variously expressed. Formulations including ‘clear and unambiguous words,’ ‘unambiguously clear,’ ‘irresistible clearness,’ ‘plain words of necessary intendment,’ ‘clear words or ... necessary implication,’ ‘unmistakable and unambiguous language,’ ‘clearly emerges, whether by express words or by necessary implication’ and ‘expressed clearly or in words of necessary intendment’ have all been used.<sup>34</sup>

As this suggests, express words were not necessarily needed, but the ‘necessary implication’ threshold was ‘not a low standard.’<sup>35</sup> Indeed, in some cases, the principle was applied so strongly that it seemed to positively thwart ‘Parliament’s intention’ — as in the case of *Lacey v Attorney-General (Qld)* (*‘Lacey’*), which I discuss below in Part III.<sup>36</sup>

Debate about the reality and utility of parliamentary intention raged during the era of the French Court.<sup>37</sup> The current members of the High Court are less vocally critical of parliamentary intention than several of their forebears.<sup>38</sup> At

<sup>31</sup> Including in the seminal principle of legality case, *Coco* (n 4) 436–8 (Mason CJ, Brennan, Gaudron and McHugh JJ).

<sup>32</sup> See generally Meagher, ‘Clear Statement Rule’ (n 10).

<sup>33</sup> See generally Francis Cardell-Oliver, ‘Parliament, the Judiciary and Fundamental Rights: The Strength of the Principle of Legality’ (2017) 41(1) *Melbourne University Law Review* 30.

<sup>34</sup> Perry Herzfeld and Thomas Prince, *Interpretation* (Lawbook, 2<sup>nd</sup> ed, 2020) 205 [9.130] (citations omitted).

<sup>35</sup> *Ibid* 206 [9.130].

<sup>36</sup> (2011) 242 CLR 573 (*‘Lacey’*).

<sup>37</sup> See generally Bruce Chen, ‘The French Court and the Principle of Legality’ (2018) 41(2) *University of New South Wales Journal* 401 (*‘The French Court’*).

<sup>38</sup> Justice Hayne and Chief Justice French were arguably the most vocal critics of parliamentary intention, and Justice Dawson before them: see Ekins and Goldsworthy (n 15) 41, 64.

least two members of the current Court have expressly defended it,<sup>39</sup> and there are passages in more recent case law that refer happily to the concept of parliamentary intention without the apparent need for caveats or caution.<sup>40</sup> Yet, considerable challenges to an intention-based theory of interpretation remain. There are scholars who seem to have explained how a complex, multi-member institution such as Parliament can form a singular intention.<sup>41</sup> However, they have so far failed to explain how this intention is any richer than the words of the statutory text enacted by Parliament — and hence, how the concept of parliamentary intention can assist to resolve the kind of interpretive questions that typically confront the courts.<sup>42</sup> For present purposes, it suffices to say that there are reasons to doubt the claim that Parliament forms intentions that are capable of guiding statutory interpretation, and very good reasons to doubt the more specific claim, that Parliament does not intend to abrogate (even fundamental) parts of the common law. While these doubts remain, any intentionalist justification for the principle of legality will remain on shaky ground. In any event, the principle of legality can be justified on non-intentionalist grounds, which I explain in Part III.

<sup>39</sup> See, eg, *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 460–1 [74]–[77] (Gageler J); *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 381 ALR 601, 626–7 [98] (Edelman J). Yet, Gageler J has also endorsed the view that statutory interpretation is informed (at least in certain contexts) by ‘values’ and qualitative judgments made by courts — which seems to support the view that at least some presumptions of statutory interpretation are not tools for ascertaining parliamentary intent: see, eg, *Probuild* (n 22) 22 [58]; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 134 [28] (Kiefel CJ, Gageler and Keane JJ).

<sup>40</sup> See, eg, *R v A2* (2019) 269 CLR 507, 520–1 [32] (Kiefel CJ and Keane J); *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 151 [25] (Kiefel CJ, Bell and Nettle JJ); *Masson v Parsons* (2019) 266 CLR 554, 572–3 [26] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>41</sup> See generally Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012). This is necessary because only Parliament as an institution enjoys legislative power — hence, any intentionalist theory of interpretation must avoid the pitfall of treating the intention of some subset of its members as if it were that of the institution: at 29–30, 46.

<sup>42</sup> Specifically, the ‘intention’ that Ekins argues to exist seems coextensive with the literal meaning of the statutory text which Parliament decides to adopt. If this is what ‘intention’ is, then it does not assist courts in instances where the literal meaning of the text is ambiguous. Moreover, if this ‘intention’ is the lodestar of statutory interpretation, it would seem courts are required to give statutes their literal meanings. Yet, most agree that literalism is an untenable interpretive approach: see, eg, Patrick Emerton and Lisa Burton Crawford, ‘Statutory Meaning without Parliamentary Intention: Defending the High Court’s “Alternative Approach” to Statutory Interpretation’ in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds), *Law under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, 2019) 39, 42–4.



### III THE INADEQUACIES OF THE DEMOCRACY-ENHANCING ACCOUNT

Though the democracy-enhancing account emerged as a supposedly superior justification for the principle of legality, it suffers from its own considerable flaws. Several of these have been noted by other commentators.<sup>43</sup> Yet, the democracy-enhancing account still features prominently in the case law. The aim of this section is to weave existing criticisms into a wholesale rejection of the democracy-enhancing account, drawing upon theoretical and empirical research into the nature of contemporary legislation.

First, it is not clear whether courts are permitted to interpret legislation in order to enhance the democratic process. While the position is a subject of academic debate, the High Court maintains that the objective of statutory interpretation is to ascertain the meaning of statutes.<sup>44</sup> It follows that judges can only make interpretive rules to help them find meaning, and not to achieve some broader objective (like enhancing democracy). Drawing on scholarship from the US, Dale Smith has placed considerable pressure on this ‘meaning thesis’.<sup>45</sup> In time, it may well be proven untenable. The point for present purposes is that the democracy-enhancing justification offered by the courts contradicts the way in which they explain statutory interpretation more broadly.

Relatedly, it is unclear whether the judicial power to interpret statutes extends to the creation of rules which effectively dictate the form of language that Parliament must use to achieve certain outcomes. The principle of legality as clear-statement rule has been described as a kind of ‘manner and form’ rule:<sup>46</sup> it does not substantively limit legislative power, as Parliament can still achieve the objective that the rule guards against, but it does erect a new procedural hurdle that Parliament must clear in order to do so, in the form of a superadded requirement of clarity. Parliament could well enact new manner and form provisions to condition the exercise of its own legislative power. This is an aspect of legislative power — but not judicial.<sup>47</sup>

<sup>43</sup> See, eg, Lim, ‘The Normativity of the Principle of Legality’ (n 18) 398–402.

<sup>44</sup> As Dale Smith explains, this is a contestable view. However, as Smith also explains, it is clearly the current view of the High Court: Dale Smith, ‘Is the High Court Mistaken about the Aim of Statutory Interpretation?’ (2016) 44(2) *Federal Law Review* 227, 228, 230–4.

<sup>45</sup> Smith (n 44).

<sup>46</sup> See Chen, ‘Issues of Rationale and Application’ (n 16) 337.

<sup>47</sup> There remain debates about the precise source of this power, and how it is to be reconciled with parliamentary supremacy, but all relate to the nature of legislative power and cannot be extrapolated to the courts: see generally Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) ch 7. See also George Winterton, ‘Can the Commonwealth Parliament Enact “Manner and Form” Legislation?’ (1980) 11(2) *Federal Law Review* 167.

Secondly, the democracy-enhancing account does not adequately explain the way in which the principle of legality operates. The catalogue of rights that courts protect via the principle of legality and their content are neither crystal clear, nor set in stone.<sup>48</sup> Its historical heartland was ‘vested rights, specifically private law rights in land, liberty and physical integrity’.<sup>49</sup> As Jason Varuhas explains, these rights were well established in positive law.<sup>50</sup> Thus, for example, the principle protects the property rights protected by the tort of trespass<sup>51</sup> and the right of personal liberty protected by the tort of false imprisonment.<sup>52</sup> But the principle of legality extends further. It is said to protect immunities, privileges,<sup>53</sup> and further still, the systemic features of the common law, such as the accusatorial nature of the criminal justice system.<sup>54</sup> These are not rights proper, in the sense that they ‘do not cast correlative duties, and nor are they the subject of independent legal protection via dedicated legal actions.’<sup>55</sup> Several of them are now enshrined in legislation.<sup>56</sup>

Others have observed that this expansion of the principle of legality has thwarted its democracy-enhancing potential.<sup>57</sup> Given its ‘triggers’ are not entirely clear, Parliament cannot always be taken to know when clear words were required.<sup>58</sup> The principle of legality could therefore obstruct the legislative pursuit of policy aims which are within the constitutional power of the Parliament, without enhancing the quality of deliberation in the manner claimed. The democracy-enhancing justification for the principle of legality also fails to reflect the distinctly common law origins of the things that it protects. While the principle of legality may sometimes be viewed as an indirect and imperfect means of protecting human rights in a legal system with limited human rights

<sup>48</sup> Meagher, ‘Clear Statement Rule’ (n 10) 431–2.

<sup>49</sup> Varuhas (n 5) 580.

<sup>50</sup> Ibid.

<sup>51</sup> See, eg, *Coco* (n 4) 435–6 (Mason CJ, Brennan, Gaudron and McHugh JJ).

<sup>52</sup> See, eg, *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 587 [23] (French CJ, Kiefel and Bell JJ) (‘NAAJA’).

<sup>53</sup> Such as the privilege against self-incrimination: *Sorby v Commonwealth* (1983) 152 CLR 281, 289–90 (Gibbs CJ).

<sup>54</sup> *X7 v Australian Crime Commission* (2013) 248 CLR 92, 127 [71], 132 [87], 140–1 [119], 142–3 [124]–[125] (Hayne and Bell JJ).

<sup>55</sup> Varuhas (n 5) 581.

<sup>56</sup> See, eg, *Evidence Act 1995* (Cth) pt 3.10, which sets out various privileges associated with the criminal process. Often, legislation will modify the right or principle.

<sup>57</sup> See Meagher, ‘Clear Statement Rule’ (n 10) 438.

<sup>58</sup> Ibid.

protection,<sup>59</sup> it does not protect human rights per se.<sup>60</sup> And while the principle of legality is now justified as a tool for ensuring that certain rights and principles are not abrogated without proper democratic deliberation, it does not operate to draw attention to those rights which are systemically vulnerable in a majoritarian democracy. Rather, the principle protects various aspects of the *common law*, whether they be described as rights, principles, or systemic features. If the aim of the principle of legality is to secure attention for rights restrictions that might otherwise fly under the radar, it would be more apt for the principle to protect democratically vulnerable rights rather than common law rights, principles, and systemic features. Lim has argued that the ambit of the principle should be refined in exactly this way,<sup>61</sup> but this suggestion has not been taken up by the courts, and hence the way in which the principle of legality operates does not align with the democracy-enhancing justification.

Further, if the purpose of insisting on clear words is to ensure that the abrogation of common law rights has attracted the attention of Parliament and the people, then the level of clarity required to rebut the presumption should reflect this goal. But since the principle came untethered from the concept of parliamentary intention, it has tended to be applied in a more muscular fashion: legislation has sometimes been read subject to a ‘counterintuitive judicial gloss’, thwarting the ability of the intended audiences to comprehend the effect of the law.<sup>62</sup> The most notorious example of this is *Lacey*.<sup>63</sup> There, the Court concluded that s 669A(1) of *Criminal Code Act 1899* (Qld), which conferred an ‘unfettered discretion’ on a court to hear appeals against criminal sentence, was in fact only enlivened when the applicant could show that the original sentence was erroneous.<sup>64</sup> This interpretation was based on the common law’s deep-seated aversion to double jeopardy, and the fact that the common law had long distinguished between the scope of a court’s jurisdiction to *hear* an appeal and its

<sup>59</sup> Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35(2) *Melbourne University Law Review* 449, 451. As Meagher explains, there have been calls for the principle to expand to protect international human rights norms, but this is not an approach that has been judicially endorsed: at 464–6.

<sup>60</sup> This may prove to be an important point of difference between the way in which the principle of legality is conceptualised in Australian law compared with other jurisdictions. For example, Varuhas explains that in the UK, the principle of legality has expanded to protect norms analogous to those found in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), which are not common law rights proper: Varuhas (n 5) 580–2.

<sup>61</sup> Lim, ‘The Normativity of the Principle of Legality’ (n 18) 403, 407.

<sup>62</sup> This was Gageler J’s criticism of the way in which the principle of legality was applied in *NAAJA* (n 52): at 605 [77].

<sup>63</sup> *Lacey* (n 36). See generally Ekins and Goldsworthy (n 23).

<sup>64</sup> *Lacey* (n 36) 583–4 [2], 598 [62] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

power to *alter* a verdict.<sup>65</sup> And this was so despite the Minister having clearly stated in his second reading speech that s 669A(1) was intended to confer a literally unfettered discretion on the court, despite protests from the legal fraternity.<sup>66</sup> These statements carried little weight, with the plurality explaining that '[t]he Minister's words ... cannot be substituted for the text of the law, particularly where the Minister's intention, not expressed in the law, affects the liberty of the subject.'<sup>67</sup>

It is important to clearly state the criticism being made here. It is axiomatic that only the words of a statute have legal force. Extrinsic material can illuminate the context in which those words were enacted, and the purposes they may have been designed to serve, but they can never dictate their meaning.<sup>68</sup> I do not take issue with these broader statements, but rather the way in which the principle of legality informed their Honours' reasoning in *Lacey*. That principle informed the Court's conclusion that the Minister's understanding of the legislation was *not* expressed by the text. But what justified its application in this case? Recall that the first limb of the democracy-enhancing account of the principle of legality is to ensure that the effect of the legislation on the common law is brought to Parliament's attention.<sup>69</sup> If so, it had little work to do in this case, given the rights-limiting effect of the legislation had been clearly highlighted in parliamentary debate.<sup>70</sup> The Court indicated that it would prefer a reading of a statute that leaves individual liberty intact,<sup>71</sup> which statements made on the floor of Parliament are unlikely to countervail, but which the democracy-enhancing account would seem incapable of explaining.

The second limb of the democracy-enhancing account insists that clear words in the statutory text will ensure that the rights-limiting effect of

<sup>65</sup> Ibid 582–3 [17]–[18], 593–4 [48]–[51].

<sup>66</sup> Ibid 598 [61], citing Queensland, *Parliamentary Debates*, Legislative Assembly, 23 April 1975, 993 (WE Knox, Minister for Justice).

<sup>67</sup> *Lacey* (n 36) 598 [61] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Similar statements have been made elsewhere: see, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 276 [72], 277–8 [74] (Heydon J).

<sup>68</sup> This point has been made in various guises throughout the case law. For a clear statement, see *Harrison v Melhem* (2008) 72 NSWLR 380, 384 [12]–[14] (Spigelman CJ), 399 [162] (Mason P).

<sup>69</sup> See above nn 26–7 and accompanying text.

<sup>70</sup> Varuhas makes a similar point in the context of the UK case law: Varuhas (n 5) 604–6. That is, in cases where Parliament has patently attempted to abrogate a right but the courts strive to minimise the extent of the incursion, it cannot be said that Parliament has not considered the issue nor paid the political cost. In Australia, it remains uncertain whether the common law principle of legality requires courts to adopt the 'least rights restrictive' interpretation of legislation: see *NAAJA* (n 52) 581 [11] (French CJ, Kiefel and Bell JJ), 605–6 [81]–[82] (Gageler J).

<sup>71</sup> *Lacey* (n 36) 598 [61] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

legislation is clear to the public, so that they may exact the appropriate political cost.<sup>72</sup> But it is not clear that this justified the approach taken in *Lacey* either. The democracy-enhancing justification would seem to suppose that the words of s 669A(1) did not sufficiently communicate to the public that it abrogated the relevant parts of the common law, and that the words of the second reading speech could not be relied upon to do so. And this gestures at the more fundamental flaw of the democracy-enhancing account.

The more fundamental reason, I argue, that the principle of legality is incapable of meaningfully enhancing the democratic process is that it proceeds from a mistaken assumption about the role of statutory texts. The premise of the democracy-enhancing account is that the specificities of a statutory text *matter*, in the sense that they inform parliamentary deliberation in the first instance and electoral choice after the fact. Yet this misstates the role of statutory text and the way that Parliament and the public interact with it. It represents a lawyer's view of the role of legislation which does not reflect its contemporary nature.

The Australian statute book is a 'a huge and tangled web of increasingly labyrinthian laws, many of which are changed at an astounding rate'.<sup>73</sup> Many statutes confer broad discretionary powers with the result that the precise operation of the law will depend as much upon the choices of the executive branch as what is said in the statute. Other statutes lay down specific rules, but in those instances the volume of technical detail is often such that the ordinary member of the public is unlikely to form any understanding of their legal position from reading the statutory text.<sup>74</sup> As legislative drafters have conceded, many federal statutes make no attempt to 'speak' to the people at all. The 'intended audience of legislation' is usually an expert actor: 'employees with responsibility for corporate compliance, professional advisers in the area, administrators, judges, instructors and drafters themselves'.<sup>75</sup>

There are some statutes which appear to speak more directly to the public than others, such as the *Criminal Code Act 1995* (Cth) or the *Competition and*

<sup>72</sup> See above nn 26, 28–9 and accompanying text.

<sup>73</sup> Lisa Burton Crawford, 'Between a Rock and a Hard Place: Executive Guidance in the Administrative State' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 7, 7 ('Between a Rock and a Hard Place'). For further empirical research into the nature and complexity of federal legislation, see also Lisa B Crawford, 'The Rule of Law in the Age of Statutes' (2020) 48(2) *Federal Law Review* 159.

<sup>74</sup> There is at least a public database of current versions of legislation; the point is that as a matter of practical reality, members of the public probably do not consult it, and may be unable to ascertain the law from doing so.

<sup>75</sup> Office of Parliamentary Counsel, 'Reducing Complexity in Legislation' (Document Release No 2.1, June 2016) 1–2 [7].

*Consumer Act 2010* (Cth). Even so, as these statutes grow in length and complexity, the public may soon lose interest.<sup>76</sup> And even these ostensibly public-orientated statutes are overlaid by a raft of executive-made information, purporting to explain the rules that they contain and how they apply in certain circumstances.<sup>77</sup> There are a great many statutes that the ordinary member of the public would not know to exist, let alone know the content of in any meaningful detail.

The significance of this for present purposes is that the public surely cannot look to the specificities of statutory texts in order to understand the law, and in turn make their electoral choice. As Edward Rubin has argued, 'it is difficult to imagine that legislators would be held accountable in the political arena for what the statute looks like on the statute books.'<sup>78</sup> That idea, he argues, is an 'artifact of the premodern era,' which does not adequately reflect the nature of contemporary legislation.<sup>79</sup>

It would not seem unreasonable to conclude that statements made by the responsible Minister on the floor of Parliament would have a greater effect on the public consciousness than the specificities of a statutory text.<sup>80</sup> Perhaps it is the comments made in press releases or campaign speeches that the public relies on most to form its understanding of the legislative agenda of particular parliamentarians or parties, or the forms of executive guidance referred to above. Extrinsic material is also generally written in a way that is more accessible to a lay audience than the statutory text itself. While we have no reliable evidence about exactly how 'the people' form their understanding of the law, it is highly doubtful that the precise wording of statutory text will have any meaningful impact on electoral choice, and this fundamentally undermines the claim that the curial insistence on clear words *in the statutory text* will enhance electoral accountability for the abrogation of common law rights.

<sup>76</sup> For example, in September 2021, the *Competition and Consumer Act 2010* (Cth) ('CCA') ran to 1,819 pages: see CCA (n 76) as at 14 September 2021. Note Heidi Hurd's broader argument that, even if the general public is the intended audience of (certain) statutes, it may not be listening: Heidi M Hurd, 'Sovereignty in Silence' (1990) 99(5) *Yale Law Journal* 945, 977–81.

<sup>77</sup> See, eg, the copious information published by the Australian Competition and Consumer Commission, which effectively translates the CCA (n 76) for consumers and businesses: 'Consumers', *Australian Competition & Consumer Commission* (Web Page) <<https://www.accc.gov.au/consumers>>, archived at <<https://perma.cc/4QUB-EMR8>>; 'Business', *Australian Competition & Consumer Commission* (Web Page) <<https://www.accc.gov.au/business>>, archived at <<https://perma.cc/Z357-KJ47>>.

<sup>78</sup> Edward L Rubin, 'Law and Legislation in the Administrative State' (1989) 89(3) *Columbia Law Review* 369, 395.

<sup>79</sup> *Ibid.*

<sup>80</sup> See also Lim, 'The Normativity of the Principle of Legality' (n 18) 408.

The claim that the principle of legality may improve parliamentary debate has more merit, at least at first blush. The legislative culture sketched above is still relevant here, for the volume of legislation enacted by modern Parliaments has obvious ramifications for the quality of parliamentary scrutiny.<sup>81</sup> Empirical data suggests that the statutes enacted between 1980 and 2000 could each have received, on average, only a few hours of the federal Parliament's time.<sup>82</sup> A principle of legality as clear-statement rule has some potential to arrest these dynamics and secure attention for rights restrictions that might otherwise fly under the radar. While parliamentarians may fail to properly comprehend the meaning and effect of many of the provisions enacted by their institution each year, a provision that states that it will abrogate a fundamental common law right or principle in clear and unmistakable language should leap out at them and spark debate.

However, the principle of legality may be too frail to withstand or overcome the political culture of rapid and copious legislating that has, for whatever reason, become the new norm — at least in Australia.<sup>83</sup> The workload of modern Parliaments demands an extensive division of labour, and individual members of Parliament are incentivised to rely on the summaries of legislative proposals and advices prepared by others. All of this diverts attention away from the specificities of statutory texts, which are the point at which the principle of legality operates. Certain smaller groups within Parliament — most relevantly parliamentary committees — may well engage in the kind of detailed textual analysis of legislative proposals that the democracy-enhancing account supposes. This is valuable. These committees can initiate a dialogue with the Minister responsible for the legislative proposal, seeking (for example) further justifications for the potential rights limitations that it would cause. But this does not ensure that those consequences will be appreciated by all members of Parliament, nor openly debated on the floor of Parliament, which seems to be the point at which the democracy-enhancing account of the principle of legality aims.

For these reasons, the democracy-enhancing justification for the principle of legality seems fatally flawed. This canon of construction is incapable of enhancing public debate or electoral scrutiny in any meaningful way. Its effect on parliamentary debate is likely to be limited. And this justification does not align with the way in which the principle of legality has been applied. Despite this, one can well understand judges' reluctance to 'do Parliament's dirty work' and give the hard edge to fluffy legislative language, especially when the result

<sup>81</sup> See Crawford, 'The Rule of Law in the Age of Statutes' (n 73) 163.

<sup>82</sup> *Ibid.* While I speak generally below, the applicability of the criticisms I make will depend upon the legislative practices of the Parliament: see below Part IV.

<sup>83</sup> See Crawford, 'The Rule of Law in the Age of Statutes' (n 73) 162–9.

would be a devastating abrogation of individual liberty.<sup>84</sup> But this is a rather different idea from the democracy-enhancing account. It speaks more to the institutional preferences of the courts and their unwillingness to see the common law eroded. Rather than obscure these facts, it would be better to articulate an alternative account of the principle of legality that duly reflects its common law foundations.

#### IV AN ALTERNATIVE ACCOUNT

Part I having demonstrated that the existing justifications for the principle of legality are inadequate, this Part sets out an alternative account. It provides a different justification for the principle, which entails a different manner of application. The approach outlined here has some support in the case law, most notably in the recent judicial statements that the principle of legality has variable impact, which I discuss in Part IV(D). This Part begins by situating those statements within a broader normative framework for understanding how the principle of legality should work. It emphasises that the courts may read statutes in light of the common law, not because there is evidence that this is what Parliament actually intended, nor to enhance the democratic process, but because of the institutional setting in which statutes operate and statutory interpretation occurs.

The argument is presented in three parts. Part IV(A) explains that, while the *Constitution* does not tell us how statutes should be interpreted, the principles and process of statutory interpretation are informed by the institutional setting in which it occurs. In particular, statutory interpretation is informed by the constitutional norms and principles that determine the natures and functions of Parliament and the courts. Part IV(B) examines a crucial aspect of that institutional setting: that is, the nature and function of the judicial role of ascertaining the law so as to resolve disputes about the law that are brought before the courts. ‘The law’ necessarily comprises a mix of statutory and common law norms. While courts are confined to interpreting and not making *statute law*, the *common law* is a body of law that they created and which they continue to refine.<sup>85</sup> This, I explain, permits the courts to treat the common law as a ‘weight on the scale’ when making interpretive choices. In Part IV(C), I address the challenge of determining precisely how much weight a particular common law

<sup>84</sup> Brendan Lim, ‘Executive Power and the Principle of Legality’ in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 76, 76–77 (‘Executive Power’).

<sup>85</sup> In Part IV(C) below, I address the question of whether this account of the principle of legality is compatible with the declaratory theory of the common law.



norm carries in a given case, and explain how this account of the principle of legality differs from more ambitious theories of ‘coherence’ propounded by other scholars. In Part IV(D), I examine the more nuanced approach to the principle of legality taken by some judges in recent case law, which I argue can be justified in the way that I explain below.

The pragmatist who has long intuited that the principle of legality is a judge-made tool for protecting judge-made law may think that this lengthy exposition labours the point. But that intuition needs to be given appropriate legal form. In particular, it becomes necessary to revisit some aspects of the debate over parliamentary intention. For while defenders of parliamentary intention have not yet provided an adequate account of how Parliaments form meaningful intentions, nor the principle of legality more specifically, they do make an incontrovertible point. Any interpretive presumption must be premised on some defensible theory of how statutory text conveys meaning, which is consistent with the constitutional distribution of powers between Parliament and the courts. Unless we are to abandon the democracy-enhancing account of the principle of legality and revert to the old, intentionalist one, it is necessary to explain the principle of legality on non-intentionalist grounds.

#### *A The Institutional Setting in Which Statutory Interpretation Occurs*

The first step in this argument has its origin in the extra-curial writings of Justice Gageler.<sup>86</sup> Gageler’s particular argument was that prior judicial interpretations of legislation, and the broader judicial experience of applying the legislation to different facts over time, necessarily form part of the ‘context’ that informs the meaning of that legislation.<sup>87</sup> But the premise of this argument was that ‘the institutional setting’ in which courts operate informs the way in which courts attribute meaning to legislation.<sup>88</sup> This ‘institutional setting’ includes the ‘inherent’ features of the courts, their ‘nature and operation.’<sup>89</sup> As these features are inherent, Gageler argued, they ‘must ... be taken to be part of the rules that are accepted by all arms of government as guiding the process of interpretation.’<sup>90</sup> The broader point is that the principles and process of statutory interpretation are informed by constitutional norms and the constitutional distribution of powers.

<sup>86</sup> See generally Stephen Gageler, ‘Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process’ (2011) 37(2) *Monash University Law Review* 1.

<sup>87</sup> *Ibid* 1–2.

<sup>88</sup> *Ibid* 3–4, 7.

<sup>89</sup> *Ibid* 3.

<sup>90</sup> *Ibid*.

That point might be met with some scepticism. Some might say that the *Constitution* tells us nothing about how statutes should be interpreted.<sup>91</sup> Perhaps for this reason, most of the academic literature on statutory interpretation has a philosophical focus: that is, it attempts to explain the proper process of statutory interpretation through insights drawn from the philosophy of language.<sup>92</sup> But the reason why philosophy of language is seen as so important to understanding the nature and parameters of statutory interpretation is a constitutional one: namely, because the enactment of legislation is understood as a communicative act, by which Parliament communicates what the law shall be.<sup>93</sup> By contrast, courts lack constitutional authority to decide what the content of (statute) law shall be, and hence they are said to be confined to identifying the meaning of the constitutionally appointed speaker. The basic fact that the interpretive process begins with the text enacted by Parliament and not *a priori* assumptions about sound legislative policy again reflects the constitutional distribution of legislative and interpretive power.

As Gageler also emphasised, statutory interpretation is not ‘an end in itself’.<sup>94</sup> It is a necessary step in the performance of the core judicial function: namely, ascertaining the law that applies to a dispute brought before the courts in order to resolve it.<sup>95</sup> This is a function that courts must perform, even in instances where the legislation that relates to the dispute is difficult to comprehend, or simply fails to provide an answer to the question that they must resolve.

When an ‘ordinary’ person is required to ascertain the meaning of an ‘ordinary’ communication — let us say, a letter from a friend — there is usually a simple option open to them for resolving ambiguities or filling gaps in what the author has written. Quite simply, the interpreter asks the author: ‘What do you mean?’ But a court interpreting a statute cannot do this, again for reasons that reflect the institutional setting in which the interpretation and the respective nature and functions of the institutions involved occur.

These reasons are both simple and profound. Parliament’s constitutional lawmaking power consists *only* of the enactment of statutory texts.<sup>96</sup> As Max Radin put it, ‘[w]hen the legislature has uttered the words of a statute, it is

<sup>91</sup> Cf Justice John Basten, ‘Constitutional Dimensions of Statutory Interpretation’ (Speech, Centre for Comparative Constitutional Studies Constitutional Law Conference, 2015) 2.

<sup>92</sup> See, eg, Smith (n 44).

<sup>93</sup> Emerton and Crawford (n 42) 47.

<sup>94</sup> Gageler (n 86) 10.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

*functus officio*, for that is what it means to legislate.<sup>97</sup> Parliament can only express its ‘intentions’ via the enactment of statutory text, as only statutory texts have gone through the legislative process and ultimately been approved by Parliament. It is only the institution of Parliament, and not any subset of its members, which is given legislative power.<sup>98</sup> That point has particular salience in Australia, given the way in which the federal Parliament has been constructed so as to represent the interests of all states and territories, as well as the people of the Commonwealth as one. If Parliament does not like the way in which its legislation has been interpreted, the only solution available to it is to enact more or different text.

The fact that Parliament can only express its ‘intentions’ via the enactment of statutory text provides a partial, structural guarantee of prospectivity. By this, I mean that Parliament is generally confined to laying down rules in advance. There is too great a risk that if asked to clarify its meaning after the fact, Parliament would answer in a way that served its immediate purposes but did not cohere with the legislation it enacted.<sup>99</sup> This is an imperfect shield, as Australian constitutional doctrine accepts that Parliament can make legislation that has retrospective effect.<sup>100</sup> But legislation that has retrospective effect has at least been enacted in accordance with the constitutionally prescribed legislative process, whereas a statement made to ‘clarify’ the law after the fact has not.

This constitutional fact — that courts must resolve disputes by ascertaining and applying the law, notwithstanding the likelihood of ambiguity or legislative ‘gaps’ — is reflected in more specific interpretive rules, which seek to address the issue in a manner that still coheres with the constitutional distribution of powers. First, courts develop a range of rules to guide the interpretive process and assist them to find meaning, even in difficult cases. Secondly, courts may sometimes make implications in order to solve legal disputes in cases where the (statute) law runs out, or to remedy apparent drafting errors, within a set of judicially constructed principles that are aimed at ensuring that courts do not usurp the role of Parliament.<sup>101</sup>

The preceding overview of the broad parameters and more specific principles of statutory interpretation demonstrates that, while the *Constitution* may

<sup>97</sup> Max Radin, ‘Statutory Interpretation’ (1930) 43(6) *Harvard Law Review* 863, 871.

<sup>98</sup> *Constitution* ss 1, 51. See also Emerton and Crawford (n 42) 56.

<sup>99</sup> Other questions would undoubtedly emerge — including who would speak for Parliament.

<sup>100</sup> Provided that the legislation does not contravene the implied limits on state power and Commonwealth legislative power imposed by ch III: see *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 532–40 (Mason CJ), 703–6 (Gaudron J).

<sup>101</sup> See *Taylor v Owners — Strata Plan No 11564* (2014) 253 CLR 531, 547–9 [35]–[40] (French CJ, Crennan and Bell JJ).

not tell us how legislation should be interpreted, the principles and process of statutory interpretation are informed by the institutional setting in which it occurs. In particular, the approach to statutory interpretation that is regarded as acceptable in Australian law reflects the accepted constitutional functions of Parliament and the courts.

What further guidance might the institutional setting of statutory interpretation provide us about how statutes should be interpreted by the courts? The following section explores two key features of that setting that inform the way in which the common law might inform statutory interpretation. The first is the constitutionally assumed relationship between statute and common law. The second is the role of the courts to resolve legal disputes about ‘the law’, which in the Australian constitutional context necessarily means a mix of statutory and common law norms and principles.

### B *Statute, Common Law and the Judicial Power*

Constitutions aside, the Australian legal system (like many others) recognises two sources of law: statute and common law.<sup>102</sup> The *Constitution* assumes the prior and ongoing existence of the common law.<sup>103</sup> On the other hand, many Australian judges have explained that they cannot perform their core function of resolving disputes without interpreting statutes; in other words, it would be exceedingly rare to find any matter that could be resolved solely by recourse to the common law, unpolluted by legislative interference.<sup>104</sup> But of course, this does not mean that the common law has been entirely displaced. It would seem almost as rare to find a matter that could be resolved solely by reference to statute. As Lord Sales explains, statutes are ‘new legal instructions or commands projected into a legal environment which is already densely populated with norms which have to be fitted together in a coherent manner’.<sup>105</sup> Or, as Sir Rupert Cross, John Bell and Sir George Engle put it: ‘Statutes often go into

<sup>102</sup> I leave open the possibility that certain academic writings can also be a source of law: see *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 608 [135] (Heydon J) (*‘Stoddart’*).

<sup>103</sup> See, eg, *Constitution* s 75(v), which refers to remedies already established at common law, s 80, which refers to the common law concept of a ‘jury’, and s 51(xxxi), which refers to the concept of ‘property’. Of course, the *Constitution* may have altered the way in which these common law concepts must be understood, but the drafting of the *Constitution* assumes that they exist and leaves considerable room for the courts to continue developing them within its confines.

<sup>104</sup> See, eg, Gageler (n 86) 1.

<sup>105</sup> Lord Sales, ‘Legislative Intention, Interpretation, and the Principle of Legality’ (2019) 40(1) *Statute Law Review* 53, 55.

considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum.<sup>106</sup>

Furthermore, the two sources of norms should not be treated as ‘oil and water’.<sup>107</sup> Statutes will pick up and refer to common law concepts. The common law will develop in response to legislative change. Even in the context of the most extensive statutory regime, residual common law principles will be engaged. The result is that ‘the law’ consists of a complex interwoven set of legislative and common law norms and principles.

While, in respect of statute law, courts are constitutionally confined to an interpretive role, it is well accepted that courts also play a lawmaking function in creating and continually refining the norms and principles of the common law.<sup>108</sup> Thus, statutes must be interpreted by institutional actors (the courts) who are also both empowered to make common law and responsible for applying the broader body of law comprising norms from both sources.

The constitutional distribution of powers between Parliament and the courts would seem to dictate that common law and statute cannot have equal weight. The former is inherently vulnerable, as the *Constitution* gives Parliament power to alter or override it. But while parliamentary supremacy entails that Parliament *can* overrule the common law, not every statute need do so. It is not a constituent element of the exercise of legislative power that it must change the common law. In other words, Parliament is the superior lawmaker, but it does not enjoy a monopoly over lawmaking power.<sup>109</sup> This means that courts must always be alert to the possibility that Parliament has chosen to override the common law. But there is no constitutional reason why courts should presume that Parliament has always done so.

By contrast, it is the constitutional function of the court to resolve disputes by ascertaining the relevant law that applies to a dispute and then applying it to the case at hand.<sup>110</sup> The process is one which courts must perform. They cannot

<sup>106</sup> Sir Rupert Cross, John Bell and Sir George Engle, *Statutory Interpretation* (Butterworths, 3<sup>rd</sup> ed, 1995) 165.

<sup>107</sup> Jack Beatson, ‘Has the Common Law a Future?’ (1997) 56(2) *Cambridge Law Journal* 291, 308, 312. See also Justice Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room’ (2013) 36(3) *University of New South Wales Law Journal* 1002; Andrew Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018) ch 2.

<sup>108</sup> Others would insist that courts declare, but do not ‘make’ common law. While that is not my view, the argument I present here is consistent with the declaratory theory for reasons I explain in Part IV(C) below.

<sup>109</sup> PP Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (Oxford University Press, 1991) 19–29, 49–51. See also CJS Knight, ‘Bi Polar Sovereignty Restated’ (2009) 68(2) *Cambridge Law Journal* 361, 366.

<sup>110</sup> See above Part IV(A).

throw up their hands and refuse to reach an answer, no matter how hard the case before them.<sup>111</sup> They cannot, as explained above, go back to the author (here, Parliament) and ask for clarification to assist them with their task. Ambiguities must be disambiguated and gaps in statutory meaning must be filled. In doing so, they may have recourse to contextual evidence to help them make the necessary constructional choices.<sup>112</sup>

In this institutional setting, it would be odd — perhaps impossible — for courts to attempt to ascertain the meaning of a statute in isolation from the pre-existing common law. That is so for two reasons. The first is the uncontroversial fact that the common law is part of the legal context in which statutory texts operate, and hence will often provide a useful tool for disambiguating statutes and filling gaps.<sup>113</sup> That is not necessarily because the courts can point to any evidence about the subjective intentions of Parliament, or some subset of its members. It is because this is the nature of the world in which statutes operate. It is common, when interpreting the communications of others, to impute intentions based upon our knowledge of the context in which words operate and the nature of the things in the world to which they refer.<sup>114</sup> Thus, we know that when the word ‘bank’ appears in a brochure for some financial lending institution, it is not referring to the edge of a river. Or, if someone uses the word ‘car’, we fairly presume that they intend to refer to a vehicle with four wheels and not, for example, a tree. We make that presumption because this is the way language works: when a person uses a word that is conventionally used to denote *x*, we assume that they also intend to denote *x* (and not *y*).

Legal language has its own set of references. For example, if Parliament uses a word like ‘property’, it *prima facie* picks up a long and complex chain of reference to a concept called ‘property’ which courts have defined over the course of centuries.<sup>115</sup> It is always open for Parliament to create an entirely new thing

<sup>111</sup> Justice Nye Perram, ‘Context and Complexity: Some Reflections by a New Judge’ (Speech, Challis Taxation Discussion Group, 6 August 2010) [6] <<https://essaydocs.org/challis-taxation-discussion-group.html>>, archived at <<https://perma.cc/WD46-X2X5>>.

<sup>112</sup> This is a core tenet of the modern approach to statutory interpretation articulated by Australian courts: *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (‘*CIC Insurance*’); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ).

<sup>113</sup> See, eg, *CIC Insurance* (n 112) 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

<sup>114</sup> These arguments are based upon the theory of meaning known as semantic realism. For a more detailed explanation of this theory and how it may inform the interpretation of legal texts, see Patrick Emerton, ‘Political Freedoms and Entitlements in the *Australian Constitution*: An Example of Referential Intentions Yielding Unintended Legal Consequences’ (2010) 38(2) *Federal Law Review* 169.

<sup>115</sup> See, eg, *Hocking v Director-General, National Archives of Australia* (2020) 379 ALR 395, 447 [201] (Edelman J) (‘*Hocking*’).

called ‘property’, or else modify its meaning, overriding the common law.<sup>116</sup> But it would be reasonable to presume, in the absence of evidence to the contrary, that when Parliament uses the word ‘property’ it intends to refer to the thing that already exists at common law.<sup>117</sup> In this way, the common law can inform the linguistic content of a statute even if Parliament did not actually intend it to do so.

The kind of presumption described above may well coincide with the actual intention of the speaker — but it need not do so. This caveat is important in the context of statutory interpretation, given doubts about Parliaments’ ability to form meaningful intentions.<sup>118</sup> I argue that a court can make this kind of presumption without having to embrace the reality or utility of parliamentary intention. Some would counter that it is irrational to impute intentions to a speaker whom we believe incapable of forming them.<sup>119</sup> But any illogicality in the process is outweighed, I argue, by the institutional settings described above: the fact that courts are duty-bound to disambiguate and fill gaps in legislation that Parliament has enacted, and the fact that the conventional references of language may help them to do so.

The second, and more controversial, reason why courts may interpret legislation in light of the common law has a more normative dimension. This reflects the dual constitutional role of courts as law-interpreters and lawmakers. The common law comprises norms and principles that courts have, over time, fashioned to reflect what they consider to be good devices for resolving disputes.<sup>120</sup> The judge is therefore institutionally committed to the view that the common law they apply is valuable and correct, either for first-order reasons (it is actually a good device for resolving disputes) or second-order reasons (it is a well-established device for resolving disputes, and the harm caused by departing from it would outweigh any deficiencies in the device itself).<sup>121</sup>

For these reasons, I argue that it is legitimate for a court to treat the common law as something with its own intrinsic weight. In other words, it is not merely part of the context that may assist to resolve an ambiguity or fill a gap, but something that a judge may legitimately reason *ought* to exist, unless and until Parliament clearly manifests an intention to override it. This is a more controversial

<sup>116</sup> Ibid.

<sup>117</sup> Ibid. It should be noted that Edelman J was in dissent in *Hocking* (n 115).

<sup>118</sup> See above nn 37–42 and accompanying text.

<sup>119</sup> Ekins and Goldsworthy (n 23) 48.

<sup>120</sup> See Gerald J Postema, *Bentham and the Common Law Tradition* (Oxford University Press, 2<sup>nd</sup> ed, 2019) ch 1.

<sup>121</sup> See also Darryn Jensen, ‘Theories, Principles, Policies and Common Law Adjudication’ (2011) 36 *Australian Journal of Legal Philosophy* 34.

proposition, because it may mean that the legal content of a statute is not coextensive with its linguistic meaning.

The notion that the common law powers of the courts might inform the way in which they should interpret legislation has been explored at greater length in the American literature.<sup>122</sup> There, commentators have considered whether the fact that state courts also have general common law jurisdiction justifies a less formalist approach to interpreting legislation,<sup>123</sup> and whether the fact that the US Supreme Court *lacks* such jurisdiction means that the interpretive approach that it adopts must differ from that of state courts.<sup>124</sup> While there may be some support to be found for the arguments presented below in that body of literature, it is clear that there are different constitutional frames of reference that would have to be explored at greater length than is possible here. Further, the US literature has focused more squarely on whether the common law powers of courts justify a dynamic or strongly purposive approach to statutory interpretation,<sup>125</sup> and not the more specific question with which I am concerned: namely, whether this permits courts to make constructional choices in order to protect the common law.

I explained above that a court must be alert to the possibility that the legislation it is required to interpret has abrogated the common law, but need not presume that it has done so.<sup>126</sup> The correct approach, given the institutional setting in which statutory interpretation occurs, seems to lie somewhere in the middle. It is an approach that accepts that the existing common law is a weight on the scale. If a statute is open to more than one interpretation, the fact that one of those interpretations is consistent with the common law will weigh in its favour, but this may always be outweighed by other textual and contextual indicators of meaning. So understood, the principle of legality almost loses its appearance as a standalone canon of construction. It is simply one manifestation of the modern approach to statutory interpretation, which entails that statutory texts must necessarily be read in context — and duly reflects that the common law forms a crucial part of the context into which all statutes are enacted.

<sup>122</sup> See, eg, Peter L Strauss, 'The Common Law and Statutes' (1999) 70(1) *University of Colorado Law Review* 225; Jeffrey A Pojanowski, 'Statutes in Common Law Courts' (2013) 91(3) *Texas Law Review* 479; Jeffrey A Pojanowski, 'Reading Statutes in the Common Law Tradition' (2015) 101(4) *Virginia Law Review* 1357 ('Reading Statutes').

<sup>123</sup> See, eg, Pojanowski, 'Reading Statutes' (n 122) 1358–9, 1365.

<sup>124</sup> See *ibid*; Pojanowski, 'Statutes in Common Law Courts' (n 122).

<sup>125</sup> See, eg, Pojanowski, 'Reading Statutes' (n 122) 1365; Pojanowski, 'Statutes in Common Law Courts' (n 122) 485; Strauss (n 122) 228.

<sup>126</sup> See above nn 108–9 and accompanying text.



*C Context, Coherence, and the Common Law Method*

I have said that, all things being equal, courts should prefer an interpretation of a statute that is consistent with existing common law rights and principles.<sup>127</sup> This requires something more to be said about what consistency entails, and how my account differs from the more ambitious theories of coherence offered by some scholars, especially Ronald Dworkin and TRS Allan. It also requires discussion of common law method and the ‘sources’ of the common law. This will reveal that the account of the principle of legality advocated here does not require courts to engage in moral reasoning more befitting of the legislature, nor to achieve the Herculean task of creating a perfectly coherent body of law. To the contrary, the principle of legality can be applied in the way described above by using well-established common law methods.

On Dworkin’s account, the law comprises both social and moral facts, blended together via the process of interpretation.<sup>128</sup> The court’s objective is principled coherence.<sup>129</sup> It takes a posited legal norm (such as the text of a statute) and reads it in light of moral norms not created by any legal institution, reaching a conclusion as to the content of the law, which is a hybrid of both.<sup>130</sup> The account of the principle of legality offered here differs from Dworkin’s account of legal reasoning in at least two ways.

First, my account of the principle of legality only permits courts to take the common law into account when making constructional choices. It does not require courts to find the ‘best’ interpretation of the law as a whole.<sup>131</sup> Thus, the approach to the principle of legality can be understood in entirely positivist terms. There remains disagreement about the nature of the common law: specifically, whether it comprises only the historical utterances of courts, or whether these represent only the courts’ interpretation and expression of what the law, in fact, is.<sup>132</sup> On the former view, judges make the common law, and the common law is what the judges say it is.<sup>133</sup> On the latter view, the judgments of courts are only the metaphorical tip of the iceberg: the common law, properly

<sup>127</sup> See above Part IV(B).

<sup>128</sup> Ronald Dworkin, *Law’s Empire* (Belknap Press, 1986) 52–3.

<sup>129</sup> See especially *ibid* 243.

<sup>130</sup> See generally Dworkin (n 128).

<sup>131</sup> Cf *ibid* 240–5.

<sup>132</sup> See Jensen (n 121) 40.

<sup>133</sup> See Lord Reid, ‘The Judge as Law Maker’ (1972) 12(1) *Journal of the Society of Public Teachers of Law* 22, 22.

understood, is the broader body of moral principle or social custom which judges declare, but do not make.<sup>134</sup>

The declaratory theory of law is not absurd, but it has fallen out of favour with legal theorists and judges,<sup>135</sup> and seems inconsistent with the positivist methods of Australian courts.<sup>136</sup> The contrary theory accepts there are posited sources of law in legal systems such as Australia, besides the constitutions:<sup>137</sup> the law created by the statutes enacted by Parliaments, and the law created by judges. The latter consists of the historical utterances of courts and hence is to be found in promulgated case law.<sup>138</sup> It is consistency between these two posited sources of law at which my account of the principle of legality aims.

Secondly, consistency is used here in a minimal sense, to mean that the two sources of law are capable of logically coexisting. This is very different from the rich sense of *coherence* used by some scholars, according to which the entire body of the law is assumed (and, in turn, made) to represent the coherent out-working of one set of overarching moral principles.<sup>139</sup> It makes no claim that the law speaks with one voice<sup>140</sup> — to the contrary, it is premised on the fact that there are (at least) two lawmakers in our constitutional order whose opinions of what the law should be may legitimately differ.

Finally, my account does not *demand* consistency. Rather, it directs courts to treat the existing common law as a weight on the interpretive scale, which will influence the constructional choices that they make. The common law should not be afforded so much weight that it leads courts away from the meaning indicated by all other relevant evidence. In this respect, my account differs from the more ambitious ones of scholars such as Allan.<sup>141</sup> Like Allan, I maintain that the common law has intrinsic weight, which permits the courts to treat

<sup>134</sup> See generally Lord Bingham, 'The Judge as Lawmaker: An English Perspective' in *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000) 25, 25–7.

<sup>135</sup> See generally Alan Beever, 'The Declaratory Theory of Law' (2013) 33(3) *Oxford Journal of Legal Studies* 421.

<sup>136</sup> See generally Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017).

<sup>137</sup> See also Jensen (n 121) 40.

<sup>138</sup> *Ibid.*

<sup>139</sup> See, eg, Dworkin (n 128) 176–84, 219.

<sup>140</sup> Cf *ibid* 218.

<sup>141</sup> See TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press, 1<sup>st</sup> ed, 2013) ('*The Sovereignty of Law*'); TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001).

it as a weight on the interpretive scale.<sup>142</sup> But Allan argues that some aspects of the common law are so valuable, and protected by interpretive presumptions so strong, that Parliament may not, in practice, be allowed to override them.<sup>143</sup> This is not the approach advocated here; it would be inconsistent with the nature of legislative power conferred by the *Constitution* and the relationship between Parliament and the courts.<sup>144</sup>

This difference of opinion can be demonstrated by revisiting the case of *Lacey*. Reading this case through the lens described above,<sup>145</sup> it becomes clear that the majority did not apply the principle of legality in a way that properly reflected the ‘institutional setting’ in which statutory interpretation occurs. It was legitimate for the Court to read the legislation in light of the common law. But the majority did not merely treat the existing common law as a weight on the scale. Their Honours gave the common law disproportionate weight, such that it obscured proper consideration of other relevant evidence of meaning, including the words of the statutory text and persuasive evidence of statutory purpose. Hence, the Court was not sufficiently alert to the possibility that Parliament had chosen to abrogate the common law. The justification for the principle of legality I have offered would not justify such an approach.

In *Australian Crime Commission v Stoddart* (*‘Stoddart’*), Heydon J stated that ‘a right does not become fundamental merely because cases call it that’.<sup>146</sup> Other judges have expressed doubt about the possibility and utility of ranking and categorising different parts of the common law, such that some are recognised as fundamental and thus protected by the principle of legality, and some are not.<sup>147</sup> Further, if we accept that the principle of legality recognises common law rights and principles, this necessarily concedes that courts have the power to determine its ‘triggers’, and may well recognise new ‘triggers’ or abandon old ones. Finally, the certainty of the common law should not be exaggerated. There are difficulties in ascertaining it and judges sometimes disagree about what it is.

This unpredictability fundamentally undermines the democracy-enhancing account of the principle of legality and the robust approach to the principle of

<sup>142</sup> TRS Allan, ‘The Common Law as Constitution: Fundamental Rights and First Principles’ in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 146, 148.

<sup>143</sup> Allan, *The Sovereignty of Law* (n 141) 376. At this point, Allan is referring to the common law principles which limit executive power.

<sup>144</sup> Crawford, *The Rule of Law and the Australian Constitution* (n 136) 3–4.

<sup>145</sup> See above nn 108–9 and accompanying text.

<sup>146</sup> *Stoddart* (n 102) 619 [166].

<sup>147</sup> *Shade Systems* (n 22) 167 [46] (Basten JA).

legality to which it has seemingly given rise. As I explained above, this sometimes caused the principle of legality to obstruct the legislative pursuit of policy aims which were within the constitutional power of the Parliament, without enhancing the quality of deliberation in the manner claimed.<sup>148</sup> However, this unpredictability does not necessarily undermine the alternative justification of the principle outlined here, which does not profess to put anyone 'on notice', but rather explicitly recognises that it is an interpretive tool for protecting judge-made law.

It would still seem unsatisfactory if courts could recognise new doctrines or principles and immediately demand a superadded degree of legislative clarity in order to oust them. But this would not be an appropriate application of the method outlined here either. The very fact that the relevant part of the common law is a new, and not a deeply embedded, feature of the common law would generally mean that it should carry less weight, and hence be relatively easy for the Parliament to overrule.

As this suggests, the common law is not a homogeneous entity. It may indeed be artificial to draw bright-line distinctions between fundamental and non-fundamental rights, and more satisfying to approach fundamentality as a sliding scale. On this approach, there is no need to draw an unprincipled distinction between one strong presumption that protects fundamental parts of the common law and another weak presumption that protects the rest — these are rightly recognised as variations of the same principle in practice.

The obvious question this then raises is: how are courts to determine the strength of the principle of legality in any given case? Some may be concerned that this leaves too much room for judicial creativity and unstructured choice. Yet, it seems possible for courts to gauge the principle's strength by applying well-established common law methods. Specifically, courts can interrogate the body of materials that make up the common law to assess the pedigree, strength and fundamentality of the part in question. For example, standard case law analysis can reveal not only whether a particular norm is recognised at common law, but also whether a common law norm is longstanding or a relatively recent innovation. That analysis can also reveal whether a norm is uniformly or at least widely endorsed, or else the subject of debate (for example, if there is considerable case law in which judges doubt the existence of the principle or call for its modification or abandonment). This is a method routinely applied by the courts in ascertaining the common law and refining it and, in less routine

<sup>148</sup> See above Part III.

cases, in deciding whether a certain doctrine should no longer form part of the common law.<sup>149</sup>

As this suggests, fundamentality should be understood to mean not principled importance as revealed by some abstract moral philosophising,<sup>150</sup> but the quality of forming a well-established and important part of the common law, determined via standard common law analysis of the kind described above. By contrast, inquiry may reveal that a part of the common law is not well integrated into the corpus of the law or, indeed, contradicts other parts of it. Here, the provocation of the legislature can prompt courts to realise that a longstanding part of the common law in fact carries little weight, and hence that a Parliament should be able to do away with it relatively easily.

Beyond these positive sources of law, it may be necessary for a court to have regard to the purposes or values that the law serves. An awareness of the purposes served by a particular part of the common law may shed light on how fundamental that law is and hence the extent to which it should be protected from legislative incursion. At first glance, this may seem methodologically radical, at least for those who believe that judicially constructed values should not inform the interpretation of legislation. But this too is a well-established feature of common law method, whichever way the common law is understood.<sup>151</sup> As Darryn Jensen explains:

Unless a dispute is identical in all relevant respects to a previously adjudicated dispute, adjudicating upon the dispute necessitates the formulation of a hypothesis as to the values which the previous case law expresses. Adjudicators need to do this in order to determine whether the present case is really of the same type as the previous case or is a case which must be treated differently.<sup>152</sup>

<sup>149</sup> See, eg, *Stoddart* (n 102) and the method by which the judges of the High Court ascertained whether or not the common law recognised a privilege against spousal incrimination, by analysing case law as well as academic commentary: at 568–71 [29]–[40] (French CJ and Gummow J), 615–18 [153]–[164] (Heydon J), 627–36 [202]–[230] (Crennan, Kiefel and Bell JJ). In the result, a majority concluded that there was no such privilege: at 571 [41] (French CJ and Gummow J), 636–7 [231]–[233] (Crennan, Kiefel and Bell JJ).

<sup>150</sup> As in the case law criticised in *Varuhas* (n 5) 589. To be clear, I do not seek to argue that Australian courts have done so — rather, that the approach advocated by this article does not lead in that direction.

<sup>151</sup> See, eg, *Stoddart* (n 102). In addition to examining positive sources of law in order to determine whether there was a privilege against self-incrimination, the Court also discussed the purposes potentially served by such a rule of law (for example, maintenance of the family unit): see, eg, at 617–18 [162]–[163] (Heydon J), 625 [196] (Crennan, Kiefel and Bell JJ).

<sup>152</sup> Jensen (n 121) 35.

As Andrew Burrows explains it: ‘The common law is developed precisely by the articulation of principle from a mass of decisions.’<sup>153</sup>

If we delve deeper, disagreements may emerge about how exactly principle informs the development of the common law reasoning, which reflect the more fundamental disagreement outlined above about how the common law should be understood.<sup>154</sup> Those who subscribe to the declaratory theory of the common law would explain that novel cases can reveal inadequacies in the judicial explication of the common law, which merely reflects or implements a broader body of moral principle or social custom.<sup>155</sup> Those who adopt the realist position that judges make law deny that there is some latent body of law for courts to discover, but do not necessarily accept that judges can engage in abstract moral reasoning in order to fill the gaps revealed by novel cases.<sup>156</sup> Rather, ‘in making new law, judges should be guided by the principles and reasons that underlie the decided cases.’<sup>157</sup>

The point for present purposes is that, whichever theory of the common law one subscribes to, it is clear that judges can and do assess the values or purposes served by recognised legal norms and take those into account in deciding cases. Hence, a version of the principle of legality that depends in part upon courts assessing the principles or values served by the common law does not require courts to do anything which they lack the expertise or authority to do.

One issue, which I highlight but cannot aim to answer in the confines of this article, is the extent to which proportionality analysis might assist this weighing process.<sup>158</sup> This would be controversial, because proportionality analysis, however it is understood, seems to involve a more searching level of scrutiny than

<sup>153</sup> Andrew Burrows, ‘The Australian Law of Restitution: Has the High Court Lost Its Way?’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 67, 74.

<sup>154</sup> As explained in Gerald J Postema, ‘Law’s Autonomy and Public Practical Reason’ in Robert P George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press, 1996) 79, 94 (‘Law’s Autonomy’); Jensen (n 121) 42–3; Emily Sherwin, ‘Legal Positivism and the Taxonomy of Private Law’ in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008) 103, 125. See also above nn 132–6 and accompanying text.

<sup>155</sup> Postema, ‘Law’s Autonomy’ (n 154) 94.

<sup>156</sup> See generally Lord Reid (n 133).

<sup>157</sup> Beever (n 135) 430, citing Lord Reid (n 133) 26.

<sup>158</sup> For analysis on the role (if any) for proportionality analysis in context of the principle of legality, see generally Dan Meagher, ‘The Principle of Legality and Proportionality in Australian Law’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 114. This discussion predates the doctrinal developments discussed in Part IV(D).

the idea of consistency that I have articulated here.<sup>159</sup> While I have sought to show that a version of the principle of legality that requires the court to assess the fundamentality of, and principles served by, a common law norm is compatible with established common law method, proportionality analysis is not yet a well-established feature of judicial method in Australia. That said, it is certainly not as alien as it arguably once was, given the tentative embrace of proportionality analysis in Australian public law.<sup>160</sup>

Most of these ideas are novel. The courts have yet to abandon the democracy-enhancing account of the principle of legality, or to embrace the idea that some version of this principle is justified by the constitutional function of the courts and the institutional setting in which statutory interpretation occurs. Yet there have been recent cases in which some judges have articulated a more nuanced and context-sensitive approach to the principle of legality, which could be justified in the way that I have argued, and which exemplifies much of the methodology that I have advocated here. The following section examines this case law, and uses it to further clarify the account of the principle of legality that has been provided here.

#### D A Variable Presumption

As foreshadowed, cases like *Lacey* might now be viewed as a high-water mark from which the tide has since receded. Numerous commentators and judges expressed discomfort with the robust way in which the principle of legality was applied in that and other cases.<sup>161</sup> Those criticisms support the argument made in Parts I and II: that there was no adequate justification for an interpretive presumption that operated in this way.

In more recent case law, several judges have suggested that the principle of legality has variable strength. The idea appears to have emerged in the series of cases concerning the *Building and Construction Industry Security of Payment Act 1999* (NSW) ('*Security of Payment Act*').<sup>162</sup> This Act created a scheme under

<sup>159</sup> See Meagher, 'The Principle of Legality and Proportionality in Australian Law' (n 158) 114.

<sup>160</sup> See, eg, *McCloy v New South Wales* (2015) 257 CLR 178, 194–6 [2]–[5] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 369–70 [125]–[131] (Kiefel CJ, Bell and Keane JJ), 398 [236] (Nettle J); *Unions NSW v New South Wales* (2019) 264 CLR 595, 615 [42] (Kiefel CJ, Bell and Keane JJ), 638 [110] (Nettle J); *Clubb v Edwards* (2019) 267 CLR 171, 186 [5]–[6] (Kiefel CJ, Bell and Keane JJ), 264–5 [266] (Nettle J), 311 [408] (Edelman J).

<sup>161</sup> See above n 63.

<sup>162</sup> See *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2016] NSWSC 770; *Shade Systems* (n 22); *Probuild* (n 14). A 'twin' case was decided at the same time, concerning the effect of an equivalent South Australian statute: see *Maxcon Constructions Pty Ltd v Vadasz* (2018) 264 CLR 46.

which contractors could recover progress payments for work undertaken in the construction industry, by lodging claims to be determined by an adjudicator.<sup>163</sup> The question was whether the decision of an adjudicator could be reviewed by the New South Wales Supreme Court, on the basis that a non-jurisdictional error of law appeared on the face of the record of the adjudicator's decision.<sup>164</sup> The *Security of Payment Act* did not contain an express privative clause, and the primary judge held that judicial review was available, but this was overturned by the New South Wales Court of Appeal.<sup>165</sup> The High Court subsequently upheld the decision of the Court of Appeal.<sup>166</sup>

This was a surprising result. The matter concerned access to judicial review, which is frequently described as a fundamental right or principle and as essential to the rule of law,<sup>167</sup> and which the courts have long struggled to protect from legislative incursion.<sup>168</sup> Why, then, were these courts willing to conclude that judicial review had been ousted, especially given the statute did not say so expressly? As noted above, the case more specifically concerned access to judicial review for non-jurisdictional error of law, a quirky feature of administrative law jurisprudence, which seemingly prompted a broader reassessment of the way in which the principle of legality should be applied.

In the Court of Appeal, Basten JA stated:

Although it has not been expressed in such terms, it seems likely that the level of clarity required of the legislature will depend upon the nature of the perceived infringement, the nature of the rights or general principles infringed and, no doubt, other factors.<sup>169</sup>

These ideas were explicitly endorsed by Edelman J in the High Court.<sup>170</sup> There, his Honour concluded that the principle of legality applied to the legislation, but 'only weakly' — and in the result, had been rebutted by implication.<sup>171</sup> His Honour noted that legislative attempts to restrict judicial review have long been

<sup>163</sup> *Probuild* (n 14) 6 [1] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), discussing *Building and Construction Industry Security of Payment Act 1999* (NSW) ('*Security of Payment Act*').

<sup>164</sup> *Probuild* (n 14) 6 [2] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>165</sup> *Ibid* 6 [2], 11 [23], 12 [24] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>166</sup> *Ibid* 6 [2] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 21 [55] (Gageler J), 44–5 [108] (Edelman J).

<sup>167</sup> For a recent example, see *Smethurst v Commissioner of Police* (2020) 376 ALR 575, 601–2 [110]–[111] (Gageler J). See also at 619 [173] (Gordon J), quoting *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157 [56] (Gaudron J).

<sup>168</sup> As Edelman J notes in his judgment: *Probuild* (n 14) 33 [84].

<sup>169</sup> *Shade Systems* (n 22) 167 [46]. See also at 165 [39].

<sup>170</sup> *Probuild* (n 14) 42 [102] (Edelman J).

<sup>171</sup> *Ibid* 42 [102], 44–5 [108].



interpreted narrowly, but emphasised the reasons why that was so.<sup>172</sup> The rationale, his Honour explained, is to protect individuals' freedom of access to the courts — not just for its own sake, but to ensure that individuals can correct legal errors which affect their rights, and that Parliament does not create 'islands of power immune from supervision and restraint'.<sup>173</sup> This rationale did not apply very strongly in this case, and so neither did the principle of legality.<sup>174</sup>

The first reason for this was the error in question was non-jurisdictional in nature.<sup>175</sup> The second reason was that s 32 of the *Security of Payment Act* ensured that a party affected by an adjudicator's decision could sue on the contract down the track, and hence the decision could be loosely described as interim in nature.<sup>176</sup> In the result, then, clear words were not necessary to oust judicial review on non-jurisdictional grounds; this conclusion could be inferred from the fact that judicial review would clearly frustrate the objectives of the Act.<sup>177</sup> Thus, the strength of the principle of legality in any given case depends not only upon the purposes served by the particular part of the common law which might be abrogated, but also upon the particular *way* in which the common law may be abrogated by the statute at hand. This means that the principle of legality has a 'variable impact'.<sup>178</sup>

This is an approach which Edelman J has advocated in other cases.<sup>179</sup> In *BVD17 v Minister for Immigration and Border Protection* ('*BVD17*'), his Honour reasoned that

the more important or fundamental a person's right, and the greater the alleged adverse effect on the right, the less likely it is that Parliament would have intended that effect, and the clearer the words that are required to achieve it.<sup>180</sup>

The legislation in question had the potential to reduce the common law requirements of procedural fairness, in relation to a power to decide an application for

<sup>172</sup> Ibid 34–5 [86]–[87].

<sup>173</sup> Ibid 34 [86], quoting *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>174</sup> *Probuild* (n 14) 42 [102] (Edelman J).

<sup>175</sup> Ibid 45 [108] (Edelman J).

<sup>176</sup> Ibid 42 [102] (Edelman J).

<sup>177</sup> Ibid 14–15 [34], 15 [36], 17 [40], 19 [48] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 31–2 [80] (Gageler J). Cf at 41–2 [100]–[101] (Edelman J).

<sup>178</sup> Ibid 42 [102] (Edelman J).

<sup>179</sup> See, eg, *Tomaras* (n 12) 467 [101]; *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, 654 [212]; *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29, 51 [55] ('*BVD17*').

<sup>180</sup> *BVD17* (n 179) 51 [55].

a protection visa.<sup>181</sup> Justice Edelman reasoned that ‘a person’s right to a reasonable opportunity to present a case ... is not an aspect of procedural fairness that can usually be abolished by Parliament by a nudge and a wink’.<sup>182</sup> Unlike in *Probuild*, the aspect of the common law engaged by the legislation was so important that it could not be abrogated by implication. Rather, clear words were required.<sup>183</sup>

These statements coincide with the expression of similar ideas in the United Kingdom (‘UK’), most notably in the decision of the Court of Appeal of England and Wales in *R (Privacy International) v Investigatory Powers Tribunal*.<sup>184</sup> This case concerned a statutory provision which purported to preclude judicial review of decisions of the Investigatory Powers Tribunal — a specialist body established by Parliament to determine complaints about surveillance agencies.<sup>185</sup> UK courts have recognised access to judicial review as a fundamental ‘right’ protected by the principle of legality.<sup>186</sup> But counsel for the government argued that the application of this presumption varied depending, for example, on the nature of the decision under review and the suitability of any alternatives to judicial review provided for by statute.<sup>187</sup> The Court of Appeal saw ‘force’ in these arguments, but found them unnecessary to decide as this clause was said to involve ‘a substantial inroad upon usual rule of law standards in this jurisdiction’, and thus to require strict scrutiny.<sup>188</sup> The matter reached the UK Supreme Court, where the variability argument received a mixed response. Lord Carnwath JSC (with whom Baroness Hale PSC and Lord Kerr JSC agreed) gave it short shrift, reiterating that judicial review could only be excluded by ‘the most clear and explicit words’<sup>189</sup> and that ‘[t]here [was] no doubt that, if [Parliament was to oust review], nothing less than the clearest wording [would]

<sup>181</sup> Ibid 46–7 [43] (Edelman J), discussing *Migration Act 1958* (Cth) ss 473DA(1), 473GA–473GB.

<sup>182</sup> *BVD17* (n 179) 52 [56].

<sup>183</sup> Ibid 51 [55], 52 [56] (Edelman J).

<sup>184</sup> [2018] 1 WLR 2572 (‘*Privacy International (Court of Appeal)*’).

<sup>185</sup> Ibid 2574 [1]–[2] (Sales LJ, Flaux LJ agreeing at 2590 [50], Floyd LJ agreeing at 2590 [51]). See also generally *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491, 508 [1] (Lord Carnwath JSC for Baroness Hale PSC, Lords Kerr and Carnwath JSC) (‘*Privacy International (Supreme Court)*’), discussing *Regulation of Investigatory Powers Act 2000* (UK).

<sup>186</sup> *Privacy International (Court of Appeal)* (n 184) 2583 [19], [21] (Sales LJ, Flaux LJ agreeing at 2590 [50], Floyd LJ agreeing at 2590 [51]).

<sup>187</sup> Ibid 2583–4 [23] (Sales LJ, Flaux LJ agreeing at 2590 [50], Floyd LJ agreeing at 2590 [51]).

<sup>188</sup> Ibid 2584 [25] (Sales LJ, Flaux LJ agreeing at 2590 [50], Floyd LJ agreeing at 2590 [51]).

<sup>189</sup> *Privacy International (Supreme Court)* (n 185) 518 [37] (Lord Carnwath JSC for Baroness Hale PSC, Lords Kerr and Carnwath JSC), quoting *R (Cart) v Upper Tribunal* [2011] QB 120, 136 [31] (Laws LJ, Owen J agreeing at 162 [114]), *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574, 583 (Denning LJ).

suffice.<sup>190</sup> Lord Sumption was far more receptive, stating: ‘The degree of elaboration called for in a statutory provision designed to achieve a given effect must depend on how anomalous that effect would be.’<sup>191</sup> Other UK judges have expressed support for these ideas, at least extra-curially.<sup>192</sup>

To return to decision of the High Court in *Probuild*, no Justice other than Edelman J expressly used the language of variable impact. Justice Gageler concluded that the principle of legality was not engaged at all, and hence no special degree of clarity was required to oust access to judicial review; rather, this could be implied via the usual recourse to statutory text, context and purpose.<sup>193</sup> His Honour was not content with the ‘all-encompassing aphorism that recourse to the courts is not to be taken away except by clear words.’<sup>194</sup> A more refined approach was required. Whatever might be said about the fundamentality or otherwise of the right to seek judicial review in general, the particular form of relief sought by this plaintiff — certiorari for non-jurisdictional error on the face of the record — was a doctrinal quirk which could not be reconciled with contemporary understandings of the constitutional purpose of judicial review.<sup>195</sup> That purpose is to ensure that decision-makers act *within the limits* of the powers that have been conferred by Parliament — and a non-jurisdictional error is one which, by definition, does not cause the decision-maker to stray beyond the boundaries of legal authority.<sup>196</sup> Justice Gageler seems to have suggested that certiorari for non-jurisdictional error should be interred altogether.<sup>197</sup> At the very least, he concluded, the right to seek this form of relief should not be exalted by treating it as a fundamental one, protected by the principle of legality.<sup>198</sup>

Like the majority in the UK Supreme Court in *R (Privacy International) v Investigatory Powers Tribunal*,<sup>199</sup> the majority in *Probuild* did not expressly endorse the variability of the principle of legality. Their Honours simply stated that ‘[a]n intention to alter the settled and familiar role of the superior courts

<sup>190</sup> *Privacy International (Supreme Court)* (n 185) 538 [99] (Lord Carnwath JSC for Baroness Hale PSC, Lords Kerr and Carnwath JJSC).

<sup>191</sup> *Ibid* 577 [199].

<sup>192</sup> See, eg, Sir Philip Sales, ‘A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998’ (2009) 125 (October) *Law Quarterly Review* 598, 607.

<sup>193</sup> *Probuild* (n 14) 23 [59]–[60].

<sup>194</sup> *Ibid* 23 [59] (citations omitted).

<sup>195</sup> *Ibid* 27 [69], 30 [77] (Gageler J).

<sup>196</sup> *Ibid* 27 [69] (Gageler J).

<sup>197</sup> See *ibid* 30 [77].

<sup>198</sup> *Ibid*.

<sup>199</sup> See above nn 185–91 and accompanying text.

must be clearly expressed.<sup>200</sup> However, their Honours continued that ‘the question is a matter of statutory construction; and in the resolution of such a question, context is, as always, important.’<sup>201</sup> They concluded — in significant part, due to statements made on the floor of Parliament — that the *Security of Payment Act*

evinced a clear legislative intention to exclude the jurisdiction of the Supreme Court to make an order in the nature of certiorari to quash an adjudicator’s determination for non-jurisdictional error of law on the face of the record.<sup>202</sup>

The purpose of the *Security of Payment Act* was to create a self-contained and expeditious system for resolving interim-payment disputes, in light of the fact that cashflow was ‘the lifeblood of the [building] industry.’<sup>203</sup> It only enforced interim entitlements and did not purport to finally resolve the contractual entitlements of the parties.<sup>204</sup> And

[t]o permit potentially costly and time-consuming judicial review proceedings to be brought on the basis of error of law on the face of the record, regardless of whether an adjudicator had exceeded the limits of their statutory functions and powers, would frustrate the operation and evident purposes of the statutory scheme.<sup>205</sup>

Hence, the way in which the majority interpreted the legislation did in fact belie an approach broadly similar to those of Gageler J and Edelman J. The majority were evidently concerned with the precise nature and effect of the legislative incursion in question. There was no blunt requirement that *any* ‘intention to alter the settled and familiar role of the superior courts ... be clearly expressed.’<sup>206</sup>

The judgments described in this Part advocate a very different approach to the principle of legality from that taken in cases such as *Lacey*.<sup>207</sup> This is not to suggest some bright-line distinction between an ‘old’ and a ‘new’ approach. As previously noted, there were always inconsistencies in the way that the principle of legality was applied, and *Lacey* took a particularly robust approach. Yet, it

<sup>200</sup> *Probuild* (n 14) 14 [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid* 15 [35].

<sup>203</sup> *Ibid* 17 [40] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), quoting New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 2002, 6542 (Morris Iemma).

<sup>204</sup> *Probuild* (n 14) 16 [39] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>205</sup> *Ibid* 19 [48].

<sup>206</sup> *Ibid* 14 [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>207</sup> *Lacey* (n 36).

still seems possible to identify an important shift. Prior case law tended to treat the principle of legality as a presumption that was triggered when legislation engaged a catalogue of fundamental rights and principles, and which could only be rebutted by very clear evidence; this usually required an express statement in the statutory text. By contrast, parts of the common law that were not categorised as fundamental did not trigger the principle of legality and were protected by only a very weak presumption, which could easily be rebutted by words in the text or extrinsic evidence of statutory purpose. The approach taken in *Probuild*, and the other judgments described above,<sup>208</sup> seems to merge these presumptions.<sup>209</sup> They recognise one variable presumption that Parliament does not intend to abrogate the common law, which is strong when the part of the common law in question is regarded as particularly valuable or important, and the legislation threatens to abrogate it in significant ways; in other cases, it is weak. And this is an approach that, I argue, can be justified in the way presented in Part III.

In most of the case law described above, there is no suggestion that the purpose of the principle of legality is to enhance the democratic process. There is some reference to parliamentary intention, including in the above-quoted passage from *BVD17*.<sup>210</sup> While it was not my objective, there may be those who would prefer to rescue the principle of legality and explain the shift in recent case law by presenting an improved version of the old, intentionalist account. They would need to answer the same questions that plagued the old account, though in slightly different guises, including: is there any basis for presuming that Parliament does not intend to abrogate *fundamental* parts of the common law in *significant* ways? It seems telling that, in explaining the strength of the principle of legality in a given case, the judges quoted above draw almost exclusively upon common law resources: an assessment of the pedigree of the part of the common law in question, and judicial statements of the legal purposes it serves. An appreciation of those purposes, and the extent to which they may be thwarted if the court concludes that the common law has been abrogated in a given case, determines the weight to be afforded to the common law. In some cases, the common law is found to weigh heavily in favour of one constructional choice; in others, it does little to sway constructional choice. In some instances (most notably, that of Gageler J in *Probuild*),<sup>211</sup> potential legislative abrogation prompts the judge to stop and reconsider whether this is a part of the common

<sup>208</sup> See above Part IV.

<sup>209</sup> See also *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 623 [159] (Nettle, Gordon and Edelman JJ).

<sup>210</sup> *BVD17* (n 179) 51 [55] (Edelman J).

<sup>211</sup> See *Probuild* (n 14).

law which is worthy of judicial protection, which in turns informs the degree of clarity required to oust it. This approach to the principle of legality is one which more appropriately foregrounds the common law origins of the rights which the principle protects, and the institutional setting in which statutory interpretation takes place.

## V CONCLUSION

The principle of legality is one of our most important canons of statutory interpretation — each of which demands a justification which is principled and coherent, and which aligns with the way in which it is applied by the courts. This article has aimed to show that the existing justifications for the principle of legality — the intentionalist and democracy-enhancing accounts, respectively — are inadequate. The first fails to overcome the broader objections to intentionalist-based methods of statutory interpretation. The second fails to reflect the nature of contemporary legislation, by placing unrealistic emphasis on the specificities of statutory texts and their capacity to enhance democratic debate; moreover, it does not align with the way in which the principle of legality is actually applied by the courts.

The alternative justification that I have outlined here aims to appropriately foreground the common law origins of the principle of legality, and the rights, principles and so forth that it protects. On this view, courts may treat the common law as a weight on the scale that can legitimately sway constructional choice, while maintaining Parliament's supreme power to abrogate the common law when and if it so chooses. This is a legitimate means of making constructional choices, given the institutional setting in which statutory interpretation occurs and the constitutional role of the courts. But it does not justify a presumption so robust that it defeats all other indicia of meaning. Cases such as *Probuild* demonstrate many parts of this methodology in practice, and suggest support for the ideas that have been articulated here.

This alternative account is not without its own complexities or challenges. A variable principle of legality may seem more difficult to wield than a blunt clear-statement rule. But the latter cannot be justified (at least, not on current formulations), and the former does not seem to require courts to do anything radically different from that which they regularly do, in the course of ascertaining and developing the common law. The alternative account reflects what most have long suspected, but which is yet to have been given appropriate legal form: that the principle of legality is a judge-made tool for protecting judge-made law — and legitimately so.