THE PRINCIPLE OF LEGALITY: PROTECTING STATUTORY RIGHTS FROM STATUTORY INFRINGEMENT?

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ABSTRACT

The principle of legality has been described as a presumption that Parliament does not intend to abrogate or curtail fundamental common law rights, freedoms, immunities, principles, and depart from the general system of law, except by clear and unambiguous language (herein referred to collectively as 'fundamental common law protections'). The principle of legality is a common law interpretive principle, which protects fundamental *common law* protections from infringing statutes. Nevertheless, a question arises as to whether the principle can and should be extended beyond the realms of the common law, to protect certain *statutory* rights in Australia. This is yet to be considered at length in academic commentary and is presently unresolved. Such a development would increase the principle's scope exponentially. This article seeks to comprehensively examine the issue – by reference to the principle of legality's origins and rationale, the concept of parliamentary sovereignty and doctrine of implied repeal, and analogous instances where statutory rights are protected through interpretation. This article argues that, on balance, the principle of legality should not be utilised to protect statutory rights from statutory infringement.

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KEYWORDS

Principle of legality – protection of statutory rights – principle's origins and rationale – parliamentary sovereignty and doctrine of implied repeal – constitutional statutes – human rights statutes – existing common law presumptions

I INTRODUCTION

The principle of legality is a common law interpretive principle, most frequently associated with the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms and immunities, except by clear and unambiguous language. The principle of legality's 'roots […] lie firmly in the common law'.[1] Several commentators have observed that the principle has sprung from the increasing ubiquity of statutes. The principle was in 'respon[se] to the avalanche of legislation which regulates our conduct';[2] 'developed […] in an age of expanding legislative activity, when the proliferating functions of the State might have inadvertently or benignly impinged on rights'.[3] In recent times, some have gone so far as to describe the principle of legality as a 'common law bill of rights'. For example, it has been said that the principle's 'significance is that in this age of statutes, our courts have developed a common law bill of rights, freedoms and principles that is strongly resistant to legislative encroachment'.[4]

However, with the proliferation of statutes in the contemporary Australian legal system, the 'rights of citizens are as likely nowadays to be founded in statutory statement as in the common law'.[5] This gives rise to the question: can and should the principle of

[1] Mark Elliott, 'Brexit: Constitutional Legislation, Fundamental Rights and Article 50' on Public Law for Everyone, Mark Elliott (8 September 2016) <https://publiclawforeveryone.com/2016/09/08/brexit-constitutional-legislation-fundamental-rights-and-article-50/>.
[2] John Doyle and Belinda Wells, 'How Far Can the Common Law Go Towards Protecting Human Rights?' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999, Oxford University Press) 17, 18.
[3] Philip A Joseph, 'The Principle of Legality: Constitutional Innovation' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (The Federation Press, 2017) 27, 32.
[4] Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36 *Sydney Law Review* 413, 415.
[5] D C Pearce AO, and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 245.

legality be equally applied to protect certain statutory rights? The implication being that a statutory provision could be interpreted restrictively, pursuant to the principle of legality, to prevent it from infringing another statutory provision which confers a right.

This notion is of fairly recent history. The leading Australian authority is the 1996 Federal Court decision of *Buck v Comcare*.[6] That case was heard by Finn J. Only a few years earlier, prior to his appointment to the Court, Paul Finn had remarked on the 'large encroachment by statute on the traditional domains of the common law'.[7] Finn described how '[f]rom the 1970's we have witnessed the proliferation of statutes which have entrenched directly upon areas of governmental, commercial and social life which for the most part were regulated, if at all, by common law doctrines […]'.[8] Finn was also cognisant of the 'reaffirmation'[9] of the common law principle of legality.

Likely inspired by the above trends, Finn J in *Buck* enlarged the principle of legality's protective scope to encompass statutory rights. That case concerned statutory rights to workers' compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth). His Honour said (in *obiter*):

> [That] right does not fall into the category of 'common law' rights which traditionally have been safeguarded from legislative interference etc in the absence of clear and unambiguous statutory language […] Yet it is a right of sufficient significance to the individual in my view, that, where there may be doubt as to Parliament's intention, the courts should favour an interpretation which safeguards the individual. To confine our interpretative safeguards to the protection of 'fundamental common law rights' is to ignore that we live in an age of statutes and that it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society.[10]

The references to '"common law" rights which traditionally have been safeguarded from legislative interference etc in the absence of clear and unambiguous language', and 'interpretative safeguards to the protection of "fundamental common law rights"', are undoubtedly references to what is commonly known as the principle of legality. His

[6] (1996) 66 FCR 359.
[7] Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *Western Australian Law Review* 7.
[8] Ibid 11.
[9] Ibid 28.
[10] (1996) 66 FCR 359, 364–5.

Honour extended the principle beyond the common law, to protect statutory rights to workers' compensation.

The principle of legality is evolving and growing in scope. While there is some support for extending the principle to protect statutory rights, this is yet to be considered at length in academic commentary and is presently unresolved in the jurisprudence. This is a topic of much significance and controversy. The extension of the principle of legality to protect statutory rights would represent an immense expansion of the principle, particularly with the proliferation of statutes in modern Australian society as described by Finn. As to the principle's impact on statutory interpretation, it has greatly risen in prominence in recent times.[11] It has become central to the process of statutory interpretation and been applied quite robustly by the courts.[12] Presumably then, a principle of legality which extends to statutory rights would make it more difficult for Parliament to amend or repeal those rights. The test of clear and unambiguous language for rebutting the principle is 'weighty';[13] it is not of 'a low standard'.[14]

This introduction is Part I. Part II outlines the rationale of the principle of legality. Part III examines the Australian commentary and jurisprudence, to ascertain the level of agreement regarding whether the principle of legality applies to statutory rights, and if so, in what circumstances and to which rights. Part IV discusses whether an extended principle of legality is consistent with the rationale of the principle. Part V examines consistency with the concept of parliamentary sovereignty, including what is commonly described as the doctrine of implied repeal. That doctrine provides that '[i]f a later Act makes contrary provision to an earlier, Parliament (though it has not expressly said so) is taken to intend the earlier to be repealed'.[15] This may be raised as a key obstacle to an extended principle of legality.

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[11] See Bruce Chen, 'The French Court and the Principle of Legality' (2018) 41(2) *University of New South Wales Law Journal* 401.
[12] Ibid.
[13] George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 43.
[14] *X7 v Australian Crime Commission* (2013) 248 CLR 92, 153 [158] (Kiefel J).
[15] Francis Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th ed, 2008) 304.

Parts VI to VIII consider existing approaches which are analogous to a principle of legality that protect statutes or statutory rights, and might be drawn on to support the principle's extension. Part VI analyses a notion being developed by the courts in the United Kingdom – that there are 'constitutional' statutes, such that subsequent statutes ought to be interpreted strictly so as not to repeal or amend those earlier constitutional statutes. Part VII discusses statutory bills of rights, such as the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic), which set out human rights in statute and require legislation to be interpreted compatibly with them where possible. Part VIII considers other interpretive presumptions which fall within the scope of the principle of legality and have been taken to protect certain statutory rights.

Finally, Part IX concludes that the question of whether the principle of legality should extend to statutory rights is a complex issue and the arguments pull in different directions. However, the principle of legality ultimately should not be extended to statutory rights because it would leave it vulnerable to arguments that it is inconsistent with the principle's origins and rationale, and introduces a large and undesirable element of uncertainty. Moreover, there is an actual lack of demonstrable utility in extending the principle in this way.

It is beyond the scope of this article to consider the interaction between Commonwealth and State legislation where there is inconsistency.[16] Rather, this article focuses on the principle of legality's possible application where there is potential conflict within a statute or between statutes enacted in the same jurisdiction.

II RATIONALE OF THE PRINCIPLE OF LEGALITY

The principle of legality's rationale has been heavily critiqued in recent commentary.[17] The 'original rationale' of the principle has been outlined in several cases. In the seminal High Court case of *Potter v Minahan*,[18] O'Connor J quoted approvingly from

[16] See s 109 of the *Australian Constitution*.
[17] See, most recently, Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017).
[18] (1908) 7 CLR 277.

Maxwell on Statutes,[19] which stated that '[i]t is in the last degree improbable' that Parliament would abrogate or curtail fundamental common law protections 'without expressing its intention with irresistible clearness'.[20] This was endorsed by six members of the High Court in *Bropho v Western Australia*.[21] In *Coco v The Queen*,[22] four members of the High Court said that the legislature must have 'not only directed its attention' to the question of abrogation or curtailment of the fundamental common law protection, but 'also determined upon abrogation or curtailment of them'.[23] As if to reinforce the point, Gleeson CJ in *Al-Kateb v Godwin*[24] added that Parliament must do so 'consciously' – the legislature must have '*consciously* decided upon abrogation or curtailment'.[25] The principle of legality is, in the author's view, therefore concerned with actual legislative intention[26] – it is presumed Parliament's state of mind is that it is unlikely to intend to enact legislation that abrogates or curtails fundamental common law protections.

Whenever Parliament legislates, it does not do so 'in a vacuum'[27] or 'on a blank sheet'.[28] Rather, Parliament is taken to be aware of standing principles of statutory interpretation, including the principle of legality. Thus, the principle of legality is said to be grounded in an institutional relationship between Parliament and the courts. In the influential passage of Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian*

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[19] J A Theobald (ed), *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905).
[20] (1908) 7 CLR 277, 304.
[21] (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[22] (1994) 179 CLR 427.
[23] Ibid 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). See also *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310 [314] (Gageler and Keane JJ); cited in *North Australian Aboriginal Justice Agency v NT* (2015) 256 CLR 569, 606 [81] (Gageler J).
[24] (2004) 219 CLR 562.
[25] Ibid 577 [19] (emphasis added).
[26] See also Jeffrey Goldsworthy, 'The Principle of Legality and Legislative Intention' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 46, 58; Philip Sales, 'Rights and Fundamental Rights in English Law' (2016) 75(1) *Cambridge Law Journal* 86, 99 citing *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 (Gleeson CJ).
[27] Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998' (2009) 125 *Law Quarterly Review* 598, 600, citing Rupert Cross, John Bell and George Engle, *Cross: Statutory Interpretation* (Oxford University Press, 3rd ed, 1995) 165. See also *Brown v Tasmania* (2017) 349 ALR 398, 523 [535] (Edelman J); Susan Glazebrook, 'Do They Say What They Mean and Mean What They Say? Some Issues in Statutory Interpretation in the 21st Century' (2015) 14(1) *Otago Law Review* 61, 69.
[28] Lord Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 5, 18.

Workers' Union,[29] his Honour said that the principle of legality is 'known both to Parliament and the courts, upon which statutory language will be interpreted'.[30] This dictum has subsequently been cited by the High Court in several cases, to the point that 'it now can be said […] reflect[s] orthodoxy'.[31]

The 'original rationale' of the principle has come under scrutiny. One of the reasons for this is the identification of another rationale (at least, arguably) for the principle of legality – the '*Simms* rationale'.[32] In *R v Secretary of State for the Home Department; Ex parte Simms*,[33] Lord Hoffmann said:

> the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[34]

Brendan Lim has said this is a 'normative justification'.[35] It 'places less emphasis'[36] on actual legislative intention, and it could be said that this rationale is 'not really motivated by genuine uncertainty about Parliament's intentions'[37] (although this can be disputed). Rather, Lim said, the '*Simms* rationale' is 'concerned with enhancing the parliamentary process' through 'political transparency and the amenability of the legislature's decision to democratic scrutiny and electoral discipline'.[38] The above

[29] (2004) 221 CLR 309.
[30] Ibid 329 [21].
[31] Matthew Groves and Dan Meagher, 'The Principle of Legality in Australian and New Zealand Law: Final Observations' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (The Federation Press, 2017) 258, 261. Cf John Basten, 'The Principle of Legality: An Unhelpful Label?' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (The Federation Press, 2017) 74, 76; Sir Anthony Mason, 'The Interaction of Statute Law and Common Law' (2016) 90 *Australian Law Journal* 324, 329.
[32] See Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372.
[33] [2000] 2 AC 115.
[34] Ibid 131.
[35] Lim, above n 32, 374.
[36] Ibid.
[37] Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 308.
[38] 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* (The Federation Press, 2017) 2, 7.

passage from *Simms* has been widely cited, such that it has obtained the status of a 'definitive modern restatement of the principle'.[39]

The 'original rationale' is also under challenge by the High Court bringing into doubt the notion of actual legislative intention. In *Lacey v Attorney-General (Qld)*,[40] the High Court controversially determined that the concept of legislative intention is a product of the statutory interpretation process itself, rather than something that is pre-existing and subsequently ascertained through the statutory interpretation process.[41] However, there are some potential indicators that more recent appointments to the High Court might recognise the existence of actual legislative intention.[42] Commentators have also argued, convincingly, that *Lacey* rejects traditional understandings of legislative intention, undermines the rationale of the principle of legality,[43] and that 'judges continue to habitually speak *as if* legislative intentions (really) exist'.[44]

Moreover, the High Court of Australia has not resiled from the 'original rationale', and its close association with actual legislative intention. In *Lee v NSW Crime Commission*,[45] Gageler and Keane JJ said: 'More recent statements of the principle in this Court do not detract from the rationale identified in *Potter*, *Bropho* and *Coco* but rather reinforce that rationale'.[46] In *North Australian Aboriginal Justice Agency v Northern Territory*,[47] French CJ, Kiefel and Bell JJ treated the normative justification as entirely consistent with the 'original rationale',[48] which it acknowledged was

[39] Matthew Groves, 'The Principle of Legality and Administrative Discretion' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (The Federation Press, 2017) 168.
[40] (2011) 242 CLR 573.
[41] Ibid 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); see also *Momcilovic v The Queen* (2011) 245 CLR 1, 141 [341] (Hayne J).
[42] See Stephen Gageler, 'Legislative Intention' (2015) 41 *Monash University Law Review* 1; *Graham v Minister for Immigration and Border Protection* (2017) 347 ALR 350, 369 [76] (Edelman J) in relation to both constitutional and any other (legislative) texts; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225, 247–8 [84], 249 [87] (Edelman J).
[43] See Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Sydney Law Review* 39, 42–5, Jeffrey Goldsworthy, 'Is Legislative Supremacy under Threat? Statutory Interpretation, Legislative Intention and Common-Law Principles' (2015) 60(11) *Quadrant* 56; Goldsworthy, above n 26, 55–6.
[44] Goldsworthy, above n 26, 55.
[45] (2013) 251 CLR 196.
[46] Ibid 309 [312].
[47] (2015) 256 CLR 569.
[48] Ibid 581–2 [11].

'longstanding'.[49] In *Brown v Tasmania*,[50] Edelman J referred to the 'original rationale' first set out in *Potter*.[51] As such, the '*Simms* rationale' is currently better seen as a corollary of the 'original rationale'. This issue has been dealt with at greater length elsewhere.[52]

In any event, even if the '*Simms* rationale' were accepted, actual legislative intention is still relevant (as this article argues in Part IV). The principle of legality is motivated by a search for parliament's actual legislative intention – which is what *Simms* must still be referring to when it says that 'Parliament must squarely confront what it is doing'.[53] The significance of actual legislative intention to whether the principle of legality should apply to statutory rights will soon become apparent.

III STATUTORY RIGHTS

A Existing commentary

This article now turns to ascertain the level of agreement that the principle of legality can protect certain statutory rights in Australia. It has been acknowledged in academic commentary that statutes can influence the development of fundamental common law rights and freedoms.[54] However, this article is concerned with the question of whether the principle of legality should be extended *directly* to statutory rights – such that the principle goes beyond protecting the common law.

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[49] Ibid 581 [11].
[50] (2017) 349 ALR 398.
[51] Ibid 525 [544] citing *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15], which quoted *Potter v Minahan* (1908) 7 CLR 277, 304.
[52] See Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41 *Monash University Law Review* 329, 338–9 and the citations therein.
[53] See Goldsworthy, above n 26, 58; 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* (The Federation Press, 2017) 114, 135–6; Williams and Hume, above n 13, 37–8, 46.
[54] Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449, 457; Meagher, above n 4, 430; Kris Gledhill, 'Rights-Promoting Statutory Interpretive Obligations and the "Principle" of Legality' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (The Federation Press, 2017) 93. See further The Hon James Spigelman, *The McPherson Lecture Series: Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) vol 3, 29.

Elsewhere in the academic commentary, there is some support for this proposition. D C Pearce and R S Geddes acknowledge that '[t]he same approach' to fundamental common law protections 'could be adopted in relation to statutory rights – clear words would be necessary to limit them'.[55] Brendan Lim goes further, advocating for a shift from 'fundamental' common law protections, toward 'vulnerable' rights,[56] being a 'mode of analysis or framework of argument' with respect to protecting 'rights which the political process is inherently inapt to protect, because they are claimed by a politically weak minority, or because they go to the substance of the political process and democratic representation itself'.[57] He considers that there is no reason this ought to be limited to the common law, and can be extended to 'vulnerable' statutory rights.[58]

By contrast, Justice Basten of the New South Wales Court of Appeal has expressed doubt extra curially about the notion that the principle of legality can be extended to statutory rights (compare with his Honour's judgment in *Elliott v Minister administering Fisheries Management Act 1994*).[59] In his view, such a development 'offers the potential to destroy the principle as a freestanding doctrine'.[60] Justice Basten has pointed to the fact that '[w]hen statute affects statute we are within that growing and challenging area of conflict resolution where the conflict is between laws of the same polity'.[61] Developing Basten J's thoughts further – that polity is Parliament. An extended principle of legality would mean that certain statutory rights receive favourable treatment over other statutory provisions, despite all being enacted by Parliament. This links with the concept of parliamentary sovereignty, which is discussed later in this article. Moreover, Basten J has said that in practice 'the principle of legality cannot necessarily provide useful guidance in determining whether one particular statutory provision derogates from another'.[62] That is because where there is conflict between laws, the principle of harmonious construction and the doctrine of

[55] Pearce and Geddes, above n 5, 245. See also George Williams and Daniel Reynolds, 'The *Racial Discrimination Act* and Inconsistency under the *Australian Constitution*', (2015) 36 *Adelaide Law Review* 241, 250–1.
[56] Lim, above n 32, 398–409; Lim, above n 38, 10.
[57] Lim, above n 32, 413; Lim, above n 38, 10–11.
[58] Lim, above n 32, 409–12.
[59] [2018] NSWCA 123 (8 June 2018). See Part III-B below.
[60] Basten, above n 31, 84.
[61] Ibid 84–5.
[62] Ibid 85.

implied repeal may already be raised.[63] These concepts are also discussed further in this article.

B Statutory rights within the context of their Act

The notion that the principle of legality can protect statutory rights has been 'followed on occasion by courts'.[64] As noted above, the leading authority is *Buck v Comcare*[65] regarding workers' compensation rights under the *Safety, Rehabilitation and Compensation Act 1988* (Cth).[66]

Buck was cited with approval and applied by the Full Court of the Federal Court in *Australian Postal Corporation v Sinnaiah*.[67] That case dealt with a different provision of the same Act.[68] The provision suspended an employee's compensation rights for workplace injury, and their ability to institute and continue compensation proceedings, for refusal or failure to undertake a rehabilitation program.[69] A constructional question arose where a person claimed compensation for multiple injuries, but only failed to undertake rehabilitation for one injury – did the suspension take hold in respect of all of the injuries? The Full Court (Cowdroy, Buchanan and Katzmann JJ) considered that Finn J's obiter remarks 'apply with equal force here'.[70] The Court observed that a broad interpretation of the provision would result in the suspension of various rights to compensation under the Act.[71] The broad interpretation was rejected.

In these cases,[72] the possibility of infringement of the statutory right lay in the same legislative scheme which granted the right in the first place. It was failures to comply

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[63] Ibid.
[64] Pearce and Geddes, above n 5, 245.
[65] (1996) 66 FCR 359.
[66] Section 57(2).
[67] (2013) 213 FCR 449.
[68] *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 37(7).
[69] *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 37(1) provided that a rehabilitation authority may make a determination that an employee who has suffered an injury resulting in an incapacity for work or an impairment should undertake a rehabilitation program.
[70] (2013) 213 FCR 449, 458 [34].
[71] Ibid 458–9 [35].
[72] See also *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, 442–3 [105]–[107], 443 [110], 444 [114] ('valuable' visa rights); *Tassell v Hayes* (1987) 163 CLR 34, 41, 44 (Mason, Wilson

with requirements under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) – in *Buck*, to attend a medical examination and in *Sinnaiah*, to undertake a rehabilitation program – for which the right to compensation, granted by that same statute, could be suspended. On one view, a parallel may be drawn between the recognition of fundamental common law protections and the recognition of certain statutory provisions within the context of their Acts, for the purposes of the principle of legality. Some common law protections can be taken to be more fundamental than others and deserving of special protection. Not all common law protections fall within the scope of the principle of legality. As Kirby J has said, '[t]he key word is "fundamental"'.[73] Similarly, a statutory provision might be considered more significant or valuable (see Part III-D) than another provision and deserving of special protection. That may be so even if the two provisions in question were enacted at the same time in the same statute.

However, the New South Wales Court of Appeal (Basten JA, Beazley P and Payne JA agreeing) in a recent case was much less enthusiastic about the principle of legality's application to statutory rights. In *Elliott v Minister administering Fisheries Management Act 1994*,[74] the appellant was a commercial fisherman who had his catch entitlements limited pursuant to a new quota shares scheme. He challenged this, submitting that the statutory provision under the *Fisheries Management Act 1994* which gave the power to issue 'further classes of shares'[75] should be construed narrowly, so as not to allow for impairment of existing property rights without clear and unambiguous language.

The Court considered that the right was more accurately described as a statutory right to participate in fisheries. It referred to the principle of legality's 'original rationale' and '*Simms* rationale'.[76] Significantly, it considered that under either, 'there is no

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and Dawson JJ) (right to be tried by jury); cf *PPHF v Director-General of Security* (2011) 193 FCR 436, 441 [38] (Robertson J, Perram J agreeing) (the right to merits review) where the principle was rebutted as there was no 'doubt as to Parliament's intention'.

[73] See also Chief Justice J J Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 781. Although it has been suggested that this designation should be discarded: see *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43] (French CJ); and *Tajjour v NSW* (2014) 254 CLR 508, 545 [28] (French CJ). Cf Groves, above n 39, 171.

[74] [2018] NSWCA 123 (8 June 2018).

[75] Section 71A.

[76] [2018] NSWCA 123 (8 June 2018), [36]-[37].

necessary constraint depriving the holder of *statutory* rights of the benefits of the principle'.[77] This can be contrasted with the views expressed in this article. Nevertheless, the Court remained ambivalent, couching the principle of legality's application in uncertain terms: '[t]o the extent that the principle applies';[78] '[e]ven conceding some limited operation'[79] to it. Should the principle apply, the Court considered it had 'muted' or 'limited' application because the right 'being one conferred by statute, is inherently liable to alteration by statute'.[80] Notably, the Court drew upon analogous authority about a person's rights under a fishing licence being 'subject to certain powers conferred on the Director of Fisheries by the Act, and subject to other statutory provisions'.[81]

Elliott highlights that it is at least questionable whether the principle of legality should be applied in these contexts. Arguably, the principle should have no role to play when statutory rights are bestowed by Parliament *subject to qualification*. The improbability of Parliament curtailing a statutory right is significantly negated when the right is enacted as curtailed in the first place. Such a right must be read in the context of the Act as a whole, including other statutory provisions. One should query the justification for treating a right as being subject to special protection from its qualifications. The principle of legality is applied to statutes against a background of external standards (historically, it has been fundamental common law protections). In *Sinnaiah*, the principle of legality was applied to statutory rights against a previously non-existent internal standard – ie. provisions within the same Act. This is not akin to the principle of legality's usual operation. The objection is not necessarily the constructional outcome reached in *Sinnaiah*, but rather that the Court applied the principle of legality in doing so.

[77] Ibid [38].
[78] Ibid [39].
[79] Ibid [60].
[80] Ibid [39].
[81] Ibid [47], quoting *South Australian River Fishery Association Inc and Warrick v South Australia* (2003) 85 SASR 373, 387 [74] (Doyle CJ, Besanko J agreeing).

C Statutory rights and subsequent legislation

By contrast, there are several authorities where the courts have applied *Buck* to safeguard statutory rights from *subsequent* legislative developments.[82] The subsequent statute is interpreted restrictively, so as not to infringe the earlier statutory right. The principle of legality is being applied to a subsequent infringing statute against a pre-existing external standard – ie. an earlier statutory right. That right, having been conferred earlier in time and deemed protected, is shielded from subsequent legislative infringement. This is not dissimilar to the principle of legality's application to fundamental common law protections.

The most authoritative decision in this respect was again by the Full Court of the Federal Court in relation to workers' compensation – *Anglican Care v NSW Nurses and Midwives' Association*.[83] Section 130 of the *Fair Work Act 2009* (Cth) removed an employee's entitlement to accrue leave while receiving workers' compensation. An exception was provided under sub-s (2) where the accrual of such leave is 'permitted by a compensation law'. Justices Bromberg and Katzmann applied *Buck* and *Sinnaiah* to construe the words 'permitted by', such that s 130 did not remove an employee's 'previously enjoyed' statutory right to accrue leave while receiving workers' compensation under the earlier *Workers Compensation Act 1987* (NSW).[84]

There are other cases where the principle of legality's application to statutory rights has been found to be rebutted, due to there being clear and unambiguous language in the subsequent statute and no doubt as to Parliament's intention. This is consistent with the usual operation of the principle of legality. Does this mean though that in these cases, the courts have actually accepted that the principle can extend to statutory rights?

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[82] See *Re Schofield, Ex parte Rangott v P&B Barron Pty Ltd* (1997) 143 ALR 185 (restriction on admissibility of transcript of examination in bankruptcy proceedings); *SB v Parramatta Children's Court* (2007) 39 Fam LR 132 (right of a parent to appear and examine and cross-examine witnesses in Children's Court proceedings); *Davies v Barancewicz* (2011) 5 ACTLR 305 (right to sue for workers' compensation for negligence on the part of someone other than their employer); *Oxenbould v The Solicitors' Trust* [2011] TASSC 57 (3 November 2011) (overturned on appeal to the Full Court of the Tasmanian Supreme Court, but not on this point) (claims for payment pursuant to the *Legal Profession Act 1993* (Tas) for investment losses suffered from the failure of a law firm's mortgage loan scheme); *Anglican Care v NSW Nurses and Midwives' Association* (2015) 231 FCR 316.

[83] (2015) 231 FCR 316.

[84] Ibid 327 [58]–[61], [64]; cf 320 [15] (Jessup J).

These cases may be divided into three categories. The first category is where the courts have accepted this proposition.[85] The second category is where the courts have not positively approved or otherwise objected to the notion.[86] The third category is where uncertainty has been expressly raised regarding the proposition – but in any event it was found regardless that the principle was rebutted.[87]

In summary, the issue of whether the principle of legality extends to protect statutory rights from *subsequent* legislation remains to be finally determined. The High Court has yet to decide the issue. Acceptance of the proposition by lower courts has been infrequent. Most significantly, it was endorsed and applied by the Full Court of the Federal Court in *Anglican Care*. However, there remains an air of doubt and uncertainty.

D Which statutory rights are protected?

So far, this article has referred to whether the principle of legality can extend to certain statutory rights. It is clear that there is no support for the principle being applied to *all* statutory rights. In *Buck*, Finn J spoke of statutory rights of 'sufficient significance to the individual',[88] observing that such rights can 'secure the basic amenities of life in

[85] *DPP (WA) v GTR* [2007] WASC 318 (20 December 2007) [28]–[29] (outcome upheld on appeal to Western Australia Court of Appeal) (right of certain young offenders not to be regarded as convicted); *Humphreys v Mulco Tool & Engineering Pty Ltd* [2006] NSWCA 355 (11 December 2006) [77]–[78] (rights to claim workers' compensation); *Tabcorp Holdings Limited v The State of Victoria* [2014] VSC 301 (26 June 2014) [1], [97], [99] (right to terminal payment on grant of new gambling licences) (appealed but this point left unaddressed).

[86] *Calimoso v Minister for Immigration and Border Protection* [2016] FCA 1335 (11 November 2016) [28]–[30] (right to merits review); *Minister for Immigration v Islam* (2012) 202 FCR 46, 55 [54] (special leave refused by the High Court) (right to merits review); *The Owners – Strata Plan No 72357 v Dasco Constructions* (2010) 77 NSWLR 607, 611 [24] (right to sue the builder for breach implied warranties); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, 472 [81]–[83], 474 [89] (right of Australian citizenship); *Harvey v Minister Administering Water Management Act 2000* (2008) 160 LGERA 50, 71–2 [65] (rights to extract and use groundwater).

[87] *Brett v O'Neill, Director General, Department of Education* [2015] WASCA 66 (7 April 2015) [18]–[20] (Buss, Le Miere and Murphy JJ) (right to bring a claim for unfair dismissal): 'It is not clear that the court should apply the same approach to limitations on statutory rights as to limitations on common law rights'.

[88] *Buck v Comcare* (1996) 66 FCR 359, 364; see also *Australian Postal Corporation v Sinnaiah* (2013) 213 FCR 449, 458 [32]: 'significant statutory rights'; *DPP (WA) v GTR* [2007] WASC 318 (20 December 2007) [28] (McKechnie J): 'right of significance to the individual'; *Humphreys v Mulco Tool & Engineering Pty Ltd* [2006] NSWCA 355 (11 December 2006) [77] (McColl JA dissenting): 'significant statutory entitlements'.

modern society'.[89] Alternatively, the language of 'valuable' statutory rights has been used in this context.[90] This terminology of 'significant' or 'valuable' statutory rights can be contrasted with 'fundamental' common law protections, although it is arguably a distinction without a difference. Pursuant to the principle of legality, Parliament is presumed by the courts to be aware of and committed to respecting 'fundamental' common law protections because of their significance and value.[91]

The difficulties in identifying 'fundamental' common law protections have previously been articulated.[92] There is no authoritative statement of fundamental common law protections, since their recognition is 'ultimately a matter of judicial choice'.[93] While attempts have been made to identify the range of fundamental common law protections, no two lists are identical – nor can they be. Recognition of a fundamental common law protection may be contestable or controversial, and thus prone to accusations of judicial activism, given its implications for the statutory interpretation process. It is 'never really made clear'[94] how the courts determine whether a common law protection is fundamental or not. To uphold actual Parliamentary intention and sovereignty, and the democratic nature of law making, '[o]ne needs reasonably determinate criteria to identify the fundamental rights which are going to be the basis to create these interpretive effects'.[95]

Similar criticisms apply to 'significant' or 'valuable' statutory rights. There is no authoritative statement of significant or valuable rights under statute law; it also being subject to judicial recognition. It follows that there is uncertainty about which statutory rights are actually significant or valuable and thus protected by the principle. Whether a statutory right is significant or valuable (or even a statutory *right* at all), may be

[89] *Buck v Comcare* (1996) 66 FCR 359, 365.
[90] See *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, 443 [110]. See also *Tabcorp Holdings Ltd v Victoria* (2016) 328 ALR 375, 389 [68]; and *State of NSW v Macquarie Bank Ltd* (1992) 30 NSWLR 307, 318, 319-20 (Kirby P).
[91] See further Chen, above n 52, 350 in response to the supposed distinction between 'important' and 'fundamental' common law protections.
[92] Ibid 343–53. As to Lim's conception of 'vulnerable' rights, 'a criterion of "vulnerability" may give rise to as many questions as one of "fundamental"': Groves, above n 39, 172 n 25.
[93] Meagher, 'The Common Law Principle of Legality', above n 105, 211; Meagher, 'The Common Law Principle of Legality in the Age of Rights', above n 54, 459.
[94] Meagher, 'The Common Law Principle of Legality in the Age of Rights', above n 54, 458.
[95] Sales, above n 26, 92.

contestable and controversial. For example, in *Vikpro Pty Ltd v Wyuna Court Pty Ltd*,[96] Holmes CJ of the Queensland Court of Appeal simply said in obiter that a lessee's right to resist payment of land tax under the *Land Tax Act 1915* (Qld) was not a 'right of such significance' as to attract the principle of legality.[97] The reasons for this conclusion were unarticulated. In cases to date, the process and criteria for the identification of significant or valuable statutory rights have not been fleshed out[98] (the same can also be said of fundamental common law protections).

There is potential for a far broader range of significant or valuable statutory rights, as compared with fundamental common law protections. With the proliferation of statutes in modern Australian society, there are hundreds, if not thousands, of rights on the statute books, potentially awaiting judicial pronouncement that they attract the protection of the principle of legality. Until these rights receive such pronouncement, and in the absence of a clear process or criteria for identification, their status is unclear. This causes difficulty for the operation of the principle of legality. How are parliamentarians to enact legislation (and parliamentary drafters to draft legislation) with this degree of uncertainty? This is an issue further explored in the context of the principle of legality's rationale.

An additional question is whether the recognition of significant or valuable statutory rights, like fundamental common law protections, may be 'weakened' or 'removed'. In respect of fundamental common law protections, McHugh J in *Malika Holdings Pty Ltd v Stretton*[99] stated that '[w]hat is fundamental in one age or place may not be regarded as fundamental in another age or place'.[100] The High Court has recognised

[96] [2016] QCA 225 (7 September 2016).
[97] Ibid [29].
[98] It is also not clear how to reconcile protection of a significant or valuable statutory right pursuant to the principle of legality, against competing valuable or significant non-statutory rights. See eg. *Vikpro Pty Ltd v Wyuna Court Pty Ltd* [2015] QSC 216 (7 August 2015) [29] (Holmes CJ). As to the principle of legality and fundamental common law protections, see Chen, above n 52, 362–73; and as to s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and human rights, see Bruce Chen, 'The Principle of Legality and Section 32(1) of the Charter: Same Same or Different?' on Gilbert + Tobin Centre of Public Law, AUSPUBLAW (26 October 2016) <https://auspublaw.org/2016/10/same-same-or-different/>.
[99] (2001) 204 CLR 290.
[100] Ibid 298 [28].

that the weakening or removal of fundamental common law protections may occur,[101] including by subsequent legislative incursions.[102] So presumably the same may also occur with significant or valuable statutory rights.[103] If that is correct, then only those statutory rights which are not regularly subject to amendment should be able to attract the protection of the principle of legality.

IV CONSISTENCY WITH RATIONALE OF THE PRINCIPLE OF LEGALITY

The principle of legality's 'original rationale', as set out earlier, is that '[i]t is in the last degree improbable' that the legislature would abrogate or curtail fundamental common law protections 'without expressing its intention with irresistible clearness'.[104] Parliament must have both 'directed its attention' to, and 'determined' or 'consciously decided' upon, abrogation or curtailment. Arguably, it could also be said it is in the last degree improbable that the legislature would repeal or amend certain statutory rights. There are likely to be statutory rights so 'significant' or 'valuable' that they ought not be taken to be easily abrogated or curtailed.

However, Australian commentator Dan Meagher has explained that the principle of legality 'can only operate as articulated in *Coco* if parliaments in Australia have prior notice as to the content of the common law bill of rights'.[105] Parliament cannot direct its attention to, and determine or consciously decide upon, abrogation or curtailment of something which it is not alert to. This is also consistent with the notion that the principle of legality reflects the institutional relationship between Parliament and the

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[101] *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). In that case, the High Court held that the presumption that the Crown is not bound by legislation was weakened. Historical reasons underlying the presumption were considered much less relevant in Australian contemporary conditions, since the activities of the Crown now 'reach into almost all aspects of commercial, industrial and developmental endeavour' and it commonly 'compete[s] and ha[s] commercial dealings on the same basis as private enterprise': ibid 19.

[102] See Chen, above n 52, 356–8, 359–61.

[103] As to 'constitutional' statutes in the United Kingdom, discussed in Part VI below, it has been said that their '[c]onstitutional force may be acquired, or may conceivably come to be lost': Sales, above n 26, 100 n 72.

[104] *Potter v Minahan* (1908) 7 CLR 277, 304 (citation omitted).

[105] Dan Meagher, 'The Common Law Principle of Legality' (2013) 38 *Alternative Law Journal* 209, 213; see also Meagher, above n 4. By contrast, a bill of human rights provides greater clarity about what rights it protects: see Chen, above n 98; see further Sales, above n 27, 610 in the United Kingdom context.

courts. The principle of legality is meant to be known both to Parliament and the courts for the purposes of statutory interpretation.

There are potentially significant difficulties with extending the principle of legality to certain statutory rights. As noted above, this is not within the principle's traditional scope. There is a lack of certainty about whether the principle can extend to significant or valuable statutory rights (and what those rights are). Given this absence of widespread agreement and acceptance, it could be argued that Parliament cannot have determined or consciously decided upon repeal or amendment of certain statutory rights, when it is not even aware that it is required to do so. Arguably, nor does extending the principle of legality beyond its conventional understanding reflect the institutional relationship between Parliament and the courts. The principle must be grounded in an awareness from both institutions as to how it will operate. Thus, an extended principle of legality would likely be subjected to accusations of judicial activism. As Jeffrey Goldsworthy has said: 'judges do not possess the same relatively unfettered authority to change these interpretive principles'.[106]

Lim relies on the '*Simms* rationale' – the normative justification that the principle of legality is concerned with enhancing the parliamentary process – to argue that the principle can extend to certain statutory rights.[107] He has argued that since the '*Simms* rationale' is animated by this purpose, the principle of legality should be directed away from its application to 'fundamental' common law protections, and towards, 'vulnerable' rights, which might be sourced in legislation. Lim conceptualised such rights as those 'vulnerable to casual abrogation'.[108] They 'may not be adequately protected by ordinary political processes, in the sense that there is a real risk they might be abrogated by Parliament without effective opportunity for electoral discipline'.[109]

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[106] Goldsworthy, 'Is Legislative Supremacy under Threat?', above n 43, 60, citing *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 322 (Brennan J). See also Jeffrey Goldsworthy, 'The Constitution and its Common Law Background' (2014) 25(4) *Public Law Review* 265, 270–1. Cf *Probuild v Shade Systems* (2018) 351 ALR 225, 239 [58] (Gageler J).
[107] Lim, above n 32, 398, 409.
[108] Lim, above n 32, 403.
[109] Ibid.

But even if the '*Simms* rationale' were accepted as a new and different rationale, actual legislative intention is still relevant.[110] Lord Hoffmann said that 'Parliament must squarely confront what it is doing'. As Jeffrey Goldsworthy has pointed out, his Lordship 'wrote as if legislatures can have intentions'.[111] Indeed, Lim made a rather significant concession – 'if Parliament is unaware that a particular right in a particular context will be regarded' as fundamental, then it 'it may be accepted' that Parliament 'may not be moved "squarely [t]o confront what it is doing"'.[112] This is consistent with other United Kingdom commentary. The principle of legality 'has no application "if the necessary contextual backcloth of a relevant basic common law principle is absent"'.[113] The fundamental common law protection must be 'already present'.[114] Speaking extra-curially, Justice Philip Sales (as his Lordship then was) adopted the words in *Simms* to say:

> if Parliament cannot be taken to *have been squarely on notice* of the existence of [a fundamental common law protection], then the process of 'reading down' or modifying the natural meaning of the words used would undermine rather than promote Parliament's intention as expressed in the legislation.[115]

Along those lines, Parliament cannot be taken to be 'squarely on notice' about the existence of certain statutory rights which are protected by the principle of legality, and to 'squarely confront' them in enacting legislation. The necessary contextual backcloth is not there; there is no common understanding and acceptance that the principle of legality extends to certain statutory rights.[116]

V CONSISTENCY WITH PARLIAMENTARY SOVEREIGNTY AND IMPLIED REPEAL

Whether an extended principle of legality is consistent with parliamentary sovereignty is a foundational issue. We have already seen the implications for parliamentary

[110] See Goldsworthy, above n 26.
[111] Goldsworthy, above n 26, 58.
[112] Lim, above n 32, 409.
[113] Sales, above n 27, 605, quoting *R v Secretary of State for the Home Department; Ex parte Stafford* [1999] 2 AC 38, 49 (Lord Steyn).
[114] Oliver Jones, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6th ed, 2013) 754.
[115] Sales, above n 27, 605 (emphasis added).
[116] As to what implications this line of reasoning has for newly recognised fundamental common law protections, see further Chen, above n 52, 347–53.

sovereignty, arising from the uncertainty about which statutory rights might be protected by the principle of legality. There are further questions, explored below, regarding whether an extended principle of legality might impermissibly limit legislative power.

The writings of A V Dicey loom large when it comes to the concept of parliamentary sovereignty. In his seminal work, *Introduction to the Study of the Law of the Constitution*,[117] Dicey said that it was a trait of Parliamentary sovereignty that the legislature had the power 'to alter any law, fundamental or otherwise, as freely and in the same manner as other laws'.[118] No bill is 'legally speaking, a whit more sacred or immutable than the others, for they each will be neither more nor less than an Act of Parliament'.[119] Thus on the Diceyan view, it is understood that all statutes are equal and Parliament can legislate to repeal or amend existing statutes.[120]

Further, Dicey said that 'a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment'.[121] It would contradict the notion of parliamentary sovereignty. Dicey approved the statement that a 'Parliament cannot so bind its successors by the terms of any statute, as to limit the discretion of a future Parliament'.[122] Hence, on the Diceyan view, the doctrine of implied repeal is considered integral to parliamentary sovereignty.[123] The doctrine stands for the proposition that '[i]f a later Act makes contrary provision to an earlier, Parliament (though it has not expressly said so) is taken to intend the earlier to be

[117] A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co Ltd, 10th ed, 1960).
[118] Ibid 91; see also 88.
[119] Ibid 88–9.
[120] See further discussion in Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) 302; Sir John Laws, 'Constitutional Guarantees' (2008) 29(1) *Statute Law Review* 1, 3; Mark Elliott, 'Embracing "Constitutional" Legislation: Towards Fundamental Law?' (2003) 54(1) *Northern Ireland Legal Quarterly* 25; Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing, 2009) 9–10; Geoffrey Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?' (2006) 17 *Public Law Review* 188, 193, 198, see also 199–200.
[121] Dicey, above n 117, 68 n 1.
[122] Ibid 67, quoting Alpheus Todd, *Parliamentary Government in the British Colonies* (Little, Brown, and Company, 1st ed, 1880) 192; see also 68 n 1.
[123] Kavanagh, above n 120, 297; Young, above n 120, 32–3; Elliott, above n 120, 25; Lindell, above n 120, 189, 193. Cf Goldsworthy 299, 182; and Daniel Kalderimis and Chapman Tripp, '*R v Pora*' [2001] *New Zealand Law Journal* 369.

repealed'.[124] This proposition has been endorsed by the High Court of Australia.[125] Thus, if the principle of legality is applied to protect *earlier* significant or valuable statutory rights from *subsequent* infringing statutes, concerns would undoubtedly be raised that this approach is contrary to the doctrine of implied repeal and challenges parliamentary sovereignty.[126]

It is true that the principle of legality's extension to significant or valuable statutory rights would mean that some statutory provisions are, in Dicey's words, 'more sacred or immutable' than others and Parliament cannot 'as freely and in the same manner' repeal or amend such provisions. This does create a hierarchy of statutory provisions. It is only those which are more significant or valuable that are protected by the principle of legality. But otherwise, the protection of significant or valuable statutory rights pursuant to the principle of legality is consistent with Dicey's conceptualisation of parliamentary sovereignty. Parliament retains the ability to repeal or amend such statutory rights, provided that it has used clear and unambiguous language to do so in the subsequent infringing statute. After all, the principle of legality is considered an orthodox principle of statutory interpretation that 'operat[es] consistently with the principle of parliamentary supremacy'.[127] It 'can be defeated […] by a sovereign legislature'.[128]

Moreover, the so-called doctrine of implied repeal does not pose a difficulty for extending the principle of legality to significant or valuable statutory rights. Implied repeal is a 'comparatively rare phenomenon'.[129] Commentators have recognised as

[124] Bennion, above n 15, 304. Rather than 'implied repeal', Pearce and Geddes prefer to say 'the later Act displaces or supercedes the earlier': Pearce and Geddes, above n 5, 328.
[125] See, for example, *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603, 616, 617 (Latham CJ), 623 (Starke J), 625 (Dixon J), 633–4 (Evatt J, in obiter); *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 137–8 [18] (Gummow and Hayne JJ); *Firebird Global Master Fund II Ltd v Nauru* (2015) 258 CLR 31, 60 [82] (French CJ and Kiefel J).
[126] Although noting that in the Australian context, some prefer to use the term 'parliamentary supremacy' rather than 'parliamentary sovereignty', as parliaments across Australia are subject to the *Australian Constitution*.
[127] Chief Justice Robert French, 'The Courts and the Parliament' (2013) 87 *Australian Law Journal* 820, 827.
[128] Alexander Williams and George Williams, 'The British Bill of Rights Debate: Lessons from Australia' [2016] *Public Law* 471, 484.
[129] *Butler v Attorney-General (Vict)* (1961) 106 CLR 268, 275, 276 (Fullagar J); cited in *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1, 14.

much – it is expressed more accurately as a presumption *against* implied repeal;[130] is a 'measure of last resort';[131] its operation is 'much more limited than is often assumed';[132] and it 'is not the rule, but the exception'.[133] In the Australian jurisprudence, it is said that the courts firstly presume that 'statutes do not contradict one another',[134] and seek to apply a 'principle of harmonious construction'[135] so that both statutes can operate harmoniously and not in conflict.[136]

The respective thresholds for rebutting the principle of legality and the presumption against implied repeal are perhaps not so far removed. Both would apply at the point of resolving apparent conflict. In Australia, pursuant to the principle of legality 'the implication must be necessary, not just available or somehow thought to be desirable'.[137] The predominant approach[138] is to ask whether rebuttal of the principle is necessary to 'prevent the statutory provisions from becoming inoperative or meaningless'[139] by reference to their purpose. The approach to the presumption against implied repeal is also stringent in the Australian cases. For instance, in *Saraswati v The Queen*,[140] Gaudron J stated:

> It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is *necessarily to be implied*.[141]

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[130] Bennion, above n 15, 305. See also Young, above n 120, 36–7.
[131] Kavanagh, above n 120, 298.
[132] Ibid.
[133] Young, above n 120, 36; see also 37.
[134] *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 19 [48] (Crennan, Kiefel and Bell JJ) citing *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 137–8 [18], 146 [49], 148 [54]–[55].
[135] *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 33 [98] (Gageler J) citing *Butler v Attorney-General (Vict)* (1961) 106 CLR 268, 276, *Saraswati v The Queen* (1991) 172 CLR 1, 17, *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 133–4 [4], 138 [18].
[136] See also Young, above n 120, 43; and Kavanagh, above n 120, 297–8 in the United Kingdom context.
[137] *X7 v Australian Crime Commission* (2013) 248 CLR 92, 149 [142]; cited with approval in *Lee v NSW Crime Commission* (2013) 251 CLR 196, 265 [173] (Kiefel J); see also *Plenty v Dillon* (1991) 171 CLR 635, 654: 'inconvenience in carrying out an object authorised by legislation is not a ground for eroding fundamental common law rights'.
[138] See further Chen, above n 11, 428–32.
[139] *Coco v The Queen* (1994) 179 CLR 427, 436, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ).
[140] (1991) 172 CLR 1.
[141] Ibid 17 (emphasis added). See also *Goodwin v Phillips* (1908) 7 CLR 1, 10 quoting *Craies on Statute Law* (Sweet and Maxwell, 4th ed, 1936) 303; *Hack v Minister for Lands* (1905) 3 CLR 10, 23–4 (O'Connor J); *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 134 [4] (Gleeson CJ), 163 [109]–[110] (Kirby J); *Shergold v Tanner* (2002) 209 CLR 126, 136–7 [34] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ). See further the general tenor of *Butler v Attorney-General (Vict)* (1961) 106 CLR 268, 275–6 (Fullagar J), 280 (Kitto J), 290 (Windeyer J).

A necessary implication under the presumption against implied repeal will arise where 'the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together';[142] they 'cannot be reconciled'.[143]

The same terminology of 'necessary implication' is used in both the presumption against implied repeal and the principle of legality. As Basten has said, the 'strength' of the presumption against implied repeal 'reflects the language used to describe' the principle of legality.[144] Both the presumption against implied repeal and an extended principle of legality would afford stringent protection to earlier statutes. That being the case, a principle of legality which protects significant or valuable statutory rights is consistent with the presumption against implied repeal. Thus, implied repeal – since it is the exception to the rule – presents no theoretical obstacle. The principle of legality is in addition to and reinforces the existing proposition that an earlier statute is not to be impliedly repealed without clear and unambiguous language.[145] An extended principle of legality would be another interpretive principle relevant to resolving apparent conflict between statutes.[146]

VI 'CONSTITUTIONAL' STATUTES

The remainder of this article focuses on analogous instances where statutory rights are protected through interpretation, and whether they provide support for extending the principle of legality to significant or valuable statutory rights. The analysis shows that an extended principle of legality is not as revolutionary for Australia as it might first seem, however difficulties remain.

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[142] *Hack v Minister for Lands* (1905) 3 CLR 10, 23 (O'Connor J) quoting *Kutner v Phillips* (1891) 2 QB 267, 271–2; see further *Butler v Attorney-General (Vict)* (1961) 106 CLR 268, 276 (Fullagar J), 280 (Kitto J). See also Young, above n 120, 36–7 in the United Kingdom context.

[143] *Firebird Global Master Fund II Ltd v Nauru* (2015) 258 CLR 31, 61 [87] (French CJ and Kiefel J).

[144] Basten, above n 31, 86.

[145] See also Williams and Hume, above n 13, 19; Lim, above n 32, 412. Cf Basten, above n 31, 85; Lim, above n 32, 411.

[146] There are of course others which do not necessarily point in the same direction, such as *generalia specialibus non derogant* – the presumption that general laws do not derogate from special laws.

First, a parallel may be drawn between the principle of legality protecting statutory rights and the recognition and protection of 'constitutional' statutes in United Kingdom jurisprudence. Judicial commentators have observed how these constitutional statutes are safeguarded through the strict interpretation of subsequent statutes.[147] In obiter, French CJ of the High Court of Australia said that the classification of constitutional statutes in the United Kingdom has:[148]

> been used, albeit not without controversy,[149] to attract to them the protection of a rule constraining their amendment by mere implication in a way which is analogous to the operation of the principle of legality in respect of common law rights and freedoms.[150]

Lord Neuberger as President of the United Kingdom Supreme Court has remarked (extra curially) that the protection of constitutional statutes 'may in fact be no more than an extension of the principle of legality'.[151] Similarly, Lord Justice Sales (extra curially) has said that the interpretive process requires respect for constitutional statutes 'in the interpretation of later legislation in much the same way as by reference to fundamental rights under the principle of legality'.[152] Since the United Kingdom approach applies the principle of legality or something close to it to *statute*, this provides a useful comparator for considering whether the principle of legality can and should be extended to statutory rights in Australia.

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[147] Lord Neuberger, 'The Constitutional Role of the Supreme Court in the Context of Devolution in the UK' (Speech delivered at the Lord Rodger Memorial Lecture 2016, Glasgow, 14 October 2016) [18]–[20]; Sales, above n 26, 91; *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 217–8 [55] (French CJ); Robert S French AC, 'Foreword' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (The Federation Press, 2017) viii; and Laws, above n 120, 8, in commentary on his own judgment in *Thoburn v Sunderland City Council* [2003] QB 151.
[148] *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 217–8 [55].
[149] See *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 419–20 [62] (Lord Rodger); 'Editorial: Constitutional Statutes', (2007) 28(2) *Statute Law Review* iii; Geoffrey Marshall, 'Metric Measures and Martyrdom by Henry VIII Clause', (2002) 118 *Law Quarterly Review* 493, 495–6, 501.
[150] *Thoburn v Sunderland City Council* [2003] QB 151, 185–7 [60]–[64] (Laws LJ); Daniel Greenberg (ed), *Craies on Legislation* (9th ed, 2008) 581–2.
[151] Neuberger, above n 147, [20].
[152] Sales, above n 26, 91.

A United Kingdom jurisprudence

Thoburn v Sunderland City Council[153] is the 'novel'[154] and 'controversial'[155] decision that is 'usually credited as being the source of the idea'[156] that constitutional statutes are subject to special protection through interpretation. The High Court of Justice of England and Wales (Laws LJ, Crane J agreeing) defined a 'constitutional statute' as one which '(a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights'.[157] Notably, the first limb of this definition makes the concept of constitutional statutes in the United Kingdom broader than the notion of significant or valuable statutory rights espoused in Australia.

The High Court in *Thoburn*, referring to the principle of legality, extended it to encompass constitutional statutes. The Court said:

> In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental […] And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes.[158]

The High Court considered that the *European Communities Act 1972* (UK) (EC Act) – which incorporated European Community Law into United Kingdom domestic law and was at the heart of the 'Brexit' debate – was a constitutional statute.[159] Thus, the High Court thought that what was required for its repeal or significant amendment was 'express words in the later statute, or […] words so specific that the inference of an

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[153] [2003] QB 151.
[154] Adam Tomkins, *Public Law* (Oxford University Press, 2003) 124; Goldsworthy, above n 37, 312; Elliott, above n 120, 28, 31; Christopher Forsyth and Mark Elliott, 'The Legitimacy of Judicial Review' (2003) *Public Law* 286, 298.
[155] Mark Leeming, 'Equity: Ageless in the "Age of Statutes"' (2015) 9 *Journal of Equity* 108, 109 n 5. See also Nicholas Bamforth, 'A Constitutional Basis for Anti-discrimination Protection?' (2003) 119 *Law Quarterly Review* 215, 220; Kevin Boreham, 'International Law as an Influence on the Development of the Common Law: *Evans v New South Wales*' (2008) 19 *Public Law Review* 271, 277.
[156] David Feldman, 'The Nature and Significance of "Constitutional" Legislation (2013) 129 *Law Quarterly Review* 343, 345.
[157] [2003] QB 151, 186 [62].
[158] Ibid.
[159] This was subsequently confirmed by the United Kingdom Supreme Court in the 'Brexit' litigation: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, [67].

actual determination to effect the result contended for was irresistible'.[160] '[G]eneral words could not be supplemented, so as to effect a repeal or significant amendment to a constitutional statute'.[161] Repeal or significant amendment of the EC Act could not be by mere implication in a subsequent statute. It needed to be by *necessary* implication.

The *Thoburn* approach has gained some support in the ensuing jurisprudence.[162] The United Kingdom Supreme Court went further in *H v Lord Advocate (SC(Sc))*,[163] again in obiter. Lord Hope, who gave the leading judgment, observed the 'fundamental constitutional nature of the settlement' achieved by the *Scotland Act 1998*.[164] When it came to overriding this statute, 'only an express provision to that effect could be held to lead to such a result'.[165] The fact that the *Scotland Act* was a constitutional statute 'in itself must be held to render it incapable of being altered otherwise than by an express enactment'.[166]

While Lord Hope did not refer explicitly to the principle of legality or *Thoburn*, significantly, his Lordship accepted that constitutional statutes were subject to special protection. Moreover, Lord Hope considered that a constitutional statute could only be rebutted by express words, and not by necessary implication. This goes beyond *Thoburn* and the principle of legality – which can be rebutted by necessary implication. In that respect, *H* is 'quite radical'.[167]

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[160] [2003] QB 151, 187 [63]. Some commentators have taken the view that the dicta in *Thoburn* stands for the proposition that constitutional statutes can only be repealed or significantly amended by express words. However, in light of the second limb of this quotation, such a reading is mistaken.
[161] Ibid.
[162] *H v Lord Advocate (SC(Sc))* [2013] 1 AC 413; *Miller & Anor, R (On the Application Of) v The Secretary of State for Exiting the European Union (Rev 1)* [2016] EWHC 2768 (Admin) (3 November 2016); cf *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61 (on appeal). See also *R (HS2) v Secretary of State* [2014] 2 All ER 109, 168 [207] (Lords Neuberger and Mance) where an issue arose as to how to deal with a potential conflict between a constitutional statute and another, subsequent constitutional statute.
[163] [2013] 1 AC 413.
[164] Ibid 435 [30].
[165] Ibid.
[166] Ibid 435–6 [30].
[167] Farrah Ahmed and Adam Perry, 'The Quasi-entrenchment of Constitutional Statutes' (2014) 73(3) *Cambridge Law Journal* 514, 521.

There are other statutes considered to be constitutional.[168] But whether subsequent statutes are to be interpreted strictly so as to protect these constitutional statutes, the case law is sparse. The United Kingdom position remains to be finally determined. The discussion in *Thoburn* and *H* was only obiter. As Lord Neuberger has said (extra curially): 'It remains to be seen whether the notion of entrenched legislation with special constitutional status […] is correct, and, if it is, how far it goes'.[169] This potential development is in some respects defensible, but in other respects has its weaknesses.

B Consistency with parliamentary sovereignty and implied repeal

Concerns about consistency with parliamentary sovereignty for constitutional statutes in the United Kingdom bear some resemblance to concerns about a principle of legality which protects significant or valuable statutory rights in Australia. As outlined above, Dicey's view was that no bill is 'more sacred or immutable' than others. Dicey further stated that '[t]here is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional'.[170] The *Thoburn* decision does run counter to these ideals. The High Court recognised the creation of 'a hierarchy of Acts of Parliament'[171] – ordinary statutes and constitutional statutes. Lord Justice Laws (commentating extra curially on his judgment) admitted as much, when he said that while '[i]t is inherent in the doctrine [of parliamentary sovereignty] that there is no hierarchy of statutes; all have equal status',[172] 'we need the means to create a hierarchy of laws, so that our constitution may furnish constitutional guarantees'.[173]

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[168] Other statutes considered to be 'constitutional' include the *Magna Carta 1297*, *Petition of Right 1628*, *Bill of Rights 1689* and *Claim of Rights Act 1689*, *Act of Settlement 1701*, *Act of Union 1707*, *Union with Scotland Act 1706*, *Representation of the People Acts 1832*, *1867* and *1884*, *Human Rights Act 1998*, *Government of Wales Act 1998*, and *Constitutional Reform Act 2005*: see *Thoburn v Sunderland City Council* [2003] QB 151, 186 [62]; *R (HS2) v Secretary of State* [2014] 2 All ER 109, 167–8 [207]. See further Bennion, above n 15, 189 n 11, 190 n 1 for other potential examples.
[169] Neuberger, above n 147, [19].
[170] Dicey, above n 117, 89.
[171] [2003] QB 151, 186 [62].
[172] Laws, above n 120, 3.
[173] Ibid 5.

Nevertheless, the High Court in *Thoburn* maintained the view that its approach 'preserves the sovereignty of the legislature'[174] and Laws LJ stated extra curially that the *Thoburn* approach was not a '*fatal* assault on the doctrine of sovereignty'.[175] This is presumably because constitutional statutes can still be repealed by express words or necessary implication.[176] The same could be said of a principle of legality in Australia which protects significant or valuable statutory rights.

Specifically in relation to implied repeal, the High Court in *Thoburn* considered that the doctrine of implied repeal had been 'modified',[177] by creating an 'exception'[178] to the doctrine with respect to constitutional statutes. However, this description is apt to mislead. As discussed above, implied repeal is itself the exception to the presumption *against* implied repeal. The *Thoburn* approach provides an additional interpretive principle which reinforces the presumption against implied repeal. It does not truly involve a modification as has been suggested. Similarly, an extended principle of legality in the Australian context would not involve a modification of the doctrine of implied repeal.

C Position in Australia

The purpose of this article is not to consider whether the concept of constitutional statutes should be applied in Australia. Nevertheless, for completeness it will be canvassed briefly here. Jeffrey Goldsworthy has suggested that *Thoburn* 'could be endorsed on relatively orthodox grounds'.[179] That is because '[w]e already accept that there are fundamental common law rights that Parliament is very unlikely to intend to override, and it is just as plausible to think that there are very important statutes that it is equally unlikely to intend to override'.[180]

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[174] *Thoburn v Sunderland City Council* [2003] QB 151, 187 [64].
[175] Laws, above n 120, 6 (emphasis added).
[176] See ibid 6–7.
[177] [2003] QB 151, 185 [59]. See further Laws, above n 120, 7–8.
[178] [2003] QB 151, 185 [60].
[179] Goldsworthy, above n 37, 312.
[180] Ibid 313. See also Rebecca Prebble, 'Constitutional Statutes and Implied Repeal: The *Thoburn* Decision and the Consequences for New Zealand (2005) 36 *Victoria University of Wellington Law Review* 291, 300.

To date in Australia 'there is no precedent for a distinction between […] "constitutional statutes" and other statutes'.[181] No Australian court has applied *Thoburn*, which can be traced to a movement to have identified 'rights' or 'guarantees' which should be accorded some higher status and protection,[182] in the absence of a 'written constitution' in the United Kingdom.[183] The drivers do not exist to the same extent in Australia. Our written Constitution, such as s 51, expressly denotes the limits of Commonwealth legislative power. Safeguards have also been implied from our Constitution based on: the requirement that the Commonwealth Parliament be directly chosen by the people;[184] the separation of powers at the federal level;[185] and in respect of State legislative power, the 'institutional integrity' of courts at the state level.[186] It remains true that the 'rights' which can be derived from our Constitution are scant. But at least on the basis of views expressed by French CJ, it appears very unlikely for Australian courts to adopt the *Thoburn* approach.[187] More probable is the approach taken in *Buck* – the principle of legality being extended to protect significant (or valuable) statutory rights.

D Analogous criticisms

In any event, the United Kingdom developments with respect to constitutional statutes illuminate similar concerns that would arise under an extended principle of legality.

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[181] Williams and Reynolds, above n 55, 251. One commentator has provided a list of 'candidates for treatment as constitutional legislation' in the Australian context: Simon Evans, 'Why is the Constitution Binding? Authority, Obligation and the Role of the People' (2004) 25 *Adelaide Law Review* 117, 120.
[182] See *Thoburn v Sunderland City Council* [2003] QB 151, 187 [64]; Laws, above n 120, 4–8; Elliott, above n 120, 40.
[183] Cf Forsyth and Elliott, above n 154, 296–7. As to the position in New Zealand, see Prebble, above n 180.
[184] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.
[185] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
[186] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[187] In *Cadia Holdings*, French CJ said in obiter, 'The application of the term "constitutional" to a statute which is not a written constitution must be approached with some care': (2010) 242 CLR 195, 217 [54]. His Honour went on to say, 'in a country with a written constitution the utility of such a designation, which is not amenable to precise definition, may be debatable': ibid 218 [56]. More recently, his Honour said (extra curially) that the characterisation of certain statutes as constitutional 'is no doubt of greater importance in the United Kingdom than in Australia': French, above n 147, viii. See further Williams and Hume, above n 13, 18–9.

These have significant force. For instance, Geoffrey Marshall was of the view that *Thoburn* 'raises some difficult issues':[188]

> The proffered definitions are undeniably vague and it is hard to see any clear dividing line between ordinary statutes and statutes that deal with rights of a kind that we would now regard as fundamental. Are rights to education, medical services or pensions basic or fundamental, or are they mere run-of-the-mill entitlements? […]
>
> What, in any event, is the rationale for supposing that some Acts of Parliament, whatever their subject matter, embody the intentions of the legislature in a more forceful way or in a more protected form than others, in the absence of any explicit Parliamentary expression of intention to create first and second class statutes? […] In the absence of a consistent and workable definition […] [t]his seems to inject an unwelcome element of uncertainty into our public law.[189]

The above criticisms relate to the lack of clarity around the definition of constitutional statutes and the dubious consistency with legislative intention in their recognition and protection. They pertain to the undeveloped criteria and undefined range of statutes which may be regarded as constitutional,[190] and as a result, the lack of certainty in statutory interpretation. If the courts are to apply the presumption 'in accordance with the wish of the Parliament enacting the constitutional statute',[191] being a reference to the notion of actual legislative intention, the courts must also be taking their cues from Parliament as to which statutes deserve special protection. Moreover, any attempt to

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[188] Marshall, above n 149, 495. See also 'Editorial: Constitutional Statutes', above n 149; Feldman, above n 156, 345–8; Matthew SR Palmer, 'What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-Holders' (2006) 17 *Public Law Review* 133, 137 n 24; Prebble, above n 180, 297, 307; *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 419 [62] (Lord Rodger); Mark Elliott, 'Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution' (2014) 10 *European Constitutional Law Review* 379, 386.

[189] Marshall, above n 149, 495–6.

[190] Cf Lord Justice Sales who posits (extra curially) that '[s]uch constitutional force may be inferred from the circumstances in which a particular piece of legislation was passed, or may be acquired over time from the prominence it is given in constitutional debate': above n 26, 100 (footnotes omitted).

[191] Daniel Greenberg (ed.), *Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation* (Sweet & Maxwell, 10th ed, 2012) 665. However, Mark Elliott has observed that Laws LJ in *Thoburn* 'was at pains to emphasise that whether something is a constitutional statute is *not* a matter of parliamentary intention. Rather, it is a conclusion reached, and a status ascribed to legislation by, the *common law*': 'Critical Reflections on the High Court's Judgment in *R (Miller) v Secretary of State for Exiting the European Union*' on Public Law for Everyone, Mark Elliott and Hayley J Hooper (7 November 2016) <https://publiclawforeveryone.com/2016/11/07/critical-reflections-on-the-high-courts-judgment-in-r-miller-v-secretary-of-state-for-exiting-the-european-union/>. See further Goldsworthy, above n 37, 313–4; Lindell, above n 120, 198 n 36, 199–200. Cf *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (3 November 2016) [88]: 'Since in enacting the [EC Act] as a statute of major constitutional importance *Parliament has indicated* that it should be exempt from casual implied repeal by Parliament itself' (emphasis added).

list the constitutional statutes 'is not and could not be complete'[192] – 'from a practical perspective this is itself not encouraging'.[193] These criticisms mirror and are equally applicable to extending the principle of legality to significant or valuable statutory rights in Australia.

VII HUMAN RIGHTS STATUTES

A Overview

A further comparison may be made between an extended principle of legality and the protection of human rights under statutory bills of rights. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter') is a statutory bill of rights. It is one of only two enacted in Australia, the other being the *Human Rights Act 2004* (ACT). Taking the Victorian Charter as the example, section 32(1) provides that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights' under the Charter.[194]

The Victorian Charter makes clear that s 32(1) applies to both legislation 'passed before *or after*' commencement of the Charter.[195] Thus, statutes passed after commencement of the Charter which engage human rights, set out in the earlier enacted Victorian Charter, are to be interpreted pursuant to s 32(1) in a way which avoids incompatibility. Nevertheless, the Victorian Charter recognises that it may not always be 'possible' to interpret a statutory provision compatibly with human rights. Unlike a constitutional bill of rights, this does not affect the validity of primary legislation.[196] Rather, s 36(2) provides that the Victorian Supreme Court and Court of Appeal may make a 'declaration of inconsistent interpretation'.[197] This declaration does not affect 'the validity, operation or enforcement of the statutory provision'.[198]

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[192] Greenberg, above n 191.
[193] Editorial: Constitutional Statutes', above n 149, iv.
[194] See also *Human Rights Act 2004* (ACT) ('ACT HRA'), s 30.
[195] Victorian Charter, s 49(1) (emphasis added); see also ACT HRA, s 29.
[196] Victorian Charter, ss 32(3)(a). See also s 31, which provides that Parliament 'may expressly declare' that an Act or a provision of an Act 'has effect despite being incompatible with one or more of the human rights' (override declaration).
[197] See also ACT HRA, s 32 on 'declarations of incompatibility'.
[198] Victorian Charter ss 36(5)(a); see also ACT HRA, s 32(3)(a).

Section 32(1) has predominantly been equated with the principle of legality in the jurisprudence. It 'applies in the same way as the principle of legality but with a wider field of application';[199] although this proposition has been disputed.[200] Parallels might therefore be drawn between the Victorian Charter and an extended principle of legality which protects significant or valuable statutory rights. Both would protect rights set out in statute. Both would require a restrictive interpretation of subsequent infringing statutes in the absence of clear and unambiguous language.

B Consistency with parliamentary sovereignty and implied repeal

The issue of consistency with parliamentary sovereignty and implied repeal also arises under the Victorian Charter and other statutory bills of rights. A common theme between the Victorian Charter, the *New Zealand Bill of Rights Act 1990* (NZ) (NZ BORA), and the United Kingdom *Human Rights Act 1998* (UK) (UK HRA) is that they are designed to preserve parliamentary sovereignty. The Victorian Charter is based on what is commonly known as a 'dialogue' model for human rights.[201] It promotes a human rights dialogue between the three branches of Victorian government – the Executive, Parliament, and the courts.

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[199] *Momcilovic v The Queen* (2011) 245 CLR 1, 50 [51] (French CJ). See further *Slaveski v Smith* (2012) 34 VR 206, 215 [23], 219 [45] (Warren CJ, Nettle and Redlich JJA); *Noone v Operation Smile* (2012) 38 VR 569, 608 [139] (Nettle JA); *Victorian Toll v Taha* (2013) 49 VR 1, 12–13 [25] (Nettle JA); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383 [85] (Redlich, Osborn and Priest JJA); *Carolan v The Queen* (2015) 48 VR 87, 103–4 [46] (Ashley, Redlich and Priest JJA). Cf *R v DA* [2016] VSCA 325 (16 December 2016) [44] n 47.

[200] See *Victorian Toll v Taha* (2013) 49 VR 1, 61–3 [188]–[191] (Tate JA, in obiter); Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: the *Momcilovic* Litigation and Beyond' (2014) 40 *Monash University Law Review* 340; Justice Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the Charter — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online Journal* 43; Sir Anthony Mason, 'Statutory Interpretive Techniques under the *Charter*: Section 32' (2014) 2 *Judicial College of Victoria Online Journal* 69; Gledhill, above n 54.

[201] However, usage of the term 'dialogue' was criticised by members of the High Court in *Momcilovic v The Queen* (2011) 245 CLR 1: see 67–8 [95] (French CJ); 84 [146(iii)] (Gummow J, Hayne J agreeing), 207 [534] (Crennan and Kiefel JJ). Cf Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 37, 61–2 n 104 in response to those remarks.

Even under this dialogue model, there is a large body of commentary on whether the interpretive mechanisms of the Victorian Charter, NZ BORA and UK HRA are consistent with implied repeal[202] – which, it will be recalled, is considered integral to Parliamentary sovereignty.[203] With respect to post-bill of rights legislation,[204] do interpretive mechanisms undermine the so-called doctrine of implied repeal, by requiring that when they subsequently enact legislation which is incompatible with human rights, they must do so with clarity? In the New Zealand case of *R v Pora*,[205] three justices of the Court of Appeal gave precedence where fundamental human rights were concerned to an earlier statute over a subsequent statute, including by reference to s 6 of the NZ BORA – the equivalent of s 32(1) of the Victorian Charter. Chief Justice Elias and Tipping J stated that '[i]t is not a correct approach to assume that pro tanto implied repeal […] is to be preferred'[206] and this 'does not affect the orthodoxy that Parliament cannot bind its successors'.[207] Justice Thomas remarked that implied repeal 'need not be treated as if it were absolute'.[208] Section 6 was thus deployed to operate against the so-called doctrine of implied repeal.[209] But three other justices,[210] Gault, Keith and McGrath JJ, disagreed. Even with the NZ BORA, their Honours said,

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[202] For the Victorian Charter, see James Allan, 'The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism' (2006) 30(3) *Melbourne University Law Review* 906, 911–2; Jim South, 'Potential Constitutional and Statutory Limitations on the Scope of the Interpretative Obligation Imposed by s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)' (2009) 28(1) *The University of Queensland Law Journal* 143, 155–6; The Hon Sir Anthony Mason, 'Human Rights: Issues to be Resolved' (Speech delivered at the Law Institute of Victoria, Melbourne, 24 August 2009) [55]–[60].

[203] See n 123.

[204] The issue of implied repeal also arises with respect to pre-bill of rights legislation. For example, does s 32(1) of the Victorian Charter, being the subsequently enacted legislation, effect implied repeal of the earlier statute by requiring that the earlier statute must be interpreted where possible so as to be compatible with human rights? This issue was raised in the *Momcilovic v The Queen* proceeding, but not determined: see Transcript of Proceedings, *Momcilovic v The Queen* [2011] HCATrans 015 (8 February 2011) 2260–80, 3435, 4160–4245. For present purposes, the application of s 32(1) to post-Charter legislation provides the better analogy with the principle of legality's extended application to protect significant or valuable statutory rights from subsequent infringing statutes.

[205] [2001] 2 NZLR 37.

[206] Ibid 50 [51]; see also 47–8 [36]–[40].

[207] Ibid 50 [52]. Rather, said their Honours, the outcome 'implements Parliament's own requirement in s 6 of the [NZ BORA] that Parliament must speak clearly if it wishes to trench upon fundamental rights': ibid; see also 46–7 [29].

[208] Ibid 69 [140]. Not unlike Laws LJ's view in *Thoburn* that constitutional statutes created an 'exception' to the doctrine of implied repeal, Thomas J thought that the doctrine can be subject to 'modification': ibid 70 [144].

[209] This approach was controversial: see Andrew Butler, 'Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand' [2001] *Public Law* 586; Anita Killeen, Richard Ekins and John Ip, 'Undermining the Grundnorm?' [2001] *New Zealand Law Journal* 299; Kalderimis and Tripp, above n 123; Anthony Bradley, 'Conflicting Statutory Provisions: The Impact of Fundamental Rights' [2001] *New Law Journal* 311.

[210] The seventh justice, Richardson P, did not consider this issue.

if two enactments cannot be read together 'the provision enacted later in time will prevail'.[211]

There are other examples of rights-protective interpretive provisions, which can operate prospectively. For example, s 17(2) of the *Supreme Court Act 1986* (Vic) provides that '[u]nless otherwise expressly provided by this or any other Act, an appeal lies to the Court of Appeal from any determination of the Trial Division constituted by a Judge'. Like Lord Hope's approach in *H v Lord Advocate*,[212] this goes further than the test under the principle of legality, by excluding the possibility of amendment or repeal by necessary implication. Section 17(2) was the subject of proceedings in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue*,[213] where the High Court took no issue with the provision's prospective operation,[214] finding that the subsequently enacted s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) did not 'expressly' provide otherwise.[215]

Based on the position taken earlier in this article, the application of s 32(1) of the Charter, and other rights-protective interpretive provisions, to subsequent statutes is broadly consistent with the presumption *against* implied repeal, with implied repeal better viewed as an exception to the rule. What the above further demonstrates is that there are already instances where the courts are empowered to interpret legislation in a way which protects certain statutory rights from subsequent statutes. There already are certain statutes that are 'more sacred or immutable' than others and which Parliament cannot 'as freely and in the same manner' legislate against. On the one hand, this bodes well for extending the principle of legality to protect significant or valuable statutory rights. An extended principle is not out of step with these rights-based developments.

However, where the fundamental difference lies is that the interpretive function of s 32(1) is conferred by Parliament, rather than self-conferred by the courts. It is a

[211] [2001] 2 NZLR 37, 63 [110].
[212] See Part VI-A above.
[213] (2001) 207 CLR 72.
[214] Cf *South-Eastern Drainage Board (SA) v Savings Bank of SA* (1939) 62 CLR 603.
[215] (2001) 207 CLR 72, 78–9 [11]–[12] (Gaudron, Gummow, Hayne and Callinan JJ).

democratically sanctioned statutory command. Parliament when enacting legislation can be taken to know that the courts will, where possible, interpret legislation compatibly with a clearly identified set of human rights. Given this, s 32(1) bears a greater degree of legitimacy than the courts modifying a common law presumption from how it has long been understood and accepted to operate. There is greater flexibility for Parliament itself to make explicit and subscribe to new 'standing commitments'.[216] Moreover, if Parliament already has the capacity to lay down interpretive provisions which require that particular statutory rights not be lightly overridden, then there is little to be gained by extending the principle of legality to do the same. Rather, applying the principle to statutory rights in the absence of such interpretive provisions can be seen as contrary to legislative intention.[217]

C Convergence between principle of legality and Victorian Charter?

Furthermore, even if one accepts that the principle of legality extends to significant or valuable statutory rights, this logically leads to a further question – can the principle be applied to the human rights in the Victorian Charter itself? In *DPP v Kaba*,[218] Bell J of the Victorian Supreme Court said in obiter, 'there is reason to think that the statutory human rights specified in the Charter […] are protected at common law under the principle of legality'.[219] That was because 'human rights specified in the Charter may be compared with the fundamental rights and liberties traditionally protected by the principle of legality. Following Finn J in *Buck*, it might be concluded that the principle encompasses these human rights'.[220] However, his Honour refrained from expressing a concluded view.

If the principle of legality protects significant or valuable statutory rights, then presumably it would include Charter rights. However, there is questionable utility in applying the principle of legality to Charter rights. The Victorian Charter already has

[216] Goldsworthy, above n 37, 305–6.
[217] This could be broadly analogised with an *expressio unius est exclusio alterius* argument – the express inclusion of rights-protective interpretive provisions in some statutes indicates that such an approach is excluded under other statutes.
[218] (2014) 44 VR 526.
[219] Ibid 580 [188].
[220] Ibid 581 [193].

its own interpretive mechanism in s 32(1). Furthermore, it is doubtful whether the principle of legality and Charter rights may properly be converged, as there are some aspects which potentially differ in operation. These are explored elsewhere. One example relates to whether justification and proportionality can have any role to play in interpretation under the principle of legality[221] and s 32(1).[222] Another example is how the principle of legality and s 32(1) apply to broadly expressed statutory discretions and their scope.[223]

VIII RELATED PRESUMPTIONS

Finally, it should not be overlooked that the principle of legality *already* protects certain statutory rights in Australia. The principle of legality encompasses the well-established common law presumptions against interference with vested property rights without adequate compensation,[224] and against the retrospective operation of statutes.[225] These may be dealt with briefly.

As to the former, the courts have sometimes approached the presumption against interference with 'vested'[226] property rights as including not only common law property rights, but also property rights sourced in statute.[227] For example, in *University of*

[221] See Chen, above n 52, 362–73; Goldsworthy, above n 26, 69–70; Meagher, above n 53, 114; Hanna Wilberg, 'Common Law Rights Have Justified Limits: Refining the "Principle of Legality"' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (The Federation Press, 2017) 139.
[222] See Bruce Chen, 'Making Sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the *Charter of Human Rights and Responsibilities Act 2006*' [2013] (74) *Australian Institute of Administrative Law Forum* 64; and Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (September 2015) 155.
[223] See Bruce Chen, 'Section 32(1) of the Charter: Confining discretions compatibly with Charter rights?' (2016) 42 *Monash University Law Review* 608; Bruce Chen, 'How Does the Charter Affect Discretions? The Limits of Section 38(1) and Beyond' (2018) *Australian Journal of Administrative Law* (forthcoming).
[224] *Clissold v Perry* (1904) 1 CLR 363, 373.
[225] *Maxwell v Murphy* (1957) 96 CLR 261; *Rodway v The Queen* (1990) 169 CLR 515; *Esber v Cth* (1992) 174 CLR 430.
[226] The word 'vested', it is said, 'is primarily a technical legal term used to differentiate a presently existing interest from a contingent interest': Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws*, Report No 129 (2016) 466 [18.32]. Something is 'contingent' where it is 'conditioned upon the occurrence of a future event which is itself uncertain or questionable': *Temwood Holdings Pty Ltd v Western Australian Planning Commission* (2001) 115 LGERA 152, 169 [57].
[227] See, for example, *Greville v Williams* (1906) 4 CLR 694, 703; *University of Western Australia v Gray (No 20)* (2008) 246 ALR 603, 634 [86], [88]–[89]; *Young v Owners Strata – Plan 3529* (2001) 54

Western Australia v Gray (No 20),[228] French J (as his Honour then was) held that intellectual property rights derived from patents statutes could 'fall into the category of property rights which attract the presumption'.[229] An inventor's intellectual property rights could be vested property rights. Consistently with the above, the High Court appears to have recently accepted that the presumption can indeed apply to property rights in statute.[230]

As to the presumption against retrospective operation of statutes, this common law presumption is widely reflected in interpretation Acts across the Commonwealth, State and Territory jurisdictions, with respect to statutory rights.[231] The statutory presumption applies to 'acquired' or 'accrued' statutory rights.[232] It is presumed that legislation will not operate retrospectively to affect existing statutory rights which have been acquired or accrued, in the absence of express words or a necessary implication to the contrary.

Since the presumption against interference with vested property rights and the presumption against retrospectivity are considered to fall within the scope of the principle of legality, the principle in its current state protects certain statutory rights. An extended principle of legality may overlap with these pre-existing presumptions, where relevant.[233] Moreover, as outlined earlier, there will be overlaps between the principle of legality and the presumption against implied repeal.

NSWLR 60. Cf discussion in Pearce and Geddes, above n 5, 233–4; and *State of NSW v Macquarie Bank Ltd* (1992) 30 NSWLR 307, 319-20 (Kirby P), where his Honour framed it in terms of procedural fairness before depriving a person of a valuable property right.

[228] (2008) 246 ALR 603.

[229] Ibid 634 [89].

[230] *Tabcorp Holdings Ltd v Victoria* (2016) 328 ALR 375, 389 [68].

[231] See, for example, *Acts Interpretation Act 1901* (Cth) s 7(2)(c); *Interpretation Act 1987* (NSW) s 30(1)(c); *Interpretation of Legislation Act 1984* (Vic) s 14(2)(e).

[232] That is, a statutory right that is 'real' rather than 'abstract': *Abbott v Minister for Lands* [1895] AC 425; it is not 'a mere hope or expectation that a right will be created': *Director of Public Works v Ho Po Sang* [1961] AC 901.

[233] See, for example, *Tabcorp Holdings Limited v The State of Victoria* [2014] VSC 301 (26 June 2014) [93], [97], [98]–[99] (vested property rights); *Oxenbould v The Solicitors' Trust* [2011] TASSC 57 (3 November 2011) [31], [36]–[37], [39] (presumption against retrospectivity).

IX CONCLUSION

The principle of legality is a common law interpretive principle which protects fundamental common law protections from abrogation or curtailment, except by clear and unambiguous language. While it is uncontroversial that statute law can be a source for the development of fundamental common law protections, it would appear at first glance to be a radical thing for the principle to extend *directly* to protect statutory rights. However, this article has identified two scenarios in which steps have been taken to develop the principle of legality in this way. The first is where 'significant' or 'valuable' statutory rights are read generously within the context of the Act in which they are found. However, it is questionable whether this approach is appropriate. The second possibility is that subsequent infringing legislation is interpreted restrictively so as to protect earlier 'significant' or 'valuable' statutory rights.

There are several arguments for why the principle of legality can be extended to certain statutory rights. It is arguably consistent with the principle's 'original rationale', which already recognises the improbability of certain common law protections being abrogated or curtailed. It is not a great extension of logic to recognise the same with respect to statutory rights. That is all the more pertinent, given we live in this modern 'age of statutes'. Alternatively, if the concept of actual legislative intention is abandoned in statutory interpretation, as it was in *Lacey*, this removes the objection (at least, theoretically) that Parliament cannot be taken to know that certain statutory rights are to be protected by the principle of legality and cannot act accordingly. An extended principle is also consistent with the doctrine of parliamentary sovereignty in some respects. While it would create a hierarchy of statutes, contrary to Dicey's conception of parliamentary sovereignty, Parliament ultimately remains sovereign. Parliament is still free to amend or repeal statutory rights as it wishes, provided it does so with clear and unambiguous language. An extended principle of legality is also consistent with the so-called doctrine of implied repeal as an aspect of parliamentary sovereignty. 'So called' because, as scholars have rightly identified, it is really a presumption *against* implied repeal. Thus, a principle of legality which protects statutory rights from subsequent infringing statutes adds to and fortifies, rather than deviates from, this presumption.

The protection of particular statutes through the strict interpretation of subsequent statutes is not as revolutionary as it might initially seem. Four examples have been provided in this article. First, movement towards the recognition of 'constitutional' statutes in the United Kingdom. Secondly, the enactment of rights-protective interpretive provisions, including under statutory bills of rights in Victoria and the Australian Capital Territory. Thirdly, the common law presumption against interference with vested property rights without adequate compensation, and the statutory presumption against retrospective operation, which already apply to protect statutory rights. Fourthly, as already noted above, the operation of the presumption against implied repeal.

Nevertheless, there are stronger arguments which pull in the other direction. As to the principle of legality's origins, the principle is not conventionally understood to extend to statutory rights. It protects against legislative incursions into the common law. It would be rather ironic then if the principle were applied to the very thing which it was intended to be shielded from. Moreover, the principle of legality is based on actual legislative intention and grounded in the institutional relationship between Parliament and the courts. Arguably, Parliament cannot have 'directed its attention' to, and 'determined' or 'consciously decided' upon, abrogation or curtailment, or 'squarely confront what it is doing', in the absence of widespread agreement. Parliament and the courts are taken to be aware of the principle of legality. But legitimacy of the principle risks being undermined if the courts strike out on their own to apply the principle to certain statutory rights, contrary to this shared understanding and acceptance.

There are already difficulties in ascertaining the scope of protection of the principle of legality with respect to fundamental common law protections. This has implications for both legislative intention and parliamentary sovereignty, and the democratic nature of law making. Extending the principle of legality to statutes would significantly magnify that problem. There would be a high level of uncertainty and contestability about which statutory rights are 'significant' or 'valuable' and therefore protected. This is borne out in the commentary on the United Kingdom experience with respect to

'constitutional' statutes. The extension to certain statutory rights would also lead to a convergence between the principle of legality and s 32(1) of the Victorian Charter, which poses some problems given their potential differences in operation. Section 32(1) is also distinguishable from the principle of legality, in that the former is democratically sanctioned, whereas the latter would require modification and would be contrary to actual legislative intention and institutional understanding.

Finally, it appears there is little discernible benefit to be gained in return for such methodological challenges. Parliaments can and already do enact rights-protective interpretive provisions which allow for provisions to be protected against subsequent statutes. The presumption against implied repeal already protects statutes from repeal or amendment by subsequent statutes in the absence of express words or necessary implication. To adopt the words of Gageler J (albeit expressed in different contexts): '[o]utside its application to established categories of protected common law rights and immunities', the principle of legality 'must be approached with caution';[234] '[u]nfocused invocation' of the principle 'can only weaken its normative force, decrease the predictability of its application, and ultimately call into question its democratic legitimacy'.[235]

[234] *ACMA v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 382 [67].
[235] *ICAC v Cunneen* (2015) 256 CLR 1, 35–6 [88].