

Interpretive Presumptions – which courts apply to determine the legal meaning of a statute:

For interpreting acts, assumptions about the backdrop in which the act operates in/ background legal environment

The Principle of Legality

The principle holds that '[u]nless the Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation' (Re Bolton; Ex parte Beane (1987) (Brennan JJ)).

- We have charter of rights/bills of rights – give explicit instructions to judges how to interpret laws
- In Vic we have a double up - both principle of legality and also have parl instructing judges how to interpret ambiguities. E.g in NSW just look at principle of legality but we look at vic charter and also legality cause they mimic each other.
- European convention – right to life etc

Dan Meagher, 'The Common Law Principle of Legality' (2013)

- In aus, these cases demonstrate an increased judicial sensitivity to human rights and a willingness to protect them where interpretively possible.
- Potter v Minohan
 - *It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.*
- In this way the catalogue of fundamental common law rights and freedoms has expanded beyond the holy trinity of life, liberty and property to include, for example, equality of religion and freedom of speech. And the Constitution has buttressed (supported)- if not inspired - the strengthening of the common law rights to fair trial, procedural fairness and court access from legislative encroachment.
- In Australia it was a trio of cases decided by the High Court between **1987** and **1992** that underlined the contemporary significance of the principle of legality to our law – re Bolton, bropho v wa, coco v the queen
- **If parliament wishes to limit or abrogate a common law right or freedom in its legislation then it must express that intention with unmistakable clarity.**
- In Australia, the principle of legality has **hardened into a strong clear statement** rule that is applied when legislation engages fundamental common law rights and freedoms. Its application to the construction of statutes operates to protect from legislative encroachment
- The common law bill of rights and now, arguably, the 'defining characteristics' of the 'general system of law' in Australia. **Parliament can, however, legislate to the contrary.** But to do so the courts look for 'a clear indication that the legislature has directed its attention to the rights and freedoms in question, and has consciously decided upon abrogation or curtailment.
- It can **improve judicial transparency in judicial interpretation** by giving legislators prior notice of the cl (rights and principles) backdrop against which their legislation will be construed.

- This may improve the clarity and right-sensitivity of legislation promoting democracy and rule of law values in the process.
- It 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 and the 'defining characteristics' of our 'general system of law'.
- If act has capacity to severely infringe on people's fundamental common law rights from its literal/ordinary meaning, if in act through looking at plain words could infringe on people's fundamental common law rights, courts should be weary or resistant to giving that provision a rights infringing interpretation unless there are clear words in the statute that parliament meant to infringe rights. As an interpretative question – court will resist interpreting the widest possible scope of those words where they infringe words, unless parl has used clear and unambiguous words to infringe those rights.
- What are these fundamental rights and liberties that we assume parl didn't mean to abrogate unless says so explicitly - 'common law rights and freedoms' (not exclusive)
 - the right of access to the courts;
 - immunity from deprivation of property without compensation;
 - legal professional privilege;
 - privilege against self-incrimination;
 - immunity from the extension of the scope of a penal statute by a court;
 - freedom from extension of governmental immunity by a court;
 - immunity from interference with equality of religion;
 - the right to access legal counsel when accused of a serious crime;
 - no deprivation of liberty, except by law;
 - the right to procedural fairness when affected by the exercise of public power;
 - freedom of speech and movement.
 - right to open justice,
 - freedom from retrospective criminal laws and
 - mens rea as an element of crimes created by statute
- There is also the concern expressed by 4 members of the HC in *Momcilovic* that the sort of justification analysis that proportionality involves forms no legitimate part of judicial interpretation in the context of the Charter 4 of Human Rights and Responsibilities Act 2006 (Vic). Chief J French, that 'the justification of limitations on human rights is a matter for the Parliament. That accords with the constitutional relationship between the Parliament and the judiciary.'
- A related issue and concern is that the strong contemporary conception of the principle of legality must be applied to further (not undermine) the core interpretive duty of our courts: to 'give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'." (project blue skys tells us duty of court)
- The application of the principle of legality must always constitute statutory *interpretation* **not** judicial *legislation*.

Evans v State of NSW [2008]

- The case arose from World Youth Day, a global event held in Sydney in July 2008 involving hundreds of thousands of young Catholic pilgrims. The applicants were protesters who opposed Catholic Church doctrine on abortion, contraception and sexuality and wished to directly communicate these concerns to the World Youth Day pilgrims.
- The Court (French, Branson & Stone JJc) cited the authoritative contemporary statement of the principle of legality from *Coco* and then applied it to invalidate a regulation that infringed the free speech rights of the protesters in a manner that was not clearly authorized by the regulation-making statutory power.