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Human Rights in Australia

CONTENTS

1 Introduction

When the people of Australia 'agreed to unite in one indissoluble Federal Commonwealth' at the turn of the 20th century, the Constitution they ordained included few express human rights. It took until 1918, 15 years from the establishment of Australia's highest court and in the final days of World War I, for the High Court of Australia first to refer to 'human rights'.[1] It was another 31 years, and shortly after the adoption of the *Universal Declaration of Human Rights 1948* ('the *Declaration*') by the United Nations General Assembly, before the High Court again referred to 'human rights'.[2] When the

1 *Sickerdick v Ashton* (1918) 25 CLR 506, 517 (Isaacs J).

2 *R v Wallis* (1949) 78 CLR 529, 546 (Latham CJ); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

first edition of this book was published in 1999, the count had increased to 81. Since then, it has more than tripled.

Human rights have increasing prominence in Australian law. But all this discussion of human rights does not mean that the High Court has developed a rich, rights-protective constitutional jurisprudence. The text and history of the Constitution have posed insurmountable obstacles. Neither does it mean that the constitutional human rights jurisprudence the High Court has developed is principled, systematic or uncontroversial.

This book is about constitutional rights protections in Australia today. Australia, uniquely among democratic countries, has no constitutional or statutory charter of rights at the national level. Responsibility for developing constitutional rights protections has fallen to Australia's High Court. An astonishing feature of its jurisprudence has been the number of rights-related protections it has been able to weave from the yarn of the Constitution. Working with limited text and an ambivalent constitutional history has, however, meant the High Court has run up against significant limits, both doctrinal and institutional. Many protections – particularly guarantees that individuals will be treated equally and guarantees of economic, social, cultural and group interests – have proven incapable of being developed and recognised through accepted judicial methodology. The protections that do exist are often weak or under-theorised. Not surprisingly, the High Court's work has been contentious, with some people asserting that unelected judges should not update the Constitution to reflect contemporary human rights norms.

This chapter provides background and context for the more specific constitutional subjects covered in the balance of the book. It contains a general discussion of the nature of human rights, describes several key sub-national and non-constitutional protections of rights in Australia and discusses the important roles which international law and the common law play in Australian rights protections. Later chapters discuss key topics in the protection of rights under the Commonwealth Constitution.

2 What are human rights?

There is no one conception of human rights. Such ideas may be affected by a person's social, economic and cultural background. Philosophers describe rights in different ways. People differ over justifications for the existence of rights; others believe that there is no sound justification at all. The international community has, however, sought to entrench the notion that certain human rights exist and are universal. The process of determining human rights in the international sphere began after World War II with the *Declaration* and has continued apace with a growing number of international instruments that witness the commitment of states to various fundamental rights. While in the past Australian lawyers turned to English constitutional documents such as the *Magna Carta 1215* or the *Bill of Rights 1688* (I Will & Mary, Sess 2 c 2) to identify basic rights,[3] today they increasingly turn to international instruments.

3 In *Re Cusack (*1985) 66 ALR 93, 94–5, Wilson J held that neither the Magna Carta nor the Bill of Rights is capable of rendering inconsistent Commonwealth legislation invalid. See also *Jago v District Court (NSW)* (1989) 168 CLR 23.

The *Declaration* was adopted by the General Assembly of the United Nations on 10 December 1948. It is not binding at international law,[4] but has since become a powerful authority for, and symbol of, the protection of human rights. In its 30 articles, the *Declaration* lists a broad range of rights, including:

- 'Everyone has the right to life, liberty and security of person': art 3.
- 'No one shall be arbitrarily deprived of his property': art 17(2).
- 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers': art 19.
- 'Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay': art 24.

The preamble to the *Declaration* states that these are 'fundamental human rights'. In other words, they derive generally from the dignity and worth of the human person rather than from a particular social, cultural or other context.[5] As such, the preamble states that these rights are 'a common standard of achievement for all peoples and all nations'.

The *Declaration* was subsequently bolstered by the *International Covenant on Civil and Political Rights 1966* ('ICCPR')[6] and the *International Covenant on Economic, Social and Cultural Rights 1966* ('ICESCR').[7] These treaties were ratified by Australia in 1980 and 1975 respectively. Unlike the *Declaration*, these covenants distinguish between civil and political rights on the one hand, and economic, social and cultural rights on the other.

The ICCPR recognises rights such as the following:

- 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation': art 7.
- 'Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him': art 9(2).
- 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence': art 12(1).
- 'The right of men and women of marriageable age to marry and to found a family shall be recognized': art 23(2).

The ICESCR recognises economic, social and cultural rights[8] such as the rights of everyone to:

- 'form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests': art 8(1)(a);

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4 See, eg, James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 636, 638.

5 Art 1 of the *Declaration* states that '[a]ll human beings are born free and equal in dignity and rights'.

6 ICCPR, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

7 ICESCR, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976).

8 The ICESCR does not distinguish between economic, social and cultural rights. Commentators give different rights different classifications: see, eg, Henry J Steiner, 'Social Rights and Economic Development: Converging Discourses?' (1998) 4 *Buffalo Human Rights Law Review* 25.

- 'social security, including social insurance': art 9;
- 'an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions': art 11(1);
- 'the enjoyment of the highest attainable standard of physical and mental health': art 12(1);
- 'education': art 13(1).

The individual rights recognised in the ICCPR are sometimes referred to as 'first generation' rights, while those recognised in the ICESCR are called 'second generation' rights.[9] Rights developed subsequently have often been referred to as 'third generation' rights or 'other generations' of rights and include collective or group rights[10] such as rights to development, peace and the environment. These rights are recognised in instruments such as the *Declaration on the Right to Development 1986*[11] and *United Nations Declaration on the Rights of Indigenous Peoples 2007*.[12]

While the existence of two instruments – the ICCPR and ICESCR – suggest that the rights they contain can be divided into two categories, it has been said that the 'two sets of rights can neither logically nor practically be separated into watertight compartments'.[13] It may be impossible to vindicate civil and political rights without vindicating social, economic and cultural rights. For example, vindicating the right to vote (a civil and political right) may presuppose vindicating rights to education and a minimum standard of living (social, economic and cultural rights).

Further, many rights can be classified in either way. For example, the right to freedom of association is recognised in the ICCPR while the right to form trade unions (which can be seen as a subset of the right to freedom of association) is recognised in the ICESCR. More recent human rights treaties, such as the *Convention on the Rights of the Child 1989*[14] and the *Convention on the Rights of Persons with Disabilities 2007* ('CRPD'),[15] have not distinguished between rights as if they can neatly be categorised as civil and political or social, economic and cultural.

A functional distinction sometimes drawn between civil and political rights and economic, social and cultural rights is that the latter may be both less feasible to protect (because they require significant government resources and implementation capacities) and less amenable to judicial enforcement (because judges lack the expertise or legitimacy

9 Louis Henkin et al, *Human Rights* (Foundation Press, 2nd ed, 2010) 367.

10 See, eg, ibid 196.

11 GA Res 41/128, UN GAOR, 41st sess, 97th plen mtg, UN Doc A/RES/41/128 (4 December 1986) annex ('*Declaration on the Right to Development 1986*').

12 GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007) annex ('*United Nations Declaration on the Rights of Indigenous Peoples 2007*').

13 Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 3rd ed, 2008) 275.

14 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

15 CRPD, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

to make the difficult social policy and resourcing assessments required to enforce them).[16] Even here, however, the distinction is not clean. For example, vindicating the right to a fair trial (a civil and political right) requires government expenditure on courts.

Perceived difficulties in requiring states to protect economic, social and cultural rights are reflected in the language of the ICESCR, which requires state parties only to 'take steps … to the maximum of [their] available resources … to achiev[e] progressively the full realization' of the recognised rights.[17] In contrast, states parties to the ICCPR 'undertak[e] to respect and to ensure to all individuals within [their] territory' the recognised rights.[18] For some decades, these perceptions were reinforced by the fact that an optional protocol to the ICCPR established a complaints mechanism for individuals claiming to be victims of ICCPR violations,[19] but there was no similar mechanism under the ICESCR. However, in 2013, a new optional protocol to the ICESCR, establishing a complaints and inquiry mechanism for ICESCR violations, entered into force.[20]

Differences sometimes perceived between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, stem also from the distinction that is sometimes drawn between negative and positive rights.[21] The notion of positive and negative rights is illustrated by the scheme developed by Wesley Hohfeld.[22] Hohfeld noted that the legal use of the term 'right' denotes at least four distinct conceptions. Each of these conceptions defines a relationship between the right-bearer and at least one other person:

Right A person with a 'right' has an affirmative claim against another person. Correlatively, the other person owes a 'duty' to the right-bearer. For example, X,

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16 See, eg, Maurice Cranston, *What are Human Rights?* (Taplinger Publishing, 1973) 65–71; Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) *Human Rights Brief* 1. It has been said that '[e]ven where judicially enforceable, constitutional courts have generally been cautious about the scope of their review of social and economic rights and have tended to grant legislatures wide discretion as to the means of fulfilling their affirmative obligation': Stephen Gardbaum, 'The Structure and Scope of Constitutional Rights' in Tom Ginsburg and Rosalind Dixon, *Comparative Constitutional Law* (Edward Elgar, 2011) 387, 399.

17 Art 2(1). The Committee on Economic, Social and Cultural Rights has, however, suggested that the ICESCR imposes 'minimum core obligation[s]' on each state party: Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations*, 5th sess, UN Doc E/1991.e/23 (1990) annex III 86 [10].

18 Art 2(1).

19 *Optional Protocol to the International Covenant on Civil and Political Rights 1966*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

20 *Optional Protocol to the International Covenant on Economic, Social and Cultural Right*, opened for signature 24 September 2009, Doc.A/63/435; C.N.869-2009.TREATIES-34 of 11 December 2009 (entered into force 5 May 2013).

21 See Isaiah Berlin, *Two Concepts of Liberty* (Clarendon Press, 1958); Charles Sampford, 'The Four Dimensions of Rights', in Brian Galligan and Charles Sampford (eds), *Rethinking Human Rights* (Federation Press, 1997) 50; Gardbaum, above n 16, 396–402.

22 Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Greenwood Press, 1919). See also Nigel Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (Sweet & Maxwell, 1986) ch 8.

a property-owner, has a right against Y that Y shall stay off X's property, so Y has a duty to stay off the property.

Privilege (or liberty) A person with a 'privilege' is free from the right of another. The person has no duty not to do the act in question. For example, X, a proprietor, has the privilege of entering on X's land.

Power A person with a 'power' has the ability to alter legal rights and duties, or legal relations generally. The person whose legal relations can be altered by exercise of the power is said to be under a 'liability'. A 'power' is different to a right because there is no correlative duty imposed on another person. For example, if X has received an offer from Y in which Y offers to enter a contract, X has a power to accept the offer, while Y has a liability to X's acceptance.

Immunity A person with an 'immunity' is not under a liability to have his or her legal relations altered by another. Correlatively, the person who lacks the power to alter the immunity-holder's legal relations is said to be under a 'disability'. For example, if X is a property-owner, X may have an immunity in relation to Y (and other persons) attempting to transfer X's proprietary interest.

Under this scheme, rights and powers can be seen as positive rights (the right to …), while privileges and immunities can be viewed as negative rights (a freedom from …). Many civil and political rights are best classified as privileges or immunities; while many economic, social and cultural rights are best classified as rights or powers.[23] As we will see, in addition to helping distinguish civil and political rights from social, economic and cultural rights, Hohfeld's classification also helps us understand elements of the High Court's human rights jurisprudence.

The South African Constitution protects many economic, social and cultural rights. For example, s 26(1) recognises the right to 'access to adequate housing' and s 26(2) provides that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. Despite the contention that economic, social and cultural rights are not amenable to judicial enforcement, the Constitutional Court of South Africa has been willing both to determine that the government has infringed these rights and to provide judicial remedies requiring a government response. In its landmark decision in *Government of South Africa v Grootboom*,[24] for example, the Court considered a suit brought by a group of people who, lacking adequate living conditions, had set up shacks on private land, been evicted and were living in temporary shelter on a sports field. The Court applied s 26(2) of the Constitution and declared the following:[25]

- Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated program progressively to realise the right of access to adequate housing.

23 Although, even here, the distinction is not neat: see Gardbaum, above n 16, 397.

24 (2001) 1 SA 46 (Constitutional Court).

25 Ibid [99].

- The program must include reasonable measures such as, but not necessarily limited to, those contemplated in a land settlement program developed by the relevant provincial government, to provide relief for people who have 'no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations'.
- The existing state housing program in the local area did not comply with these requirements.

In *Treatment Action Campaign v Minister of Health*,[26] the Constitutional Court of South Africa considered a challenge based on the right of everyone to health care services (s 27(a)) and of children to be afforded certain special protections (s 28). The applicants claimed that, in order to reduce the risk of HIV-positive mothers transmitting the disease to their babies, the government should have made a given antiretroviral drug available and set a timeframe for a national program to prevent mother-to-child transmission. The Court upheld the claim. It ordered the government 'without delay' to 'permit and facilitate' the use of the drug, 'make provision if necessary for counsellors based at public hospitals and clinics … to be trained for the counselling necessary' for the use of the drug and to 'take reasonable measures to extend the testing and counselling facilities … throughout the public health sector to facilitate and expedite' use of the drug.[27]

Thus far, Australian constitutional law has not tended to recognise Hohfeldian 'rights' or 'positive rights'. It has generally not been concerned with placing positive duties on the government or others to protect, realise or promote human rights. In *Dietrich v The Queen*,[28] for example, a majority of the High Court considered a court's power to order a stay where a trial would be unfair. The Court held that the power can be exercised where an indigent accused is charged with a serious offence and, through no fault of his or her own, is unable to obtain legal representation. Although the Court in effect recognised a person's right to legal representation in some cases, it did not construct this right as an obligation on government to provide representation, but rather as a limitation on courts' power to proceed with an unfair trial. This reluctance to recognise positive rights reflects the fact that Anglo–Australian law has, traditionally, derived much from liberalism, which emphasises individual freedom *from* government action, rather than individual rights *to* various outcomes. As we will see in Chapter 4, this reluctance to recognise positive rights also derives from the view that the Australian Constitution is generally not intended to serve inherently individual interests, such as individual autonomy and dignity.

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26 (2002) 5 SA 721 (Constitutional Court).

27 Ibid [135]. On the government's implementation of the *Treatment Action Campaign* orders, see Amy Kapczynski and Jonathan Berger, 'The Story of the *TAC* Case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa' in Deena Hurwitz and Margaret Satterthwaite (eds), *Human Rights Advocacy Stories* (Foundation Press, 2009) 43, 70–9.

28 (1992) 177 CLR 292 ('*Dietrich*').

3 The legal protection of human rights in Australia

The way human rights are articulated in moral or political theories or international law does not always correspond with the way they are expressed in domestic legal systems.[29] Neither should they: as Cass Sunstein has said, 'there is a big difference between what a decent society should provide and what a good constitution should guarantee … If the Constitution tries to specify everything to which a decent society commits itself, it threatens to become a mere piece of paper, worth nothing in the real world.'[30] When rights are articulated in domestic law, unlike when they are articulated in theories or international law, their efficacy depends on local social, cultural and economic conditions.

This book is concerned with the protection of human rights in Australian domestic law under the Australian Constitution. It does not focus on how rights are articulated and protected in theories or international law. Neither does it focus on extra-constitutional domestic human rights protections in Australia. However, this focus should not detract from the fact that human rights are protected by law in Australia at many levels. In many instances, these other avenues do not suffer from the limitations of the rights protected under the Constitution, and therefore offer a better alternative to constitutional litigation.

3.1 State and territory law

The Australian Constitution establishes a federation with a central Commonwealth government and six state governments. The Constitution also contemplates the existence of regionally based, self-governing territories. The Constitution is primarily concerned with constituting, empowering and constraining the Commonwealth, but, as we will see in subsequent chapters, the states and territories, to a greater or lesser extent, are constrained by some constitutional rights.

Unlike the Commonwealth, the states were established with relatively flexible constitutions, with broad legislative power. The New South Wales *Constitution Act 1902*, for example, confers power on the New South Wales Parliament to make laws for the 'peace, welfare, and good government'[31] of the state. The High Court has confirmed that these are not words of limitation.[32]

While there is no national constitutional or statutory charter of rights, in 2004 the Australian Capital Territory (the *Human Rights Act 2004* (ACT) (*'ACT Human*

29 On the distinction between human rights and the *legal protection* of human rights, see Amartya Sen, 'Human Rights and the Limits of Law' (2006) 27 *Cardozo Law Review* 2913. On the distinction between international and domestic protections of human rights, see Gerald Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stanford Law Review* 1863.

30 Cass Sunstein, 'Against Positive Rights' (1993) 2 *Eastern European Constitutional Review* 35, 36.

31 *Constitution Act 1902* (NSW) s 5.

32 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9–10 (The Court). The High Court has rejected challenges to statutes said to be derived from limitations inherent in the term *law* itself. See, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 64 (Brennan CJ), 76–7 (Dawson J), 109 (McHugh J) (*ad hominem* laws); *R v Hughes* (2000) 202 CLR 535, 551–2 [26] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (vague laws).

Rights Act')) and in 2006 Victoria (*Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*')) enacted statutory charters of rights.[33] These charters were based on the models enacted in New Zealand and the United Kingdom, known as the 'Commonwealth model'[34] or 'parliamentary model'.[35]

These charters protect and promote many rights, particularly civil and political rights.[36] This book does not discuss in any detail the development, scope and effect of these charters, which are well-covered elsewhere in books,[37] reports[38] and articles.[39] Key elements of the ACT and Victorian schemes are set out below.

Parliamentary scrutiny	Members of Parliament proposing a Bill (in Victoria) or the Attorney-General (in the ACT) must table a 'statement of compatibility' detailing whether the Bill is compatible with human rights (that is, the rights listed in the relevant statute).[40]
	Failure to table a statement of compatibility does not invalidate the statute.[41]
	In Victoria, Parliament can make an override declaration, declaring that the Bill infringes human rights, but a member of Parliament must explain the exceptional circumstances which justify the infringement.[42]
	A parliamentary committee must scrutinise all Bills for compatibility with human rights.[43]

33 For a summary of movements towards statutory charters of rights in other Australian jurisdictions, see Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 155–7 <http://www.parliament.vic.gov.au/sarc/article/1446>.

34 See Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707.

35 Janet Hiebert, 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69 *Modern Law Review* 7. See also, eg, Mark Tushnet, 'The Rise of Weak-Form Judicial Review' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, 2011) 321.

36 In 2012, the ACT Parliament amended the *Human Rights Act 2004* to incorporate various rights to education, which can be understood as social, economic and cultural rights: *Human Rights Amendment Act 2012* (ACT), inserting a new s 27A.

37 See Hilary Charlesworth and Gabrielle McKinnon, *Australia's First Bill of Rights: The Australian Capital Territory's Human Rights Act* (Federation Press, 2006); Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis, 2008); Alistair Pound and Kylie Evans (eds), *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Lawbook, 2008).

38 Scrutiny of Acts and Regulations Committee, above n 33; ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (2009).

39 See, eg, George Williams, 'The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope' (2006) 80 *Melbourne University Law Review* 880; Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33 *University of New South Wales Law Journal* 136.

40 *Victorian Charter* s 28; *ACT Human Rights Act* s 37.

41 *Victorian Charter* s 29; *ACT Human Rights Act* s 39.

42 *Victorian Charter* s 31.

43 *Victorian Charter* s 30; *ACT Human Rights Act* s 38.

Interpretation	All statutes must, consistently with their purpose, be interpreted in a way that is compatible with human rights.[44] International and foreign law may be considered in the interpretation process.[45]
Declarations of inconsistent interpretation/ incompatibility	If a statutory provision cannot be interpreted consistently with a human right, the supreme court can make a declaration of 'inconsistent interpretation' (Victoria) or 'incompatibility' (ACT).[46] Such declarations do not affect the law's validity or any rights or obligations.[47] A copy of the declaration must be given to the Attorney-General,[48] who must prepare and table in Parliament a written response within six months.[49] The power to make declarations of inconsistent interpretation/ incompatibility is similar to that conferred on courts in the United Kingdom.[50]
Administrative duties	Public authorities must not act in a way incompatible with human rights or fail to give proper consideration to relevant human rights.[51] In Victoria, this duty does not apply if the public authority could not reasonably have acted differently or made a different decision.[52] In the ACT, this duty does not apply if either the law expressly requires the act or decision or the law cannot be interpreted in a way that is consistent with human rights.[53] The term 'public authority' is broadly defined[54] to include, for example, various kinds of administrators and public officials, the police, ministers and various entities exercising functions of a public nature.
Remedies	There is no action for damages for breach of either law.[55] However, all other remedies, including administrative law remedies, remain.[56] Further, in the ACT, the Supreme Court is expressly empowered to grant all relief (other than damages) it considers 'appropriate'.[57]

44 *Victorian Charter* s 32(1); *ACT Human Rights Act* s 30.
45 *Victorian Charter* s 32(2); *ACT Human Rights Act* s 31(1).
46 *Victorian Charter* s 36(2); *ACT Human Rights Act* s 32(2).
47 *Victorian Charter* s 66(5); *ACT Human Rights Act* s 32(3).
48 *Victorian Charter* s 36(6); *ACT Human Rights Act* s 32(4).
49 *Victorian Charter* s 37; *ACT Human Rights Act* s 33(3).
50 *Human Rights Act 1998* (UK) s 4. The *Bill of Rights Act 1990* (NZ) does not contain an express power to issue declarations of incompatibility, but such a power may exist: see *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 20 (Tipping J) (CA); Claudia Geringer, 'On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act' (2009) 40 *Victoria University Wellington Law Review* 613.
51 *Victorian Charter* s 38(1); *ACT Human Rights Act* s 40B(1).
52 *Victorian Charter* s 38(2).
53 *ACT Human Rights Act* s 40B(2).
54 *Victorian Charter* s 4; *ACT Human Rights Act* s 40.
55 *Victorian Charter* s 39(3); *ACT Human Rights Act* s 40C(4).
56 *Victorian Charter* s 39(1); *ACT Human Rights Act* s 40C(5).
57 *ACT Human Rights Act* s 40C(4). The term 'appropriate' is the same term used in s 24(1) of the *Canadian Charter of Rights and Freedoms* (discussed in Chapter 4).

The High Court considered the constitutionality of central features of the Victorian scheme – the interpretation and declaration of inconsistent interpretation provisions – in *Momcilovic v The Queen*.[58] In six separate, and complicated, judgments, the High Court (with Heydon J dissenting)[59] rejected the constitutional challenge, but cast strong doubts on whether the Commonwealth Parliament could enact a similar scheme at the national level. The upshot of *Momcilovic* was as follows.

- *Interpretation provision*. The interpretation provision was valid, but did not empower courts to depart from ordinary principles of statutory construction.[60] It did not authorise courts to interpret a statute to conform to human rights if that interpretation would depart from Parliament's intention. The lesson from *Momcilovic* is that courts will view human rights interpretation provisions as just one factor guiding the discernment of Parliament's intent; the court's task remains to discern Parliament's intent having regard to all the principles of statutory construction.[61]
- *Declaration of inconsistent interpretation*. The validity of the court's power to make a declaration of inconsistent interpretation depended on whether the court was exercising federal jurisdiction. Four judges (French CJ, Crennan, Kiefel and Bell JJ) upheld the power when exercised in state jurisdiction.[62] On the other hand, five judges (French CJ, Gummow, Hayne, Heydon and Bell JJ) effectively held that the power to make declarations of inconsistent interpretation could not be exercised by the Supreme Court while it was exercising federal jurisdiction.[63] This was due to the restrictions imposed by the separation of federal judicial power in Ch III of the Constitution (discussed in more detail in Chapter 9).

Momcilovic was a blow to human rights protections in Australia. The Court read the interpretation provision narrowly and asserted the primacy of traditional modes of interpretation. In so doing, the Court rejected the view that the interpretation provision authorised more rights-oriented modes of interpretation, such as that authorised by the *Human Rights Act 1998* (UK) in which the courts may depart from Parliament's intent.[64] The provisions governing declarations of inconsistent interpretation survived scrutiny – just, and only in the exercise of state jurisdiction. They cannot apply where a federal court or a court of a state is exercising federal jurisdiction – for example, where, as in *Momcilovic*, there is a suit between a state and a resident of another state. The upshot

58 (2011) 245 CLR 1 ('*Momcilovic*').

59 Heydon J held the interpretation provision invalid on the basis that it authorised courts to interpret legislation to give it a 'desired' meaning, but not its 'actual' meaning: ibid 184 [454].

60 See, eg, ibid 50 [50]–[51] (French CJ), 92–3 [170]–[171] (Gummow J), 123 [280] (Hayne J), 210 [544], 217 [565] (Crennan and Kiefel JJ), 250 [684] (Bell J).

61 See, eg, *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Lacey*').

62 *Momcilovic* (2011) 245 CLR 1, 68 [96]–[97] (French CJ) (Bell J agreeing at 241 [661]), 227 [600] (Crennan and Kiefel JJ).

63 Ibid 65 [89] (French CJ) (Bell J agreeing at 224 [661]), 96–7 [187] (Gummow J), 123 [280] (Hayne J), 185 [457] (Heydon J).

64 See, eg, *R v Waya* [2013] 1 AC 294, 308–9 [14] (Walker JSC and Hughes LJ) (Hale B, Kerr, Clarke and Wilson JJSC agreeing).

is that that any federal human rights Act probably could not create a declaration of inconsistent interpretation scheme analogous to that in the Victorian and ACT schemes.

Outside the Victorian and ACT charters, state- and territory-specific rights protections are scattered. The Parliaments of the two inland territories – the Northern Territory and the Australian Capital Territory – are prohibited from acquiring property otherwise than on just terms.[65] Another specific guarantee is contained in s 46 of the Tasmanian *Constitution Act 1934*, which provides:[66]

> (1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
> (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.

However, s 46 is not entrenched, meaning that the Tasmanian Parliament can amend it merely by passing an ordinary law that amends or repeals the provision.[67] Thus, to abridge freedom of conscience and the free profession and practice of religion, the Tasmanian Parliament need only pass a law to that effect. The amending law need not even express an intention to amend s 46: it can do so impliedly.[68] Accordingly, s 46 offers no protection against an Act that properly construed infringes any of the listed rights. At best, it offers only a political impediment.

In 1992, the High Court found that the Australian Constitution protects an implied freedom of political communication (see Chapter 5). Two years later in *Stephens v West Australian Newspapers Ltd*,[69] the Court recognised that a similar freedom could be derived from the Western Australian *Constitution Act 1889*. Like the federal implication, this was held to be derived from the system of 'representative democracy' created by the Western Australian Constitution. The implication in the Western Australian Constitution was derived from s 73(2)(c), which entrenched[70] the *Constitution Act 1889* against laws that 'expressly or impliedly provide[d] that the Legislative Council shall be composed of members other than members chosen directly by the people'. In *Stephens*, Brennan J stated that s 73(2)(c):

> entrenches in the *Constitution Act* the requirement that the Legislative Council and the Legislative Assembly be composed of members chosen directly by the people.

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65 *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 23(1)(a); *Northern Territory (Self-Government) Act 1978* (Cth) s 50.

66 *Constitution Act 1934* (Tas) s 46.

67 Section 41A is the only entrenching provision in the Tasmanian Constitution Act. However, it does not entrench s 46 and is not itself entrenched. Thus, while s 41A currently requires that certain amendments be supported by a special majority, s 41A may itself be amended or repealed by an ordinary Act of Parliament and the entrenchment removed. On entrenchment generally, see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) Ch 10.

68 *McCawley v The King* [1920] AC 691.

69 (1994) 182 CLR 211 ('*Stephens*').

70 Under ss 73(2)(f), (g), such Bills must be passed by an absolute majority of both houses of the Parliament and be approved by the electors of the state at a referendum.

> This requirement is drawn in terms similar to those found in ss 7 and 24 of the Commonwealth Constitution from which the implication that effects a constitutional freedom to discuss government, governmental institutions and political matters is substantially derived. By parity of reasoning, a similar implication can be drawn from the *Constitution Act* with respect to the system of government of Western Australia therein prescribed.[71]

Entrenched provisions in other state constitutions and territory self-government Acts that establish a system of representative democracy or require that members of Parliament be chosen by the people may also give rise to an implied freedom of political communication limiting the powers of the respective Parliament[72] or even to a requirement of one vote, one value (see Chapter 6).

Like s 46 of the Tasmanian Constitution, this implied freedom of political communication would only be effective in limiting the power of a state Parliament to the extent to which the provisions from which it is implied are entrenched against legislative repeal, and only to the extent of the protection afforded by that entrenchment. Further, the protection may be narrower than that recognised by the implied freedom under the Commonwealth Constitution because, unlike that freedom, it may not also derive from the constitutional entrenchment of responsible government and the system for amending the Commonwealth Constitution by referendum. Even if state constitutions did protect political speech, that protection may often rise no higher than that already protected by the Commonwealth Constitution, rendering the protection partly redundant. So, in *Hogan v Hinch*,[73] the High Court held that any political speech protection in the Victorian Constitution would add nothing to what was already protected by reason of the freedom of political communication implied in the Commonwealth Constitution.[74]

Some state constitutions and territory self-government Acts also enshrine provisions that respect political rights by mandating a level of voter equality, or 'one vote, one value'. For example, s 77 of the South Australian Constitution requires that whenever an electoral redistribution is made for the South Australian Parliament, the redistribution is to be made by applying the principle that the number of electors in any electorate should not deviate by more than 10 per cent from the electoral quota (that is, the figure derived by dividing the number of electors by the number of electoral districts). Section 77 is entrenched by s 88(2), which requires that any Bill to amend s 77 be approved by the electors of South Australia at a referendum.

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71 *Stephens* (1994) 182 CLR 211, 236.

72 See also the discussion in Anne Twomey, 'The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws' (2012) 35 *University of New South Wales Law Journal* 625, 638–42 (regarding the New South Wales Constitution); Michael Wait, 'Representative Government under the South Australian Constitution and the Fragile Freedom of Communication of State Political Affairs' (2008) 29 *Adelaide Law Review* 247, 256–9.

73 (2011) 243 CLR 506.

74 Ibid 547 [64] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

3.2 Federal statute law

Many Commonwealth statutes protect human rights.[75] While constitutional rights are generally only concerned with imposing limitations on governmental action, such statutes frequently also establish positive rights and create rights and obligations as between private individuals, such as between employer and employee, or between landlord and tenant. Human rights legislation can play a separate complementary role even where a constitution contains some rights protections. Key Commonwealth rights-related statutes include:

- privacy laws;[76]
- laws regulating the exercise of administrative power;[77]
- laws governing evidence and civil and criminal procedure;[78] and
- employment laws protecting rights such as those related to work conditions, fair wages and industrial action.[79]

In addition, Australian laws protect against discrimination.[80] Commonwealth anti-discrimination legislation includes the *Racial Discrimination Act 1975* (Cth) ('*Racial Discrimination Act*'), the *Sex Discrimination Act 1984* (Cth),[81] the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth). These Acts operate throughout Australia and are enforced, to the extent possible given the separation of powers in the Australian Constitution,[82] by the Australian Human Rights Commission.[83] The scope of this legislation is very broad. For example, s 9(1) of the *Racial Discrimination Act* provides:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.[84]

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75 See Hilary Charlesworth, 'The Australian Reluctance about Rights' in Philip Alston (ed), *Towards an Australian Bill of Rights* (Centre for International and Public Law, 1994) 34–40.

76 See *Privacy Act 1988* (Cth) and the laws described at Office of the Australian Information Commissioner, *Privacy Law* <http://www.privacy.gov.au/law>.

77 See, for example, *Administrative Decisions (Judicial Review) Act 1977* (Cth).

78 See, for example, *Evidence Act 1995* (Cth).

79 See, for example, *Fair Work Act 2009* (Cth).

80 For an overview, see Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (2008) and Chris Ronalds, *Discrimination Law and Practice* (Federation Press, 2008).

81 See also *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) and *Public Service Act 1999* (Cth) ss 10, 18.

82 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 (holding that the Human Rights and Equal Opportunity Commission, as a body that was not a Ch III court, could not make declarations taking effect as an order of a court).

83 *Australian Human Rights Commission Act 1986* (Cth).

84 See also *Racial Discrimination Act* s 10.

The validity of federal anti-discrimination legislation primarily depends on the Commonwealth's power to legislate with respect to 'external affairs' under s 51(xxix) of the Constitution. The High Court has held[85] that this power enables Commonwealth Parliament to pass legislation to implement international treaty obligations, so long as the law is 'reasonably capable of being considered appropriate and adapted' (in effect, proportionate)[86] to meeting the treaty obligations.[87] The regime required by the treaty must be set out with 'sufficient specificity to direct the general course to be taken'.[88] But Parliament need not meet all of its obligations under a treaty, nor must it meet any particular obligation fully or exactly, at least so long as the departure from the treaty is not so substantial or so inconsistent with the treaty as to deny the law the character of a measure implementing the treaty.[89]

The *Racial Discrimination Act* relies on the *International Convention on the Elimination of All Forms of Racial Discrimination* ('ICERD');[90] the *Sex Discrimination Act* on the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW');[91] and the *Disability Discrimination Act* on the *Discrimination (Employment and Occupation) Convention*,[92] the ICCPR, ICESCR and the CRPD.

The Commonwealth's broad power to implement international human rights standards under the external affairs power marks an important difference between the Australian and United States constitutions. Australia has no equivalent to § 5 of the Fourteenth Amendment to the United States Constitution,[93] so the Commonwealth Parliament's power to implement rights is not constrained by the scope of existing constitutional rights. So far as laws rely on the 'external affairs' power for their support, the Commonwealth's power is largely constrained only by the scope of the rights protections in the treaties to which Australia is a party.

Commonwealth anti-discrimination legislation has another significant constitutional dimension. As with the doctrine of pre-emption in the United States, where a Commonwealth law is inconsistent with a state law, the state law is rendered inoperative in accordance with s 109 of the Constitution. The exercise of public power in purported exercise of laws rendered inoperative by s 109 will also be invalid, for it will lack statutory authority. Similar principles operate between Commonwealth and

85 *Victoria v Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Act Case*').

86 But '[t]he notion of "reasonable proportionality" will not always be particularly helpful': ibid 488 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

87 Ibid 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

88 Ibid 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

89 Ibid 488–9 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

90 ICERD, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

91 CEDAW, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

92 *Discrimination (Employment and Occupation) Convention* (*International Labour Organization Convention 111*), adopted 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

93 'The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.'

territory laws.[94] Under the tests for inconsistency developed by the High Court, state and territory laws will be 'inconsistent' with Commonwealth laws, and thus inoperative in the following circumstances:

1 If it is impossible to obey both laws simultaneously – for example, one law requires you to do X and the other forbids you from doing X.[95]
2 If a state or territory law would 'alter, impair or detract from' the operation of a Commonwealth law. [96] This can include cases in which a state law infringes upon an area of liberty which the Commonwealth Parliament intends not to be closed up.[97]
3 If the Commonwealth law evinces a legislative intention to 'cover the field'. In such a case there need not be any direct contradiction between the two enactments: both may even require the same conduct or pursue the same legislative purpose. What is needed is an intention in Commonwealth Parliament that its law shall be all the law there is on that subject matter, in which case any state or territory law on that subject matter is rendered inoperative by s 109.[98]

Each of these tests involves the same root inquiry: whether there is a 'real conflict' between Commonwealth law and state or territory law.[99] Whether there is a real conflict ultimately depends on construing the Commonwealth law (to discern Parliament's intent) and the state or territory law (to determine whether it conflicts with the Commonwealth's paramount intent).[100] By ensuring the supremacy of Commonwealth laws, s 109 allows the Commonwealth to legislate for uniform, nationwide rights protections.

Just as the Commonwealth may want to rely on s 109 to ensure that states and territories cannot derogate from minimum national rights standards, it may also want to ensure either that states and territories can protect rights to a greater extent than Commonwealth law or that states and territories can be coequal regulatory partners in recognising and enforcing minimum rights standards. In these circumstances, there is a risk that s 109 could, contrary to the Commonwealth Parliament's hopes, render inoperative state or territory laws. The Commonwealth Parliament can attempt to avoid this risk by including various kinds of concurrent operation provisions in the

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94 *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 28 has a similar effect to Commonwealth Constitution s 109, as between Commonwealth and Australian Capital Territory legislation. Northern Territory legislation may also be invalid for inconsistency with Commonwealth legislation even though the *Northern Territory (Self-Government) Act 1978* (Cth) is silent on the issue: *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 25 FCR 345, 366–7 (Lockhart J).

95 *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23, 29 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ).

96 *Jemena Asset Management (3) Co Pty Ltd v Coinvest Limited* (2011) 244 CLR 508, 524 [39] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ) ('*Jemena Asset Management*'), quoting *Dickson v The Queen* (2010) 241 CLR 491, 502 [13]–[14] (The Court); *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J).

97 *Dickson v The Queen* (2010) 241 CLR 491, 505 [25] (The Court), quoting *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84, 120 (Dixon J).

98 *Ex parte McLean* (1930) 43 CLR 472, 483–6 (Dixon J).

99 *Jemena Asset Management* (2011) 244 CLR 508, 525 [42] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

100 Ibid 526 [45] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

Commonwealth law – for example, provisions expressing either an intention that the Commonwealth law is intended to operate together with complementary state or territory laws or an intention that the Commonwealth law not cover the field. Such provisions are relevant to, but not determinative of, the question of whether the Commonwealth law is inconsistent with a state or territory law.[101] The question remains one of construing the text of the Commonwealth law having regard to its context, and this context includes any concurrent operation provision.

By indicating an intention in Commonwealth anti-discrimination laws that its laws operate concurrently with certain state and territory laws, the Commonwealth has sought to foreclose the operation of s 109.[102] For example, s 6A(1) of the *Racial Discrimination Act* states: '[t]his Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of [ICERD] and is capable of operating concurrently with this Act'. Section 6A(1) makes it clear that Parliament intends only that laws *furthering* the objects of ICERD are to be immunised from s 109 – so state or territory laws detracting from, or even not advancing, those objects may be rendered inoperative. Such provisions have meant that the states and territories have also been able to maintain anti-discrimination laws.[103] Of course, other Commonwealth laws lacking a clause such as s 6A(1) are more likely to override state and territory anti-discrimination laws if, properly construed, the Commonwealth laws evince an intention to operate exclusively of state and territory law.[104]

The wide operation of the Commonwealth's anti-discrimination legislation combined with the Commonwealth's power to override inconsistent state and territory laws means there is great scope for such legislation to protect human rights. Sir Harry Gibbs, a former Chief Justice of the High Court, commented that in s 9 of the *Racial Discrimination Act* 'we may already have what appears to be a bill of rights, limited it is true in scope, which is [effectively] entrenched against the states'.[105] So, in the area of native title, inconsistency with the Commonwealth *Racial Discrimination Act* has rendered inoperative legislative attempts by the Queensland and Western Australian governments to extinguish or limit the native title held by Indigenous peoples in their state.[106] Similarly, the *Human Rights (Sexual Conduct) Act 1994* (Cth) has been effective in overriding Tasmanian statute law that prohibited homosexual sexual activity between consenting adult males in that state (discussed below in this chapter).

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101 *Momcilovic* (2011) 245 CLR 1, 74 [111]–[112] (French CJ), 120–1 [271]–[272] (Gummow J), 134 [316], 142 [344] (Hayne J), 238–9 [654] (Crennan and Kiefel JJ).

102 *Sex Discrimination Act* (Cth) ss 10, 11; *Disability Discrimination Act* (Cth) s 13.

103 See, eg, *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1991* (Qld); *Anti-Discrimination Act 1992* (NT); *Discrimination Act 1991 (*ACT); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1998* (Tas).

104 For example, in *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330, the High Court unanimously held that the *Anti-Discrimination Act 1977* (NSW) was inconsistent with the *Life Insurance Act 1945* (Cth). See also *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237.

105 Harry Gibbs, 'The Constitutional Protection of Human Rights' (1982) 9(1) *Monash University Law Review* 1, 13.

106 *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Western Australia v Commonwealth* (1995) 183 CLR 373 ('*Native Title Act Case*').

There is less scope for Commonwealth laws to protect against encroachment on human rights by subsequent *Commonwealth* laws. Ordinarily, Parliament can repeal what it has enacted[107] and it is doubtful that provisions purporting to restrict the power of future Parliaments to amend or repeal statutes – so-called 'manner and form provisions' – could validly bind the Commonwealth Parliament.[108]

Further, Australian courts have not adopted a specific approach to the amendment or repeal of human rights legislation similar to that enunciated by the Supreme Court of Canada in *Winnipeg School Division No 1 v Craton*.[109] There, McIntyre J, speaking for the Court, said:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. [It] is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement.[110]

Similarly, in *Thoburn v Sunderland City Council*,[111] Laws LJ identified a class of 'constitutional or fundamental' statutes. That class included statutes conditioning 'the legal relationship between citizen and state in some general, overarching manner' and statutes enlarging or diminishing 'what we would now regard as fundamental constitutional rights'.[112] Lord Justice Laws argued that amendment of constitutional statutes could not be effected in the same way as any other statute. Instead, it must be shown 'that the legislature's *actual* – not imputed, constructive or presumed – intention was to effect the repeal'.[113] An Australian court would reject the idea that courts could identify an 'actual' intention of Parliament distinct from its imputed, constructive or presumed intention.[114]

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107 See, eg, *New South Wales v Commonwealth* (2006) 229 CLR 1, 151 [307] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices Case*').

108 See George Winterton, 'Can the Commonwealth Parliament Enact Manner and Form Legislation?' (1980) 11 *Federal Law Review* 167 (arguing for the validity of Commonwealth manner and form provisions). Compare *Work Choices Case* (2006) 229 CLR 1, 151 [307] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651, 659 [3] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

109 [1985] 2 SCR 150.

110 Ibid 156. See the similar argument put by Shaw QC in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 6. The position of the Canadian Supreme Court has been criticised: see Peter W Hogg, *Constitutional Law of Canada: Volume 1* (Carswell, 5th supplemented ed, 2007) 12–17 n 67.

111 [2003] QB 151. This approach and its lack of clarity have been criticised: see, eg, *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 419–20 [62] (Rodger LJ); 'Editorial – Constitutional Statutes' (2007) 28(2) *Statute Law Review* iii. See also *Re Local Government Byelaws (Wales) Bill 2012* [2012] 3 WLR 1294, 1312 [80] (Hope LJ, with whom Clarke, Reed and Carnwath LLJ agreed) (doubting that the 'description' of a statute as 'constitutional' could 'be taken to be a guide to its interpretation' and holding that 'the statute must be interpreted like any other statute').

112 Ibid 186 [62].

113 Ibid 187 [63].

114 *Zheng v Cai* (2009) 239 CLR 446, 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

An Australian court, relying on these Canadian and United Kingdom authorities, might find that legislation is only effective in abrogating a fundamental right recognised by statute where Parliament's intent is clear and unambiguous. A firmer ground for such an interpretive approach would, however, start by rejecting any strict distinction between 'human rights' or 'constitutional' statutes and other statutes and proceed by applying existing principles of statutory construction governing the implied repeal of statutes. Taking this approach would better accord with the view expressed by French CJ in *Cadia Holdings Pty Ltd v New South Wales*.[115] There, French CJ suggested that questions such as those considered in *Thoburn* were likely to be resolved through the 'characteristics of a statute' rather than through the designation of a statute as 'constitutional'.[116]

According to those ordinary principles of statutory construction, if an existing Commonwealth law expressly conferred a right, privilege or immunity, there may need to be at least 'strong grounds',[117] such as 'clear words',[118] manifesting in 'actual contrariety',[119] before a later Act will be taken to have impliedly repealed the earlier right, privilege or immunity.[120] The fact that the right conferred by the earlier statute was discernibly 'important' or 'fundamental' would strengthen any inference that the later statute did not intend to repeal it.

Even absent legal constraints, legislation such as the Commonwealth *Racial Discrimination Act* may prove a significant political obstacle to restricting rights. For example, the need to amend the *Racial Discrimination Act* has acted as a barrier to the extinguishment or modification of the native title rights of Australian Aborigines by the Commonwealth Parliament. This barrier has, however, on occasion been overcome. The *Native Title Amendment Act 1998* (Cth) implemented the Howard government's 'ten point plan' for native title after the High Court's decision in *Wik Peoples v Queensland*.[121] In seeking to achieve, in the words of the Deputy Prime Minister Tim Fischer, 'bucket-loads of extinguishment', the Act overrode the *Racial Discrimination Act*. This was achieved through introducing a new s 7 into the *Native Title Act 1993* (Cth), expressing an intention that the *Racial Discrimination Act* only overrode the *Native Title Act* where the provisions of the *Native Title Act* were ambiguous. A similar suspension of the *Racial Discrimination Act* was achieved under the legislation that brought about the Northern Territory intervention in 2007 in response to findings of child sexual abuse within Aboriginal communities.[122]

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115 (2010) 242 CLR 195.

116 Ibid 218 [56].

117 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 137–8 [18] (Gummow and Hayne JJ).

118 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 366–7 [114] (French CJ), 378–9 [158]–[159] (Gummow and Hayne JJ).

119 *Putland v R* (2004) 218 CLR 174, 189 [40] (Gummow and Heydon JJ).

120 See also *Commissioner of Police v Eaton* (2013) 294 ALR 608, 631 [98] (Gageler J); cf 620–1 [44]–[48] (Crennan, Kiefel and Bell JJ).

121 (1996) 187 CLR 1.

122 *Northern Territory National Emergency Response Act 2007* (Cth).

3.3 Commonwealth parliamentary processes

In 2012, through the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ('*Scrutiny Act*'), the Commonwealth adopted a new human rights parliamentary scrutiny process.[123] The *Scrutiny Act* followed consultation and a report of the National Human Rights Consultation Committee.[124] The Committee recommended the adoption of a national Human Rights Act, with power in the High Court to make a declaration of incompatibility, an interpretation provision akin to that in the *Victorian Charter* and *ACT Human Rights Act* and the imposition of a duty on public authorities to act compatibly with and have regard to human rights.[125] These recommendations were not adopted by the federal government, which instead introduced a model involving *ex ante* parliamentary and executive scrutiny of laws.

The *Scrutiny Act* provides for the appointment of a Parliamentary Joint Committee on Human Rights,[126] the functions of which include examining and reporting to Parliament on the human rights compatibility of Bills, legislative instruments and Acts[127] and inquiring into human rights matters referred by the Attorney-General for report to Parliament. In exercising these functions, the Committee may hold public hearings and examine witnesses.

The *Scrutiny Act* requires members of Parliament who propose to introduce a Bill to table a 'statement of compatibility' in respect of the Bill.[128] The statement must assess 'whether the Bill is compatible with human rights'.[129] It is implicit that the statement could assess the Bill as being *in*compatible with human rights. Persons making disallowable rules (a kind of delegated legislation) must also prepare statements of compatibility.[130]

The *Scrutiny Act* has several limitations. It provides virtually no information about the level of detail a 'statement of compatibility' should contain, requiring only that it 'must include an assessment of whether the Bill is compatible with human rights'.[131] An analysis of the early operation of the *Scrutiny Act*'s operation concluded that, while the vast majority of Bills had been accompanied by a statement of compatibility, most

123 The regime is discussed in James Stellios and Michael Palfrey, 'A New Federal Scheme for the Protection of Human Rights' (2012) 69 *Australian Institute of Administrative Law Forum* 13; David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights' (2012) 1 *European Human Rights Law Review* 58; Rosalind Dixon, 'A New (Inter)National Human Rights Experiment for Australia' (2012) 23 *Public Law Review* 69; Dan Meagher, 'The Significance of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth)' (Paper presented at the Australian Association of Constitutional Law Victorian Seminar Series, Melbourne, 7 June 2012).

124 Also known as the 'Brennan Committee': *National Human Rights Consultation Report* (2009) <http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Documents/NHRCReport.pdf>.

125 Ibid xxxii, xxxiv, xxxvii.

126 *Scrutiny Act* s 4.

127 Ibid s 7.

128 *Scrutiny Act* s 8(2). Failure to prepare or table the statement does not affect the validity of the Act: s 8(5).

129 Ibid s 8(3).

130 Ibid s 9(1).

131 Ibid s 8(3).

such statements were 'brief' and lacked 'analytical rigour'.[132] The *Scrutiny Act* does not specify when statements of compatibility must be presented to Parliament – and, while an obligation could be implied,[133] nothing in the Act expressly provides that they must be presented before a Bill is passed.[134] The *Scrutiny Act* also provides that a failure to prepare and present a statement of compatibility in relation to a Bill does not affect the validity, operation or enforcement of any resulting Act.[135]

Unlike the *ACT Human Rights Act* and *Victorian Charter*, the Commonwealth Act does not in itself recognise that Australians have rights. Instead the 'human rights' referred to in the *Scrutiny Act* are simply a yardstick by which laws are to be assessed. The 'human rights' referred to are defined to mean the rights and freedoms declared in several human rights treaties, the ICERD, ICESCR, ICCPR, CEDAW, CRPD, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[136] and the *Convention on the Rights of the Child*.[137] All up, the *Scrutiny Act* recognises over 100 rights and freedoms, more than any other democratic nation – many of these rights overlap, so the real number is somewhat smaller.

It is too early to determine whether the *Scrutiny Act* will have a beneficial effect on parliamentary deliberation. By recognising so many rights, it may gain breadth at the risk of depth. A number of the rights recognised, including many of those in the ICESCR, are more in the nature of aspirations than concrete rights coupled with duties – making it hard to assess compatibility. The sheer number of rights recognised raises doubts about the extent to which those rights have public acceptance; this may both undermine the ongoing legitimacy of the scheme and cast doubts on the *Scrutiny Act*'s ability to foster a true rights culture.[138]

The *Scrutiny Act* also leaves key questions unanswered. It is ambiguous about how rights are to be assessed. As Rosalind Dixon has pointed out, the Act does not specify whether compatibility with rights should be assessed simply by comparing the law against rights (a one-step approach) or whether it should be assessed by comparing the law against rights and then balancing the rights-impairing elements of the law against its advancement of other rights or its proportionate pursuit of other important interests (a two-step approach).[139] The Act also does not explain the extent to which parliamentarians and public servants should engage with sources of international law

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132 George Williams and Lisa Burton, 'Australia's Exclusive Model of Parliamentary Rights Protection' (2013) 34 *Statute Law Review* 58, 81.

133 'A statement will ordinarily form part of the explanatory memorandum for the bill': Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) 4.

134 Under *Legislative Instruments Act 2003* (Cth), an explanatory statement for a disallowable instrument must contain a statement of compatibility (s 26(1A)(f)), although a failure to lodge an explanatory statement does not affect the validity or enforceability of the instrument (s 26(2)).

135 *Scrutiny Act* s 8(5).

136 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

137 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

138 For an analysis of these issues, see Williams and Burton, above n 132.

139 Dixon, above n 123, 76–7.

beyond the text of human rights instruments, such as United Nations Committee decisions.[140]

The volume of Australian lawmaking renders it impractical for parliamentarians to scrutinise each Bill: for example, in 2011, 238 Bills totalling 7368 pages were introduced into the House of Representatives and 190 Bills were enacted.[141] Most scrutiny is likely to occur at the bureaucratic, sub-parliamentary level. The Attorney-General's Department has prepared templates to assist this sub-parliamentary scrutiny.[142] The template starts from the assumption that the law *will* be compatible with human rights: it reads 'This Bill/Legislative Instrument is compatible' with designated human rights. It is unclear whether the template could be used to assess a law as incompatible.

The template encourages articulation of both whether rights are limited and how, if they are limited, the limit is proportionate to a legitimate objective. A separate 'assessment tool'[143] prepared by the Attorney-General's Department advises policy-makers to 'seek advice as soon as possible … to take action quickly to resolve the incompatibility' if the law is at any stage assessed to be incompatible with rights. The assessment tool also glosses the statutory language by advising policy-makers that *only* the rights of persons subject to Australia's jurisdiction are relevant. This process will undoubtedly embed consideration of human rights in the Commonwealth's policy-making structures. Whether that consideration is genuine or manifests as post hoc justification for conclusions already reached will only become clearer over the longer-term.

Sections 8(4) and 9(3) of the *Scrutiny Act* provide that statements of compatibility are 'not binding on any court or tribunal'. Even so, the Explanatory Memorandum accompanying the Bill states that these sections are 'not intended to exclude the operation of section 15AB of the *Acts Interpretation Act 1901*'[144] to both Acts and legislative instruments. Section 15AB authorises, in the interpretation of an Act, consideration of extrinsic material, including explanatory memoranda, reports of parliamentary committees and other documents laid before Parliament, if the material is 'capable of assisting in the ascertainment of the meaning of the provision'. The material may be considered:

> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act;
> (b) to determine the meaning of the provision when
> (i) the provision is ambiguous or obscure; or
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

140 Ibid 76.

141 Department of the House of Representatives, *Work of the Session: 43*rd *Parliament: 1*st *Session* (2011) 1, 4.

142 Commonwealth Attorney-General, *Statement of Compatibility Templates* <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Statementofcompatibilitytemplates.aspx>.

143 Commonwealth Attorney-General, *Tool for Assessing Human Rights Compatibility* <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSector/Pages/Toolforassessinghumanrightscompatibility.aspx>.

144 Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010 (Cth) 5.

The Explanatory Memorandum to the *Scrutiny Act* recognised that compatibility statements and reports of the Parliamentary Joint Committee on Human Rights laid before Parliament 'could be used by a court to assist in ascertaining the meaning of provisions' in an Act or legislative instrument 'where the meaning is unclear or ambiguous'.[145]

This could mark a significant development in the protection of human rights in Australia. Much of the work of Australian courts involves statutes. Where legislation is accompanied by a statement of compatibility, the *Scrutiny Act* regime may push interpretation of ambiguous, obscure, absurd or unreasonable text towards outcomes which conform to international human rights. This rights-promoting effect should not, however, be overstated. The High Court's contemporary approach to statutory interpretation involves assessing many factors, starting with the text, and having regard to context, purpose and the presumptions of construction.[146] The High Court has emphasised that 'it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction'[147] and 'extrinsic materials cannot be relied on to displace the clear meaning of the text'.[148] A human rights compatibility statement will inevitably be only part of the evidence of the context in which a law is construed; other contextual or purposive elements, alone or coupled with the text, will often outweigh any interpretive interference arising from a compatibility statement. The weight given to compatibility statements in interpretation may also depend on perceptions by judges (whether evidence- or intuition-based) as to the real significance of the statements in policy-making and legislative processes.

The principles of statutory interpretation arising from the scheme established by the *Scrutiny Act* are broader, but shallower, than those arising from the principle of legality (discussed below in this chapter), which requires clear and unambiguous words before a statute will be construed to abrogate fundamental rights and freedoms. They are broader in that they incorporate a far greater and more dynamic range of rights. They are shallower because the principle of legality applies to Commonwealth and state laws, operates irrespective of whether a compatibility statement has been prepared and does not hinge on ambiguity, obscurity, absurdity or unreasonableness.

The formal human rights scrutiny regime established by the *Scrutiny Act* is not the only parliamentary mechanism for scrutinising rights. Many established parliamentary and governmental processes – including parliamentary committees,[149] parliamentary question time, parliamentary debate and the policy-making process – involve scrutiny

145 Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2011 (Cth) 5.

146 See, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

147 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 265 [33] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

148 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

149 The Senate Scrutiny of Bills Committee, for example, is directed by the Senate Standing Orders to report on Bills which 'trespass unduly on personal rights and liberties': Senate Standing Order 24. The limitations of existing Committees are discussed in Williams and Burton, above n 132, 63.

of whether laws and government conduct will infringe or have infringed domestic and international human rights norms.

4 International law

There are many international instruments to which Australia is a party that protect or foster human rights. The impact of these treaties on domestic Australian law is limited.[150] As we will see in Chapter 3, international law has not been understood to be generally relevant to constitutional interpretation. Outside constitutional interpretation, the orthodox position is that 'treaties do not have the force of law unless they are given that effect by statute'.[151] In other words, treaties are not automatically incorporated into domestic law. So, in *Dietrich*, Mason CJ and McHugh J found that the effect of the ICCPR on Australian law is as follows: '[r]atification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions'.[152]

Despite the need for formal implementation of international human rights instruments into Australian law, international law has played a role in the protection of human rights in Australia. International law norms and remedies can build pressure for domestic political reform. The Toonen case provides an example of this. Nicholas Toonen, a Tasmanian activist, used complaint mechanisms established by the (first) *Optional Protocol of the International Covenant of Civil and Political Rights 1966*, which came into force in Australia in 1991.[153] Under art 5(2)(b) of the *Optional Protocol*, anyone within Australian jurisdiction may, after they have 'exhausted all available domestic remedies', make a complaint to the Human Rights Committee[154] that their ICCPR rights have been breached.

Toonen complained to the Human Rights Committee that his rights were infringed by the now-repealed[155] ss 122 and 123 of the *Criminal Code Act 1924* (Tas).[156] Section 122 of Chapter XIV ('Crimes against Morality') of the *Code* made homosexual sexual activity between consenting adult males a crime by establishing the offence, punishable

150 On the treatment of international treaties in the constitutional conventions which drafted the Australian Constitution, see Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 428–30.

151 *Kioa v West* (1985) 159 CLR 550, 570 (Gibbs CJ). But see Charlesworth et al, above n 150, 447–8.

152 *Dietrich* (1992) 177 CLR 292, 305.

153 See Christopher Caleo, 'Implications of Australia's Accession to the First Optional Protocol to the ICCPR' (1993) 4 *Public Law Review* 175; Hilary Charlesworth, 'Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights' (1991) 18 *Melbourne University Law Review* 428.

154 The Human Rights Committee is an international body established under ICCPR art 28.

155 *Criminal Code Amendment Act 1997* (Tas) ss 4, 5.

156 See Anna Funder, 'The Toonen Case' (1994) 5 *Public Law Review* 156; Wayne Morgan, 'Sexuality and Human Rights: The First Communication by an Australian to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights' (1992) 14 *Australian Yearbook of International Law* 277; Ivan Shearer, 'United Nations: Human Rights Committee: The Toonen Case' (1995) 69 *Australian Law Journal* 600.

by jail, of having 'carnal knowledge of any person against the order of nature'. The Human Rights Committee upheld Toonen's claim that the law was inconsistent with the right to privacy set out in art 17 of the ICCPR.[157] The Commonwealth responded by enacting the *Human Rights (Sexual Conduct) Act 1994* (Cth).[158] Section 4(1) of that Act provided that '[s]exual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights'.

This provision was clearly designed to override the Tasmanian legislation under s 109 of the Constitution. A proceeding was brought before the High Court to test whether the Commonwealth law was effective in achieving this.[159] The main difficulty faced by this challenge was that although two activists had publicly stated that they had breached the Tasmanian law, they had not been prosecuted by the Tasmanian authorities. In resisting the attempt to invoke s 109 of the Constitution, the Tasmanian government argued that, as no proceedings had been brought or threatened against the plaintiffs, there was no 'matter' within the meaning of that term in s 76 of the Constitution and s 30 of the *Judiciary Act 1903* (Cth), with the result that the High Court could not determine the issue. However, this argument was rejected by the High Court, which unanimously held that the issue could be determined. Justices Gaudron, McHugh, and Gummow found that '[t]he conduct by the plaintiffs of their personal lives in significant respects is overshadowed by the presence of ss 122 and 123 of the Code. The policy of the law which animates the operation of the Australian legal system includes the encouragement, and indeed the requirement, of observance of the law'.[160] In the wake of this finding, Tasmania conceded that ss 122 and 123 of the *Criminal Code Act* had been overridden by the Commonwealth Act. While the Toonen case furnishes an example of where pursuing international remedies brought domestic political change, the case is exceptional. Australian governments have typically ignored such findings.[161]

Aside from creating domestic political pressure, international law may be 'invocable'[162] in several ways[163] in domestic human rights litigation, even in the absence of its incorporation into Australian law. We turn to this topic now.

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157 Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (8 April 1994) ('*Australia v Toonen*'). See also Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) ('*A (name deleted) v Australia*'), in which the Committee held that Australia had breached ICCPR arts 2(3), 9(1), 9(4) in its detention of a Cambodian citizen seeking refugee status.

158 See Simon Bronitt, 'The Right to Sexual Privacy, Sado-Masochism and the *Human Rights (Sexual Conduct) Act 1994* (Cth)' (1995) 2 *Australian Journal of Human Rights* 59.

159 *Croome v Tasmania* (1997) 191 CLR 119.

160 Ibid 138.

161 Devika Hovell, 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28 *Alternative Law Journal* 6.

162 See Stefan Riesenfeld, 'International Agreements' (1989) 14 *Yale Journal of International Law* 455, 462–7.

163 In addition to the methods described below, treaties may change the status of enemy aliens in Australian courts: see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 33 [100] (McHugh and Gummow JJ) ('*Lam*').

4.1 Shaping the interpretation of statutes

International law, including international human rights law, is an important factor in statutory interpretation. It has a role to play in several different situations. First, where legislation, on its face or 'evidently',[164] is enacted in contemplation of,[165] pursuant to or for the purpose of[166] implementing international obligations, courts may infer that Parliament intended that the Act facilitate compliance with those international obligations.[167] This principle of construction does not authorise courts to rewrite statutes to conform to international law: the ultimate task is the construction of the Australian law by discerning Parliament's intent.[168] That a statute is designed to implement international obligations is just one factor in that task. A statute may, for example, be intended to give effect to an international obligation only *to an extent* or *in part*.[169] A related presumption is that where Parliament 'transposes the text of a treaty or a provision of a treaty into [a] statute so as to enact it as part of domestic law … that … transposed text should bear the same meaning in the domestic statute as it bears in the treaty'.[170] These common law principles are supplemented by s 15AB of the *Acts Interpretation Act 1901* (Cth) (set out above). One class of extrinsic material to which s 15AB permits regard in construing a statute is 'any treaty or other international agreement that is referred to in the Act'.[171]

Plaintiff M70/2011 v Minister for Immigration and Citizenship[172] provided a striking example of these principles' potential strength. *Plaintiff M70* concerned the validity of the so-called 'Malaysia solution', which contemplated the removal of asylum seekers from Australia to Malaysia for immigration processing. Justices Gummow, Hayne, Crennan and Bell proceeded from the observation that relevant elements of the *Migration Act 1958* (Cth) ('*Migration Act*') were intended to respond to Australia's protection

164 *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 303–5 (Gummow J) ('*Magno*').

165 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [29] (Gleeson CJ) ('*Plaintiff S157*').

166 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 339 [27] (The Court) ('*Plaintiff M61*').

167 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 192 [98] (Gummow, Hayne, Crennan and Bell JJ) ('*Plaintiff M70*'). A further related presumption of unclear scope is that laws should be construed, 'so far as their language permits, so as not to clash with international comity': *Zachariassen v Commonwealth* (1917) 24 CLR 166, 181 (Barton, Isaacs and Rich JJ). See also *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 391, 424 (Dixon J). As to the concept of 'comity', see, eg, *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 395–6 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 161–2 [474] (Heydon J).

168 See, eg, *Plaintiff M47 v Director General of Security* (2012) 292 ALR 243, 301 [223]–[224] (Hayne J) ('*Plaintiff M47*'). See also, eg, *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211, 215 [18]–[20] (The Court).

169 See, eg, *Plaintiff M47* (2012) 292 ALR 243, 310 [263] (Heydon J).

170 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230–1 (Brennan CJ). This presumption has, for example, been applied to construe the term 'refugee' in the *Migration Act 1958* (Cth) to have the same meaning as under the *Convention Relating to the Status of Refugees*: at 231 (Brennan CJ).

171 *Acts Interpretation Act 1901* (Cth) s 15AB(2).

172 (2011) 244 CLR 144.

obligations under the Refugees Convention and Refugees Protocol.[173] The provisions of the *Migration Act* at issue specifically referred to the need for the relevant Minister to declare in writing that the country to which asylum seekers were removed 'provide[d] access, for persons seeking asylum, to effective procedures for assessing their need for protection', 'provide[d] protection for persons seeking asylum, pending determination of their refugee status' and 'provide[d] protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country'.[174]

The plurality's observation that the *Migration Act* was intended to respond to the Refugees Convention and Refugees Protocol underpinned a construction of the *Migration Act* which did not permit the government to remove an asylum seeker to just *any* country willing to receive that person – for that interpretation would risk the Act conferring a power that would place Australia in breach of its protection obligations.[175] It underpinned a further construction of the *Migration Act* that did not permit the government to remove an asylum seeker to a state which did not, as a matter of legal obligation, provide protections for refugees consistent with international law.[176] The plurality observed that when the *Migration Act* 'speaks of a country that provides access and protections it uses language that directs attention to the kinds of obligation that Australia and other signatories have undertaken under the Refugees Convention and the Refugees Protocol'.[177]

Secondly, even where it is not possible to identify an intention that a statute was intended to implement Australia's international obligations, there may be a residual presumption that laws conform to those obligations.[178] A related principle holds that statutes are presumed to conform to international law.[179] In *Chu Kheng Lim v Minister for Immigration*,[180] Brennan, Deane and Dawson JJ said that 'courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the

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173 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) ('*Refugee Convention*'); *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('*Refugees Protocol*'); ibid 189 [90].

174 *Migration Act* ss 198A(3)(a)(i)–(iii).

175 *Plaintiff M70* (2011) 244 CLR 144, 190–2 [94]–[97].

176 Ibid 196–7 [119]. The plurality expressly left open whether the criteria set out in *Migration Act* ss 198A(3)(a)(i)–(iii) require an assessment of whether the country in question adheres in practice to the 'procedures' and 'protection' that it must provide 'as a matter of legal obligation': 195 [112]–[116], 198 [124].

177 Ibid 195–6 [117].

178 A similar presumption operates in the United Kingdom: *ANS v ML* [2012] UKSC 30 [16] (Lord Reed) (Lady Hale and Lord Wilson agreeing).

179 See, eg, *XYZ v Commonwealth* (2006) 227 CLR 532, 536 [5] (Gleeson CJ); *AMS v AIF* (1999) 199 CLR 160, 180 [50] (Gleeson CJ, McHugh and Gummow JJ); *Polites v Commonwealth* (1945) 70 CLR 60, 68–9 (Latham CJ), 77 (Dixon J), 81 (Williams J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 385 [98] (Gummow and Hayne JJ); *D'Emden v Pedder* (1904) 1 CLR 91, 120 (The Court). See also *Queensland v Commonwealth* (1989) 167 CLR 232, 239–40 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

180 (1992) 176 CLR 1 ('*Lim*').

obligations of Australia under an international treaty'.[181] In *Minister for Immigration and Ethnic Affairs v Teoh*,[182] Mason CJ and Deane J, citing that statement in *Lim*, said:

> [w]here a statute or subordinate legislation is ambiguous, the courts should favour the construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations.[183]

The status of the qualification following the words 'at least', which would collapse this second presumption into the first, is unclear. It imposes a qualification not apparent in the citation to *Lim* on which it was based. It is also superfluous given the rationale Mason CJ and Deane J provided – that Parliament prima facie intends to give effect to Australia's obligations. In *Teoh*, McHugh J stated a similar presumption without the qualification.[184] Chief Justice Mason and Justice Deane's statement, without that qualification,[185] has subsequently been referred to approvingly.

There remain questions as to whether this presumption, if it exists, operates only where a statute is ambiguous.[186] In *Teoh*, Mason CJ and Deane J said that the only condition was that the text be 'susceptible' of a construction conforming to Australia's obligations.[187] However, other statements appear to require ambiguity as a precondition.[188] Even if ambiguity is not a precondition, many statements of the principle indicate that the presumption must give way in the face of unambiguous or unmistakable language.[189]

As suggested above, there also remains a question whether this presumption applies only to treaties signed or ratified prior to a law's enactment and treaties in contemplation of which a law was enacted[190] and only to international norms arising pre-enactment.[191]

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181 Ibid 38.

182 (1995) 183 CLR 273 ('*Teoh*').

183 Ibid 287.

184 Ibid 315.

185 *Lam* (2003) 214 CLR 1, 33 [100] (McHugh and Gummow JJ); *Plaintiff M70* (2011) 244 CLR 144, 234 [247] (Kiefel J).

186 See also the discussion in Charlesworth et al, above n 150, 460–1.

187 (1995) 183 CLR 273, 287–8.

188 See, eg, *XYZ v Commonwealth* (2006) 227 CLR 532, 536 [5] (Gleeson CJ); *Yager v R* (1977) 139 CLR 28, 43–4 (Mason J); *Teoh* (1995) 183 CLR 273, 315 (McHugh J); *Kruger v Commonwealth* (1997) 190 CLR 1, 70–1 (Dawson J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 386 [101] (Gummow and Hayne JJ); *AMS v AIF* (1999) 199 CLR 160, 250 [280]–[281] (Callinan J). Robert Geddes has argued that ambiguity should not be a precondition to considering treaties and that regard to treaties should be capable of creating ambiguity: see RS Geddes, 'Purpose and Context in Statutory Interpretation' in Judicial Commission of New South Wales, *Statutory Interpretation: Principles and Pragmatism for a New Age* (2007) 127, 152.

189 See, eg, *Lim* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

190 See *Kruger v Commonwealth* (1997) 190 CLR 1, 70–1 (Dawson J); *Coleman v Power* (2004) 220 CLR 1, 7–8 [19] (Gleeson CJ).

191 See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1, 70–1 (Dawson J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 589–90 [63] (McHugh J).

In *Coleman v Power*,[192] Gleeson CJ argued that there may be constitutional issues if subsequent treaties could affect a statute's meaning.[193] The issues he referred to could be the apparent conferral of power on the executive to 'change' a statute's meaning by accepting international obligations or the apparent retrospectivity which could result if a statute's meaning could change by reference to the conduct of the executive alone. Both issues would seem to dissipate if Parliament's intention was always that the meaning of the statute vary from time to time depending on the status of Australia's international obligations. There is no constitutional objection to statutes having ambulatory meanings dependent on extra-parliamentary facts.[194]

To acknowledge that international law has a role to play does not, of course, mean that it is always easy to discern its content; nor does it mean that treaty obligations are always readily reducible to concrete norms easily amenable to application in the process of statutory construction.[195] However, where Parliament intends that a statute conform to international law, the difficulty of the task does not absolve courts of the responsibility of having regard to international law as a constructional factor. On the other hand, the fact that international law is only one factor in construction entails constraints on the use to which it can be put. In *Al-Kateb v Godwin*,[196] international law provided no succour to the plaintiff, an asylum seeker liable to indefinite detention under Commonwealth law. Three members of the majority held that the law too unambiguously authorised indefinite detention for international law to play any role in the constructional process.[197] Further, as Gummow and Hayne JJ said in *Kartinyeri v Commonwealth*, once a statute has been construed, its provisions 'must be applied and enforced even if they be in contravention of accepted principles of international law'.[198]

4.2 Informing the development of the common law

International human rights norms have had a significant influence on the development of the Australian common law.[199] In *Mabo v Queensland (No 2)*,[200] in the context of recognising the continuance of 'traditional native title', Brennan J stated:

> The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not

192 (2004) 220 CLR 1.

193 Ibid 9 [22].

194 See, eg, *Sportsbet Pty Ltd v New South Wales* (2012) 286 ALR 404, 408 [9] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

195 See, eg, James Allan, '"Do the Right Thing Judging?" The High Court of Australia in *Al-Kateb*' (2005) 24 *University of Queensland Law Journal* 1, 18–19.

196 (2004) 219 CLR 562.

197 At 581 [33]–[35] (McHugh J), 642 [238]–[239] (Hayne J), 661 [298] (Callinan J). See also at 662–3 [303] (Heydon J).

198 (1998) 195 CLR 337, 384 [97]. See also, eg, *Meyer Heine Pty Ltd v China Navigation Co Ltd* (1966) 115 CLR 10, 31 (Taylor J).

199 See also the discussion in Charlesworth et al, above n 150, 452–7.

200 (1992) 175 CLR 1.

> necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.[201]

This position was subject to the qualification that 'contemporary notions of justice and human rights' could not be applied to develop the common law 'if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency'.[202] Chief Justice Mason and McHugh J agreed with Brennan J.[203] In other cases, while reaffirming the approach of Brennan J in *Mabo (No 2)*, courts have made more cautious use of international law in developing the common law.[204] In *Nulyarimma v Thompson*,[205] the Full Federal Court rejected an argument that a rule of customary international law (the prohibition on genocide) could be directly incorporated into the common law of Australia to create a new common law offence.[206]

In *Dietrich*, Mason CJ and McHugh J[207] and Toohey J[208] suggested that the use of international law in developing the common law may only be legitimate when the common law is ambiguous or uncertain.[209] They were not prepared to apply international norms to support a right (the right of an accused to counsel at public expense) which, in the words of Mason CJ and McHugh J, had 'hitherto never been recognized'.[210] Subsequently, Mason CJ observed extra-curially that there was a 'possibility' that Australian courts would have regard to the ICCPR and the interpretation of its provisions in formulating the common law.[211]

In *Teoh*, Mason CJ and Deane J emphasised that courts should be particularly cautious of developing the common law in light of international law where 'Parliament itself has

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201 Ibid 42.

202 Ibid 29.

203 See also *Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J), 315 (McHugh J).

204 See, eg, *Environment Protection Authority v Caltex Refining Co. Pty Ltd* (1993) 178 CLR 477, 499 (Mason CJ and Toohey J); *Teoh*, above n 203, 288 (Mason CJ and Deane J), 315 (McHugh J).

205 (1999) 96 FCR 153.

206 See the discussion in Douglas Guilfoyle, '*Nulyarimma v Thompson*: Is Genocide a Crime at Common Law?' (2001) 29 *Federal Law Review* 1. This decision could be understood to reflect concerns about the judicial creation of offences and of retrospectivity in developing the common law to recognise new offences.

207 (1992) 177 CLR 292, 306.

208 Ibid 360.

209 Compare this finding with Kristen Walker, 'Treaties and the Internationalisation of Australian Law' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 204, 213–14. See also *Dietrich* (1992) 177 CLR 292, 349 (Dawson J).

210 Ibid 306.

211 Anthony Mason, 'An Australian Common Law?' (Paper delivered at Australasian Law Teachers Association 50th Anniversary Conference, La Trobe University, 1 October 1995) 14.

not seen fit to incorporate the provisions of a Convention into … domestic law'.[212] This may reflect the general principle that statutes may, by omitting to vary the law, *confirm* a subsisting common law principle.[213] The upshot of these cases is that there is strong support for the view that international law may assist in developing the common law, but there remains significant disagreement about when and how it may be so used.

4.3 Providing extra-legal facts which can have legal consequences

Australia's international obligations can also constitute facts that have material legal consequences. This point was powerfully made in *Plaintiff M61/2010E v Commonwealth*.[214] In *Plaintiff M61*, the High Court had found that the government had breached a duty of procedural fairness in the processing of claims for asylum. A question arose as to what remedy it could issue. Ordinarily, the remedy of 'declaration' (which declares rights and liabilities) can issue only where it would have utility. The Court held that to declare that the government had breached its duty of procedural fairness would have utility, in part because Australia's undertaking of international obligations in relation to refugees showed 'the importance attached to the performance' of those obligations by the executive.[215]

4.4 Affecting procedural powers and obligations?

A statute, properly construed, may require or permit[216] a person or body exercising a statutory power to have regard to, or act for the purpose of implementing, international law. In 2009, French CJ observed extra-curially that the application of unincorporated treaty obligations to the exercise of discretionary powers under statute was 'still a matter of debate'.[217] Even so, there are many instances in which those exercising statutory powers have had regard to international law.[218] For example, in *Schoenmakers v Director of Public Prosecutions*,[219] in determining whether there were 'special circumstances' justifying the appellant's release from remand pending extradition, French J himself had regard to the ICCPR right not to be arbitrarily detained.[220]

If international law is to play a role of this kind in decision-making, it must be on the basis that the instrument creating the power, properly construed, requires or permits the decision-maker to have regard to international law. That requirement or permission

212 *Teoh* (1995) 183 CLR 273, 288.

213 See, eg, *Barclay v Penberthy* (2012) 246 CLR 258, 278–9 [24]–[26] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

214 (2010) 243 CLR 319.

215 At 359 [103] (The Court).

216 See, eg, *Magno* (1992) 37 FCR 298, 503–5 (Gummow J) ('upon the proper construction of [a] law', the law may permit 'regard [to an] international agreement or obligation').

217 Robert French, 'Oil and Water? – International Law and Domestic Law in Australia' (Speech delivered at the Brennan Lecture, Bond University, 26 June 2009) 15 [30].

218 See the examples identified by Catherine Branson, 'The Influence of Human Rights on Judicial Decision-Making' (2009) 5 *High Court Quarterly Review* 65.

219 (1991) 30 FCR 70.

220 Ibid 74–5.

would reflect the outcome of a process of construction specific to the particular power – it would not reflect a general proposition that international law is a required or permissible consideration. The presumptions of construction described earlier in this chapter could assist in construing a statute so that international law is relevant to the power's exercise.

In *Teoh*,[221] a majority of the High Court suggested international law could have a further significance in determining the contours of non-legislative public powers. In 1995, prevailing doctrine held that a duty to afford procedural fairness in the exercise of a power could arise where the power could destroy, defeat or prejudice a person's legitimate expectations.[222] In *Teoh*, the majority held that ratification of a treaty by the executive could give rise to a 'legitimate expectation' either that administrative conduct would conform to the treaty[223] or that decision-makers would take Convention obligations into account in making decisions.[224] The result was to enliven a duty to inform and allow submissions by persons who would be affected by conduct inconsistent with that legitimate expectation.[225] Any impact *Teoh* could have had was blunted by two joint statements, the first by the Minister for Foreign Affairs, Senator Gareth Evans, and the Attorney-General, Michael Lavarch, dated 10 May 1995, and the second, which replaced the first, by the Minister for Foreign Affairs, Alexander Downer, and the Attorney-General, Daryl Williams, dated 25 February 1997.[226] These Statements provided an executive indication that 'the act of entering into a treaty does not give rise to legitimate expectations in administrative law'.[227] Three subsequent attempts to enshrine a similar indication in legislation failed to pass Parliament.[228]

Teoh, without being overruled, has lost much of its significance. The basis of *Teoh* was that ratification of a treaty could give rise to a legitimate expectation, departure from which would ordinarily warrant notice and a hearing. It is now accepted that a duty to afford procedural fairness presumptively arises when a statute confers a power to destroy, defeat or prejudice a person's rights or interests.[229] The duty may even apply presumptively to *any* exercise of power to make 'administrative and similar decisions … by public

221 (1995) 183 CLR 273.

222 See, eg, *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

223 (1995) 183 CLR 273, 290–1 (Mason CJ and Deane J).

224 Ibid 302 (Toohey J), 305 (Gaudron J).

225 Ibid 291–2 (Mason CJ and Deane J), 302 (Toohey J), 305 (Gaudron J).

226 'International Treaties and the High Court Decision in *Teoh*', Ministerial Document Service No 179/94–95 (11 May 1995) 6228–30; 'The Effect of Treaties in Administrative Decision-Making' in Commonwealth, *Gazette: Special*, No S 69, 26 February 1997.

227 Doubt has been expressed about the effectiveness of these statements: see Charlesworth et al, above n 150, 450.

228 See Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth); Administrative Decisions (Effect of International Instruments) Bill 1997 (Cth); Administrative Decisions (Effect of International Instruments) Bill 1999 (Cth). The South Australian Parliament succeeded in passing such a law: see *Administrative Decisions (Effect of International Instruments) Act 1995* (SA).

229 *Plaintiff M61* (2010) 243 CLR 319, 352 [74] (The Court).

tribunals and officials'.[230] In any case, the duty to afford procedural fairness would arise irrespective of any 'legitimate expectation' arising from the ratification of a treaty or otherwise. Once the duty is enlivened, it requires fairness in the circumstances, which ordinarily may require a person whose interests are prejudiced by the decision to be notified and have an opportunity to make submissions on the critical issue on which the decision is likely to turn.[231] Again, that would be so irrespective of any 'legitimate expectation'. In light of these principles, in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*,[232] a majority of the High Court has held that the phrase 'legitimate expectations' should be discarded.[233]

The upshot of *Plaintiff S10* appears to be that any legitimate expectation arises from either the law's potential to affect rights and interests or the mere existence of executive power – either way, the existence of an international obligation is irrelevant to the existence of a duty to afford procedural fairness. It remains conceivable that the existence of international obligations could be relevant to the *content* of a subsisting duty to afford procedural fairness, but only as a factor in identifying what is fair in the circumstances.

5 The common law as a source of rights and freedoms

The common law is a vibrant and rich source of human rights. As a 'work in progress' encompassing the concerns and values of many generations, it is open to continual development and the input of judicial imagination. In *Dietrich*, for example, the High Court developed the common law to recognise that, absent exceptional circumstances, a court must stay a trial against an indigent accused charged with a serious offence unless the accused has counsel. The common law can also develop in light of progressive statutory developments. So, in *PGA v The Queen*,[234] the High Court held that statutory developments, including women's suffrage and the recognition of female legal capacity, had undermined any reason for an asserted common law rule that a husband could not rape his wife.[235] Common law *stare decisis* principles also impose practical constraints on the judiciary's power, thus reducing the risk of arbitrary judicial decision-making and, therefore, of arbitrary government. Moreover, the common law starts from a foundation of liberty: under a common law system, 'everybody is free to do anything, subject only

230 *Teoh* (1995) 183 CLR 273, 311–12 (McHugh J), affirmed in *Lam* (2003) 214 CLR 1, 27–8 [81]–[83] (McHugh and Gummow JJ), in turn affirmed in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ) ('*Plaintiff S10*').

231 *Kioa v West* (1985) 159 CLR 550, 587 (Mason J).

232 (2012) 246 CLR 636.

233 Ibid 633 [65] (Gummow, Hayne, Crennan and Bell JJ). This reflected earlier views expressed in *Lam* (2003) 214 CLR 1, 47–8 [147]–[148] (Callinan J) (doubting *Teoh*), 37–8 [120]–[121] (Hayne J) (suggesting that *Teoh* had been overtaken by subsequent developments).

234 (2012) 245 CLR 355.

235 Ibid 604–5 [18], 616–17 [61]–[65] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

to the provisions of the law'.[236] Liberty also infuses the positive principles of the common law. So personal autonomy is central to the common law,[237] and manifests in rules such as the principle that there is no obligation to rescue or act to preserve human life.[238]

The common law has two important advantages as a guardian of human rights. First, it is omnipresent: it 'surrounds us and applies where it has not been superseded by statute'.[239] This means that it can apply to protect rights in circumstances unforeseen by the drafters of the Constitution or of statutes, or not expressly recognised in existing jurisprudence. Secondly, decisions relying on the common law, rather than controversial interpretations of the Constitution, may be perceived to have a sense of 'orthodoxy' and 'conservatism' about them, meaning that judges, the legal profession and broader public may perceive them to be more legitimate. That perception of conservatism is supported by the fact that the common law is ordinarily amenable to statutory variation.

Relying on the common law to protect rights also has disadvantages. The common law falls away in the face of inconsistent legislation.[240] Where a statute is repugnant, there is no scope for the common law to, as Lord Coke CJ put it in *Dr Bonham's Case*, 'adjudge such Act to be void'.[241] Also, when rights are vindicated by the common law, there is a risk that the judiciary will be perceived to be abusing the judicial power to uphold values created by judges, not by elected parliaments or responsible governments. A third disadvantage is that the common law is limited in the rights or interests which it recognises or protects. For example, the common law does not recognise that mere discrimination (such as racial discrimination) is harm warranting protection.[242] As French CJ and Gageler J have said, '[n]ot every common law rule reflected well on common law courts'.[243]

5.1 Statutory construction and human rights

The principles of statutory interpretation are, unless amended by statute, principles of the common law.[244] James Spigelman, former Chief Justice of New South Wales, has said that common law rights protections are largely 'secreted within the law of

236 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (The Court) ('*Lange*'), quoting *Attorney-General v Guardian Newspapers [No 2]* [1990] 1 AC 109, 283. See also *Potter v Minahan* (1908) 7 CLR 277, 321 (Higgins J).

237 See *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 248 [88]–[89] (Gummow, Hayne and Heydon JJ), 265 [147] (Crennan and Kiefel JJ).

238 *Burns v The Queen* (2012) 246 CLR 334, 366–7 [97] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

239 Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240, 241.

240 See generally George Winterton, 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 121.

241 (1610) 8 Co Rep 107a, 118a [77 ER 638].

242 See also Jeffrey Jowell, 'Is Equality a Constitutional Principle' [1994] *Current Legal Problems* 1 (observing that equality is not generally regarded as a basic principle of English constitutional law).

243 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 295 ALR 596, 608 [35].

244 *Plaintiff S10* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).

statutory interpretation'.[245] In a world of increasing statutory regulation, the common law's role in shaping statutory interpretation is ever more important.

There are important limits on courts' ability to give effect to human rights through statutory construction. In construing statutes, Australian courts must give effect to Parliament's 'intention',[246] where 'intention' is understood to identify the meaning a statute's text bears after the court has applied all the rules of statutory construction known to parliamentary drafters and the courts.[247] If a court departs from Parliament's intent in construing a statute and 'chooses' for itself the meaning of a law, it impermissibly exercises legislative, not judicial, power.[248]

There are limits on the interpretive leeway a court has when identifying Parliament's intent. Courts generally cannot depart from an 'unambiguously expressed' meaning;[249] the meaning selected must be 'open'[250] and one which the text can 'reasonably bear'.[251] Reasoning of this kind resulted in the relatively narrow construction given to the interpretation provision of the *Victorian Charter* in *Momcilovic* (discussed earlier in this chapter). Even so, the courts have recognised a set of 'presumptions' which form part of the rules of construction. These presumptions reflect principles which legislatures are, all other things being equal, ordinarily taken to intend. They give rise to what has been described as a 'common law bill of rights'.[252]

We have discussed some important examples of these presumptions earlier in this chapter, being the presumptions governing the relationship between statutes and international law. Other principles of statutory construction also help statutes comply with human rights principles.[253] Statutes creating offences may[254] presumptively be construed narrowly so that they do not exceed the statutory purpose[255] or the natural and ordinary meaning of the statute's text.[256] A clear statement of legislative intention is needed before courts will find that liability for a serious Commonwealth offence 'is imposed by means of a statutory fiction'.[257] Statutes are presumptively read so as not

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245 James Spigelman, 'The Common Law Bill of Rights' in *Statutory Interpretation and Human Rights: McPherson Lecture Series* (University of Queensland Press, 2009) vol 3, 9.

246 *Project Blue Sky* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

247 *Lacey* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

248 See *Momcilovic* (2011) 245 CLR 1, 92 [169] (Gummow J). If a court of a state construing a state law chooses for itself the meaning of the law, it may impermissibly act in a manner incompatible with the court's role as a repository of federal jurisdiction: at 92 [169] (Gummow J), 183–4 [454] (Heydon J).

249 Ibid 221 [579] (Crennan and Kiefel JJ).

250 Ibid 182–3 [452] (Heydon J).

251 Ibid 45 [39]–[40] (French CJ).

252 See Spigelman, above n 245, n 3, describing the origin of the phrase.

253 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) ch 5.

254 Although see, eg, *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 102–3 (Toohey, Gaudron and Gummow JJ), 109–110 (McHugh J).

255 *R v Khazaal* (2012) 246 CLR 601, 614 [33] (French CJ); *R v Adams* (1935) 53 CLR 563, 567–8 (Rich, Dixon, Evatt and McTiernan JJ).

256 *Coleman v Power* (2004) 220 CLR 1, 20 [64] (McHugh J). See also *Acts Interpretation Act 1915* (SA) s 22(2).

257 *Director of Public Prosecutions (Cth) v Keating* (2013) 297 ALR 394, 403–4 [47] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

to breach constitutional limits,[258] with the result that they may be construed not to infringe, for example, constitutional free speech protections.

It has also been said that, in construing statutes which 'protec[t] or enforce[e] human rights', courts 'have a special responsibility to take account of and give effect to the statutory purpose'.[259] In *AB v Western Australia*,[260] the High Court applied this principle to construe a statute concerning gender recognition to cover a broad group of transgender persons.[261] This principle can be reinforced by the presumption that beneficial and remedial legislation, such as legislation overcoming perceived deficiencies in rights protections, should be given a 'fair, large and liberal' interpretation.[262]

5.2 Statutory construction: the principle of legality

5.2.1 Overview

The most important rights-protecting principle of construction is the 'principle of legality',[263] a principle which was affirmed by six High Court judges in 2011.[264] The principle has been articulated in different ways, some broader, some narrower. Broader articulations of the principle express it as deriving from broad conceptions of liberal democracy, representative democracy or the rule of law. So a broad version of the principle holds that 'Parliament legislates for a … liberal democracy founded on the principles and traditions of the common law [a]nd the courts may approach legislation on this initial assumption'.[265] Similarly, in 2012, French CJ, Crennan and Kiefel JJ saw the principle of legality as being in part dependent on what may be expected of Parliament in a 'representative democracy governed by the rule of law'.[266] In other cases,

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258 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

259 *AB v Western Australia* (2011) 244 CLR 390, 402 [24] (French CJ, Gummow, Hayne, Kiefel and Bell JJ); *Waters v Public Transport Commission* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J); *IW v City of Perth* (1997) 191 CLR 1, 22–3 (Dawson and Gaudron JJ), 58 (Kirby J). The Federal Court has, for example, applied this presumption to construe an equal opportunity statute not to require that a person have an intention or motivation of discriminating in a particular way: *Australian Building and Construction Commissioner v McConnell Dowell Constructors (Aust) Pty Ltd* (2012) 203 FCR 345, 355 [45] (Flick J).

260 (2011) 244 CLR 390.

261 Ibid 401–2 [22]–[25], 405–6 [34]–[37] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

262 Ibid 402 [24] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

263 Justice Heydon has criticised this term (*Momcilovic* (2011) 245 CLR 1, 177 [444] n 639), but it seems set in the jurisprudence. As to its origin, see Spigelman, above n 245, 28; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449, 452.

264 *Lacey* (2011) 242 CLR 573, 582 [17] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). Conceivably, the principle, being a common law principle, could be abrogated if all or most Australian jurisdictions adopt a statutory interpretive principle directing courts not to presume that laws are not intended to infringe fundamental human rights.

265 *R v Home Secretary; Ex parte Pierson* [1998] AC 539, 587 (Steyn LJ) ('*Ex parte Pierson*').

266 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 134–5 [30]. See also *Monis v The Queen* (2013) 295 ALR 259, 342 [331] (Crennan, Kiefel and Bell JJ) (holding that the principle of legality 'may be sourced in rule of law concepts'); *X7 v Australian Crime Commission* (2013) 298 ALR 570, 578 [24] (French CJ and Crennan J).

Australian judges have described the principle as 'an aspect of the rule of law'.[267] In these broader articulations, the principle of legality could be understood to extend beyond any narrow understanding of fundamental rights and freedoms to include norms deriving from 'representative democracy' or the 'rule of law'. So, in 2009, French CJ expressed the view that the principle of legality existed in aid of the rule of law, before proceeding expressly to derive specific interpretive rules (against laws infringing the open court principle and derogating from judicial due process) from the rule of law itself.[268]

Authoritative Australian statements have often expressed the principle more narrowly, focusing on the presumption against interfering with so-called 'fundamental rights', without identifying its source in broad notions such as the rule of law or perceiving that presumptions could be independently derived from those broad notions. So, in *Coco v The Queen*,[269] the High Court expressed the principle as follows:

> The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.[270]

It is unclear to what extent this apparently narrower version of the principle departs from the more open-ended statements describing the principle as deriving from, or supporting, the rule of law and the principles of representative democracy.

The principle of legality has four closely related rationales. First, it is improbable that Parliament would infringe fundamental rights without using clear words.[271] Secondly, the principle of legality is 'well known to every parliamentary drafter'.[272] It may therefore be taken that, if Parliament intends to abrogate an element of the principle or the principle itself, it will say so. Thirdly, there is a risk that, absent clear words, the full

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267 See, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 622 [182] (Crennan, Kiefel and Bell JJ); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

268 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [48].

269 (1994) 179 CLR 427.

270 (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ), citing *Lim* (1992) 176 CLR 1, 12 (Mason CJ).

271 *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). Although see *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [20] (Gleeson CJ): 'A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.'

272 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197, 211 [42] (French CJ); Spigelman, above n 245, 31. See also Sir Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*' (2009) *125 Law Quarterly Review* 598, 605.

implications of a proposed statute will pass unnoticed.[273] Fourthly, if Parliament is to override fundamental rights, it 'must squarely confront what it is doing and accept the political cost'.[274] The third and fourth of these rationales reflect a common law policy which promotes deliberation in the legislative process.

A fifth possible rationale, identified in the broader statements of the principle, is the rule of law. As we will see in Chapter 4, the rule of law is an assumption on which the Australian Constitution is based. The intuition underlying the 'rule of law' justification for the principle of legality could be that any assertion of government power requires positive justification in law.[275] A difficulty with relying on this intuition is that it cannot explain why the principle of legality is confined only to infringement of fundamental rights and freedoms as, taken at its highest, the principle could entail that there is a strong presumption against law authorising *anything*. Alternatively, the intuition underlying the 'rule of law' justification could be that, ordinarily, individuals are entitled to rely on the principle that long-standing values will not be impaired: a strong presumption against interfering with such long-standing values is justified in order to protect the legitimate, rule-of-law-related reliance and expectation interests thereby generated. A difficulty with relying on this intuition is that, taken at its highest, it would necessitate a strong presumption against any interference with *any* long-standing norms – those norms would include, but not be limited to, fundamental rights and freedoms. This intuition therefore seems to prove too much. Further, the scope and variety of modern legislation, coupled with the obvious fact that government typically legislates to overcome existing norms, suggest that any general presumption against interfering with long-standing norms would suffer from a significant democratic deficit. Both of these intuitions have an additional difficulty: explaining how the content of the principle of legality (the substantive rights it protects and the presumption's weight) is linked to any specific constitutional or common law notion of the rule of law and to specific elements of the text and structure of the Constitution that the rule of law infuses.

Most statements of the principle of legality trace its Australian history to *Potter v Minahan*,[276] a case which shows both the principle's advantages and its limitations. *Potter v Minahan* concerned the application of the so-called 'dictation test', given to persons entering Australia, pursuant to the *Immigration Restriction Acts 1901* (Cth). James Minahan had been born in Australia to Winifred Minahan and Teung Ming.

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273 Robert French, 'The Common Law and the Protection of Human Rights' (Speech to the Anglo Australasian Lawyers' Society, 4 September 2009) 7–8 [12].

274 *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann) ('*Ex parte Simms*').

275 A conception of this kind appears to underlie the discussion of the principle of legality and the rule of law in *Halsbury's Laws of England* (4th ed, reissued, 1996) 8(2) at [6] on which Lord Browne-Wilkinson relied in identifying the principle of legality in *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587–8. Gleeson CJ referred to *Ex parte Pierson* (but to Steyn LJ's judgment, not Browne-Wilkinson LJ's judgment) when identifying the principle of legality as an 'aspect of the rule of law' in *Electrolux*: at 329 [21]. See also *Abebe v Commonwealth* (1999) 197 CLR 510, 560 [137] (Gummow and Hayne JJ) (observing that the rule of law entails that 'every person "is entitled to his personal liberty except so far as that is abridged by a due administration of the law"').

276 (1908) 7 CLR 277.

Ming was described by the *Commonwealth Law Reports* as 'a Chinese'.[277] When Minahan was about five years old, he moved from Australia to China with his father, before returning to Australia 26 years later. At the border, Minahan was asked to write a passage in English read to him by a customs officer. He failed and was told he could not land. Section 3(a) of the *Immigration Restriction Acts* provided for the giving of a so-called 'dictation test' of this kind in cases of 'immigration' into Australia and designated a class of 'prohibited immigrants'. The test required by s 3(a) was the core provision of what became known as the 'White Australia' policy.

Minahan contended that he was not required to sit the dictation test in order to return to Australia, arguing that a person has a 'right to return to the country to which he owes allegiance' which 'Parliament will not be supposed to have denied … except by express words'.[278] The result, Minahan argued, was that the terms 'immigration' and 'immigrant' in the statute should not be read to apply to a person like him who had been born in Australia and had not accepted any foreign allegiance. The High Court, by 3:2, accepted Minahan's argument. The principle of legality appears most clearly in Justice O'Connor's judgment, when he quoted the fourth edition of *Maxwell on Statutes* in support of the proposition that '[i]t 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'.[279] He identified a right on the part of 'member[s] of the Australian community' to re-enter Australia, a right which should not be affected to a 'greater extent than the scope and purpose of the Act require'.[280] Because Minahan had been born in Australia and had not abandoned it as his home, O'Connor J held he was not an 'immigrant' who must pass the dictation test.[281] Chief Justice Griffith[282] and Barton J[283] reasoned similarly. Justice Isaacs and Higgins J dissented on the ground that the statutory language was clearly intended to cover a person in Minahan's position.[284]

Potter v Minahan shows the important role that the principle of legality can play in achieving rights-protecting outcomes – in that case, the protection of Minahan against discrimination based on his 'race'. At the same time, the fulcrum of each of the majority judgments was a common law right of *members of the Australian community* to return home.[285] It was not a common law right against discrimination, based on race

277 Ibid 278.

278 Ibid 281 (Duffy KC, for the respondent).

279 Ibid 304. *Maxwell on Statutes* in turn cited Marshall CJ's judgment in *United States v Fisher*, 6 US 358, 389–90 (1805). There Marshall CJ said that 'Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.'

280 *Potter v Minahan* (1908) 7 CLR 277, 305.

281 Ibid 306–7.

282 Ibid 290–1.

283 Ibid 293–4, 299.

284 Ibid 310–11 (Isaacs J), 321–4 (Higgins J).

285 See 289–90 (Griffith CJ), 293–4 (Barton J), 305 (O'Connor J). There is, however, no absolute prohibition on the rights and freedoms recognised by the principle being rights and freedoms of non-citizens: *Plaintiff M47* (2012) 292 ALR 243, 380 [532] (Bell J).

or otherwise, nor a common law right of equal treatment. This emphasises that the principle of legality can only apply to fundamental common law rights and the common law of its nature tends to reflect conservative, older values rather than contemporary values. For example, no application of the principle of legality in *Potter v Minahan* could have protected the application of the dictation test to Chinese nationals. Further, the important role that the ambiguity of the terms 'immigration' and 'immigrant' played in *Potter v Minahan* emphasises that the principle of legality is capable of applying only where there is sufficient plasticity in the statute's text to allow it to be read in a rights-protecting way.

The 2008 judgment of the Full Federal Court in *Evans v New South Wales*[286] also shows the principle's power. *Evans* concerned the validity of regulations made by the New South Wales government as part of the government's plans for the World Youth Day event in Sydney, a Catholic youth celebration. Section 58 of the *World Youth Day Act 2006* (NSW) gave the New South Wales Governor power to make regulations with respect to 'the conduct of the public [on] World Youth Day venues and facilities'. Pursuant to this power, a regulation was made empowering authorised persons to 'direct a person within a World Youth Day declared area to cease engaging in conduct that … causes annoyance or inconvenience to participants in a World Youth Day event'.[287] Failure to comply with a direction was an offence.[288] The applicants intended to protest during the celebrations by distributing T-shirts, leaflets, flyers, stickers, condoms and coat-hangers. They argued that the Act and Regulations were invalid as infringing a constitutional freedom of political communication.

The Full Federal Court decided the issue without resolving the constitutional question. It did so by applying the principle of legality to read the *World Youth Day Act* in light of the fundamental right to freedom of expression – thereby reducing the scope of the power to make regulations. They pointed out that 'annoyance' was a subjective response and that the regulation could be read as applying regardless of the number of people who might be 'annoyed'.[289] The result was that the regulation of 'annoying' behaviour 'affect[ed] freedom of speech in a way that … [was] not supported by the statutory power'.[290] The effect of reading the regulation-making power in the *World Youth Day Act* narrowly was that a regulation, which may have appeared to be within power if the regulation-making power were given its broad, ordinary meaning, was in fact beyond power. The Court upheld the regulation so far as it applied to 'inconvenience' on the basis that 'inconvenience' had a more objective content and that 'inconvenience' did not apply to expression with which people merely disagreed or found troubling.[291] Accordingly, the Court declared that the regulations were invalid to the extent that they applied to conduct which annoyed participants.

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286 *Evans v New South Wales* (2008) 168 FCR 576 ('*Evans*').
287 *World Youth Day Regulations 2008* (NSW) cl 7(1)(b).
288 *World Youth Day Regulations 2008* (NSW) cl 7(2).
289 *Evans* (2008) 168 FCR 576, 596 [83] (French, Branson and Stone JJ).
290 Ibid 597 [83] (French, Branson and Stone JJ).
291 Ibid 597 [84] (French, Branson and Stone JJ).

The principle of legality is an important weapon in the armoury of rights-protecting principles. It has both *ex ante* and *ex post* benefits. *Ex ante*, it encourages Parliament to deliberate about the rights-impairing effects of laws.[292] *Ex post*, it can result in laws being construed and applied in rights-protecting ways. The principle also represents prevailing High Court doctrine and, for that reason, it may be taken that Parliament legislates on the basis that statutes will be construed in light of it: this reinforces its legitimacy. The principle of legality may, however, not come without costs in terms of rights protection. Some presumptions associated with the principle (for example, those associated with freedom of expression, acquisition of property, procedural fairness and the presumption of innocence) are – or could be – the subject of express or implied constitutional protection. The more cases that are decided on statutory construction grounds, the less often courts will tend to the growth of constitutional protections. *Evans* furnishes an example of where the Court passed up an opportunity to deepen the constitutional protection of free speech. Lacking a more developed jurisprudence giving them robust protection, constitutional rights may be weak in the face of express parliamentary abrogation.

5.2.2 Breadth and depth of the principle of legality

The High Court has identified an array of 'fundamental'[293] rights and freedoms that are presumptively protected by reason of the principle of legality – so, presumptively, Parliament may be taken not to intend:[294]

- to abrogate the liberty of the individual and authorise detention;[295]
- to abrogate the freedom of speech;[296]
- to abrogate the freedom of association[297] and freedom of assembly;[298]
- to abrogate the freedom of movement;[299]

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292 See, eg, Dan Meagher, 'The Principle of Legality and the Judicial Protection of Rights – *Evans v State of New South Wales*' (2009) 37 *Federal Law Review* 295, 312–13.

293 The use of 'fundamental' has been criticised: Paul Finn, 'Statutes and the Common Law: The Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52, 56–7, citing *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298–9 [27]–[29] (McHugh J); French CJ has suggested it should be discarded: *Momcilovic* (2011) 245 CLR 1, 46–7 [43] (French CJ).

294 It has also been suggested, for example, that Parliament will be taken not to intend: to interfere with native title (French, above n 273, 9 [16]); to deprive a subject of a right to appeal against a sentence which a court had no power to pass (*Ex parte Pierson* [1998] AC 539, 589 (Lord Browne-Wilkinson)); to interfere with equality of religion (*Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 544 (McHugh JA)); to interfere with the free flow of communication between solicitor and client (*Ex parte Pierson* [1998] AC 539, 574–5 (Lord Browne-Wilkinson)); to legislate contrary to the 'rule of law' (*Moran Hospitals Pty Ltd v King* (1997) 49 ALD 444, 461 (Beaumont J)); and to abrogate the right to bring a private prosecution (*R (Gujra) v Crown Prosecution Service* [2012] 3 WLR 1227, 1256–7 [113] (Mance JSC)). There may also be a presumption against making fundamental alterations to the process of criminal justice: *X7 v Australian Crime Commission* (2013) 298 ALR 570, 602–3 [119] (Hayne and Bell JJ).

295 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J); *Lim* (1992) 176 CLR 1, 11–13 (Mason CJ); *Plaintiff M47* (2012) 292 ALR 243, 276–7 [116]–[117] (Gummow J), 378–9 [529] (Bell J).

296 *Lange* (1997) 189 CLR 520, 564 (The Court).

297 *South Australia v Totani* (2010) 242 CLR 1, 139–40 [365] (Heydon J).

298 Ibid 28 [30] (French CJ).

299 *Commonwealth v Progress Advertising & Press Agency Co Pty Ltd* (1910) 10 CLR 457, 464 (O'Connor J).

- to abrogate the freedom of individuals to re-enter their home country;[300]
- to abrogate the presumption of innocence;[301]
- to impose a legal burden, rather than an evidential burden, on an accused;[302]
- to enact an offence of strict or absolute liability;[303]
- to enact an offence that does not require knowledge of wrongfulness;[304]
- to criminalise behaviour on the basis that it is subjectively (rather than objectively) offensive;[305]
- to abrogate the privilege against self-incrimination;[306]
- that a law operate retrospectively;[307]
- to authorise the commission of a tort;[308]
- to authorise the fraudulent exercise of power;[309]
- to authorise the unreasonable exercise of power;[310]
- to interfere with common law protection of personal reputation;[311]
- that procedural fairness need not be afforded in the exercise of a power capable of affecting rights and interests;[312]
- to require courts to take secret evidence absent an affected parties' legal representatives;[313]
- to restrict access to the courts and judicial review;[314]
- to interfere with the course of justice;[315]

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300 *Potter v Minahan* (1908) 7 CLR 277 (described above).

301 *Momcilovic* (2011) 245 CLR 1, 47 [44] (French CJ), 200 [512] (Crennan and Kiefel JJ).

302 Ibid 47 [44] (French CJ).

303 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 528 (Gibbs CJ), 551 (Wilson J), 565–8 (Brennan J).

304 *Hogan v Hinch* (2011) 243 CLR 506, 538–9 [39] (French CJ).

305 *Coleman v Power* (2004) 220 CLR 1, 5–6 [12] (Gleeson CJ).

306 *Hammond v Commonwealth* (1982) 152 CLR 188, 197–8 (Barwick CJ), 199 (Mason J agreeing), 200 (Murphy J), 203 (Brennan J), 209 (Deane J); *X7 v Australian Crime Commission* (2013) 298 ALR 570, 578 [24] (French CJ and Crennan J). See also *Legislation Act 2001* (ACT) ss 170; 6(2).

307 *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 134 [29] (French CJ, Crennan and Kiefel JJ). This presumption may be particularly strong in the case of retroactive criminal liability: *Director of Public Prosecutions (Cth) v Keating* (2013) 297 ALR 394, 404 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

308 *Coco v The Queen* (1994) 179 CLR 427, 436–7 (Mason CJ, Brennan, Gaudron and McHugh JJ).

309 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 663 [28] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

310 *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225, 237–8 [28]–[29] (French CJ), 246 [63], 252 [86] (Hayne, Kiefel and Bell JJ), 252–4 [90]–[93] (Gageler J).

311 *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 635–6 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

312 *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

313 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 526 [73] (French CJ).

314 *Plaintiff S157* (2003) 211 CLR 476, 492–3 [32] (Gleeson CJ). This presumption now, in part, has status as an absolute constitutional principle (see Chapter 9). Any fundamental right to access the courts may be subject to the power of the courts to require leave to commence proceedings: *R (Gujra) v Crown Prosecution Service* [2012] 3 WLR 1227, 1247 [81] (Kerr JSC), 1254 [107] (Mance JSC).

315 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 558 (McHugh J).

- to interfere with the right to a fair trial;[316]
- to abrogate a court's power to issue habeas corpus in respect of a person not lawfully detained;[317]
- to confer a privilege on the Crown of appeal against acquittal[318] or sentence[319];
- to abrogate the principle of open justice;[320]
- to abrogate legal professional privilege;[321]
- that executive immunities be read broadly;[322]
- to interfere with vested property interests;[323]
- to alienate property without compensation;[324]
- that the compensation due to a person whose property has been impaired will not be generous;[325] and
- to interfere with the liberty to carry on a business.[326]

This list shows the breadth of the principle of legality; it is also deep. Because it forms part of the one Australian common law, subject to statutory variation, it applies to statutes enacted at all levels of government. Expressions of the presumption's strength vary,[327] but share the theme that the presumption is weighty. It has been said to require 'clear and unambiguous words'[328], 'irresistible clearness',[329] 'unmistakeable and unambiguous

316 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518, 541–2 (Isaacs J); *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298 [28] (McHugh J).

317 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, 91 (Isaacs J); *Lim* (1992) 176 CLR 1, 12 (Mason CJ).

318 *Davern v Messel* (1984) 155 CLR 21, 31 (Gibbs CJ), 48 (Mason and Brennan JJ), 63 (Murphy J), 66 (Deane J).

319 *Lacey* (2011) 242 CLR 573, 583–4 [20] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

320 *Hogan v Hinch* (2011) 243 CLR 506, 534–5 [27]–[29] (French CJ).

321 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 553 [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also *Legislation Act 2001* (ACT) ss 171, 6(2).

322 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105, 116 (Kitto J); *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575, 587–9 [33]–[37] (McHugh J), 594–9 [59]–[68] (Kirby J), 613 [113] (Callinan J).

323 *Clissold v Perry* (1904) 1 CLR 363, 373 (Griffith CJ).

324 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 414–16 [28]–[31] (Kirby J).

325 See *Marshall v Director General, Department of Transport* (2001) 205 CLR 602, 623 [38] (Gaudron J), 637 [48] (McHugh J).

326 *Commonwealth v Progress Advertising and Press Agency Co Pty Ltd* (1910) 10 CLR 457, 464 (O'Connor J).

327 Various formulations are collected in *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340, 353–4 [44] (Spigelman CJ). See also *S v Boulton* (2006) 151 FCR 364, 383–4 [121]–[127] (Jacobson J), identifying seven principles relating to the strength of the presumption.

328 *Bropho v Western Australia* (1990) 171 CLR 1, 17–18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

329 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

language',[330] 'clear words',[331] 'something unequivocal',[332] 'crystal' clarity of intention,[333] 'express words',[334] 'express authorization',[335] 'unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question',[336] 'express language or necessary implication'[337] or 'clear and unequivocal language'.[338] The statute need not be ambiguous in any narrow sense before the presumption operates.[339] The principle of legality may prevail over other textual and structural presumptions such as the presumption against inutility[340] and any presumption against statutes causing inconvenience.[341]

5.2.3 The future of the principle of legality

The principle of legality is open to several objections. The wide number of subjects with which modern regulatory statutes deal and the depth of those statutes' coverage may undermine any factual claim that Parliament in general does not intend to close up common law liberties.[342] There is also a risk that courts will apply the principle in an elitist, anti-democratic way to subvert Parliament's will.[343] This risk is particularly strong where the courts have not identified principles guiding the identification of 'fundamental' rights and have not identified principles governing how those rights will be balanced against other rights or the broader public interest.[344] There is also a risk that courts will, in reality or appearance, protect rights by constructing an artificial parliamentary intent to justify decisions reached by judges on impermissibly value-laden grounds.

Having regard to these objections, the legitimacy of the principle of legality depends on the High Court resolving three issues. First, some statements of the principle link it

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330 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

331 *Coleman v Power* (2004) 220 CLR 1, 54 [184]–[185] (Gummow and Hayne JJ), 66–7 [225] (Kirby J), 96 [313] (Heydon J).

332 *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, 93 (Isaacs J).

333 *R (Jackson) v Attorney General* [2006] 1 AC 262, 318 [159] (Hale B).

334 *Coco v The Queen* (1994) 179 CLR 427, 436 (Mason CJ, Brennan, Gaudron and McHugh JJ).

335 Ibid 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

336 *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ).

337 *Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffmann).

338 *Momcilovic* (2011) 245 CLR 1, 46–7 [43] (French CJ).

339 See *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552–3 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); Spigelman, above n 245, 33.

340 See *Lim* (1992) 176 CLR 1, 12–13 (Mason CJ).

341 *Coco v The Queen* (1994) 179 CLR 427, 436 (Mason CJ, Brennan, Gaudron and McHugh JJ).

342 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298–9 [28]–[29] (McHugh J); Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] *Public Law* 397, 397.

343 French, above n 273, 16–17 [27], quoting Roscoe Pound, 'Common Law and Legislation' (1908) 21 *Harvard Law Review* 383, 387. See also Lord Devlin, 'Judges and Lawmakers' (1976) 39 *Modern Law Review* 1, 13–15.

344 David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) *1 Oxford University Commonwealth Law Journal* 5, 6.

to a presumption that Parliament does not intend to alter the common law *in general*.[345] The principle of legality should be severed from that presumption. The presumption against altering the common law must become progressively weaker as the regulatory state expands.[346] The presumption against altering common law principles also reflects a history of anti-democratic judicial turf-protection.[347] Further, the principle of legality does not protect just *any* common law principles; it protects only those that have crystallised into fundamental rights. The principle of legality is narrower and, arguably, deeper than any presumption against altering the common law. If the principle of legality were to be severed from the presumption against altering common law principles, the justification for doing so should be found in the rationales for the principle of legality – those rationales emphasise the improbability or undesirability of Parliament infringing fundamental rights, but do not emphasise the improbability or undesirability of Parliament altering the common law.

Secondly, the High Court needs to articulate clear principles guiding the identification of fundamental rights. The difficulty is in identifying whether an existing principle is 'fundamental' or is precisely the kind of anachronistic common law residue that statutory regulation is intended to overcome.

Reflecting the general capacity of the common law to develop, the High Court has held that what constitutes fundamental rights can change over time.[348] But the Court has not identified how that change is to be discerned; neither has it conclusively identified a general principled basis grounding those rights which are recognised by doctrine. It has been suggested that the 'history of the common law',[349] statutory developments[350] and international law[351] are all possible sources for the identification of fundamental rights. Because the principle of legality is a common law principle,

345 See, eg, *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 271 [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Ex parte Pierson* [1998] AC 539, 573–4 (Lord Browne-Wilkinson); *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298–9 [28] (McHugh J). As to the presumption against altering common law principles, see *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677, 682–3 (Mason J) (Gibbs CJ, Murphy, Aickin and Brennan JJ concurring).

346 See *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298–9 [28]–[30] (McHugh J); *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 284 [36] (McHugh J).

347 See, eg, French, above n 273, 17 [29].

348 *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

349 Spigelman, above n 245, 26.

350 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 520–1 (Brennan J); *Watkins v Home Secretary* [2006] 2 AC 395, 418–419 [61] (Rodger LJ).

351 Spigelman, above n 245, 24; French, above n 217, 20. In *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 620 [44], French CJ expressly linked the presumption against acquisition of property otherwise than on just terms with the ICCPR, ICESCR and the *Universal Declaration of Human Rights*. See also Robert French, 'International Law and Australian Domestic Law' (Speech delivered at the Supreme Court of New South Wales Annual Conference, Hunter Valley, 21 August 2009) 33–5.

executive practice, informed professional opinion[352] and even 'contemporary values'[353] could also be sources.

Three judges of a six-judge bench of the High Court have suggested that before a right may be admitted into the corpus of fundamental rights, it must be 'clearly' recognised by the courts.[354] This is a helpful guide but, if taken literally, a requirement of 'clear' and prior recognition by courts risks stultifying the recognition of new fundamental rights. There are few, perhaps no, occasions outside the context of the application of the principle of legality where a court declares and applies a fundamental common law right. A condition of clear and prior recognition would entail that, in any given case where it was sought to apply the principle of legality, the court could not recognise a *new* right – because such a right would fail the condition of clear prior recognition. That would leave few, perhaps no, circumstances in which a new right could be recognised.

Third, as Dan Meagher has persuasively argued,[355] the High Court needs to articulate clear principles guiding whether and how the 'rights and freedoms' protected by the principle of legality incorporate notions of balancing against other rights and freedoms and balancing against the broader public interest. When reading a statute in the light of the freedom of expression, should courts have regard to the fact that the freedom of expression cannot be absolute and must give way to the legitimate claims of others to, for example, personal reputation and to the broader interest in an ordered society? If so, what criteria guide that determination? In the sphere of constitutional rights, the courts have developed a broad, if incomplete, jurisprudence of balancing (see Chapter 4). The High Court must do the same for the principle of legality or explain why (as is often the current practice)[356] the principle of legality does not incorporate notions of balancing.

Resolving these three issues is essential to the legitimacy of the principle of legality because it is a significant assertion of judicial power for a court to depart from a statute's ordinary meaning merely because Parliament is perceived to be derogating from some right considered 'fundamental' by the courts. It is also essential because of the very rationales for the principle of legality, rationales which impute to Parliament and parliamentary drafters an awareness of fundamental rights and the nature of the principle. It is very difficult to justify such an imputed awareness if the principles guiding the identification and development of fundamental rights remain unarticulated.

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352 By analogy with the fact that these are arguably sources of the common law. See *PGA v The Queen* (2012) 245 CLR 355, 389–90 [93], 394–5 [105]–[107] (Heydon J).

353 *Dietrich* (1992) 177 CLR 292, 319 (Brennan J); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 142 (Brennan J).

354 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 622 [182] (Crennan, Kiefel and Bell JJ); cf 619 [166] (Heydon J).

355 See Meagher, above n 263.

356 See ibid 460–2. In *Momcilovic* (2011) 245 CLR 1, French CJ (at 40 [23], 44 [35]–[36]) and Crennan and Kiefel JJ (at 219–20 [571]–[576]) appeared to consider that it was conceptually possible to separate the determination of whether a 'right' has been infringed from any balancing. Cf 91–2 [166]–[168] (Gummow J), 123 [280] (Hayne J), 249–50 [683]–[684] (Bell J).

5.3 Are there 'fundamental rights and freedoms' which cannot be abrogated?

In 1610, in *Dr Bonham's Case*, Lord Coke CJ asserted a broad judicial power to hold statutes void on the basis that they were 'against common right and reason, or repugnant, or impossible to be performed'.[357] However, the asserted power to hold legislation void has not been exercised by an English,[358] let alone an Australian, court. In 1885, Dicey was able to deal with *Dr Bonham's Case* in a footnote. He declared 'obsolete' the idea that a judge might declare legislation 'void' for being 'against common right and reason'.[359] Similarly, the power expressed in the case has, at least to the present day, been accurately described as 'empty phrases'.[360]

Interestingly, the High Court has left open a faint possibility of the common law playing a larger role in protecting human rights against abrogation by statute. Sir Robin Cooke, a former President of the New Zealand Court of Appeal, has argued that certain rights lie so deep that they are incapable of legislative repeal.[361] He stated in *Taylor v New Zealand Poultry Board*:[362] 'I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.' In *Union Steamship Co of Australia Pty Ltd v The King*,[363] the High Court cited decisions of Cooke J, stating:

> Whether the exercise of … legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law … a view which Lord Reid firmly rejected in *Pickin v British Railways Board*, is another question which we need not explore.[364]

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357 (1610) 8 Co Rep 107a, 118a [77 ER 638].

358 Compare *Day v Savadge* [1614] Hob 85, 87 [80 ER 235]; *City of London v Wood* (1701) 12 Mod 669, 687–8 [88 ER 1592].

359 A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, first published 1885, 10th ed, 1959) 61–2 n 2.

360 Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin, 7th ed, 1994) 76. On the fate of fundamental rights arguments before the High Court, see Michael Kirby, 'Deep Lying Rights – A Constitutional Conversation Continues' (2005) 3 *New Zealand Journal of Public International Law* 195.

361 *L v M* [1979] 2 NZLR 519, 527; *Brader v Ministry of Transport* [1981] 1 NZLR 73, 78; *New Zealand Drivers Association v New Zealand Carriers* [1982] 1 NZLR 374, 390; *Fraser v State Services Commission* [1984] 1 NZLR 116, 121. See Lord Irvine of Lairg, 'Judges and Decision-Makers: The Theory and Practice of Wednesbury Review' [1996] *Public La*w 59, 76–8; Winterton, above n 240, 139–40.

362 [1984] 1 NZLR 394, 398.

363 (1988) 166 CLR 1.

364 Ibid 10. See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 636 (Dawson J) ('*War Crimes Act Case*'). Cf *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 43 (Brennan J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 362–3 (Dawson J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 66 (Brennan CJ), 71–6 (Dawson J), 90–1 (Toohey J).

The High Court has continued to leave this question open.[365] As Anne Twomey has pointed out, 'courts have been reluctant to hammer the nails into Dr Bonham's coffin, leaving open the possibility of the resurrection of the corpse *in extremis*'.[366] Any resurrection of fundamental rights as an absolute limitation on legislative power would need to be attended by extreme judicial caution given its anti-democratic effects and appropriate judicial humility. Further, it would need to articulate the principles guiding the choice of those rights, lest the result be incapacitating uncertainty in the law, 'rule by judiciary rather than the rule of law'[367] or, most perversely, rule by an individual judge's conceptions of fundamental rights.[368]

5.4 The common law and the Constitution

The High Court has held that the common law must conform to the Constitution.[369] This means that common law principles that do not conform to constitutional rights and freedoms must give way to those freedoms. An example of this is the case of *Lange v Australian Broadcasting Corporation*,[370] which we discuss in Chapter 5. *Lange* decided that the common law of defamation must develop to allow a greater freedom for political speech so as to conform to the constitutional freedom of political communication. Further, not only must common law rules conform to the Constitution, but the *reasoning* underlying existing common law rules must be rejected if that reasoning is inconsistent with the Constitution.[371] The rejection of that reasoning may necessitate rejection of

365 *Momcilovic* (2011) 245 CLR 1, 46 [43] n 217 (French CJ), 215–16 [562] (Crennan and Kiefel JJ); *South Australia v Totani* (2010) 242 CLR 1, 29 [31] (French CJ); *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ). See also canvassing arguments for and against a fundamental rights limitation deriving from the common law: Anthony Gray, 'The Common Law and the Constitution as Protectors of Rights in Australia' (2010) 39 *Common Law World Review* 119, 156.

366 Anne Twomey, 'Fundamental Common Law Principles as Limitations upon Legislative Power' (2009) 9 *Oxford University Commonwealth Law Journal* 47, 61.

367 Ibid 71. Justice Gummow, extra-curially, identified nine 'difficulties' in the way of any contention that fundamental common law rights constrain legislative power: W M C Gummow, 'The Constitution: Ultimate Foundation of Australian Law?' (2005) 79 *Australian Law Journal* 167, 176–7.

368 See, eg, George Winterton, 'Extra-Constitutional Notions in Australian Constitutional Law' (1986) 16 *Federal Law Review* 223, 234.

369 *Lange* (1997) 189 CLR 520, 566 (The Court); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 528 [44] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). On the nature of the common law's conformance to the Constitution, see Graeme Hill and Adrienne Stone, 'The Constitutionalisation of the Common Law' (2004) 25 *Adelaide Law Review* 67; Greg Taylor, 'The Effect of the Constitution on the Common Law as Revealed by *John Pfeiffer v Rogerson*' (2002) 30 *Federal Law Review* 69; Pamela Tate, 'Some Observations on the Common Law and the Constitution' (2008) 30 *Sydney Law Review* 119; Gummow, above n 367. See also Gardbaum, above n 16, 394 (discussing different methods by which constitutions impact private law).

370 See *Aid/Watch Incorporated v Commissioner of Taxation for the Commonwealth of Australia* (1997) 189 CLR 520, 557 [48] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

371 Ibid.

a rule based upon it.[372] One effect of these principles is to ensure that common law rules appropriately respect constitutional guarantees. In developing the common law to conform to constitutional guarantees, the High Court has, unlike the Supreme Court of Canada,[373] applied the same proportionality analysis as it applies to determining a statute's validity.

The High Court has also held that, unlike in the United States, there is only *one* Australian common law.[374] Along with express constitutional protection of non-discrimination based on state residency,[375] the principle that there is only one Australian common law provides a minimum degree of equality in the legal consequences of conduct wherever it occurs in Australia.[376] As we will see in Chapter 9, the principle that there is one Australian common law has also formed the basis of a rights-protective implication guaranteeing the jurisdiction of state supreme courts to supervise exercises of public power.

6 The state of human rights protection in Australia

As this chapter and the subsequent chapters in this book show, human rights are protected in Australia in a range of ways. While the Constitution itself contains few rights protections, Australia has an array of significant, albeit often ad hoc, protections. Commonwealth, state and territory statutes, international law and the common law all have important roles to play. From a rights protection perspective, the ad hoc extra-constitutional nature of many of Australia's rights protections has both strengths and weaknesses. It means Australia is not in thrall to rights considered important in past times, but now considered obsolete. It also means that Australian Parliaments have been able to legislate to promote rights – for example, by introducing anti-discrimination statutes – without risking a constitutional challenge on the basis that that legislation itself infringes rights. On the other hand, the ad hoc and historically contingent nature of the rights protected in the Australian Constitution – for example, the rights of public servants transferred to the Commonwealth in 1901 are protected,[377] while there is no express constitutional protection of free speech – means that many people may consider that Australia's constitutional rights protections are either incomplete or, at least, display no consistent scheme. The ad hoc nature of that protection has also made it difficult for courts to develop a principled and coherent rights jurisprudence.

This book is not about whether Australia's Constitution should be amended to incorporate new rights protections or delete outdated, discriminatory provisions, a topic

372 See, eg, *PGA v The Queen* (2012) 245 CLR 355, 373 [30] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

373 See, eg, *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130, 1171 [97] (Cory J, for La Forest, Gonthier, Cory, McLachlin, Iacobucci and Major JJ).

374 *Lange* (1997) 189 CLR 520, 563 (The Court).

375 For example, Commonwealth Constitution s 117, discussed in Chapter 7.

376 See, eg, *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 252 [102] (Gummow, Hayne and Heydon JJ).

377 Constitution, s 84.

which is dealt with elsewhere.[378] It proceeds from the premise that where the Constitution in fact protects rights, the judiciary should enforce those protections in a principled and coherent way. A theme of this book, developed over the subsequent chapters, is that an important means of achieving that coherence is to articulate the interests that constitutional guarantees are intended to serve. Articulating those interests, where they exist, is an essential precondition to identifying the scope of rights and the extent to which judicial intervention is necessary to ensure those interests' protection. It is a responsibility that falls to the High Court in interpreting and applying the Constitution.

378 See, eg, George Williams, *A Charter of Rights for Australia* (UNSW Press, 3rd ed, 2007).