Foreword

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In his poem, 'The Second Coming', WB Yeats found his sight troubled by an image from the desert waste 'out of Spiritus Mundi'. It was a rough beast with 'lion body and the head of a man … moving its slow thighs while all about it/Wind shadows of the indignant desert birds'.

In this excellent and timely collection, the contributors, some indignantly and some not, wind about a rough beast that bears the name 'the principle of legality'. They consider its uncertain origins, its chimeric and evolving rationales, its shifting lineaments and its varying purposes. They look to its parasitic connection with another fabulous creature – legislative intention – and whether it requires ambiguity for sustenance. They offer a diversity of perspectives, which cannot all concurrently command assent. Together, however, they provide a valuable opportunity for the enrichment of judicial, academic and practitioner reflection on the theory and operation of a common law 'principle' which has been said to have a constitutional dimension.

Various formulations of the principle are discussed in the book. Dan Meagher chooses a passage from *Coco v The Queen*:[1]

> 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.

Questions about the principle of legality begin with the term itself. Justice Basten argues that it is 'an unhelpful label'. The 'principle' might better be described as an approach. The term 'legality' is imprecise and anodyne and perhaps should be replaced by something else. He refers to a usage of the term 'principle of legality' embracing the concept of equal justice in a statement by Hans Kelsen quoted in *Green v The Queen*.[2] Kelsen was using the term at a level of abstraction and in a sense that was not relevant and not invoked in *Green* as relevant to any question of statutory interpretation. However, Kelsen's usage does highlight the difficulty with the term which has its origins in the United Kingdom but does not give any real clue to the content of the principle it denotes.

A second and fundamental question concerns the place of legislative intention in the content and application of the principle. The answer depends upon the place

1 (1994) 179 CLR 427 at 437 (citation omitted), per Mason CJ, Brennan, Gaudron and McHugh JJ, Deane and Dawson JJ agreeing at 446.

2 (2011) 244 CLR 462 at 472 [28].

of legislative intention in statutory interpretation generally. Is it something logically anterior to the interpretive exercise or something imputed as a result of it? In what some might call a seminal passage, Chief Justice Marshall of the Supreme Court of the United States said in 1805:[3]

> 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.

In Marshall's view 'the *intention* is the most sacred rule of interpretation'.[4]

Marshall's words resonated down the years. A legislative intention expressed with 'irresistible clearness' was necessary, according to the 1905 edition of *Maxwell on Statutes*, to support an interpretation of a statute departing from fundamental principles and the general system of law.[5] Those words were quoted in the much cited passage in the judgment of O'Connor J in *Potter v Minahan*[6] which is referred to in a number of the chapters of the book.

Jeffrey Goldsworthy records that there is 'good reason to believe that O'Connor J was sincere' when he echoed what had been said in *Maxwell*. He points, however, to the long history of judges deploying presumptions of legislative intention disingenuously in order to protect judicial policies. He notes Lord Devlin's description of 19th century judges as sometimes 'obstructive' by giving statutory words 'the narrowest possible construction even to the point of pedantry' in order to protect 'a Victorian Bill of Rights, favouring … the liberty of the individual, the freedom of contract and the sacredness of property, and which was highly suspicious of taxation'.[7]

Recently the location of legislative intention as something anterior to interpretation was displaced by the observation of six Justices of the High Court in *Lacey v Attorney-General (Qld)*[8] that:

> [L]egislative intention … is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results …

That proposition feeds into Brendan Lim's discussion of the rationale for the principle of legality. If the principle is a proxy for authentic legislative intention then, he argues, the purpose for which it demands clear words is the purpose of being confident that Parliament in fact intended to abrogate the right in question. If the rationale of the principle is enhancement of the political process then it requires a

3 *United States v Fisher* 6 US 358 at 390 (1805).
4 John Marshall, A Friend of the Constitution, *Alexandria Gazette*, 2 July 1819, reproduced in Gerald Gunther (ed), *John Marshall's Defense of McCulloch v Maryland* (Stanford University Press, 1969) at 167.
5 Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) at 122.
6 (1908) 7 CLR 277 at 304.
7 Lord Devlin, 'Judges and Lawmakers' (1976) 39 *Modern Law Review* 1 at 13-14.
8 (2011) 242 CLR 573 at 592 [43] (citations omitted).

degree of clarity that would actually deliver that desired enhancement. He quotes the words of Hayne J in dissent in *Lee v New South Wales Crime Commission*:[9]

> The accusatorial process of criminal justice reflects the balance that is struck between the power of the state and the place of individual. Legislative alteration to that balance may not be made without clear words or necessary intendment.

Those words, Lim argues, evoke an image of the principle of legality operating as a quasi-constitutional common law Bill of Rights or manner and form requirement with which legislatures must comply.[10]

Another question discussed in the book, is whether the principle of legality engages only with existing ambiguity in the statutory text – shades of *Codelfa*[11] and its sequelae. Philip Joseph describes this as the elephant in the room. However, the trouble with the term 'ambiguity' is that it is ambiguous in the sense of having more than one meaning. It covers doubt or uncertainty and also describes a characteristic of words which have more than one meaning. The term 'constructional choice' is perhaps preferable as an indication of an interpretive outcome permitted by the relevant text. A provision of a statute may offer constructional choice without having to be described as 'ambiguous'. It may offer such choice because it uses words which, individually or in combination, are of potentially wide or narrow application or capable of more than one meaning. Matthew Groves notes that Lord Hoffmann's often quoted statement of the principle of legality in *R v Secretary of State for the Home Department; Ex parte Simms*[12] spoke of fundamental rights not being overridden 'by general or ambiguous words'. As Groves points out the reference to 'general or ambiguous words' was not shared by the other Law Lords. Lord Steyn held that the principle was a 'constitutional' one of general application that operated even in the absence of an ambiguity.[13] Presumably, however, a construction maintaining fundamental rights or the general system of law must be one that is open on the text.

The question of constructional choice is linked to another issue, namely whether proportionality has any part to play in interpretation of the affected rights or freedoms anterior to, or as an aspect of, the application of the principle of legality. The question is discussed by Dan Meagher and also by Hanna Wilberg who speaks of justified limits on rights in support of a proposition that such limits do not represent rights violations and so do not engage the principle of legality.

Then there is the connection of the principle to what is sometimes called 'common law constitutionalism'. Philip Joseph, writing from a New Zealand perspective, links the characterisation of the principle as constitutional to Sir Rupert Cross' proposition that interpretive presumptions generally operate as constitutional principles in the service of common law values. Joseph argues that successive English courts have endorsed Cross' thesis requiring statutory provisions

9 (2013) 251 CLR 196 at 237 [84].
10 See also *Northern Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 90 ALJR 38.
11 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.
12 [2000] 2 AC 115.
13 Ibid at 130.

to be construed against a backdrop of common law values and applied in ways that are sensitive to them.

An interesting perspective on the character of the principle of legality as protective of statutes which can be described as 'constitutional' arises out of Lord Hope's description of the settlement underlying the *Scotland Act 1998* as constitutional and thereby rendering that statute incapable of alteration other than by an express enactment.[14] His remarks were condemned by some academic legal commentators as wrong in principle. Lord Neuberger, in a speech delivered in October 2016, defended Lord Hope, saying of that condemnation:[15]

> [T]hat is the fate of not only decisions which are wrong, but also of decisions which take the law forward.

He suggested that what Lord Hope had said might be 'no more than an extension of the principle of legality'. That extension would evidently depend upon the characterisation of the protected statute as constitutional. Such a characterisation is no doubt of greater importance in the United Kingdom than in Australia. However, the designation 'constitutional' has sometimes been used in this country in relation to statutes. Spigelman CJ's application of it in that wider generic sense in *New South Wales v Cadia Holdings Pty Ltd*[16] was discussed in *Cadia Holdings Pty Ltd v New South Wales*.[17]

Having regard to Lord Neuberger's remarks about academic criticism, it should be said that the products of judicial work and the discussion of those products by academic writers have different functions. Judges at every level including the final appellate level are concerned to determine particular cases. They endeavour to do so in a principled way and they take seriously the notion of 'justice according to law'. Sometimes the exercise of that function requires the use of a relatively rough beast which may be fashioned over a period of time into a gentler, more nuanced creature, without losing its beneficial power. In the evolution of common law principles and their precursors which might be called 'approaches', there can be a very powerful symbiotic relationship between the judiciary and the academy. This book realises the potential for that symbiotic relationship with the many perspectives from which it examines the concept of the principle of legality. The contributors can truly be likened to Yeats' desert birds winding about their subject. I have mentioned a few of the questions they consider to give a sense of the richness and diversity of the discussion which is to be found in the pages that follow. I congratulate the editors and the publisher and commend the book to its readers.

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14 *H v Lord Advocate* [2013] 1 AC 413 at 435-436.

15 Lord Neuberger, 'The Constitutional Role of the Supreme Court in the Context of Devolution in the UK' (Lord Rodger Memorial Lecture, Glasgow, 14 October 2016) at [19].

16 (2009) 257 ALR 528.

17 (2010) 242 CLR 195, see especially at 217-219.