Chapter 9

# The Principle of Legality and Administrative Discretion: A New Name for an Old Approach?

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## I Introduction

The principle of legality has become an important focus of public law and statutory interpretation. While much of that focus has been on the protection of rights, and the logically related questions of when and why rights might warrant protection by the principle of legality, my focus is on the discretionary powers that are so often trimmed by operation of the principle. My argument is a simple one – the principle of legality is a recent example of a longstanding tendency of the courts to interpret discretionary powers in a restrictive manner. That tendency operates as much to trim the powers of the administrative state as it does to protect the rights of those who live in the administrative state (or, as is common in modern Australia, those who wish to live in this particular state). Viewed in that way, the principle of legality does not represent a radical step in judicial reasoning but the language of legality reveals much about what the courts are seeking to do and why.

## II What is the Principle of Legality?

In my view, the principle of legality is an interpretive rule that contains two key components. The first is the assumption that parliaments accept that the statutory powers they enact will be interpreted by the courts, so far as is reasonably possible, in accordance with common law fundamental rights and freedoms that are clearly established or least fairly well settled. The second aspect of the principle is the acceptance that fundamental rights may be overridden or limited if, and only if, legislation to that effect is expressed with sufficient clarity.[1] The definitive modern restatement of the principle is widely accepted to be the judgment of Lord Hoffmann in the *Simms* case,[2] though the rule clearly has a long pedigree that can be traced to the beginning of the last century rather than this current one.[3] Lord

1 D Pearce and R Geddes, *Statutory Interpretation in Australia* (8th ed, 2014) at 214-215.

2 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115.

3 Professor Taggart noted that the core of the principle was "ages old" but given a new "snappy name" in 1995: M Taggart, "Administrative Law" [2003] *New Zealand Law Review* 99 at 110, citing R Cross, *Statutory Interpretation* (3rd ed, 1995) at 165-166. On the Australian history of