

## Chapter 13

# The Principle of Legality in Australian and New Zealand Law – Final Observations

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In 2009 Sir Philip Sales observed that “the ‘principle of legality’ is the rather strange name given by *Halsbury’s Laws*, and then adopted by Lord Steyn in *R v Secretary of State for the Home Department; Ex parte Simms*, to the doctrine that rights and constitutional principles recognised by the common law will not be treated as overridden by statute unless by express language or by clear and necessary implication”.<sup>1</sup> In doing so his Honour rightly traced the principle’s contemporary history to the House of Lords decision in *Simms*, the case in which Lord Hoffmann now famously observed:

[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.<sup>2</sup>

Yet the antipodean variant of the “principle of legality” clearly predates *Simms*. The most commonly identified Australian source, for example – the High Court decision in *Potter v Minahan (Potter)*<sup>3</sup> – applied the principle in 1908, well before its current label was coined. *Potter* itself appeared to recognise the longer history of the principles it is now known for when O’Connor J explained that, in cases “where a Statute affects civil rights” it was necessary “to keep in view the principle of construction stated in *Maxwell in Statutes*”.<sup>4</sup> That principle was that:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general

1 “A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998” (2009) 125 *Law Quarterly Review* 598 at 600 (footnote omitted).

2 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131–132 (*Ex parte Simms*).

3 (1908) 7 CLR 277.

4 *Ibid* at 304.

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