A JUDICIAL FICTION? RETROSPECTIVITY AND THE ROLE OF PARLIAMENT

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While a presumption against retrospectivity is applied by Australian courts, it is accepted that Australian Parliaments do have the power to enact retrospective laws. Pursuant to the principle of legality, the requirement is simply that retrospectivity be expressed in clear and unambiguous statutory language. Underpinning this is the idea that any retrospective law will be subject to parliamentary consideration and scrutiny before being adopted. This paper will consider whether the parliamentary scrutiny supposedly underpinning the principle of legality actually operates in practice, or whether it is more of a judicial fiction. The particular examples that will be considered are delegated legislation, claims of parliamentary consultation, legislation by press release, and examples of legal uncertainty requiring judicial clarification. These examples highlight the significant disparity between the parliamentary scrutiny referred to by the courts when applying the presumption against retrospectivity, and the reality of the parliamentary process. The paper concludes that the diminished role played by Parliaments in the Australian political system creates a very real risk of retrospective laws that are ill-considered and that potentially undermine the rule of law.

I INTRODUCTION

In a number of cases in recent years, the High Court of Australia has been required to consider the validity and operation of retrospective laws and related questions of retrospectivity in a variety of different contexts. This includes cases such as *Plaintiff M68/2015 v Minister for Immigration and Border Protection* ('*Plaintiff M68/2015*'),[1] *Duncan v Independent Commission against Corruption*,[2]

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1 (2016) 257 CLR 42 ('*Plaintiff M68/2015*').

2 (2015) 256 CLR 83.

ADCO Constructions Pty Ltd v Goudappel ('*ADCO Constructions*'),[3] *Director of Public Prosecutions (Cth) v Keating*,[4] *PGA v The Queen* ('*PGA*'),[5] and *Australian Education Union v General Manager of Fair Work Australia* ('*AEU v Fair Work Australia*').[6] These cases make clear that while retrospective laws may themselves be controversial, the general principles that will be applied by the courts when considering questions of retrospectivity are well-established and settled.

While Australian Parliaments clearly have the capacity to enact retrospective laws,[7] there is a common law presumption against retrospective operation in the absence of clear statutory language. This approach is based upon traditional concepts of parliamentary sovereignty. It reflects an understanding that there may be circumstances in which retrospectivity is warranted, and that in such cases the rule of law can be best protected by allowing Parliament to enact retrospective laws only where they have a clear understanding of what they are doing and with all of the scrutiny and safeguards that parliamentary processes are meant to provide.

These parliamentary safeguards are referred to in many of the High Court judgments considering retrospectivity.[8] But is this picture of parliamentary processes realistic or idealistic? This paper will consider whether modern Australian Parliaments live up to these ideals, or whether the parliamentary oversight and scrutiny referred to by the courts are more of a judicial fiction.

The paper will begin by considering the general principles around retrospective laws in Australia, and will then consider the specific examples of delegated legislation, public and parliamentary consultation, legislation by press release, and uncertain or vague laws to highlight both the importance of robust parliamentary processes, and the limitations of current parliamentary practices. The paper concludes that the diminished role played by Parliaments in the Australian political system creates a very real risk of retrospective laws that are ill-considered and that potentially undermine the rule of law.

II WHAT IS A 'RETROSPECTIVE LAW'?

The concept of a retrospective law is not a straightforward one. The High Court has stated that '"[r]etrospectivity" is a word that is not always used with a

3 (2014) 254 CLR 1 ('*ADCO Constructions*').

4 (2013) 248 CLR 459.

5 (2012) 245 CLR 355 ('*PGA*').

6 (2012) 246 CLR 117 ('*AEU v Fair Work Australia*').

7 See below nn 29–30 and accompanying text.

8 See, eg, *AEU v Fair Work Australia* (n 6) 134–5 [30] (French CJ, Crennan and Kiefel JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ) ('*Plaintiff S157*'); *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1, 26–7 [87] (Kirby J) ('*Dossett*'); *ADCO Constructions* (n 3) 26 [61] (Gageler J).

constant meaning'.[9] The Senate Standing Committee on the Scrutiny of Bills has previously stated that '[l]egislation has retrospective effect when it makes a law apply to an act or omission that took place *before* the legislation itself was enacted'.[10] This is potentially an extremely broad definition of retrospectivity that would capture a large number of laws. Similarly, it is recognised that if the mere interference with an existing right was enough to make a law retrospective then '[m]any if not most statutes' would necessarily be characterised as retrospective.[11]

This broad approach to the question of retrospectivity was acknowledged by Fullagar J in *Maxwell v Murphy* ('*Maxwell*'):

> I think that the word 'retrospective' has acquired an extended meaning in this connexion. It is not synonymous with '*ex post facto*', but is used to describe the operation of any statute which affects the legal character, or the legal consequences, of events which happened before it became law.[12]

In its recent *Freedoms Inquiry*,[13] the Australian Law Reform Commission ('ALRC') adopted a narrower definition that had initially been proposed by Elmer Driedger and that distinguishes between retroactive and retrospective statutes:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted.[14]

This has similarities to a definition adopted by Andrew Palmer and Charles Sampford who explained that

> retrospective laws alter the direct legal consequences of past events or statuses. If a law only alters the direct legal consequences of future events, actions or statuses, it is prospective, even if those future events are determined by past

9 *Chang v Laidley Shire Council* (2007) 234 CLR 1, 32 [111] (Hayne, Heydon and Crennan JJ) ('*Chang*'), citing *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285, 309 [57] (McHugh and Gummow JJ), *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 92 [114] (Gummow, Hayne and Crennan JJ) and *Coleman v Shell Co of Australia Ltd* (1943) 45 SR (NSW) 27, 30 (Jordan CJ) ('*Coleman*'); *Chang* (n 9) 32 [111], quoted in Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) 364 [13.29] ('*Traditional Rights and Freedoms*').

10 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *The Work of the Committee in 2014* (Annual Report, March 2015) 39, quoted in *Traditional Rights and Freedoms* (n 9) 366 [13.34].

11 *AEU v Fair Work Australia* (n 6) 133 [26] (French CJ, Crennan and Kiefel JJ), citing *West v Gywnne* [1911] 2 Ch 1, 11–12 (Buckley LJ).

12 (1957) 96 CLR 261, 285 ('*Maxwell*').

13 *Traditional Rights and Freedoms* (n 9).

14 Ibid 365 [13.29], quoting Elmer A Driedger, 'Statutes: Retroactive Retrospective Reflections' (1978) 56(2) *Canadian Bar Review* 264, 268–9.

actions, events or statuses.[15]

The debate about the meaning of retrospectivity, and whether a particular law is retrospective or not, can be significant. To give just one recent example, opposition to changes to superannuation proposed by the Australian government in the 2016 federal budget focused to a significant degree on the claim that some of the changes were retrospective.[16] In particular, it was claimed that two specific measures were retrospective, namely the introduction of a $1.6 million cap on the total amount of superannuation that could be transferred into a tax-free retirement phase account, and the proposed new lifetime limit of $500,000 on non-concessional (post-tax) contributions to superannuation that was backdated to 2007.[17] The Prime Minister and other senior government Ministers all denied that the changes were retrospective,[18] and if a strict legal approach was taken to the question then they would seem to be correct. While the proposed law referenced past events and was backdated in terms of the contributions affected, it only imposed actual legal obligations in relation to future occurrences.

However, applying the extended meaning described by Fullagar J in *Maxwell* would lead to a different result, with the backdating of the law to 2007 opening the way for it to be described as retrospective. The legal and political definitions of retrospectivity appeared to be quite different in this particular case. It highlights the sometimes imprecise, unclear and contested use of the term 'retrospective', and the potential difference between the legal and political meanings of the term.

Both the broader *Maxwell* definition and the narrower ALRC definitions of retrospectivity will be referred to at various points in this paper. It is, however, the latter, narrower definition that will be considered to be the working definition for the purposes of the paper. This is because the rule of law concerns that attach to retrospective laws are directly, and more strongly, raised where a law attempts to alter the direct legal consequences of past events.

III RETROSPECTIVITY AND THE RULE OF LAW

There is a long history of retrospective laws being recognised as problematic with regards to the rule of law. For example, in the 18th century, William Blackstone wrote in his *Commentaries on the Laws of England*:

15 Andrew Palmer and Charles Sampford, 'Retrospective Legislation in Australia: Looking Back at the 1980s' (1994) 22(2) *Federal Law Review* 217, 222–3.

16 See, eg, 'Fact Check: Are the Government's Super Changes "Not at All" Retrospective?', *ABC News* (online, 27 May 2016) <www.abc.net.au/news/2016-05-26/fact-check--government-super-changes/7422540>; Dennis Shanahan, 'Federal Election 2016: Coalition Sells Super Changes as "Fair"', *The Australian* (online, 13 May 2016) <www.theaustralian.com.au/federal-election-2016/federal-election-2016-coalition-sells-super-changes-as-fair/news-story/0a8689658a2e192cec9471489207a608>.

17 Ibid.

18 Ibid.

> [H]ere it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement …[19]

A central tenet of the rule of law is that an individual will only be subject to laws that are both established and known. As Joseph Raz observed, '[a]ll laws should be prospective, open and clear'.[20] If an individual ensures that they are complying with the law known at the time, it seems unjust to later change that law in a way that transforms lawful behaviour into unlawful behaviour after the fact. It is essential to the rule of law that individuals are able to rely upon the law as known. As Andrew Palmer and Charles Sampford have observed, '[t]he most important argument against retrospective laws is that they defeat the expectations of citizens formed in reliance on the existing state of law'.[21] They go on to note that

> [t]he use of retrospective law undermines the effectiveness of law in two ways; firstly, the specific piece of retrospective legislation will be ineffective in terms of guiding the behaviour of citizens, simply because the law did not exist at the time the actions targeted by the law were taken. Secondly, it sets a bad example and makes citizens more apprehensive about trusting and relying on the law generally; to use Fuller's words, it puts all laws 'under the threat of retrospective change', and if citizens perceive such a threat they may no longer be willing to be guided in their behaviour by the law as it stands.[22]

This is not to say that a retrospective law will always be unjust. For example, while in *George Hudson Ltd v Australian Timber Workers' Union*,[23] Isaacs J confirmed that the presumption against retrospective operation is 'the universal touchstone for the Court to apply to any given case',[24] he also noted that a retrospective law may be 'absolutely just' when the entirety of the circumstances re considered.[25] Indeed, in *Polyukhovich v Commonwealth*,[26] Dawson J observed that the presumption against the retrospective operation of civil laws must 'at best, be a weak presumption'[27] as 'justice may lay almost wholly upon the side of giving remedial legislation a retrospective operation'.[28]

19 William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, 1979) vol 1, 46 (emphasis in original).

20 Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93(2) *Law Quarterly Review* 195, 198.

21 Palmer and Sampford (n 15) 229.

22 Ibid 228, quoting Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 39.

23 (1923) 32 CLR 413 ('*George Hudson*').

24 Ibid 434.

25 Ibid.

26 (1991) 172 CLR 501 ('*Polyukhovich*').

27 Ibid 643.

28 Ibid 642.

IV RETROSPECTIVE LAWS IN AUSTRALIA

Unlike in some other jurisdictions,[29] there is no constitutional prohibition on the making of retrospective laws in Australia. Indeed, there is a long line of High Court authority stretching back to the 1915 decision in *R v Kidman*[30] that establishes that the power of the Parliament to make retrospective legislation is 'beyond doubt'.[31] In Australia, laws will not be declared invalid purely on the basis that they are retrospective.[32]

Rather, there is a judicial handbrake placed on retrospectivity through the operation of the principle of legality.[33] This is a common law rule of statutory interpretation that, in the specific context of retrospective laws, applies a presumption that statutes do not operate retrospectively unless there is a clearly expressed contrary intention evident from the law itself.[34] As noted by Dixon CJ in *Maxwell*:

> The general rule of the common law is that a statute changing the law ought

29 Jurisdictions that provide some level of restriction on retrospective laws (although there is variation in exactly what is prohibited, notably in terms of whether the prohibition extends to both civil and criminal laws) include Brazil: *Constituição da República Federativa do Brasil* [Constitution of the Federative Republic of Brazil] (Brazil) arts 5(XXXVI), (XL); Canada: *Canada Act 1982* (UK) c 11, sch B pt I s 11(g) ('*Constitution Act 1982*'); Indonesia: *Undang-Undang Dasar Negara Republik Indonesia 1945* [Constitution of the Republic of Indonesia 1945] (Indonesia) art 28I(1)); Japan: ≪日本国憲法≫ [Constitution of Japan 1946] (Japan) art 39; New Zealand: *New Zealand Bill of Rights Act 1990* (NZ) s 26(1); Norway: *Constitution of the Kingdom of Norway* (Norway) art 97; United Kingdom: *Human Rights Act 1998* (UK) sch 1 pt I art 7; United States of America: *United States Constitution* art I § 9–10. Within Australia there are specific protections against retrospective criminal laws in Victoria: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 27; the Australian Capital Territory: *Human Rights Act 2004* (ACT) s 25. See *Traditional Rights and Freedoms* (n 9) 368–9 [13.46]–[13.47].

30 (1915) 20 CLR 425.

31 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1993) 179 CLR 155, 210 (McHugh J). See also ibid 450–1 (Higgins J); *Polyukhovich* (n 26) 721 (McHugh J).

32 Noting, however, that they may be declared invalid if they violate ch III requirements by impermissibly interfering with judicial functions. For example, a Bill of Attainder would be constitutionally prohibited not because it is a retrospective law but because it amounts to an exercise of judicial power by the legislature and in this way violates ch III of the *Australian Constitution*. See *Polyukhovich* (n 26) 539 (Mason CJ), 649 (Dawson J), 686 (Toohey J), 721 (McHugh J). See also Suri Ratnapala, 'Reason and Reach of the Objection to *Ex Post Facto* Law' [2007] *Indian Journal of Constitutional Law* 140; *Traditional Rights and Freedoms* (n 9) 367 [13.40], citing *Polyukhovich* (n 26) 539, 649, 686, 721.

33 The reference here to the principle of legality is to the principle in its narrow sense ('to mean the interpretive presumption against legislative abrogation of fundamental common law rights') rather than in the broader sense of 'a wider set of constitutional precepts requiring that any governmental action be undertaken only under positive authorisation': Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372, 373.

34 Of course, the principle of legality extends in its application well beyond the specific context of retrospective laws. It provides that

> [t]he 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.

Coco v The Queen (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) ('*Coco*'), citing *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 12 (Mason CJ).

> not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.[35]

More recently, in *AEU v Fair Work Australia*, French CJ, Crennan and Kiefel JJ linked this presumption directly to the rule of law:

> In a representative democracy governed by the rule of law, it can be assumed that clear language will be used by the Parliament in enacting a statute which falsifies, retroactively, existing legal rules upon which people have ordered their affairs, exercised their rights and incurred liabilities and obligations. That assumption can be viewed as an aspect of the principle of legality, which also applies the constructional assumption that Parliament will use clear language if it intends to overthrow fundamental principles, infringe rights, or depart from the general system of law.[36]

This presumption against retrospective operation is at its strongest when dealing with criminal laws,[37] but still applies in the case of civil laws.

Despite the long-standing rule of law concerns surrounding retrospective laws, the ALRC found in its *Freedoms Inquiry* that retrospective laws 'are reasonably common'[38] and 'are enacted quite frequently in Australia'.[39]

V PARLIAMENTARY PROCESSES AND ACCOUNTABILITY

The presumption against retrospectivity must be viewed within the context of representative democracy, responsible government and parliamentary sovereignty as being guiding principles of the Australian political system. As was explained by Sir Robert Menzies:

> [R]esponsible government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights. Except for our inheritance of British institutions and the principles of the Common Law, we have not felt the need of formality and definition.
>
> I would say, without hesitation, that the rights of individuals in Australia are as adequately protected as they are in any other country in the world.[40]

35 *Maxwell* (n 12) 267.

36 *AEU v Fair Work Australia* (n 6) 134–5 [30].

37 See, eg, *Polyukhovich* (n 26) 642 (Dawson J).

38 *Traditional Rights and Freedoms* (n 9) 360 [13.5].

39 Ibid 371 [13.58].

40 Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (University of Virginia Press, 1967) 54.

Although retrospective laws are generally discouraged and viewed with caution, it is accepted that it is within the power of Parliament to choose to enact them and to determine the circumstances in which this might be appropriate. The requirement is simply that Parliament does so expressly and clearly, so that it is accountable and bears the political cost for any decision to introduce retrospective laws. Implicitly underpinning this is the idea that a retrospective law will not be 'accidentally' enacted, but will instead be subject to parliamentary scrutiny before being adopted. In this way, it is perhaps hoped that retrospective laws will be introduced by Parliament only in the limited cases where they are seen as truly necessary, and in a form that seeks to minimise rule of law concerns.

Within the broader context of the principle of legality, the requirement that Parliament uses clear language to displace fundamental rights was originally based on the rationale that it was safe to presume that the Parliament would generally not intend to interfere with common law rights. This traditional rationale was set out in 1908 by O'Connor J in *Potter v Minahan*:

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.[41]

More recently, however, this traditional justification has been called into question, in light of the growing number of laws that clearly interfere with, or restrict, rights. As noted by McHugh J, '[g]iven the frequency with which legislatures now abolish or amend "ordinary" common law rights, the "presumption" of non-interference with those rights is inconsistent with modern experience and borders on fiction'.[42] Instead, more recent considerations of the principle of legality have focused on justifications based around concepts of enhancing the parliamentary process and political accountability.[43] For example, in *Coco v The Queen* ('*Coco*') the majority judgment expanded on the traditional rationale for the principle of legality by observing that

> [a]t the same time, curial insistence on a clear expression of an unmistakable

41 (1908) 7 CLR 277, 304, quoting Sir Peter Benson Maxwell and J Anwyl Theobald, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) 122, citing *United States v Fisher*, 6 US (2 Cranch) 358, 390 (1805).

42 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 284 [36]. See also *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 299 [29] (McHugh J); Brendan Lim, 'The Rationales for the Principle of Legality' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 2, 5.

43 For a more substantial consideration of the rationales for the principle of legality, see Lim, 'The Rationales for the Principle of Legality' (n 42); Lim, 'The Normativity of the Principle of Legality' (n 33); Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329.

> and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.[44]

A related justification focusing on political accountability was outlined by Lord Hoffmann in *R v Home Secretary; Ex parte Simms*:

> [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.[45]

This has been called '[t]he most famous contemporary exposition of the common law principle of legality'.[46] The statement by Lord Hoffmann has been 'frequently cited' in Australia,[47] with the emerging rationale echoed in numerous subsequent cases.[48] Implicit in statements of this nature are assumptions about the way that Parliament approaches both law-making and the principle of legality. It is assumed that the principle of legality 'is a working hypothesis, the existence of which is known both to Parliament and the courts'.[49] Where the presumption is rebutted through the use of clear and unambiguous statutory language there is an assumption that Parliament has actively considered the individual rights in question, and made a conscious decision to remove or restrict those rights. In this way, the principle of legality aims to avoid any inadvertent weakening of rights, and to instead require 'the kind of considered adoption by Parliament of a law abolishing established rights and privileges that can be expected where law-makers set out to take away such legal entitlements'.[50] Any rationale for the principle of legality based upon the enhancement of the parliamentary process and political accountability assumes, as a necessary precondition, the active

44 *Coco* (n 34) 437–8 (Mason CJ, Brennan, Gaudron and McHugh JJ).

45 [2000] 2 AC 115, 131.

46 Dan Meagher and Matthew Groves, 'The Common Law Principle of Legality and Secondary Legislation' (2016) 39(2) *University of New South Wales Law Journal* 450, 450.

47 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 309 [311] (Gageler and Keane JJ) ('*Lee*'); *Graham v Minister for Immigration and Border Protection* (2017) 347 ALR 350, 371 [84] (Edelman J).

48 *Lee* (n 47) 309 [311] (Gageler and Keane JJ); *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 66 [148] (Heydon J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *Plaintiff S157* (n 8) 492 [30] (Gleeson CJ); *A-G (WA) v Marquet* (2003) 217 CLR 545, 599–600 [164] (Kirby J); *Dossett* (n 8) 26–7 [87] (Kirby J); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 582 [106] (Kirby J). See also Chief Justice RS French, 'The Common Law and the Protection of Human Rights' (Speech, Anglo Australasian Lawyers Society, 4 September 2009) 2.

49 *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ), quoted in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also Matthew Groves and Dan Meagher, 'The Principle of Legality in Australian and New Zealand Law: Final Observations' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 258, 261.

50 *Dossett* (n 8) 26 [87] (Kirby J).

engagement of the Parliament and a deliberate approach to any decision to abrogate fundamental rights.

Within the specific context of retrospective laws, the necessary assumption is that the Parliament will only introduce such laws where it has (to paraphrase the majority judgment in *Coco*) given a measure of attention to the impact of the legislative proposal on the rule of law, and has consciously decided to bear the political cost. Does the reality match this ideal? The particular examples that this paper will focus on to examine this question are examples of delegated legislation, claims of parliamentary consultation and scrutiny, legislation by press release, and examples of legal uncertainty requiring judicial clarification.

A *Delegated Legislation*

Both the Commonwealth and State Parliaments have the power to delegate certain legislative powers to the executive,[51] and such delegations are increasingly commonplace. For example, the Federal Register of Legislation shows that in 2016 there were 102 Acts passed by the Commonwealth Parliament and 2,037 legislative instruments registered.[52] It is not an exaggeration to say that the primary law-making institutions in Australia at both the national and state levels are no longer the respective Parliaments, but rather the executive and, specifically, the public service. The ALRC recently observed that '[t]oday, far more laws are made under delegation than directly by parliaments'.[53]

The presumption against retrospectivity and principle of legality both apply to delegated legislation in essentially the same way as they apply to Acts of Parliament, although there are two key points to observe in this respect. The first is to note that there are statutory restrictions on delegated legislation being made with retrospective effect in most Australian jurisdictions that apply varying limitations.[54] The second is that it is the empowering legislation is central when considering the principle of legality and delegated legislation. This point has been made by Dan Meagher and Matthew Groves, who observed that in cases of delegated legislation infringing common law rights:

> [T]he question is not whether the delegated legislation is expressed with sufficient clarity but whether the statutory power under which it is made is expressed with the clarity the courts require. According to this view, delegated legislation may only infringe common law rights, freedoms and principles *if the empowering*

51 *Baxter v Ah Way* (1909) 8 CLR 626, 637–8 (O'Connor J); *Roche v Kronheimer* (1921) 29 CLR 329, discussed in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 101 (Dixon J).

52 'Legislative instrument' is defined under s 8 of the *Legislation Act 2003* (Cth).

53 *Traditional Rights and Freedoms* (n 9) 449 [17.14], citing Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4th ed, 2012) 5.

54 Pearce and Argument (n 53) 471 [31.3], 473–4 [31.7].

> *statute provides that power expressly or by necessary implication*.[55]

The ALRC identified a range of Commonwealth Acts during the recent *Freedoms Inquiry* that specifically allowed for the possibility that related delegated legislation would operate retrospectively, particularly in the areas of taxation, pensions and migration.[56] Delegated legislation that operates retrospectively may raise particular rule of law concerns given that it is 'less visible to the public' than primary legislation.[57] The ALRC has found that '[t]he tabling, disallowance, and committee scrutiny of delegated legislation are important safeguards and practical ways for Parliament to control executive law making'.[58] While some have argued that 'Australia has, for seventy years, led the world in legislative scrutiny',[59] others have reached the opposite conclusion, observing that parliamentary scrutiny of delegated legislation is 'in practice, minimal'.[60]

A recent example of this can be seen in *ADCO Constructions*.[61] This case concerned the application of a transitional regulation made under the *Workers Compensation Legislation Amendment Act 2012* (NSW) ('*Amendment Act*'). This *Amendment Act* introduced significant changes to the workers compensation scheme in New South Wales. The particular regulation that was critical in this case was backdated and had the effect of extinguishing Ronald Goudappel's entitlement to permanent impairment compensation.[62] Mr Goudappel was an employee of ADCO Constructions Pty Ltd and had made a claim for workers compensation on 19 April 2010 after suffering an injury at work.[63] He was subsequently assessed as having a permanent impairment of 6%, and made a specific claim for permanent impairment compensation on 20 June 2012.[64] The claim was initially denied by the insurer on the basis that the *Amendment Act* limited any entitlement to permanent impairment compensation to permanent impairments exceeding 10%.[65] The savings and transitional provisions in the *Amendment Act* protected the entitlements of workers who had claimed permanent impairment compensation before 19 June 2012, however a further transitional regulation subsequently limited the effect of this to workers who had 'specifically

55 Meagher and Groves (n 46) 451 (emphasis in original) (citations omitted).

56 *Traditional Rights and Freedoms* (n 9) 388 [13.139].

57 Ibid.

58 Ibid 458 [17.52].

59 Stephen Argument, 'Delegated Legislation' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 134, 142.

60 *Traditional Rights and Freedoms* (n 9) 458 [17.53], citing Public Interest Advocacy Centre, Submission No 55 to Australian Law Reform Commission, *Freedoms Inquiry* (3 March 2015).

61 *ADCO Constructions* (n 3).

62 Ibid 11 [17] (French CJ, Crennan, Kiefel and Keane JJ).

63 Ibid 6 [4].

64 Ibid.

65 Ibid 6 [5].

sought' permanent impairment compensation before this date.[66] This regulation commenced on 1 October 2012, and effectively applied the new permanent impairment compensation regime to compensation claims made before 19 June 2012.[67] The central question before the High Court concerned the validity and effect of this transitional regulation. All members of the Court ultimately held that the regulation was valid and that it extinguished Mr Goudappel's entitlement to permanent injury compensation.

There was a brief discussion in the majority judgment about whether the transitional regulation could be characterised as retrospective. The majority described this characterisation as 'something of a distraction',[68] noting that it could only be characterised as retrospective if given the extended meaning referred to by Fullagar J in *Maxwell*.[69] It is, however, difficult to see how the relevant provisions here would not also be classified as retrospective under the narrower ALRC definition. While the transitional regulations operated prospectively, they looked backwards in that they attached new consequences for the future (ie the extinguishment of a right to permanent impairment compensation) to an event that took place before the law was enacted (ie the making of a specific claim for lump sum compensation on 20 June 2012).

In his separate judgment, Gageler J considered the question of retrospectivity in further detail, in particular distinguishing between 'two senses in which a provision of a regulation might be said to have retrospective operation'.[70] Ultimately, however, Gageler J concluded that the relevant provisions manifested a sufficiently clear legislative intention and were valid.[71] All Justices agreed that there was no constructional choice available which would allow the relevant provisions to be interpreted in a way that avoided their application to Mr Goudappel's entitlement to permanent injury compensation.[72]

This would appear, therefore, to be an example of the presumption against retrospectivity being displaced by clear and unambiguous statutory language. According to the rationales underpinning the principle of legality, Parliament has made a deliberate decision to enact a law with retrospective effect and is to be accountable for that decision. So what did the parliamentary process look like in practice? Can it truly be said that Parliament applied appropriate oversight and scrutiny to this decision? The starting point is to consider the parliamentary

66 Specifically, cl 11 of sch 8 to the *Workers Compensation Regulation 2010* (NSW) ('*Workers Compensation Regulation*') as inserted by *Workers Compensation Amendment (Transitional) Regulation 2012* (NSW) sch 1 item 5 ('*Workers Compensation Amendment (Transitional) Regulation*').

67 *ADCO Constructions* (n 3) 12–3 [21] (French CJ, Crennan, Kiefel and Keane JJ), 18–9 [39]–[40] (Gageler J).

68 Ibid 15 [26] (French CJ, Crennan, Kiefel and Keane JJ).

69 Ibid, citing *Maxwell* (n 12) 285 (Fullagar J).

70 *ADCO Constructions* (n 3) 20 [44] (Gageler J), citing *Coleman* (n 9) 30–1 (Jordan CJ for the Court).

71 *ADCO Constructions* (n 3) 26 [66] (Gageler J).

72 Ibid 17 [32]–[33] (French CJ, Crennan, Kiefel and Keane JJ), 26 [63]–[65] (Gageler J).

process surrounding the Workers Compensation Legislation Amendment Bill 2012 (NSW) ('Amendment Bill'), which introduced the original changes to the workers compensation scheme that were in issue in *ADCO Constructions*. This *Amendment Act* was the enabling Act that authorised the possible subsequent introduction of retrospective regulations. The New South Wales Premier first announced his intention to introduce significant changes to the workers compensation system at an address to the Business Council of Australia on 26 March 2012.[73] An issues paper outlining reform options was released on 23 April 2012,[74] and the matter was referred to a Joint Select Committee inquiry.[75]

The committee process here is worth considering in some detail. The Joint Select Committee on the NSW Workers Compensation Scheme ('NSW Workers Compensation Committee') 'was established on 2 May 2012 to inquire into and report on the New South Wales Workers Compensation Scheme'.[76] The public consultation period was short with only two weeks provided for public submissions, although 353 written submission were received during this time.[77] Despite this, the Parliamentary Counsel was instructed to commence drafting legislation whilst the NSW Workers Compensation Committee process was underway and before its report had been tabled, leading to the allegation 'that the whole process was a sham. It is a piece of window-dressing to make stakeholders and concerned members of the public think that the Government is listening to them'.[78] The NSW Workers Compensation Committee tabled its report on 13 June 2012, less than six weeks after it had been established.[79] One of the key conclusions of the NSW Workers Compensation Committee was recommendation 20, which recommended increasing the thresholds for permanent impairment compensation.[80] However, the NSW Workers Compensation Committee Report

73 Lenny Roth and Lynsey Blayden, 'Workers Compensation: An Update' (Research Paper No 10, Parliamentary Research Service, Parliament of New South Wales, May 2012) 1 <www.parliament.nsw.gov.au/researchpapers/Documents/workers-compensation-an-update/e-briefworkers%20compensation.pdf>, discussing Barry O'Farrell, 'The NSW Economy, Infrastructure and Productivity: The Next 156 Weeks of an O'Farrell Government' (Speech, Business Council of Australia, 26 March 2012).

74 Greg Pearce, Minister for Finance and Services, New South Wales Government, 'NSW Workers Compensation Scheme' (Issues Paper, 23 April 2012).

75 Joint Select Committee on the NSW Workers Compensation Scheme, Parliament of New South Wales, 'Parliamentary Inquiry into the New South Wales Workers Compensation Scheme' (Media Release, 2 May 2012) <www.parliament.nsw.gov.au/lcdocs/other/8114/120502%20Media%20Release_NSW%20Workers%20Comp%20Scheme_Announcement%20of%20Inquiry_Final.pdf>.

76 'Joint Select Committee on the NSW Workers Compensation Scheme', *Parliament of New South Wales* (Web Page) <www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=194>.

77 Joint Select Committee on the NSW Workers Compensation Scheme, Parliament of New South Wales, *New South Wales Workers Compensation Scheme* (Report No 1, 13 June 2012) 2 [1.13]–[1.14] <www.parliament.nsw.gov.au/lcdocs/inquiries/1637/120613%20Final%20report.pdf> ('*Workers Compensation Scheme Report*').

78 New South Wales, *Parliamentary Debates*, Legislative Council, 20 June 2012, 13190 (Adam Searle, Deputy Leader of the Opposition).

79 'Joint Select Committee on the NSW Workers Compensation Scheme', *Parliament of New South Wales* (Web Page) <www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=194>.

80 *Workers Compensation Scheme Report* (n 77) 112.

contained no discussion about whether any amendments should be applied retrospectively and also no discussion about any savings or transitional provisions.

The Amendment Bill was introduced into the New South Wales Legislative Assembly on 19 June 2012,[81] less than one week after the government had received the Committee Report. 'No draft legislation was provided for members … before the bill was introduced' into Parliament.[82] The Explanatory Note referred to the fact that the Bill contained 'savings and transitional provisions provide[d] for the staged implementation of the weekly payments amendments and the transitional arrangements to apply to other amendments, together with savings and transitional regulation-making powers'.[83] No further explanation of these provisions was provided, and there was no specific mention of either backdating or retrospectivity.

The Amendment Bill was debated for three days in the New South Wales Parliament, before being passed on 22 June 2012. The second reading speeches reference the savings and transitional provisions, but do not outline these in any specific detail.[84] During the parliamentary debates the Opposition did squarely raise the issue of retrospectivity, with the Member for Blacktown stating that the retrospective nature of the Bill 'will have an enormous impact on many workers under the scheme'.[85] In response, the Treasurer denied that the proposed changes were retrospective.[86] In media interviews the Premier similarly insisted that the proposed changes were not retrospective.[87] The Greens proposed amendments in the Legislative Council, which were supported by the Opposition, to remove the retrospective provisions from the Bill. These proposals were defeated along Party lines.[88]

The Amendment Bill was also considered by the Legislation Review Committee of the New South Wales Parliament, and this Committee did expressly consider the issue of retrospectivity. The full statement made by the Committee in the *Legislation Review Digest* on this point was as follows:

> The Committee will always comment when an amendment applies retrospectively. However, as this amendment relates to saving and transitional provisions, the Committee does not consider that this will unduly impact on

81 New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 June 2012, 13014 (Mike Baird, Treasurer).

82 Ibid 13223 (Lynda Voltz).

83 Explanatory Note, Workers Compensation Legislation Amendment Bill 2012 (NSW) 3.

84 New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 June 2012, 13018–9 (Mike Baird, Treasurer).

85 Ibid 13022 (John Robertson).

86 Ibid 13067 (Mike Baird, Treasurer).

87 New South Wales, *Parliamentary Debates*, Legislative Council, 20 June 2012, 13208 (Peter Primrose).

88 New South Wales, *Parliamentary Debates*, Legislative Council, 21 June 2012, 13452–4.

> personal rights and liberties. As such, the Committee does not make an adverse comment with respect to this issue.[89]

This pro forma statement fails to provide any detailed scrutiny of the particular provision and entirely avoids any discussion of the need for retrospective legislation in this particular case, or the justification for retrospectivity in these particular circumstances.

It is difficult to reconcile the realities of this particular example with the modern rationales for the principle of the legality that are based upon the enhancement of the parliamentary process and political accountability. The government itself provided no justification to the Parliament for the retrospective nature of the amendments. The only substantive reference is found in remarks made by a non-government member, with Fred Nile referring to his negotiations with the government and stating:

> The issue of retrospectivity was discussed … However, advice received is that if these reforms are applied only to future claims and not to existing claims then the deficit will not be reduced — which is the purpose of this legislation — and the current outstanding claims liability will not decrease. The changes proposed by the bill to weekly benefits, including the conduct of work capacity tests, medical costs and duration of benefits, are to apply to existing claims. This approach is proposed to avoid the creation of a dual workers compensation scheme — two levels — based purely on the date on which the claim was made. Such arrangements would be very difficult to administer and would need to continue for many years given the current lack of a cap on claim duration.[90]

In relation to the specific transitional regulation that was in issue in *ADCO Constructions*,[91] the parliamentary scrutiny was even more minimal.[92] The *Workers Compensation Amendment (Transitional) Regulation 2012* (NSW) ('*Workers Compensation Amendment (Transitional) Regulation*') was published on the New South Wales Legislative Assembly website on 28 September 2012 and in the Government Gazette on 5 October 2012.[93] Notice was tabled by the Clerk in the New South Wales Legislative Assembly on 16 October 2012.[94] The regulations would also have been considered by the Legislation Review Committee who are charged with considering all regulations while they are subject to disallowance by resolution of Parliament. In particular, the Committee is required to consider

89 Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest* (Digest No 21 of 2012, 14 August 2012) ix.

90 New South Wales, *Parliamentary Debates*, Legislative Council, 21 June 2012, 13375 (Fred Nile).

91 *ADCO Constructions* (n 3).

92 Namely *Workers Compensation Regulation* (n 66) sch 8 cl 11 as inserted by *Workers Compensation Amendment (Transitional) Regulation* (n 66) sch 1 item 5.

93 New South Wales, *New South Wales Government Gazette,* No 105, 5 October 2012, 4271.

94 New South Wales, *Statutory Instruments*, Legislative Assembly, No 39, 16 October 2012, 10.

whether the attention of Parliament should be specifically drawn to any regulation on particular grounds, including where the regulation 'trespasses unduly on personal rights and liberties'.[95] There is no reference to the *Workers Compensation Amendment (Transitional) Regulation* in any of the *Legislation Review Digests* published by the Legislation Review Committee. Given the standard practices of the Committee, the only conclusion that can be drawn from this is that the Committee did not consider that the attention of Parliament needed to be drawn to this particular regulation.

The realities of the parliamentary process in this case suggest that it seemed to lack the parliamentary oversight and scrutiny that implicitly underpin the modern rationales for the principle of legality. It is important to note here that no implications are being drawn about the value or otherwise of the substantive reforms themselves. This example is simply a useful case study to highlight the differences between the principles and the practice, with Parliament seeming in this case to have had minimal oversight of the particular regulations and little opportunity to engage specifically in any discussion about the merits or otherwise of the retrospective application of this law.

B *Consultation and Scrutiny*

The idea that parliamentary processes should provide an opportunity for consultation and scrutiny was also evident in the judgments in *AEU v Fair Work Australia*.[96] In this case the High Court was considering the validity of the registration of the Australian Principals Federation ('APF') under the *Fair Work (Registered Organisations) Act 2009* (Cth). The Australian Education Union ('AEU') had objected to the original application for registration that was made by the APF in 2003 under the *Workplace Relations Act 1996* (Cth).[97] The registration was held to be invalid by the Full Court of the Federal Court in *Australian Education Union v Lawler* ('*Lawler*')[98] on the basis that a deficiency in the rules of the APF meant that it did not satisfy the legislative criteria for registered associations. Following the *Lawler* decision, substantial amendments were made to the *Workplace Relations Act 1996* (Cth),[99] including a retrospective amendment (s 26A) that validated registrations prior to 1 July 2009[100] such as that of the APF that had been rendered invalid under the interpretation adopted

95 Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest* (Digest No 21 of 2012, 14 August 2012) v.

96 *AEU v Fair Work Australia* (n 6).

97 Ibid 126 [7] (French CJ, Crennan and Kiefel JJ).

98 (2008) 169 FCR 327 ('*Lawler*').

99 Including the title being changed to the *Fair Work (Registered Organisations) Act 2009* (Cth).

100 Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (Cth) ('Fair Work (Transitional Provisions and Consequential Amendments) Bill'); *Fair Work (Registered Organisations) Act 2009* (Cth) s 26A.

in the *Lawler* decision. The appeal by the AEU in *AEU v Fair Work Australia* questioned whether the retrospective amendment was constitutionally valid and 'whether, as a matter of construction, [it operated] to validate the registration … of the APF.[101] The High Court unanimously dismissed the appeal, holding both that the amendment was valid and that it validated the purported registration.

The AEU made a submission during arguments pointing 'to the unfairness to it of the construction adopted by the Full Court. The unfairness was defined by reference to the AEU's loss of the benefit of the judgment it had secured in *Lawler* and the waste of resources expended in obtaining it'.[102] The majority judgment observed that in relation to questions of retrospectivity '[c]onsiderations of fairness at this level of particularity are not of great assistance in the construction of a statutory rule with general application'.[103] They further stated:

> [The AEU] does not offer, and almost certainly could not offer, any comprehensive analysis and weighing of the interests, both public and private, which may have been benefited fairly or disadvantaged unfairly by the validating legislation, either generally or in its application to the APF. Nor is this Court in a position to make broad judgments, appropriate to the Parliament, about the balance of fairness in relation to the legislative validation of the APF's registration.[104]

This is an entirely appropriate observation given the traditional balance between judicial and legislative roles. It is a matter for Parliament to weigh competing policy interests and to determine how the 'balance of fairness' should be struck in relation to any particular law. Indeed, this is particularly important when Parliament is considering legislation that has a retrospective impact given the rule of law considerations that arise. In theory, the observation made by the majority reflects traditional notions in a parliamentary democracy about the appropriate roles to be played by the Parliament and the courts.

In reality, however, it does not appear as though Parliament did give sufficient consideration to these particular amendments and, in particular, failed entirely to offer any comprehensive analysis or weighing of the interests in relation to the retrospective aspects of s 26A and its impact on the *Lawler* decision. The legislation itself was introduced into Parliament on 19 March 2009, although it was not debated in the House of Representatives until 2 June 2009. The second reading speech by the Minister did not mention the specific section,[105] retrospectivity or the *Lawler* decision.[106] During the three days that the legislation

101 *AEU v Fair Work Australia* (n 6) 125 [3] (French CJ, Crennan and Kiefel JJ).

102 Ibid 134 [28].

103 Ibid.

104 Ibid 134 [29].

105 *Fair Work (Registered Organisations) Act 2009* (Cth) s 26A.

106 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2009, 3225–30 (Julia Gillard, Minister for Employment and Workplace Relations).

lay before the Senate, there was a brief reference in debate to retrospectivity in relation to National Employment Standards, but absolutely no debate regarding the retrospective application of s 26A or the *Lawler* decision.

The proposed amendments were also referred to the Senate Standing Committee on Education, Employment and Workplace Relations. The Senate referred the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (Cth) to the Committee on 19 March 2009 for report by 7 May 2009. The Committee allowed three weeks for public submissions and conducted three days of public hearings in Sydney and Canberra.[107] The final report of the Committee mentioned retrospectivity only in terms of the fact that the section of the Bill[108] relating to Take Home Pay Orders was 'unclear in relation to time limit[s] … and [did] not provide any limitation on retrospective operation'.[109] There was no mention at all of retrospectivity in terms of the registration requirements or the *Lawler* decision.

Again, the legislative history is not outlined to draw any negative conclusions about the value or otherwise of the provisions themselves. Rather, the history simply highlights the gulf between the idealised version of parliamentary processes referred to by the courts and what actually happens in practice. In the case of the retrospective laws considered in *AEU v Fair Work Australia*, the Australian Parliament gave the specific amendment minimal consideration. Not only was there no comprehensive analysis and weighing of the interests, but there was no express consideration given to the issue of retrospectivity in the relevant context at all.

This seems to be a fairly common occurrence when retrospective laws are passed to overcome the effect of a judicial decision or where remedial legislation is required to overcome some recently discovered defect in a government scheme. Retrospective legislation may well be justified in these cases. For example, Lon L Fuller observed that: 'It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces'.[110]

There is, however, a real risk in these cases that Parliament may be pressured into passing remedial legislation in a crisis environment, without having the opportunity to properly scrutinise the provisions. The dominance of the executive government over Parliament — with the executive described by Jim Chalmers

107 Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 [Provisions]* (Report, May 2009) 1 [1.1]–[1.3] ('*Fair Work (Transitional Provisions and Consequential Amendments) Bill Provisions Report*').

108 See Fair Work (Transitional Provisions and Consequential Amendments) Bill (n 100) cl 9(1).

109 *Fair Work (Transitional Provisions and Consequential Amendments) Bill Provisions Report* (n 107) 54.

110 Fuller (n 22) 53, cited in Palmer and Sampford (n 15) 237.

and Glyn Davis as '[t]he consistent winner of the "trinitarian struggle" between the Executive, House of Representatives and the Senate'[111] — can be problematic in such cases, insofar as it potentially limits the capacity of the Parliament to independently scrutinise and review proposed retrospective laws.

A case that further illustrates this point is *Plaintiff M68/2015*.[112] In this case the High Court (by majority) upheld the legality of Australia's offshore processing arrangements operating on Nauru. One issue that arose during the course of the legal proceedings was the validity of s 198AHA, which was inserted into the *Migration Act 1958* (Cth) on 30 June 2015, with retrospective effect to 18 August 2012.[113] Section 198AHA was introduced by way of the *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth) ('*Migration Amendment (Regional Processing Arrangements) Act*').[114] It was expressly noted in the separate judgment of Gageler J that, pursuant to s 198AHA(2), the statutory authority for key aspects of this scheme was retrospectively conferred on the executive government.[115] Scott Stephenson has previously suggested that:

> Given the reliance on this retrospective legislation, it appears that the Government was operating without legal authorisation for three years — a point that is explicitly acknowledged in the judgment of Gageler J (see at [180]). In my opinion, this sets a worrying precedent. It encourages Governments to act, even if they don't have explicit legal authority, if they think Parliament can and will be able to bail them out. It also has troubling implications in terms of parliamentary process in that, if the Government acts without authority and legal proceedings are subsequently launched, it places pressure on Parliament to enact remedial legislation in a very short period of time to remedy the issue before the matter comes to trial rather than allow Parliament to consider the issue at a normal pace. And, of course, it relies on litigation to ensure that the Commonwealth Government is acting with legal authority.[116]

The parliamentary passage of the *Migration Amendment (Regional Processing*

111 Jim Chalmers and Glyn Davis, 'Power: Relations Between the Parliament and the Executive' (Research Paper No 14, Parliamentary Library, Parliament of Australia, 7 November 2000) ii. It has been suggested that '[t]he dominance of the Executive is entrenched by party discipline, procedural control, a monopoly of information and advice, increasing government complexity and workload, and the scarcity of parliamentary time': at 17.

112 *Plaintiff M68/2015* (n 1).

113 *Migration Amendment (Regional Processing Arrangements) Act 2015* (Cth) s 2 ('*Migration Amendment (Regional Processing Arrangements) Act*'). The particular significance of this date is that it is shortly before the Commonwealth entered into a Memorandum of Understanding with Nauru — on 29 August 2012 — relating to the transfer and assessment of persons in Nauru: *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, signed 29 August 2012.

114 *Migration Amendment (Regional Processing Arrangements) Act* (n 113) sch 1 item 1.

115 *Plaintiff M68/2015* (n 1) 110 [180].

116 Scott Stephenson, Michael Crommelin and Cheryl Saunders, 'Scott Stephenson, Michael Crommelin and Cheryl Saunders on the Judgments in *Plaintiff M68-2015 v Commonwealth*', *Opinions on High* (Blog Post, 29 February 2016) <blogs.unimelb.edu.au/opinionsonhigh/2016/02/29/stephenson-crommelin-saunders-m68>.

Arrangements) Act would seem to bear out these concerns. The legislation was introduced into the House of Representatives on 24 June 2015 and had been passed by both Houses of Parliament by the very next day.[117] This was less than two days after the proposed amendment had even been announced. The Explanatory Memoranda confirmed that the amendments in the Bill would have both a retrospective and prospective effect. This was done

> to put beyond doubt the Commonwealth's authority to take, or cause to be taken, actions in relation to regional processing arrangements or the regional processing functions of a country, and associated Commonwealth expenditure, from the date of commencement of the Regional Processing Act. The retrospective operation of these provisions will provide authority for all activity undertaken in relation to regional processing arrangements for the entire period these arrangements have been in place.[118]

Similar justifications were provided in Parliament during the second reading speeches,[119] and there was (unlike other examples highlighted above) debate regarding the retrospective nature of these proposed changes.

The Bill was subject to the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which was 'designed to improve parliamentary scrutiny of new laws for consistency with Australia's human rights obligations and to encourage early and ongoing consideration of human rights issues in policy and legislative development'.[120] This required a Statement of Compatibility to be prepared and for the Bill to be examined by the Parliamentary Joint Committee on Human Rights ('PJCHR').[121] It is important to note, however, that the question of retrospectivity only falls within the ambit of this scrutiny mechanism insofar as it relates to the specific prohibition on retrospective criminal laws found in art 15 of the *International Covenant on Civil and Political Rights*.[122] The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) defines 'human rights' as being those 'rights and freedoms recognised' by seven key international human rights

117 Greg McIntyre, 'The High Court: Legal Answers to Contemporary Political, Social and Administrative Issues' (Sir Ronald Wilson Lecture, Law Society of Western Australia, 2 August 2016) 7 <www.lawsocietywa.asn.au/wp-content/uploads/2015/10/2016-Sir-Ronald-Wilson-Lecture-Greg-McIntyre-SC.pdf>.

118 Explanatory Memorandum, Migration Amendment (Regional Processing Arrangements) Bill 2015 (Cth) 4 [6].

119 See, eg, Commonwealth, *Parliamentary Debates*, Senate, 25 June 2015, 4562 (Mitch Fifield, Manager of Government Business in the Senate and Assistant Minister for Social Services).

120 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 271 (Robert McClelland, Attorney-General).

121 See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Twenty-Fifth Report of the 44th Parliament* (Report, 11 August 2015) 56–9 ('*Twenty-Fifth Report*').

122 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 15.

treaties.[123] The broader common law presumption against retrospectivity did not therefore fall to be considered by either the Statement of Compatibility or the PJCHR.

There is also an important limitation to note in terms of timing. While the PJCHR has the power to examine Bills for compatibility with human rights, and report back to Parliament,[124] there is no requirement for this examination to be completed before a Bill is voted on by the Parliament. Indeed, the *Migration Amendment (Regional Processing Arrangements) Act* provides a good example of the practical limitations that this imposes. The PJCHR found that 'the bill engages and limits multiple human rights'[125] but this finding was not reported until 11 August 2018, some six weeks *after* the Bill had already passed Parliament and received Royal Assent. Indeed, the final observation made by the PJCHR was that '[n]oting that the bill has already passed both Houses of Parliament, the committee has concluded its examination of the bill'.[126] As noted above, one of the stated reasons for establishing the PJCHR was to inform parliamentary debate on human rights.[127] It is difficult to see how this objective could possibly be achieved if the PJCHR is not able to examine a Bill until after the Parliament has already passed it into law.

This same limitation in terms of timing can also be seen in the examination of the legislation by the Senate Standing Committee for the Scrutiny of Bills ('Scrutiny of Bills Committee'). This particular committee is an important mechanism for oversight and scrutiny in the Parliament and is required 'to assess bills against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, the rule of law and on parliamentary scrutiny'.[128] The Scrutiny of Bills Committee reported on the *Migration Amendment (Regional Processing Arrangements) Act* in its *Alert Digest* circulated

123 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3 (definition of 'human rights') ('*Human Rights (Parliamentary Scrutiny) Act*'). Specifically, these are the rights and freedoms contained within the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *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); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

124 See *Human Rights (Parliamentary Scrutiny) Act* (n 123) s 7(a).

125 *Twenty-Fifth Report* (n 121) 56 [1.289].

126 Ibid 59 [1.297].

127 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 271 (Robert McClelland, Attorney-General).

128 'Senate Standing Committee for the Scrutiny of Bills', *Parliament of Australia* (Web Page) <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills>.

on 12 August 2015 and considered the question of retrospectivity in detail.[129] It concluded that:

> It is regrettable from a scrutiny perspective that the explanatory material accompanying this bill did not comprehensively describe the context, scope of, and justification for, the effect of the bill. Given the committee's concerns in this regard, although the bill has already been passed by the Parliament, as is its common practice, the committee still seeks the Minister's advice in relation to context, scope of, and justification for, the bill in light of the committee's comments above.[130]

The Minister did respond to this request, with his letter including a detailed justification addressing the fairness of retrospective validation in this particular circumstance.[131] The Scrutiny of Bills Committee ultimately disagreed with the Minister on the question of whether sufficient justification had been provided in this case for retrospective validation but, more importantly, noted 'that it would have been useful had this more detailed explanation been available prior to passage of the bill'.[132] The response of the Minister was not received until 29 September 2015, more than three months *after* the Bill had been voted on by both Houses of Parliament. Again, the Scrutiny of Bills Committee concluded that it would make no further comment as the Bill had already been passed by the Parliament.[133]

To some extent, the passage of the *Migration Amendment (Regional Processing Arrangements) Act* is an improvement over previous examples as it does indicate that the question of retrospectivity was given direct consideration by Parliament and that the executive attempted to provide at least some justification for the retrospective nature of the laws. On the other hand, the short period of time allowed for parliamentary debate highlights the dominant role played by the executive government in the Australian political system, and raises questions about the extent to which parliamentary debate has any real impact or ability to shape legislation. The example also illustrates some important practical limitations found in the existing committee system, notably the inability of committees to actually inform parliamentary debate in circumstances when committee scrutiny does not occur until *after* the particular Bill has already been passed into law. This calls into question the capacity of the modern Australian Parliament to engage in the type of scrutiny and oversight that is assumed by the

129 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest* (Digest No 7 of 2015, 12 August 2015) 35–7.

130 Ibid 37.

131 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Eleventh Report of 2015* (Report, 14 October 2015), 667–70 ('*Eleventh Report*').

132 Ibid 670.

133 *Eleventh Report* (n 133) 671.

modern rationales underpinning the principle of legality.

C *Legislation by Press Release*

Another category of retrospective legislation that is generally accepted in Australia is 'legislation by press release'.[134] In these cases, the law operates retrospectively from the date on which the government originally announced its intention to legislate. The vast majority of retrospective taxation laws fall into this category. Indeed, '[t]here is wide acceptance that amendments to taxation law may apply retrospectively where the Government has announced, by press release, its intention to introduce such legislation, particularly when the announcement is sufficiently detailed'.[135] This is seen as raising fewer problems in terms of the rule of law as the public have been notified of the change, and are able to modify their behaviour from the date of the announcement in the expectation of the relevant law actually being passed by the Parliament on some subsequent date.[136]

The key issue here is the need for the government to legislate promptly so that the period of retrospectivity is as short as possible. In the recent *Freedoms Inquiry* the ALRC concluded that taxation laws providing for lengthy periods of retrospectivity could be further reviewed to determine whether that retrospective operation was justified.[137] The Tax Institute provided some key examples of exactly this in their submission to the *Freedoms Inquiry*.[138] In particular, the submissions noted:

> In recent years, the build-up of announced but unenacted measures has become a clear issue in terms of maintenance of the rule of law in Australia. There are currently tax measures with announced start dates as far back as 1 July 2001 which have yet to be legislated … Such a situation should never be allowed to develop again. Where urgent circumstances require a retrospective measure, its terms should be announced quickly and precisely, and it should gain priority in legislative development toward prompt enactment.[139]

The particular example highlighted in the submission by the Tax Institute was the extraordinary announcement by the government in 2013 that there was a backlog of 92 announced but unlegislated tax and superannuation measures, including one

134 Palmer and Sampford (n 15) 235.

135 *Traditional Rights and Freedoms* (n 9) 378 [13.90].

136 Ibid 371 [13.57].

137 Ibid 383 [13.119].

138 Tax Institute, Submission No 68 to Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (12 March 2015).

139 Ibid 4 [20]–[21].

announced measure dating back as far as March 2001.[140] On 6 November 2013, the government announced that it would be proceeding with some initiatives, withdrawing others, and commencing an expedited expert consultation process with regards to the remaining measures.[141] On 14 December 2013, the government made an announcement regarding the outcome of that consultative process, confirming that it intended that the majority of legislation it was proceeding with should be passed by the Parliament during 2014.[142] Of the 37 measures that the government decided to proceed with, 30 had a date of effect that was prior to intended date of Royal Assent, and 12 of these had a date of effect prior to the date that the measure was originally announced.

This situation was extraordinary, and yet another example of Parliament being sidelined in the consideration of questions of retrospectivity. An interesting aside that highlights the sidelining of Parliament is the wording used by the Assistant Treasurer when making the announcement about the outcome of the consultative process in December 2013. The media release that was issued was entitled 'Integrity Restored to Australia's Taxation System', with the Assistant Treasurer announcing that '[w]e have delivered on our commitment to clear the backlog of tax measures and provide significant operational certainty for business and consumers'.[143] It was only in the final sentence of the media release that there was any recognition that the announced measures were still yet to be passed by the Parliament.[144] The impression is that parliamentary passage was assumed to be a mere formality, rather than a substantive step in the law-making process.

D *Legal Uncertainty Requiring Judicial Clarification*

A related concern in relation to retrospective laws is the increased tendency of Parliament to introduce complex laws that leave key terms undefined. As a result, the operation and scope of the law in particular circumstances may not be clear until it has been subsequently interpreted by the courts. To some extent, retrospectivity in this context is an inevitable by-product of judicial review. This point was made by the ALRC in the *Freedom Inquiry*, noting that '[t]he clarification by the courts of an uncertain law necessarily imports an element of retrospectivity. Indeed, all judicial decisions about common law, constitutional

140 Arthur Sinodinos, Assistant Treasurer, 'Integrity Restored to Australia's Taxation System' (Media Release, Treasury (Cth), 14 December 2013) <ministers.treasury.gov.au/sites/ministers.treasury.gov.au/files/2019-05/MR008-2013.pdf> 13 item 75.

141 Joe Hockey, Treasurer and Arthur Sinodinos, Assistant Treasurer, 'Restoring Integrity in the Australian Tax System' (Media Release, Treasury (Cth), 6 November 2013) <ministers.treasury.gov.au/ministers/joe-hockey-2015/media-releases/restoring-integrity-australian-tax-system>.

142 Sinodinos (n 140) 2.

143 Ibid 1.

144 Ibid.

matters or statutory interpretation are essentially retrospective'.[145] This is because '[t]he courts do not state what the law is from the date of a decision, but declare the law as it has always been'.[146]

As Heydon J observed in *PGA*: '[t]o the extent that they may be changed retrospectively, uncertainty is inherent in common law rules'.[147] However, the issue of unclear or vague legislative drafting appears to be growing as the body of law expands both in size and complexity. If laws are not drafted with sufficient precision and clarity, there will be rule of law concerns due to the fact that people will be uncertain about exactly what their legal obligations are and exactly what conduct is prohibited. The concern here is that '[v]ague laws and regulations allow shifting standards to be applied in retrospect to attack conduct that was not regarded as wrong, or at least not recognised as being illegal or contrary to regulatory requirements, when it was undertaken'.[148]

Jeremy Gans gave an example in his submission to the ALRC *Freedoms Inquiry* of the '"market manipulation" offence in s 1041A of the *Corporations Act 2001* (Cth)'.[149] This came into effect on 11 March 2002[150] but was not considered by the High Court until 2013 in *Director of Public Prosecutions (Cth) v JM*.[151] The impact of this was described as follows:

> An example … is the 'market manipulation' offence in s 1041A of the *Corporations Act 2001* (Cth), which bars actions that create or maintain an 'artificial price' in financial products. Last year, in *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30, the High Court gave 'artificial price' a broad definition that covered actions for the 'sole or dominant purpose of creating or maintaining a particular price' in a financial product. Although unanimous, the decision overturned a lower court's ruling that limited the definition to certain forms of monopolist behaviour. The upshot was that the High Court, in 2013, determined the scope of the law after (and as applied to) its alleged breach by JM (Mervyn Jacobson, since convicted and currently subject to a prison sentence) in 2006.[152]

In the view of Gans, this 'implicates the rationales for the rule against

145 *Traditional Rights and Freedoms* (n 9) 389 [13.143]. See also Richard Clayton and Hugh Tomlinson (eds), *The Law of Human Rights* (Oxford University Press, 2nd ed, 2009) vol 1, 822; Enid Campbell, 'The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts' (2003) 29(1) *Monash University Law Review* 49.

146 *Traditional Rights and Freedoms* (n 9) 389 [13.144].

147 *PGA* (n 5) 402 [127].

148 Linklaters, *In Defence of the Rule of Law: Challenging the Erosion of the Legal Certainty and Fairness that Business Needs* (Report, 11 September 2015) 13 <www.linklaters.com/en/insights/thought-leadership/rule-of-law-2015/in-defence-of-the-rule-of-law>.

149 Jeremy Gans, Submission No 2 to Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* 3.

150 *DPP (Cth) v JM* (2013) 250 CLR 135, 144–5 [1] ('*JM*').

151 *JM* (n 150).

152 Gans (n 149) 3, citing ibid.

retrospectivity',[153] namely that 'retrospective laws "make the law less certain and reliable"' with the consequence that '"[a] person who makes a decision based on what the law is, may be disadvantaged if the law is changed retrospectively"'.[154]

V CONCLUSION

While judges applying the presumption against retrospectivity often refer to an idealised notion of Parliament and parliamentary processes, this is generally far removed from the modern reality. In cases of retrospective laws, it is comparatively rare to find cases in which the question of retrospectivity is adequately addressed, with the executive providing justifications as to the need for retrospectivity and the Parliament carefully weighing up the competing interests and striking a fair balance. The diminished role played by Parliament today has real consequences in terms of the application of the presumption against retrospectivity, and the rule of law concerns that are raised by retrospective legislation.

So, what is the answer? The principles of retrospectivity are well established in Australia and this paper is not calling for those to be reconsidered. Similarly, the role of the judiciary in Australia is well settled, and any increased power to invalidate retrospective laws contrary to the clear wording of the law itself would be an exercise in unacceptable judicial activism. The problem that has been identified here is a diminution of Parliament's role. Removing parliamentary sovereignty and further weakening the institution is not the answer. To the contrary, the appropriate remedy is to strengthen the role of Parliament to return to it the capacity to apply independent oversight and scrutiny to proposed laws. There are many individual reforms that could help achieve this end, with just one canvassed in this paper being the need for committee scrutiny to take place *before* a Bill is voted on in Parliament, allowing it to potentially inform parliamentary debate. A strong and robust Parliament is an essential aspect of constitutional government in Australia and, as this paper has sought to demonstrate, has an important role to play in protecting the rule of law.

153 Gans (n 149) 3.

154 Ibid 4, quoting Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Issues Paper No 46, December 2014) 56 [7.6] (citations omitted).