Editor's Note

Comparing different societies, past and present, it readily becomes apparent that law is not static but adapts its form to reflect the social, economic and political characteristics of the particular society in which it operates.[1] In Australia today there are over 1000 Acts in force in New South Wales alone.[2] Our specialised, information-age society requires an A–Z set of specialised, information-age laws — and statute law is the form of law that has evolved to meet this need.[3]

Whether on paper or computer screen, statutes make the will of those who govern indelible. Indelible but inert, like all words, until enlivened when read. Statutory *interpretation* — as opposed to statutory declaration, discovery or divination — is a term that explicitly alludes to the low-fidelity nature of reading and writing.[4] A reader cannot recreate a writer's intent with the precision of copying a digital computer file; nor can a writer ensure that any particular form of words will perfectly transmit their ideas to all readers. Reading is an analogue process because words are ambiguous, irreducible to fixed units of meaning. As Justice Mason and Professor Raymond explain in their respective articles, this is why dictionaries can do no more than list the various alternative meanings of a particular word and leave it up to the reader to choose which meaning is appropriate in any given context. It is the judiciary's ongoing effort to grapple with the inherent linguistic ambiguity of statutes — a specialised exercise in hermeneutics — that gives rise to the principles and practice of statutory interpretation.

It follows that statutory interpretation ultimately endeavours to reduce ambiguity to background noise, so that meaning becomes discernable. Precisely how this occurs is examined by the authors of the following selected articles. Collecting and juxtaposing the different perspectives offered by the individual authors — judicial, legislative drafter, academic, Australian, American, Canadian — adds richness to the insights offered and provided the rationale for the form of this publication.

Justice Gummow draws attention to how, despite much being said in judgments about purposive interpretation, legislative drafters cannot be released from the requirements of precision of thought and expression. Purposivism cannot provide determinative answers

1 P Goodrich, *Reading the Law*, 1986, Basil Blackwell, Oxford, Ch 1 "Ideational and Institutional Sources of Law".

2 Chief Justice Gleeson has explained that "[i]f you compare the amount of legislative output of a modern parliament with the legislative output of 100 or 50 years ago, the change is extraordinary.": "Law is now too complex for juries to understand", *The Sydney Morning Herald*, 26 March 2007.

3 Chief Justice Spigelman has described our time as the "age of statutes", where "no area of the law has escaped statutory modification": JJ Spigelman, "The Poet's Rich Resource: Issues in Statutory Interpretation" (2001) 21 *Australian Bar Review* 224 at 224. Justice Kirby has recently highlighted the importance of statute law by describing the common law as "orbiting around" statute law: MD Kirby, "Precedent Law, Practice and Trends in Australia" (2007) 28 *Australian Bar Review* 243 at 251. Kirby J has also recently said that "we have well and truly entered the age of statutes [but] … we still need to wean lawyers from their love affair with the common law": "Too Rigid, No Bill of Rights: Kirby's Constitution Verdict", *The Sydney Morning Herald*, 19 March 2007.

4 On the nature of language and reading, see S Pinker, *The Language Instinct*, 1994, Harper Collins, New York.

where different purposes, and perhaps cross-purposes, are apparent. His Honour then refers to a persisting attitude that statute law is less interesting and less important than "purely judge-made law". This attitude, of English pedigree, begins in law schools, where students are plied with cases but graduate with few skills in doing what practitioners do on a daily basis — reading statutes. But the common law contained both "gross imperfection" and "grand principles"; and, in the newly federated nations of Australia and the United States, legislation enabled the gross imperfections to be eradicated and the Parliaments to adapt to ever-changing circumstances, including their citizens' own evolving values. Justice Gummow then considers the many ways in which the presence of a written federal constitution influences the form and interpretation of statute law.

Chief Justice Spigelman explains that statutory interpretation is not merely a collection of maxims, but properly forms a distinct body of law. To a substantial degree, common law protection of fundamental rights and liberties now resides within the law of statutory interpretation. His Honour, after discussing parliamentary intent, context and ambiguity, focuses on one of the most fundamental assumptions of statutory interpretation — the principle of legality. His Honour quotes Lord Hoffman, who explained:

> "The principle of legality means that the Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by general or ambiguous words".

Chief Justice Spigelman suggests that the test applied by a court to determine whether a particular statute has subordinated the principle of legality should be known as the clear statement principle. Nevertheless, "[t]he core difficulty remains. Clarity, like beauty, always involves questions of degree and is affected by the eye of the beholder."

His Honour then demonstrates the potential for friction between the principle of legality and the clear statement principle by examining how courts interpret statutes in cases where what is at stake is the presumption that Parliament does not intend to interfere with fundamental rights and freedoms.

Justice Mason points out that the judicial experience of legislation is bound to be jaundiced — the easy issues of statutory interpretation are all resolved before they proceed to court. Judges may also find legislation challenging because, apart from any real defects contained in an Act, which often reflect the realities of legislative drafting, legislation challenges ideas and attitudes that have taken over half a lifetime to learn. His Honour then describes the distinguishing feature of modern Australian drafting as "fussy", as opposed to the "fuzzy" style of the law of the past or the European civil system. Fussy law concentrates on detailed distinctions and specific circumstances, while fuzzy law is expressed in terms of general principles and broad legislative purposes. Judges need to be able to recognise the different styles of law and "change gear" to interpret provisions accordingly. Justice Mason then discusses developments in specific interpretive techniques, including the use of legislative context and purposive construction, before suggesting that courts can do more to develop the common law for the age of statutes.

Justice Kenny discusses statutory interpretation in the context a singularly unique legislative creation — the Constitution of the Commonwealth of Australia. Grand theories of constitutional interpretation are eschewed in favour of interpretive practices. Her Honour outlines five interpretive modes — textual, structural, historical, doctrinal and prudential–ethical — and presents a detailed examination of how these modes determined the High Court's reasoning in the controversial *Work Choices Case*. Understanding the choices each judge had when selecting a particular interpretive mode is essential to evaluating the High Court's decision. Indeed, it is in the act of choosing between competing interpretive modes that the High Court's ongoing attempt to discharge its constitutional mandate is played out.

From her vantage point as Parliamentary Counsel, Hilary Penfold QC provides an insider's account of the processes involved in drafting legislation, including the sources of legislative change and the preparation of explanatory memoranda and second reading speeches. Ms Penfold then considers the relationship between legislative drafting and statutory interpretation. In particular, she examines whIch principles of statutory interpretation legislative drafters take seriously and which approaches to statutory interpretation are irrelevant or unhelpful to the work of the legislative drafter. She concludes by suggesting that Australian legislative drafting processes, although far from ideal, and despite the inherent ambiguity of language, produce legislation good enough for the interpretive process to start with the premise that "the words mean what they say." At least, as she points out, there is only *one* text to interpret; unlike the decisions of appellate courts, where two, three or even seven independently drafted texts, *taken together*, form the law on a particular issue. It is an interesting counterpoint.

Professor Geddes details how, since 1980, Parliaments have made a significant contribution to statutory interpretation and how courts have become increasingly willing to articulate the general interpretive principles on which their reasoning is based. After examining recent legislative and common law developments, Professor Geddes proposes that:

- legislation is to be interpreted *with reference to* its underlying purpose and context (which includes extrinsic material);
- underlying purpose and context are to be considered initially, rather than after it has been determined that ambiguity exists;
- the task is informed by ss 15AA and 15AB of the *Acts Interpretation Act* 1901 (Cth), and equivalent State provisions, and *CIC Insurance Ltd v Bankstown Football Club Ltd*[5]; and
- presumptions of interpretation are to be used but are necessarily overriden by an interpretation properly informed by purpose and context.

Professor Frickey analyses American purposivism and suggests how it might be relevant to statutory interpretation under ss 15AA and 15AB of the *Acts Interpretation Act* 1901 (Cth) and State equivalents. He describes the model of purposivism set out by Hart and Sacks, which is based on their assumption that all law — case law and statutes alike — involves

5 (1997) 187 CLR 384 at 408.

a purposive endeavour designed to promote social utility. He also points out that if the phrase "shall be preferred" in s 15AA is read as "shall be adopted", then s 15AA appears to encourage purposivism above all else. However, when s 15AA is read together with s 15AB, statutory interpretation may appear to accommodate an eclectic weighing of interpretive sources — text, purpose, context, canons, intent — rather than being solely grounded in purposivism. This avoids the various limitations that any interpretive theory, including purposivism, faces. Professor Frickey then suggests that — irrespective of the extent to which eclecticism may be accommodated — the purposivism of ss 15AA and 15AB should be interpreted as a "legislative invitation to the judiciary to become more of a partner in the ongoing elaboration, not just of common law, but of statutes as well".

Professor Sullivan provides an overview of statutory interpretation in Canada, in light of the long-standing legacy of Elmer Driedger, former Deputy Minister of Justice and Professor of Law. Among his many initiatives — which include numerous publications and establishing a graduate program in legislative drafting — Driedger integrated the mischief rule, literal rule and golden rule into the "modern principle". After acknowledging some of its positive effects, Professor Sullivan critiques the modern principle and its application by the courts. In particular, she emphasises its own inherent ambiguity. Canadian courts have used the modern principle to justify every possible approach to interpretation and even "as a substitute for real justification". In practice, despite the rhetoric of the modern principle, the Canadian judiciary — even its most doctrinaire members — adopt a pragmatic approach to interpretation. Professor Sullivan urges Australian judges to align rhetoric with reality by rejecting formulaic expressions such as Driedger's modern principle and stating plainly the considerations that have led them to their preferred interpretation.

Professor Raymond analyses decisions of the top-tier courts of Australia, Canada, South Africa and the United States to identify and compare their respective approaches to statutory interpretation. Like Professor Sullivan, Professor Raymond explores statutory interpretation in terms of rhetoric and reality, and emphasises pragmatism over principle. Indeed, after meticulously dissecting the diverse interpretive techniques displayed in the selected cases, he discusses the "soft logic" of law in light of Aristotle's *Rhetoric* and AJ Ayer's *Language, Truth and Logic*. He introduces the Aristotelian idea of *topes* — patterns of soft logic — and suggests that, when reading law, where absolute truth is unattainable, a choice must be made as to which interpretive technique (tope) to select. And in cases where alternative interpretive modes are equally available, it is their respective consequences which distinguish between the merits of each mode. Both statutory interpretation and justice itself are relative exercises.

By analysing the topic from these different perspectives, this monograph offers a detailed exploration of how courts presently engage in statutory interpretation and encourages ongoing development of relevant principles and practice.

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