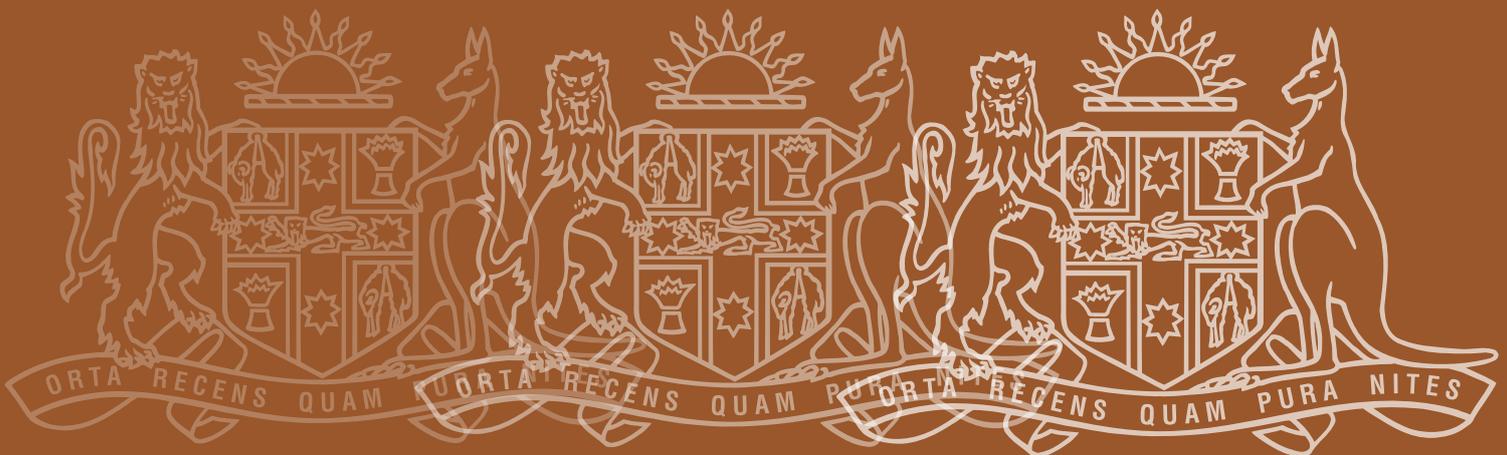


Statutory Interpretation

Principles and pragmatism for a new age



Judicial Commission of New South Wales
Education Monograph 4 – June 2007

Statutory Interpretation

Principles and pragmatism for a new age



Education Monograph 4

Published in Sydney by the:
Judicial Commission of New South Wales
Level 5, 301 George Street
Sydney NSW 2000

DX 886 Sydney

GPO Box 3634
Sydney NSW 2001
www.judcom.nsw.gov.au

National Library of Australia
Cataloguing-in-publication entry

Statutory interpretation : principles and pragmatism for a new age.

Includes index.

ISBN 9780731356195

1. Judicial process — New South Wales. 2. Law — New South
Wales — Interpretation and construction. 3. Judicial
discretion — New South Wales. I. Gotsis, Tom. II. Title.
(Series : Educational monograph (Judicial Commission of New South Wales)).

347.94405

© Judicial Commission of New South Wales 2007

This publication is copyright. Other than for the purposes of, and subject to the conditions prescribed under the *Copyright Act 1968* (Cth), no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior permission. Enquiries should be addressed to the publisher.

The views expressed in this monograph are the views of the individual authors and do not represent any official views of the Judicial Commission of New South Wales, nor are they necessarily shared by all members of the staff of the Commission. Whilst all reasonable care has been taken in the preparation of this publication, no liability is assumed for any errors or omissions.

Editor: Tom Gotsis

Graphic design and typesetting: Lorraine Beal

Printed by: Emerald Press

Table of contents

Foreword	v
Editor's Note	vii
Statutes	1
<i>The Honourable WMC Gummow AC</i> <i>Justice of the High Court of Australia</i>	
The Principles of Legality and Clear Statement	13
<i>The Honourable JJ Spigelman AC</i> <i>Chief Justice of New South Wales</i>	
The Intent of Legislators	33
<i>The Honourable Justice Keith Mason AC</i> <i>President, New South Wales Court of Appeal</i>	
The High Court of Australia and Modes of Constitutional Interpretation	45
<i>The Honourable Justice Susan Kenny</i> <i>Judge of the Federal Court of Australia</i>	
Legislative Drafting and Statutory Interpretation	81
<i>Ms Hilary Penfold QC</i> <i>First Parliamentary Counsel</i> <i>Commonwealth Office of Parliamentary Counsel, 1993–2004</i>	
Statutory Interpretation in Canada	105
<i>Professor Ruth Sullivan</i> <i>Faculty of Law, University of Ottawa</i>	
Purpose and Context in Statutory Interpretation	127
<i>Associate Professor RS Geddes</i> <i>School of Law, University of New England</i>	
Structuring Purposive Statutory Interpretation	159
<i>Professor Philip P Frickey</i> <i>School of Law, University of California at Berkeley</i>	
Saving the Literal	177
<i>Professor James C Raymond</i> <i>Consultant in Legal Writing and Reasoning</i>	
Index	217
Table of Statutes	225
Table of Cases	229

Foreword

Lawyers are traffickers in words. Words are the vehicle by which the law and legal relationships must be conveyed. Words are our basic tools of trade. Interpreting words is a large part of what we do.

Lawyers, including parliamentary draftsmen, attempt to be as precise and clear as possible and to anticipate the kinds of issues that may arise in the course of application of legislation. However, clarity and precision can never be capable of complete achievement, not least because the verbal formulae devised in legislative form often have to be stretched to factual situations that no-one could have or did anticipate.

Hence litigation about what words mean. As Lord McMillan once put it:

“One of the chief functions of our courts is to act as an animated and authoritative dictionary.”¹

One of the difficulties is, of course, the richness of our language which gives rise to ambiguity, indeterminacy or inexplicitness. In English, as in French, in the words of Joseph Joubert:

“Words are like eyeglasses, they blur everything which they do not make more clear.”²

Over the last two or three decades there appears to have been a paradigm shift in all forms of interpretation of legal texts, including constitutional, statutory and contractual interpretation. The shift is from text to context. Literal interpretation — a focus on the plain or ordinary meaning of particular words — is no longer in vogue. Purposive interpretation is what we do now!

Of course context was always accepted as significant. Sir Owen Dixon, who many would place at the literalist end of the spectrum of judicial approaches to interpretation, said in 1934:

“The rules of interpretation require us to take expressions in their context, and to construe them with proper regard to the subject matter with which the instrument deals and the object it seeks to achieve, so as to arrive at the meaning attached to them by those who must use them.”³

Nevertheless, there does appear to have been a change in the emphasis given to context, by referring to it in the first instance and not simply after some verbal or grammatical ambiguity has been identified.

Justice Learned Hand explained the approach now generally applied:

“Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, sources of interpreting the meaning of any writing: be it a statute, a contract, or

1 Lord McMillan, *Law and Other Things*, 1937, Cambridge University Press, Cambridge, p 163.

2 J Joubert, *Pensées*, 1842, Section 21, Part 15.

3 See *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234 at 244.

anything else. But it is one of the surest indices of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”⁴

However, as Felix Frankfurter once put it:

“While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature.”⁵

The collection of essays in this monograph is a testament to the recognition by judges and legal scholars of the central significance of statutory interpretation to contemporary legal practice, including litigation. There is now a widespread acceptance that statutory interpretation constitutes a distinct body of law. As I have said in the paper that is reprinted herein, many areas of law are entirely the creation of statute and no area of the law has escaped modification by statute, often substantial modification. It is perhaps somewhat ironic that one of the areas of the law that has been least modified by statute is the law of statutory interpretation. Not least for that reason, the principles of statutory interpretation require the kind of detailed attention that appears in this monograph.

The Honourable JJ Spigelman AC
Chief Justice of New South Wales

4 *Cabell v Markham* 148 F 2d 737 at 739 (1945).

5 F Frankfurter, “Some Reflections on the Reading of Statutes” (1947) 47 *Columbia Law Review* 527 at 543.

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 overridden 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.

Tom Gotsis
Editor



Statutes*

The Honourable WMC Gummow AC†

What of Sir Maurice?

Sir Maurice served as Solicitor-General of the Commonwealth between 1973 and 1983. In that time, there were administrations headed by three Prime Ministers, Messrs Whitlam, Fraser and Hawke, from different sides of politics. Byers QC advised them all, with the objectivity of a leading counsel. This independence (and thus added value) of the office had been an aim of the *Law Officers Act* 1964 (Cth).

Sir Maurice Byers, to my observation, was interested in statute law. He spent a good deal of his time as Solicitor-General considering existing and proposed legislative measures.

Much of this activity was in preparation of submissions for High Court litigation. The written outline which emerged was always a model of sequential reasoning, designed to point clearly to the desired and apparently inevitable destination. The outline was succinct, with a citation of the minimum compelling authority where it existed. How different from the diffuse position papers which the High Court now receives.

At the heart of much of this litigation was the construction of a law of the Commonwealth as the first step to supporting validity, or of a law of a State as a first step in showing its invalidity, whether for lack of State legislative power or for inconsistency by operation of s 109 of the Constitution.

The necessity to connect each law of the Commonwealth sufficiently to at least one head of federal legislative power required a particular skill in drafting. Sir Maurice admired what was then the preferred methods exemplified in the work of Mr Ewens QC during the 1940s, a time of great legislative initiative by the Commonwealth.¹ Mr Ewens had become Parliamentary Draftsman in 1948. Sir Maurice was struck by what he identified as the crab-wise movement apparent in the structure of an Ewens Bill, as the Commonwealth edged sideways into legislative power.

* Presented as the Sir Maurice Byers Annual Address on 17 March 2005, Sydney. Published in (2005) 26 *Aust Bar Rev* 121 and 2005 (Summer) *Bar News* 30.

† Justice of the High Court of Australia.

1 See Obituary, Mr JQ Ewens CMG CBE QC (1992) 66 *ALJ* 870.

One example of such a technique will suffice. The power to legislate with respect to trade and commerce with other countries supports a law prohibiting the export of a mineral, with a provision for relaxation of the prohibition by the executive government if there be satisfied criteria (such as the environmental effects of the extraction processes used) which have little or no apparent relevance to the topic of international trade and which themselves are not a head of federal legislative power. The example is taken from *Murphyores Incorporated Pty Ltd v The Commonwealth*,² in which Sir Maurice led (successfully) for the Commonwealth.

Policy into statute

Judges and counsel tend insufficiently to appreciate the great difficulties encountered in the reduction of government policy into legislative form.

Several matters should be borne in mind here. One is the relatively recent emergence of the offices of Parliamentary Counsel. It all began in the United Kingdom as late as 1869, but even then it was Chalmers, a practising barrister, who drafted the *Sale of Goods Act 1893* (UK).³ In Australia, the Office of Parliamentary Counsel was established by the *Parliamentary Counsel Act 1970* (Cth).

The New Zealand Chief Parliamentary Counsel, Mr Tanner QC, well observed that the drafting of legislation is quite unlike the writing of judgments. He remarked that, whereas legislation has a single objective, the changing of the law, the process of developing the common law involves moving from one precedent to the next and “a reader sees into the mind of the judge working through the legal issues before the court”.⁴ These thoughts are encapsulated in the observation by Professors Eskridge, Frickey and Garrett⁵ that, unlike judge-made law, statute law “resides in canonical, not discursive form”.

Much is now said in judgments about “purposive” construction. Certainly there has been a marked change apparent in judicial approaches to statutory construction. Thirty years ago there were still to be found judges whose first and controlling response to remedial legislation was to set out uncovering difficulties in expression which frustrated the otherwise evident scope and purpose of remedial legislation. These judges were encouraged in their efforts by the then understood restraints upon examination of supporting legislative materials. All that has changed, assisted by changes made in the various interpretation statutes.

But “purposive” construction does not release the draftsman from the requirements of precision of thought and expression. The Editor of *Craies on Legislation*⁶ is Parliamentary

2 (1976) 136 CLR 1.

3 Lord Renton, “The Evolution of Modern Statute Law and its Future” in M Freeman (Ed), *Legislation and the Courts*, 1997, Dartmouth, Aldershot, p 9.

4 G Tanner, “Confronting the Process of Statute-Making” in R Bigwood (Ed), *The Statute — Making and Meaning*, 2004, LexisNexis, Wellington, p 49 at p 72.

5 In their excellent joint work, *Legislation and Statutory Interpretation*, 2000, Foundation Press, New York, p 3.

6 *Craies on Legislation* (8th ed), 2004, Sweet & Maxwell, London.

Counsel in the United Kingdom. Of reliance on purposive construction as an excuse for imprecision, Mr Greenberg writes:

“First, the main cause of imprecision in drafting is not that the draftsman cannot find or does not wish to trouble to find a precise way of expressing the concept in his mind, but rather that the concept in his mind is not sufficiently precise to admit of clear expression. That principal task in drafting is to refine and analyse the policy to the state of clarity in which the words for its expression suggest themselves naturally. When the draftsman struggles to find the words or structure to express a thought, it is generally time to abandon the struggle and return to analysis or refinement of the thought. All that being so, it is not sufficient to draft imprecisely and hope that the courts will supply the draftsman’s deficiencies by adopting a purposive construction ...

Secondly, prediction of the likely results of a purposive construction is not a precise science. It will rarely be appropriate for the executive to substitute the certainty provided by a clear and precise provision for the hope that the courts’ understanding of the general principles and purpose of the legislative scheme will correspond to the understanding of the executive.”⁷

Further, “purposivism” cannot provide determinative answers where different purposes, perhaps cross-purposes, are apparent. Professors Eskridge, Frickey and Garrett add:

“Even if there were agreement as to which purpose should be attributed to a statute, the analysis in the hard cases might still be indeterminate. Often an attributed policy purpose is too general and malleable to yield interpretive closure in specific cases, because its application will depend heavily upon context and the interpreter’s perspective”.⁸

Finding the statute

In his judgment in *Watson v Lee*,⁹ Barwick CJ stressed the importance of the principle that the citizen should not be bound by a law the terms of which the citizen has no means of knowing. Then, in *Fothergill v Monarch Airlines Ltd*,¹⁰ Lord Diplock remarked:

“The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining ‘the intention of parliament’; but what this metaphor, though convenient, omits to take into account is that the court, when acting in its interpretive role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state. Elementary justice or, to use the concept often cited by the European Court [of Justice], the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.”

7 *ibid* p 304 (footnote omitted).

8 *op cit* n 5, p 222.

9 (1979) 144 CLR 374 at 381.

10 [1981] AC 251 at 279.

Thereafter, when dealing with the provisions for prosecution by the Commonwealth Director of Public Prosecutions of offences against what, at that stage, was the national scheme of corporations laws, Gaudron, McHugh, Gummow and Callinan JJ said in *Byrnes v The Queen*:¹¹

“Bentham viewed with disfavour ‘the dark Chaos of Common Law’, favouring the prescription of rules of conduct by statute.¹² This, Bentham said, would ‘mark out the line of the subject’s conduct by visible directions, instead of turning him loose into the wilds of perpetual conjecture’.¹³ By that criterion, the legislative scheme, the subject of these appeals, is a failure. It does not go so far as to bind the citizen by a law, the terms of which the citizen has no means of knowing. That, as Barwick CJ put it in *Watson v Lee*,¹⁴ ‘would be a mark of tyranny’. However, the legislative scheme does require much cogitation to answer what, for the citizen, should be simple but important questions respecting the operation of criminal law and procedure.”

Their Honours then had to set about revealing what they called the threads leading through the complexity of federal and State (there, South Australian), laws.¹⁵

More recently, in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs*,¹⁶ Gleeson CJ, McHugh, Gummow and Heydon JJ, after some puzzling over the reprint of the *Migration Act 1958* (Cth) which appeared to be the relevant one, discovered that an amendment had miscarried by reason of the misidentification of the provision to be amended. Another instance of this appears from Note 2 to Reprint No 4 of the *Civil Aviation Act 1988* (Cth).

But at least in these instances a close enough examination of the reprint disclosed what had gone wrong in the law-making processes of the Commonwealth, if not why this had occurred.

It now appears (from recent correspondence with the Office of Legislative Drafting within the Department of the Attorney-General, which was initiated by Professor Lindell and others, and is reported in the *Australian Law Journal*)¹⁷ that, while statutes such as the *Superannuation Act 1976* (Cth), the *Patents Act 1990* (Cth), and the *Corporations Act 2001* (Cth), among others, authorise amendments and modifications thereof by subordinate legislation, there is no practice of alerting the reader of reprints, whether by note or other means, to changes so made. Something, surely, needs to be done here.

11 (1999) 199 CLR 1 at 13 [11]. See also [82]–[83] per Kirby J.

12 JH Burns and HLA Hart (Eds), *A Comment on the Commentaries and A Fragment of Government*, 1977, Humanities Press, London, p 198.

13 *ibid* p 95. See also P Schofield, “Jeremy Bentham: Legislator of the World” (1998) 51 *Current Legal Problems* 115 at 122.

14 (1979) 144 CLR 374 at 379.

15 (1999) 199 CLR 1 at 13 [12].

16 (2004) 210 ALR 190 at 200 [38]–[40]; 79 ALJR 94 at 101–102 [38]–[40].

17 (2004) 78 ALJ 221–228.

Second class law?

In his consideration of the process of statute-making in New Zealand, the Chief Parliamentary Counsel remarks:

“It is inherently more interesting to read a judgment of a court than a statute — or, at least, I find it so. Statutes are limited in the amount of context that they can contain. They represent the outcome of policy decisions. The reasons or policy considerations to which the statute gives effect are seldom explained in the statute. That is in part because, of themselves, they do not create rights or impose legal obligations. A judgment, on the other hand, can discuss the policy underlying the court’s decision. While it may be only the decision or legal principle that matters in the end, a judgment contains both elements.”¹⁸

There has been an attitude, which daily life in the courts indicates still strongly persists, that statute law is not only less interesting but also of an intrinsically inferior importance to “purely” judge-made law. By the latter is meant that case law which is not concerned with statutory construction and which is concerned with legal rights and duties derived and presently applied solely by reference to case law. That, in any event, is a diminishing area. There are few cases that come into the High Court which turn upon, say, tort or contract untouched by statute.

But the old attitude persists. Perhaps its most striking manifestation is in appeals on points of construction of the Criminal Codes in jurisdictions which continue to apply or have adopted Sir Samuel Griffith’s Code. Almost invariably counsel take the High Court to the common law on general questions of criminal responsibility, with which the Codes deal specifically and apparently exhaustively.

There is an irony in this. Griffith framed his Code at the end of the nineteenth century. The general questions of criminal responsibility with which he dealt thereafter received considerable attention in common law jurisdictions. Codes tend to freeze further development of principle. In 1935 it was established in *Woolmington v The Director of Public Prosecutions*¹⁹ that, contrary to previous understandings of the common law, on a trial for murder the prosecution bears the burden of proving that the death resulted from an act that was conscious and voluntary (or, in the terms of the Code, “willed”). Some agility then was required for the High Court to read the Code in a consistent fashion with *Woolmington*.²⁰

An attitude to statute law as second class law begins in the law schools. In course after course students are plied with cases, but they graduate with no skills in doing what practitioners daily must do, namely, read statutes.

This attitude has an English pedigree. Let us take the case of Sir Frederick Pollock, for so long, among other things, editor of the *Law Quarterly Review*. Pollock’s recent biographer writes:²¹

18 Tanner, op cit n 4, p 72.

19 [1935] AC 462.

20 See *Murray v The Queen* (2002) 211 CLR 193 at 206–207 [39]–[40].

21 N Duxbury, *Frederick Pollock and the English Juristic Tradition*, 2004, Oxford University Press, Oxford, p 173.

“His perspective on legislation is that of the classic Burkean Whig: although ‘forced to acknowledge the necessity of legislation, for him the common law — that cautious, organic, accretion of slow-won judicial wisdom — remains the true bedrock of English law.’²² The common law is a good thing because it nourishes principles where legislation is more likely to stifle them. It is also a good thing because, unlike legislation, it is more likely to promote and protect rather than impede and neglect the liberties of citizens. ... Too often, in short, legislators impose duties on individuals and groups — landlords, mortgagees, whomever — without realizing that the initiative may diminish the liberty of those whose liberty is supposed to be protected. ‘[M]ost of the grievances of particular individuals or groups can be removed only by measures which create new grievances elsewhere.’²³ The words are Hayek’s, but they might easily have been Pollock’s.”

In 1911, on one of his visits to the United States, Pollock told an audience at Columbia University that they were there “to do homage to our lady the Common Law”;²⁴ the Secretary of the Editorial Board of the *Columbia Law Review* dubbed Pollock’s lectures “the love story of the common law”.²⁵

Sir Maurice would have none of this. What was there to revere in a system which devised the doctrines of common employment and contributory negligence as absolute defences, allowed no remedy in cases of wrongful death, denied appearance of counsel in many criminal trials, subjected the property rights and contractual capacity of married women to those of their husbands, and in many ways (and unlike equity) preferred form to substance? It was statute which had been needed to place the law in these and other respects upon an acceptable basis.

Writing his additional notes to the second edition of Sedgwick’s treatise,²⁶ published in 1874, Pomeroy (it must be said, an equity lawyer of note) wrote:

“It is a demonstrable proposition, that there is hardly a rule or doctrine of positive practical jurisprudence in England or in the United States to-day, which is not the result, in part at least, of legislation; hardly a rule or doctrine of the original common law which has not been abolished, or changed, or modified by statute. Furthermore, it is conceded that the ancient conception as to the perfection of the common law was absurdly untrue. The great mass of its practical rules as to property, as to persons, as to obligations, and as to remedies, were arbitrary, unjust, cumbersome, barbarous. For the last generation the English Parliament and our State Legislatures have been busy in abolishing these common-

22 R Munday, “The Common Lawyer’s Philosophy of Legislation” (1983) 14 *Rechtstheorie* 191 at 193. See also J Burrow, *A Liberal Descent: Victorian Historians and the English Past*, 1981, Cambridge University Press, Cambridge, p 138; also p 105 (on “the Burkean Whig’s conception” of the common law as “the slow, anonymous sedimentation of immemorial custom”).

23 F Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, 1982, Routledge & Kegan Paul, London, pp i, 144.

24 F Pollock, “The Genius of the Common Law” (1912) 12 *Columbia Law Review* 190 at 191.

25 B Black, “From the Archives (Such As They Are)” (2000) 100 *Columbia Law Review* 1 at 15. See generally, RA Cosgrove, *Our Lady The Common Law: An Anglo-American Legal Community 1870–1930*, 1987, New York University Press, New York.

26 T Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law*, (2nd ed), 1874, Baker, Voorhis & Co, New York.

law rules, and in substituting new ones by means of statutes. That all this remedial work, all this benign and necessary legislative endeavour to create a jurisprudence scientific in form and adapted to the wants of the age, should be hampered, and sometimes thwarted by a parrot-like repetition and unreflecting application of the old judicial maxim that statutes in derogation of the common law are to be strictly construed is, to say the least, absurd.”²⁷

Moreover, the creation in the United States and Australia of federal bodies politic, with legislatures of enumerated heads of power, encouraged (sooner in the history of Australia than in that of the United States) the notion that in these new societies, fed by large-scale immigration, improvement was to be brought about by legislation to change, not replicate, the status quo.

In 1876, the Supreme Court of the United States declared in *Munn v Illinois*²⁸ that:

“the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.”

How did this sit with the constitutional guarantees respecting the taking or acquisition of private property for public use or purposes? The answer given in *Munn v Illinois*²⁹ was that “[a] person has no property, no vested interest, in any rule of the common law.” The distinction was drawn by the Supreme Court as follows:

“Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations.”³⁰

A modern Australian example is the legislative declaration in s 6 of the *Diplomatic Privileges and Immunities Act 1967* (Cth) that the statute operates to the exclusion of any rule of the common law that deals with a matter dealt with by the statute.

In this fashion there developed a view of statute law which reflected the importance of federal constitutionalism. But how is it that in *Coco v The Queen*,³¹ and numerous other cases, the common law is invoked as part of reasoning that plain words are required for a construction of a statute which abrogates or diminishes what the courts see as basic immunities and fundamental rights of the citizen? The answer was given by Pomeroy in a further passage to that quoted above from his additional notes to Sedgwick. Pomeroy wrote:

“With all the gross imperfection of the common law, it did contain certain grand principles, and these principles had been worked out into many practical rules both of primary right and of procedure, which protected personal rights — rights of property, of life, of liberty, of body and limb — against the encroachments both of government and of private individuals. This was the great glory of the common law. Any statutes which should take

27 *ibid* pp 270–271.

28 94 US 113 at 134 (1876).

29 94 US 113 at 134 (1876).

30 94 US 113 at 134 (1876), applied in the *Second Employers' Liability Cases* 223 US 1 at 50 (1912).

31 (1994) 179 CLR 427 at 435–438.

away, change, or diminish these rights should be strictly construed. To this extent the rule is in the highest degree valuable, not because such statutes 'are in derogation of the common law,' but because they oppose the overwhelming power of the government to the feeble power of resistance of the individual, and it is the duty of courts under such circumstances to guard the individual as far as is just and legal, or, in other words, to preserve the individual from having his personal rights taken away by any means that are not strictly legal."³²

Federal constitutionalism

Federalism, with the division of legislative competence, denied the omnipotence of any one legislature at any one time. This also was a brake on too adventurous efforts at legislative improvement. Sir Maurice as Solicitor-General was, of course, closely involved in the defence (in very large measure successful) of the legislation of the Whitlam government. Decisions tending to advance federal legislative power, at the time seen as radical, are more or less today taken by federal governments of all complexions as matters of course.

That brings me to the focus of the balance of this article. My concern is not with the large questions of federal legislative power. Rather, consideration is given to the many ways in which the presence of a written federal constitution influences the form and interpretation of statute law.

I do so with reference to several United States constitutional doctrines and their Australian analogues.

Extrinsic materials

The first matter concerns the use of extrinsic materials. Speaking of the United States, Professor Eskridge writes:³³

"During the last one hundred years judicial invocation of extrinsic legislative sources to interpret statutes has bloomed like azaleas in April. For most of the nineteenth century, American courts focused on statutory text, policy, and canons of interpretation. But by the turn of the century a number of American judges and commentators had come to believe that the proceedings of the legislature in reference to the passage of an act may be taken into consideration in construing it. Reliance on such materials grew more widespread in the twentieth century and was well entrenched in the federal and some state courts by World War II. By 1983 Judge Patricia Wald could observe that '[n]o occasion for statutory construction now exists when the [Supreme] Court will *not* look at the legislative history.'"³⁴ (original emphasis)

32 op cit n 27, p 271.

33 *Dynamic Statutory Interpretation*, 1994, Harvard University Press, Cambridge, Massachusetts, p 207.

34 P Wald, "Some Observations on the Use of Legislative History in the 1981 Supreme Court Term" (1983) 68 *Iowa Law Review* 195.

Since that high-water mark, there has been something of a retreat. The extreme manifestation of this is the attitude of Justice Scalia. His Honour emphasises that the only constitutionally mandated role of the federal courts is to interpret the language used by the legislature, something that does not involve attempted reconstructions of the intentions of legislators. Justice Scalia stresses that par (2) of Art 1 §7 of the United States Constitution provides for the presentation to the President of Bills which have passed the House of Representatives and the Senate and specifies procedures whose operation depends upon the response of the President to their presentation for his signature. The paragraph uses such expressions as “it shall become a law” and “shall be a law”.

Section 58 of the Australian Constitution likewise provides for the presentation of “a proposed law”, after its passage through both Houses of Parliament, for the giving by the Governor-General of the Queen’s Assent. No one has, I should think, suggested that this forecloses any particular method of interpretation which may be applied by federal courts and courts exercising federal jurisdiction in dealing with matters arising under laws so made (ss 76(ii), 77(i), 77(iii)). However, the conclusion drawn by Justice Scalia from the constitutional text is that legislative history is necessarily irrelevant to the interpretation of the laws made by the Congress.

Justice Scalia expresses his position in *Green v Bock Laundry Machine Co*:

“The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which, by the benign fiction, we assume Congress always has in mind.”³⁵

However, in Australia, since amendments made in 1984 to the *Acts Interpretation Act* 1901 (Cth) (the *Interpretation Act*), detailed provision is made for the use of extrinsic materials in the interpretation of federal legislation to confirm that the meaning of a provision is the ordinary meaning conveyed by the text; and to determine the meaning of ambiguous or obscure provisions, and provisions whose ordinary meaning yields manifestly absurd or unreasonable results (s 15AB). It is assumed that s 15AB is a law with respect to matters incidental to the execution of the legislative powers vested in the Parliament, is supported by s 51(xxxix) of the Constitution, and is consistent with Ch III.

However, in the *Native Title Act Case*,³⁶ there does appear some affinity with Justice Scalia’s view of the effect of the separation of powers upon the interpretative role of the courts. Section 12 of the *Native Title Act* 1993 (Cth) stated:

35 490 US 504 at 528 (1989).

36 *Western Australia v The Commonwealth* (1995) 183 CLR 373.

“Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth.”

The High Court held that provision invalid. The kernel of its reasoning was as follows:

“If the ‘common law’ in s 12 is understood to be the body of law which the courts create and define, s 12 attempts to confer legislative power upon the judicial branch of government. That attempt must fail either because the Parliament cannot exercise the powers of the courts or because the courts cannot exercise the powers of the Parliament.”³⁷

There is a further point. The range of extrinsic materials specifically mentioned in s 15AB(2) of the *Interpretation Act* is extensive. There is room for argument whether they satisfy Lord Diplock’s precept in *Fothergill*³⁸ of “identifiable sources that are publicly available.”

Chevron

The second matter concerns the *Chevron* doctrine. In Australia, we tend to look on statutes as commands directed to citizens. However, much modern regulatory legislation also is directed to those who, over time, will be charged with the administration of the regulatory scheme. In so doing, administrators may develop formal (for example, by taxation “rulings”) or informal interpretations of the relevant law. There is then what Professor Eskridge has called an issue of “institutional competence”.³⁹

In the era of the New Deal, it appeared that agencies charged with administration of the new legal order and endowed with delegated law-making powers should be allowed a wide leeway to pursue dynamic interpretations of their mandate. This thinking later became particularly associated with its apparent acceptance in *Chevron USA Inc v National Resources Defense Council Inc*.⁴⁰ Interpretation of provisions conferring discretionary powers may well involve policy making choices and interpretations may have to change as times change. The agency in *Chevron*, the Environmental Protection Agency (“the EPA”), had technical expertise and political accountability and was best equipped to make such distinctions. Moreover, to “reasonable” agency determinations, the courts should display “deference”. This was the thinking in *Chevron*.

It is inappropriate here to trace the subsequent development of *Chevron* by the United States Supreme Court. But it is fair to say that there may have been a growing appreciation of the strains *Chevron* places upon the constitutional structure. In *Enfield City Corporation v Development Assessment Commission*,⁴¹ the High Court, in a joint judgment of four members, turned its face against the adoption of *Chevron* reasoning in Australia.⁴² The High Court referred to the caution by Professor Schwartz⁴³ that misapplication of its

37 (1995) 183 CLR 373 at 485.

38 [1981] AC 251 at 279.

39 op cit n 33, p 161.

40 467 US 837 (1984).

41 (2000) 199 CLR 135.

42 (2000) 199 CLR 135 at 151–155.

43 *Administrative Law* (3rd Ed), 1991, Little Brown & Co, Boston, §10.36.

statute by an agency may involve jurisdictional error. The High Court also referred to the writing of Professor Werhan.⁴⁴ He made the point that, before *Chevron*, interpretation of ambiguous laws was classed as a matter of law whereas, after *Chevron*, the task was reconceptualised as a “policy choice”;⁴⁵ the legal was transformed into the political and so interpretative authority was conceded to the agencies.

In *Enfield* the High Court also referred to the detailed discussion by Brennan J in *Attorney-General (NSW) v Quin*.⁴⁶ Brennan J stressed that *Marbury v Madison*⁴⁷ was concerned not just with questions of constitutional validity of legislation but that the “grand conception” therein included judicial control over administrative interpretation of legislation. The significance of this notion is considered by Mr Keane QC in his paper, “Judicial Power and the Limits of Judicial Control”,⁴⁸ which merits close study.

In Australia, any “deference” reflects different considerations to those expressed in *Chevron*. Primarily, these are the basic principles of administrative law respecting the exercise of discretionary powers. Particular provision for judicial review of decision-making under Commonwealth enactments, to be made by the Federal Court, was established by the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Distinct provision for “merits review” is made by the *Administrative Appeals Tribunal Act 1975* (Cth). There is then an “appeal” to the Federal Court on a question of law.

There is also a long history in federal law of legislation in specialist areas of revenue law and intellectual property law which provides for an “appeal” to a court from decisions within the remit of an administrative body or officer such as the Registrar of Trade Marks and the Commissioner of Taxation. Questions then arise in the court as to the side of the line on which a particular case falls. In *Enfield*, the High Court concluded that in such cases:

“[t]he weight to be given to the opinion of the tribunal in a particular case will depend upon the circumstances. These will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning.”⁴⁹

Conclusions

Lawyers tend to look backwards to a past time when the law, particularly that in the statute book, was simpler. They pine for the uniform companies legislation of 1961, the income tax legislation before flow charts and plain English, and even for the *Copyright Act 1968* (Cth), the *Trade Practices Act 1974* (Cth) and the *Family Law Act 1975* (Cth) in their original, much briefer, form.

44 “Delegalising Administrative Law” [1996] *University of Illinois Law Journal* 432 at 457.

45 *Chevron USA Inc v National Resources Defense Council Inc* 467 US 837 at 844–845 (1984).

46 (1990) 170 CLR 1 at 35–36.

47 1 Cranch 137 at 177 (1803); 5 US 137 at 111 (1803).

48 Published in P Cane (Ed), *Centenary Essays for the High Court of Australia*, 2004, Butterworths, Sydney, p 295.

49 (2000) 199 CLR 135 at 154–155 [47].

The truth is that there is not now, and never has been, a golden age in statute law or in anything else pertaining to the legal system. Certainly Sir Maurice, ever an optimist, did not look backwards in that way.

Sir Maurice was admitted to the New South Wales Bar in 1944. He came to occupy a position of pre-eminence at the Bar. Many barristers were (and are) adept at the exercise of mental agility. For them, that was enough. Sir Maurice had that agility, of course, but was distinguished by an intellectual curiosity and productive intellectual speculation. These attributes were put to good use in what, rather misleadingly, has been described as his conversational advocacy before the High Court.

Sir Maurice, speaking late in his career, observed that it was only when he began to obtain briefs to appear before the High Court, then dominated by Sir Owen Dixon, that he felt that he had reached a level where substantial intellectual debate might take place. Sir Maurice put it in more modest terms but that was what he meant.

But Sir Maurice would have thought it pointless and ridiculous to attempt to locate any “golden age” of the High Court. How could that be said, for example, of the Dixon era with its legacies of *Koop v Bebb*⁵⁰ and *Dennis Hotels Pty Ltd v Victoria*?⁵¹ For decades, the one bedevilled the Australian choice of law rules in tort and the other the operation of the critical excise provision in s 90 of the Constitution. Relief came respectively only with *John Pfeiffer Pty Ltd v Rogerson*⁵² and *Ha v New South Wales*.⁵³

So it is with statute law. Legislators react to new situations and old solutions require qualification. What is needed more than ever, and what still is lacking in Australia, is a better understanding of statute law, its purposes and processes of creation, coupled with closer analytical skills in working with the results of those creative processes.

50 (1951) 84 CLR 629.

51 (1960) 104 CLR 529.

52 (2000) 203 CLR 503.

53 (1997) 189 CLR 465.



The Principles of Legality and Clear Statement*

The Honourable JJ Spigelman AC†

Introduction

When dealing with the interpretation of words, a judge in an adversarial system sometimes experiences the frustration that Eliza Doolittle expressed in the musical *My Fair Lady*:

“Words! words! words! I’m so sick of words. I get words all day through: first from him, now from you! Is that all you blighters can do?”

The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of the law has escaped statutory modification.

Statutory interpretation is not merely a collection of maxims. It is a distinct body of law. Its significance is emphasised by the fact that the protection which the common law affords to the preservation of fundamental rights and liberties is, to a substantial extent, secreted within the law of statutory interpretation.

Oliver Wendell Holmes Jnr summarised the law of statutory interpretation with his customary epigrammatic brevity. Speaking of a statute which he described as “a foolish law” — it happened to be the *Sherman Act* — he said:

“... If my fellow citizens want to go to Hell, I will help them. It’s my job.”¹

When Chief Justice Gleeson said that the quality that sustains judicial legitimacy is fidelity to the techniques of legal methodology, in part he probably had something similar in mind.²

* Opening address to the New South Wales Bar Association conference, “Working with Statutes”, 18 March 2005, Sydney. Published (2005) 79(12) *Australian Law Journal* 769. Published by Lawbook Co, Thomson Legal & Regulatory Ltd, www.thomson.com.au. Reproduced with permission. This article involves a development of ideas put forward in earlier articles: “Statutory Interpretation: Identifying the Linguistic Register”: (1999) 4 *Newcastle Law Review* 1; “The Poet’s Rich Resource: Issues in Statutory Interpretation” (2001) 21 *Aust Bar Rev* 224; “Blackstone, Burke, Bentham and the Human Rights Act 2004” (2005) 26 *Aust Bar Rev* 1.

† Chief Justice of New South Wales.

1 MD Howe (Ed), *Holmes-Laski Letters: The Correspondence of Mr Justice Holmes and Harold J Laski 1916–1935*, 1953, Harvard University Press, Cambridge, Massachusetts, p 249.

2 AM Gleeson AC, *The Rule of Law and the Constitution: The Boyer Lectures*, 2000, ABC Books, Sydney, pp 136–137 and cf 130.

Intention

The task of statutory interpretation is most frequently expressed in terms of identifying the intention of the Parliament. This terminology is not without its difficulties. Indeed, legislative intention is often characterised as a fiction.

At one level the terminology of “intention”, when employed by judges, is an act of constitutional courtesy which the judiciary observes in its collective relationship with the Parliament. Courteous language is a feature of our constitutional arrangements which have, over the course of a long period, involved tensions and, sometimes, conflict between the separate institutions of our mechanisms of governance.

A good example of constitutional courtesy is the statement that a monarch or, in our system, a governor or governor-general, acts on the “advice” of his or her ministers. What we in fact mean by this terminology is that the Head of State will do as he or she is told. The word “advice” softens the brutal reality of the situation.

Indeed, the word minister itself, referring to the executive head of a particular department of state, has another meaning of rendering aid or service to another person. In our constitutional history, ministers serve the monarch in this way. Both senses of the word derive from the same Latin origin, with its distinct connotation of subordination.

The language of intention has been criticised on a number of bases and some avoid its use, making their attitude clear by putting the word within scare quotes, as Felix Frankfurter and Justice Michael Kirby have done.³ So, interestingly, has Justice Scalia.⁴ Justice Kirby has described legislative intention as “a polite but unacceptable fiction”.⁵

On the other hand, the constitutional significance of the language of intention has been emphasised by Chief Justice Gleeson, who said:

“In the construction or interpretation of a statute, the object of a court is to ascertain, and give effect to, the will of Parliament. Courts commonly refer to the ‘intention of the legislature’. This has been described as a very slippery phrase (*Salomon v A Salomon & Co Ltd* 1897 AC 22 at 38 per Lord Watson), but it reflects the constitutional relationship between the legislature and the judiciary. Parliament itself uses the word ‘intention’ in the *Interpretation Act* 1901 (Cth) as a focal point for reference in construing its enactments. Certain words and phrases are said to have a certain meaning unless a contrary intention is manifested in a particular Act. Parliament manifests its intention by the use of language, and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the legislative will.”⁶

3 See F Frankfurter, “Some Reflections on the Reading of Statutes” (1947) 47 *Columbia L Rev* 527 at 538; *The Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 190 CLR 410–497; *Byrnes v The Queen* (1999) 199 CLR 1 at [80]; *R v Hughes* (2000) 202 CLR 535 at [60]; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [262]; MD Kirby, “Interpretation and the Rule of Law” in D Kelly, *Essays on Legislative Drafting*, 1988, Adelaide Law Review Association, Adelaide, pp 88–90.

4 *Bank One Chicago NA v Midwest Bank Trust Co* 516 US 264 (1996) at 279.

5 *R v Hughes* (2000) 202 CLR 535 at [60].

6 *Wilson v Anderson* (2002) 213 CLR 401 at [8]. His Honour expanded on these observations in *Singh v Commonwealth of Australia* (2004) 222 CLR 322 at [19].

Bennion's *Statutory Interpretation* contains a spirited and detailed defence of legislative intention as the paramount criterion and a rebuttal of the proposition that it is a fiction.⁷

What is involved is the search for an objective intention of Parliament, not the subjective intention of ministers or parliamentarians.⁸ Indeed, often there is no relevant subjective intention at all. The words used may represent a compromise, without consensus, so that, in substance, the decision has been left to the courts.⁹ Even more frequently, indeed almost always in cases of difficulty, the circumstances in which the statute falls to be applied were not actually contemplated by anybody. Even if they were contemplated, a statement of intention in a ministerial Second Reading speech will not prevail over the words of the statute.¹⁰

The task of the court is to interpret the words used by Parliament. It is not to divine the intent of the Parliament.¹¹ The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say.¹²

This issue has long been settled in the cognate law of the construction of contracts, in which the relevant question is always “What is the meaning of the words used?”, not “What was the intention of the parties?”.¹³ As Isaacs J put it, “few principles are more firmly entrenched in the law”.¹⁴

So long as the objective nature of the intention is kept firmly in mind, there is a strong case, and not just for reasons of constitutional courtesy, to continue to use the terminology of Parliamentary intention. There is, however, truth in the observation of Oliver Wendell Holmes Jnr:

“... Intention is a residuary clause intended to gather up whatever other aids there may be to interpretation beside the particular words and the dictionary.”¹⁵

7 F Bennion, *Statutory Interpretation* (4th ed), 2002, Butterworths, London, pp 405–409; see also *NAAV v The Minister for Immigration* (2002) 123 FCR 298 at [430], [432].

8 See, for example, *Eastman v The Queen* (2000) 203 CLR 1 at 146–147 per McHugh J.

9 See *Brennan v Comcare* (1994) 50 FCR 555 at 572–575; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168–169.

10 *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *R v Young* (1999) 46 NSWLR 681 especially at [33]–[37].

11 See *State v Zuma* (1995) (4) BCLR 401 at 402; [1995] (2) SA 642; *Matadeen v Pointu* [1999] 1 AC 98 at 108; *R v PLV* (2001) 51 NSWLR 736 at [82]; *La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius* (unrep, 13/12/95, Privy Council); *Pinder v The Queen* [2003] 1 AC 620.

12 *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168–169; *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 at 953d; [1978] 1 WLR 231 at 236G; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 at 814a, 842; [1975] AC 591 at 613G, 645C–V; *R v Young* (1999) 46 NSWLR 681 at [5]; *Dossett v TKJ Nominees Pty Ltd* (2003) 78 ALJR 161 at [10]; *Donselear v Donselear* 1982 1 NZLR 97 at 114.

13 See *Moneyppenny* (1861) 11 ER 671 at 684; *Smith v Lucas* (1881) 18 Ch Div 531 at 542; *Rickman v Carstairs* (1833) 110 ER 931; *Deacon Life & Fire v Gibb* (1962) 15 ER 630; *Drughan v Moore* [1924] AC 53 at 57.

14 *Life Insurance Co of Australia v Phillips* (1925) 36 CLR 60 at 76.

15 Quoted by F Frankfurter, op cit n 3.

Determining the objective intention of the legislature is a process that sometimes requires care. As Chief Justice Griffith once pointed out:

“... As to the argument from the assumed intention of the legislature, there is nothing more dangerous and fallacious in interpreting a statute than first of all to assume that the legislature had a particular intention, and then, having made up one’s mind what that intention was, to conclude that that intention must necessarily be expressed in a statute, and then proceed to find it.”¹⁶

It is all too easy to dress up a conclusion reached on other grounds in the language of intention. There are important limits to the role of the judiciary in a democratic polity.

Ambiguity

As is well known, the most well-established circumstance calling for a process of interpretation is where the legislative will is not apparent and there is ambiguity. In part that is a function of our extraordinary language.

I have on more than one occasion had reason to draw on the observations of a master of statutory interpretation, Lord Simon of Glaisdale¹⁷ — both an officer of the Simplified Spelling Society and a Scrabble tragic — including the following:

“Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know as exactly as possible, where he stands under the law).”¹⁸

Perhaps not without irony, the word “ambiguity” has more than one meaning. It is not necessarily limited to situations in which a word has more than one meaning by reason of lexical or verbal ambiguity and grammatical or syntactical ambiguity. The word ambiguity is often used in a more general sense of indicating any situation in which the scope and applicability of a particular statute is, for whatever reason, doubtful.¹⁹

For my own part, save where the word falls to be construed in *Interpretation Acts*, I would prefer to confine the word “ambiguity” to its more usual meaning of verbal or grammatical ambiguity. The broader issue raises a problem of “inexplicitness.”²⁰ There are a range of circumstances in which the application of a statutory formula is doubtful: when deciding whether to read down general words; when implications are sought to be drawn from a text; when considering whether to depart from the natural

16 *Richardson v Austin* (1911) 12 CLR 463 at 470.

17 The titles of the first two earlier addresses set out in the first footnote above were drawn from Lord Simon’s judgments. See also his Lordship’s series of articles on “English Idioms from the Law” (1967) 76 *LQR* 283 and 429, (1962) 78 *LQR* 245 and (1965) 81 *LQR* 52.

18 *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 236.

19 See the references set out in my earlier addresses: (1999) 4 *Newcastle Law Review* 1 at 2 and (2001) 21 *Aust Bar Rev* 224 at 231–232; *Repatriation Commission v Vietnam Veterans Association of Australia, NSW Branch* (2000) 48 NSWLR 548 at [116].

20 See *Repatriation Commission v Vietnam Veterans’ Association of Australia, NSW Branch* (2000) 48 NSWLR 548 at [116].

and ordinary meaning of words; when deciding whether or not a statutory definition or interpretation section does not apply on the basis of an intention to the contrary; when giving qualificatory words an ambulatory operation; and, more controversially, whether words and concepts are read into a statute by filling gaps. Each of these interpretive techniques arises frequently. I will only be able to refer to some of them in the course of this article.

Context

Whilst all statutory interpretation is text based, it has long been accepted that the words of the text must be understood in their context. The words do not exist in limbo.²¹ We do not, as Justice Learned Hand once famously said, “Make a fortress out of the dictionary.”²²

As Professor Sunstein has put it:

“Legal words are never susceptible to interpretation standing by themselves, and in any case they never stand by themselves.”²³

Context is always important. Take the example of the statement “The chicken is ready to eat”. This can either refer to a cooked chicken or a hungry chicken. The context alone will determine the meaning.

Similarly, in an adaptation of an example originally propounded by Ludwig Wittgenstein,²⁴ parents leave their young children in the care of a babysitter with an instruction to teach them a game of cards. The babysitter would not be acting in accordance with these instructions if he or she taught the children to play strip poker.²⁵

Furthermore, when a nanny is instructed to “drop everything and come running” she would know that it is not intended to apply literally to the circumstance in which she was holding a baby over a tub full of water. As Professor Lon L Fuller said of this example:

“Surely we have a right to expect the same modicum of intelligence from the judiciary.”²⁶

I give one final example of the significance of context. It does make a difference to understand that you are involved in a discourse about the judicial power in Chapter 3 of the *Constitution of the Commonwealth*, when you are asked to answer the question “What’s the matter?”. Your answer might be quite different in another context.

A similar dilemma is identified in *Hamlet* in the passage when Polonius asked the prince, who was in one of his unco-operative moods, “What do you read my Lord?”. To this Hamlet replied “Words, words, words”, a line which the more astute of you will have immediately observed was shamelessly plagiarised by Eliza Doolittle. Polonius then

21 See, for example, *Morris v Beardmore* [1981] AC 446 at 459 per Lord Edmond-Davies.

22 *Cabell v Markham* (1945) 148 F 2d 737 at 739.

23 C Sunstein, “Principles, Not Fictions” (1990) 57 *University Chicago Law Review* 1247 at 1247.

24 See L Wittgenstein, *Philosophical Investigations*, 1958, Basil Blackwell, Oxford, footnote to [68]–[69], p 33e.

25 This adaptation of the Wittgenstein example is found in M Zander, *The Lawmaking Process*, 1980, Wiedenfeld & Nicholson, London, p 57.

26 LL Fuller, “The Case of the Speluncean Explorers” (1949) 62 *Harvard Law Review* 616 at 625–626.

asked “What is the matter my Lord?”, to which Hamlet replied “Between who?”; so that Polonius had to say “I mean the matter that you read my Lord.” This, as you will have noted, was not a Chapter 3 context.

The broader concept of ambiguity performs the same role as performed by a broad idea of the context in which words have to be construed. As the High Court has authoritatively stated:

“The modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which ... one may discern the statute was intended to remedy. Instances of general words of a statute being so constrained by their context are numerous. ... Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.”²⁷

The context in which language is used encompasses the background against which the text has been brought into existence and reflects assumptions as to the manner in which, and the circumstances in which, the statute will operate. As McHugh J once put it:

“The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the texts took for granted or understood without conscious advertence by reason of their common language or culture.”²⁸

It is an inevitable concomitant of statutory interpretation that it is necessary to invoke interpretive principles which reflect values and assumptions that are so widely held as to not require express repetition in every text. Often these principles will play the determinative role in finding the intended meaning of the text. The existence of such background assumptions has been identified in many different circumstances of constitutional and statutory interpretation.²⁹

As the authors of the third edition of *Cross on Statutory Interpretation* indicate:

“Statutes...are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules ... Longstanding principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament. ... One function of the word ‘presumption’ in the context of statutory

27 See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; see also *K & S Lakes City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 515; *R v Wilson*; *Ex parte Kisch* (1934) 52 CLR 234 at 244; *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297 at 304, and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].

28 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 196.

29 For example, the well-known reference to the background of the rule of law referred to in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J; and the assumption of responsible government, referred to in a range of authorities summarised in *Egan v Chadwick* (1999) 46 NSWLR 563 at [16]–[25]. This is also the general theme of C Sunstein, “Interpreting Statutes in the Regulatory State” (1989) 103 *Harvard Law Review* 405.

interpretation is to state the result of this legislative reliance (real or assumed) on firmly established legal principles ... These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction and they may be described as ‘presumptions of general application’. At the level of interpretation, their function is the promotion of brevity on the part of the drafter. Statutes make dreary enough reading as it is and it would be ridiculous to insist in each instance upon an enumeration of the general principles taken for granted.

These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text.”³⁰

The focus of this article is on one of the most fundamental of these background assumptions, which has conveniently been called, in comparatively recent times, “the principle of legality”.

The principle of legality

In Australia the first use of this terminology of which I am aware was by Chief Justice Gleeson in his Boyer Lectures.³¹ His Honour subsequently referred to the “principle of legality” in a number of landmark cases including *Al-Kateb* and *Electrolux*.³²

The principle of legality was adopted in the United Kingdom and appears likely to be accepted here. It should be regarded, in my opinion, as a unifying concept identifying the higher purpose of a number of interpretive principles which have in the past been called canons or presumptions or maxims. The words “the principle of legality” were introduced into contemporary discourse by Lord Steyn, being a phrase he found in the fourth edition of *Halsbury’s Laws of England*, where it was employed as equivalent to the traditional phrase “the rule of law” in a narrower sense than many who use that concept have adopted.³³

Lord Steyn referred to the principle in the following way:

“Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.”³⁴

30 J Bell & G Engle, *Cross on Statutory Interpretation* (3rd ed), 1995, Butterworths, London, pp 165–166.

31 AM Gleeson, *op cit* n 2, pp 2, 5.

32 See *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19]; *Electrolux Home Products Pty Ltd v Australian Workers Union* (2003) 209 ALR 116 at [21] and [23].

33 See (1996) 8(2) *Halsburys Laws of England* (4th ed, reissue) at [6]. See also G Williams, *Criminal Law* (1st ed), 1953, Stevens & Sons Ltd, London, pp 434–465.

34 *R v Secretary of State to the Home Department; Ex parte Pierson* [1998] AC 539 at 587. I should note that his Lordship believed that the presumption that Parliament did not intend to invade common law rights was not applicable because the statute under consideration contained no ambiguity. This takes an unnecessarily restrictive view of the concept of ambiguity. In my opinion that common law presumption should be regarded as a specific application of the principle of legality, although it is now necessary to distinguish between fundamental rights, traditions and immunities, recognised by the common law, and other common law doctrines, which may also be loosely described as common law rights.

In the case which established “the principle of legality” as a unifying principle in English law, Lord Hoffman said, in a passage subsequently quoted with approval by Gleeson CJ³⁵ and Kirby J:³⁶

“The principle of legality means that Parliament must squarely confront what it is doing and accept the political costs. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”³⁷

As Lord Simon of Glaisdale once said, the canons of construction “are ... constitutionally salutary in helping to ensure that legislators are not left in doubt as to what they are taking responsibility for”.³⁸ The idea is the same as that expressed by John Marshall, Chief Justice of the United States, when he said in 1820, with respect to the rule that penal laws are to be construed strictly:

“It is the legislature, not the court, which is to define the crime and ordain its punishment.”³⁹

In the same context, Isaacs J said, to similar effect:

“... a Court should be specially careful, in the view of the consequences on both sides, to ascertain and enforce the actual commands of the legislature.”⁴⁰

The principle of legality is a unifying concept, which should be used to encompass a range of more specific interpretive principles that have been developed over many centuries of common law development of the law of statutory interpretation. Amongst the rebuttable presumptions which it may now be convenient to consider under the rubric of the principle of legality are the presumptions that Parliament did not intend to:⁴¹

- Invade fundamental rights, freedoms and immunities.⁴²

35 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [30]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19] fn 11.

36 *Daniels Corporation v ACCC* (2002) 213 CLR 543 at 582.

37 *R v Secretary of State for Home Department; Ex parte Simms* [2002] 2 AC 115 at 131. See also *B v DPP* [2000] 2 AC 423 at 470; *Ngata Apa Ki Te Waipounama Trust v The Queen* [2000] 2 NZLR 659 at [82].

38 *Ealing London Borough Council v Race Relations Board* [1972] AC 342 at 361.

39 *United States v Wiltberger* 5 Wheat 76 (1820) at 95.

40 *Scott v Cawsey* (1907) 5 CLR 132 at 155.

41 See D Pearce & H Geddes, *Statutory Interpretation in Australia* (5th ed), 2001, Butterworths, Sydney, especially at 515–529.

42 *Potter v Minahan* (1908) 7 CLR 277 at 304; *Bropho v Western Australia* (1990) 170 CLR 1 at 17–18; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [32]; *Coco v The Queen* (1994) 179 CLR 427; *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19], [150]; *Minister v Al Masri* (2003) 197 ALR 241 at [82]–[85].

- Restrict access to the courts.⁴³
- Abrogate the protection of legal professional privilege.⁴⁴
- Exclude the rights to claims of self-incrimination.⁴⁵
- Permit a court to extend the scope of a penal statute.⁴⁶
- Deny procedural fairness to persons affected by the exercise of public power.⁴⁷
- Give immunities for governmental bodies a wide application.⁴⁸
- Interfere with vested property rights.⁴⁹
- Alienate property without compensation.⁵⁰
- Interfere with equality of religion.⁵¹

These interpretive principles are longstanding. The debate about their deployment by common law judges goes back at least as far as Blackstone and Bentham. In many ways Blackstone's account of statutory interpretation in Book 1 of the *Commentaries*⁵² is quite contemporary.

What attracted Bentham's outrage, in this as in other aspects of the common law method, was the fluidity that is introduced by the use of interpretive principles — particularly those which emphasise the context and purpose of the statutory text and specific principles, such as Parliament did not intend an absurd result. Bentham found all of this inconsistent with a rational legal order, which required express codification of everything. He made no allowance for ambiguities, gaps, generalities or the scope of language. He found the flexibility that the common law judges retained nothing short of outrageous.⁵³

Notwithstanding the assumption in some Continental legal systems that complete precision and comprehensiveness is possible, Bentham's obsessiveness has never been accepted in the common law world. His view that every aspect of law could be

43 *Magrath v Goldsborough Mort & Co Ltd* (1932) 47 CLR 121 at 134; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 especially at 492.

44 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at [11]. Note also *R (Morgan Grenfell Ltd) v Special Commissioner* [2003] 1 AC 563 at 606–607, [7]–[8].

45 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Rich v ASIC* (2003) 203 ALR 671.

46 *Ex parte Fitzgerald Re Gordon* (1945) 45 SR(NSW) 182 at 186; *Krakouer v The Queen* (1998) 194 CLR 202 at [62].

47 *Commissioner of Police v Tanos* (1958) 98 CLR 363 at 395–396.

48 *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 101 at 116; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 525 at [33]–[37], [59]–[68], [113].

49 *Clissold v Perry* (1904) 1 CLR 363 at 373; *Clunies Ross v The Commonwealth* (1984) 155 CLR 193 at 199–200.

50 *Commonwealth v Haseldell Ltd* (1918) 25 CLR 552 at 563; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [28]–[31].

51 *Canterbury Municipal Council v Muslim Alawy Society Ltd* (1985) 1 NSWLR 525 at 544 per McHugh JA.

52 Blackstone, *Commentaries on the Laws of England* (Vol 1), 1830, London, pp 87–92.

53 See the analysis in C Sunstein and A Vermule, "Interpretation and Institutions" (2003) 101 *Michigan Law Review* 885, especially at 890–897.

written down as a complete body of law, which he called a *Pannomion*, has never been achieved, even in the Continental codes.

Many years ago Rupert Cross described Bentham's approach to Blackstone as "pig headed" and referred to:

"The naive belief manifested throughout so much of his work that it is possible for the laws of a sophisticated society to be formulated in terms of indisputable comprehensibility."⁵⁴

Notwithstanding this longstanding controversy, over the course of the last century when Parliament has codified, modified and rewritten the common law in so many areas, the law of statutory interpretation has been modified to only a small degree in the respective *Interpretation Acts* or by provisions of specific scope. Indeed the most dramatic alteration to the law of statutory interpretation is a relatively recent development, where a provision is inserted into human rights legislation requiring courts to construe *other* legislation so as to be consistent with the fundamental human rights protected in some manner by that Act.⁵⁵ The case law on such provisions has led to the result that the inconsistent provision will be read down in a manner contrary to the intention of Parliament when enacting the later statute, by reason of the authority of Parliament given by the human rights Act.⁵⁶ We are a long way from taking that step here.

Except in the Australian Capital Territory, which has enacted such a provision in its *Human Rights Act*, the interpretative principles which are manifestations of the principle of legality have not been the subject of statutory extension. Nor have they been modified. That they exist is well known to every parliamentary drafter. They are well established and have been reaffirmed on numerous occasions. The courts are entitled to approach the process of statutory interpretation on the assumption that, if the principles are not to be applied, the Parliament will say so, or otherwise express its intention so as to identify the results it wishes to achieve in a way that will ensure that the law of statutory interpretation does not interfere with that occurring.

However, it is a concomitant of this principle, and a manifestation of what Chief Justice Gleeson has felicitously called judicial legitimacy, that the judiciary do not find ambiguity where there is none and recognise clear and unambiguous language when it is presented to them for interpretation.

The common law rule that statutes have to be interpreted so as to achieve the purpose of the legislature is now enacted in statutory form in all Australian jurisdictions. The application of the various presumptions that are manifestations of the principle of legality is not directly affected by this or any other statutory modification. The application of a purposive approach may, however, have consequences which recognise that the

54 "Blackstone v Bentham" (1976) 92 LQR 516 at 521 and 520.

55 See, for example, s 3 of the *Human Rights Act* 1998 (UK); s 6 of the *Bill of Rights Act* 1990 (NZ); and s 13 of the *Human Rights Act* 2004 (ACT).

56 *Ghaidan v Godin Mendoza* [2004] 3 WLR 113; *Sheldrake v DPP*; *Attorney General's Reference (No 4 of 2002)* (2004) 3 WLR 976; JJ Spigelman, "Blackstone, Bentham and the Human Rights Act" (2005) 26 *Aust Bar Rev* 1 at 5, 8–10.

presumptions contained within that unifying principle are rebuttable and, accordingly, constitute an application of the common law of statutory interpretation rather than a qualification of it.

There are examples in legal history of the judiciary applying interpretive principles as a means of subverting legislative intent. The old rule that penal statutes have to be strictly construed — referred to as the rule of lenity in the United States — was developed to mitigate the harshness of the death penalty then applicable to minor offences and concomitant attempts by Parliament to restrict benefit of clergy.⁵⁷

The contemporary controversy about judicial activism — particularly in the context of human rights litigation, notably in migration cases, raises parallel issues. Subject to an entrenched bill of rights, the judiciary must always remember that the interpretive principles are rebuttable.

Changing the common law

The protection of fundamental rights, freedoms and immunities recognised by the common law has often been expressed in a shorthand way as the protection of common law rights. That terminology can be misleading if it is used in such a way as to equate the position of fundamental rights, freedoms and immunities with the old presumption that Parliament did not intend to change the common law.

One relevant matter arises from the significant changes to the common law made by the *Civil Liability Act 2002 (NSW)*, and similar legislation in other States. This requires consideration of the contemporary strength, indeed existence, of the presumption that Parliament did not intend it to affect common law rights, if understood as extending to common law doctrines. That is a presumption that first emerged in a period when the body of statute law was small and statutory intervention was generally narrowly directed to quite specific rules and practices. Prior to the emergence of widespread government regulation, particularly after the Great Depression and the Second World War, judges often approached legislation as a foreign intrusion. As Benjamin Cardozo once put it:

“The truth is that many of us, bred in common law traditions, view statutes with a distrust which we may deplore, but not deny.”⁵⁸

It has now long been the case that statutory intervention is not only wide-ranging, but often fundamental.

The High Court judgment in *Bropho* emphasised that the strength of the presumptions reflected in the law of statutory interpretation may vary over time. The High Court said:

57 D Pearce & H Geddes, op cit n 41, at [9.8]; L Radzinowicz, *A History of English Criminal Law* (Vol 1), 1948, Stevens & Sons, London, pp 83–88; LM Solan, “Law, Language and Lenity” (1999) 40 *Wm & Mary L Rev* 59; L Hall, “Strict or Liberal Construction of Penal Statutes” (1935) 48 *Harvard Law Review* 748; J Jeffries, “Legality, Vagueness and the Construction of Penal Statutes” (1985) 71 *Virginia Law Review* 245; S Newland, “The Mercy of Scalia: Statutory Construction and the Rule of Lenity” (1994) 29 *Harv CR — CLL Rev* 17; S Klooper, “The Status of Strict Construction in Canadian Criminal Law” (1983) 15 *Ottawa Law Review* 553.

58 Quoted in C Sunstein, “Interpreting Statutes and the Regulatory State”, op cit n 29, at 408 fn 2.

“If such an assumption be shown to be or to have become ill founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed. Thus, if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption that the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear.”⁵⁹

The High Court went on to hold that the presumption that legislation did not intend to bind the Crown had been so modified.

The same process has occurred with respect to the rule that penal statutes have to be strictly construed. Penal provisions are now only be read down in the case of ambiguity.⁶⁰ The same development has occurred in the United States. As one author has concluded:

“Rather than facilitating judicial nullification of the legislative will, the rule evolved into a principle of judicial restraint, mandating that the legislature define crime.”⁶¹

There is a real issue as to what aspects of tort litigation would ever have invoked the principle that legislation is to be interpreted on the assumption that it does not invade common law rights. Many aspects of negligence law are based on statutory modification of the common law; for example, *Lord Campbell's Act* permitted the recovery of damages for the death of another person, the abolition of the doctrine of common employment, the abolition of Crown immunity, the creation of an apportionment regime in the case of contributory negligence. Many of the matters that are often called common law rights are, in fact, statutory rights, although some allowance must be made for the fact that the common law would have developed in a similar direction.⁶²

There is now a clear distinction between legislation which invades fundamental rights and legislation which alters common law doctrines.⁶³

As Lord Simon of Glaisdale put it in 1975:

“It is true that there have been pronouncements favouring a presumption in statutory construction against a change in the common law . . . Indeed, the concept has sometimes been put (possibly without advertence) in the form that there is a presumption against change in the law pre-existing the statute which falls for construction. So widely and crudely stated, it is difficult to discern any reason for such a rule — whether constitutional, juridical or pragmatic. We are inclined to think that it may have evolved through a distillation of forensic experience of the way Parliament proceeded at a time when conservatism alternated with a radicalism which had a strong ideological attachment to the common

59 *Bropho v State of Western Australia* (1990) 171 CLR 1 at 18.

60 See, for example, in relation to penal provisions, *Beckwith v The Queen* (1976) 135 CLR 569 at 576; *Denning No 456 Pty Ltd v Brisbane Unit Development Co Pty Ltd* (1983) 155 CLR 129 at 145; *Waugh v Kippen* (1986) 160 CLR 156 at 164.

61 S Newland, op cit n 57, at 200.

62 See JJ Spigelman, “Negligence: The Last Outpost of the Welfare State” (2002) 76 *ALJ* 432 at 437–438.

63 Pearce & Geddes, op cit n 41, at 5.21.

law. However valid this particular aspect of the forensic experience may have been in the past, its force may be questioned in these days of statutory activism ... Whatever subsisting scope any canon of construction may have, whereby there is a presumption against change of the common law, it is clearly a secondary canon ... of assistance to resolve any doubt which remains after the application of ‘the first and most elementary rule of construction’, that statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances. Moreover, even at the stage when it may be invoked to resolve a doubt, any canon of a construction against invasion of the common law may have to compete with other secondary canons. English law has not yet fixed any hierarchy amongst the secondary canons: indeed, which is to have paramountcy in any particular case is likely to depend on all the circumstances of the particular case.”⁶⁴

Kirby J has emphasised the duty to obey legislative texts and the impermissibility of adhering to pre-existing common law doctrine in the face of a statute.⁶⁵

McHugh J has, on a number of occasions in recent years, emphasised that the presumption that a statute is not intended to alter or abolish common law rights must now be regarded as weak.⁶⁶ His Honour did not expressly distinguish in this respect between the presumption against altering common law doctrines and the presumption against invading common law rights. His Honour did, however, identify circumstances in which the presumption would operate more strongly, identifying that category as “fundamental legal principles”⁶⁷ or as “a fundamental right of our legal system”.⁶⁸ He distinguished “fundamental rights” which are “corollaries of fundamental principles” from “infringements of rights and departures from the general system of law”⁶⁹ and “a fundamental right” from a right “to take or not to take a particular course of action”.⁷⁰

With respect to common law doctrines, his Honour emphasised the weakness of the presumption. He said:

“Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the legislature did not intend to interfere with them. Given 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. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced.”⁷¹

This analysis would appear to apply to the *Civil Liability Act*.

64 *Maunsell v Olins* [1975] AC 373 at 394–395.

65 See, for example, *Regie Nationale Renault v Zhang* (2002) 210 CLR 481 at [143]–[147].

66 See *Malika Holdings v Stretton* (2001) 204 CLR 290 at [28]–[30]; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36].

67 *Malika Holdings v Stretton* (2001) 204 CLR 290 at [28].

68 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36].

69 *Malika Holdings v Stretton* (2001) 204 CLR 290 at [28].

70 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36].

71 See *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36]. See also the approving reference by Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian Workers Union* (2003) 78 ALJR 1231, 209 ALR 116 at [19]. See also *Malika Holdings v Stretton* (2001) 204 CLR 290 at [29]–[30].

The clear statement principle

The determination that the principle of legality and a particular interpretive principle applies in a particular case is, regrettably, the easy part of the process. All that we have done at this stage is to identify the two elements — namely the statutory formulation and the interpretive principle — that may give rise to an incompatibility. The difficult part is determining which must prevail in the particular circumstances. It is at this point that judicial reasoning becomes distinctly fuzzy when identifying a relevant test and, perhaps more significantly, when applying it. The relevant test is, more often than not, expressed in the conclusion rather than in the reasoning.

It is often said that a statute which impinges upon the principle of legality, or any of its constituent interpretive principles, must be construed strictly. However, the concept of strict construction does not involve a single standard. There are degrees of strictness. There is very little discussion in the literature or case law about what is meant by strict construction. Such discussion as there is tends to arise in the context of a particular interpretive principle without cross-reference to the use of similar terminology in cases involving other interpretive principles.⁷² It may be that a careful reading of the authorities will identify patterns and themes which repeat themselves in particular contexts, so that it may prove possible to identify circumstances in which the level of strictness varies and to determine why. I have not undertaken such a task.

It is, of course, necessary to commence with the words of the statute to be interpreted and to recognise that the primary rule of interpretation is to give those words their natural and ordinary meaning. However, as I sought to indicate at the outset, words always have a context and the principle of legality should be regarded as part of that context. In my opinion, the principle is always engaged in the task of interpretation and it is not necessary to first determine that there is an ambiguity in the text.

There are a variety of formulations about how a Parliamentary intention needs to be expressed to ensure that the principle of legality, or the relevant constituent principle, if applicable in the circumstances, has been subordinated. They include “clear and unambiguous words”⁷³ or “irresistible clearness”⁷⁴ or “clearly emerges whether by express words or by necessary implication”⁷⁵ or “with a clearness which admits of no doubt”.⁷⁶ These various formulations are equivalent.⁷⁷

72 See, for example, M Mullins, “Coming to Terms with Strict and Liberal Construction” (2000) 64 *Albany L Rev* 9, especially at 12–13; J Jeffries, “Legality, Vagueness and the Construction of Penal Statutes” (1985) 71 *Virginia Law Review* 189, especially at 219.

73 *Bropho v Western Australia* (1990) 170 CLR 1 at [17].

74 *Potter v Minahan* (1908) 7 CLR 277 at 304.

75 See *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341; *Public Service Association (SA) v Federated Clerks Union* (1991) 173 CLR 132 at 160.

76 *Magrath v Goldsborough Mort & Co Ltd* (1932) 47 CLR 121 at 128.

77 I collected them in *Durham Holdings v NSW* (1999) 47 NSWLR 340 at [44].

I do not believe we should continue to use the language of “strict construction”. It breaches the constitutional courtesies to which I have earlier referred. It suggests that courts give a restricted interpretation to the language of Parliament, and do so irrespective of the intention of Parliament. That that has been the case, and not only in the distant past, is a good reason for ensuring that the terminology more accurately reflects the true scope of the judicial role. In my opinion, this approach should now be called: the clear statement principle.

The core difficulty remains. Clarity, like beauty, always involves questions of degree and is affected by the eye of the beholder.

The circumstance in which the application of the clear statement principle most often leads to a diversity of result is when an issue arises as to whether or not general words used in a statute should be read down so as to have a narrower meaning than that of which they are literally capable, with the result that the particular conduct under consideration falls outside the terminology of the statute. It is actually quite rare to find an English word that cannot be applied at different levels of generality or otherwise circumscribed in its application. The former poet laureate, Ted Hughes, put it well:

“A word is its own little solar system of meaning.”

The classification of words as general and, therefore, as capable of being read down, is so frequently available a technique that it can be invoked in circumstances where it would be quite inappropriate.

Nevertheless, as Isaacs J put it:

“The full literal intention will not ordinarily be ascribed to general words where that would conflict with recognised principles that Parliament would be prima facie expected to respect. Something unequivocal must be found, either in the context or the circumstances, to overcome the presumption.”⁷⁸

This is a well-established and longstanding technique of statutory interpretation for which there are numerous authorities, including many in which the principle of legality has arisen.⁷⁹

As long ago as 1560, the Barons of the Court of the Exchequer said:

“And the Judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular where the intent was particular.”⁸⁰

A fuller quotation from this judgment of 1560 has a decidedly contemporary ring:

“... the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they

78 *Ex parte Walsh and Johnson; In Re Yates* (1925) 37 CLR 36 at 93.

79 See my discussion of reading down general words in: “The Poet’s Rich Resource: Issues in Statutory Interpretation” (2001) 21 *Aust Bar Rev* 224 at 227–230, 232–233 and in *R v Young* (1999) 46 NSWLR 681 at [22]–[32].

80 *Stradling v Morgan* (1560) 75 ER 305 at 312.

have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.”⁸¹

The “foreign circumstances” referred to would extend to the circumstances which give rise to the principle of legality.

In my concluding remarks I will focus on the presumption that Parliament does not intend to interfere with fundamental rights and freedoms. This interpretive principle has a long history in Australian jurisprudence dating back to the judgment in *Potter v Minahan* in 1908.⁸² It has been expressed on numerous occasions including, forcefully, in the joint judgment of the court in *Coco v The Queen*:⁸³

“The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with a question because, in a context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.”

It is the formulation in *Coco* of a “fundamental right, freedom or immunity” that should be accepted as an authoritative statement of the scope of the interpretive principle, in preference to “common law rights”. The word “fundamental” has work to do.

The presumption has been described by Chief Justice Gleeson in the following terms:

“The presumption is not merely a commonsense guide to what a Parliament in a liberal democracy is likely to have intended. It is a working hypothesis, the existence of which is known both to the Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.”⁸⁴

81 *Stradling v Morgan* (1560) 75 ER 305 at 312 at 315. See also *Bowtell v Goldsborough Mort* (1905) 3 CLR 444 at 457–458; *Ex parte Walsh*; *In re Yates* (1925) 37 CLR 36 at 91–93; *Ex parte Kisch* (1934) 52 CLR 234 at 244; *Commercial Union Insurance Co Ltd v Colonial Carrying Co of New Zealand Ltd* [1937] NZLR 1041 at 1047–1049; *Church of the Holy Trinity v United States* 143 US 457 (1892) at 459; *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 at 203; *Smith v East Elloe Rural District Council* [1956] AC 736 at 764–765; *Bropho v Western Australia* (1990) 170 CLR 1 at 17–18.

82 *Potter v Minahan* (1908) 7 CLR 277 at 304 per O’Connor J.

83 *Coco v The Queen* (1994) 179 CLR 427 at 437. See also *Bropho v Western Australia* (1990) 170 CLR 1 at 17–18.

84 *Electrolux Home Products Pty Ltd v Australian Workers Union* (2003) 209 ALR 116 at [21].

His Honour also said:

“What courts will look for is a clear indication that the Parliament has directed its attention to the rights and freedoms in question and has consciously decided upon abrogation or curtailment.”⁸⁵

And in another case, his Honour said:

“Courts do not impute to the legislature an intention to abrogate certain human rights and freedoms (of which personal liberty is the most basic) unless such intention is clearly manifested in unambiguous language, which indicates that the legislature has directed its attention to the rights and freedoms in question and has consciously decided upon abrogation or curtailment.”⁸⁶

In the context of this interpretive principle, the level of strictness is high; that is, a high level of clarity is required for the clear statement principle. In such a case, it will frequently be the case that the test for clarity is not merely what Parliament ‘intended’, but the more stringent test of what it has said expressly or by *necessary* intention. Indeed, Lord Steyn, no doubt fearful of glib repetition, has advanced the formulation “express words or *truly necessary* implication”.⁸⁷

Nevertheless, a diversity of approach will still occur. This is manifest in the judgments of the High Court in *Al-Kateb*. The relevant statutory provisions were in mandatory language:

- An officer “must detain” an unlawful non-citizen.
- An unlawful non-citizen “must be kept in immigration detention until he or she is ... removed from Australia”.
- “An officer must remove, as soon as reasonably practical, an unlawful non-citizen” after a request for removal.

On the facts of the case there was no prospect of Australia receiving international co-operation for the removal of the applicant. By a majority of four to three, the High Court held that the terminology was clear, unambiguous and intractable.⁸⁸ The majority held that there was no room in this context for the application of a “purposive limitation” or of the presumption that Parliament does not intend to interfere with individual rights and freedoms. Detention must continue until deportation, however unlikely that may be.

The minority of Gleeson CJ, Gummow and Kirby JJ, a singular and perhaps unique concatenation of dissentients, read down the words “must be kept in immigration detention”.

Gleeson CJ applied the principle that “unambiguous language” in a statute interfering with human rights or freedoms must indicate “that the legislature has directed its attention to the rights or freedoms in question and has consciously decided upon abrogation or

85 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [30].

86 *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19].

87 *B v DPP* [2000] 2 AC 423 at 470.

88 *Al-Kateb v Godwin* (2004) 219 CLR 562 at [33] per McHugh J; at [241] per Hayne J (with whom Hayden J agreed); and at [298] per Callinan J.

curtailment”.⁸⁹ The majority made no reference to this particularly strict requirement, contained in the joint judgment of the court in *Coco*.⁹⁰ The majority reasoning proceeded on the basis that the mandatory requirement — “must keep in detention” — satisfied any such test.

Gummow J construed the provisions as having the purpose of removal and, accordingly, that the power could be read down once that purpose was no longer pertinent.⁹¹

Kirby J agreed with Gummow J, but also invoked a presumption of the common law “in favour of liberty and against indefinite detention”.⁹²

Similar divergences can be expected in the future.

Although the identification of which rights and freedoms are recognised as fundamental by the common law is to a certain extent uncontroversial, the boundaries cannot be regarded as settled.

On one occasion, McHugh J identified some fundamental legal principles which were entitled to a strong presumption, including:

“A civil or criminal trial is to be a fair trial, a criminal charge is to be proved beyond reasonable doubt, people are not to be arrested or searched arbitrarily, laws, especially criminal laws, do not operate retrospectively, superior courts have jurisdiction to prevent unauthorised assumptions of jurisdiction by inferior courts and tribunals ...”

His Honour emphasised that these matters were examples.⁹³

The right to personal liberty is plainly fundamental in the requisite sense.⁹⁴ A range of other rights are also jealously, but perhaps not so stringently, protected.

What is required to overcome the interpretive principle is not only affected by the nature of the right, freedom or immunity. It is also affected by the extent of the intrusion. As the Full Federal Court said in *Al Masri*,⁹⁵ with respect to this principle:

“In considering the application of the principle of construction it is appropriate to take into account not only the fundamental nature of the right that may be abrogated or curtailed, but also the extent to which, depending upon the construction adopted, that may occur. Although all interferences with personal liberty are serious in the eyes of the common law, it may be said that the more serious the interference with liberty, the clearer the expression of intention to bring about that interference must be. Where the right in issue is the fundamental right of personal liberty, it is appropriate to consider the nature and duration of the interference.”

89 *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19].

90 See *Coco v The Queen* (1994) 179 CLR 427 at 437.

91 *Coco v The Queen* (1994) 179 CLR 427 at [117] and [122].

92 *Coco v The Queen* (1994) 179 CLR 427 at [15].

93 *Malika Holdings v Stretton* (2001) 204 CLR 290 at [28].

94 *Minister v Al Masri* (2003) 197 ALR 241 at [86]–[91].

95 (2003) 197 ALR 241 at [92].

There is considerable scope for diversity of opinion in this regard also.

To a significant degree, Australian lawyers have been insulated from what has been called the global human rights revolution. Nevertheless, although we have no bill of rights, save in the Australian Capital Territory and Victoria, rights discourse has re-emerged. As anti-terrorist legislation and restrictive migration legislation continues to be enacted, in a form which impinges on fundamental rights, freedoms and immunities, it is likely that the clear statement principle will be frequently invoked in the years ahead.



The Intent of Legislators

How judges discern it and what they do if they find it*

The Honourable Justice Keith Mason AC†

Judicial angst and the realities of drafting

In *Rowe v Russell*,¹ Scrutton LJ concluded his judgment stating:

“I regret that I cannot order the costs to be paid by the draughtsmen of the *Rent Restrictions Acts*, and the members of the Legislature who passed them, and are responsible for the obscurity of the Acts ...”

Similar expressions of judicial angst are collected in the texts on statute law. The harder the problem of statutory interpretation, the more likely judges will inveigh against the person they think responsible, namely Parliamentary Counsel. Often the frustration directed at the drafter treats that personage as some sort of Thomas the Tank Engine Fat Controller, someone who has the full capacity to prevent all misunderstandings and avoid all litigation.

The personal criticisms are seldom justified.

Sometimes they proceed from ignorance as to the exigencies of the legislative drafting process. Judges may need to remind themselves that legislative drafters often work to produce gold from dross within particularly short timeframes. From personal experience, judges know that the very discipline of writing a reserved judgment can itself expose issues and problems requiring further attention. That is the main theme of Sir Frank Kitto’s famous essay, “Why Write Judgments?”² Alas for Parliamentary Counsel, there may not be time for a further draft. And the attention span of those giving instructions may be limited, at least in the amount of time that the policy makers are able to invest in a particular project.

Chief Justice Wilmott wrote in 1767 that “*words are only pictures of ideas on paper*”.³ Sometimes the principles of legislation are themselves inadequately formed by those

* This is a slightly revised version of an address to Fourth Australasian Drafting Conference, Parliament House, 3 August 2005, Sydney. In that context, the address was entitled “The View From the Other Side — Judicial Experiences of Legislation”. Published as “The intent of legislators: How judges discern it and what they do if they find it” in (2006) 27 *Australian Bar Review* 253.

† President, New South Wales Court of Appeal.

1 [1928] 2 KB 117 at 130.

2 (1992) 66 *ALJ* 787.

3 *Dodson v Grew* [1767] Wilm 272 at 278; 97 ER 106 at 108, cited by Isaacs J in *Fell v Fell* (1922) 31 CLR 268 at 276.

who are responsible for the policies designed to be embedded in statute. Their rosy vision of desired outcomes may blind them to the need to cover all bases so as to pre-empt the avoidance techniques of those not favourably disposed to the new dispensation.

Alternatively, the policy-makers may be unable to resist having an each-way bet. This occurred, in my opinion, in the insider trading legislation discussed in the 2001 Court of Criminal Appeal decision of *R v Firns*.⁴ There is continuing debate about the theories offered for prohibiting insider trading. Some experts emphasise fairness and “equal access” to a market as the overriding goal. Others contend that insider trading is inefficient, because it damages the integrity of the financial market. The former policy was adopted by the Griffiths Committee on whose Report the 1991 legislation was drafted, according to the Explanatory Memorandum. Even insiders were to be permitted to rely on “generally available information”, defined in effect as information disclosed by the company in a manner that would be likely to bring it to the attention of a reasonable investor in a reasonable time. But the Bill as introduced and passed also permitted the clever, swift and efficient to act forthwith if they relied upon “readily observable matter”, an undefined term. The upshot was that an insider was permitted to get the jump on the market by dealings on the Stock Exchange in Sydney effected immediately after the announcement by the Supreme Court of Papua New Guinea of a price-sensitive judgment.

Those having the carriage of the legislation thus produced a clearly bifurcated enactment of legislative policy. In my reasons (with which Hidden J agreed) I said:

“The language of the statutory definition of ‘generally available’ and the drafting history of that definition demonstrate that the Griffiths Committee’s clear vision of an underlying policy of promoting fairness in the market through equal access to information became badly blurred in the legislative process. This did not happen through oversight, although it is possible that different participants in the legislative process concentrated on one factor to the exclusion of the other or persuaded themselves that two essentially conflicting policies could be brought into sharp focus at the point of statutory definition. Regrettably for the courts at least, this has not happened. The result has been a form of legislated astigmatism because the attempt to converge essentially incompatible policy goals has produced a patchy blurring of the image ...”⁵

There is little that Parliamentary Counsel can do if faced with unresolved and unresolvable divergences of policy instructions. The best one can hope for is that the problem is laid before the legislative masters before the Bill is finalised. Like Walter Bagehot’s monarch, Parliamentary Counsel have the right to warn if alerted to potential problems. In doing so they may alert starry-eyed or astigmatic policy makers. The art of drafting hopefully develops minds “alveolated with suspicion”, to pick up a phrase of Justice Michael McHugh.⁶ But crystal balls are not yet standard issue.

4 (2001) 51 NSWLR 548. The key provisions were ss 1002B and 1002G of the *Corporations Law*.

5 (2001) 51 NSWLR 548 at 558 [53].

6 *Registrar-General v Northside Developments Pty Ltd* (1988) 14 NSWLR 571 at 599 per McHugh JA.

As a last resort, the government that perceives a problem that must be addressed, but does not know how to do so, can always pass the problem to the judiciary. When this occurs, one often finds a weak instruction about doing what is just and equitable in the circumstances accompanied by a non-exclusive checklist of factors to be taken into account.

Intractable and irreconcilable concepts

Sometimes enacted concepts resist reduction to sharp-faced rules, despite the best of intentions. Laws attempting to define insider trading or unfair contracts are prime examples. Judges who complain about the vagueness of such legislation should remember that the common law is full of similar problems, although it has had hundreds of years to get its rules stated clearly and sharply prioritised. Diplock LJ once remarked that:

“... the law is nearly almost most obscure in those fields in which the judges say: ‘the principle is plain, but the difficulty lies in its application to particular facts’.”⁷

Or as Dawson J put it in the *David Securities Case*:⁸

“Facts tend to be black or white but the law very often is not.”

Putting “the law” into a statute does not necessarily make its concepts more tractable.

Judges sometimes get snaky when faced with apparently contradictory statutory commands. There is a tendency to blame the drafter, because it is assumed that the difficulty would have been removed had it been perceived before the legislation was enacted. It is certainly a step along the way to solving a problem to know that it exists, but many policies and legal principles are ambiguous and contradictory in their nature. Even the canons of statutory interpretation have been said to be incompatible one with the other.⁹

Most difficult questions of statutory interpretation involve reconciling competing commands. The clash may only become apparent when litigants ask questions never dreamed of by legislators or posed to parliamentary counsel. Difficulties are multiplied when the apparent conflict exists between different statutes. Contending parties may agree that the meaning of a statute is plain, but violently disagree about what is revealed. The New South Wales Court of Appeal recently had cause to construe s 101 of the *Proceeds of Crime Act 1987* (Cth). Santow JA wryly observed that:

“[T]here is some irony in the fact that both appellant and respondent began by considering that s 101 as it stands is clear and unambiguous. Yet they come to diametrically opposed views as to that supposedly patent meaning. That is usually a precursor to finding either ambiguity or a wholly specious argument for one of the supposedly competing interpretations”.¹⁰

7 *Ilkiw v Samuels* [1963] 2 All ER 879 at 889.

8 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 402–403.

9 K Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed” (1950) 3 *Vanderbilt Law Review* 395.

10 *Diez v Director of Public Prosecutions* (2004) 62 NSWLR 1 at 8 [24].

Judges who criticise the drafter for ignorance or oversight do well to remember that prioritising and reconciling generally stated legal principles is the very pith and substance of the common law. In matters of general law we are used to wrestling without the aid of clear hierarchies of principle. We look to hierarchies of precedents and of appeal courts to guide us. But legislation purports to speak in a single imperious voice and at a constant volume. To pursue the metaphor, we accept as an ultimate principle of statutory interpretation that “the legislature cannot speak with a forked tongue”.¹¹ This, of course, is a myth, but a necessary one. It would be intolerable for a court to tell a litigant that he or she is caught in a cross-fire of conflicting statutory demands. The problem for judges is that we take up the strain of reconciling conflict between statute and common law and between statute and statute. Judges do not have the option of saying “It is too hard”, “No answer to your problem is available” or “The matter is remitted to Parliament to have a second attempt at explaining itself”.

Sometimes, therefore, the judicial labour becomes Herculean because the reality is that the conflict was not perceived by those who made the earlier statutory or common law rules; or because it was perceived, but deemed incapable of resolution other than by fuzzy legislation or honest delegation to the courts. These difficulties will be with us to the end of time. My point is that the bedrock principle that the law is a coherent unity¹² forces the court to come up with answers and drives the court into searching for a sometimes non-existent intention.

Judges need to recognise that their experience of legislation is bound to be jaundiced. Most issues of statutory interpretation are resolved on the advice of lawyers. Few persist into the public well of the courtroom. Of those that do, many will be genuine and some quite vexing in their complexity.

The exigencies of the drafting task and the constancy of human imperfection guarantees that hard questions of statutory interpretation will always be with us. Parliamentary Counsel will never have to adopt the work practices of the rug weavers of Qum who deliberately insert a mistake into their handiwork to reflect their belief that only Allah is perfect. Those who write judgments are in a similar position.

Legislation may be the end product of the process of debate, in which amendments are inserted to obtain assent, without always having the opportunity to check the flow-on effects. Thankfully it is now permissible to track the parliamentary history, thereby ascertaining changes made to the Bill as presented to Parliament. Of course, the Bill itself will often be the product of last minute horse-trading. Late changes may hit their target, but at the cost of skewing the thrust of the instrument unintentionally. Yet these will usually be undetectable to the reader of the Act. For example, if there are changes to a draft Bill set out in a schedule to a law reform commission report, then there may be no legitimate way of learning why they were made. Is there a role for the Explanatory Memorandum to contain a schedule from the drafter explaining the textual changes not intended to reflect changes in substance?

11 *Waugh v Kippen* (1986) 160 CLR 156 at 165 per Gibbs CJ, Mason, Wilson and Dawson JJ.

12 See K Mason, “The Unity of the Law” (1998) 4 (1) *The Judicial Review* 1.

As often happens, when several people are involved in settling a report or agreeing on a Bill, some only read the draft when it is at its final stage. Others may have read it earlier, but only twig late to its impact in a particular matter.

Expressed intent versus actual language

I was a member of the Special Committee of Solicitors General during the final stages of preparing the cross-vesting legislation. The Commonwealth had the carriage of the drafting exercise. I remember well the response of Mr Dennis Rose QC, then Chief General Counsel in the Commonwealth Attorney General's Department, in relation to a sensible suggestion for amendment to the "final draft" of the Bill that was being settled by the Committee:

"Your point is a good one, but it is just too late to take the Bill back to Parliamentary Counsel. But let me promise this: I will have a statement put into the Minister's Second Reading speech saying that the legislation is intended to operate in the way you have proposed."

I will recount another Second Reading speech story later.

My anecdote highlights the danger of confusing the expressed intent of the promoter and the language adopted by Parliament. I recently had my attention drawn to the early decision of *Nolan v Clifford*,¹³ where the High Court was considering the interpretation of a section of the *Crimes Act 1900* (NSW). That was a consolidating statute, although there were some changes recorded in the note of the consolidating commissioner. Barton J pithily expressed the judicial task in the following terms:¹⁴

"We have been asked to refer to the brevier, the note of the consolidating commissioner, to find out what he meant. I do not think this reference is of any value, because we are not to consider what the commissioner thought, but what Parliament has said, and what it meant by what it has said."

Sometimes judges make unjustified assumptions about the relationship between the Executive and Parliament at the time when the legislation was enacted.

Legislation used to be enacted by the Crown on the petition of Parliament. The old approach may still be reflected in Constitutions such as the *New South Wales Constitution Act 1902* that speak of the Legislature as "His Majesty the King with the advice and consent of the Legislative Council and the Legislative Assembly".¹⁵ During the medieval era the King's Council drew statutes based on proposals that had been initiated by Parliament. In this context, the judges often had a leading role in drafting. This explains the remark of Hengham CJ who told counsel in 1305:

"Do not gloss the statute: we know it better than you do, because we made it."¹⁶

13 (1904) 1 CLR 429.

14 (1904) 1 CLR 429 at 449.

15 *Constitution Act 1902* (NSW), s 3.

16 Year Book 33–35 Ed I (RS) 83, cited in WS Holdsworth, *A History of English Law*, Vol XI, Sweet & Maxwell, London, p 366. For other examples, see F Bennion, *Statutory Interpretation* (4th ed), Butterworths, London, p 553.

In the eighteenth and early nineteenth centuries, when the Executive government was relatively weak, legislation tended to become more verbose and variegated in style. Holdsworth has observed that:¹⁷

“History shows that those periods in which Parliament has had a large amount of independence, and the Executive has had a small amount of control, have been periods in which the statute book has shown the greatest lack of symmetry.”

Presumptions of interpretation based on consistency of style or concept are at their weakest in such contexts. Sir Harold Kent, a legislative draftsman, referred to the statutes of the mid-nineteenth century “with their appalling tracts of unparagraphed, unpunctuated matter, with the conveyancer’s predilection for repeating everything again and again”.¹⁸ It would be careless to construe legislation of this era by assuming that different words are necessarily intended to convey different ideas.

These phenomena are not just a matter of distant history. They may impact on modern legislation and it may be something that judges need to take into account before venting their spleen on Parliamentary Counsel. For a time when I was Solicitor General for New South Wales, the government of the day controlled neither House of Parliament. This made it cautious about introducing any legislation into Parliament and it certainly made it harder for Parliamentary Counsel to get his hands on amendments, particularly late amendments, to Bills. There were of course mechanisms for providing confidential drafting assistance to opposition and cross-bench members, but these were not always utilised. Non-governmental ministers are naturally free to draw on private legal assistance. But, as occurred in the eighteenth century, this can mean that accumulated drafting wisdom is by-passed and that more than the usual number of “i”s are not dotted and “t”s not crossed. It helps the judges at least to be aware of this phenomenon.

Tension between common law and statute law

Most statutes are designed to take the law outside the judicial comfort zone (that is, the realm of the common law). This causes many judges to get their hackles up, often unreasonably. History is littered with prolonged rearguard battles by judges reluctant to understand or accept ground-breaking legislation. Consider, for example, the judicial response to the *Statute of Frauds* or the business records provisions of the *Evidence Acts*. In the process of resisting change to the familiar wisdom of the common law, judges may feel like hitting out at the messenger, rather than the message. Many statutes transport judges into a universe of discourse in which they have no familiarity at all. That is often Parliament’s intent.

Change usually generates opposition from those who are most affected. Changing law affects judges sharply, especially if it challenges attitudes they have taken over half a lifetime to learn.

Sir Robert Torrens did not accuse the legal profession of seeking to feather its own nest in opposing his reforms. Rather, he reflected upon the difficulty which any body in

¹⁷ *ibid*, p 371.

¹⁸ Quoted in F Bennion, *op cit* n 16, p 352.

control of an arcane and complex art has as regards the *capacity* to see the need for reform. In his partly autobiographical work, *Registration of Title*,¹⁹ he wrote the following under the heading “Professional bias incapacitates for the work of reform”:

“The work of law reform has been left in the hands of lawyers; and without adopting the ancient proverb, “Hawks dinna paik out hawks’ een” [Hawks do not pick out hawks’ eyes] and without attributing any sordid motive, there are other influences no less powerful which operate to deter the professional mind from realizing the idea of thorough radical reform of the law. As Lord Brougham says — ‘They love and revere the mysteries which they have spent so much time in learning, and cannot bear the rude hand which would wipe away the cobwebs, in spinning which they have spent their zeal and their days for perhaps half a century.’ The effect of education may be such as to prevent men seeing clearly or judging impartially. How else can we account for the fact that in the most important affair that can occupy the mind of men here below — ‘religion’ — we find men adhering to that creed, be it what it may, in which they have been brought up?

It would seem as though the mind, confined for a length of time to run in grooves, loses the power to draw out from the deep-worn track. Hence, upon examining the projects of law reform emanating from legal men, even the most learned, we find them to be little better than palliatives.”

Fussy law versus fuzzy law

Oliver Wendell Holmes once observed that “ignorance is the best of law reformers”.²⁰

Legislation today is very different from older enactments in form and structure. But the greatest distinguishing point lies in the modern drafting style which has been labelled as “fussy”, in contrast to the “fuzzy” law of the past or as found in the civilian tradition in Europe. Fussy law concentrates on detailed distinctions thrown up by a focus on specific circumstances. Fuzzy law on the other hand, provides general principles in the context of broad legislative purposes. The differences and their consequences are expounded in an excellent article called “Legal Drafting Styles: Fuzzy or Fussy?” in the Murdoch University Electronic Journal of Law.²¹ The author, Lisbeth Campbell, points out that the English/Australian style of drafting that is elaborate and complex is a response to sustained and continuing judicial reluctance to permit statutory tinkering with the common law. Campbell points out that:

“By being specific in its instructions to drafters Parliament sought to control judicial construction of its enactments. Courts responded by becoming even more literal and restricted in their reading of statutes thus generating a vicious spiral of convoluted detail which resulted in the lack of intelligibility referred to by the Renton Report which was set up to address this problem.”²²

19 1859, Register and Observer General Printing Office, Adelaide, pp 5–6.

20 *The Common Law*, Little Brown, Boston, 1946, p 64.

21 (1996) 3(2) *Murdoch University Electronic Journal of Law* (July), available at <www.murdoch.edu.au/elaw/indices/issue/v3n2.html> accessed 28/03/07.

22 This is a reference to *The Preparation of Legislation: Report by the Committee appointed by the Lord President of the Council (the Renton Committee)*, 1975, HMSO, London.

Fussy law has advantages and disadvantages that are pointed out by the author. Australian judges may not be consciously aware of the distinction between fussy and fuzzy law, but they should be prepared to change gear when confronted with an interpretative task involving law of the latter character. The prime example in the present era is s 52 of the *Trade Practices Act 1974* (Cth). It took several years before judges came to accept that this thin provision was designed to drag them brutally away from their comfort zone. It compelled them to apply a radical, widely intrusive provision in situations where neither Parliament nor Parliamentary Counsel had provided many clues. As we know, judicial grumbling on this account has led to a cluster of later fussier provisions surrounding and partially qualifying the core enactment in s 52.

Recent developments

Recent developments in the law of statutory interpretation have dramatically assisted the search for the true (though limited) intentions of those who frame or promote legislation. The real issue is whether the judges are interested in discovering those intentions and, if not, why not. I shall return to that topic.

For the moment it is well to remember that only within the last generation has it become compulsory to consider legislative context in the first instance, and not merely at some later stage when ambiguity might be thought to arise.²³ Nowadays, we acknowledge the permissibility (indeed essentiality) of purposive construction, yet this was a radical idea before the judgment of McHugh JA in *Kingston v Ke prose Pty Ltd*.²⁴

Thankfully, we have moved away from the belief that the meaning of a statute can be discovered by consulting dictionaries and encyclopedia of words and phrases. In *House of Peace* I observed:²⁵

“A dictionary may offer a reasonably authoritative source for describing the range of meanings of a word, including obsolete meanings. Dictionaries recognise that usage varies from time-to-time and place-to-place. However, they do not speak with one voice, even if published relatively concurrently. They can illustrate usage in context, but can never enter the particular interpretative task confronting a person required to construe a particular document for a particular purpose. I agree with the following remarks of Judge Randolph of the United States Court of Appeals for the District of Columbia Circuit:²⁶

‘... citing ... dictionaries creates a sort of optical illusion, conveying the existence of certainty — or “plainness” — when appearance may be all there is. Lexicographers define words with words. Words in the definition are defined by more words, as are those words. The trail may be endless; sometimes, it is circular. Using a dictionary definition simply pushes the problem back.’”

23 *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) CLR 175 at 315; *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc* (2000) 47 NSWLR 548 at 575–576.

24 (1987) 11 NSWLR 404.

25 *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498 at 505.

26 “Dictionaries, Plain Meaning and Context in Statutory Interpretation” (1994) 17 *Harvard Journal of Law and Public Policy* 71 at 72.

I would not want this to discourage Parliamentary Counsel from inserting dictionaries into statutes. They are most helpful, especially where the dictionary itself is easily identifiable and where the reader is directed to it in the substantive text.

The mischief rule has been around for at least as long as *Heydon's Case* in 1584,²⁷ but only comparatively recently have judges been assisted by knowing what materials may be consulted in order to determine the mischief addressed by Parliament and by having ready access to those materials. When, in 1978, Mason J suggested that courts might consult Law Reform Commission reports to identify the mischief at which a statute was directed,²⁸ this was a controversial proposition. His Honour added that he did not favour resort to Law Reform reports for any broader purpose. How things have changed since then!

Of course, matters can be taken to extremes. I once heard the submission that an enactment meant X because, when the Bill was in the Committee stage, an opposition member urged a particular amendment, asserting that if it were not made X would follow. The amendment was opposed, but without the minister denying the assertion. Counsel was about to take the court to the caselaw on admissions by silence when the judge exploded.

My former colleague, Mr Tom Pauling QC, the Solicitor General for the Northern Territory, once told me about research he had done concerning a statute dealing with riparian rights. He went to the South Australian nineteenth century parliamentary debates. In the Lower House, the minister told the members that this was a reforming statute that would open up the great waterways of South Australia to smallholding farmers. The promoter's speech in the Upper House commenced with the words "Fellow pastoralists need have no fears about this legislation ...".

This reminds us that Parliament is sometimes the venue of genuine debate, where reports, explanatory memoranda and second reading speeches are designed to persuade a particular audience, not just to inform the public.

Judges like Antonin Scalia in the United States who scorn interpretative assistance from secondary sources have actually been accused of being undemocratic in outlook, anxious to avoid anything that reflects messy democracy in action. In politics like ours, responsible government paradoxically ensures a greater level of Executive control over Parliament. The cold reality may be that the majority in Parliament intend the legislation to mean whatever the government of the day intends it to mean. In this context, judges who resist being taken to the secondary materials may be upholding the primacy of Parliament over the Executive, rather than searching for the political realities of the law-makers' "intent". The judicial viewpoint is thus unashamedly *from the other side* to that of the politicians and those who act on the instructions of politicians, including Parliamentary Counsel. I am not apologising for this instance of judicial stubbornness in importing high constitutional principle into an essentially interpretative task. Rather, my concern is that we should try to view things as they are.

²⁷ 3 Co Rep 7a, 76 ER 637 at 638.

²⁸ *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 520–521.

It has been observed that the English legal system is more formal than the American in its methods of statutory interpretation.²⁹ Australia is in the English camp, even though we are now comfortable with the idea of interpreting statutes in context.³⁰

The House of Lords has been very reluctant to go down the path of accessing *Hansard* to construe legislation. *Pepper v Hart*³¹ opened the door in 1993, but only so far as permitting consultation of clear statements made by the minister or other promoter of a Bill directed to the very point in question in the litigation.³² Later decisions of the House of Lords have confined English courts to permitting reference to statements in Parliament only where:

- (a) legislation was ambiguous, obscure, or led to an absurdity;
- (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together, if necessary, with such other parliamentary material as might be necessary to understand such statements and their effect; and
- (c) the effect of such statements was clear.³³

The precise application of these principles in Australia is not my present concern. But I do wish to identify the constitutional principles perceived by the judges, here and abroad, as colouring their frequent unwillingness to follow the Executive's at times sloppy signposts and move away from the enacted text of legislation. What lies behind this judicial reluctance is a mixture of distrust of the prescience of ministers, suspicion that ministers sometimes know that what they are saying is not necessarily reflected in the text, and affirmation of the high constitutional principle about statute law being the prerogative of Parliament, not the Executive.

These views have been articulated most clearly in an influential article by Lord Steyn, "Pepper v Hart; A Re-Examination".³⁴ My anecdote about the drafting of the cross vesting legislation suggests that caution should be the order of the day, even (or particularly) with the statements of ministers promoting legislation. The House of Lords has recently moved from caution to positive mistrust, basing their stance upon constitutional principle. In *Wilson v First County Trust Ltd (No 2)*³⁵ their Lordships were at pains to demonstrate that reliance on ministerial statements actually skews the court away from the true, so-called objective or enacted intention of Parliament, the only source of law-making power (judges aside). Lord Nicholls said³⁶ that "[i]t should not be supposed that

29 PS Atiyah & RS Summers, *Form and Substance in Anglo-American Law*, 1991, Clarendon Press, Oxford, Ch 4.

30 See generally JJ Spigelman AC, "The Poet's Rich Resource: Issues in Statutory Interpretation" (2001) 21 *Aust Bar Review* 224.

31 [1993] AC 593.

32 See *Melluish v BMI (No 3) Ltd* [1996] 1 AC 454 at 481.

33 See *R v Environment Secretary, Ex parte Spath Holme Ltd* [2001] 2 AC 349 at 391. See also *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816.

34 (2001) 21 *OJLS* 59.

35 [2004] 1 AC 816. See also A Kavanagh, "Pepper v Hart and Matters of Constitutional Principle" (2005) 121 *LQR* 98.

36 [2004] 1 AC 816 at 843 [66].

members necessarily agreed with the minister's reasoning or his conclusions". Lord Hobhouse was even blunter in stating that it was:

"a fundamental error of principle to confuse what a minister or a parliamentarian may have said (or said he intended) with the will and intention of Parliament itself".³⁷

There is also a strong judicial preference for the accessibility of law. In *Watson v Lee*,³⁸ the case about gazettal of regulations, Barwick CJ asserted that:

"No inconvenience in government administration can ... be allowed to displace adherence to the principle that a citizen should not be bound by a law the terms of which he has no means of knowing."

The text of a statute is always available, not so the secondary materials. For example, the vital Australian Law Reform Commission *Interim Report on Evidence*³⁹ is a rare collector's item. In this context, it is harsh to criticise a judge or litigator for not going behind the text of the *Evidence Act*, especially since it was intended as a ready tool of practical assistance.

Judicial and statutory permission to examine extrinsic materials may well lessen the chances of the true intention of the framers being disregarded, at least by default. But, if anything, it has heightened the stringency of the academic and judicial debate about "legislative intent". The stakes are at their highest with virtually unamendable statutes, that is, Constitutions. But, if the United States experience is anything to go by, those who are most insistent on "original intent" are generally the most hostile about going behind the text on ordinary legislation. It is a curious paradox.

My favourite Scalia quote is his reference to the use of legislative history as:

"the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends".⁴⁰

Scalia J also stated that:

"the greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislatures."⁴¹

Equally pithy, was his statement in *Pennsylvania v Union Gas Co*⁴² that:

"It is our task, as I see it, not to enter the minds of the Members of Congress — who need have nothing in mind in order for their votes to be both lawful and effective — but, rather, to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times."

37 [2004] 1 AC 816 at 864 [139].

38 (1979) 144 CLR 374 at 381.

39 *Interim Report on Evidence* (IR 26), 1985, ALRC, Canberra.

40 *Conroy v Aniskoff* 507 US 511, 519 (1993).

41 *Conroy v Aniskoff* 507 US 511, 519 (1993).

42 491 US 1 (1989).

This is the notion developed by the House of Lords in explanation of its extreme reluctance to give weight to ministerial statements.

As well as significant developments in the law of statutory interpretation, there have been recent improvements in the science of legislative drafting. Some changes are bound to be faddish, but most represent welcome developments based on the accumulated wisdom of experts. I urge Parliamentary Counsel to continue their attempts to engage legal practitioners, especially judges, in their endeavours. Dialogue will increase mutual understanding about needs and the best means to address them.

Conclusion

We live in an exciting time of transition. The great commons of the common law are being engulfed by a tsunami of legislation. Even the principles of statutory interpretation are increasingly found in statute. In these circumstances, it is amazing that law schools do not include a greater component of statute law in the curriculum. Courts themselves have been slow in developing the common law for the age of statutes (to pick up Guido Calabresi's phrase).⁴³

Judges are forced daily to adjust and accommodate the existing body of reasonably coherent law with the engulfing tide of new statutes. We have to reconcile the sometimes irreconcilable commands of the primary lawmaker, Parliament. At times, judicial stubbornness is due to concern to protect core values, including key constitutional principles and basic fairness as embodied in the doctrines of natural justice. But sometimes judges are just angry that they do not have Parliament's option of doing nothing when faced with a problem.

One thing is sure. The dialogue between the three arms of government will continue to be vigorous and constructive.

43 G Calabresi, *A Common Law for the Age of Statutes*, 1982, Harvard University Press, Massachusetts.



The High Court of Australia and Modes of Constitutional Interpretation

The Honourable Justice Susan Kenny*

Introduction

Scholars, judges and various others have sought to explain the processes of construing written constitutions. There is a wealth of literature on the topic in the United States of America¹ and a considerable body of writing in Australia.² No explanation has yet won general acceptance and probably none ever will. Some theories of constitutional interpretation have been fashionable in certain quarters for a time until further reflection

* Judge of the Federal Court of Australia. BA (Hons) (Melb), LLB (Hons) (Melb), D Phil (Oxon).

1 See, for example: F Lieber, "Legal and Political Hermeneutics" in *Classics in Legal History*, 1970, Buffalo, Hein; C McIlwain, *Constitutionalism, Ancient and Modern*, 1947, Cornell University Press, Ithaca; AM Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed), 1986, Yale University Press, New Haven; CL Black Jr, *Structure and Relationship in Constitutional Law*, 1969, Louisiana State University Press, Baton Rouge; P Bobbitt, *Constitutional Fate: Theory of the Constitution*, 1982, Oxford University Press, New York; R Dworkin, *A Matter of Principle*, 1985, Harvard University Press, Cambridge; M Tushnet, *Red, White and Blue: A Critical Analysis of Constitutional Law*, 1988, Harvard University Press, Cambridge; S Levison and S Mailloux (Eds), *Interpreting Law and Literature: A Hermeneutic Reader*, 1988, Northwestern University Press, Evanston; S Levison, *Constitutional Faith*, 1988, Princeton University Press, Princeton; S Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literature and Legal Studies*, 1989, Duke University Press, Durham; RH Bork, *The Tempting of America: The Political Seduction of the Law*, 1990, The Free Press, New York; CR Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, 1990, Harvard University Press, Cambridge; CR Sunstein, *The Partial Constitution*, 1993, Harvard University Press, Cambridge; EM Maltz, *Rethinking Constitutional Law: Originalism, Interventionism, and the Politics of Judicial Review*, 1994, University Press of Kansas, Lawrence; R Kahn, *The Supreme Court and Constitutional Theory 1953–1993*, 1994, University Press of Kansas, Lawrence; P Bobbitt, *Constitutional Interpretation*, 1991, Blackwell, Oxford; G Leyh (Ed), *Legal Hermeneutics: History, Theory and Practice*, 1992, University of California Press, Berkeley; SD Gerber, *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation*, 1995, New York University Press, New York; G Bassham, *Original Intent and the Constitution: A Philosophical Study*, 1992, Rowman & Littlefield Publishers, Lanham; W Harris II, *The Interpretable Constitution*, 1993, Johns Hopkins University Press, Baltimore; CR Sunstein, *Designing Democracy: What Constitutions Do*, 2001, Oxford University Press, New York; and a host of journal articles, including P Kissam, "Triangulating Constitutional Theory: Power, Time, and Everyman" (2006) 53 *Buffalo Law Review* 269; R Fallon Jr, "How to Choose a Constitutional Theory?" (1999) 87 *California Law Review* 535; L Lessig, "Fidelity and Constraint" (1997) 65 *Fordham Law Review* 1365; DA Strauss, "Common Law Constitutional Interpretation" (1996) 63 (3) *University of Chicago Law Review* 877; M Gerhardt, "The Role of Precedent in Constitutional Decision-making and Theory" (1991) 60 *George Washington Law Review* 68; H Monaghan, "Stare Decis and Constitutional Adjudication" (1988) 88 *Columbia Law Review* 723; D Farber, "Legal Pragmatism and the Constitution" (1988) 72 *Minnesota Law Review* 1331; R Fallon Jr, "A Constructivist Coherence Theory of Constitutional Interpretation" (1987) 100 *Harvard Law Review* 1189; E Sanchez, "A Case Against Judicial Internationalism" (2006) 38 *Connecticut Law Review* 185; and P Racusin, "Looking At The Constitution Through World-coloured Glasses: The Supreme Court's Use Of Transnational Law in Constitutional Adjudication" (2006) 28(3) *Houston Journal of International Law* 913.

2 See, for example, L Zines, "Social Conflict and Constitutional Interpretation" (1996) 22 *Monash University Law Review* 195; A Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication" (1999) 23 *Melbourne University Law Review* 668;

and experience marked out their limitations. Although the search for an all-encompassing and generally-approved theory is probably hopeless, continued discussion and analysis of constitutional interpretation assists in understanding the processes of making decisions in constitutional cases³ and, in the Australian context, enables the identification of the nature of the choices open to the High Court in constitutional decision-making.

It is necessary to appreciate the nature of these choices in order to evaluate usefully and fairly the High Court's constitutional work. The decision of the High Court in November 2006, in *New South Wales v Commonwealth* (the *Work Choices Case*),⁴ illustrates this proposition. The majority (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) held that the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (hereafter the *Work Choices Act*) was constitutionally valid. The *Work Choices Act* provided for an Australia-wide regime to regulate the employment relationship of "constitutional" corporations (broadly speaking, trading, financial and foreign corporations) and their employees. In the course of so doing, the majority held that a law of the Commonwealth

G Williams, "Engineers is Dead, Long Live the Engineers!" (1995) 17 *Sydney Law Review* 63; K Walker, "International Law as a Tool of Constitutional Interpretation" (2002) 28 *Monash University Law Review* 85; G Craven, "Heresy as Orthodoxy: Were the Founders Progressivists?" (2003) 31 *Federal Law Review* 87; J Kirk, "Constitutional Implications (I): Nature, Legitimacy, Classification, Examples" (2000) 24 *Melbourne University Law Review* 645; J Goldsworthy, "Interpreting the Constitution in its Second Century" (2000) 24 *Melbourne University Law Review* 677; J Goldsworthy, "Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donoghue" (1997) 23(2) *Monash University Law Review* 362; J Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Federal Law Review* 1; A Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy" in C Sampford (Ed), *Interpreting Constitutions: Theories, Principles and Institutions*, 1996, Federation Press, Sydney, p 13; G Lindell, "Recent Developments in the Judicial Interpretation of the Australian Constitution" in G Lindell (Ed), *Future Directions in Australian Constitutional Law*, 1994, Federation Press, Sydney; L Zines, "The Present State of the Constitution" in A Stone and G Williams (Eds), *The High Court at the Crossroads: Essays in Constitutional Law*, 2000, Federation Press, Sydney; G Hill, "'Originalist' vs 'Progressive' Interpretations of the Constitution — Does it Matter?" (2000) 11(3) *Public Law Review* 159; G Craven, "Cracks in the Façade of Literalism: Is there an Engineer in the House?" (1992) 18 *Melbourne University Law Review* 540; H Patapan, "High Court Review 2001: Politics, Legalism and the Gleeson Court" (2001) 37(2) *Australian Journal of Political Science* 241; L Zines, "Legalism, Realism and Judicial Rhetoric in Constitutional Law" (2002) 5(2) *Constitutional Law and Policy Review* 21; D Meagher, "Guided By Voices? — Constitutional Interpretation on the Gleeson Court" [2002] *Deakin Law Review* 14, (2002) 7 *Deakin Law Review* 261; C Birch, "Mill, Frege and the High Court: The connotation/denotation distinction in Constitutional Interpretation" (2003) 23 *Australian Bar Review* 296; L Zines, "Dead Hands or Living Tree? Stability and Change in Constitutional Law" (2004) 25 *Adelaide Law Review* 3; BM Selway, "Methodologies of constitutional interpretation in the High Court of Australia" (2003) 14 *Public Law Review* 234; C Saunders, "Interpreting the Constitution" (2004) 15 *Public Law Review* 289; M McHugh, "The Constitutional Jurisprudence of the High Court: 1989–2004", The Inaugural Sir Anthony Mason Lecture in Constitutional Law, delivered 26 November 2004, Banco Court, Sydney: <www.hcourt.gov.au/speeches/mmchughj_26nov04.html> accessed 28/2/07; WMC Gummow, "The Constitution: Ultimate Foundation Of Australian Law?" (2005) 79 *Australian Law Journal* 167; D Hovell and G Williams, "A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa" (2005) 29 *Melbourne University Law Review* 95; A Stone, "Australia's Constitutional Rights and the Problem of Interpretive Disagreement" (2005) 27 *Sydney Law Review* 29; A Lynch, "Does the High Court Disagree More Often in Constitutional Cases? A Statistical Study of Judgment Delivery 1981–2003" (2005) 33 *Federal Law Review* 485.

3 I continue to use the expression "constitutional case" to signify a case in which an issue arose involving the Constitution of the Commonwealth of Australia or of an Australian State: see S Kenny, "The High Court on Constitutional Law: The 2002 Term" (2003) 26(1) *UNSWLJ* 210, citing S Gageler, "The High Court on Constitutional Law: The 2001 Term" (2002) 25(1) *UNSWLJ* 194.

4 (2006) 231 ALR 1.

Parliament regulating the business and other activities, functions and relationships of a constitutional corporation was constitutionally valid. The *Work Choices Act* was, so the majority said, such a law since it controlled the people through whom the corporation acted. Plainly enough, the court's reasoning will apply to other activities and relationships involving constitutional corporations.

At the time judgment was delivered, the daily press published numerous commentaries and opinion-pieces on the decision, in many of which the decision was seen to mark the "death of federalism",⁵ at least as we know it.⁶ Interestingly enough, the actual outcome of the case had clearly been foreshadowed earlier in the scholarly literature.⁷ For present purposes, it is relevant to note that at least one writer attributed the outcome of the case to the court's interpretive method.⁸

Hereafter I examine the interpretive analyses employed by the High Court in the *Work Choices Case*. The reasons for judgment of the majority (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) disclose that the majority used various interpretive modes in resolving the constitutional issues that arose. Broadly speaking, Kirby and Callinan JJ, who dissented, referred to the same modes but did not use them in the same way as the majority did.

In the *Work Choices Case*, the majority and the dissentients stated contrary views about constitutional interpretation. This is unsurprising. Over the past decade, judges have been setting out their views about the proper approach to constitutional interpretation in reasons for judgment and elsewhere.⁹ They have recognised, either expressly or by implication,¹⁰ that their preferred interpretive method is fundamental to their constitutional decision-making.

Differences in opinion about the proper approach to constitutional interpretation raise numerous questions. Taking the comparatively recent and undoubtedly significant *Work Choices Case* as an example, one may ask whether the majority preferred one mode of interpretation to another or accorded priority to some modes rather than to others? Did

5 G Craven, "How the High Court Failed Us", *The Australian Financial Review*, 24 November 2006.

6 See also G Williams, "Ruling Beefs Up Federal Muscle at Expense of States", *Canberra Times*, 15 November 2006; A Lynch, "The Die is Cast, and it is Time to Reshape Australian Federalism" *The Sydney Morning Herald*, 15 November 2006; S Evans, "Federation in tatters", *The Sydney Morning Herald*, 18 November 2006; and Editorial, "The High Court and Federalism", *Quadrant*, January–February 2007, Vol LI, No 1–2, 1–4.

7 See, for example, L Zines, op cit n 2, (1996) 22 *Monash University Law Review* 195 at 208; G Craven, "Industrial Relations, The Constitution and Federalism: Facing The Avalanche" (2006) 29(1) *UNSWLJ* 203 (though arguing against such an outcome); R McCallum, "The Australian Constitution and the Shaping of Our Federal and State Labour Laws" (2005) 10 *Deakin Law Review* 461 (also arguing against the result); and compare L Zines, op cit n 2, (2004) 25 *Adelaide Law Review* 3 at 19.

8 G Craven, op cit n 5.

9 See, for example, *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51 at 75 (Gummow J), 86–87 (Kirby J); *Re Wakim; Ex parte McNally* (1990) 198 CLR 511 at 554–556 (McHugh J); *Eastman v The Queen* (2000) 203 CLR 1 at 44–51 (McHugh J); *Newcrest Mining (WA) Limited v Commonwealth of Australia* (1997) 190 CLR 513 at 657–661 (Kirby J); and *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337 at 399–401 (Kirby J). See also BM Selway, op cit n 2, (2003) 14 *Public Law Review* 234 at 240–247.

10 Contrast the approaches of Kirby and Gummow JJ in *SGH Ltd v Commissioner of Taxation* (2002) 219 CLR 51.

the majority's choices in that case differ from those of the minority judges? Did these choices have any constitutional relevance?

In an address delivered in February 2003, I considered similar questions in connection with the work of the High Court in the 2002 term.¹¹ I concluded that the principal mode of interpretation used by the High Court at that time was doctrinal. That is, the court relied upon the principles it discerned in its past decisions to construe the constitutional text. I further concluded that structural and historical modes were important, and that the choice of one mode over another mattered. In looking at constitutional interpretation again, I have a further question. Is there any discernible difference between the High Court's interpretive method in the *Work Choices Case* and that which appeared in the constitutional cases of 2002? Has this difference any constitutional significance?

Before seeking to answer these questions, I should perhaps disclose that this article does not seek to argue the cases for or against legalism, originalism or progressivism, or any other general theory of constitutional interpretation. As Saunders has observed, to characterise an approach to constitutional interpretation in such a broad-brush way is too simplistic and is "vulnerable to criticism on the grounds that it is inaccurate, or inappropriate, or both, generally or in particular circumstances".¹² As she said:

"Even in the heyday of strict legalism judges clearly made choices which were policy driven and, sometimes quite dramatic ones, as a range of cases shows, from *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' case)* (1956) 94 CLR 254 to *Parton v Milk Board (Vic)* (1949) 80 CLR 229. Originalism is a foreign transplant, sparked by the particular experience of the United States constitutional founding, which sits uncomfortably with the evolutionary constitutional tradition that Australia, in other contexts, proudly claims to share with Commonwealth countries. Variants of progressivism, on the other hand, are troubling by their lack of benchmarks against which the proper role of a judge can be measured."¹³

I am inclined to agree with Gummow J, writing as a judge of the High Court, that questions of constitutional construction are not to be answered by "any particular, all-embracing revelatory theory or doctrine of interpretation".¹⁴ Indeed, Sunstein has argued that the lack of theory is a useful part of "well-functioning constitutional orders".¹⁵ Sunstein argued that "people can often agree on constitutional *practices* ... when they cannot agree on constitutional *theories*".¹⁶ He added that "well-functioning constitutional orders try to solve problems, including problems of deliberative trouble, through reaching *incompletely theorized agreements*".¹⁷ Although writing in a different constitutional

11 I previously considered these questions in connection with four constitutional cases decided in the 2002 term of the High Court (*Luton v Lessels* (2002) 210 CLR 333; *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; and *Roberts v Bass* (2002) 212 CLR 1); see S Kenny, op cit n 3, (2003) 26(1) *UNSWLJ* 210.

12 C Saunders, op cit n 2, (2004) 15 *Public Law Review* 289 at 291.

13 *ibid* (citations omitted).

14 (2002) 210 CLR 51 at 75.

15 CR Sunstein, *Designing Democracy: What Constitutions Do*, op cit n 1, pp 50–51.

16 *ibid* p 50 (emphasis original).

17 *ibid* (emphasis original).

environment, Sunstein's observations may assist in understanding aspects of Australian constitutional interpretation.

This article is not, however, concerned with any possible *theoretical* bases of constitutional interpretation. Instead, it is concerned with the modes of constitutional interpretation *used* by the High Court, especially in the *Work Choices Case*. That is, the focus of this article is on the manner in which members of that High Court have resolved questions of constitutional interpretation.

Other scholars have already taken this route, although not generally with reference to the High Court of Australia. In his book *Constitutional Fate*,¹⁸ Bobbitt identified six modes or methods of interpretation used in constitutional argument.¹⁹ These six modes were:

1. historical;
2. textual;
3. structural;
4. prudential;
5. doctrinal; and
6. ethical.²⁰

Bobbitt contended that individual judges prefer some modes of interpretation over others, depending on their individual style and the constitutional functions involved in the particular case.²¹ According to Bobbitt, this matrix of methods and functions reflects what has become an accepted practice and justifies judicial constitutional review.²² Farber also argued against grand theories and for the utility of “every tool that comes to hand” — precedent, tradition, legal text and social policy.²³

Writing of the work of the High Court of Australia in the field of constitutional rights, Stone identified four established methods. They were “textual argument, historical (or originalist) argument, argument based on precedent, and implications from the constitutional text and structure”.²⁴ In the same context, she also referred to arguments from “fundamental doctrines or constitutional assumptions”, noting that rights derived in this way “have only ever been recognised by a minority of the court”.²⁵ In a commentary on the High Court in 2002, Zines discerned a preference for doctrinal analysis over other analyses and a:

18 P Bobbitt, *Constitutional Fate*, op cit n 1. See also P Bobbit, op cit n 1, *Constitutional Interpretation*.

19 P Bobbitt, op cit n 1, *Constitutional Fate* pp 7 ff, 93 ff; P Bobbitt, op cit n 1, *Constitutional Interpretation* pp 12–13, 31 ff. Bobbitt also describes the several “constitutional functions” that, in his view, the different modes serve in arguments used by Justices of the US Supreme Court: see *Constitutional Fate*, op cit n 1, 190–195.

20 P Bobbitt, op cit n 1, *Constitutional Fate* pp 7 ff, 93 ff; P Bobbitt, op cit n 1, *Constitutional Interpretation* pp 12–13, 31 ff.

21 P Bobbitt, op cit n 1, *Constitutional Fate*, pp 123–124.

22 P Bobbitt, op cit n 1, *Constitutional Fate*, pp 3–7, 181.

23 D Farber, op cit n 1, at 1332.

24 A Stone, op cit n 2, (2005) 27 *Sydney Law Review* 29 at 41.

25 *ibid* at 34–35.

“tendency ... to treat social and political practices and consequences as irrelevant for the purpose of deciding whether the language of the Constitution is unambiguous and how it should be interpreted”.²⁶

Others have described the constitutional interpretive method of the court as primarily textual.²⁷ In 2003, Selway described the High Court as “fundamentally textualists”, with “a preference for ‘purposive’ interpretation” and “a strong disposition to following previous authority”.²⁸ Judicial and scholarly opinions are generally agreed that there is also a place in constitutional interpretation for history, although its precise role is less certain.²⁹

Again in curial and extra-curial settings, current and former judges of the Australian High Court have also sought to identify the modes of constitutional argument. For Gummow J, constitutional interpretation was primarily dependent on the written text and the authorities, and to a lesser extent matters of structure and history. Accordingly, in his view:

“The state of the law of the Constitution at any given time is to be perceived by study of both the constitutional text and of the Commonwealth Law Reports. Decisions of this court dealing with the text and structure of the Constitution but not bearing directly upon a particular provision nevertheless may cast a different light upon that provision and so influence its interpretation.

This indicates ... that questions of constitutional interpretation are not determined simply by *linguistic* considerations which pertained a century ago. Nevertheless, those considerations are not irrelevant; it would be to pervert the purpose of judicial power if, without recourse to the mechanism provided by s 128 and entrusted to the parliament and the electors, the Constitution meant no more than what it appears to mean from time to time to successive judges exercising the jurisdiction provided for in Ch III of the Constitution.”³⁰

These comments have relevance in considering the differing interpretive approaches in the *Work Choices Case* and I return to them hereafter.

In curial and extra-curial analyses,³¹ Kirby J has rejected originalism as an appropriate approach to constitutional construction. In *SGH Ltd v Commissioner of Taxation*³² (*SGH*),

26 L Zines, op cit n 2, (2002) 5(2) *Constitutional Law and Policy Review* 21 at 28.

27 BM Selway, op cit n 2, (2003) 14 *Public Law Review* 234 at 248. See also M McHugh, op cit n 2, and D Hovell and G Williams, op cit n 2, (2005) 29 *Melbourne University Law Review* 95 at 103.

28 BM Selway, op cit n 2, (2003) 14 *Public Law Review* 234 at 248.

29 M McHugh, op cit n 2; D Meagher, op cit n 2; and J Waugh, “Lawyers, Historians and Federation History” in R French, G Lindell and C Saunders (Eds), *Reflections on the Australian Constitution*, 2003, Federation Press, Annandale, pp 25 ff.

30 (2002) 210 CLR 51 at 75.

31 See, for example, *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 657–661 (Kirby J); *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337 at 399–401 (Kirby J); MD Kirby, “Constitutional Interpretation and Original Intent: A Form of Ancestor Worship” (2000) 24 *Melbourne University Law Review* 1; MD Kirby, “Living With Legal History In The Courts” [2003] *Australian Journal of Legal History* 3; and BM Selway, op cit n 2, (2003) 14 *Public Law Review* 234 at 240 ff.

for example, his Honour stated that it was:

“a serious mistake ... to attempt to construe any provision of the Constitution, including a prohibition such as that contained in s 114, from a perspective controlled by the intentions, expectations or purposes of the writers of the Constitution in 1900”.³³

He disagreed with the majority’s holding that the appellant, which was a form of building society, was not “the State” for the purposes of s 114 of the Commonwealth Constitution.³⁴ He disagreed with the majority because, so he said, he differed about the proper approach to constitutional interpretation.³⁵ According to Kirby J, when the purposes of s 114 were “fully appreciated”, then:

“it will be realised that the section speaks to succeeding generations in a way that adapts to the significantly altered manner in which the political units of the Australian federation manifest themselves today when compared, say, with the equivalent manifestations of 1901 or of 1950, 1980 or even of 1990”.³⁶

When on the court, McHugh J also sought to formulate a distinctive approach to constitutional interpretation.³⁷ In *Re Wakim; Ex parte McNally*, his Honour stated his view that:

“The starting point for a principled interpretation of the Constitution is the search for the intention of its makers. That does not mean a search for their subjective beliefs, hopes or expectations. Constitutional interpretation is not a search for the mental states of those who made, or for that matter approved or enacted, the Constitution. The intention of its makers can only be deduced from the words that they used in the historical context in which they used them.”³⁸

In McHugh J’s analysis, the intention of the makers of the Constitution might be ascertained from the text, structure and history of the Constitution and also from certain principles drawn from the Constitution and its history.³⁹ He was not, however, an originalist in any genuine sense. He went on to say:

“[M]any words and phrases of the Constitution are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they should apply to whatever facts and circumstances succeeding generations thought they covered.”⁴⁰

32 (2002) 210 CLR 51.

33 (2002) 210 CLR 51 at 87.

34 Section 114 of the Commonwealth Constitution relevantly provides that “The Commonwealth [shall not] impose any tax on property of any kind belonging to a State”.

35 (2002) 210 CLR 51 at 74–75.

36 (2002) 210 CLR 51 at 87.

37 See, for example, *McGinty v Western Australia* (1996) 186 CLR 140 at 230; *Langer v Commonwealth* (1996) 186 CLR 302 at 342–343; *Eastman v The Queen* (2000) 203 CLR 1 at 41 ff; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 549–551; *Cheng v The Queen* (2000) 203 CLR 248 at 292.

38 (1999) 198 CLR 511 at 551.

39 See further BM Selway, op cit n 2, (2003) 14 *Public Law Review* 234 at 244 ff.

40 (1999) 198 CLR 511 at 552

Speaking extra-curially, McHugh J has also acknowledged that practical and political considerations played a part in decision-making on some occasions, as well as values inherent in the law.⁴¹

My previous examination⁴² of four cases from the 2002 term of the High Court (namely, *Luton v Lessels*,⁴³ *SGH*,⁴⁴ *Mobil Oil Australia Pty Ltd v Victoria*,⁴⁵ and *Roberts v Bass*⁴⁶) and the examination below of the *Work Choices Case*, indicates that a judge's choice of preferred interpretive mode matters. Other scholarly commentaries have reached a like conclusion after considering different constitutional decisions.⁴⁷ Precisely how the choice matters is perhaps the more interesting question, the answer to which may well be contested. McHugh J has seen the real source of difference between the High Court at the time of Mason CJ and earlier times as stemming from "a particular attitude of mind".⁴⁸ This "attitude of mind" was "the belief [within the Mason Court] that Australia was now an independent nation whose political, legal and economic underpinnings had recently and essentially changed".⁴⁹ Stone has argued that constitutional interpretations are least contested when they are the clear product of established interpretive methods. Conversely, a constitutional interpretation is, so she contended, most vulnerable to challenge when it is not the clear product of such methods or is inconsistent with one or other of them.⁵⁰ In the context of an examination of express and implied constitutional rights, she said:

"Interpretations of the Constitution will be most secure when an interpretation is clearly supported by one or more established methods and is not inconsistent with any of them. ... By the same token, however, readings of the Constitution which rely on controversial modes of constitutional interpretation or which seem to run contrary to one of the established modes will be much less secure. The problem for many of the Australian constitutional rights is that there is at least one established form of constitutional argument (usually one based on constitutional text or constitutional history) that undermines them."⁵¹

It may be too that certain arguments, such as those from text and doctrine, render a constitutional interpretation less vulnerable than arguments in other modes. I return to this possibility below.

41 M McHugh, op cit n 2.

42 S Kenny, op cit n 3.

43 (2002) 210 CLR 333.

44 (2002) 210 CLR 51.

45 (2002) 211 CLR 1.

46 (2002) 212 CLR 1.

47 For example, A Stone, op cit n 2, (1999) 23 *MULR* 668 at 675. See also A Stone, op cit n 2, (2005) 27 *Sydney Law Review* 29 at 43–44 and WG Buss, "A Meikeljohn, American Constitutional Law, and Australia's Implied Freedom of Political Communication" (2006) 34 *Federal Law Review* 421 at 427, 452 ff.

48 M McHugh, op cit n 2.

49 *ibid.*

50 A Stone, op cit n 2, (2005) 27 *Sydney Law Review* 29 at 41.

51 *ibid.*

It is plain enough that judicial and scholarly commentators have used various terms and expressions to describe the High Court's interpretive method. These differences reflect individual preferences, purposes and perceptions. As in my earlier article, in this article, I use the terms textual; structural; historical; doctrinal; and prudential-ethical to describe modes of constitutional interpretation. The first four are well known in the scholarly literature and the authorities. The term "prudential-ethical" is one derived from Bobbitt's two works, *Constitutional Fate* and *Constitutional Interpretation*.⁵² I use these terms again here. Recent scholarly writing suggests yet another mode — internationalist — but I leave this mode to another day. I explain each of these terms below.

These terms are not intended to describe the entire universe of modes of constitutional interpretation. They are intended to be broadly descriptive of certain interpretive styles. They are inevitably imprecise and inadequate descriptors of the sometimes very complex styles of interpretive analysis used by the court. The use of these terms is not intended to give the impression that constitutional interpretation is capable of any precise analysis. Such an impression would be misleading. The terms refer to the more commonly used approaches to analysis that lie in what Saunders has referred to as "the very considerable toolbox of common law adjudicative method".⁵³

In the textual mode

In using the word "textual", I mean an approach that focuses on the words of the text and attributes to them the meaning they naturally bear. Since most of the constitutional cases that concern the High Court raise for determination issues under, or arising from, the text of the written Commonwealth Constitution, the court almost invariably begins with that text.⁵⁴ In this sense at least, the High Court's approach is, as others have said, fundamentally textualist. There will be occasions when the words of the written Constitution will have a clear natural meaning, which yields no ambiguity, and an incontestable application. If there is any process of interpretation, it is entirely unremarkable. It will, however, be comparatively rare for a constitutional issue of this kind to be litigated in the court; and thus equally rare for the court to hold that the natural meaning of the text completely resolves the matter, at least not without the court first making other inquiries.

Thus, for example, when I looked at the court's 2002 term, I noted that, whilst the terms of s 114⁵⁵ were plain enough, they did not immediately answer the question that arose in *SGH*⁵⁶ as to whether the appellant building society was the State for the purposes of the

52 P Bobbitt, op cit n 1, *Constitutional Fate*, pp 7 ff, 93 ff; P Bobbitt, op cit n 1, *Constitutional Interpretation*, 12–13, 31 ff.

53 C Saunders, op cit n 2, (2004) 15 *Public Law Review* 289 at 291.

54 Compare RC Post, "Theories of Constitutional Interpretation" in RC Post (Ed), *Law and the Order of Culture*, 1991, University of California Press, Berkeley, p 14.

55 Section 114 relevantly states that: "A State shall not, without the consent of the Parliament of the Commonwealth ... impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

56 (2002) 210 CLR 51.

provision. Nor did s 55⁵⁷ provide a ready answer to the question in *Luton v Lessels*⁵⁸ as to whether the Commonwealth's child support legislation contravened its terms. In the latter case, the answer depended on whether the statutory creation of a debt due from Mr Luton to the Commonwealth constituted "the imposition of taxation", a question which did not admit of ready answer.

The principal question for determination in the *Work Choices Case* was whether the *Work Choices Act* validly amended the *Workplace Relations Act* 1996 (Cth). If it did, the *Work Choices Act* shifted the principal constitutional basis of the Commonwealth's industrial relations legislation from s 51(xxxv) (the conciliation and arbitration power) to s 51(xx) (the corporations power). This was a deceptively straightforward question: did the *Work Choices Act* constitute a law "with respect to ... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth"?⁵⁹ The very length of the judgment of the majority, and the two dissenting judgments of Kirby J and Callinan J, demonstrate that this question was far from straightforward and its resolution required more than merely consideration of the words of s 51(xx), or even ss 51(xx) and 51(xxxv).

Therefore, to say that the court's approach is textualist, in the sense that it generally begins its inquiry with the written text of the Constitution, is not especially helpful. If there is any particular utility in describing the court's interpretive approach as primarily textual, it is because the court prefers a textual answer to another answer that some other mode or modes might give. In the Australian constitutional context, a constitutional interpretation that gives the textual mode priority over other modes has been called "literalism". This approach derives from the *Engineers' Case*,⁶⁰ in which the court drew on a conventional rule of statutory construction in saying that the words of the Constitution should be given their "natural" or "ordinary" meaning.⁶¹ Even in that case, though, this proposition was not regarded as absolute and the court acknowledged that a limited class of matters extrinsic to the text might properly be considered.⁶² Thus, the majority (Knox CJ, Isaacs, Rich and Starke JJ) concluded that:

"The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it, and then *lucet ipsa per se*."⁶³

57 Section 55 relevantly states that "[l]aws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect".

58 (2002) 210 CLR 333.

59 Section 51(xx) provides that "the Parliament ... shall have power to make laws ... with respect to ... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

60 *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd* (1920) 28 CLR 129.

61 *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd* (1920) 28 CLR 129 at 148–150.

62 See also C Saunders, "Future Prospects for the Australian Constitution" in R French, G Lindell and C Saunders (Eds), *op cit* n 29, p 221.

63 (1920) 28 CLR 129 at 152.

This permitted even the firmest adherence to literalism to take account of the complementary principle, stated before and after the *Engineers' Case*, that the court must also take account of the fact that the Constitution is “a statute of a special kind”.⁶⁴

In Australian constitutional law, the primacy of the literalist approach is said to derive from the character of the text of the Constitution itself. As McHugh J observed:

“Because the Constitution is contained in a statute of the Imperial Parliament and the people of the Constitution have agreed to be governed under the Constitution, it seems obvious that the best guides to its interpretation are the general rules of statutory interpretation.”⁶⁵

Further, adherence to this strong form of textualism has been strengthened by judicial commitment to the view that the legitimacy of the court’s decisions in constitutional cases depends on the decision’s attachment to the Constitutional text. McHugh J identified this commitment in his dissent in *Theophanous v Herald & Weekly Times Ltd*, when he said:

“If this court is to retain the confidence of the nation as the final arbiter of what the Constitution means, no interpretation of the Constitution by the court can depart from the text of the Constitution and what is implied by the text and the structure of the Constitution. ... [T]his court has consistently held that it is not legitimate to construe the Constitution by reference to political principles or theories that find no support in the text of the Constitution. ... [O]ne starts with the text and not with some theory of federalism, politics or political economy. The *Engineers' Case* made it plain that the Constitution is not to be interpreted by using such theories ... unless those theories can be deduced from the terms or structure of the Constitution itself. It is the text and the implications to be drawn from the text and structure that contain the meaning of the Constitution.”⁶⁶

This is, then, the supposed strength of the textual mode as applied in Australia: the mode apparently derives from an ultimate constitutional authority that is objectively ascertainable.

There is, however, a significant flaw in the assumption that the literalist interpretive mode is a *necessary* outcome of the character of the Constitution. This is evident in the fact that the original members of the court did not pursue this approach at all.⁶⁷ Instead, the early court relied heavily on implications drawn from constitutional federal structure and relationships to develop the doctrines of immunities of instrumentalities and reserved powers. These doctrines were designed to take account of the distinctively federal character of the Constitution.⁶⁸ The *Engineers' Case* not only approved textual primacy, it also closed the chapter on these doctrines. As Zines aptly said:

64 See, for example, *Victoria v Commonwealth* (1971) 122 CLR 353 at 394–395 (Windeyer J); *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 81 (Dixon J); and earlier, *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367–368 (O'Connor J).

65 *Singh v Commonwealth* (2004) 209 ALR 355 at 372 (citations omitted).

66 (1994) 182 CLR 104 at 197–198.

67 Compare *Victoria v Commonwealth* (1971) 122 CLR 353 at 396 (Windeyer J).

68 *D'Emden v Pedder* (1904) 1 CLR 91 at 111; *Attorney General for Queensland v Attorney General for the Commonwealth* (1915) 20 CLR 148 at 163.

“In 1920 [in the *Engineers’ Case*] the High Court, in a sharp reversal of its earlier decisions and doctrines, proclaimed that the role of the court was merely to construe the powers of the Commonwealth, without regard to the question of how much exclusive power was left to the States.”⁶⁹

In giving primacy to the text over federal structure, the court necessarily adopted a more expansive reading of grants of power to the Commonwealth Parliament. Accordingly, literalism has also become associated with a more generous reading of Commonwealth powers than, perhaps, other approaches would entail.

In Australia, there has been much scholarly criticism of this literalist tradition. Thus, it may be that:

1. In pursuing this highly textual mode, judges may make unwarranted claims to hold the constitutional high ground, particularly if they assume that the literal approach is the necessary outcome of the character of the Constitution.
2. The mode makes only limited allowance for the significance of what might be broadly called “extrinsic circumstances”, whether historical or contemporary in nature.
3. Interpreting in this mode may disguise the real part being played in a judge’s reasons by external factors.
4. Interpreting in this mode may, as Saunders commented:

“obscur[e] the constitutional character of unwritten principles and practices, except in the most obvious cases, and inhibi[t] their development as a source of constitutional strength.”⁷⁰

As she observed, to understand the language of the constitutional text requires some understanding of the common law.

5. Interpreting in this mode may lead judges to disregard the importance of what the text does not say and the implications that ought properly be drawn from this silence and from textual structure.
6. In giving primacy to the text, judges may give insufficient attention to fundamental constitutional assumptions and the learning in the authorities.
7. In giving primacy to the words of the text, judges may focus overly much on what the text signifies to a reader today and pay insufficient regard to the significance of the text to an informed reader on 1 January 1901, when the Constitution first came into effect. The history of the interpretation of s 92 of the Constitution may illustrate this phenomenon. The court was only able to reach some settled agreement on the scope of s 92 when it referred to the history of s 92, in order to identify:

“the contemporary meaning of the language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged”.⁷¹

69 L Zines, *op cit* n 2, (1996) 22 *Monash University Law Review* 195 at 196.

70 C Saunders, *op cit* n 62, p 225.

71 *Cole v Whitfield* (1988) 165 CLR 360 at 385.

These considerations mark out some of the limitations of the textual mode and signify why it is that interpretation from the text so often collapses into interpretation in some other mode. Hence, in *SGH and Luton v Lessels*, the textual approach, which began the court's enquiry, collapsed into an historical or structural analysis. The form of textualism used by the court on these occasions relied less on the literal meaning of the words of the text and more on the meaning of the words viewed historically and by reference to the rest of the text read as a whole.⁷²

Although the extent to which the High Court follows the literalist path has varied over time,⁷³ the literalist approach has continued to pervade the court's interpretive method. The majority judgment in the *Work Choices Case* is illustrative of this. The principal question presented in the majority's judgment was one of characterisation. Thus, the majority framed a central question as:

“whether a law that provides that a corporation of a kind referred to in s 51(xx) of the Constitution must pay its employees certain minimum wages, and must provide them with certain leave entitlements, and must not require them to work more than a certain number of hours, is a law with respect to such corporations”.⁷⁴

The parameters of the contestable field were, in the majority's analysis, marked out by the *Engineers' Case* and *Strickland v Rocla Concrete Pipes Ltd*⁷⁵ (the *Concrete Pipes Case*).⁷⁶

In the *Work Choices Case*, the point of the majority's lengthy analysis of *Huddart, Parker & Co Pty Ltd v Moorehead*⁷⁷ (*Huddart Parker*) was not merely to validate the overruling of that case by the *Concrete Pipes Case*.⁷⁸ This analysis also confirmed the majority's adherence to the interpretive approach that derived from the *Engineers' Case*.

The majority stated that *Huddart Parker* “was important for what it reveal[ed]] concerning assertions made about what the framers of the Constitution intended” and because the plaintiffs relied on the dissenting reasons of Isaacs J.⁷⁹ From their analysis the majority concluded that “no one view of the meaning of [the corporations power] commanded the assent of even a majority of the [early] court” and there was no “settled understanding” of the meaning and effect of the corporations power.⁸⁰ They identified the importance of the reserved powers doctrine to the reasoning of Griffith CJ, Barton and Connor JJ, as well

72 S Kenny, op cit n 3, (2003) 26(1) *UNSWLJ* 210 at 214–215.

73 See, for example, G Walker, “The Seven Pillars of Centralism: Engineers' Case and Federalism” (2002) 76 *Australian Law Journal* 678 at 704; C Saunders, op cit n 62, p 221; G Williams, op cit n 2, (1995) 17 *Sydney Law Review* 63; and A Mason, “The Australian Constitution in Retrospect and Prospect” in R French, G Lindell and C Saunders (Eds), op cit n 29, pp 12, 20.

74 (2006) 231 ALR 1 at 10 [17].

75 (1971) 124 CLR 468.

76 (2006) 231 ALR 1 at 18 [49].

77 (1909) 8 CLR 330.

78 (2006) 231 ALR 1 at 18 [49]–[50].

79 (2006) 231 ALR 1 at 25 [68].

80 (2006) 231 ALR 1 at 29 [82].

as the importance in Isaac J's reasoning of another distinction drawn by an earlier scholar in a different context.⁸¹ They rejected the utility of this latter distinction for the purposes of the characterisation of an exercise of legislative power.⁸² At the same time, the majority validated the rejection of the doctrines of reserved powers and implied immunities in the *Engineers' Case*. Underscoring their commitment to the text, the majority noted that the validity of the doctrines of implied immunities and reserved powers depended on their initial premise. They argued that, if one began from the text, and not from an initial assumption outside the text, the doctrines could not be supported as matters of necessary implication.⁸³ I interpolate here that this objection is not fatal to these doctrines since almost every argument from constitutional structure depends on an initial assumption: the critical question is whether that initial assumption is accepted as justified.

The critical validation of the *Engineers' Case* was the majority's evaluation that the case was:

“both a consequence of developments outside the law courts (not least, a sense of national identity emerging during and after the First World War) and a cause of future developments”.⁸⁴

From this perspective, the *Engineers' Case* was a virtually inevitable outcome of the progress of Australian history, from which there was no going back. That is, the justification for the *Engineers' Case* lay, in the majority's judgment, in nascent nationhood, rather than in the precedential value of authority or judicial fiat.

Thus, the majority's analysis not only served to answer the framers' intent arguments that were central to Callinan J's reasoning and the historical argument on which Kirby J's opinion depended, they also strengthened the legitimacy of the interpretive approach that flowed from the *Engineers' Case*. This, in turn, served to negate the possibilities that the conciliation and arbitration power limited the corporations power, as Kirby J believed, or that “federal balance” implications limited the corporations power, as Callinan J maintained.

For reasons to be discussed, apart from this reference to nationhood and the evolution of corporations law, in this process of interpretation, the majority derived little assistance from history and limited guidance from the authorities. They laid aside interpretation in the structural mode, whether said to arise from notions of a federal balance or some relationship with the conciliation and arbitration power. There remained the text and, perhaps, some prudential-ethical considerations, to which I return below.

Hence the question for the majority became a relatively simple one. Was there a sufficient connection between the *Work Choices Act* and the corporations power in order for the Act to be described as a law “with respect to ... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth”? In non-contested constitutional doctrine, the sufficiency of this connection depends on the legal and

81 (2006) 231 ALR 1 at 27 [74] and 29–30 [82]–[83], [85].

82 (2006) 231 ALR 1 at 34 [95].

83 (2006) 231 ALR 1 at 58 [191]–[192].

84 (2006) 231 ALR 1 at 58 [193].

practical operation of the exercise of legislative power. Since the Act “prescribe[d] norms regulating the relationship between constitutional corporations and their employees” (and the majority rejected any of the limitations that earlier authorities contemplated, as discussed below), the conclusion that the Act lay within power was unremarkable.⁸⁵ This conclusion followed from an application of an interpretive approach deriving from the *Engineers’ Case* and a rejection of any limitation from history, constitutional structure or the authorities.

Kirby J and Callinan J did not reason in the same interpretive mode as the majority. Both took a different view of the *Engineers’ Case* from the majority. Although Kirby J did not contest the *Engineers’ Case* and the *Concrete Pipes Case*⁸⁶ directly, he noted that the *Engineers’ Case* had been “criticised in recent years”. Further, his subsidiary argument against a “potentially radical shift of governmental responsibilities from the States to the Commonwealth” may be thought to resemble a modern form of the early reserved powers doctrine.⁸⁷ Kirby J rejected this latter suggestion, however, on the ground that “the rule of construction ... in the *Engineers’ Case* is not an absolute one” and did not “contemplate that the federal Parliament could use its identified heads of power to destroy the States”.⁸⁸ This proposition is accepted in Australian constitutional law, although the majority rejected its application to *Work Choices Case*. Kirby J came close to conceding that he took a different (and weaker) view of the authority of the *Engineers’ Case* when he said that the *Work Choices Case* “present[ed] the intersection of two accepted, and basic, rules of constitutional interpretation”. The first was the *Engineers’ Case* and the second, so he said, “established at least since *Schmidt*⁸⁹ in 1961, but given effect many times before and since, holds that particular grants of federal legislative power that are subject to expressed safeguards, restrictions or qualifications (or guarantees protecting identifiable persons or groups), require the modification of what would otherwise be ‘plenary’ federal powers”.⁹⁰

Relevantly for the present discussion, Kirby J also took issue with the majority’s manner of interpretation. He argued that the language of the corporations power was not to be read in isolation from the preceding paragraphs of s 51.⁹¹ Thus, he said:

“Context is critical to the understanding of communication by the use of human language. This is nowhere more so than in deriving the meaning of a constitutional text, typically expressed (as in the Australian instance) in sparse language, designed to apply for an indefinite time and to address a vast range of predictable and unpredictable circumstances.”⁹²

85 (2006) 231 ALR 1 at 60 [197]–[198]. See also *Fairfax v FCT* (1965) 114 CLR 1 at 7 (Kitto J).

86 (2006) 231 ALR 1 at 125–126 [462]–[465].

87 (2006) 231 ALR 1 at 145–146 [536], 147 [541].

88 (2006) 231 ALR 1 at 148 [548]–[549], citing *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82–83 (Dixon J).

89 *Attorney General (Cth) v Schmidt* (1961) 105 CLR 361 at 371–372 (Dixon CJ).

90 (2006) 231 ALR 1 at 163 [606].

91 (2006) 231 ALR 1 at 127 [471].

92 (2006) 231 ALR 1 at 127 [470].

For him, the critical question was the relationship of the corporations power to the conciliation and arbitration power. As discussed below, Kirby J reasoned in structural and historical modes to conclude that the content of the former was limited by restrictions inherent in the latter. A subsidiary and supporting argument for this related to the federal structure of the Constitution.⁹³

In the structural mode – Part 1

Callinan J trod a different path from the majority and from Kirby J (although he indicated that he did not disagree with the latter⁹⁴). His judgment virtually began with a statement of what he regarded as the proper approach to constitutional interpretation in the *Work Choices Case*:

“The sum of matters which should inform the proper construction are: the techniques employed from time to time by Justices of this court in construing the Constitution; the constitutional imperative of the maintenance of the federal balance; the fundamental canon of construction, the need to construe the Constitution as a whole; the reach, impact and meaning of the industrial affairs power conferred by s 51(xxxv) of the Constitution; the reach, impact and meaning of the corporations power; and the relationship between the two powers.”⁹⁵

Leaving aside the matter of accepted techniques, most of the other matters mentioned by the judge are the bases of structural analysis and prudential-ethical considerations (as to which, see below). Structural analysis is, of course, also an accepted technique for constitutional interpretation, although it is not the only one. Constitutional decision-making has frequently involved prudential-ethical considerations.

Callinan J justified his adoption of a primarily structural mode at a number of levels. First, he did not place the *Engineers’ Case* at the centre of his interpretive firmament. Whilst apparently accepting that its principles were “still binding”, he expressed the view that other authorities:

“... suggest[ed] a realisation on the part of the court that the *Engineers’ Case* went too far in favour of the Commonwealth, and that any unqualified application of it had the capacity to reduce unacceptably the constitutional status and role of the States. The *Engineers’ Case* is part of the relevant history, but, as an examination of it will show, stands for little to assist in this case.”⁹⁶

Indeed, his subsequent analysis circumscribed the significance of the *Engineers’ Case* and undermined its authority.⁹⁷ Thus, Callinan J referred, amongst other things, to the lack of satisfactory reasoning in the case, to what he regarded as its illegitimate disregard of federalism as a fundamental “policy” of the Constitution, and to the fact

93 (2006) 231 ALR 1 at 145 [532].

94 (2006) 231 ALR 1 at 248 [834].

95 (2006) 231 ALR 1 at 167 [621].

96 (2006) 231 ALR 1 at 187 [682]. The authorities to which he referred were *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 and *Austin v The Commonwealth* (2003) 215 CLR 185.

97 See, for example, (2006) 231 ALR 1 at 212–214 [740]–[747].

that the *Engineers' Case* overruled authority decided by individuals who were “closer in time, circumstances and knowledge to the Constitution”. He added:

“There are references in the joint judgment in the *Engineers' Case* to the desirability, in the interpretation of the Constitution, of adherence to the ordinary, or the ‘golden’, or the ‘universal’ rules of construction of statutes. One such rule, to which lip service only seems to have been paid ... is the necessity to read an Act of Parliament, and by analogy, a constitution, as a whole ...”.⁹⁸

In light of these sentiments, it is unsurprising that his Honour did not pursue the strictly textual approach of the majority and instead adopted an argument chiefly in a structuralist mode.

A related justification for this primarily structuralist approach was, so far as Callinan J was concerned, the absence of “consistency of interpretation of the Constitution by the justices of this court” over the history of the court.⁹⁹ This conclusion followed, in part, from his rejection of the *Engineers' Case*. The fact that the Constitution provided for a federation and a “federal balance” was critical to his reasoning, the significance of which was validated by constitutional history¹⁰⁰ (to which I turn below) and by “elementary principles of construction” — “that effect must be given to the intention, the objects and purposes of the document, and that it must be read and construed as a whole”.¹⁰¹ The first of these principles reverts to an historical mode and the second, in Callinan J’s case, to a structural mode. The primacy of the latter mode, so far as he was concerned, was underlined by his affirmation that considerations of federal balance and founders’ intent also provided legitimate “yardsticks” to depart from settled authority.¹⁰²

Callinan J’s analysis was dependent on the proposition that “the whole structure ... of the Constitution clearly mandates the co-existence of the Commonwealth and the States”.¹⁰³ This proposition relied on the distribution of powers between them, “notions of comity”¹⁰⁴ and other specific provisions, such as ss 102, 107 and 128. In essence, Callinan J held the *Work Choices Act* invalid because, if it were not, then the “reach of the corporations power” was “enormous”¹⁰⁵; and, I interpolate, inimical to his Honour’s understanding of “federal balance”. So far as he was concerned, it was proper to take account of such a consequence in the process of constitutional interpretation. Hence, as he said: “[t]he more expansive the industrial power can be seen to be, the more likely it is that the power is the only power of the Commonwealth to legislate about industrial affairs”.¹⁰⁶ Since the power had a large operation, then there was “a negative or restrictive implication

98 (2006) 231 ALR 1 at 213 [743] (citations omitted).

99 (2006) 231 ALR 1 at 208 [736].

100 (2006) 231 ALR 1 at 223–224 [772]; 224 [775].

101 (2006) 231 ALR 1 at 223 [770].

102 (2006) 231 ALR 1 at 218 [759].

103 (2006) 231 ALR 1 at 225 [778].

104 (2006) 231 ALR 1 at 226 [781].

105 (2006) 231 ALR 1 at 233 [794].

106 (2006) 231 ALR 1 at 243 [822], 248 [834].

of the absence of a conferral of industrial power elsewhere under s 51” (except in some limited areas).¹⁰⁷ It followed, on this reasoning, that the corporations power did not support the *Work Choices Act*.

In the structural mode – Part 2

Structural analysis is commonplace in Australian constitutional interpretation. This form of analysis may take at least two forms. In the first, more straightforward form, the judge draws inferences from the structure of the constitutional text or a combination of provisions. In the second, the judge draws conclusions from “the nature of aspects of the system of government for which the Constitution makes provision”.¹⁰⁸ As we have seen, Callinan J adopted this latter form of structural analysis.

Speaking of the work of the High Court between 1989 and 2004, McHugh J said that:

“[d]rawing conclusions from the logic of the structure of the institutions and principles established by the Constitution has also become a relatively familiar technique in relation to federalism, the separation of powers and in relation to the constitutional provisions that establish representative and responsible government”.¹⁰⁹

In my earlier commentary on the High Court’s 2002 term,¹¹⁰ I noted that, in *Luton v Lessels*,¹¹¹ structural analysis was favoured by Kirby J and in the joint judgment of Gaudron and Hayne JJ. The joint judgment concentrated upon the significance of the fact that, under the relevant child support legislation, monies collected by the Commonwealth were paid into the Consolidated Revenue Fund in accordance with s 81 of the Constitution.¹¹² The joint judgment’s acceptance of the fact that the mere payment into the Fund did not make an exaction a tax rested very largely on a structural analysis of the interrelationship of ss 53–56 and ss 81–83 of the Constitution. The outcome of this analysis was that s 81 was “both the consequence of, and a necessary step in the effecting of, parliamentary control over taxation”.¹¹³ This analysis, like virtually all structural analyses, depended upon the validity of the claim that a particular principle was implicit in the structure of government for which the Constitution provides and in the relationships created by the constitutional text. Having determined that a principle of parliamentary control over monies was to be inferred from these structures and relationships, it was open to the authors of the joint judgment to conclude, as they

107 (2006) 231 ALR 1 at 248 [834].

108 C Saunders, op cit n 2, (2004) 15 *Public Law Review* 289 at 293. In this context, Saunders described Gaudron J as “a deep structuralist”. Philip Bobbitt described structural arguments as “inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures”: op cit n 1, *Constitutional Fate*, p 74.

109 M McHugh, op cit n 2. Citations omitted. See also C Saunders, in R French, G Lindell and C Saunders (Eds), op cit n 29, p 222.

110 S Kenny, op cit n 3, (2003) 26(1) *UNSWLJ* 210 at 216.

111 (2002) 187 ALR 529.

112 This was significant because of the observation in *Australian Tape Manufacturers Association Ltd v Commonwealth* that “the fact that a levy is directed to be paid into the Consolidated Revenue Fund has been regarded as a conclusive indication that the levy is exacted for public purposes”: (1993) 176 CLR 480 at 503.

113 *Luton v Lessels* (2002) 187 ALR 529 at 542.

did, that, whilst every tax must be paid into the Consolidated Revenue Fund, not every payment made into the Fund was necessarily a tax.¹¹⁴

The contestable field of Callinan J's reasoning is, plainly enough, his assumption that a concept of "a federal balance" inheres in the federal and state polities for which the Constitution provides. Reference has already been made to the doctrines of immunities of instrumentalities and reserved powers. These were the outcome of arguments in the structural mode developed by the early High Court to take account of the federal character of the Constitution.¹¹⁵ As noted above, the court rejected the arguments in this mode when it delivered judgment in the *Engineers' Case* in 1920.¹¹⁶ The majority adhered to this decision and rejected the concept of a federal balance. Callinan J's judgment reverts to the approach of the original court.

The merits of argument in the structural mode are patent. An argument in this mode takes the text of the Constitution as its beginning. Its cogency depends upon the strength of its claim to derive from the text considered as a whole and as a coherent document. Its weakness stems from its essentially inferential nature. The contestability of inferences from structure may be high and the cogency of the argument in this mode therefore low. As Sunstein commented in the context of the US Constitution:

"[i]nferences from constitutional text and structure sometimes involve a large measure of discretion. In using these sources of law, we must often resort to ideas external to text and structure".¹¹⁷

Care therefore must be taken in drawing inferences from structure and in claiming too much for the logical force of an argument in the structural mode.

As the history of the court up to the *Work Choices Case* shows, sometimes the inferences from structure are strong and the answer they support recommends itself to the entire court, whilst at other times, especially where the bases for inferences are contested, differences between members of the court may arise from differences about the inferences that should be drawn. Ever since the *Engineers' Case*, the inferences to be drawn from the federal character of the Constitution have been in this debated field. In *SGH*, for example, the difference of opinion between Gummow J and Kirby J can be attributed to differences about the inferences that should be drawn from the federal character of the Constitution. Referring to matters of structure, as well as to the history of intergovernmental immunities, Gummow J observed in *SGH* that s 114 "no longer replicates any fundamental considerations of federalism which inform a present understanding of the Constitution".¹¹⁸ Kirby J took the opposite view and reached a contrary conclusion.¹¹⁹

114 *Luton v Lessels* (2002) 187 ALR 529 at 543.

115 *D'Emden v Pedder* (1904) 1 CLR 91 at 111; *Attorney General for Queensland v Attorney General for the Commonwealth* (1915) 20 CLR 148 at 163.

116 cf G Walker, op cit n 73, at 678–682.

117 C Sunstein, op cit n 1, *The Partial Constitution*, p 106.

118 (2002) 210 CLR 51 at 79.

119 (2002) 210 CLR 51 at 263–266.

In the historical mode

When I wrote about the historical mode in the context of the 2002 term of the High Court, I used the expression to signify:

“a mode of interpretation that relies upon the purpose or understanding of the Constitution’s framers and ratifiers to assist in the interpretive process”.¹²⁰

On reflection, this seems too narrow a way of describing the historical mode. In what follows, I use the expression to refer to the use of history as an interpretive style in constitutional cases.

The use of history in constitutional cases in the High Court has grown over the last two decades, although an historical approach can be traced to the earliest work of the court.¹²¹ Since *Cole v Whitfield*,¹²² however, interpretation in the historical mode has become a well-accepted style of constitutional interpretation.

Given that the written Constitution is now over 100 years old and unwritten constitutional law very much older, an historical approach to constitutional interpretation can be critical. Resort to primary sources, such as the record of the federal conventions of the 1890s, can assist in understanding the sense in which words in the text were used, and the concerns that prompted the inclusion of some provisions and not others. As Waugh has commented, “[t]he publication of the Convention Debates made Australia something of a constitutional laboratory.”¹²³

In the Australian context, it should not be thought that the prevalence of the historical mode signifies that the High Court as a whole favours some form of originalism, according to which theory the Constitution should only, or principally, be interpreted according to the intentions of its drafters and ratifiers. The debate between originalists and non-originalists that derives from the United States has not found a large place on the judicial landscape in this country, although the *Work Choices Case* may indicate that it has at least one proponent on the current High Court.¹²⁴ As noted above, Callinan J included constitutional history amongst the matters to which he referred in interpreting the corporations power in the *Work Choices Case*. The judge went further than this, however, when he said that “[o]riginalism’ so-called, is no less a proper interpretive tool than any other, and will often be an appropriate one.”¹²⁵ The majority in that case countered with the observation that:

“To pursue the identification of what is said to be the framers’ intention, much more often than not, is to pursue a mirage. It is a mirage because the inquiry assumes that it

120 S Kenny, op cit n 3, (2003) 26(1) *UNSWLJ* 210 at 215.

121 For example, see *Baxter v Commissioner of Taxation* (NSW) (1907) 4 CLR 1087 at 1109 per Griffith CJ and Barton and O’Connor JJ.

122 (1988) 165 CLR 360.

123 J Waugh, “Lawyers, Historians and Federation History” in R French, G Lindell and C Saunders (Eds), op cit n 29, p 26.

124 Kirby J has rejected “originalism” as a form of “ancestor worship”: MD Kirby, above n 31, (2000) 24 *Melbourne University Law Review* 1.

125 (2006) 231 ALR 1 at 222–223 [772].

is both possible and useful to attempt to work out a single collective view about what is now a disputed question of power, but then was not present to the minds of those who contributed to the debates.”¹²⁶

The value of the historical mode in the court’s armoury clearly depends on the nature of the interpretive problem. From a lawyers’ perspective, resort to the historical record can be especially useful in determining the meaning of an expression or word appearing in the Constitution.¹²⁷ In this circumstance, the inquiry is usually limited and no large question of historical method arises. Indeed, the inquiry is commonly about the meaning that words and expressions had for an earlier generation of lawyers and therefore an inquiry judges are qualified to make. At other times, interpretation in the historical mode can involve reference to matters of generally uncontested historical fact. Once again, these historical matters are commonly of a kind that judges might reasonably be expected to know and understand. The court’s consideration in *Sue v Hill*,¹²⁸ of such matters as the development of sovereignty and the broad history of Australia’s relations with the United Kingdom, illustrates the point.

On other occasions, individual judges have relied on generally accepted historical knowledge in a different way. In *Luton v Lessels*, for example, Kirby J referred to the significance of taxation in 17th century English constitutional history and in the constitutional history of the United States to provide the context in which to evaluate the likely importance attached to these matters by the framers of the Constitution.¹²⁹ As I have previously noted,¹³⁰ the historical knowledge that his Honour attributed to the framers provided the basis for the inferences he drew from the structure of the constitutional provisions on taxation — especially as to the relationship between ss 53 and 55.

History loomed large in the *Work Choices Case*. The use of history varied, however, in the three different judgments. In the majority’s judgment, the chief utility of history was to explain the apparent expansion of Commonwealth power, as well as to exclude other mooted interpretations of the relevant powers. Thus, history, for the majority, primarily served a non-interpretive purpose since the majority treated it primarily as explanatory of the current constitutional position. Its secondary purpose, which was an interpretive one, was to negate other interpretive possibilities.

First, according to the majority, the true reason for the apparent expansion of the corporations power was not any error in the settled authorities or misuse of settled principles of interpretation but “the fundamental and far-reaching legal, social, and economic changes in the place now occupied by the corporation, compared with the place it occupied when the Constitution was drafted and adopted, and when s 51(xx)

126 (2006) 231 ALR 1 at 40 [120].

127 See, for example, *Ha v New South Wales* (1997) 189 CLR 465; *Cheatle v The Queen* (1993) 177 CLR 541; *The Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479.

128 (1999) 199 CLR 462 at 490.

129 (2002) 210 CLR 333 at 366–367

130 S Kenny, *op cit* n 3, (2003) 26(1) *UNSWLJ* 210 at 215.

was first considered in *Huddart Parker*.¹³¹ The majority mapped the legal, and some of the social and economic circumstances attending the development of corporations law prior to and contemporaneous with the Convention Debates. The majority concluded that it was not until after *Salomon v Salomon*,¹³² in November 1896, that “the corporation ... emerged as the chief means through which individuals conducted business ventures”;¹³³ and that:

“the place of corporations in the economic life of Australia today is radically different from the place they occupied when the framers were considering what legislative powers should be given to the Federal Parliament”.¹³⁴

Further, since the framers could not have foreseen this turn of events,¹³⁵ the majority found it was impossible “to attribute to them some intention about how this legislative power operates in respect of these or other subsequent legal, economic, and social developments”.¹³⁶ After tracing the discussion of the corporations power in the Debates themselves, the majority found that “the Convention Debates reveal very little about what those who framed the Constitution thought would fall within or outside the power”.¹³⁷ Accordingly, the majority rejected the kind of analysis that Callinan J chose to adopt.

The majority’s approach to the history of the conciliation and arbitration power was not dissimilar to its treatment of the history of the corporations power. The majority considered the history of the drafting of the conciliation and arbitration power and the significance of the terms in which it was expressed at the time it was introduced into the Constitution. The majority held that these considerations, as well as the economic and social context in which the power was introduced, did not support:

“the proposition to the effect that what was seen in the 1890s as an authority for legislative experimentation of a particular kind under the Constitution was to be the sole method open to the Parliament of the Commonwealth for legislating for industrial regulation”.¹³⁸

In so doing, the majority rejected the analysis favoured by Kirby J. Amongst other things, the majority found that:

1. the power dealt with “a narrower subject-matter than industrial matters or relations and their regulation”;¹³⁹
2. the power did not contain a positive prohibition or restriction;¹⁴⁰

131 (2006) 231 ALR 1 at 25 [67] and 40 [121]. See also the 19th century history of corporations law and corporations discussed in (2006) 231 ALR 1 at 34 [96]–37 [109].

132 [1897] AC 22.

133 (2006) 231 ALR 1 at 37 [108].

134 (2006) 231 ALR 1 at 40 [121].

135 (2006) 231 ALR 1 at 41 [123].

136 (2006) 231 ALR 1 at 41 [123].

137 (2006) 231 ALR 1 at 39 [118].

138 (2006) 231 ALR 1 at 68 [230].

139 (2006) 231 ALR 1 at 61 [203].

140 (2006) 231 ALR 1 at 65 [220].

3. at the time of the Convention Debates, “in Australia, as elsewhere, there was a concern with both the public disorder and the economic hardship which attended the strikes and lock-outs used by ‘capital’ and ‘labour’ in their disputes”,¹⁴¹ and
4. “it was to be expected that ... the Constitution would encompass these matters, and do so at several levels”,¹⁴² including by the provision of “the use of particular means to prevent and settle industrial disputes of a certain geographical character”.¹⁴³

The majority also dealt shortly with the argument that the failed attempts by federal governments, by way of referendums, to expand the corporations power and to confer a general industrial relations power was relevant to constitutional interpretation. These were the referendums of 1910, 1912, 1926 and 1946. For a number of reasons, the majority found that “[t]here are insuperable difficulties in arguing from the failure of a proposal for constitutional amendment to any conclusion about the Constitution’s meaning”.¹⁴⁴ Fundamentally, there was what the majority termed “a problem of equivalence”. That is, the question before the court was different from the proposals defeated at referendums.

The majority appreciated that, when the meaning and operation of the Constitution was controversial, only the High Court could give an authoritative answer.¹⁴⁵ Other constitutional actors, such as the electors at referendums, had different and distinct roles to play. In this instance, the basis for the rejection of an interpretive argument in the historical mode depended on an appreciation of the political and judicial processes for which the Constitution provides — that is, an argument in the prudential-ethical mode (see below).

Comparing the majority and the dissenting judgments highlights the fact that a central difficulty facing a judge using an historical approach is to determine the relevance of the historical data and assess its proper limits. Thus, the difference between Kirby J and the majority concerned the interpretive relevance of the largely uncontested historical facts.¹⁴⁶ In contrast with the majority, Kirby J considered an understanding of history fundamental to an understanding of the way meaning was attributed to the Constitution.¹⁴⁷ Though not an originalist, the study of history provided him with a rational basis for constitutional interpretation and evolution.

Thus, Kirby J used history to justify the inferences that supported his structural analysis of the relationship of the conciliation and arbitration power to the corporations power. This history did not primarily derive from the Convention Debates but from previous

141 (2006) 231 ALR 1 at 63 [209].

142 (2006) 231 ALR 1 at 63 [212].

143 (2006) 231 ALR 1 at 64 [215], 65 [222].

144 (2006) 231 ALR 1 at 43 [131].

145 (2006) 231 ALR 1 at 43 [134].

146 (2006) 231 ALR 1 at 126 [466]–[467].

147 (2006) 231 ALR 1 at 117 [442].

legislation and cases, referendums and constitutional practice. Kirby J maintained that the *Conciliation and Arbitration Act 1904* (Cth), its history and the litigation concerning it were relevant because they provided the constitutional context “in which, for more than a century, legislators and courts in Australia assumed that any law enacted with respect to industrial disputes had to conform to the limitations imposed by s 51(xxxv).”¹⁴⁸ He maintained that, while past decisions did not settle the issue before the court, “the past [was] clearly of great importance in reaching a conclusion based on the constitutional text”.¹⁴⁹ He argued that the history of the decisions on the conciliation and arbitration power, and the Convention Debates, supported the propositions that:

1. the power was the only constitutional source for federal legislation that might be characterised as law with respect to “industrial disputes”, “industrial relations” or “workplace relations”;
2. the power contained two “safeguards, restrictions or qualifications”; and
3. these safeguards were “interstateness” and provision for dispute resolution through conciliation or arbitration.¹⁵⁰

For Kirby J, the history with which he was concerned included the failed referendums.¹⁵¹ Relevance flowed, in his view, from the fact that constitutional legitimacy derived from the people, and the referendums evidenced their refusal, over time, to approve the creation of a general power over industrial relations. He concluded:

“In my view, the long-held and shared assumptions, given effect by this court, involved a correct view of the grant of legislative power in this respect to the Federal Parliament. The applicable grant of power imported a safeguard, restriction or qualification protective of all those involved in collective industrial bargaining: employer and worker alike. It provided a constitutional guarantee of fairness and reasonableness in the operation of any federal law with respect to industrial disputes, including for the economically weak and vulnerable. It afforded machinery that was specific to the concerns of the parties, relatively decentralised in operation and focused on the public interest in a way that laws with respect to constitutional corporations made in the Federal Parliament need not be. These values profoundly influenced the nature and aspirations of Australian society, deriving as they did from a deep seated constitutional prescription. They should not be swept aside lightly by this court. Doing so would renounce an important part of the nation’s institutional history and the egalitarian and idealistic values that such history has reinforced in the field of industrial disputes and employment standards because of the constitutional prescription.”¹⁵²

Plainly enough, prudential-ethical considerations suffused his Honour’s construction of the historical record.

148 (2006) 231 ALR 1 at 113–114[431]

149 (2006) 231 ALR 1 at 112[427].

150 (2006) 231 ALR 1 at 138[510]–[525].

151 (2006) 231 ALR 1 at 127[468].

152 (2006) 231 ALR 1 at 144[530].

Relying on this construction, Kirby J held that the corporations power was subject to various limitations arising from other paragraphs of s 51, including (xxxv) — the conciliation and arbitration power.¹⁵³ Since the *Work Choices Act* was a law with respect to the subject matter of s 51(xxxv) and it did not comply with the requirements in s 51(xxxv), the Act was, in his view, invalid.¹⁵⁴ Perhaps, Kirby J’s ultimate interpretive argument was in the structural mode, however, since he held that:

“The textual foundation for the importation of such restriction is the structure of the Constitution and its federal character, inherent in its overall expression and design. But it can also be found in the clear statement in the opening words of s 51 that each grant of legislative power in that section is made ‘subject to this Constitution’. That expression obviously includes the other provisions in s 51, including para (xxxv). It also includes the federal character of the Constitution that pervades its entire provisions.”¹⁵⁵

As foreshadowed above, history was also central to Callinan J’s reasons. He too used history, especially as derived from the Convention Debates, to support the inferences he drew about constitutional structure. According to his Honour, the Convention Debates showed that:

“any federal power in relation to industrial affairs was to be confined to those of an interstate character, and that the former colonies were to retain power over internal industrial disputes”.¹⁵⁶

As well, Callinan J, like Kirby J, relied on the history of the *Conciliation and Arbitration Act 1904* (Cth), decisions concerning it, and the failed referendums to support his understanding of the purpose and scope of the conciliation and arbitration power.¹⁵⁷ He traced the “great reach” of the power as developed by the court over time and concluded that, since it covered so much, it represented the totality of federal power over industrial affairs.¹⁵⁸ Callinan J regarded the referendums as particularly compelling “because of the repetitiveness and ingenuity of the attempts made by the Commonwealth to gain power”.¹⁵⁹ The High Court, should not, he said, disregard that history since the “people have too often rejected an extension of power to do what the Act seeks to do”. In the same place, he added that:

“[t]o ignore the history would be, not only to treat s 128 of the Constitution as irrelevant, but *also* for the court to subvert democratic federalism for which the structure and text of the Constitution provide”.¹⁶⁰

153 (2006) 231 ALR 1 at 121 [458].

154 (2006) 231 ALR 1 at [531].

155 (2006) 231 ALR 1 at 121 [459].

156 (2006) 231 ALR 1 at 189 [690].

157 (2006) 231 ALR 1 at 189 [691]–208 [735].

158 (2006) 231 ALR 1 at 248 [834].

159 (2006) 231 ALR 1 at 207 [732].

160 (2006) 231 ALR 1 at 207 [732] (emphasis in original).

In stating that the corporations power received only “the most cursory of attention during the debates”, Callinan J agreed with the majority. He departed from them, however, when he concluded from this that “[i]t is inconceivable that the founders visualised a power as broad as the one asserted”.¹⁶¹ Noting that the principal preoccupation of the delegates was relatively narrow (the adjustment of powers between the new polity and the States), he concluded that:

“if the corporations power were intended to abrogate so much industrial power as would otherwise be within State power, as the majority hold, the possibility and the desirability of that abrogation would have been of intense concern to the founders”.¹⁶²

Reference to history can lend authenticity and authority to an interpretive argument.¹⁶³ This is partly because the historical mode creates a contextual frame of reference about the matters in dispute, which is also removed from the litigating parties and the judges. Recognising this, both dissenting judgments relied on historical analysis to justify the inferences upon which their structural arguments depended.

The judgments in the *Work Choices Case* demonstrate that some care needs to be taken, however, to ask questions that can properly be answered from the historical record. As Waugh commented:

“Historians find multiple intentions and diverse experiences in federation, while lawyers usually strive to establish single meanings in order to support definitive judgments. Historians explore personalities, setting, mood, culture, society, economy, theory, and the meaning of events in such a broad sense that a lawyer in search of original intention must be tempted to give up and go back to something safe like the Convention Debates or the *Federal Law Review*. This interest in context can seem redundant to lawyers wanting precise information rather than contemporary colour.”¹⁶⁴

The judges’ choice of question reflects their assessment of the limits of legitimate historical inquiry as well as the assumptions that underpin their reasoning. For example, all the court assumed that an inquiry into the reasons for the introduction of the two relevant heads of power was a legitimate historical inquiry, to be answered within the limits of the primary sources. Put another way, an inquiry into the context in which the framers acted and the choices they made was appropriate. Only Callinan J treated specific questions about the framers’ intent as suited to historical inquiry. The majority dismissed the utility of inquiry into intent on the basis that the historical data indicated that the framers had none that was relevant.¹⁶⁵

161 (2006) 231 ALR 1 at 249[840].

162 (2006) 231 ALR 1 at 249[840].

163 Compare P Bobbitt, op cit n 1, *Constitutional Fate*, p 13.

164 J Waugh, op cit n 123, p 28.

165 See, generally, JL Landau, “A Judge’s Perspective on the Use and Misuse of History in State Constitutional Interpretation” (2004) 38 *Valparaiso University Law Review* 451; J Wofford, “The Blinding Light: The Uses of History in Constitutional Interpretation” (1964) 31 *University of Chicago Law Review* 502.

Used carefully, the historical mode can greatly assist interpretive inquiry about the meaning and purpose of constitutional provisions. As Waugh said, “the emphasis on historical context guards against one of the major failings of what the Americans call ‘law-office history’”.¹⁶⁶ The mode has, however, its own dangers. First, its use may not suit the interpretive problem. The *Work Choices Case* illustrates the problem of silence in the historical record. Whilst the majority held that the Convention Debates provided no relevant evidence, Callinan J, by contrast, drew a strong negative inference from the very sparseness of the material. Caution is, however, called for when the record is silent. Plainly, there is a risk that the reader will read into the silence a significance that it does not have.¹⁶⁷ If negative inferences are to be accepted, they must find strong positive support from elsewhere in the historical record. Further, the *Work Choices Case* demonstrates that care must be taken in deciding on the sources that are relevant to the issue at hand, as well as in assessing which of these sources are likely to be the most reliable. There is also a need to consider the appropriate level of generality to describe the effect of the relevant historical data. At each turn in using this mode, there is room for serious differences of judicial opinion.

In the doctrinal mode

Writing about the constitutional cases of the 2002 term, I concluded that “the common law constitutional method took priority over other interpretive approaches”.¹⁶⁸ Other writers have also described the modern court’s approach as primarily driven by the prior authorities.¹⁶⁹ I used the term “doctrinal” to describe this common law constitutional method. In so going, I drew on the work of scholars in the United States.¹⁷⁰ I continue to use this term because it is convenient, although the longer expression “common law constitutional method” might be more accurate. In other words, the term “doctrinal” is not intended to carry any value-added significance. In referring to interpretation in the doctrinal mode, I mean the application and adaptation of constitutionally relevant principles, rules or ideas derived from previous authorities in accordance with common law method or, more accurately, methods. I am indebted to Saunders for this way of describing the mode.¹⁷¹

As Saunders noted, the common law affects constitutional interpretation in a number of ways.¹⁷² First, the Constitution exists within a common law legal system. Secondly, words and expressions in the Constitution derive from the common law. Thirdly, the

166 J Waugh, op cit n 3, p 28.

167 JL Landau, op cit n 165, at 473.

168 S Kenny, op cit n 3, at 217.

169 M McHugh, op cit n 2, referring to the heavy reliance on authority in *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511; A Mason, op cit n 73, p 20; and WG Buss, op cit n 47, (2006) 34 *Federal Law Review* 421 at 452 ff.

170 P Bobbitt, op cit n 1, *Constitutional Fate*, pp 43, 57; cf SM Griffin, *American Constitutionalism: From Theory to Politics*, 1996, Princeton University Press, Princeton, p 150; RC Post, op cit n 54, p 20; and DA Strauss, op cit n 1, (1996) 63(3) *The University of Chicago Law Review* 877 at 879.

171 Compare C Saunders, op cit n 62, pp 227, 229, although she was writing about related matters. See also WMC Gummow, op cit n 2.

172 C Saunders, op cit n 62, 229 ff.

institutions established by the Constitution are governed by the common law. Finally, constitutional interpretation depends in large part on the common law method. Naturally, these matters are inter-related. In sum, the doctrinal mode of interpretation is fundamental to Australian constitutionality. It is, therefore, unsurprising that it is a mode of interpretation in constant use.

For example, when writing about the 2002 term,¹⁷³ I noted that, in *Luton v Lessels*,¹⁷⁴ Gleeson CJ (with whom McHugh J agreed) focused on the significance of the decision in *Australian Tape Manufacturers Association Ltd v The Commonwealth*¹⁷⁵ for Mr Luton's case. Using orthodox common law method, the Chief Justice distinguished this earlier case from Mr Luton's on the ground that, in the earlier case, the revenue was designed to compensate a group who had no prior legal entitlement to compensation. In contrast with this, in Mr Luton's case, the debt due to the Commonwealth merely replaced a debt due to the eligible carer. The result was that the suggested "taxation" was, in Gleeson CJ's view, "no more than a mechanism for the enforcement of a pre-existing private liability".¹⁷⁶ Similarly, in *SGH*, the joint judgment of Gleeson CJ, Gaudron, McHugh and Hayne JJ relied most on the earlier decision in *Deputy Commissioner of Taxation v State Bank of New South Wales*.¹⁷⁷ The joint judgment declined to enter "the troubled waters of more general questions about the preferable approach to constitutional interpretation"¹⁷⁸ upon the ground that the argument in the court depended on acceptance of the *State Bank Case*.

The majority judgment in the *Work Choices Case* did not depart from the common law method, although its interpretive reasoning depended less on doctrine than on textual considerations. The majority's approach was, therefore, different in the *Work Choices Case* from the constitutional cases of the 2002 term. The judgment itself suggested that a reason for this was the lack of any prior authoritative decision. When the majority judgment and the judgments of Kirby J and of Callinan J are compared, however, it appears that differences in the judgments' use of common law method flowed principally from differences between their authors about the role of the High Court in constitutional review, federalism under the Constitution, and the constitutional location of social and economic values.

By using the common law plough, the majority cleared the constitutional field of the ideas that had been mooted in past cases and that were designed to limit the corporations power. The majority's treatment of the prior authorities depended heavily on the proposition that caveats on the reach of the corporations power finding root in prior cases were to be understood as products of the background against which those

173 See also the discussion of *Roberts v Bass* (2002) 212 CLR 1 by WG Buss, op cit n 47, at 452 ff.

174 (2002) 210 CLR 333.

175 (1993) 176 CLR 480.

176 (2002) 210 CLR 333 at 344.

177 (1992) 174 CLR 219.

178 (2002) 210 CLR 51 at 67.

cases were decided. The *Banking Case*¹⁷⁹ was “of little direct assistance” because the *Work Choices Act* was not properly characterised as a law with respect to the two relevant heads of power (ss 51(xx) and (xxxv)), that being the context in which certain remarks within the earlier case should be understood. Certain observations of Barwick CJ and of Menzies J in the *Concrete Pipes Case* were put aside on the ground that “what was said was no more than the proper marking of a limit to what was being decided in a case where the law in question was being addressed to all persons, not constitutional corporations in particular”.¹⁸⁰ *Fontana Films*¹⁸¹ was, so the majority said, to be understood in the light of the argument presented to the court, namely, that there was a valid distinction between laws that regulate or prohibit trading activities of a corporation and laws that strike at the activities of others because they interfere with the activities of such a corporation. The discussion in the *Tasmanian Dams Case*¹⁸² was, so the majority held, “moulded by the terms of the legislation under consideration and the arguments advanced in the case”.¹⁸³ Furthermore, the majority rejected as unsatisfactory because unworkable, uncertain or productive of illogical results the various tests that had, from time to time, been put forward by judges in earlier cases.¹⁸⁴ Finally, the majority noted that in *Re Dingjan*, “[e]ach member of the majority expressed the reasons for concluding that the provision was invalid in different words”.¹⁸⁵ It was therefore open to the majority to prefer the analysis of the dissenting members of the court (Mason CJ, Deane and Gaudron JJ) as amplified by Gaudron J, in dissent, in the subsequent case of *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union*.¹⁸⁶

The second principal use of the doctrinal mode, or common law method, in the *Work Choices Case* was to set up a bulwark against the implications from structure that Kirby J and Callinan J desired to draw. The majority held that:

“[t]he course of authority ... denie[d] to para (xxxv) a negative implication of exclusivity which would deny the validity of laws with respect to other heads of power which also had the character of laws regulating industrial relations in a fashion other than as required by para (xxxv)”.¹⁸⁷

The well-established authority of *Pidoto v Victoria*¹⁸⁸ was significant in the course of this authority and both the dissenting judgments of Kirby J and of Callinan J devoted special attention to it.

179 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1.

180 (2006) 231 ALR 1 at 49 [155]–[156].

181 *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169.

182 *The Commonwealth v Tasmania* (1983) 158 CLR 1.

183 (2006) 231 ALR 1 at 52 [167].

184 (2006) 231 ALR 1 at 52 [170], 55–56 [179]–[182].

185 (2006) 231 ALR1 at 53 [174].

186 (2000) 203 CLR 346 at 365.

187 (2006) 231 ALR 1 at 66 [223], referring to *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397; *Pidoto v Victoria* (1943) 68 CLR 87; and *Re Pacific Coal* (2000) 203 CLR 346 at 359–360 per Gleeson CJ.

188 (1943) 68 CLR 87.

Kirby and Callinan JJ also emphasised that the outcome of the *Work Choices Case* was not controlled directly by any prior authority.¹⁸⁹ Callinan J relied on the fact that no majority of the court had previously accorded the corporations power a reading that would extend to “each and every aspect of a corporation, its activities and its employees”. He referred to the limits on the power that judges over the years had posited in relation to it.¹⁹⁰

Kirby J reasoned from cases on express exclusions from power¹⁹¹ and on powers subject to a guarantee¹⁹² that the conciliation and arbitration power contained a “safeguard, restriction or qualification” that also resulted in limitations on a purported exercise of the corporations power. Kirby J distinguished prior and otherwise inconsistent authorities, such as *Pidoto v Victoria*.¹⁹³

I interpolate that reasoning by analogy with pre-existing principles, rules and ideas is a well-accepted common law method. In this way, the method promotes flexible and imaginative applications of the decisions of the past to the questions of the present. This mode of interpretation can encourage the gradual accretion of understanding about the validity of a particular interpretive outcome. It lends itself to facilitating incremental modification of a received interpretation as this understanding alters. The outcome of the technique is likely to be best accepted, however, when it apparently conforms to past authorities. When the outcome is apparent inconsistency with these authorities, the application of this technique is likely to be contested.

Callinan J’s challenge to some previously accepted authorities, especially on the doctrine of indirect operation,¹⁹⁴ was direct and extensive.¹⁹⁵ He directly contested the reasoning in the *Concrete Pipes Case*, which, so he said, did not stand in the way of his conclusion and, in any event, he would not follow.¹⁹⁶ I have already referred to his criticism of the *Engineers’ Case*, and his Honour’s associated appeal to the yardsticks of founders’ intent and federal balance to justify departure from previous authorities.¹⁹⁷ The concept of federal balance was, in his Honour’s view, anchored in sounder authorities.¹⁹⁸ Like Kirby J, Callinan J also distinguished other prior and otherwise inconsistent authorities, such as *Pidoto v Victoria*.¹⁹⁹

Common law methods of interpretation may be qualified or modified by the constitutional context in which they are applied. It is open to the High Court in an appropriate case

189 (2006) 231 ALR 1 at 111–112[425]–[427] (Kirby J); 167 [620] (Callinan J).

190 (2006) 231 ALR 1 at 254[855]–257[865], 260[873] ff.

191 For example, *Bourke v State Bank of New South Wales* (1990) 170 CLR 276.

192 For example, *Attorney General (Cth) v Schmidt* (1961) 105 CLR 361.

193 (2006) 231 ALR 1 at 154 [569]–157[583].

194 See *Murphyores Inc Pty Ltd v The Commonwealth* (1976) 136 CLR 1 and the *Tasmanian Dam Case* (1983) 158 CLR 1.

195 (2006) 231 ALR 1 at 185–186 [677]–[679].

196 (2006) 231 ALR 1 at 267 [894].

197 (2006) 231 ALR 1 at 218 [759].

198 (2006) 231 ALR 1 at 226–233 [781]–[793].

199 (2006) 231 ALR 1 238 [810].

to depart from and overrule previous authorities when it is persuaded that, for some sufficient reason, the principles embodied in them should no longer govern.²⁰⁰ There are, however, a variety of techniques short of overruling that the judges of the court may employ to weaken or circumscribe the force of prior authorities. Some of these techniques were evident in the three judgments in the *Work Choices Case*. Their use in this case shows how the practice of the common law method in constitutional cases can be more deliberate than in other kinds of cases. In the constitutional context, judges are, as in this case, called on to articulate clearly the basis for not according authoritative status to prior pronouncements apparently relevant to the question before them.

The virtues of the doctrinal mode or common law method are largely the virtues of the common law. In interpreting the constitutional text by reference to prior authorities, the court promotes the values of continuity, consistency, stability and predictability. Hence, all the judgments in the *Work Choices Case* anchored their key principles or ideas to authority. By promoting the virtues of the common law — continuity, consistency, stability and predictability — the judges enhanced the legitimacy of their decisions.²⁰¹ That is, the *Work Choices Case* showed again that common law virtues were also constitutionally relevant values.²⁰²

In the constitutional work of the 2002 term, the prior authorities limited the nature of the choices open to a judge in the interpretive process. Some American scholars have made much of the tendency of the common law method to constrain judges more than other methods.²⁰³ The *Work Choices Case* illustrates, however, that this tendency can be overstated, particularly when there is a dearth of authority directly on the issue falling for the court's determination. The case demonstrates that judges skilled in the common law method can employ a variety of techniques to diminish the constraining effect of the past.

Finally, the method of the common law might be seen as conducive to consensus on constitutional principles because these at least are treated as fixed by long-standing authorities. There was some evidence of this in the work of the High Court in the 2002 term.²⁰⁴ In the *Work Choices Case* the five-judge majority agreement about the continuing strength of the interpretive principles stated in the *Engineers Case* provided further evidence of this effect. The *Work Choices Case* also showed that any claims for this attribute must be tempered by the realisation that, in a constitutional case at least, much depends on the individual perspective of the judge and the point from which the judge begins to answer the questions that fall for determination.

200 M McHugh, op cit n 2. See also G Boeddu and R Haigh, "Terms of Convenience: Examining Constitutional Overrulings by the High Court" (2003) 31 *Federal Law Review* 167 and A Lynch, op cit n 2, (2005) 33 *Federal Law Review* 485 at 486 ff.

201 Compare P Bobbitt, above n 1, *Constitutional Fate*, p 43.

202 Compare, in the US context, H Monaghan, op cit n 1, at 749.

203 M Gerhardt, above n 2, (1991) 60 *George Washington Law Review* 68 at 87. See also H Monaghan, op cit n 1, at 744 and DA Strauss, op cit n 1, at 879, 926.

204 S Kenny, op cit n 3, at 217 ff.

In the prudential-ethical mode

The prudential-ethical interpretive mode may be the most complex of the interpretive modes. The mode is a constitutional argument that relies on economic, social, political or ethical considerations attending the case.²⁰⁵ It includes what may be regarded as fundamental assumptions about the relationships constitutional institutions ought to have with one another and the Australian people. The mode is self-consciously or expressly evaluative but it is not for that reason an illegitimate style. Indeed, in many — if not all — cases, this interpretive mode may be an essential and unavoidable part of decision-making. In the American scholarly context, the interpretive mode has a long and respected history. Thus, for example, Bickel argued that a function of the US Supreme Court justices was “to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law”; and extract from this study “fundamental presuppositions” about government and society.²⁰⁶

Writing about the constitutional cases of the 2002 term, I concluded that “most of the court at one time or another adopted a prudential-ethical mode of interpretation”.²⁰⁷ On that occasion, I also said that:

“[u]nless tied firmly to the constitutional text and the commitments, values and principles embedded in the Commonwealth Constitution, the prudential-ethical mode is the most difficult of the interpretive modes to justify as part of the court’s interpretive method”.

Plainly enough, the use of the prudential-ethical approach can permit commitments, values and principles that lack constitutional foundation to permeate constitutional decision-making.

In the *Work Choices Case*, the dominant prudential-ethical considerations were different in each of the three judgments that were delivered. Kirby J’s judgment focused on the importance of context to meaning and on institutional relationships and responsibilities. He discerned these relationships and responsibilities in the history of Australian society, especially the history of conciliation and arbitration. He found in this history “the important guarantee of industrial fairness and reasonableness that has been secured by this court’s adherence to the requirements of s 51(xxxv) over a century”.²⁰⁸ Thus, he observed that “[f]rom the earliest days of federation, compulsory conciliation and arbitration ... became a distinctive characteristic of the Australian industrial and workplace system”.²⁰⁹ He affirmed that the effect of the history of s 51(xxxv) “profoundly affected the conditions of employment, and hence of ordinary life, of millions of Australians”.²¹⁰ He concluded that the High Court had correctly “contributed to, and generally upheld, the industrial fairness guarantee by its decisions on the ambit of the federal power with respect to

205 Compare P Bobbitt, op cit n 1, *Constitutional Fate*, pp 61, 94.

206 AM Bickel, op cit n 1, *The Least Dangerous Branch*, p 236.

207 S Kenny, op cit n 3, at 217.

208 (2006) 231 ALR 1 at 141 [523].

209 (2006) 231 ALR 1 at 115 [435].

210 (2006) 231 ALR 1 at 143 [525].

industrial disputes”.²¹¹ Accordingly, the conciliation and arbitration power should be seen to import a guarantee of industrial fairness and reasonableness in the operation of federal law with respect to industrial disputes.²¹²

Callinan J placed paramount importance on the maintenance of the federal balance and the framers’ intent. In his analysis, being faithful to the framers’ intent was critical to the legitimacy of constitutional review. The federal balance, or what he termed “a sharing of power” between the Commonwealth and States, had an independent existence and was of fundamental constitutional importance. For Callinan J, the court had a central role in protecting this balance, which was presumably capable of independent ascertainment.²¹³ He affirmed that the court went “beyond power if it reshapes the federation”,²¹⁴ as in his view it did in the *Work Choices Case*.

Kirby J found common ground with Callinan J on the matter of federalism. The federal character of the Constitution was, he said, important, because of its “liberty-enhancing feature”.²¹⁵ This conception of federalism was, however, essentially different from that of Callinan J’s. Thus, for Kirby J (though not especially for Callinan J):

“Federalism is a system of government of special value and relevance in contemporary circumstances. It is protective of the freedom of individuals in an age when the pressures of law, economics and technology tend to pull in the opposite direction”.²¹⁶

As we have seen, the *Engineers’ Case* was critical to the interpretive orientation of the majority’s judgment. The ultimate justification for the *Engineers’ Case*, in the majority’s consideration, was as an expression of nationhood. In holding there was no need to confine the operation of the corporations power to take account of the potential consequences of its wide sweep for the concurrent legislative authority of the States, the majority accorded primacy in the area of the power to the Commonwealth Parliament. This was a product of its acceptance of the *Engineers’ Case* and the orientation that it required. So far as the majority was concerned, possible consequences, social and otherwise, were not matters appropriate for the High Court but for the Parliament (and, ultimately, the electors).²¹⁷ The majority rejected the notion that the court should regulate the powers of the Commonwealth Parliament and the States Parliaments in order to secure some federal balance. They commented that:

“[r]eferences to the ‘federal balance’ carry a misleading implication of static equilibrium, an equilibrium that is disturbed by changes in constitutional doctrine such as occurred in the *Engineers’ Case*, and changes in circumstances as a result of the First World War”.²¹⁸

211 (2006) 231 ALR 1 at 144 [529].

212 (2006) 231 ALR 1 at 144 [530].

213 (2006) 231 ALR 1 at 225 [777].

214 (2006) 231 ALR 1 at 226 [779].

215 (2006) 231 ALR 1 at 151 [558].

216 (2006) 231 ALR 1 at 151 [558].

217 (2006) 231 ALR 1 at 57 [188]–[189].

218 (2006) 231 ALR 1 at 20 [54].

The majority did not attribute any kind of paramountcy to the modes of dispute resolution that were the subject of the conciliation and arbitration power and did not find the safeguards for which Kirby J argued in the history of the power.

The prudential-ethical considerations that moved the court in the *Work Choices Case* reflected each judge's understanding of some fundamental political, social and economic values that each believed inhered in the Constitution. The differences between the three judgments were serious and incapable, so it would seem, of resolution. Interpretation in the prudential-ethical mode can, as in this case, create or draw attention to irreconcilable differences in perspective between members of the court. The publication of these differences has the capacity to undermine perceptions of institutional and decisional legitimacy. Perhaps this is why, in the main, the court has traditionally used the prudential-ethical mode as no more than a secondary mode of interpretation.

Conclusion

Choice of interpretive mode plainly matters. The work of the High Court in the *Work Choices Case* can be contrasted with its work in the 2002 term, when it adopted a primarily doctrinal approach. Use of the doctrinal mode in 2002 promoted the constitutional values of continuity and stability. Disagreement over fundamental constitutional assumptions and values in the *Work Choices Case* exposed the court to widespread and vigorous debate. The majority have, however, secured their interpretive approach in settled authority and their interpretive argument in the text. In this way, they have claimed continuity with the past and the ultimate authority of the Constitution.

In the *Work Choices Case*, the majority gave primacy to the text over any other interpretive mode. This is broadly consistent with Gummow J's earlier statement that the law of the Constitution is to be perceived from the text and the reports of the cases decided by the court. Prudential-ethical considerations, however, informed the majority's textual approach. That is, considerations of nationhood harking back to the *Engineers' Case* and national economic life permeate the majority's reasoning.

Is the majority's interpretation of the corporations power built to last? It is clearly supported by the textual mode in which it is primarily argued and, at least within its own parameters, is not inconsistent with the historical, structural or doctrinal modes. It would appear that it is built to last.²¹⁹ The weaknesses of the majority's approach are the weaknesses of any interpretation in this mode. Kirby and Callinan JJ's judgments pinpoint these weaknesses as being insufficient attention to constitutional implications and assumptions.

Callinan J argued in the structural mode. The cogency of his argument depended on its claim to derive from the text considered as a whole. Like any interpretive argument in this mode, it may or may not win acceptance on account of the perceived strengths or weaknesses of the inferences on which it depends. Interpretive arguments in this mode

219 Compare A Stone, *op cit* n 2, (2005) 27 *Sydney Law Review* 29 at 41 (quoted at text accompanying n 24).

are commonplace in constitutional decision-making but, in this case, the argument in the structural mode collided with interpretive arguments in textual and doctrinal modes.

Kirby J gave primacy to an interpretive argument in the historical mode, although his ultimate position depended on an argument from textual structure. He used these two interpretive modes to support one another, with prudential-ethical arguments as the glue. These interpretive approaches had a tendency to collide with interpretation in the doctrinal mode, a result his Honour sought to avoid by the common law technique of reasoning from analogy.

In the *Work Choices Case*, the five modes of interpretive analysis occur in each of the three different judgments. The judges' choice of primary interpretive mode reflected constitutional preferences. In preferring one mode of interpretation to another, judges not only contributed to the interpretive mix of the court, they also disclosed the nature of the choices that were open to them and the reasons why they made those choices. We need to understand these choices and reasons for making them to evaluate the work of the court properly, and to understand how it has sought, and seeks still, to discharge its constitutional mandate in this and other constitutional cases.



Legislative Drafting and Statutory Interpretation*

Ms Hilary Penfold QC†

Introduction

Legislative drafters engage in direct statutory interpretation only incidentally in the course of working out the legislative status quo before they start work on changing it. Other lawyers, and judges in particular, are the practitioners of, and experts in, statutory interpretation.

This article deals with the sources of legislative change, the processes of drafting legislation, and the preparation of explanatory memoranda and second reading speeches. It then draws out aspects of the drafting process that affect how Bills turn out. Finally, the article deals with aspects of the relationship between legislative drafting and statutory interpretation from two angles:

1. What principles of statutory interpretation do legislative drafters take seriously?
2. What approaches to statutory interpretation are irrelevant or unhelpful to the work of the legislative drafter?

The article relates to practices in the Commonwealth and mainly the Commonwealth Office of Parliamentary Counsel (OPC), which drafts primary legislation (Bills) only. Most secondary legislation (for example, regulations) is drafted in the Commonwealth by the Office of Legislative Drafting in the Attorney General's Department, and some of it is drafted elsewhere, for instance, in administering departments or agencies.

Most elements of the drafting process are similar in the Australian States and Territories (except that there is no split between the drafting of primary and secondary legislation). Some aspects of the management of legislation are rather different; in general, but not always, the State or Territory processes are slightly less formal.

The development of legislation

Each Bill goes through a unique process, from conception to introduction. There are certain points in the process (mainly immediately before legislation is introduced in the Parliament) at which rules or practices circumscribe the possible actions. These are surprisingly rare and, in general, the processes of legislation are open to quite a lot of

* Originally presented at the Supreme Court of New South Wales Annual Conference, August 2005, Sydney and published at (2006) 7(4) *TJR* 471.

† First Parliamentary Counsel, Commonwealth Office of Parliamentary Counsel, 1993–2004.

variation. As well, hardly any of the rules and practices that do exist are immutable. Most of them can be changed or overridden quite easily if the right people want to change or override them.

Sources of legislative change

Technical sources of legislative change

Technically, the common source of all new government legislation is a minister of the government.

A government Bill will not be introduced into the federal Parliament unless all provisions have appropriate policy approval, as follows:

- Measures with significant policy implications — the Cabinet.
- Measures with minor significance — the Prime Minister.
- Technical amendments within existing policy — the minister administering the legislation in question.
- Technical corrections that would otherwise be suitable for inclusion in a Statute Law Revision Bill — First Parliamentary Counsel.¹

Substantive sources of legislative change

More can be said about the substantive sources of legislative policy. These are many and varied, and are all but impossible to categorise except in the most superficial way. Here are some examples:

- Party platforms. These tend to be particularly significant at the beginning of the term of a “new” government (that is, a government of a different political persuasion from the immediately preceding government). In general, the party platform becomes less significant as a source of legislative proposals, where a particular party has been in office for a number of years. As well, of course, a policy does not get implemented simply because it is enshrined in a party platform. Unless the policy is on the personal “to do” list of an influential member of Parliament (generally a Minister) or very senior party official, it may not progress far.
- A Minister may have a personal commitment to achieve a particular result in an area that has been of interest to him or her before becoming a minister or before becoming a member of Parliament. Attorneys General have a particular tendency to this kind of commitment, perhaps because they are much more likely than other ministers to have worked in the relevant area (law) before acquiring ministerial responsibility for it.
- A member of a Minister’s staff, or a senior public servant, may have a personal commitment to changing the law.
- A Minister may respond to a perceived problem or need by establishing a body, or referring the matter to an existing body, to investigate the issues and make recommendations, which often include recommendations about legislation.

¹ Legislation Handbook <http://dpmc.gov.au/guidelines/docs/legislation_handbook.pdf> at [4.1] accessed 29/3/07.

- A body whose function it is to inquire into referred matters and make reports on those matters (for example, a law reform body or a parliamentary committee) may actively pursue references relating to particular matters. Having obtained a reference from the minister concerned and reported on the need for legislative change, the body may then put pressure on the government to implement its report.
- Public servants or others who are responsible for administering legislation may perceive administrative difficulties, public dissatisfaction or unintended losses to the revenue arising from the form or content of the legislation, and may make proposals to the minister for legislative change.
- Judicial decisions may *require* a legislative response by interpreting a law so as to leave an unacceptable regulatory vacuum, or they may *inspire* a legislative response by departing from an assumed interpretation of a law or from an apparently settled legal position, causing either a perceived threat to government policies or potentially damaging uncertainty within the community.
- Ministers, their staff or public servants may be lobbied by special interest groups for change in the law to address particular concerns of the interest groups. This is particularly common in areas such as primary industries, where much of the relevant legislation regulates particular industries largely at the instigation of groups within the industry.
- Legislation may be necessary or desirable to implement an international agreement, or to respond to some kind of international pressure.

Some legislation develops through a combination of several sources and, by the time it is enacted, the original source of the legislation may be quite forgotten. For instance, a minister may conceive a general policy direction which is developed by his or her department. The minister may then move on, to another portfolio or out of the Parliament. The department, having developed detailed policy in the area, may then seek to convince the new minister of the virtues of the approach. This may be done for good reasons (for example, the department has itself become convinced of the virtue of the approach) or for less than good reasons (inertia, or a reluctance to let work go to waste).

There is little to be gained from trying to analyse or categorise these sources of change further. There are, however, two common threads that can be identified.

1. In all cases, the proposed legislative change will not proceed unless it can capture the minister's attention, or that of the Prime Minister, in some way, however fleeting that attention and however unwillingly it is directed towards the particular proposal.
2. In all cases, it is possible to identify some perceived need or problem that is being responded to by means of a legislative proposal. This does not mean that the perceived need or problem is real. It does not mean that the proposal will necessarily meet the need or solve the problem.

Management of the legislation program

In the Commonwealth, neither parliamentary time nor drafting resources are freely available to any minister who wishes to legislate.

Before each parliamentary sitting (there are usually three sittings a year in the federal Parliament), ministers bid for the inclusion of proposed legislation on the program for that sitting. The bids are collated and considered as a whole by the Parliamentary Business Committee of the Cabinet, which assigns each Bill to one of four priority categories. It is rare that a proposed Bill is completely excluded from the program, but assignment of the Bill to the lowest priority category may have the same effect.

Thereafter, the allocation of drafting resources and parliamentary time is governed by the priorities decided by the Parliamentary Business Committee. This process, like the requirement for policy approval to be obtained from either the Cabinet or the Prime Minister, imposes some discipline on the legislation process.

In urgent or politically sensitive cases the rules can be, and often are, bent or ignored.

Preparation of Bills

The instructing and drafting processes

The instructing and drafting processes are far more arcane than the sources of legislation and, indeed, are sometimes not understood by all of the participants.

A common view of drafting instructions is that they are, more or less, complete instructions (whether written or oral) to the drafter about what is required in the legislation. This view tends to be accompanied by a belief that drafters are mere scribes, and not particularly good ones at that.

In reality, the instructing process and the drafting process are far more complex. They are also substantially interrelated, and cannot usefully be discussed separately.

First steps

The drafting process usually starts with the conveying of “instructions” to Parliamentary Counsel by the department or agency with policy responsibility for the proposal. How these instructions are conveyed, and the form they take, vary considerably from Bill to Bill.

At one end of the spectrum, the process may start with a telephone call raising the need for a Bill that is then followed by the giving of oral “instructions” in conference. The draft Bill may be the only piece of paper produced during the whole process.

More commonly, the first batch of instructions are in writing and attempt to set out the details of what the proposed Bill should achieve. Ideally, this is done by explaining the policy intentions in appropriate detail, and leaving it to the drafters to work out the legislative approach.

In some cases, policy officers attempt to work out the details of the legislation by identifying, for instance, each provision of an existing Act that requires amendment, and the exact nature of the amendment required, or by providing an outline or table of provisions for the proposed Bill.

On rare occasions, policy officers actually provide a draft Bill by way of instructions.

The drafting of the Bill

In a few cases, a written drafting instruction may be entirely adequate. In such a case, the drafter may prepare a draft and send it to the instructor with a request for comments.

More commonly, the drafter will first work through the written drafting instructions, analysing them from various angles including the following:

- What are the instructors trying to achieve?
- Do they need legislation at all? (This is a *legal* question — generally the drafter does not enter into arguments about whether, for instance, community attitudes are best changed by legislation or education campaigns).
- Is there constitutional power for the proposed legislation?
- What are the possible legislative options?
- Are there gaps in the policy as expressed (for example, missing steps in a process, particular cases not dealt with)?
- Are there other matters that need to be considered (for example, integration with other legislation, consultation with other parts of the government)?

Having identified a set of issues that need to be discussed, the drafter will then make contact with the instructors to arrange that discussion.

If the legislative proposal and the issues raised are fairly minor, the drafter may do this over the telephone or even by preparing a preliminary draft and noting the issues that need to be addressed, either in a covering memorandum or within the draft itself.²

More often, the drafter's initial analysis of the instructions is followed by a conference involving the drafters and the policy officers. The issues identified by the drafter are thrashed out around the table. Sometimes they can be resolved there and then. Sometimes advice needs to be sought from other agencies (for example, the Attorney General's Department). Sometimes the instructing officers recognise that they need to engage in further policy development (often to address fundamental issues raised by the drafters) or to seek further guidance from their Minister or elsewhere. In some cases, the process of giving instructions may take place in a series of conferences over hours, days, weeks or even months, depending on the magnitude of the matter to be dealt with.

² The word processor styles used in OPC to create a draft Bill include one for "drafter's note" — this ensures that they are recognised as such by those reading the draft Bill, and also means that before introduction, an automatic check can be run to ensure that none of the comments or queries remain in the Bill.

In some cases (often, but not only, those involving urgent Bills) there may be no written instructions as such — instead, all instructions will be provided orally during one or more conference or telephone calls.

These discussions may be followed by the production of a preliminary draft Bill, of the kind described above (that is, containing alternatives, suggestions, questions and reminders).

Alternatively, the conference process may be used by the drafter to develop a document called an outline. This document does not purport to be a draft, even a preliminary one. Rather, it attempts to bring together all the relevant information that will be needed for the eventual drafting of the Bill, before any attempt is made to do any “drafting”. The outline may, for instance:

- Contain a list of key concepts, with explanations of the concepts and of their significance in the proposed legislative scheme.
- Contain a table showing all the cases intended to be dealt with and the ways in which these cases are to be handled (tables are an almost unbeatable tool for revealing the cases that have been overlooked in the usual process of policy development).
- Identify the elements of a scheme to be set up by the Bill.
- List the offences to be created and relate them to other aspects of the Bill.
- Note matters that are *not* to be dealt with in the Bill, with reasons.

The outline may also operate as a project management tool by noting contact details for instructors and other stakeholders, consultation arrangements, timing issues, unresolved policy decisions and similar matters.

Whether the drafter works with annotated preliminary drafts or with outlines, the process is almost invariably an iterative one. The instructors consider the preliminary draft or the outline, identify areas where it doesn't meet their needs, make suggestions about forms of expression, point out inconsistencies with other legislation and, above all, change their minds. Sometimes this is sheer indecisiveness on the part of instructors, Ministers or ministerial staff, but more often it is simply the result of the work that the drafter has done in drawing out the details of the original policy, articulating the operation of that policy and identifying its implications.

The rare occasions when the process does not become iterative are, for drafters, the most terrifying. If an instructor tells a drafter that the first draft is entirely satisfactory, that almost certainly means he or she has not read it. It can be very distressing to the drafter to know that there is no-one in the world who knows both what is actually in the Bill *and* what the Bill is meant to achieve!

The process of revising and improving the draft or outline continues until the draft or outline is completed to the satisfaction of both the drafters and the instructors. This may involve further conferences, telephone calls or exchanges of correspondence.

If this process has involved an outline, the drafter will then turn the outline into a draft. The drafters in OPC who use the outline technique estimate that the process of actually writing the draft Bill takes around 30% of the total time spent on the Bill, the rest of the time being spent on the outlining process. This assessment probably provides a reasonable breakdown of the work involved in any routine drafting project, however it is handled — 70% of the effort is in working out what is needed and only 30% involves getting the words down on paper.

Approval for introduction

When the Bill is completed to the satisfaction of the instructors, it is submitted to the Department of the Prime Minister and Cabinet (PM&C), which arranges approval of the Bill for introduction. Generally, this approval is given, on the recommendation of PM&C, by a junior Minister or Parliamentary Secretary to the Prime Minister. The Bill is usually also considered by the Joint Party Room or the Caucus.

An important control in the process is that OPC separately submits to PM&C a memorandum that confirms that the Bill has appropriate policy approval, or identifies any elements that do not have that approval. OPC's capacity to advise PM&C about policy authority independently, and sometimes contrary to the wishes of OPC's client department or agency, is protected by OPC's separation from policy departments and by First Parliamentary Counsel's statutory appointment.³

Explanatory memoranda and second reading speeches

In the Commonwealth, the drafters are rarely involved in the preparation of explanatory memoranda or second reading speeches.

Explanatory memoranda

The explanatory memorandum is generally prepared by the policy officers who are also giving instructions on the Bill.

Ideally, the memorandum would be written after the Bill is finalised, but generally the memorandum is written in parallel with the drafting of the Bill. There is rarely any time available between the finalisation of the Bill and the time when the Bill and the explanatory materials must be lodged with the PM&C in preparation to being cleared for introduction.

This lack of time has more to do with human nature than with the legislative processes. Murphy's Law for legislative drafting says that a Bill is not finished (for the first time) until it is introduced. In other words, until the relevant deadlines arrive, instructors (and sometimes drafters) will keep having second, third and fourth thoughts about changes they could make to it, other provisions they could usefully add and provisions that might be unnecessary ... and so on. Since the deadlines are the same for the Bill and the

³ Under the *Parliamentary Counsel Act 1970* (Cth), First Parliamentary Counsel and the two Second Parliamentary Counsel are appointed by the Governor General for terms of up to seven years, and the appointments can only be terminated for cause as set out in the Act.

explanatory materials, there is no time available after the Bill is “finished” in which to prepare the explanatory materials.

In these circumstances, it is understandable that the policy-makers do not leave the writing of the explanatory memorandum and second reading speech until the Bill is finalised. On the other hand, having regard to the tendency mentioned above for Bills to change and develop in the course of the drafting process, it will be apparent that drafting the explanatory memorandum in parallel with the drafting of the Bill generally involves a considerable amount of wasted effort.

The contents of an explanatory memorandum may vary from unilluminating paraphrases of the provisions of the relevant Bill to genuine attempts to explain the background and purpose of those provisions.⁴

Since ss 15AA and 15AB of the *Acts Interpretation Act* 1901 gave legislative respectability to certain long-standing approaches to statutory interpretation, and even more so since OPC first came under pressure to look for ways to simplify its legislation in the early 1980s, there is something of a tendency for explanatory memoranda to try to explain how, and in what circumstances, provisions are intended to operate.

In the past, lengthy or complex provisions might have been included in a Bill to clarify the application of other provisions to particular, highly unlikely, cases, or to resolve a potential ambiguity in a provision, even if both the drafter and the instructors were confident that the problem was unlikely to arise, or that if it did, a reasonable court could not possibly adopt an interpretation other than the intended one.

These days, such a case might be handled by a paragraph in the explanatory memorandum. In general, this would seem to be a desirable result because it leaves the legislation uncluttered by probably unnecessary provisions, whose length and complexity often seem to bear an inverse relationship to the likelihood that they will ever become important.

On the other hand, it is hard to imagine a case in which a drafter would rely on the explanatory memorandum to clarify an ambiguity in a central or significant legislative provision.

4 See, for instance, the Explanatory Memorandum for the Parliamentary Service Amendment Bill 2005, which contains the following examples of each kind of material:

Item 4 (Amendment of section 7)

7 This item provides a definition of Parliamentary Librarian.

Item 5 (Amendment of section 9)

8 Section 9 specifies the people who constitute the Australian Parliamentary Service. This amendment provides that the Parliamentary Librarian is part of the Australian Parliamentary Service.

9 This amendment is necessary because the Parliamentary Librarian is neither a Secretary nor a Parliamentary Service employee. The Parliamentary Librarian office is not created as a Parliamentary Service employee position because of the special appointment, termination, remuneration and other provisions that apply to the Parliamentary Librarian.

10 Section 14 of the [*Parliamentary Service Act* 1999] will apply so that the Parliamentary Librarian is bound by the Code of Conduct. However s 14 will apply to the Parliamentary Librarian by virtue of an existing determination made under subsection 14(3), so no direct amendment of s 14 is necessary.

It is, perhaps, a measure of how rarely explanatory memorandums are actually intended to be used in the interpretation of the legislation concerned that drafters in OPC hardly ever see a draft explanatory memorandum. In fairness, it must be said that OPC has never volunteered for the job of vetting explanatory memoranda, and so there may be another explanation for the fact that drafters are rarely offered draft explanatory memoranda for comment.

In rare cases, explanatory memoranda may have been used to put an inappropriate slant on the operation of the provisions — this would have been another good reason not to show them to OPC.

OPC takes seriously its role as a professional but non-partisan adviser to the government of the day. OPC's role is to express the government's policy intents in legislation that is both effective and transparent (by transparent I mean that the aim of the legislation should be apparent to those who are being asked to vote on it). Accordingly, OPC's service charter includes, under the heading "What do we expect from you, as our client?", the following (entirely unenforceable) paragraph:

"That you will ensure that any material you prepare to accompany the draft legislation (in particular the explanatory memorandum and the second reading speech) does not in any way misrepresent the contents of the legislation."⁵

Second reading speeches

Second reading speeches are a further step removed from the work of the drafters. Preliminary drafts of such speeches are usually prepared by departmental officers but the drafts are often revised by members of the minister's staff to inject any desired political content.

Like explanatory memoranda, second reading speeches are available to be used in the interpretation of the Act, in certain circumstances. Like explanatory memoranda, the majority of second reading speeches do not seem to be taken particularly seriously by their authors as a vehicle for bolstering a particular interpretation of the legislation.

The drafting process — why Bills turn out the way they do

Legislative drafting is an inherently difficult task.

On top of the difficulty of eliciting the intentions of the sponsors of legislation, the drafter faces a difficult task in choosing words and legislative structures with which to convey those intentions. Those intentions need to be conveyed to a variety of different audiences, each individual member of which brings to the process of interpretation a unique set of preconceptions, life experiences and understanding of language.

⁵ *Working with the Office of Parliamentary Counsel: A Guide for Clients* (2002) <<http://www.opc.gov.au/about/documents.htm>> accessed 29/3/07.

Additionally, drafters do not have the judicial luxury of giving reasons, or of being able to set out at length all the matters they considered in reaching a particular form for a legislative statement. Drafters do not have scope for explaining and qualifying their legislative statements at length. They do not even have the privilege of being able to set out the background to their laws.⁶

Without the opportunity to sit down individually with each reader and explain the legislation personally, the drafter is bound to fail in the task of conveying the same message to all his or her readers. At best, the drafter can hope to convey a message which is similar enough (for practical purposes) to enough of the readers (ideally, including any judges called on to interpret the legislation).

Sometimes judges take the major step of recognising the conflicting aims inherent in the writing of legislation. Unfortunately they do not seem to be any more successful than anyone else in resolving that conflict. In *Blunn v Cleaver*,⁷ the Federal Court made some perceptive observations about the difficulties of attempting to improve the accessibility of legislation, but finished by throwing up its collective hands:

“It is difficult to know what can be done about [the problem of the complexity of legislation]. As the [Senate Standing Committee on Legal and Constitutional Affairs] remarked, the increasingly complex society in which we all live very often demands that legislation be expressed in a complex form. That is the factor which will so often operate to prevent simplicity in legislative drafting.”

The drafting process is described above in fairly mechanical terms. However, the context in which legislation is drafted can have a big effect on how those processes work, and the nature and quality of the end product (the Bill and, in due course, the Act).

Timeframes and deadlines

Bills are almost always drafted too quickly.

There are cases where Bills are drafted too slowly, over months or years, such that the original policy-makers have moved on and the drafters provide the only real continuity in the project, and find themselves explaining to the policy-makers why the policy-makers want their legislation to do particular things.

Mostly, however, Bills are drafted too quickly, in circumstances that do not allow for much reflection or research as the drafters choose their words.

This is partly because of the workloads of individual drafters and partly because of political demands to produce legislation quickly after the initial policy decisions have been made.

6 OPC's attempts from around the mid-1980s to add various forms of explanatory material to Bills (reader's guides, examples, provisions setting out the matters covered by a particular part of the Bill) have often received a cool response from judges, who have been known to suggest that statutes should simply state the law.

7 (1993) 119 ALR 65 at 83.

Workloads for drafters are substantial and the size of the legislative program means that the only reductions in workloads tend to come during election caretaker periods (not just because there is less demand but also because, during the caretaker period, it would be inappropriate for OPC to work on legislation with a party political aspect).⁸

In the 2003–2004 financial year, for instance, 27 drafters in OPC (around one-third of them classified as “trainee” drafters), working in 12 or 13 teams, produced 173 Bills totalling 6700 pages. As well, consultation drafts totalling over 1500 pages were prepared. This works out at around 14 introduced Bills, and over 650 pages of draft legislation (including consultation drafts), per team.

As well as the total demand for legislation to be drafted, there are often demands for particular legislation to be drafted to very short deadlines. For instance, the original Legislative Instruments Bill was drafted in three weeks (it then took 10 years and several substantial revisions before it was passed). The original Native Title Bill in fact took around five months to draft, but at every point in the process the deadline was no more than a few weeks ahead; as each deadline drew near, it was extended by another couple of weeks.

This can be a particularly frustrating experience for a drafter. There are various “quick fixes” that may be used in a Bill drafted in a hurry but, generally, they do not enhance the quality of the Bill. It is very annoying to have produced only a “quick fix” Bill in a period that would have allowed the production of a much better Bill if the project had been managed more sensibly.

Subject matter expertise and consultations

Bills are usually drafted with inadequate consultation with outside experts. Often, policy development is handled by a small group of public servants who, however skilled and theoretically expert they may be, cannot hope to understand everything about the likely operation and effect of the legislation they are proposing. Indeed, it is often the drafters who point out to policy-makers some of the practical flaws in their ideas.

Where there is outside consultation, it tends to be limited, sometimes one-sided, and often too late in the drafting process. As well, drafters are rarely directly involved in consultations with people outside the public service and often receive the results of such consultations second or third-hand.

Political imperatives

Another matter that may affect the drafting process is a political imperative to draft a Bill in a particular way for political, rather than legal, reasons. For instance, a particular expression may need to be used in legislation because it has been used in the political debate, even if it would not be the preferred legal expression. This is not to say that a Bill would be drafted to satisfy political requirements *instead of* legal ones, but there might

⁸ Since the mid-1990s OPC has used the caretaker period to prepare a Statute Law Revision Bill, as well as do a lot of other necessary “housekeeping”.

be, for instance, a need to define one expression (a politically favoured one) to mean another expression (the legally sound one) in order to satisfy both requirements.

Parliamentary amendments

For 24 years, until July 2005, the upper house of the federal Parliament (the Senate) was not controlled by the government of the day. Many Bills passed through the Parliament only as a result of compromises made in the Senate, and many of those settlements required amendments of the Bills.

Parliamentary amendments may be good for democracy but they are not good for the coherence of legislation.

At best, they are drafted by OPC, with instructions from the policy department concerned (this is quite common, even where the proposals originate with the non-government parties and the amendments will be handed over to non-government members to move). In such cases there is a good chance that they will fit neatly into the larger legislative scheme and that all necessary consequential amendments will be identified and made. Even in such cases, however, it is highly likely that the resulting scheme, if drafted from scratch, would have been structured differently.

Some parliamentary amendments are drafted by parliamentary staff who have some drafting experience and expertise, and often the ability to get general advice from OPC about how the amendments should be slotted into the legislative scheme.

At worst, parliamentary amendments may be drafted by members of Parliament personally, or by their staff.

It is not common for amendments drafted outside OPC to be passed. But when they are, it is common for them to be ineffective, or worse. Such amendments, accepted in the heat of a parliamentary debate, often have to be tidied up by further legislation when the heat has subsided.

Pre-emptive drafting

Drafters are often asked to make pre-emptive amendments where administrators are not confident that their preferred interpretation of the law will survive judicial scrutiny. This tendency to legislate further instead of testing the original legislation in a court is likely to survive as long as pre-emptive legislating is quicker, cheaper and safer than going to court. However, attempting to tighten up a legislative scheme without being quite sure what is wrong with it is unlikely to improve the coherence of the legislation.

It is apparent that drafting legislation is more difficult than it needs to be because of the circumstances in which it is usually done. However, I argue below that Australian legislative drafting is, nevertheless, by and large, good enough not to need help from philosophies of statutory interpretation.

Legislative drafting and statutory interpretation

Judges and other lawyers are, quite appropriately, interested in statutory interpretation. In general, statutory interpretation does not have the same fascination for legislative drafters, and they approach it in a different way. The way that drafters approach statutory interpretation affects, and is affected by, the way that Bills are drafted.

Practice versus philosophy

From the drafter's point of view, statutory interpretation covers two quite distinct areas.

The rules, approaches and presumptions of statutory interpretation that have been described as constituting a "code of communication" between the legislative drafter (charged with conveying what Parliament *meant* to say) and the courts (charged with construing what Parliament *did say*)⁹ are important to drafters. To the extent that there is a general agreement about such rules, approaches and presumptions, drafters certainly do recognise and apply them.

However, philosophies of statutory interpretation are quite another matter. In my view, these philosophies have little significance in the Australian legislative system and there are good reasons why they are only of incidental interest to legislative drafters.

Useful elements of interpretation theories

The basic tenets of statutory interpretation quickly become second nature to any skilled drafter, and to any skilled reader of legislation, and are relied on all the time, usually unconsciously.

Statutory provisions

Many of the provisions of our interpretation legislation are regularly relied on by drafters. These include basic provisions dealing with, for instance, the effect of repealing an Act, the use of the singular to include the plural and vice versa, and the exact time when legislative provisions take effect.¹⁰ The ability to define one grammatical form of a word and then rely on other grammatical forms taking equivalent meanings¹¹ is fundamental to any kind of drafting. The many provisions that enable a set of standard provisions to be imported into an Act by use of a specific expression are also very useful to drafters.¹²

As mentioned above, sometimes a drafter deliberately relies on ss 15AA or 15AB of the *Acts Interpretation Act 1901 (AIA)*. This happens mainly in the context of a risk assessment that further clarification of a particular provision to ensure that it covers a particular, unlikely, case is simply not justified. The risk assessment would include

9 See, for instance, H Roberts, "Mr Justice John Bryson on Statutory Interpretation: A Comment" (1992) 13 *Statute Law Review* 209 at 211.

10 *Acts Interpretation Act 1901 (Cth)*, ss 7 and 8, and ss 23 and 3, respectively.

11 *Acts Interpretation Act 1901 (Cth)*, s 18A.

12 See, for instance, ss 25 (definition of document) and 28A (service of documents), *Acts Interpretation Act 1901 (Cth)*.

consideration of whether the particular issue would be likely to generate a challenge at all. If the decision is that further clarification is not justified, the drafter, in consultation with instructors, might decide instead to hope that a purposive interpretation of the provision (s 15AA) or some help from extrinsic materials (s 15AB) will get the right answer.

More commonly, however, a drafter would include a purpose clause as an extra chance to direct users of legislation towards the “intended” construction of the legislation, rather than as a technique to compensate for recognised weaknesses in the substantive provisions.

There are also some provisions included in interpretation legislation that drafters choose not to rely on. For instance, OPC decided several years ago to abandon reliance on s 5 of the AIA, which provides that, in the absence of any specific provision in the Act, an Act will commence on the 28th day after Royal Assent. The provision was hardly ever used. This was because the sponsors of Acts generally either wanted the Act, once passed, to commence as soon as possible or wanted to be able to choose the commencement date depending on their state of readiness for its operation, or so as to nominate a date that was “tidy” having regard to the operation of the Act (for instance, a change to pensions and benefits might conveniently commence at the beginning of a pay period rather than during a pay period).

The almost universal use of specific commencement provisions in Commonwealth Acts meant that an Act without a commencement provision caused confusion among various users of the Act (often starting with the policy makers instructing OPC on the draft Bill). An OPC policy was accordingly developed requiring all Bills to contain a commencement provision, even if in fact it duplicated the AIA provision.

Other rules and presumptions

As well as rules of statutory interpretation that are enshrined in legislation, drafters try to pay appropriate regard to judicially-developed general rules of statutory interpretation.

Some of these are also fundamental to the drafter’s work; for instance, the presumption that an Act must be read as a whole.¹³ However, the related presumption that an Act must be read in order, and that in the last resort a later section prevails over an earlier one,¹⁴ ignores both the modern use of standard structures for legislation and parliamentary practice.

Many of the general rules of interpretation are of little value to the drafter as he or she works. At best, they may serve to get the drafter out of a hole that is only recognised long after his or her dealings with a Bill have finished.

Some rules of interpretation are expressly aimed at cases in which the court finds an ambiguity or uncertainty in the language of the Act. Obviously, the drafter is trying to ensure that there are no ambiguities or uncertainties in the language he or she chooses.

13 DC Pearce and RS Geddes, *Statutory Interpretation*, (2001), (5th ed), Butterworths, Sydney, pp 88–90.

14 *ibid*, pp 90 and 115.

If the drafter recognises a potential problem in the Bill, he or she will try to resolve the problem before the Bill is finalised, rather than relying on the courts to solve it by applying a rule of interpretation. The presumption about the order in which an Act should be read provides a good example of this proposition; if a drafter recognised any inconsistency between two provisions in a Bill, he or she would resolve the inconsistency properly and not by relying on the order of the provisions.

Some other rules do not require the same kind of ambiguity before they become applicable (for instance, syntactical presumptions such as the *eiusdem generis* rule). Drafters would in any case try not to offend against syntactical presumptions because of their contribution to comprehensible writing. From time to time drafters may rely on such presumptions if they have no alternative (for example, because all the elements of the class cannot be identified). In other cases, the drafter may need to consider whether a provision could be *misinterpreted* by a court applying a particular presumption, and may take steps to prevent this outcome. However, as already pointed out, if there is any real scope for ambiguity, and the ambiguity is capable of being resolved, the drafter would try to resolve it rather than relying on any presumption to ensure that a court reached the intended interpretation.

In general, however, apart from the legislative rules of statutory interpretation, drafters think very hard before relying on rules or presumptions of statutory interpretation to ensure that their legislation is effective (or more accurately, drafters would think very hard in order to avoid relying on most rules or presumptions of statutory interpretation). This is largely because, as the cases demonstrate, the courts cannot be relied on to apply any particular rule of interpretation in a particular way, or at all.¹⁵

“Words mean what they say”

Drafters are more inclined to assume that the best that can be hoped for from the courts (and other users) is that they will heed Sir Harry Gibbs’s exhortation to “begin with the assumption that words mean what they say”.¹⁶

Unfortunately, this exhortation is of limited value. It is useful as a reminder that judges should look to the “obvious” meaning of the words of the provision before venturing into the relative dangers of the various rules or presumptions of statutory interpretation. However, as a suggestion that the words have some sort of absolute meaning, it is at best misleading. Mr Justice Bryson of the NSW Supreme Court has pointed out one of the problems with Sir Harry’s comment:

“Gibbs CJ’s observation that it is not unduly pedantic to begin with the assumption that words mean what they say will guide us to the solution of most problems, but could

15 *ibid.* At p 126, the authors state:

“Whether the court will have regard to punctuation [in the interpretation of a legislative provision] seems to depend very much upon whether it suits the judge to refer to it as aiding the interpretation that he or she wishes to adopt or whether it interferes with that interpretation.”

The discussion of a wide range of approaches to the construction of legislation in Chs 2, 3 and 4 of this work suggests that an equivalent statement could fairly be made about most, if not all, specific approaches to the construction of legislation.

16 Referred to in J Bryson, “Statutory Interpretation: An Australian Judicial Perspective” (1992) 13 *Statute Law Review* 187 at 188.

tend to obscure the besetting difficulty that each of us is very tempted to see his own first interpretation as much more strongly and clearly what the words say than any other view.”¹⁷

Perhaps more significant are the warnings of linguists and communications experts who turned their attention to legislation during the 1980s and 1990s. For instance, Dr Robyn Penman of the Communication Research Institute of Australia makes the point:¹⁸

“When we are dealing with language and communication we must recognise the fundamentally slippery nature of words and meanings. The very open ended, symbolic features of language makes meanings fundamentally and unavoidably uncertain. Despite all, and often desperate, attempts of legal writers to ensure certainty, this is fundamentally impossible. Regardless of whether clarity or tortuous legalese is chosen as the approach to legal documents, neither will ever guarantee certainty of meaning.”

Philosophies of statutory interpretation

As suggested above, drafters do place some reliance on *rules and presumptions* of statutory interpretation, especially those that are themselves set out in legislation. Their attitude to what I have called *philosophies* of statutory interpretation is, however, rather different.

Statutory interpretation in Australia

Professor Suzanne Corcoran has identified nine different theories of statutory interpretation¹⁹ and comments that “the international debate concerning the theoretical bases for interpreting statutes has been ignored in Australia”.²⁰

Certainly that debate has been ignored in Australian legislative drafting offices, for reasons explained below. There may be sound reasons why the debate has been largely ignored in the broader legal community too.

17 *ibid* at 194–195.

18 R Penman, *Legislation, Language and Writing for Action*, Collected Papers, Parliamentary Counsel's Committee Conference on Legislative Drafting, Canberra, July 1992, 33 at 40.

19 S Corcoran and S Bottomley (Eds), *Interpreting Statutes*, 2005, The Federation Press, Sydney, pp 16–25. The theories identified are as follows:

A. Intentionist Theories

- A.1 — Specific Intent Theories—The Literal Approach
- A.2 — Imaginative Reconstruction
- A.3 — Purposive Interpretation

B. Textualist Theories

- B.1 — Soft Plain Meaning Theories
- B.2 — The New Textualism (Hard Plain Meaning Theories)

C. Dynamic Theories

- C.1 — Best Answer Theories
- C.2 — Community-Based Theories
- C.3 — Critical Theories
- C.4 — Pragmatic Theories

20 *ibid*, p 30.

On one view, Australian drafters have no discretion even to think about different philosophies of statutory interpretation. Drafters work in an environment in which their clients (the sponsors of legislation) believe:

- that their policies should be able to be implemented by legal means;
- that those legal means will be identified and articulated by the drafters;
- that the articulation of the policies will be considered in a deliberate way by the Parliament; and
- that, if approved by the Parliament, the policies proposed by the sponsors of the legislation will then be implemented.

There is no room in this process for consideration of, or choice among, assorted theories of statutory interpretation, especially when some of those theories contemplate the courts taking over substantial elements of the legislative responsibility that is constitutionally conferred on our parliaments. The “Dynamic” theories of construction raise the most significant issues. For instance, “Best Answer” theories require statutes to be construed “in light of the purposes that they may best be made to serve” rather than “the intentions which the legislators had in drafting them”.²¹

It could be argued that the drafter’s environment as described above is an idealistic fantasy and, therefore, should not be used as an excuse for ignoring philosophies of statutory interpretation.

It is true, for instance, that words are not as reliable in carrying and conveying meaning as the description assumes. It is also true that drafters and policy makers are not as good as the description assumes at identifying and solving every issue that might arise in implementing a policy through legislation. But those qualifications do not undermine the basic proposition that Australian statutes are the deliberate and conscious products of fairly well-functioning intelligences and cannot be dismissed as accidental artefacts, available for the creative enjoyment of readers, according to their personal philosophies and preferences.

Sources of statutory interpretation theories

The more creative theories of statutory interpretation may be a direct response to aspects of the processes by which, and the time at which, legislation is made.

Philosophies of statutory interpretation have their place in dealing with legislation that is long-standing, expressed in general terms, and difficult to change. In Australia that covers the Constitution, and not much else.

Such philosophies may also have a role in dealing with legislation that is not well-drafted, not part of a coherent statute book and, again, difficult to change. In Australia, in the 21st century, there is little legislation that fits that description.

²¹ *ibid*, p 22.

The Australian environment

Most Australian legislation is fairly modern, well-drafted and part of a coherent statute book. It is passed by functioning Parliaments and is relatively easy to change if genuine deficiencies become apparent. There are a number of factors that contribute to this situation.

The processes by which legislation is developed combine to ensure that it is of fairly high quality, in the sense that it effectively articulates its sponsors' intentions in a way that is generally understandable by both the legislators and subsequent users. Mistakes, ineffective provisions and internal inconsistencies in a jurisdiction's legislation are rare. Reasons for this include the following:

- There is a recognised profession of legislative drafting, whose members have a near-monopoly on the activity of legislative drafting.
- Professional legislative drafters work almost entirely in centrally co-ordinated groups, supported by a range of technological aids that further the co-ordination and quality control of legislation.
- Policy development is also carried out largely by professionals, and is to a significant extent centrally co-ordinated.

The political processes are also centralised and fairly well co-ordinated. Legislation is examined by bureaucrats with a central co-ordinating role and by party committees. Party discipline is generally tight and it is rare for unconsidered amendments moved in the Parliament to be passed. Even during the 24 years that ended in 2005, during which the federal government of the day did not control the Senate, most amendments passed in the Parliament were negotiated between the government and the non-government parties, and many of them were drafted by the same co-ordinated group of professional legislative drafters who were responsible for the government's original legislation.

Where genuine deficiencies in legislation become apparent (by which I mean cases in which the legislation is not legally effective to implement the sponsors' intentions), they are usually corrected by further legislation quite quickly. The process adopted in the taxation area of announcing that proposed changes to legislation will take effect from the date of the announcement may be objectionable in some respects, but it is a clear signal that the Executive and the Parliament will handle identified deficiencies, rather than leaving them to be dealt with by the courts with the aid of philosophies of statutory interpretation.

Furthermore, to the extent that legislation *is* difficult to change for other than practical reasons (for instance, because there is a difference of opinion within the Parliament or even within the government), that in itself is a good reason for its current operation not to be circumvented by the courts using a particular philosophy of statutory interpretation.

Comparison with similar jurisdictions

The central co-ordination and control of the Australian drafting and legislative systems contrasts in significant ways with the systems in other common law countries with similar legal histories.

For instance:

- Neither the drafting nor the policy-making processes in the US federal legislature have anything like the co-ordination found in Australia. The drafting offices operate as the chambers of a group of independent barristers, while legislation often involves a wide range of political compromises collected into a single Act without any regard to their policy coherence.
- In the United Kingdom and New Zealand the drafting arrangements are similar to those in Australia, but the legislative process involves more substantial rewriting of Bills through committee stages in the Parliament.

Thus, in those jurisdictions, the chances of inconsistency or incoherence in legislation are substantially higher than in Australia.

This may go some way to explaining why there are relatively few major statutory interpretation cases in Australia and why most of the ones that matter involve interpreting the Constitution.

Project Blue Sky

Project Blue Sky,²² one of the rare High Court cases that really turned on questions of statutory interpretation without involving the Constitution, is a useful case study to illustrate several of the points I have made about statutory interpretation. For a start, it only arose because of a departure from the centrally co-ordinated drafting and policy-making processes that I have described above. It also provides some interesting examples of approaches to statutory interpretation that would make drafters' lives quite impossible if drafters took them too seriously.

The case concerns the interpretation of arguably inconsistent pieces of legislation; namely, an Act and a set of program standards made under the Act.

The *Broadcasting Services Act* 1992 required the Australian Broadcasting Authority (the ABA) to make program standards for certain television broadcasting.

It also required the ABA to perform its functions (including making standards) in a manner consistent with Australia's obligations under treaties or international agreements.

The ABA made a program standard setting out Australian content requirements that were inconsistent with part of the Closer Economic Relations Trade Agreement with New Zealand.

Project Blue Sky, a New Zealand group with a role in encouraging the New Zealand film and television industry, challenged the ABA standard, and the case went all the way to the High Court.

The *Broadcasting Services Act* was drafted in OPC and passed by the Parliament. The ABA standards were not. They might have been drafted by the Office of Legislative Drafting, which drafts some subordinate legislation, but were probably drafted within the ABA itself. They were disallowable instruments, which meant that they would have

²² *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28.

been tabled in the Parliament but could have come into force without any parliamentary consideration if no disallowance motion was moved. In other words, the provenance of the ABA standards was quite different from that of the Act.

Was there any inconsistency?

From a drafter's perspective, the first oddity about this case was why anyone bothered to defend the standards challenged by Project Blue Sky, since they were so clearly beyond the ABA's power. However, since even the High Court was prepared to see the case as involving two pieces of possibly operative legislation, it seems that the matter was not so clear-cut.

In the High Court, the majority judges suggested that a requirement in the Act that the ABA perform its functions in a manner consistent with Australia's obligations under any convention to which Australia is a party "contains the potential for conflict with the objects of the Act" because "it is not difficult to imagine treaties entered into between Australia and a foreign country which may be utterly inconsistent with those objects".²³

While it is true, as a matter of legal theory, that Parliament passes Acts and governments enter into treaties, it is also true as a practical matter that the *Broadcasting Services Act* is government legislation and, clearly, the intention of that legislation was not to create the potential for conflict, it was to ensure that there would not be any conflict.

That is, the clear intention was that the ABA, in making standards, would be constrained by the range of government policies expressed in the Act and in any treaties that the government happened to enter into.

This is where the different provenances of the provisions are relevant. The Act was drafted and passed in a system with central co-ordination and various quality control points. The policy enshrined in the *Broadcasting Services Act* — that standards had to be consistent with international treaties — would have represented government policy, as approved at least by the Prime Minister and possibly by the Cabinet. Furthermore, that requirement was enacted by a deliberate Act of the Parliament.

The program standards, on the other hand, may have been prepared entirely within the ABA and, at most, might have received ministerial clearance. They had to be tabled in the Parliament but, if no disallowance motion was moved, there would have been no conscious parliamentary consideration. In other words, the program standards might have slipped under the government's policy radar.

It is therefore not clear what possible justification there could be, having regard to the terms of the legislation, for seeking to identify a potential for conflict between the two pieces of legislation — when the potential could only be realised, by definition, if the ABA ignored the instructions in the Act and made a standard that was not consistent with those instructions. Rather, the justification for alleging a conflict emerged only when the ABA acted inconsistently with the empowering legislation — which hardly seems to be a legitimate reason for then attempting to interpret the original legislation to mean anything other than exactly what it said.

23 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [60].

Do courts (or counsel) read legislation properly?

The judgments have other elements that are disturbing for legislative drafters. The majority judges in the High Court quote from the full Federal Court majority judgment, which claimed that s 122 of the Act required the ABA to provide for preferential treatment of Australian programs, when all that s 122 actually required was that the ABA make standards relating to the Australian content of programs. The High Court corrected that claim firmly²⁴ but, for the drafter, there is still a problem if the Federal Court cannot be relied on to understand the difference between:

- making standards *about* Australian content; and
- giving preferential treatment to Australian programs.

Chief Justice Brennan’s judgment suggests a similar problem, given some of the arguments, presumably made by counsel, that the Chief Justice felt obliged to deal with; for instance, the argument that because two concepts — Australian content and Australian provenance — are alternative criteria for identifying an “Australian drama program”, one of those concepts must include the other. If drafters have to assume that providing two alternative criteria may be interpreted as an implicit statement that one of the criteria includes the other (or perhaps that each includes the other), it would become completely impossible to draft effective or comprehensible legislation.

Is public inconvenience more important than parliamentary sovereignty?

The High Court majority’s final solution that “courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act”²⁵ raises further problems for the legislative drafter. It is possible to imagine that there may be some kinds of breaches, and some circumstances, in which that might be an appropriate approach. But from the perspective of a legislative drafter, if that approach is to be applied to breaches that go to the heart of the power to act, it goes close to undermining the whole concept of Parliament being able to delegate limited legislative powers to another, apparently subordinate, authority.

Can standard delegations of legislative power be relied on?

The conferral of subordinate legislative power on the ABA was not identical in form to the usual regulation-making power conferred on the Governor General, but it had much the same elements:

- a requirement to determine standards (s 122(1));²⁶
- a requirement that the standards “must not be inconsistent with” the Act (s 122(4)); and

24 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [86].

25 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [97].

26 The fact that the ABA was required, rather than just empowered, to make standards may have some significance, but it is hard to argue that this difference somehow rendered the “not inconsistent with” requirement ineffective or inoperative.

- a provision of the Act apparently intended to operate as a constraint on the subordinate legislation-making power, namely, a requirement in the Act that the ABA “is to perform its functions in a manner consistent with ... Australia’s obligations under ... any agreement between Australia and a foreign country”.²⁷

On the basis of the High Court’s finding that the inconsistent standard was unlawfully made but not thereby invalid, where does this leave the drafters with regulation-making powers in the future? It is not clear how much more a drafter can do to convince a judge that a power to make a subordinate instrument “not inconsistent with” empowering legislation does *not* include a power to make an instrument that *is* inconsistent.

Can Acts be read as a whole or is order significant?

The judgment implies that there is some significance in the order of provisions in the Act. The majority judges said “the fact that s 160 regulates the exercise of functions already conferred on the ABA rather than imposes essential preliminaries to the exercise of its functions strongly indicates that it was not a purpose of the Act that a breach of s 160 was intended to invalidate any act done in breach of that section”.²⁸ The reference to the functions having been “already conferred” appears to be important—but “already” only means, in this context, “by an earlier provision in the Act”, not “by a provision enacted at an earlier time than the provision under examination”. What is interesting is that, if the order of the provisions is in fact important, the court is treating the earlier provision as prevailing over the later one — contrary to the presumption mentioned above²⁹ and described by Pearce and Geddes as a “rule of last resort”.³⁰

Is the drafter to draw from this that, if s 160 had in fact been s 3, the court would have reached a different conclusion?

It is common for provisions in Acts to allow or require specific matters to be prescribed for the purposes of those provisions, with the actual regulation-making power specified in general terms at the end of the Act. Does this mean that an express reference in a particular provision to prescribing matters for the purposes of that provision is not restricted by the general statement that the regulation-making power covers only regulations “not inconsistent with” the Act? Can drafters only get the limitation on regulation-making powers taken seriously by the courts if those powers are moved to the early parts of each Act? Would that be safe having regard to the “rule of last resort” mentioned above?

Judicial comments in general

My comments about *Project Blue Sky* indicate that particular judicial approaches to interpretation may cause problems for drafters. On other occasions, judicial comments that should be relevant to drafters are unhelpful because of the way the judiciary operates.

27 *Broadcasting Services Act 1992*, s 160.

28 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [94].

29 Under the heading “Other rules and presumptions”, above, p 94.

30 Pearce and Geddes, *op cit* n 13, p 115.

The difficulties of extracting clear reasons for a decision from several separate judgments, written in several different styles by judges whose positions as members of the majority or minority might shift in the course of a single judgment from issue to issue (and who often do not even address the same issues in the same order or even under the same names) affect most lawyers, not only legislative drafters.

Drafters, however, may find these difficulties more frustrating than other lawyers do. Now that it is generally accepted that judges make law, questions about the form in which judges make law cannot be ignored. Presumably, it would not be acceptable for drafting offices to produce two or three or even seven different versions of each Bill, drafted by different drafters, which could all be enacted by the Parliament and which, *taken together*, would form the law on the particular subject. Should it remain acceptable for judges to make law in this fashion?

Conclusions

In this article I have tried to give some insights into the processes by which legislation comes into being. It will be apparent that the processes are far from ideal and that, in many ways, they are not particularly well adapted to the difficult task of using an infinitely flexible but correspondingly imprecise language to communicate complex concepts to a wide range of different audiences.

At the same time, I contend that, at least in Australia, the legislative processes produce legislation that is usually good enough not to raise difficult questions of statutory interpretation; and certainly good enough for interpretation to start with the premise that the words mean what they say.



Statutory Interpretation in Canada

The Legacy of Elmer Driedger

Professor Ruth Sullivan*

Part 1 – Introduction

Statutory interpretation in Canada has been powerfully influenced by the work of Elmer Driedger. For many years he was Deputy Minister of Justice for Canada and an adjunct Professor of Law at the University of Ottawa. In both capacities he worked to develop a new style of drafting for federal legislation in Canada and a new approach to statutory interpretation. He founded and taught a graduate program in legislative drafting at the University of Ottawa, which trained many of the legislative drafters currently working as legislative counsel for Canadian provincial and federal governments. An important part of his program was an in-depth study of the rules of statutory interpretation. Driedger was keenly aware of the close and complex interaction between drafting and interpretation. If law-makers are to achieve their desired results, legislation must be drafted having regard to how it will be interpreted by those who will apply it. Conversely, if interpretation is to give effect to the intentions of the law-maker, the legislative text must be read having regard to the conventions of legislative drafting, as well as the contexts in which legislation is conceived, prepared and operates.

Driedger's lectures on statutory interpretation at the University of Ottawa led to the publication in 1974 of *Construction of Statutes*.¹ In that text Driedger identified three dimensions of interpretation:

1. The meaning of legislation, whether clear or ambiguous.
2. The purpose of legislation, that is, the changes the law-maker hoped to effect by introducing legislation.
3. The consequences of applying legislation to particular facts.

He noted that these dimensions are reflected in the three competing “master rules” of interpretation: the literal meaning rule, the mischief rule and the golden rule.²

* BA (Minn) MA (Concordia) BCL (McGill) LLB (McGill) MLeg (Ott), Professor of Law, University of Ottawa, Canada.

1 EA Driedger, *Construction of Statutes*, 1974, Butterworths, Toronto.

2 These three rules were discussed and to some extent derided in an earlier article, which remains influential in Canada: see J Willis, “Statute Interpretation in a Nutshell” (1938) 16 *Can Bar Rev* 1. I find Willis’s “Nutshell” offers a very inadequate account of the current practice of interpreters.

Of the mischief rule he wrote:

“*Heydon’s Case* is an expression of the doctrine of ‘equitable construction’, which prevailed in the fifteenth and sixteenth centuries. In those days the intent of the statute was more to be regarded and pursued than the precise letter.”³

Of the literal rule he wrote:

“What came to be called the literal rule was a revolt against judicial legislation, and under it, the words of the Act were dominant. Judges refused to go outside the statute; they considered the object or purpose of the Act only ‘if any doubt arises from the terms employed by the legislature’ ... In other words, regard was had only to the words of the Act, and only if the ‘words in themselves’ were not ‘precise and unambiguous’ did the judges consider the object [or other extra-textual considerations]. This is what they meant by ‘literal construction’.”⁴

Driedger had considerable difficulty with the golden rule. He was alarmed by the possibility that judges might rely on the golden rule to substitute their own subjective views of good policy for those of the law-maker. Of the golden rule he wrote:

“Only when there is an ambiguity, obscurity or inconsistency that cannot be resolved by objective standards is it permissible to resort to subjective standards of reasonableness in order to avoid unreasonable consequences ... [I]t is not legitimate to use consequences as an excuse to place an unreasonable construction on words that can have only one reasonable grammatical construction.”⁵

Driedger’s particular contribution to statutory interpretation in Canada was to integrate these three rules into a single formula which he called “the modern principle”:

“Today there is only one principle or approach, namely, the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”⁶

Since its initial appearance in 1974, this passage has been continually cited and relied on by Canadian courts. In 1998, in *Rizzo v Rizzo Shoes Ltd*, it was formally adopted by the Supreme Court of Canada as stating its preferred approach.⁷

3 EA Driedger, *Construction of Statutes* (2nd ed), 1983, Butterworths, Toronto, p 81.

4 *ibid*, pp 82–83.

5 *ibid*, p 86.

6 *ibid*, p 87.

7 See *Rizzo v Rizzo Shoes Ltd (Re)* [1998] 1 SCR 27. In *Bell Express Vu Ltd Partnership v Rex* [2002] SCC 42 at [26], Iacobucci J wrote: “Driedger’s modern approach has been repeatedly cited by this court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stuart Investments Ltd v The Queen* [1984] 1 SCR 536 at 578 per Estey J; *Québec (Communauté urbaine) v Corp Notre-Dame de Bon-Secours* [1994] 3 SCR 3 at 17; *Rizzo & Rizzo Shoes Ltd (Re)* [1998] 1 SCR 27 at [21]; *R v Gladue* [1999] 1 SCR 688 at [25]; *R v Araujo* [2000] 2 SCR 992, [2000] SCC 65 at [26]; *R v Sharpe* [2001] 1 SCR 45, [2001] SCC 2 at [33] per McLachlin CJ; *Chieu v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 84, [2002] SCC 3 at [27]. I note as well that, in the federal legislative context, this court’s preferred approach is buttressed by s 12 of the *Interpretation Act* 1985 RS c I–21, which provides that every enactment “is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”.

Driedger's modern principle is obscure in a number of respects. Presumably, if something is part of the entire context, it is automatically admissible as evidence of legislative intent. But what is to be included in the "entire context"? What is meant by "intention of Parliament" apart from the "object of the Act"? What if the grammatical and ordinary sense of the legislative language is at odds with, rather than in harmony with, the object of the Act or the intention of Parliament? What if the grammatical and ordinary sense of the legislative language leads to absurd consequences? How do the common law norms embodied in the presumptions of legislative intent figure in the modern principle?

Although Driedger addresses these questions in his book, his explanations are rarely referred to. Most often the courts do not even acknowledge the questions, much less address them in a clear and systematic way. The result is somewhat disconcerting. On the surface it appears that Canadian courts have achieved a uniform, comprehensive and principle-based approach to statutory interpretation. In practice, however, there is considerable variation in the courts' approach and considerable confusion about a number of important issues, not least the role that judges may legitimately play in resolving statutory interpretation problems. Some judgments are rooted in textualism, some in intentionalism; some are pragmatic.⁸ Although there are real differences among these approaches, each purports to be an application of Driedger's modern principle and, therefore, to be justified.

In Part 2 of this article I briefly explore the beneficial impact that Driedger's modern principle has had on the practice of statutory interpretation in Canada. If it has not caused, it has at least supported a robust and increasingly sophisticated body of interpretive case law. This is one area where the Bench is ahead of the Bar in both knowledge and skill.

Part 3 looks at the shortcomings of the modern principle. The most serious of these, in my view, is its assumption that textual meaning can be harmonised with the purpose and scheme of the legislation, and with legislative intent. In cases that require adjudication, such harmony may be impossible. In fact, one needs a judge to hear and decide most cases precisely because the factors relevant to interpretation provide support for competing interpretations. A second shortcoming is that the modern principle focuses attention on certain types of interpretation issues, namely those involving disputes about the meaning of a text, and ignores others, such as gaps and mistakes or conflicting provisions. This has, on occasion, derailed proper analysis of the issue before the court. My final complaint about the modern principle is that it does not adequately delineate what is included in "the entire context".

8 To summarise, **textualists** make the meaning of the text the touchstone of interpretation and reject all extra-textual evidence of the appropriate outcome; **intentionalists** make legislative intent the touchstone of interpretation and therefore allow extra-textual evidence of legislative intent but reject reliance on judge-made norms; **pragmatists** believe that in every case judges should rely on text, evidence of legislative intent, and judge-made norms to resolve the statutory interpretation problem. These competing approaches to statutory interpretation are explored in more detail below.

Part 2 – The beneficial impact of Driedger’s modern principle

The modern principle parsed

To resolve an interpretation problem, the modern principle requires interpreters to go through five steps.⁹

1. **Determine the ordinary meaning of the contentious provision.** Ordinary meaning is the meaning that spontaneously comes to mind upon reading words in their immediate context. The immediate context consists of an *internal* and *external* element. The *internal element* is the *rest of the sentence in which words appear*. The *external element* is the *entire content of the interpreter’s mind*, including knowledge of language, shared knowledge of the world and personal knowledge and experience.
2. **Identify the doubtful words or expressions.** Those are words or expressions that might, but do not self-evidently, apply to the facts in question. Most legislative provisions have two parts: a legal fact situation and a legal consequence. The legal fact situation consists of the facts that have to be present and the conditions that have to be met before the legal consequence can operate. To determine whether a provision might apply to an actual fact situation, the first step is to identify the legal fact situation set out in the provision. The second step is to compare the legal situation to the actual situation, word by word, in order to identify possible areas of doubt.

Consider the following text and facts:

No person shall sleep in a public transportation terminal.

Any person who breaches this regulation is guilty of an offence and is liable to [a specified punishment.]

Angus is sitting on a bench inside a bus terminal waiting for a bus when he nods off over his newspaper.

The legal fact situation here requires a person; the person must engage in the act of sleeping; and the sleeping must occur in a transportation terminal. A comparison of the actual fact situation and the legal situation yields the following: Angus is clearly a person; and a bus terminal is clearly a transportation terminal; but it is not clear whether nodding off while reading counts as “sleep” for purposes of the rule. “Sleep” here could refer to any lapsing into an unconscious state of mind; alternatively, it could require a conscious choice to spend a period of time in a supine position in that state of mind. Therefore, the application of “sleep” to these facts is an area of doubt.

3. **Consider the “entire context” of the doubtful words or expression.** This includes (at least) the rest of the Act in which the words occur, related legislation (statutes in *pari materia*) and the statute book as a whole.

⁹ The modern principle has been parsed in various ways. What is set out in the text reflects my own reading of the principle.

4. **Consider the objects of the Act and the scheme devised by Parliament to achieve those objects.** Determine how the provision in question fits into the scheme and helps to promote the legislative purpose.
5. **Finally, consider the “intention of Parliament”.** At first glance, the reference to the “intention of Parliament” in the modern principle appears to be tautologous, and both courts and academic scholars have remarked on this point.¹⁰ But if one takes the trouble to read the whole of Driedger, the reference turns out to be sneaky rather than tautologous.

Here is what Driedger says about this aspect of interpretation:

“It may be convenient to regard ‘intention of Parliament’ as composed of four elements, namely:

1. The expressed intention — the intention expressed by the enacted words;
2. The implied intention — the intention that may legitimately be implied from the enacted words.
3. *The presumed intention — the intention that the courts will in the absence of an indication to the contrary impute to Parliament.*
4. The declared intention — the intention that Parliament itself has said may be or must be or must not be imputed to it.” (my emphasis)

The striking feature of this description is that it folds the entire body of common law legal norms, including the presumption that the legislature does not intend to produce absurd consequences, into the concept of legislative intent. Given that these aids to interpretation are relied on in the absence of evidence of actual intent, this characterisation is, at the least, surprising.

Repudiating textualism

In my view the most important thing about Driedger’s modern principle is that it is inconsistent with textualism, the approach to statutory interpretation based on the plain meaning rule. Under the plain meaning rule, if the meaning of a legislative text seems, upon first reading, to be clear or “plain”, the court must give effect to that plain meaning despite compelling evidence that the legislature intended something different or that adopting the plain meaning would violate important legal norms or otherwise lead to absurdity. A court may look to factors other than textual meaning only if the text to be applied is ambiguous. Under Driedger’s modern principle, ambiguity is not a prerequisite. Even if the text on initial reading seems plain, the interpreting court must nonetheless consider the entire context, including the purpose and scheme, and the intention of the legislature.

¹⁰ See, for example, S Beaulac and PA Côté, “Driedger’s ‘Modern Principle’ at the Supreme Court of Canada: Interpretation, Justification, Legitimation” (2006) 40 *Thémis* 131 at 164. In *R v Jarvis* [2002] 3 SCR 757 at [77], the Supreme Court of Canada reformulated the modern principle so as to drop the reference to legislative intent as an element with which the ordinary and grammatical meaning must be harmonised.

Textualism claims that the *only* legitimate source of legislative intent is the ordinary meaning of the words found in the text. One can understand the appeal of this position. In principle, ordinary meaning is the meaning that is presupposed by the drafters, the meaning intended to be enacted by the legislature and the meaning that will be understood by those who must administer and comply with the statute. It is the single golden thread that ties legislative process to legislative enactment to the application and enforcement of legislation in particular cases. It is therefore the only truly legitimate source of interpretation. Only if this golden thread is broken may interpreters resort to default strategies, such as extra-textual evidence of legislative intent.

Textualism's claim is based on two assumptions, one about language and one about the proper role of the courts in a democracy. First, textualists assume that the ordinary meaning of words and word combinations constitute a fixed code, shared by everyone in a language community. This code enables authors to embody mental abstractions such as directives in a text and enables readers to extract the intended message simply by decoding the text. Modern linguists have acknowledged that, in practice, this model of communication bears little, if any, relation to reality.¹¹ The construction of meaning from a text is a complex, multi-faceted process. It involves assumptions about the origin of the text, the genre in which it is written, its author, its intended audience, its purpose, the cultural tradition in which it has operated and operates, and more.¹² By insisting that interpreters consult the entire context and achieve harmony between ordinary meaning, scheme, object and legislative intent, Driedger's modern principle indirectly acknowledges the real complexity of interpretation and, to that extent, repudiates the textualist assumption.

Secondly, textualists assume that the judicial role in interpreting a text is properly limited to discerning and declaring the intention of the legislature. If that intention is not self-evident from simply reading the text, then resort may be had to other plausible evidence. But resort must not be had to judicial notions of reasonableness, fairness or good policy unless all else seriously fails. Driedger's modern principle is inconsistent with this second textualist assumption as well. In so far as legislative intention is understood to include presumed intent, or alternatively, in so far as the entire context of a legislative provision is understood to include the common law tradition as part of the legal context, judicial notions of reasonableness, fairness and good policy are relevant factors in every interpretation endeavour. They are not to be dismissed as inferior considerations, relevant only when other factors fail to resolve the interpretation issue. Rather they are to be taken into account at the outset in the initial effort to determine the meaning of the text and whether it is ambiguous.

Another, related implication of the modern principle is that statutory interpretation involves *work* and outcomes require *justification*. Interpreters are not entitled to simply

11 For a discussion of relevant authorities, see R Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998–1999) 30 *Ottawa Law Review* 1–45.

12 For an analysis of these factors in the context of legislation, see F Bowers, *Linguistic Aspects of Legislative Expression*, 1989, University of British Columbia Press, Vancouver, pp 15–81.

read the text and declare that their personal linguistic intuition is what the legislature intended. Personal intuition must be tested against a range of considerations, which may or may not support the initial impression. The conclusion, often based on balancing competing considerations, must be justified by an account of the work the interpreter has done. The themes of work and justification are examined in more detail below.

Part 3 – Some shortcomings

Not every interpretation problem is about the meaning of legislative text

Driedger's modern principle offers a blueprint for determining the legal meaning of a legislative provision. But there is more to statutory interpretation than disputes about the meaning of the text. Sometimes the meaning is clear, but there is a gap in the legislative scheme and the question is whether the court can do anything about it. Sometimes there is overlap between a clear provision and the common law, and the issue is whether both apply. Many disputes are about the circumstances in which a court should update a statute or decline to apply a legislative rule even though its meaning appears to be clear. In short, determining the meaning of words in a legislative text is an important task of interpreters, a necessary first task, but it is only part of the work of interpretation.

Table 1 indicates the range of problems that arise in statutory interpretation and how they are addressed.

Table 1 – Statutory interpretation problems and approaches to their resolution

Type of problem	Type of argument to resolve problem
Ambiguous text	Disputed meaning
Evolving context	Static versus dynamic interpretation
Over-inclusive text	Non-application (This includes arguments about territorial and temporal application and immunities.)
Under-inclusive text	Incorrigible gap in legislative scheme, or fill by necessary implication, or supplement with common law rule or remedy
Contradictory or incoherent text	Corrigible mistake
Overlapping provisions	(No conflict): Overlap versus exhaustive code (Conflict): Paramountcy rule ¹³

In a **disputed meaning argument**, the interpreter claims that, properly interpreted, the provision in question has a particular preferred meaning. He or she must establish that

¹³ This account of the several types of argument available to interpreters, and the claims associated with each, is based on R Sullivan, "Statutory Interpretation in a Nutshell" (2003) 82 *Can Bar Rev* 51 at 64–65.

this interpretation is the ordinary meaning, an intended technical meaning, or at least a plausible meaning. If the legislation is bilingual, the interpreter must address both language versions.

For instance, in *Perrier Group of Canada Inc v Canada*,¹⁴ the court had to decide whether the carbonated water sold under the Perrier label was a “beverage” within the meaning of the *Excise Tax Act*. Perrier Group argued that “beverage” meant a manufactured drink, produced by mixing ingredients, and therefore excluded naturally carbonated water. The Minister of Revenue argued that “beverage” meant any liquid fit for human consumption and, therefore, included water. The court preferred the Minister’s understanding of the term.

In a **static versus dynamic interpretation argument**, the interpreter claims that the text should be interpreted as it would have been when the text was first enacted (static interpretation) or interpreted in light of current understanding of language and social conditions (dynamic interpretation).

For instance, in *Harvard College v Canada (Commissioner of Patents)*,¹⁵ the issue was whether the so-called oncomouse was an “invention” within the definition of the *Patent Act*, which included “any new and useful art, process, machine, manufacture or composition of matter”. Even though a genetically-altered mouse could be thought of as a “composition of matter”, the majority held that Parliament had not contemplated the patenting of higher life forms when it drafted the definition of “invention”. Such a “radical departure from the traditional patent regime” could not be effected through interpretation but required legislative intervention.

In a **non-application argument**, the interpreter identifies a reason not to apply a provision to the facts even though, given its ordinary meaning, it would otherwise apply. A provision may be “read down” in this way for any number of reasons: to promote legislative purpose; avoid absurdity; or comply with presumed intent, including, in particular, the presumptions against retroactive application and interference with vested rights.

For example, in *Re Vabalis*,¹⁶ a married woman applied to change her name from Vabalis to Vabals under Ontario’s *Change of Name Act* 1980. Section 4(1) of the Act provided as follows:

“A married person applying for a change of surname shall also apply for a change of the surnames of his or her spouse and all unmarried minor children of the husband or of the marriage.”

Since Ms Vabalis had not adopted her husband’s name when she married, applying this provision to her would have required her husband, whose surname was different, to

14 [1996] 1 FC 586 (CA).

15 [2004] 4 SCR 45.

16 (1983) 2 DLR (4th) 382 (Ont CA).

change his name to Vabals. The court held that this requirement was absurd and should be limited to married applicants who have the same surname as the spouse. In effect, the court narrowed the scope of the provision by reading in words of qualification:

“A married person applying for a change of surname *who has the same surname as his or her spouse* shall also apply for a change of the surname of the spouse.”

In an **incurable gap argument**, the interpreter claims that the legislation, as drafted, cannot apply to the facts even though, given its purpose, it probably should apply. Whether this omission is deliberate or inadvertent, the court has no jurisdiction to fill a gap in a legislative scheme or otherwise enlarge the scope of legislation.

Thus, in *Beattie v National Frontier Insurance Co.*¹⁷ an insured claimed no fault accident benefits under Ontario’s statutory scheme. Under the regulations, a claimant who was driving the vehicle at the time of the accident was ineligible for certain benefits if:

- the claimant knew the vehicle was uninsured;
- the claimant did not have a valid driver’s licence; or
- the claimant was operating the vehicle without the owner’s consent.

In addition, s 30(4) of the relevant Act provided that, if the claimant “was engaged in ... an act for which [he or she] is charged with a criminal offence”, the insurer was obliged to hold in trust any amounts payable under the scheme:

“until the charge is finally disposed of, at which time the amounts:

- (c) shall be returned to the insurer, if the [claimant] is found guilty of the offence ...; or
- (d) shall be paid to the [claimant], if ... not found guilty...”

Beattie was found guilty of impaired driving. He conceded that, under s 30(4)(c), the benefits paid into trust pending his conviction had to be returned to the insurer. However, he claimed post-conviction benefits on the grounds that there was nothing in the legislation that prevented him from receiving those benefits.

The court reluctantly agreed. Although it was clear that the law-maker had intended to deny benefits to a person in Beattie’s position, there was a gap in the legislative scheme. Section 30(4) dealt exclusively with benefits payable before disposition of the charge, but there was nothing in the Act or regulations denying a claimant access to benefits once he or she was convicted of an offence.

In a **necessary implication argument**, the interpreter claims that a person or body has the authority to do something that is not expressly mentioned in the legislation, but is necessary if the person or body is to carry out the functions that are expressly assigned.

In *Bell Canada v CRTC*,¹⁸ for example, the court held that the Canadian Radio-Television and Telecommunications Commission had the power to retroactively revise its interim orders even though such a power was not expressly conferred. The court noted that

17 (2003) 68 OR (3d) 60 (CA).

18 [1989] 1 SCR 1722.

the powers conferred on the Commission were given to ensure that telephone rates and tariffs are, at all times, just and reasonable. From this it followed that “the power to make appropriate orders for the purpose of remedying interim rates which are not just and reasonable is a necessary adjunct to the power to make interim orders.”¹⁹

In a **supplementation argument**, the interpreter concedes that the legislation as drafted does not apply but claims that the common law does apply so as to supplement the under-inclusive legislation. Supplementation arguments are generally successful when the court relies on its *parens patrie* jurisdiction or its inherent jurisdiction to control its own process.

For example, in *Beson v Director of Child Welfare for Newfoundland*,²⁰ the court acknowledged that, although the province’s *Adoption of Children Act* created various appeals to the Adoption Appeal Board, it did not provide for an appeal in the circumstances of the case. Wilson J wrote:

“If the Besons had indeed no right of appeal under the statute ... there is a gap in the legislative scheme which the Newfoundland courts could have filled by an exercise of their *parens patriae* jurisdiction.”

In a **corrigible mistake argument**, the interpreter claims that the provision in question contains a drafting mistake, which must be corrected before determining whether the provision applies to the facts. He or she must establish what the legislature clearly intended and what the text would have said had it been properly drafted. This problem arises quite often in interpreting bilingual legislation when the two versions say different things.

In *Morishita v Richmond (Township)*²¹ the court had to interpret a provision in a municipal by-law that referred to s 4 of the same by-law. Since the reference to s 4 was incoherent, while the reference to s 5 made good sense, the court concluded that the law-maker had intended to refer to s 5 and it interpreted the by-law accordingly.

In the absence of conflict, if two or more provisions apply to the same facts, each is to be applied as written. Although not articulated as such, the courts work with a **presumption of overlap**. Any law, whether common law or legislation, which could apply is presumed to apply in the absence of evidence to the contrary.

In an **exhaustive code argument**, the interpreter concedes that the overlap between legislative provisions or between legislation and the common law does not create a conflict, but claims that a particular Act or provision was meant to apply exhaustively, to the exclusion of other law, whether statutory or common law.

Thus, in *Gendron v Supply & Services Union of PSAC*,²² the issue was whether a union member could bring an action against the union for breaching the common law duty of

19 [1989] 1 SCR 1722 at 36.

20 [1982] 2 SCR 716.

21 (1990) 67 DLR (4th) (BCCA).

22 [1990] 1 SCR 1298.

fair representation. The court ruled that the duties owed by unions to union members were set out in the *Canada Labour Code* and, on this issue at least, the statute was meant to be an exhaustive code, displacing recourse to the common law.

In a **paramountcy argument**, the interpreter claims that there is a conflict between two provisions or between a provision and the common law, and that one takes precedence over the other on the basis of some principled reason; for example, legislation prevails over the common law or the specific prevails over the general.

In *Insurance Corporation of British Columbia v Heerspink*,²³ Heerspink challenged the statutory right of an insurance company to terminate an insurance contract upon giving 15 days notice without establishing any cause. British Columbia's *Human Rights Code* provided that persons could not be denied a "service ... customarily available to the public ... unless a reasonable cause exists for such denial ...". Reconciling this apparent conflict, Lamer J (as he then was) wrote (at 178):

"When the subject matter of a law is said to be the comprehensive statement of the 'human rights' of the people living in the jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have, through their legislature, clearly indicated that they consider that law and the values it endeavours to buttress and protect are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises."

Obviously the types of argument surveyed above are not mutually exclusive. The problems that arise in applying legislation to a given set of facts can often be framed in more than one way. How a problem is framed can often affect the outcome of a case.

The role of context in statutory interpretation

Driedger's modern principle says that "the words of an Act are to be read in their entire context". Later in his book he explains what context consists of²⁴ but his explanation is usually ignored. This issue turns out to be important in the practice of statutory interpretation in Canada. Everyone agrees, following Driedger, that interpreters must not pronounce on the meaning of a legislative text until the ordinary meaning has been

23 [1982] 2 SCR145.

24 Driedger, op cit n 3, pp 107–108: "Context, then, can be classified as follows. There is Internal Context and External Context. Internal Context is everything contained within the four corners of the Act, and in turn may be divided into Literary Content and Non-Literary Context. The Literary Context consists of the Verbal Context, ie, the grammatical structure, and the Substantive Context, ie the law enacted by the Act. The Non-Literary Context includes what is contained within the Act, but is not part of the actual text of the law, as, for example, the long title, headings, preambles. External Context is the setting of the Act and will here be considered under the headings Social, Legal, Language and Intellectual Contexts." Driedger regards the legal context as a category of the External Context. He writes at p 158: "The general body of the law — statutes and judicial decisions — are included in external context. Law outside the statute under consideration may not be relevant; *but it may always be looked at* and if it is relevant it may have a bearing on the construction of the statute" (my emphasis). Interestingly, Driedger includes legislative evolution as part of the external context. By "legislative evolution" he means the successive versions of a legislative provision, including both re-enactment and amendment, from its initial enactment to the version in force when the relevant facts occurred.

tested against the entire context, and that interpreters must not pronounce the text to be plain or ambiguous until the examination of context is complete. On such an approach the definition of context is crucial. The narrower the definition, the more that is potentially excluded from consideration if, after taking into account the context, the meaning is said to be clear and the plain meaning rule is invoked.

Literary context

Most interpreters would agree that legislative provisions must be read:

- 1 in the context of the Act as a whole (or the regulations and Act together);
2. in the context of statutes *in pari material* (related or interacting legislation); and
3. in the context of “the statute book” (the entire body of legislation in force within a jurisdiction).²⁵

These contexts are both literary and legal. An Act is a distinct literary genre, like a sonnet or a play. Like poets and playwrights, legislative drafters are constrained by a number of conventions, which interpreters rely on in determining the intended meaning of the text. The first and most fundamental convention of legislative drafting is ordinary language use. Drafters choose their words and arrange them in sentences using the same lexicon and grammar, and relying on the same knowledge, as the public that is governed by the legislation. In legislation like the *Criminal Code*, this is the general public, the “average person” on the street.²⁶ In legislation aimed at a specialised audience — manufacturers of aircraft, for example — this is a limited segment of the public with specialised knowledge and a technical vocabulary. In either case, the idea is to use language that conforms to the standards of usage of competent speakers within the audience addressed.

This fundamental idea underlies a number of interpretation rules, including the ordinary meaning rule, the technical meaning rule and the plausible meaning rule:

- **Ordinary meaning rule:** the meaning that spontaneously comes to the mind of a competent reader upon reading the legislative text is *presumed* to be the meaning intended by Parliament. This meaning governs unless the evidence suggests some other meaning was intended.²⁷

25 Strictly speaking, the statute book includes enacted legislation that has not yet come into force.

26 In fact, of course, the average person or the general public is a convenient fiction. The audience to which legislation is addressed, particularly legislation like the *Criminal Code*, is diverse in terms of culture, gender, race, and the like. These differences undermine traditional assumptions about “common” meaning and “common” sense.

27 Notice the difference between the *presumption* in favour of ordinary meaning and the plain meaning *rule*. The former is rebuttable; the latter is not. The former can accommodate the reality that language is more or less clear, and that the degree of clarity can shift as the context is narrowed or enlarged; the latter forces the interpreter to declare a text to be clear or ambiguous in some arbitrarily chosen context. When the plain meaning rule was first articulated in the *Sussex Peerage Case*, the only permissible context was the “internal” context (the words of the Act, excluding titles, preambles and the like). In some applications of the plain meaning rule in Canada, to determine whether the meaning is clear the courts have looked at the provision to be interpreted in isolation from everything else. In other applications, the courts have looked at the Act as a whole, including scheme and purpose, but excluding legal context and presumed intent — all in the name of Driedger’s modern principle.

- **Technical meaning rule:** when legislation deals with a specialised subject and uses language that people governed by the legislation would understand in a specialised way, that specialised understanding is preferred over ordinary usage.
- **Plausible meaning rule:** if the ordinary meaning is rejected to give effect to the actual or presumed intentions of the legislature, the meaning adopted must be one the words are capable of bearing.

While drafters observe the conventions of ordinary language use, they also rely on conventions that reflect the special status and function of legislation. For example, they write in a formal and impersonal style and avoid figurative or decorative language. They choose language with unusual care and use it consistently, without stylistic variation. They say things in a straightforward fashion, using as few words as possible. They avoid repetition and redundancy. These conventions form the basis for the following presumptions relied on in analysing legislative text:

- **Straightforward expression:** The legislature chooses the clearest, simplest and most direct way of stating its meaning; it says what it means and means what it says.
- **Uniform expression:** The legislature uses the same words and techniques to express the same meaning, and different words and techniques to express different meanings.
- **No tautology (“the legislature does not legislate in vain”):** There are no superfluous words in legislation; every feature of the text has a meaningful role in the legislative scheme.
- **Internal coherence:** All the provisions of a legislative text fit together logically and work together coherently to achieve the purposes of the legislature.

These presumptions are in turn the basis of several standard interpretation rules, including:

- **Implied exclusion (*expressio unius est exclusio alterius*):** If something is not mentioned in circumstances where one would expect it to be mentioned, it is impliedly excluded.
- **Associated words (*noscitur a sociis*):** The meaning of a word is affected by the other words to which it is linked in a sentence
- **Limited class (*eiusdem generis*):** When general language follows a series of more specific terms, the class of things referred to by the general language may be read down to refer to a narrower class of things to which the specific terms all belong.
- **Counterfactual implication:** If the legislature had meant x, it would have said y, as it does elsewhere in the statute book. Since it did not say y, it must have meant something different.

Legal context

Driedger points out that the statute book is also a legal context. Insight into the policies and goals that legislation is designed to implement and into the means chosen to

achieve the desired outcomes can be derived from examining the Act, related statutes and the statute book.

Driedger does not discuss the other legal contexts in which legislation is drafted and operates, namely entrenched constitutional law, common law and international law. He prefers to treat these aspects of legal content as presumptions of legislative intent. There are many such presumptions relied on by Canadian courts:

- Strict construction of penal legislation.
- Strict construction of legislation that interferes with individual rights.
- Strict construction of exceptions to the general law.
- Liberal construction of human rights codes.
- Liberal construction of remedial legislation.
- Liberal construction of social welfare legislation.
- Liberal construction of legislation relating to Aboriginal peoples.
- Presumed compliance with constitutional law and Charter values.²⁸
- Presumed compliance with the rule of law.
- Presumed compliance with international law.
- Presumed continuation of common law.
- Presumed non-interference with common law rights.
- Presumption that the legislature does not intend to exacerbate female poverty.
- Presumption against the extra-territorial application of legislation.
- Presumption against the retroactive application of legislation.
- Presumption against the retrospective application of legislation.
- Presumption against interference with vested rights.
- Presumption against applying legislation to the Crown and its agents.

It is also presumed that the legislature does not intend its legislation to produce absurd consequences. The following are well recognised forms of absurdity that the legislature is presumed to avoid:

- Irrational distinctions (treating like things differently or different things the same).
- Irrational, contradictory or anomalous effects.
- Defeating the purpose of the legislation.
- Undermining the efficient application of legislation.
- Violating norms of justice or fairness.

One of the issues that the modern principle leaves unresolved is whether these presumptions of legislative intent are applicable in the absence of ambiguity. On a textualist approach, the answer clearly is no. The court must rely on legislative text alone to resolve an interpretation problem and, *only if that approach fails to resolve the problem* is it then permissible to look at presumptions of legislative intent. On a

²⁸ Charter values refers to the values embodied in the rights and freedoms protected by the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Canadian Act 1982*, being Sch B to the *Canadian Act 1982* (UK), c 11.

pragmatic approach, the answer clearly is yes. On that approach, a court must look at *everything* that is relevant to resolve an interpretation problem, including external evidence of legislative intent and judge-made legal norms, even if the text seems clear. The approach adopted by Driedger hedges on this issue. He excludes judicial norms from the “entire context”, where one would expect them to figure prominently, but includes them under the rubric of “intention of Parliament”, where one would not expect to find them at all.

Unfortunately, Driedger’s eccentric handling of judicial norms has opened the door to the re-emergence of textualism. The judgment of the Supreme Court of Canada in the *Bell Express Vu* case is a good illustration.²⁹ As has become customary, the court began by reciting and endorsing Driedger’s modern principle. It then carried out both textual and purposive analyses taking into account the statute book as a whole and the consequences of competing interpretations. The court’s analysis is exemplary — in so far as it goes. But even though the court embraces the modern principle, its concept of “entire context” is curiously limited:³⁰

“[Driedger’s modern] approach recognises the important role that context must inevitably play when a court construes the written words of a statute...

Other principles of interpretation — such as the strict construction of penal statutes and the ‘Charter values’ presumption — only receive application where there is ambiguity as to the meaning of a provision...

What, then, in law is an ambiguity? To answer, an ambiguity must be ‘real’ ... The words of the provision must be ‘reasonably capable of more than one meaning’ (*Westminster Bank Ltd v Zang* [1966] AC 182 (H.L.) at p 222, *per* Lord Reid). By necessity, however, one must consider the ‘entire context’ of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J’s statement in *Canadian Oxy Chemicals Ltd v Canada (Attorney General)* [1999] 1 SCR 743 at [14], is apposite:

‘It is only when genuine ambiguity arises between two or more plausible readings, *each equally in accordance with the intentions of the statute*, that the courts need to resort to external interpretive aids’ (emphasis added), to which I would add, ‘including other principles of interpretation’...

It is clear from these passages that the court does not regard either the presumptions of legislative intent or traditional “extrinsic aids” as part of the “entire context” of a legislative provision. It offers no justification for these exclusions.

Later in *Bell Express Vu*, the court focuses on a presumption that is heavily relied on in Canadian interpretive practice; namely, presumed compliance with Charter values. The court says at [62]:

“Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial

29 *Bell Express Vu Ltd Partnership v Rex* [2002] 2 SCR 559.

30 *Bell Express Vu Ltd Partnership v Rex* [2002] 2 SCR 559 at [27]–[29].

proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that ‘it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not’ ... it must be stressed that, to the extent this court has recognised a ‘Charter values’ interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity, that is, where a statutory provision is subject to differing, but equally plausible, interpretations.”

I certainly agree that it would be a mistake to rely on presumed compliance with the Charter to the exclusion of other considerations. Too often counsel rely on the presumptions of legislative intent in lieu of — instead of *in addition to* — the hard work of textual and purposive analysis. However, in my view, it is equally a mistake to exclude Charter values and other aspects of legal context from the “entire context” in which the meaning of a legislative text is determined. The legal norms embodied in the presumptions of legislative intent are certainly known to the lawyers who draft statutes, and they are explained to legislatures, particularly to members of the Legislative Committees that review proposed legislation during the enactment process. As for regulations, they are systematically reviewed for compliance with the presumptions of legislative intent under the *Statutory Instruments Act*. To this extent, they are justifiably treated under the heading “intention of the Parliament”.

More importantly, these aspects of legal context are inevitably and unavoidably part of what a legally trained interpreter relies on in inferring legislative intent. Once a person has operated within the legal tradition for a while, he or she internalises the assumptions on which the tradition is based and necessarily brings these assumptions to their reading of a legal text. To suggest that these aspects of context play no role in determining whether a text is plain or ambiguous — to suggest that they should be referenced only if a provision is first found to be ambiguous — strikes me as both unrealistic and counter-productive.

A better approach is illustrated by the majority judgment of the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*.³¹ This case is important for a number of reasons. It clarifies the duty of procedural fairness owed by administrative decision-makers, including a duty in some circumstances to provide written reasons for decision; it clarifies the standard of review applicable to discretionary decisions; it confirms that in Canada the doctrine of legitimate expectations is confined to procedural rights; and it addresses the role of international law in the exercise of discretion. Writing for the majority, L’Heureux-Dubé J points out:

“... there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans ... :

‘The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where

31 [1999] 2 SCR 817.

it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as "structured" discretion.³²

... discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society and the principles of the Charter."³³

The points made here are important. Firstly, there is no sharp distinction to be made between plain and ambiguous text, nor between the interpretation of provisions and the exercise of powers granted by a provision. Rather, interpreters have more or less discretion, the limits of which are fixed by the language of the text, which is more or less clear, more or less precise and more or less complete. Secondly, legal text must be read in the context of the evolving legal tradition of which it forms part. This tradition includes the rule of law, administrative law values, Charter principles and (of increasing importance) international law.

One of the issues in *Baker* was the relevance of the Convention on the Rights of the Child, an international agreement ratified by Canada but not yet implemented. L'Heureux-Dubé wrote:

"Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the Convention on the Rights of the Child, and the recognition of the importance of children's rights and the best interest of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute ... I agree ... that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R Sullivan, *Driedger on the Construction of Statutes* (3rd ed 1994), p 330:

'[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. *In so far as possible, therefore, interpretations that reflect these values and principles are preferred.*'³⁴

While L'Heureux-Dubé J does not suggest that discretion *must* be exercised in accordance with international law, she rightly points out that because international law forms part of the operating context in which legislation is interpreted, it is appropriate for interpreters and decision makers to take it into account. International law is a legitimate, relevant and important source of legal norms, along with the entrenched Constitution and the common law. Such norms are relevant in helping to resolve every interpretation problem.

32 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at [54].

33 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at [56].

34 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at [69]–[70] (emphasis added).

It is worth noticing why a court might resist including these aspects of legal context. It is because they do not emanate from the legislature, but rather from the Constitution as interpreted by the courts, from judge-made norms, and from international law. Since Parliament does not control these sources of law, the issue of legitimacy inevitably arises. In a democracy, the legislature is elected and its output expresses the will of the people, or at least a significant number of them. Judge-made law is created by an unelected elite, and international law is established through the actions of the executive branch (as well as foreign states). If a court thinks its only role is to give effect to the intention of the legislature, it is easy to see why these other considerations might be disregarded.

In my view, the intentionalist approach embodies an unduly limited conception of the role of the courts in statutory interpretation, one that ignores their duty to mediate between an abstract text (enacted in ignorance of how the future might unfold) and the facts of a particular case. Sometimes the legislature anticipates a particular fact situation and discusses it during the passage of the bill. In such cases, if interpretation rules allow, a court can review the discussion and apply the solution that the legislature intended. More often, however, the facts before the court have not been specifically contemplated by the legislature. In such cases, in my view, the court must effectively “complete” the legislative process by devising a solution that is appropriate: one that takes into account the text, evidence of legislative intent and the legal norms embodied in constitutional law, international law and common law.

External context

External context is generally taken to refer to the circumstances existing when the legislation to be interpreted was first conceived. Most often, it is examined within the framework of *Heydon’s Case*:³⁵ What was the mischief — the unacceptable state of affairs — that the legislature needed to correct? Since the coming into force of the Charter, Canadian courts have also begun to look at the context in which the legislation operates from time to time. They are interested in how the denial of fundamental rights and freedoms might affect the daily life of citizens. They are also interested in the so-called operational context: Who administers the legislation, the context in which it is administered, the remedies available, and the like.

In my view, the courts do well to examine contemporary as well as historical context. When legislation is enacted with an eye to regulating an activity for the indefinite future, an interpreter can fairly presume that the legislature intended its rules to be adapted to evolving circumstances, circumstances the legislature could not have predicted with any degree of certainty, in an appropriate way.

More subtly, as indicated above, the external context includes the content of each interpreter’s brain. This is a vast context, whose importance cannot be over-estimated. To the extent members of a community share this context, interpretation will be the same

35 (1584) 3 Co Rep 7a; 76 ER 637.

for them. But in so far as members of a community bring different assumptions, “scripts”, and values to the text, shared interpretation cannot be assumed and, consequently, “plain meaning” cannot be assumed. An interpreter may feel confident that he or she clearly understands the words of the text, and there is no ambiguity to be resolved; but the basis on which the interpreter prefers her understanding over competing understandings needs to be addressed. It is not self-evident that the linguistic intuitions of judges should trump the intuitions of other language users.

Harmonisation

In an ideal world, there would never be tension between the textual meaning of legislation, its purpose and scheme, and the context in which the legislation is applied. In fact, these indicators of legislative intent are often fairly clear and work together to point to a particular outcome. Such cases are easy and rarely find their way to tribunals or courts. It is the hard cases that give rise to litigation. They are cases in which the indicators of legislative intent are uncertain or, worse still, point in contradictory directions. For example, the meaning of the text may appear to be plain and support one outcome, but the apparent purpose of the text or its legislative history supports another. While most cases that come before tribunals and courts are hard, Driedger’s modern principle does not acknowledge this problem and offers no guidance on how to resolve it. My own view of how this problem should be resolved, set out below, is a version of “pragmatism”. My commitment to pragmatism is partly ideological, but there is no doubt that in practice, despite their ideological commitments, Canadian appellate courts follow a pragmatic approach.³⁶

In hard cases, when the factors identified by Driedger as relevant to statutory interpretation do not all point to a single answer, the tribunal or court is forced to weigh and choose. It must devise an outcome that, in its opinion, is appropriate in the circumstances. An appropriate outcome is one that can be justified in terms of:

- (a) Its linguistic plausibility: that is, its compliance with the legislative text.
- (b) Its efficacy: that is, its promotion of legislative intent.
- (c) Its acceptability: that is, its accordance with accepted legal norms.

If the legislative text seems clear — if its meaning appears to be “plain” — a court appropriately assigns significant weight to this apparent meaning. The clearer it is, the greater the weight it receives. The weight accorded to the text is also affected by factors such as the following:

- how the text is drafted and, in particular, how detailed it is — how concrete and precise the language is;

³⁶ I have argued elsewhere, and continue to believe, that the *practice* of Canadian courts is exemplary but the *rhetoric* employed by the courts — their explanation of how they resolve interpretation disputes — is not. For a detailed examination of this discrepancy, see R Sullivan, “Statutory Interpretation in the Supreme Court of Canada” (1998–1999) 30 *Ottawa Law Review* 175.

- the audience to which it is addressed — whether the public in general, a narrow and specialised section of the public or those charged with the administration of the legislation;
- the subject matter of the legislation; and
- the importance of certainty and predictability in the context.

If the text is precise and addressed to a specialised audience that would understand it in a certain way and reasonably rely on that understanding, then the apparent meaning of the text appropriately receives significant weight. If the consequences of rejecting that meaning would create serious and harmful uncertainty, it appropriately receives greater weight. For example, in penal and fiscal matters, for rule of law reasons, the courts place greater weight on the text.

Similarly, if the legislature's intention seems clear and relevant to the problem at hand, a court appropriately assigns it significant weight. How much weight depends on:

- where the evidence of legislative intent comes from and how cogent and compelling it is; and
- how directly the intention relates to the circumstances of the dispute to be resolved.

If the intention is set out in a reliable source, its formulation is fairly precise, there are no competing intentions and the implications for the facts of the case seem clear, then this factor receives greater weight.

Finally, courts are concerned by violations of rationality, coherence, fairness and other legal norms. The weight attaching to this factor depends on considerations such as:

- the cultural importance of the norm engaged;
- its degree of recognition and protection in law;
- the seriousness of the violation;
- the circumstances and possible reasons for the violation; and
- the weight of competing norms.

If a possible outcome appears to violate a norm that is well-established and widely shared, if the violation is serious and there are no competing norms, this factor receives significant weight. Conversely, if there are equally important norms that point in a different direction, this factor receives less weight.

Conclusion

There is no doubt that Elmer Driedger had a major and entirely positive impact on the drafting of legislation in Canada. Since his death, Australia has taken the lead in the reform of legislative drafting and Canadian drafters have followed Australian innovations in this area with great interest. Driedger's impact on statutory interpretation in Canada is, however, more difficult to assess. Through no fault of his own, his contribution has been largely reduced to his "modern principle," the obscurity of which has lent itself

to abuse. The modern principle has been used in Canada to justify every possible approach to interpretation and, more importantly, has been used as a substitute for real justification.

In my view, Canadian courts in practice adopt a pragmatic approach to interpretation, along the lines set out above. They may not acknowledge what they are doing, but the evidence of pragmatism is striking, even among the most doctrinaire of judges. The challenge for Canadian courts is to bring their rhetoric in line with their practice. Unfortunately, Driedger's modern principle does not rise to this challenge. I would urge Australian courts to avoid formulae like Driedger's and simply do their best to explain, fully and explicitly, the considerations that have led them to their preferred interpretative outcome, including not only textual considerations and evidence of legislative intent but also the existing rich legal context, which comprises the norms embodied in entrenched Constitutional law, common law and international law.



Purpose and Context in Statutory Interpretation

Associate Professor RS Geddes*

Introduction

In Australia, the 25 year period from 1980 has been a significant one for the development of general principles of statutory interpretation. A notable feature of this period has been the Parliaments' contributions to the development of interpretive processes. Legislative provisions now direct courts, tribunals and others as to how to go about interpreting statutes and delegated legislation. Another feature of the period has been that when interpreting legislation, courts and tribunals have become increasingly willing to articulate the general interpretive principles on which their reasoning is based. Senior members of the judiciary have also spoken and written about statutory interpretation to a greater extent than previously. The contributions of the courts, tribunals and judges have been prompted in part by the activities of the legislatures, but they also exemplify a greater preparedness to discuss their decision-making methods.

A feature of common law systems is the interplay between the courts and Parliament in the laying down of legal rules and principles.¹ This may be accentuated in federal

* LLB (Hons), LLM (ANU). Associate Professor, School of Law, University of New England. I thank Professor Robin Creyke, Dr David Hamer and Emeritus Professor Dennis Pearce for comments on a draft of this paper. A version of the paper was presented at a conference on statutory interpretation hosted by the New South Wales Bar Association, in conjunction with the Australian Bar Association, on 17–19 March 2005, Sydney. This article includes references that have become available since the paper was first published in (2005) 2 *UNELJ* 5.

1 A little has been written about this, particularly with reference to substantive legal rules. See, for example, R Pound, "Common Law and Legislation" (1908) 21 *Harvard Law Review* 383, especially at 385, where Pound described four ways in which courts in a legal system like that in the United States might deal with a legislative innovation. Pound's four categories are examined in a modern Australian context by P Finn, "Statutes and the Common Law" (1992) 22 *University of Western Australia Law Review* 7, 18–30. At 19 Finn commented that "while a significant contemporary issue in our law relates to Pound's second category (the analogical use of statutes in the development of the common law) ... it seems very much the case that judicial treatment of statutes in this country falls into Pound's third and fourth categories (liberal interpretation but without analogical use, and strict and narrow interpretation)". At 23–24 Finn made the general observation that in Australia the analogical use of statutes by the courts in the development of common law principles depended on whether the statute (or statutory provision) was consistent with, or built upon a fundamental theme of, the common law. Also see P Atiyah, "Common Law and Statute Law" (1985) 48 *Modern Law Review* 1; William Gummow, "Lecture 1 — The Common Law and Statute" in *Change and Continuity: Statute, Equity and Federalism*, 1999, Oxford University Press, Oxford, pp 1, 11; J Beatson, "The Role of Statute in the Development of Common Law Doctrine" (2001) 117 *Law Quarterly Review* 247; P Finn, "Statutes and their Relationship to the Common Law" in S Corcoran and S Bottomley (Eds), *Thinking About Statutes: Essays on Statutory Interpretation*, 2005, The Federation Press, Sydney. The relationship between a statute and the common law may, of course, be dealt with in the statute itself. See, for example, the *Trade Practices Act* 1974 (Cth), s 4M.

systems, in which statutory changes are made in some jurisdictions but not in others. The development of the general interpretive principles that are applied to legislation in Australia illustrates that relationship. In parallel with the formal changes enacted by the legislatures, the courts, led by the High Court, have brought about changes at common law that in some respects have gone further than those made by the legislatures. Another feature of this period has been the refinement by the courts of the principles of interpretation laid down by statute. Recently, sharp differences of opinion have been expressed in the High Court as to the role of international agreements in the interpretive process.

The core interpretive concepts on which principles of legislative interpretation are based are not, of course, unique.² Nor are they limited to the interpretation of legal documents. They are not even limited to the interpretation of documents. However, in this article I have concentrated on the form in which these concepts are used in the interpretation of legislation. It is acknowledged at the outset that there is little that is new in the interpretive principles that have developed over the last quarter of a century. The changes relate mostly to the relationship of the principles to one another and to matters of definition. The principles themselves, which are defined by the use of modern terms such as “purpose” and “context”, have been in use for centuries.

Electronic research tools make writing about statutory interpretation both exciting and a little daunting.³ If most cases decided by Australian courts in recent years have involved the application of legislation,⁴ all of those cases are worthy of investigation. The process of selecting cases on which to concentrate is therefore not without risk. But the task is worthwhile. Spigelman CJ of the Supreme Court of New South Wales has commented that:

“The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of the law has escaped statutory modification.”⁵

In this article I have attempted to chronicle the process of development of general principles of legislative interpretation and to make a few comments on some of their features.

2 See MD Kirby, “Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts” (2003) 24 *Statute Law Review* 95.

3 A search of the AustLII databases using the term “legislative purpose” produces over 1600 references and “literal meaning” produces over 1400 references. An AustLII search for references to the *Cooper Brookes Case* (below n 34) produces over 800 references.

4 See JJ Spigelman, “Statutory Interpretation: Identifying the Linguistic Register” (1999) 4 *Newcastle Law Review* 1; D Pearce and R Geddes, *Statutory Interpretation in Australia* (6th ed), 2006, Butterworths, Sydney, p 1. There have also been substantial increases in the numbers of reported cases, both in print and in electronic form, over recent years. In addition to decisions of courts, the reporting of decisions of tribunals has also increased. A high proportion of cases decided by tribunals involve the interpretation of legislation.

5 JJ Spigelman, “The Poet’s Rich Resource: Issues in Statutory Interpretation” (2001) 21 *Australian Bar Review* 224.

Legislative changes to interpretive principles⁶

One day in March 1981 Mr Patrick Brazil, Deputy Secretary, Commonwealth Attorney General's Department, welcomed members of the Department and other invited guests to a symposium on the interpretation of legislation. It was, he explained, the first symposium in the Department's Legal Professional Development Program. Papers were given on the mischief rule, objects clauses in Acts, the purposive versus the literal approach and on the use of explanatory memoranda in interpretation. In his own paper, Mr Brazil reminded those present that Lord Scarman, in the Ninth Wilfred Fullagar Memorial Lecture, delivered at Monash University on 9 September of the previous year, had said:

"... when I, an English judge, read some of the decisions of the High Court of Australia, I think they are more English than the English. In London no-one would now dare to choose the literal rather than a purposive construction of a statute: and 'legalism' is currently a term of abuse."⁷

Some of those present at the symposium appear to have thought that Australia had some catching up to do. In his closing remarks the Commonwealth Attorney General, Senator Peter Durack QC, welcomed the discussion that had occurred that day, much of which focused on the desirability of encouraging Australian courts to be more open to purposive approaches to legislative interpretation. He added:

"I think we have reached the stage where the courts would welcome further directions by Parliament as to how they are to go about their task."⁸

A few months later, the Commonwealth Parliament enacted s 15AA of the *Acts Interpretation Act 1901*,⁹ which provides:

"In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

6 For a more detailed discussion of the changes, in a historical and theoretical setting, see JW Barnes, "Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law — Part One" (1994) 22 *Federal Law Review* 116; JW Barnes, "Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law — Part Two" (1995) 23 *Federal Law Review* 77.

7 "The Common Law Judge and the Twentieth Century — Happy Marriage or Irretrievable Breakdown?" (1980) 7 *Monash Law Review* 1 at 6. Lord Scarman also compared Australian interpretive techniques unfavourably with the more free-ranging interpretive practices of United States courts. Exactly 11 years after Lord Scarman's lecture, in an address to the 27th Australian Legal Convention on 9 September 1991, Mason CJ was able to observe: "No one would suggest nowadays that statutory interpretation is merely an exercise in ascertaining the literal meaning of words. Statutory interpretation calls for reference not only to the context, scope and purpose of the statute but also to antecedent history and policy as well as community values": see A Mason, "Changing the Law in a Changing Society" (1993) 67 *Australian Law Journal* 568 at 569.

8 Attorney General's Department (Cth), *Another Look at Statutory Interpretation*, 1982, Australian Government Publishing Service, Canberra, p 31.

9 Inserted into the principal Act by the *Statute Law Revision Act 1981*, s 115.

One of the reasons for the introduction of s 15AA was a concern that in some cases the time-honoured strict approach to the interpretation of taxation legislation had been undermining the purpose of the legislation.¹⁰ A Current Topic devoted to s 15AA, in the *Australian Law Journal* of April 1981,¹¹ referred to an observation made by Murphy J in the High Court the year before in *Commissioner of Taxation (Cth) v Westrad Pty Ltd*:

“In my opinion, strict literal interpretation of a tax Act is an open invitation to artificial and contrived tax avoidance. Progress towards a free society will not be advanced by attributing to Parliament meanings which no one believes it intended so that income tax becomes optional for the rich while remaining compulsory for most income earners. If strict literalism continues to prevail, the legislature may have no practical alternative but to vest tax officials with more and more discretion. This may well lead to tax laws capable, if unchecked, of great oppression.”¹²

A second Current Topic devoted to s 15AA, in the October 1981 *Australian Law Journal*, contained the comment that there had been “a noticeable lack of enthusiasm by way of reaction for the new s 15AA, particularly among many members of the judiciary.”¹³ It was suggested that one of the reasons for this was the belief, held by some of the sceptics, that s 15AA was unnecessary because it stated nothing new. However such a belief would be mistaken. It had been generally accepted that the common law purposive approach, which had its origins in the “mischief rule”,¹⁴ should only be brought into play if there was an ambiguity or doubt as to meaning.¹⁵ In the absence of uncertainty of that kind, the literal meaning should be adopted.¹⁶ Section 15AA was different from

10 See R Krever, “Murphy on Taxation” in JA Scutt (Ed), *Lionel Murphy: A Radical Judge*, 1987, McCulloch-MacMillan, Sydney, p 128.

11 “The ‘Purposive’ Versus the ‘Literal’ Construction of Statutes” (1981) 55 *Australian Law Journal* 175.

12 (1980) 54 ALJR 460 at 469.

13 “Statutory Guidelines for Interpreting Commonwealth Statutes” (1981) 55 *Australian Law Journal* 711 at 712.

14 See *Heydon’s Case* (1584) 3 Co Rep 7a, 7b; 76 ER 637, 638:

“In this case all the judges met. And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

1st What was the common law before the making of the Act.

2nd What was the mischief and defect for which the common law did not provide.

3rd What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. and,

4th The true reason of the remedy; and then the office of all the judges is to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.”

15 See, for example, *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 of 513 per Stephen J; *Wacando v Commonwealth* (1981) 148 CLR 1 at 17 per Gibbs CJ.

16 The literal approach was based on the literal rule, the most widely used version of which is contained in the judgment of Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (the *Engineers’ Case*) (1920) 28 CLR 129 at 161–162: “The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.” Even when stated in this uncompromising form, excluding any other approach to interpretation, the rule incorporated the proposition that the meaning of a provision was to be ascertained by considering it in the context of the rest of the Act.

the purposive approach, however, because it required the interpreter to take account of the purpose or object underlying the Act initially, not just at some later stage of the interpretive process at which an ambiguity or doubt as to meaning became apparent.¹⁷

Undeterred by the lukewarm reception accorded the introduction of s 15AA of the *Acts Interpretation Act* 1901 two years previously, early in 1983 the Commonwealth Attorney General's Department sponsored a second symposium on the interpretation of legislation.¹⁸ This symposium focused on the use which should be made of extrinsic materials, such as *Hansard*, explanatory memoranda and international agreements, in the interpretation of legislation.¹⁹ The proceedings at this more representative gathering are described in detail in a Current Topic in the *Australian Law Journal* of April 1983.²⁰ The following year s 15AB was enacted.²¹ It provides:

- “(1) Subject to sub-section (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material —
- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
 - (b) to determine the meaning of the provision when —
 - (i) the provision is ambiguous or obscure; or
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.
- (2) Without limiting the generality of sub-section (1), the material that may be considered in accordance with that sub-section in the interpretation of a provision of an Act includes —
- (a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;

17 *Mills v Meeking* (1990) 169 CLR 214 at 235 per Dawson J; *R v Boucher* [1995] 1 VR 110 at 123–124; *Thompson v Byrne* (1999) 161 ALR 632 at 646 per Gaudron J. There is a summary of the early views of several academic writers on the meaning and effect of s 15AA in JW Barnes (1994), *op cit* n 6, 162–163. Although s 15AA adds to the burden of legislative interpreters, in some instances it is only when the legislative drafter has fallen short of his or her ideal that the dominance of the purposive approach assumes significance. If the drafter has achieved what he or she set out to do, applications of the literal and the purposive approaches will ordinarily produce the same result. In the words of McHugh J in *Saraswati v The Queen* (1991) 172 CLR 1 at 21: “In many cases, the grammatical or literal meaning of a statutory provision will give effect to the purpose of the legislation. Consequently, it will constitute the ‘ordinary meaning’ to be applied.”

18 Attorney General's Department (Cth), Symposium on Statutory Interpretation, 1983.

19 A policy discussion paper prepared by the Attorney General's Department, *Extrinsic Aids to Statutory Interpretation*, 1982, was considered.

20 “Canberra Symposium on Extrinsic Aids to Statutory Interpretation, February 1983” (1983) 57 *Australian Law Journal* 191. It is recorded that participants included Lord Wilberforce, who had recently retired from the House of Lords, the Chief Justice of the High Court, Sir Harry Gibbs, four justices of the High Court (Mason, Murphy, Brennan and Dawson JJ), members of State and Territory judiciaries, senior counsel and academic scholars.

21 Inserted into the *Acts Interpretation Act* 1901 (Cth) by the *Acts Interpretation Amendment Act* 1984, s 7.

- (b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;
 - (c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;
 - (d) any treaty or other international agreement that is referred to in the Act;
 - (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;
 - (f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;
 - (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and
 - (h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.
- (3) In determining whether consideration should be given to any material in accordance with sub-section (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to —
- (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
 - (b) the need to avoid prolonging legal or other proceedings without compensating advantage.”

In its underlying philosophy and in its drafting, this section owes something to Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969.²²

Although greeted with misgivings in some quarters,²³ the introduction of s 15AB did at least clarify the principles that were to be applied in this area. Before s 15AB was enacted there had been uncertainty both as to the extent to which, and as to the purposes for which, various forms of international, parliamentary and executive material could be used in the interpretation of legislation. For example, in *Commissioner for Prices and Consumer Affairs (SA) v Charles Moore (Aust) Ltd*,²⁴ the High Court stated

22 [1974] Australian Treaty Series 2.

23 Most of the contemporary arguments for and against the introduction of a provision along the lines of s 15AB and similar provisions are canvassed in detail in JA Scutt, ‘Statutory Interpretation and Recourse to Extrinsic Aids’ (1984) 58 *Australian Law Journal* 483 at 488–494.

24 (1977) 139 CLR 449 at 457 per Barwick CJ, 462 per Gibbs J, 470 per Stephen J, 476–477 per Mason J. Cf 479–481 per Murphy J.

that courts should not refer to reports of parliamentary debates for any purpose to aid the construction of a statute. However, in *Wacando v Commonwealth*²⁵ in the High Court, Mason J said that an exception could be allowed if the Bill had been introduced to remedy a mischief. Mason J repeated that view in *Commissioner of Taxation (Cth) v Whitfords Beach Pty Ltd*.²⁶ Following the *Whitfords Beach* decision, starting with *TCN Channel Nine Pty Ltd v Australian Mutual Provident Society*,²⁷ the Federal Court admitted reports of parliamentary debates and explanatory memoranda on several occasions.²⁸

Under s 15AB(1)(a) and its equivalents in other jurisdictions, any material outside the Act (including the various kinds of material listed in subs (2)) may be used to confirm that the ordinary meaning conveyed by the text of a provision was intended, taking account of its context in the Act and the Act's underlying purpose or object. This has been described as meaning that extrinsic material may be taken into account where the provision is "clear on its face".²⁹ It would appear that such material cannot be used in those circumstances to alter the interpretation that the court would place upon the provision without reference to that material.³⁰ For a reference to extrinsic material to have the potential to change an interpretation of legislation which would otherwise have been arrived at, it is necessary for a court to conclude that one of the conditions in s 15AB(1)(b)(i) or (ii) has been met. That means the interpreter must conclude, without taking account of any material not forming part of the Act, that the provision in question is "ambiguous"³¹ or "obscure" or that, taking account of its context and underlying purpose or object, the ordinary meaning leads to a result that is "manifestly absurd" or "unreasonable".³² A difference between s 15AA and s 15AB is that, while s 15AA gives the interpreter no choice as to whether to apply it, s 15AB allows a choice as to whether extrinsic materials are to be considered (s 15AB(1)) although it also indicates two relevant matters that must be considered, amongst others, in the exercise of that choice (s 15AB(3)).

25 (1981) 148 CLR at 1 25–26.

26 (1982) 150 CLR 355 at 373–375.

27 (1982) 42 ALR 496.

28 For example, see *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236 at 244; *Trade Practices Commission v Orlane Australia Pty Ltd* (1984) 1 FCR 157 at 165–166; *Westwood v Lightly* (1984) 2 FCR 41 at 43 per Sheppard J, 52 per Kirby J; *Kavvadias v Commonwealth Ombudsman* (1984) 2 FCR 64 at 77.

29 *Commissioner of Australian Federal Police v Curran* (1984) 3 FCR 240 at 249–250 per Wilcox J, quoting Stephen J in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 599–600). Also see *Gardner Smith Pty Ltd v Collector of Customs (Vic)* (1986) 66 ALR 377 at 383–384; *NAQF v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 130 FCR 456 at 471.

30 See *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416 at 420; *The Ombudsman v Commissioner of Police* (1987) 11 NSWLR 386 at 396; *ICI Australia Operations Pty Ltd v Fraser* (1992) 34 FCR 564 at 568–570. Cf *Parrett v Secretary, Department of Family and Community Services* (2002) 124 FCR 299 at 310.

31 See JJ Spigelman, "Statutory Interpretation: Identifying the Linguistic Register" (1999) 4 *Newcastle Law Review* 1 at 2–3, where Spigelman CJ concluded that, in the context of statutory interpretation, in addition to its ordinary meaning the word "ambiguity" applied to "any situation in which the intention of Parliament with respect to the scope of a particular statutory situation is, for whatever reason, doubtful". See also *Repatriation Commission v Vietnam Veterans' Association* (2000) 48 NSWLR 548 at 577–578 per Spigelman CJ.

32 *NAQF v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 130 FCR 456 at 471–472.

In the first few years following its introduction, s 15AA was infrequently applied or even referred to in judgments.³³ Given its non-discretionary nature, this is surprising. There were indications, however, that s 15AA was having some effect on judicial reasoning. Courts became more prepared to articulate the basis on which they had arrived at a particular interpretation of the legislative provisions they were considering. There were more frequent references to the purpose of the Act or provision under scrutiny. In many instances, reference was made to *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*,³⁴ handed down following the enactment of the amending Act, one week before s 15AA came into operation. That case represented an important change in the attitude of the High Court to the interpretation of legislation, particularly income tax legislation. By a majority of four to one it construed s 80C(3) of the *Income Tax Assessment Act 1936* (Cth) in a way that avoided a drafting oversight and achieved a result which was consistent with what the court perceived to be the Parliament's manifest intentions.³⁵ The reasoning in that case is still regularly referred to in judgments today.³⁶

Section 15AB, like s 15AA, was infrequently referred to by the High Court, the Federal Court and the Commonwealth Administrative Appeals Tribunal, much less relied on, in the first few years of its operation.³⁷ That continued into the 1990s, although references to the section and reliance on it in the judgments of the Commonwealth Administrative Appeals Tribunal³⁸ and some other tribunals increased in frequency sooner than in the case of the courts.

Following the enactment of ss 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth), whatever the reasons for the initial lack of reliance on them, one by one the States and the Territories considered them important enough to enact their own versions, from 1984 into the early 1990s. The provisions which are currently in force in New South Wales,³⁹ Tasmania,⁴⁰ Victoria,⁴¹ Western Australia⁴² and the Northern Territory⁴³ are in substantially

33 See D Pearce and R Geddes, *Statutory Interpretation in Australia* (3rd ed), 1988, Butterworths, Sydney, [2.14]–[2.15]. One of the reasons for the lack of reference to s 15AA and, later on, its equivalents, may have been that some judges assumed they were merely a statutory recognition of the common law purposive approach. For example, Bryson J said of s 15AA and the *Interpretation Act 1987* (NSW), s 33: “These have not signalled any new large turn in the construction of statutes. The response to these provisions thus far appears to be appropriate to treating them as declaratory, and in my suggestion that is what they are”: J Bryson, “Statutory Interpretation” (1991–1992) 8 *Australian Bar Review* 185 at 187.

34 (1981) 147 CLR 297.

35 For a detailed discussion of *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* see Barnes (1994), op cit n 6, 163–168.

36 See n 3.

37 See D Pearce and R Geddes, 1988, op cit n 33, [3.19].

38 See D Pearce and R Geddes, *Statutory Interpretation in Australia* (4th ed), 1996, Butterworths, Sydney, [3.8]–[3.9].

39 *Interpretation Act 1987*, ss 33, 34.

40 *Acts Interpretation Act 1931*, ss 8A, 8B.

41 *Interpretation of Legislation Act 1984*, s 35. As to whether s 35(b) has a different effect from s 15AB, see D Pearce and R Geddes, 2006, op cit n 4, [3.24]–[3.26].

42 *Interpretation Act 1984*, ss 18, 19.

43 *Interpretation Act 1984*, ss 62A, 62B.

the same terms as ss 15AA and 15AB. Like ss 15AA and 15AB, they are in their original unamended form. So are the Queensland⁴⁴ and South Australian⁴⁵ provisions, both of which are worded slightly differently in the case of the s 15AA equivalents.⁴⁶ As there is no equivalent of s 15AB in South Australia, the admissibility of extrinsic materials to assist in the interpretation of legislation is governed by the common law in that state.⁴⁷ The original Australian Capital Territory provisions were closely based on the Commonwealth provisions.⁴⁸ Those provisions were repealed and replaced with new provisions in 2001.⁴⁹

Co-existing common law interpretive principles

Although we live in an age of legislation, we are seldom surprised at the resilience of common law principles. Sections 15AA and 15AB of the *Acts Interpretation Act* 1901 and the State and Territory provisions based on them were introduced to override certain common law principles of interpretation, but they did not completely sweep them aside. The staggered introduction of the State and Territory equivalents of ss 15AA and 15AB, together with the absence of an equivalent of s 15AB in South Australia, combined to make inevitable the survival of those principles, although in a modified form. In those federal systems where statutory principles exist in some jurisdictions while other jurisdictions are governed by the common law, the development of the common law principles may be informed by the statutory principles.⁵⁰ This can be a sensitive issue; judicial activism can attract the criticism that the courts are exceeding their responsibilities and breaching fundamental constitutional principles.⁵¹ Perhaps such criticisms are less likely to be made when judicial technique, rather than substantive law, is involved. But the results produced can be just as profound.

Context to be considered initially

Another reason for the survival of the general common law principles of interpretation is that it was sometimes possible to find common law principles that were incompatible

44 *Acts Interpretation Act* 1954, s 14A.

45 *Acts Interpretation Act* 1915, s 22.

46 As to the South Australian provision, whether the difference produces a different meaning is discussed in D Pearce and R Geddes, 2006, op cit n 4, [2.15].

47 In *Owen v South Australia* (1996) 66 SASR 251, the Full Court of the Supreme Court of South Australia held that reference may be made to reports of parliamentary debates both to ascertain the mischief and to discern the underlying purpose of the legislation in question: see the judgment of Cox J at 255–256, with whose conclusions Prior J concurred at 257. In that case Cox J treated “mischief” and “purpose” as interchangeable concepts. Also see *Byrnes v The Queen* (1999) 199 CLR 1 at 18 (Gaudron, McHugh, Gummow and Callinan JJ); *MSP Nominees Pty Ltd v Commissioner of Stamps* (1999) 198 CLR 494 at 506–507 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

48 *Interpretation Act* 1967, ss 11A, 11B.

49 *Legislation Act* 2001, ss 138, 139, 141–143.

50 See n 1.

51 See, for example, D Heydon, “Judicial Activism and the Death of the Rule of Law” (2003) 23 *Australian Bar Review* 110, an address to the Quadrant Dinner, 30 October 2002, Sydney; J Gava, “The Rise of the Hero Judge” (2001) 24 *University of New South Wales Law Journal* 747.

with other, less favoured, common law principles. Some of the more favoured principles came remarkably close to being consistent with the new statutory principles. Here are some examples.

There is a statement of general interpretive principle whose origins lie in the speech of Viscount Simonds LC in *Attorney General v Prince Ernest Augustus of Hanover*⁵² (“*Prince Ernest Augustus of Hanover*”) as quoted and amplified in 1985 by Mason J (dissenting) in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*⁵³ (“*K & S Lake City Freighters*”) that appears to capture the spirit of s 15AA and its equivalents. In that case the High Court applied common law principles of interpretation because the case arose under South Australian law and South Australia did not enact its version of s 15AA until the following year. Mason J said:⁵⁴

“Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise. In *Prince Ernest Augustus of Hanover* Viscount Simonds said:⁵⁵

‘... words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use the word “context” in its widest sense ... as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy’.”

Mason J’s statement of common law interpretive principle is of particular interest because of its impact on the fundamental principles of interpretation as they are applied in Australia. The passage which Mason J quoted from the speech of Viscount Simonds in *Prince Ernest Augustus of Hanover* is nearly 50 years old.⁵⁶ It harks back to the mischief rule, which dates from 1584. Notwithstanding this, the proposition that the context of a provision should be considered at the initial stage of the interpretive process, together with the inclusion of the mischief the statute was intended to remedy as part of that context, combine to convey essentially the same meaning as s 15AA.⁵⁷ As there are so

52 [1957] AC 436.

53 (1985) 157 CLR 309.

54 (1985) 157 CLR 309 at 315.

55 [1957] AC 436, 461.

56 The importance of this speech of Viscount Simonds LC in Australian law has long been recognised. An extract from it is contained in Ch 12 of FKH Maher, L Waller and DP Derham’s introductory book, *Cases and Materials on the Legal Process*, 1966, Law Book Co, Sydney.

57 See the comments of Wilcox and Finn JJ in *Rieson v SST Consulting Services Pty Ltd* (2005) 219 ALR 90 at 94. The relationship between the mischief rule and the purposive approach is discussed in Barnes (1995), *op cit* n 6, 84–85.

many more cautiously framed general statements of principle that Mason J could have relied on,⁵⁸ it is significant that he chose the one in *Prince Ernest Augustus of Hanover*. The importance of the statement lies in the fact that it places “context”, bracketed with “purpose or object”, at the beginning of the interpretive process.

The innovative significance of Mason J’s statement in *K & S Lake City Freighters* that context, interpreted in its widest sense, should be considered at the initial stage of the interpretive process, was not immediately obvious. However, it has now been relied on in many cases.⁵⁹ One of its manifestations is in the joint judgment of Brennan CJ, Dawson, Toohey and Gummow JJ in *CIC Insurance Ltd v Bankstown Football Club Ltd*,⁶⁰ (“*CIC Insurance*”) which was handed down in 1997:⁶¹

“... the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as [reference to reports of law reform bodies], one may discern the statute was intended to remedy: *Attorney-General v Prince Ernest Augustus of Hanover*,⁶² cited in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*.⁶³ Instances of general words in a statute being so construed by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*,⁶⁴ if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent: *Cooper Brookes (Wollongong) Pty Ltd v FCT*.”⁶⁵

On numerous occasions, the two propositions set out in this statement of principle have been treated by the High Court and other courts as encapsulating their fundamental

58 For example, see *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 513 per Stephen J: “The mischief aimed at may provide a useful aid in interpretation where ambiguity arises but to my mind the words of the definition are not themselves ambiguous nor do they lead to any apparent absurdity in the operation of the Act if full effect be given to their literal meaning.”

59 For example, see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 per McHugh, Gummow, Kirby and Hayne JJ; *Repatriation Commission v Vietnam Veterans’ Association of Australia NSW Branch Inc* (2000) 48 NSWLR 548 at 576 per Spigelman CJ; *Australian Industry Group v Automotive, Food, Metals, Printing & Kindred Industries Union* (2003) 130 FCR 524 at 534 per French and von Doussa JJ, 540–541 per Marshall J.

60 (1997) 187 CLR 384.

61 (1997) 187 CLR 384 at 408.

62 [1957] AC 436 at 461.

63 (1985) 157 CLR 309 at 312 at 315.

64 (1986) 6 NSWLR 363 at 388.

65 (1981) 147 CLR 297 at 320–321.

responsibilities in relation to the interpretation of legislation.⁶⁶ It is a more comprehensive statement than that of Mason J in *K & S Lake City Freighters* in that it expressly extends context to extrinsic materials such as reports of law reform bodies and makes it clear that they are also to be taken into account at the initial stage of the interpretive process, rather than at a later stage when ambiguity or doubt as to meaning become apparent. It is also clear from the examples given in the previous footnote that textual ambiguity is not a precondition for reference to these extrinsic materials for the purpose described. Quotation of, or reference to, the passage from *CIC Insurance* is often accompanied by mention of *Newcastle City Council v GIO General Ltd*⁶⁷ (“*Newcastle City Council*”), in which an explanatory memorandum was consulted to disclose the particular mischief the legislation was enacted to remedy.⁶⁸ This suggests that the principle applies generally to parliamentary and executive materials.

In addition to *CIC Insurance* and *Newcastle City Council*, *Project Blue Sky Inc v Australian Broadcasting Authority*⁶⁹ is worthy of particular mention. In that case McHugh, Gummow, Kirby and Hayne JJ affirmed the comprehensive application of the modern approach to interpretation,⁷⁰ applying it to the difficult question of whether breach of a provision that imposed an obligation produced invalidity.⁷¹

Do the common law principles governing the use of extrinsic material in interpretation co-exist with the statutory provisions, where s 15AB or a provision based on it could be applied? This question can be addressed in different ways. It might have been concluded that the effect of the doctrine of parliamentary supremacy was that s 15AB overrode inconsistent common law interpretive principles. This would have meant that extrinsic material could only be considered if s 15AB(1) was satisfied. However, courts

66 See, for example, *Burch v SA* (1998) 71 SASR 12 at 17–18 per Cox J, 26–27 per Lander J, 38–39 per Bleby J; *Police v Kennedy* (1998) 71 SASR 175 at 184–185; *Fox v Commissioner for Superannuation (No 2)* (1999) 88 FCR 416, 420 per Black CJ; *MLC Ltd v Deputy Commissioner of Taxation* (2002) 126 FCR 37 at 47–48; *Gerah Imports Pty Ltd v Duke Group Pty Ltd (in liq)* (2004) 88 SASR 419 at 428–429 per Anderson J, with whom Mullighan and Nyland JJ agreed at 421. Also see *Attorney General (Cth) v Oates* (1999) 198 CLR 162 at 175 per Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ; *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* (2001) 117 FCR 23 at 77; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 205 ALR 1 at 4 per McHugh ACJ, Gummow and Hayne JJ; *Solution 6 Holdings Ltd v Industrial Relations Commission of NSW* (2004) 60 NSWLR 558 at 579–580 per Spigelman CJ, with whom Mason P and Handley JA agreed at 597; *Mount Beauty Gliding Club Inc v Jacob* [2004] VSCA 151 at [16]; *Almario v Allianz Australia Workers Compensation (NSW) Insurance Ltd* (2005) 62 NSWLR 148 at 156–157 per Ipp JA, with whom Hodgson JA agreed at 150 and Hunt AJA agreed at 157; *Rieson v SST Consulting Services Pty Ltd* (2005) 219 ALR 90 at 92–94 per Wilcox and Finn JJ; *Tisand Pty Ltd v The Owners of the Ship MV Cape Moreton (Ex Freya)* (2005) 143 FCR 43 at 59–60; *Amos v Brisbane City Council* [2005] QCA 433 at [14] per Muir J, with whom Jerrard JA agreed at [1] and Kenane JA agreed at [2]; *Braverus Maritime Inc v Port Kembla Coal Terminal Ltd* (2005) 148 FCR 68 at 81; *Pacific Hydro Ltd v Office of the Renewable Energy Regulator* (2006) 150 FCR 124 at 131.

67 (1997) 191 CLR 85.

68 (1997) 191 CLR 85 at 99 per Toohey, Gaudron and Gummow JJ, 112 per McHugh J.

69 (1997) 194 CLR 355.

70 At 381 they said that “the process of construction must always begin by examining the context of the provision that is being construed.”

71 At the time of writing, a search of the AustLII database for references to the *Project Blue Sky v Australian Broadcasting Authority* produced over 450 references.

and tribunals have assumed, in several cases besides those already referred to, that the two sets of principles do co-exist.⁷² In these cases it was assumed that the mischief rule was extant, together with the principle that it was permissible to refer to certain kinds of extrinsic material to discover the mischief.

It has been pointed out elsewhere⁷³ that although the language of s 15AB and its equivalents is broad enough to apply to the use of dictionaries, other legislation and reports of cases, there is no need to apply these provisions to those forms of extrinsic material because such material was already admissible under principles that predate the introduction of those provisions. Courts and tribunals have never assumed that s 15AB and equivalents apply to those forms of extrinsic material.⁷⁴ To apply those provisions would impose new limitations on the use of that material. That being so, it seems reasonable to assume that just as the common law principles governing the use of that material have survived the introduction of s 15AB and equivalent provisions, so have the common law principles concerning the use of materials covered by those provisions. A troublesome aspect of this reasoning is that s 15AB and its equivalents are open-ended as to the kinds of extrinsic materials covered. For example, although s 15AB(2) specifies some of the kinds of extrinsic material that may be considered under subs (1), the only limitation, imposed by subs (1), is that the material must be “capable of assisting in the ascertainment of the meaning of the provision”.

Perhaps a more realistic approach to the question posed above is to conclude that the common law interpretive principles set out in *CIC Insurance* are so firmly entrenched that another question should be considered. What are the consequences of those principles co-existing with s 15AB or a provision based on it? It is difficult to avoid the conclusion that those principles are available to undermine s 15AB(1), which limits the circumstances in which reference can be made to extrinsic material. If that is so, s 15AB and its equivalents should be amended, to remove that limitation, bringing those provisions into line with *CIC Insurance* principles. That appears to be the position in relation to the Victorian equivalent of s 15AB, s 35(b) of the *Interpretation of Legislation Act 1984*.⁷⁵ It is also the case with the Australian Capital Territory provision, s 141 of the *Legislation Act 2001*. Section 141 simply provides:

“In working out the meaning of an Act, material not forming part of the Act may be considered.”⁷⁶

72 See, for example, *Alexandra Private Geriatric Hospital Pty Ltd v Blewett* (1984) 2 FCR 368 at 375–376; *Re Tasmanian Ferry Services Ltd and Secretary, Department of Transport and Communications* (1992) 29 ALD 395 at 408; *Lemair (Australia) Pty Ltd v Cahill* (1993) 30 NSWLR 167 at 171 per Kirby P; *Australia & New Zealand Banking Group Ltd v Federal Commissioner of Taxation* (1994) 119 ALR 727 at 752 per Hill J, with whom Northrop and Lockhart JJ agreed at 730.

73 See D Pearce and R Geddes, 2006, op cit n 4, [3.29].

74 Some of them may have been influenced by the consideration that s 15AB(2) refers to extrinsic material that could be described generically as international agreements and parliamentary and executive material.

75 This is discussed in D Pearce and R Geddes, *Statutory Interpretation in Australia*, 2006, op cit n 4, [3.24]–[3.26].

76 See the definition of “working out the meaning of the Act” in s 138 of the Act.

This proposal to amend s 15AB and its equivalents along the lines suggested would bring those provisions more closely into line with s 15AA and the provisions based on it, in that it would remove the threshold test for consideration of extrinsic material that is currently contained in the subs (1)(b) and equivalent provisions. It would also have the advantage of simplicity, dispensing with a stage in the interpretive process that has always been accompanied by uncertainty: the need to determine whether, using a literal approach, the meaning of a provision is ambiguous⁷⁷ or obscure, or, taking account of its context and underlying purpose or object, the ordinary meaning leads to a result that is manifestly absurd or unreasonable. A reading of some cases, particularly tribunal decisions, suggests that when s 15AB or a provision based on it is applied, this threshold issue is not always considered before reference is made to extrinsic materials. Of course, that in itself is not an argument for changing the law.

Another feature of the principles stated in *CIC Insurance* is that they sweep away several lingering older statements of interpretive principle which suggest that other parts of an Act, such as the long title or the preamble, are to be brought into account only if it has been established, without reference to those provisions, that the provision under scrutiny is ambiguous.⁷⁸ In the Australian Capital Territory, such a change was made by s 140 of the *Legislation Act 2001*, which provides:

“In working out the meaning of an Act, the provisions of the Act must be read in the context of the Act as a whole.”⁷⁹

As previously indicated, the concept of context extends beyond the rest of the Act and extrinsic material as instanced by s 15AB(2) and equivalent provisions, to such aids as Interpretation Acts,⁸⁰ dictionaries,⁸¹ other legislation⁸² and prior or other existing common law.⁸³

It might be argued that a change of the kind suggested could have negative consequences. Whilst the threshold test in s 15AB(1)(b) and equivalent provisions does not prevent parties from referring to extrinsic material for their own research purposes, it does operate as a limitation on the cost of litigation. Indeed, as it seems to be a common experience that extrinsic material does not usually assist in interpretation,⁸⁴

77 See above n 31.

78 See, for example, some of the authorities referred to in D Pearce and R Geddes, 2006, op cit n 4, [4.38]–[4.50].

79 See above n 76.

80 D Pearce and R Geddes, 2006, op cit n 4, Ch 6.

81 D Pearce and R Geddes, 2006, op cit n 4, [3.30].

82 D Pearce and R Geddes, 2006, op cit n 4, [3.31]–[3.42].

83 See P Finn, “Statutes and the Common Law” (1992) 22 *University of Western Australia Law Review* 7 at 18–30.

84 See, for example, *Monier Ltd v Szabo* (1992) 28 NSWLR 53 in which, at 67, Meagher JA drew attention to a problem of “ever increasing importance”: “One section of an Act ... contains an ambiguity. This propels counsel to flood the court with various Second Reading Speeches. These speeches, needless to say, do not in any way resolve the ambiguity in the Act. They do, however, raise many fresh ambiguities, hitherto unperceived. Moreover, they leave the court in the position where there are no documents to clarify the ministerial ambiguities. The habit should cease.” See also *Lembecke v SAS Trustee Corporation* (2003) 56 NSWLR 736 at 738 where Meagher JA observed: “Second reading speeches have almost never any value in elucidating a legal problem;” and Winneke P’s comments in *Masters v McCubbery* [1996] 1 VR 635 at 646.

some practitioners would wish that the authority conferred by s 15AB(3) might be exercised more rigorously. Ultimately, however, a decision as to whether to investigate the wider context is just another decision that has to be made as part of the process of dealing with legislation.

Implying words into the text

There is a long-standing controversy as to whether it can be legitimate to imply words into the text of legislation and, if so, as to the circumstances in which that can occur. Although the interpretive concepts of context and underlying purpose or object inform this debate, s 15AA and equivalent provisions do not offer any explicit solutions. As a consequence, interpretive principles that predate those provisions continue to be relied on. In these cases, although the surface intention of the parliament appears to have been fulfilled, it is clear that the text does not give effect to the underlying purpose or object of the legislation. In *Bermingham v Corrective Services Commission of New South Wales*⁸⁵ (“*Bermingham*”), after suggesting that it could be legitimate to give words used inadvertently a “strained construction” to produce an interpretation that was consistent with the purpose of the legislation, McHugh JA commented that:

“[I]t is not only when Parliament has used words inadvertently that a court is entitled to give legislation a strained construction. To give effect to the purpose of the legislation, a court may read words into a legislative provision if by inadvertence Parliament has failed to deal with an eventuality required to be dealt with if the purpose of the Act is to be achieved.”⁸⁶

McHugh JA suggested that only if certain conditions were adhered to could the “reading in” of missing words be a legitimate use of the purposive approach. Repeating what he had said in his dissenting judgment in *Kingston v Ke prose Pty Ltd*,⁸⁷ in which he had paraphrased some remarks of Lord Diplock in *Wentworth Securities Ltd v Jones*,⁸⁸ McHugh JA identified the conditions:

“First, the court must know the mischief with which the Act was dealing. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.”⁸⁹

As those conditions were fulfilled in *Bermingham*, the Court of Appeal was able to conclude that s 28(6)(b) of the *Prisoners (Interstate Transfer) Act 1982* (NSW) should be interpreted as if the words “minimum term” preceded the phrase “sentence of imprisonment” in that paragraph. This interpretation was adopted even though the

85 (1988) 15 NSWLR 292. For a more detailed discussion of this case, together with references to other relevant cases, see D Pearce and R Geddes, 2006, op cit n 4, [2.29].

86 (1988) 15 NSWLR 292 at 302.

87 (1987) 11 NSWLR 404 at 423.

88 [1980] AC 74 at 105–106.

89 (1988) 15 NSWLR 292 at 302.

phrase “sentence of imprisonment” was used elsewhere in the Act to denote a head sentence. It achieved the purpose of the legislation, which was to facilitate the inter-State transfer of prisoners on terms that neither advantaged nor disadvantaged them. Also see *Tokyo Mart Pty Ltd v Campbell*⁹⁰ per Mahoney JA,⁹¹ with whom Clarke and McHugh JJA agreed; *Saraswati v The Queen*⁹² per McHugh J,⁹³ with whose judgment Toohey J agreed;⁹⁴ *Clarke v Bailey*⁹⁵ per Kirby P,⁹⁶ with whose judgment Sheller JA agreed; *R v Di Maria*⁹⁷ per Doyle CJ,⁹⁸ with whom Prior and Nyland JJ agreed. In the last-mentioned case, the Court of Criminal Appeal of South Australia interpreted s 32(5)B(b)(ii) of the *Controlled Substances Act 1984 (SA)* as if it contained the words “in any other case”. It was decided that those words, which were present elsewhere in s 32, had been inadvertently omitted in amendments to that section. Ten years after the decision in *Bermingham*, McHugh J repeated the conditions and applied them in the High Court decision in *Newcastle City Council v GIO General Ltd*.⁹⁹

A couple of years after the *Newcastle City Council* decision, in the New South Wales Court of Criminal Appeal in *R v Young*,¹⁰⁰ Spigelman CJ suggested that it was misleading to characterise the judicial conduct that had been described in previous cases as the “reading in” of extra words. His Honour said:¹⁰¹

“The three conditions set out by Lord Diplock [in *Wentworth Securities Ltd v Jones*, paraphrased by McHugh JA in *Bermingham*] should not be misunderstood. His Lordship did not say, nor do I take any of their Honours who have adopted the passage to suggest, that whenever the three conditions are satisfied, a court is at liberty to supply the omission of the legislature. Rather, his Lordship was saying that in the absence of any one of the three conditions, the court cannot construe a statute with the effect that certain words appear in the statute.

... The court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based.

90 (1988) 15 NSWLR 275.

91 (1988) 15 NSWLR 275 at 283.

92 (1991) 172 CLR 1.

93 (1991) 172 CLR 1 at 22.

94 (1991) 172 CLR 1 at 16.

95 (1993) 30 NSWLR 556.

96 (1993) 30 NSWLR 556 at 567.

97 (1996) 67 SASR 466.

98 (1996) 67 SASR 466 at 474.

99 (1997) 191 CLR 85 at 113. The other members of the High Court reached the same conclusion without referring to the test applied by McHugh J. See also *R v Hill* [1996] SASC 5975; *Wang v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 386 at 395–396; *Fox v Commissioner for Superannuation (No 2)* (1999) 88 FCR 416 at 421 per Black CJ; *Ellavale Engineering Pty Ltd v Pilgrim* [2005] NSWCA 272 [49]–[53].

100 (1999) 46 NSWLR 681.

101 (1999) 46 NSWLR 681 at 687–688. The process of reading down general words is also discussed in JJ Spigelman, “The Poet’s Rich Resource: Issues in Statutory Interpretation” (2001) 21 *Australian Bar Review* 224 at 232–233.

... If a court can construe the words actually used by the Parliament to carry into effect the parliamentary intention, it will do so notwithstanding that the specific construction is not the literal construction and even if it is a strained construction. The process of construction will, for example, sometimes cause the court to read down general words, or to give the words used an ambulatory operation. So long as the court confines itself to the range of possible meanings or of operation of the text — using consequences to determine which meaning should be selected — then the process remains one of construction.

The construction reached in this way will often be more clearly expressed by way of the addition of words to the words actually used in the legislation. The references in the authorities to the court ‘supplying omitted words’ should be understood as a means of expressing the court’s conclusion with clarity, rather than as a description of the actual reasoning process which the court has conducted.”

As to the other judges in *R v Young*, James J¹⁰² discussed in detail the cases in which McHugh JA and other judges had “read in” extra words. In contrast to Spigelman CJ, he did not take exception to the use of the term “reading in” to describe the interpretive process outlined in those cases.¹⁰³ Beazley JA¹⁰⁴ agreed with the judgment of James J, except on a matter that is not presently relevant. The other judges, Abadee and Barr JJ, generally agreed with both Spigelman CJ and James J and did not express an independent view on the issues considered here. Counsel’s submission, which involved the redrafting of four sections of an Act by adding several words to each of the sections,¹⁰⁵ was not accepted.

The approach described by Spigelman CJ in *R v Young* requires any implied meanings derived from a statute to be closely based on the text of the statute. “Reading down” refers to the process of giving general words a more specific meaning, as suggested having regard to the underlying purpose or object of the provision in question. Spigelman CJ¹⁰⁶ identified *Tokyo Mart Pty Ltd v Campbell*¹⁰⁷ as another example of the “reading down” approach, and *Birmingham*¹⁰⁸ as an example of the “ambulatory” approach. The latter term describes the process of attributing to a word or phrase a different meaning from that given to it elsewhere, to give effect to the underlying purpose or object of the provision.

How have the courts responded to the approaches of McHugh JA in *Birmingham* and of Spigelman CJ in *R v Young*? In *Handa v Minister for Immigration and Multicultural Affairs*¹⁰⁹ (“*Handa*”) Finkelstein J treated s 475 of the *Migration Act 1958* (Cth), which

102 (1999) 46 NSWLR 681 at 733–736.

103 However, in *Director of Public Prosecutions (Cth) v Chan* (2001) 183 ALR 575 at 588–589 James J endorsed and applied the observations of Spigelman CJ in *R v Young*. This decision was affirmed by the Court of Appeal: *Director of Public Prosecutions (Cth) v Chan* (2001) 52 NSWLR 56.

104 (1999) 46 NSWLR 681 at 704.

105 (1999) 46 NSWLR 681 at 739, 749.

106 (1999) 46 NSWLR 681 at 689–690.

107 (1988) 15 NSWLR 275.

108 (1988) 15 NSWLR 292.

109 (2000) 106 FCR 95.

clearly should have been amended as part of changes to review procedures, as if it *had* been amended, so that an Migration Review Tribunal-reviewable decision was not reviewable by the Federal Court.¹¹⁰ The conditions referred to by McHugh JA in *Bermingham* were considered to have been fulfilled. *R v Young* was not cited in the judgment.

In *Parrett v Secretary, Department of Family and Community Services*¹¹¹ (“*Parrett*”), Madgwick J referred to *R v Young* and *Bermingham*, but appeared to go beyond the tests set out in both cases, to give effect to what was perceived to be the underlying purpose of the *Farm Household Support Act 1992* (Cth). The issue was whether the applicant, who, due to illness, adverse weather conditions and lack of working capital, was unable to earn any income from his farm, was a “farmer” within s 3(2) of the Act, which relevantly defined “farmer” as “a person who: ... (c) derives a significant part of his or her income from the farm enterprise.” Although he concluded that the conditions articulated by McHugh JA in *Bermingham* had been satisfied, Madgwick J acknowledged the difficulty of stating “with certainty” what words Parliament would have used to overcome the omission if it had been made aware of the problem. He offered the following formulation:

“(c) derives or attempts to derive a significant part of his or her income from the farm enterprise but is prevented from so doing by the vicissitudes of ill-health, seasonal factors or lack of means to continue farming” (emphasis added).¹¹²

Madgwick J speculated that Parliament might have recast the provision more widely than this if its members had been aware of the problem. In any event, he considered it was quite clear that Parliament would have gone as far as suggested. Although that is a clever point, the fact that this and other speculations as to what Parliament would have done are possible suggests that the degree of certainty required to satisfy the third condition in *Bermingham* was lacking.

Two cases in which the Court of Appeal of the Northern Territory corrected what it took to be drafting oversights are *Thompson v Groote Eylandt Mining Co Ltd*¹¹³ and *Minister for Lands, Planning & Environment v Griffiths*.¹¹⁴ In the first case the Court of Appeal concluded that the words “employer makes deductions” in the definition of “PAYE taxpayer” in s 3(1) of the *Work Health Act* (NT) included an employer who was required by law to make such deductions and who failed to do so without the worker’s knowledge or authority. Martin CJ indicated¹¹⁵ that this was an example of giving words an ambulatory operation in the manner described by Spigelman CJ in *R v Young*. The same interpretive technique was identified by Mildren J and applied in the second

110 (2000) 106 FCR 95 at 100.

111 (2002) 124 FCR 299.

112 (2002) 124 FCR 299 at 314.

113 [2003] NTCA 5.

114 [2004] NTCA 5.

115 [2003] NTCA 5 at [4].

case.¹¹⁶ There, “land” in s 33(1)(b) and (3)(b) of the *Lands Acquisition Act 2001* (NT) was interpreted as meaning “land or an interest in land”.

In *Victorian Workcover Authority v Wilson*¹¹⁷ a majority of the members of the Court of Appeal held that McHugh JA’s three conditions had been satisfied, so that the words “or the entitlement to compensation” should be “read in” after the words “either of the assessments” in s 104B(9) of the *Accident Compensation Act 1985* (Vic).¹¹⁸ Referring to the conditions and to the comments of Spigelman CJ and James J in *R v Young, Callaway JA* observed:

“Those conditions are satisfied in the present case. It is unnecessary to decide whether they are necessary or necessary and sufficient or usually necessary and sufficient.”¹¹⁹

The two decisions of the Court of Appeal of the Northern Territory are useful illustrations of the process of giving words an ambulatory operation to give effect to underlying purpose or object. As to the two earlier decisions, in *Handa*, although the conditions in *Birmingham* were fulfilled, it would seem that the more stringent conditions set out by Spigelman CJ in *R v Young* were not met and in *Parrett* neither of the sets of conditions appears to have been fulfilled. It is therefore too early to say that the stricter approach to implying words into legislation is both accepted and applied.

Presumptions of interpretation

In his Sir Ninian Stephen Lecture¹²⁰ Spigelman CJ observed that: “A number of the rules of construction ... make it clear that the common law’s protection of fundamental rights and liberties is secreted within the law of statutory interpretation.”¹²¹

He added:¹²²

“This protection operates by way of rebuttable presumptions that Parliament did not intend:¹²³

- to invade common law rights;
- to restrict access to the courts;
- to abrogate the protection of legal professional privilege;
- to exclude the right to claims of self-incrimination;
- to interfere with vested property rights;
- to alienate property without compensation;

116 [2004] NTCA 5 at [66].

117 (2004) 10 VR 298.

118 (2004) 10 VR 298 at 306–307 per Callaway JA, with whose interpretation Winneke P agreed at 300.

119 (2004) 10 VR 298 at 306.

120 “Statutory Interpretation: Identifying the Linguistic Register” (1999) 4 *Newcastle Law Review* 1.

121 *ibid.*

122 *ibid* at 11.

123 See D Pearce and R Geddes, 1996, *op cit* n 38, Ch 5.

- to interfere with equality of religion;
- to deny procedural fairness to persons affected by the exercise of public power.”¹²⁴

Given Australia’s lack of a constitutional bill of rights, it makes sense to ground these presumptions in the need to protect fundamental rights and liberties. In this context it is worth noting the *Human Rights Act 2004 (ACT)* s 30(1), which provides:

“In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.”

This provision is declared to be subject to the *Legislation Act 2001*, s 139, the Territory’s equivalent of s 15AA: s 30(2). Also see s 31 as to the sources relevant to a human right that may be considered in interpreting that right. Legislation similar to the *Human Rights Act 2004 (ACT)* has been enacted in Victoria: see the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

The first-mentioned presumption in the list above was a factor in the reasoning of the members of the High Court in *Al-Kateb v Godwin*.¹²⁵ The case involved an unlawful non-citizen, as defined by s 14 of the *Migration Act 1958 (Cth)*, who had been subjected to mandatory administrative detention. Although he had asked to be removed from Australia, his visa application having been unsuccessful, no other country was prepared to accept him and it was believed unlikely that this would change in the reasonably foreseeable future. The High Court considered whether the appellant was entitled to an order directing his release from detention or whether he could be detained indefinitely. It decided, by a majority of four to three,¹²⁶ that the appellant was not entitled to be released.

The reasons for the decision in *Al-Kateb v Godwin* are too complex to be discussed in detail here, but the case essentially turned on the interpretation of ss 189, 196 and 198 of the *Migration Act 1958*. One of the factors that influenced the justices in the majority was that the words of the statute were *too clear* to permit the presumption that Parliament does not interfere with fundamental rights to influence the outcome (notwithstanding the characterisation of the appellant’s position as “tragic” by one of the majority, McHugh J).¹²⁷ Gleeson CJ, one of the dissenting justices, observed:¹²⁸

“Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has

124 To this list might be added the presumption that statutes do not operate retrospectively and the presumption (or rule) that penal provisions are strictly construed, as to which see D Pearce and R Geddes, 2006, op cit n 4, Ch 10 and [9.8]–[9.14], respectively. There are other presumptions of interpretation, the existence of which is attributable to considerations other than the protection of fundamental rights and liberties. See, for example, the presumption that legislation does not bind the Crown: D Pearce and R Geddes, 2006, op cit n 4, [5.10]–[5.12], and the presumption that legislation does not have an extra-territorial effect: D Pearce and R Geddes, 2006, op cit n 4, [5.5]–[5.7].

125 (2004) 219 CLR 562.

126 (2004) 219 CLR 562, per McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow and Kirby JJ dissenting.

127 (2004) 219 CLR 562 at 581.

128 (2004) 219 CLR 562 at 577. See also *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 209 ALR 116 at 123–124 per Gleeson CJ.

directed its attention to the rights or freedoms in question and has consciously decided upon abrogation or curtailment. That principle ... is not new. In 1908, in this court, O'Connor J referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that '[i]t 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': *Potter v Minahan*.¹²⁹

Gleeson CJ added:

"A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament."¹³⁰

Like the analysis of Spigelman CJ in his Sir Ninian Stephen Lecture,¹³¹ Gleeson CJ's comment illustrates the willingness of many members of the judiciary to address the philosophical basis of some principles of interpretation. In suggesting that any intention to limit human rights or freedoms must be clearly and unambiguously expressed, it is apparent that Gleeson CJ is not referring to any actual ascertainable intention on the part of the legislature or of its members. It is an objective intention,¹³² based on values that are shared by Parliament and the courts in a society under the rule of law.¹³³

129 (1908) 7 CLR 277 at 304.

130 (2004) 219 CLR 562 at 577.

131 See n 120.

132 See also the comments of Gleeson CJ in *Singh v Commonwealth* (2004) 209 ALR 355 at 362–363. Kirby J has commented extrajudicially: "So far as Acts of Parliament are concerned, it is unfortunately still common to see reference in judicial reasons and scholarly texts to the 'intention of Parliament'. I never use that expression now. It is potentially misleading: *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168–169; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 117–118; cf *Black-Clawson International Ltd v Papierwerke AG* [1975] AC 591 at 629–630. In Australia, many other judges also regard the fiction as unhelpful: *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 633 [325] per Hayne J, referring to *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 458–459. It is difficult to attribute the "intention" of a document such as a statute, prepared by so many hands and submitted to a decision-maker of so many different opinions, as being a single "intention": S van Schalkwyk, "Subsequent Conduct as an Aid to Interpretation" (2000) 7 *Canterbury Law Review* 541 at 552. Clearly, it cannot be a reference to a subjective "intention". Being objective, and therefore the meaning which the decision-maker ascribes to the words, the abandonment of the fiction is long overdue": MD Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts" (2003) 24 *Statute Law Review* 95 at 98. Kirby J's preferred term is "purpose". See, for example, *Director-General of the Department of Corrective Services v Mitchelson* (1992) 26 NSWLR 648 at 653; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 117–118; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 622. The passage from the joint judgment in *CIC Insurance* which is quoted above (see the text above at n 61) refers to "legislative intent". The term "legislative purpose" could just as easily have been used.

133 United States courts have applied various rules or presumptions of interpretation, including the rule of lenity (that penal provisions are to be strictly construed) and the rule that remedial statutes should be broadly construed. Scalia J of the United States Supreme Court and Corrigan CJ of the Michigan Supreme Court have attacked the use of such rules or presumptions, describing them as "dice loading" rules. See A Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws" in *The Tanner Lectures on Human Values*, delivered at Princeton University in 1995, 1997, University of Utah Press, Utah, pp 77, 102–103; and MD Corrigan and JM Thomas, "'Dice Loading' Rules of Statutory Interpretation" (2003) 59 *NYU Annual Survey of American Law* 231.

Over the years the courts have used various phrases as tests of rebuttal of these presumptions, such as “clearly emerges, whether by clear words or necessary implication”¹³⁴ and “clearly manifested by unmistakable and unambiguous language”.¹³⁵ Spigelman CJ, with whom Handley and Giles JJA agreed, collected many of these phrases in *Durham Holdings Pty Ltd v New South Wales*.¹³⁶ It ought to be possible to gauge the strength of each presumption from the language used to describe the circumstances in which it is rebutted, but in practice this is not always easily done.

What is the status of these presumptions in the light of s 15AA of the *Acts Interpretation Act 1901* (Cth) and the provisions based on it? Only in South Australia and the Australian Capital Territory have the legislatures supplied any answers to this question. In South Australia, it is expressly provided that its equivalent of s 15AA, s 22 of the *Acts Interpretation Act 1915*, does not operate to create or extend criminal liability. In the ACT, s 170 of the *Legislation Act 2001* (ACT) provides:

- “(1) An Act or statutory instrument must be interpreted to preserve the common law privileges against self-incrimination and exposure to the imposition of a civil penalty.
- (2) However, this section does not affect the operation of the *Evidence Act 1995* (Cth).”

As to how this provision may be displaced, see ss 170(3) and 6(2). Legal professional privilege is similarly protected in the Australian Capital Territory: ss 171 and 6(2). Also see the *Human Rights Act 2004* (ACT) ss 30 and 31, which are referred to above.

What is the relationship of the presumptions of interpretation to the interpretive principles described by the terms “context” and “purpose” where no answer to this question is supplied by the legislature? The presumptions that have been identified by Spigelman CJ could be considered part of a broad “context”, based on shared liberal values. However, it must be said that this appears to be a broader use of the term than that identified by Brennan CJ, Dawson, Toohey and Gummow JJ in their joint judgment in *CIC Insurance Ltd v Bankstown Football Club Ltd*.¹³⁷ A more orthodox approach is to relate the presumptions of interpretation to the concept of “purpose” by assuming that any purpose would be likely to have been consistent with the values that are reinforced by those presumptions. Of course, such an assumption could be displaced. In *Newcastle City Council v GIO General Ltd*¹³⁸ McHugh J, relying in part on *Waugh v Kippen*,¹³⁹ suggested that the presumption that penal provisions should be interpreted strictly must give way to the purposive approach, especially where the provision in question was a remedial one. Toohey, Gaudron and Gummow JJ¹⁴⁰ were content to comment that in that context the presumption was “one of last resort”.

134 *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 152 CLR 328 at 341 per Mason ACJ, Wilson and Dawson JJ.

135 *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.

136 (1999) 47 NSWLR 340 at 353–354.

137 See the text at n 61.

138 (1997) 191 CLR 85 at 109–110.

139 (1986) 160 CLR 156 at 164–165 per Gibbs CJ, Mason, Wilson and Dawson JJ.

140 (1997) 191 CLR 85 at 102–103.

Referring to international agreements

There is a long-standing common law principle that if an Act purports to give effect to an international agreement, the court is at liberty to look at that agreement in an endeavour to resolve any uncertainty or ambiguity in the Act itself.¹⁴¹

More recently, the courts have also taken international agreements into consideration in the process of interpreting legislation with which those agreements have no explicit connection. International obligations may arise under agreements that Australia has signed, but which have not been enacted into Australian domestic law.¹⁴² In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,¹⁴³ citing English authority, Brennan, Deane and Dawson JJ said:

“We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty.”

Mason CJ and Deane J referred to this comment when, in *Minister for Immigration and Ethnic Affairs v Teoh*, they said:

“Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia’s obligations under a treaty or international convention to which Australia is a party: *Chu Kheng Lim v Minister for Immigration*¹⁴⁵, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia’s obligations under international law.

It is accepted that a statute is to be interpreted and applied, so far as its language permits, so that it is in conformity and not in conflict with the established rules of international law: *Polites v Commonwealth*.¹⁴⁶ The form in which this principle has been expressed might be thought to lend support to the view that the proposition enunciated in the previous paragraph should be stated so as to require the courts to favour a construction, as far as the language of the statute permits, that is in conformity and not in conflict with Australia’s international obligations. That indeed is how we would regard the proposition as stated in the preceding paragraph. In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.”¹⁴⁴

141 *Yager v The Queen* (1977) 139 CLR 28 at 43–44 per Mason J; *Enzed Holdings Ltd v Wynthea Pty Ltd* (1984) 4 FCR 450 at 458. Also see, for example, *Acts Interpretation Act* 1901 (Cth), s 15AB(1)(b), (2)(d). The variously-defined roles of both international agreements and international customary law in the interpretation of legislation are discussed in H Charlesworth, M Chiam, D Hovell and G Williams, “Deep Anxieties: Australia and the International Legal Order” (2003) 25 *Sydney Law Review* 423 at 457–461.

142 *Dietrich v The Queen* (1993) 177 CLR 292 at 305 per Mason CJ and McHugh J, 360 per Toohey J.

143 (1992) 176 CLR 1 at 38.

144 (1995) 183 CLR 273 at 287.

145 (1992) 176 CLR 1 at 38.

146 (1945) 70 CLR 60 at 68–69, 77, 80–81.

This important principle of interpretation has been accepted in many cases.¹⁴⁷ The *Teoh* principle of interpretation was also given extra-judicial support by the Chief Justice of New South Wales.¹⁴⁸ Spigelman CJ there suggested that the concept of ambiguity in this context applied “to any case of doubt as to the proper construction of a word or phrase.”¹⁴⁹ He added:

“There is no reason why this principle of statutory construction should not now be reflected in Interpretation Acts, whether at Commonwealth or State level.”

In the decision of the High Court in *Al-Kateb v Godwin*,¹⁵⁰ an aspect of which has already been discussed,¹⁵¹ McHugh J expressed serious reservations about the *Teoh* principle of interpretation. He said:¹⁵²

“Given the widespread nature of the sources of international law under modern conditions, it is impossible to believe that, when Parliament now legislates, it has in mind or is even aware of all the rules of international law. Legislators intend their enactments to be given effect according to their natural and ordinary meaning. Most of them would be surprised to find that an enactment had a meaning inconsistent with the meaning they thought it had because of a rule of international law which they did not know and could not find without the assistance of a lawyer specialising in international law or, in the case of a treaty, by reference to the Joint Standing Committee on Treaties. In *Minister for Immigration and Ethnic Affairs v Teoh*, counsel for the minister told this court that Australia was ‘a party to about 900 treaties’.”¹⁵³

McHugh J added, however, that the *Teoh* principle of interpretation “is too well established to be repealed now by judicial decision”.¹⁵⁴

147 See, for example, *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 per Gummow and Hayne JJ; *Luu v Minister for Immigration & Multicultural Affairs* (2002) 127 FCR 24 at 48; *Pilkington (Australia) Ltd v Minister for Justice & Customs* (2002) 127 FCR 92 at 99–100; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 per Gleeson CJ; *Minister for Immigration & Multicultural & Indigenous Affairs v VFAD* (2003) 125 FCR 249 at 269; *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2002) 197 ALR 242 at 273–277; *Le v Minister for Immigration & Indigenous Affairs* [2004] FCA 875 [59] (appeal dismissed (2005) 215 ALR 521); *Coleman v Power* (2004) 220 CLR 1 at 27–28 per Gleeson CJ; *McGee v Gilchrist-Humphrey* (2005) 92 SASR 100 at 114–115 per Perry J. Also see MD Kirby, “The Role of the Judge in Advancing Human Rights Norms by Reference to International Human Rights Norms” (1988) 62 *Australian Law Journal* 514; MD Kirby, “The Australian Use of International Human Rights Norms: From Bangalore to Balliol — A View from the Antipodes” (1993) 16 *University of New South Wales Law Journal* 363.

148 See JJ Spigelman, “Access to Justice and Human Rights Treaties” (2000) 22 *Sydney Law Review* 141.

149 *ibid* 149.

150 (2004) 219 CLR 562. See J Allan, “‘Do the Right Thing’ Judging? The High Court of Australia in *Al-Kateb*” (2005) 24 *University of Queensland Law Journal* 1 at 18–26.

151 See the text above at n 125.

152 (2004) 219 CLR 562 at 590.

153 (1995) 183 CLR 273 at 316 (emphasis in original).

154 (1995) 183 CLR 273 at 316.

Kirby J countered:¹⁵⁵

“McHugh J appears to adopt an interpretation of detention legislation that implies that the subjective views of legislators must prevail (for example their knowledge and views at the time of enactment about international law). I would reject such an approach. Today, legislation is construed by this court to give effect, so far as its language permits, to its purpose: *Bropho v Western Australia*;¹⁵⁶ *Project Blue Sky Inc v Australian Broadcasting Authority*.¹⁵⁷ This is an objective construct. The meaning is declared by the courts after the application of relevant interpretive principles. It is an approach that has been greatly influenced by McHugh J’s own decisions: see *Kingston v Ke prose Pty Ltd*.¹⁵⁸

The purposive approach accommodates itself readily to an interpretive principle upholding compliance with international law, specifically the international law of human rights. This is because, as Professor Ian Brownlie has explained, municipal or domestic courts when deciding cases to which international law is relevant, are exercising a form of international jurisdiction.¹⁵⁹ ... In exercising international jurisdiction, they ... give effect to interpretive principles defensive of basic rights upheld by international law.”

There appear to be difficulties with the opinions of both justices. Kirby J is surely on stronger ground in suggesting that the question does not concern the subjective views of legislators. Although Mason CJ and Deane J referred to parliamentary intention in *Teoh*, it would seem that they were speaking of an objective intention, attributed by the court to the Parliament as a whole.¹⁶⁰ With respect to the comments of Kirby J, Professor Brownlie did not refer to “municipal or domestic courts ... deciding cases to which international law is relevant”. He said:

“any national tribunal which is given jurisdiction by municipal law over questions of international law, for example responsibility for war crimes, or genocide, and which exercises that jurisdiction in accordance with international law, may ... be considered to be exercising an ‘international jurisdiction’.”¹⁶¹

This is a narrower proposition than that attributed to Professor Brownlie. That said, the principle in *Teoh* stands, independently of the principle ascribed to Professor Brownlie.

155 (2004) 219 CLR 562 at 622. Kirby J agreed with McHugh J on aspects of the relevance of international agreements as aids to the interpretation of domestic legislation in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. At 391–392 McHugh, Gummow, Kirby and Hayne JJ observed that: “while the obligations of Australia under some international conventions and agreements are relatively clear, many international conventions and agreements are expressed in indeterminate language: Bennion, *Statutory Interpretation* (2nd ed, 1992) 461 as the result of compromises made between the contracting State parties: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 255–256. Often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed. The problems that might arise if the performance of any function of the ABA carried out in breach of Australia’s international obligations was invalid are compounded by Australia being a party to about 900 treaties: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 316.”

156 (1990) 171 CLR 1 at 20.

157 (1998) 194 CLR 355 at 381–382.

158 (1987) 11 NSWLR 404 at 421–424 (McHugh JA dissenting).

159 I Brownlie, *Principles of Public International Law* (5th ed), 1998, Clarendon Press, Oxford, p 584.

160 As to this, see the comments of Kirby J, quoted above at n 132.

161 I Brownlie, op cit n 159.

There is another issue arising from *Teoh* that needs to be addressed. Does the concept of ambiguity function as a threshold test, so that it must be concluded that a provision is ambiguous before a treaty can be taken into account to produce a conclusion, or is ambiguity an *ex post facto* conclusion, reached after consideration of the treaty? Given what is at stake here and taking account of the approach to context set out in the *CIC Insurance Case*, the second principle is to be preferred. If that is correct, the principle of interpretation outlined in *Teoh* should be treated as another presumption of interpretation and added to the list above.¹⁶² Like other presumptions of interpretation, the assumption which supports it will be overridden by an interpretation that has been properly reached by reference to underlying purpose or object and context.

A few days after the *Al-Kateb* decision, in *Coleman v Power*¹⁶³ Gleeson CJ and Kirby J considered the relevance of the International Covenant on Civil and Political Rights (ICCPR) (1966) and the First Optional Protocol to the interpretation of s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld). The ICCPR had been signed by Australia in 1972 and ratified in 1980. The Protocol had been acceded to in 1991. Gleeson CJ, who dissented, concluded that the qualification relating to ambiguity referred to in the first paragraph of the extract from the judgment of Mason CJ and Deane J in *Teoh*, above, applied, with the effect that s 7(1)(d) of the Act should not be interpreted by reference to the ICCPR. He observed that:

“The proposition that the ICCPR can control or influence the meaning of an Act of the Queensland Parliament of 1931 is ... difficult to reconcile with the theory that the reason for construing a statute in the light of Australia’s international obligations, as stated in *Teoh*, is that Parliament, *prima facie*, intends to give effect to Australia’s obligations under international law.”¹⁶⁴

Kirby J disagreed, saying:

“The notion that Acts of Parliament in Australia are read in accordance with the subjective intentions of the legislators who voted on them is increasingly seen as doubtful ... It does not represent the purposive approach to legislation now followed by this court. The purpose postulated in that meaning is an objective one, derived from the living language of the law as read today. It is not derived from the subjective intentions of parliamentarians held decades earlier, assuming that such intentions could ever be accurately ascertained.”¹⁶⁵

The other justices did not enter the debate. The approach of Gleeson CJ is to be preferred. He appears to have taken a position that is between McHugh J’s view in *Al-Kateb* and the view expressed by Kirby J in this more recent case. Gleeson CJ’s approach is consistent with that of Kirby J in *Al-Kateb*, in so far as the intention to which he refers is an objective intention of the Parliament as a whole. However, in his

162 See the text above at n 122.

163 (2004) 220 CLR 1.

164 (2004) 220 CLR 1 at 28.

165 (2004) 220 CLR 1 at 95.

insistence on a strict interpretation of the language of Mason CJ and Deane J in *Teoh*, he has parted company with Kirby J. Gleeson CJ's parliamentary intention is an imputed intention like that of Kirby J, but it is an imputed intention as at the time at which the provision in question is enacted.

Refinement of statutory principles by the courts

Since the introduction of ss 15AA and 15AB of the *Acts Interpretation Act* 1901 (Cth) and the provisions based on them in the States and Territories, the courts have had a great deal to say about how they operate. An attempt has been made elsewhere to gather some of these statements together and evaluate them.¹⁶⁶ Here I have limited myself to some recent cases considering the underlying central question associated with s 15AA and equivalent provisions: the identification of purpose or object.¹⁶⁷

Under s 15AA and its equivalents, in the interpretation of a provision of an Act, the interpreter must attempt to discover the purpose or object underlying the Act and, if possible, adopt an interpretation furthering that purpose or object. But how the purpose is to be identified is not spelt out. Some legislation contains a statement of its purpose (or purposes).¹⁶⁸ Apart from that, the legislatures have made little contribution to the question of how to define the purpose or object relevantly. General statements contained in legislation as to its purpose or objects need to be treated with caution. As Brennan CJ and McHugh J observed in *IW v City of Perth*,¹⁶⁹ such statements should be understood by reference to other provisions contained in the legislation. Just as it makes no sense to interpret a provision without regard to the rest of the enactment, it is sometimes apparent that a general statement of purpose must be tempered by the contents of other provisions in the enactment. In other words, like any other provision in legislation, a purpose or objects clause must be interpreted in its context.

This last point is illustrated by the decision of the High Court in *Victims Compensation Fund Corporation v Brown*,¹⁷⁰ in which Heydon J delivered a judgment with which McHugh ACJ, Gummow, Kirby and Hayne JJ agreed. That judgment, and the dissenting judgment of Spigelman CJ in the New South Wales Court of Appeal decision¹⁷¹ that was reversed by the High Court, contain valuable insights into the way in which a statement of purpose should be formulated in the interpretive process. The case concerned a claim for compensation under the *Victims Support and Rehabilitation Act* 1996 (NSW). Clause 5(a) of Schedule 1 of the Act provided that "Compensation is payable only if the symptoms and disability persist for more than six weeks". The result turned on whether the word "and" in cl 5(a) should be given its ordinary conjunctive meaning or whether it should be interpreted disjunctively.

166 D Pearce and R Geddes (2006), op cit n 4, Chs 2 and 3.

167 For an earlier, detailed discussion of this matter see JW Barnes (1995), op cit n 6, at 91–119.

168 This has been true of all Victorian statutes since 1985.

169 (1997) 191 CLR 1 at 12.

170 (2003) 77 ALJR 1797.

171 *Victims Compensation Fund Corporation v Brown* (2002) 54 NSWLR 668.

It is useful first to consider the judgments given in the Court of Appeal. Mason P observed¹⁷² that cl 5(a) was “part of an enactment that has remedial and beneficial objectives”, adding that as a consequence “[t]he principle of a liberal approach to the interpretation of legislation of this kind is engaged”. One of the objectives of the Act was “to give effect to a statutory scheme of compensation for victims of crimes of violence”: s 3(a). The other majority judge, McClellan J, noted¹⁷³ that “the legislation is remedial, having as its purpose the compensation of victims of crimes of violence.” They drew on this formulation of the purpose of the legislation to support a conclusion that “and” should be interpreted disjunctively, producing a result favourable to the claimant.

Spigelman CJ dissented. He found no basis for any interpretation of cl 5(a) other than a literal one. Observing that the introductory words of cl 5 were words of limitation, he continued:¹⁷⁴

“With respect to a clause intended to be limiting, it is not appropriate to apply the principle of statutory construction that beneficial legislation should be construed liberally. ...

In a passage that has frequently been cited with approval (see *Applicant A v Minister for Immigration and Ethnic Affairs*;¹⁷⁵ *Brennan v Comcare*;¹⁷⁶ *Morrison v Peacock*¹⁷⁷), the Supreme Court of the United States said in *Rodriguez v United States*:¹⁷⁸

‘... No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.’

In the present proceedings, the respondent submitted that the purpose was to compensate victims. Even if I were to accept a legislative purpose stated at that level of generality, that would not entail that any ambiguity must be construed in such a way as to maximise compensation (cf *Favelle Mort Ltd v Murray*¹⁷⁹). In any event, the very specificity of the provisions of the legislation indicate that the legislative purpose is to provide compensation in accordance with the Act and not otherwise.”¹⁸⁰

172 *Victims Compensation Fund Corporation v Brown* (2002) 54 NSWLR 668 at 681.

173 *Victims Compensation Fund Corporation v Brown* (2002) 54 NSWLR 668 at 689.

174 *Victims Compensation Fund Corporation v Brown* (2002) 54 NSWLR 668 at 671–672. Spigelman CJ had previously discussed the comments of the Supreme Court of the United States in *Rodriguez v United States* in the address referred to in n 5 above, at 225.

175 (1997) 190 CLR 225 at 248.

176 (1994) 50 FCR 555 at 574.

177 (2000) 50 NSWLR 178 at 187.

178 480 US 522 (1987) 525–526.

179 (1976) 133 CLR 580.

When *Brown's Case* was appealed to the High Court, Heydon J endorsed the reasoning of Spigelman CJ and concluded¹⁸¹ that there was “no convincing textual reason emerging from the rest of the Act for departing from the ordinary meaning” of the word “and” in cl 5(a). He added that there were indications that the word “or” had been used in the Act when a disjunctive meaning had been intended. Furthermore, neither the history of this kind of legislation in New South Wales nor the Minister’s Second Reading Speech on the bill supported a disjunctive interpretation of “and” in cl 5(a). The major point of difference between Heydon J and the majority in the New South Wales Court of Appeal was Heydon J’s view that “in dealing with specific limited words like those in cl 5, it is not open to apply much liberality of construction.”¹⁸² He added that it was:

“difficult to state the legislative purpose except at such extreme levels of generality that it is not useful in construing particular parts of the legislative language.”¹⁸³

There are a couple of important lessons here. *Brown's Case* is a reminder that the contextual approach applies to the whole Act, including purpose or objects clauses. Although it is tempting to seize upon a statement of purpose in an Act and to strive for an interpretation that furthers the purpose as defined, the task of relevantly defining purpose may be more complex. The second point, illustrated by the judgments of Spigelman CJ and Heydon J, is that the interpretive techniques encapsulated in the words “context” and “purpose” are necessarily interconnected and should be employed together. Although, as I have suggested, the statement of Mason J in *Lake City Freighters* appears to capture the spirit of s 15AA and its equivalents,¹⁸⁴ the statement of “the modern approach to statutory interpretation” set out in *CIC Insurance*,¹⁸⁵ demands attention because it broadens Mason J’s definition of context and emphasises that context is part of the initial stage of the interpretive process.

Most statutes do not contain a purpose or objects clause. In these instances the challenge is to deduce the relevant purpose of the provision being interpreted from its context, using that term in its widest sense, and without an explicit starting-point. The reasoning

180 A similar point to that made in *Rodriguez v United States* was made locally, by Mahoney JA in *Metal Manufacturers Pty Ltd v Lewis* (1988) 13 NSWLR 315, 326: “[T]o see the key to the meaning of a section in the policy or purpose of the legislation is, in my opinion, to take a less than sophisticated view of the art of the parliamentary draftsmen. In many cases, the interpretation of a provision is difficult, not because the policy or purpose of the legislation is not clear, but because the section is directed, not simply to effecting that policy or purpose, but to achieving a compromise between it and other considerations. In the present case, the evil and the remedy are clear. The draftsmen sought to prevent the improper incurring of debts and to do so by imposing criminal and civil liability on relevant directors. The difficulty that arises in the interpretation of [the *Companies (New South Wales) Code*] s 556(2) arises because, having the mischief and the remedy clear, the draftsman had to determine the ‘true reason’ of the remedy chosen, that is, how far he should apply it without infringing the rights of otherwise innocent directors. I do not think that policy or purpose are of assistance in determining whether a director should be responsible for all debts incurred by his managing director or only for those to which he has given a particular authority or consent.”

181 (2003) 77 ALJR 1797 at 1799.

182 (2003) 77 ALJR 1797 at 1804.

183 That concept is regularly used in the interpretation of words and phrases contained in legislation. See JJ Spigelman, “Statutory Interpretation: Identifying the Linguistic Register” (1999) 4 *Newcastle Law Review* 1.

184 See the text above at n 55.

185 See the text above at n 61.

of the Federal Court in *Pileggi v Australian Sports Drug Agency*,¹⁸⁶ which raised an issue not altogether different from that in *Brown's Case*, provides an illustration. Regulation 17(1) of the *Australian Sports Drug Agency Regulations 1999* (Cth) provided that the Agency may ask a competitor “orally or by written notice” for a urine sample. Sub-regulation (2) provided that such a request must state the place and time for provision of the sample. Duly authorised representatives of the Agency had followed a competitor as she went to her car. One of the representatives shouted words to the effect that the competitor was notified to attend a drug test and the other showed her a completed form which indicated the place and time at which the sample was to be provided, leaving it on the windscreen of the car before it was driven away.

It was argued on behalf of the competitor that as the request for a sample had been made partly in oral form and partly by written notice, it did not comply with reg 17. Kenny J of the Federal Court rejected that interpretation of the regulation. She stated:

“... a purposive approach to interpretation would support reading the word ‘and’ for the word ‘or’; and, having regard to ... ss 15AA and 46 of the *Acts Interpretation Act 1901* (Cth), this approach is to be preferred: see *Smith v Papamihail*,¹⁸⁷ followed in *Re Peat Resources of Australia Pty Ltd; ex parte Pollock*.¹⁸⁸ A request under regulation 17 will be made when, viewed objectively and having regard to the attendant circumstances, the words used clearly convey to the competitor that he or she is being asked to provide a sample at a particular place and time.”¹⁸⁹

Noting the “general and non-technical language” of the regulation, Kenny J adopted an interpretation which, rather than being a literal reading, gave effect to what she considered to be its underlying purpose. This was that, objectively speaking, the competitor must have been informed of a request to provide a sample for a drug test at a specified time and place. The competitor was not required to have subjective knowledge of the time and place for provision of the sample. The less onerous requirement having been fulfilled, it did not matter that the medium used was partly oral and partly notice in writing.

In support of the approach taken, Kenny J employed a reasoning technique that is an aspect of the purposive approach; interpretation by reference to consequences:¹⁹⁰

“... I doubt that it was intended that there would be no request under regulation 17 in the circumstance where a duly authorised official informs a competitor that he or she is required for a drug test, whilst handing to him or her a notification form clearly setting out the time and place for the test.”¹⁹¹

Then Kenny J added that the result could not be different simply because not one but two representatives of the Agency were involved in making the request.

186 (2004) 138 FCR 107.

187 (1998) 88 FCR 80 at 88–89 per Carr J.

188 [2004] 181 FLR 454 at [23] per Malcolm CJ. See also [98] per Steytler J and [115] per McKechnie J; D Pearce and R Geddes (2006), op cit n 4 at [2.25].

189 (1998) 138 FCR 107 at 118.

190 See D Pearce and R Geddes (2006), op cit n 4, at [2.34]–[2.36].

191 (2004) 138 FCR 107 at 119.

As well as exemplifying interpretation by reference to consequences, the reasoning of Kenny J in *Pileggi v Australian Sports Drug Agency* illustrates the way in which the relevant purpose may be constructed by the court or tribunal. The presence of the words “*underlying purpose or object*” (emphasis added) in s 15AA and equivalent provisions supports the proposition that purpose may have to be constructed by the interpreter.

Conclusions

This is an attempt to state a few principles for interpreting legislation, based on the statutory and common law contributions that have been discussed.

1. Legislation is to be interpreted with reference to its underlying purpose or object and its context, using that term in its broadest sense, including extrinsic material.
2. The task is informed by the *Acts Interpretation Act* 1901 (Cth), ss 15AA and 15AB, and equivalent provisions, together with the statements of principle identified as the “modern approach to statutory interpretation” in *CIC Insurance*.
3. This means that both the underlying purpose or object and the context are to be considered initially, rather than after it has been concluded that the provision in question is ambiguous or unclear.
4. A statement of purpose or object, as with any other provision contained in legislation, is to be interpreted in its context.
5. Presumptions of interpretation are to be used, but they are necessarily overridden by interpretations properly arrived at by reference to underlying purpose or object and context.
6. This includes the presumption that legislation accords with Australia’s obligations under a treaty or convention to which Australia is a party, where the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument.

At this stage it is perhaps too early to determine whether a formulation of Spigelman CJ’s “text-based” interpretation in *Young’s Case* or McHugh JA’s “reading in” principle in *Birmingham’s Case* should join the list, or whether a more broadly-based proposition will be applied by some courts and tribunals.



Structuring Purposive Statutory Interpretation — An American perspective

Professor Philip P Frickey*

Introduction

In large part because of shared common law roots, Australia and the United States have a similar legal culture. As many commentators have pointed out, both countries have gone from the age of the common law to the age of statutes.¹ Statutory interpretation, not common law divination, is what most attorneys and judges in both countries do most of their time.

This article offers some comments on ss15AA and 15AB of the *Acts Interpretation Act 1901* (Cth) (the Act) and its State analogues. These provisions promote purposive statutory interpretation informed by what American attorneys would call legislative history. In the United States, there is an interesting academic literature on purposive interpretation and the role that legislative history might play in it. This article provides an analysis of American purposivism and suggests how that might be relevant to interpretive practice under ss 15AA–15AB, but does not examine whether this possible synthesis of the two sections is consistent with the backgrounds of these two provisions, with Australian cases, or with the practices of able lawyers. Instead, it will simply offer a potentially useful way of understanding how the two sections could work together in promoting a defensible, limited purposivism.

* BA (Kan) JD (Mich). Alexander F and May T Morrison Professor of Law, School of Law, University of California at Berkeley. James Emmett, Harry Geddes and Ruth Sullivan provided helpful comments on an earlier draft of the article. The author would like to take this opportunity to thank the New South Wales Bar Association, its officers (particularly Bret Walker and Ian Harrison) and its staff (particularly Kathy O'Neill) for including him in its conference on Working with Statutes, 18–19 March 2005, Sydney, which prompted this article. This article was first published in full in (2006) 80 *Australian Law Journal* 849, published by the Lawbook Co ©, part of Thomson & Regulatory Ltd <www.thomson.com.au.> Reproduced with permission.

1 On Australia, see, for example, MD Kirby, “Towards a General Theory of Interpretation — The Case of Statutes and Contracts” (2003) 24 *Statute Law Review* 95; on the United States, see, for example, G Calabresi, *A Common Law for our Age of Statutes*, 1982, Harvard University Press, Cambridge, Mass, pp 5–7. Some of the analysis has been borrowed from two of the author’s recent articles: PP Frickey, “Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Interpretation in the Early Warren Court” (2005) 93 *Cal L Rev* 397; PP Frickey, “Interpretive-Regime Change” (2005) 38 *Loyola LAL Rev* 1971. For a more general discussion, see WE Eskridge Jr, PP Frickey and E Garrett, *Legislation and Statutory Interpretation* (2nd Ed), 2006, Foundation Press, New York, Chs 7–9.

A model of American purposivism

In the late 1950s, Harvard law professors Henry Hart and Albert Sacks distributed their path-breaking materials on the legal process.² Their extensive discussion of statutory interpretation was better than any existing American treatment of the subject. Moreover, the purposive theory of statutory interpretation that they developed remains influential today.

Hart and Sacks made no pretence, however, that their approach — or any other — either accurately described American practice or was likely to become the predominant method. They wrote:

“Do not expect anybody’s theory of statutory interpretation, whether it is your own or somebody else’s, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.

When an effort is made to formulate a sound and workable theory, therefore, the most that can be hoped for it is that it will have some foundation in experience and in the best practice of the wisest judges, and that it will be well calculated to serve the ultimate purposes of law.”³

Almost a half-century later, what Hart and Sacks said remains true of the United States. Indeed, our Supreme Court has been mired for nearly two decades in disputes over the most basic aspects of statutory interpretation. That subject has been thoroughly analysed elsewhere.⁴ For present purposes, a short overview should suffice, focusing on the three basic approaches to statutory interpretation in the common law world: textualist, intentionalist and purposive.

A textual, or relatively literal, approach would give nearly conclusive primacy to statutory text. In the United States today, rarely does one find a case that clings to literal textual meaning regardless of consequences. For example, the judges of our Supreme Court — including Scalia J, our leading proponent of textual interpretation — adhere to the “golden rule,” the absurd-result exception to plain meaning. Under this approach, textual meaning should not be followed if it leads to an absurd result.⁵

When textual meaning does not produce absurdity, however, the practices of American judges especially enamoured of textual fidelity have diverged. Until a few years ago, the common approach, often called the “plain meaning rule”, provided that if the text produced a very clear meaning that was the end of the interpretive encounter. The plain meaning rule operated much like the parol evidence rule in contract interpretation,

2 HM Hart Jr and AM Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, 1994, WN Eskridge Jr and PP Frickey (Eds), Foundation Press, New York (originally widely distributed in a tentative edition in 1958).

3 *ibid*, p 1169.

4 For an overview see, PP Frickey, “Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honour of Irving Younger” (1999) 84 *Minn L Rev* 199.

5 See, for example, *Green v Bock Laundry Machine Co* 490 US 504 (1989). For the argument that true textualism should not embrace the absurd-result exception to plain meaning, see JF Manning, “The Absurdity Doctrine” (2003) 116 *Harv L Rev* 2387.

providing that when within the four corners of the document to be interpreted — contract or statute — a clear meaning was evident, the court’s role was at an end.⁶ More recently, Justice Scalia has argued that the touchstone of statutory meaning should not be plain textual meaning, but ordinary textual meaning. On my understanding, Scalia’s approach substantially reduces the threshold of textual clarity — a plain meaning would be something like 90/10 or better “clear”, but ordinary meaning would seem simply to be a preponderance of meaning achieved by textual exegesis.⁷

The older plain-meaning rule and Scalia’s “new textualism”⁸ point in divergent directions concerning the second plausible interpretive approach, intentionalism. For Scalia J, intentionalism is wrongheaded both for descriptive and normative reasons.⁹ Accordingly, Scalia would almost never consider legislative history relevant to statutory interpretation.¹⁰

The general practices under the plain-meaning rule, however, blended into intentionalism. As ordinarily understood, the plain-meaning method simply concluded that, when the legislative expression of intent was clear in the statutory text, the court was bound to follow it. From this formulation, it follows that statutory text is not, as Scalia would have it, potentially legally conclusive for its own sake. Instead, textual meaning serves as the best evidence of legislative intent — indeed, occasionally such powerful evidence as to foreclose any inquiry about arguably contradictory evidence of legislative intent. It is arguably consistent with the plain-meaning approach to conclude that, when textual meaning is not crystal clear, the court should consult context, including legislative history, to divine legislative intent. Indeed, if the touchstone of statutory meaning is legislative intent (as the plain-meaning rule arguably concedes) then even apparent textual meaning should not foreclose consideration of context and legislative history, for in some cases those factors might demonstrate that the statutory text was fundamentally ill-drafted to embody evident legislative intent. From just before World War II until at least sometime in the 1980s, the United States Supreme Court frequently embraced this model of statutory interpretation: statutory text was important not for its own sake, but as the best evidence of legislative intent; all other evidence that might shed light on legislative intent was admissible as well.¹¹

6 See, for example, *Caminetti v United States* 242 US 470 (1917).

7 See *Chisom v Roemer* 501 US 380 (1991) at 404 (Scalia J, dissenting).

8 Bill Eskridge coined this term. See WN Eskridge Jr, “The New Textualism” (1990) 37 *UCLA L Rev* 621.

9 In a nutshell, Scalia J thinks legislative intent cannot exist — how can a multimember body, much less a bicameral one, have a determinative “intent” about a particular issue? — and, in any event, is irrelevant because “law” only consists of the words enacted into the statute books. See, generally, A Scalia, “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws”, in A Scalia and A Guttman (Eds), *A Matter of Interpretation*, 1997, Princeton University Press, New Jersey.

10 *Green v Bock Laundry Machine Co* 490 US 504 (1989) is a rare exception. Scalia J was willing to consider legislative history to determine whether any legislators actually thought the rule of evidence in question might mean what the Justices thought would be absurd.

11 The classic formulation is in *United States v American Trucking Ass’ns Inc* 310 US 534 (1940) at 542–543.

The third plausible interpretive approach, purposivism, is the most intellectually ambitious. As a consequence, it is the most difficult to explain. Some arguments supporting it can take a negative form as attacks up on the other plausible approaches. For example, it is easy enough to rail against wooden literalism. It is also simple enough to point out that a multimember legislative body is unlikely to have a shared “intent” about the meaning to be attributed to a statute years later in a particular (usually unforeseen) context. The more interesting arguments for purposivism are positive in form, however. This article shall focus on those developed by Hart and Sacks.

A brief overview of purposivism

Hart and Sacks developed an integrated methodology for statutory interpretation that captured the spirit of the post-World War II American optimism about the legal process. Their approach was grounded upon a unitary theory of the nature and purposes of law. They assumed that all law — common law, constitutional law, statutes, administrative regulations, and the like — involves a purposive endeavour designed to promote social utility. This fundamental assumption about law’s purposiveness is firmly grounded in the rationalist, functionalist common law tradition. As such, this underlying theory makes their approach to statutory interpretation especially worthy of consideration in other common law jurisdictions, such as Australia.

When they focused on statute creation, Hart and Sacks implemented their notion of law’s purposiveness in interesting ways. They assumed that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably, and the judges interpreting statutes were engaged in the reasoned elaboration of those purposes as they could be made to fit within the broader legal fabric. On this view, it was simply unacceptable to conclude that a statute lacked a sensible purpose. Moreover, unless it was impossible to conclude otherwise, the court was to avoid the perspective of the cynical observer who might see only short-term political compromise rather than the embrace of reasonable public policy purposes.¹²

All of this sounds quite panglossian, even foolish. The better understanding is that Hart and Sacks were not writing in a descriptive mode.¹³ Instead, they were writing normatively: courts or agencies engaged in statutory interpretation would produce better results if the basic nature of law and of legal institutions were assumed to be as they proposed. Thus, they indulged in “as if” assumptions — the law should be understood as if it were this way — that amounted to legal fictions. Accordingly, a critique of their purposivism as unrealistic largely misses the point. A more salient analysis would be whether the interpretations that this theory produces are more worthwhile for a legal system than would be literalist or intentionalist ones. Obviously, answering this inquiry would require a complex calculus of descriptive and normative inquiries.¹⁴

12 Hart and Sacks, *op cit* n 2, pp 1374–1380.

13 Hart and Sacks were writing in the middle of the infamous McCarthy period in American history, where the national Congress and many State legislatures were adopting statutes rife with anti-communist hysteria. Surely they were too sophisticated to believe that their assumptions about legislatures and the law created by them were realistic.

14 See P Frickey, *op cit* n 1 (“Getting from Joe to Gene”), which examines statutory interpretation during the McCarthy era and analyses 1950s cases involving political offenders.

It is important to distinguish purposivism from intentionalism. The latter seeks to engage in an imaginative reconstruction of what the enacting legislature would have done with the interpretive problem at hand. The intentionalist interpreter does his or her best to stand in the shoes of those legislators — warts and all — and, like a good historian, reconstruct the most plausible speculative result without allowing his or her own perspective and values to intrude. Obviously, the generous assumptions involved in the Hart and Sacks purposive approach are far removed from such a hard-headed historical realism (a realist ideal that, by the way, one might doubt actual interpreters can mimic). The purposive inquiry is not what the enacting legislature might have done, but rather what reasonable policies the legislature might be understood to have designed the statute to serve, with respect to the issue at hand. Purposive interpretation is thus more abstract, less historically rooted, more functionally oriented, and has less pretence to hard-edged objectivity than intentionalist interpretation. Purposive interpretation is driven by shared values in a legal culture at least as much as it is by the historical context of a particular legislative event.

Although Hart and Sacks did what they could to avoid diluting purposivism with political compromise or concrete historicism, they did place two important side constraints on it. Their “concise statement” of the interpretive task was as follows:

In interpreting a statute, a court should:

1. Decide what purpose ought to be attributed to the statute and to any subordinate provision which may be involved; and then
2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either:
 - (a) a meaning they will not bear, or
 - (b) a meaning which would violate any established policy of clear statement.¹⁵

Each of these qualifications merits attention. For Hart and Sacks, statutory textual meaning provided a basis for identifying plausible purposes to be attributed to the statute, rather than establishing a word puzzle to be solved by discovering the one “right” answer. The interpreter was not commanded to follow first-best textual meaning, as Scalia’s “ordinary meaning” approach would largely have it. Instead, textual meaning was a side constraint that limited the attribution of plausible purposes. One way to understand the limitation is that the court is to choose the attributed purpose from within a set of plausible textual meanings rather than engage in obvious abuse of the text duly enacted by the legislature. Another way to think about the limitation is that it provides what Hart and Sacks saw as the unique difference between statutory interpretation and common law elaboration: both are purposive extensions of the existing legal fabric, but the former is required to provide somewhat more deference to canonical statutory language than the latter is mandated to do with the discursive language found in judicial precedents.

¹⁵ Hart and Sacks, *op cit* n 2, p 1374.

Under Hart and Sacks's other qualification of purposivism, a "policy of clear statement" was privileged. Hart and Sacks explained:

"In various types of situations wise policy counsels against giving words an unusual meaning even though it may be linguistically permissible.

...

[T]hese policies of clear statement may on occasion operate to defeat the actual, consciously held intention of particular legislators, or of the members of the legislature generally ... [I]n other words, they constitute conditions on the effectual exercise of legislative power. But the requirement should be thought of as constitutionally imposed. The policies have been judicially developed to promote objectives of the legal system which transcend the wishes of any particular session of the legislature."¹⁶

Hart and Sacks discussed two specific policies of clear statement. One was the familiar rule of lenity — that "words which mark the boundary between criminal and non-criminal conduct should speak with more than ordinary clearness".¹⁷ The second was one that "forbids a court to understand a legislature as directing a departure from a generally prevailing principle or policy of the law unless it does so clearly".¹⁸ They continued: "This policy has special force when the departure is so great as to raise a serious question of constitutional power. This general policy lies behind the various presumptions referred to in discussing the attribution of purpose".¹⁹

In summary, consider how Hart and Sacks melded purposivism with the reasoned elaboration of constitutional policy:

"In determining the ... purpose which ought to be attributed to a statute ... a court should try to put itself in imagination in the position of the legislature which enacted the measure.

The court, however, should not do this in the mood of a cynical political observer, taking account of all the short-run currents of political expedience that swirl around any legislative session.

It should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.

It should presume conclusively that these persons, whether or not entertaining concepts of reasonableness shared by the court, were trying responsibly and in good faith to discharge their constitutional powers and duties."²⁰

Thus, for Hart and Sacks, one did not first "interpret" the statute and then bend that interpretation to avoid serious constitutional questions — by its very nature, purposive interpretation accomplished this feat as one process, not two.

16 Hart and Sacks, op cit n 2, p 1376.

17 Hart and Sacks, op cit n 2, p 1376.

18 Hart and Sacks, op cit n 2, p 1377.

19 Hart and Sacks, op cit n 2, p 1377.

20 Hart and Sacks, op cit n 2, p 1378.

The use of legislative history

Consistent with their effort to tie statutory meaning to public policy purposes rather than to narrow conceptions of what particular legislators were thinking during the enactment process, Hart and Sacks saw legislative history as being of use in the interpretive process only to the extent that it assisted in the attribution of purpose. In addition, they were understandably concerned that examination of legislative history would skew interpretive analysis away from purposivism to intentionalism. Rhetorically, they asked:

“Consider the difference between going to the legislative history with a question about general purpose carefully formulated after analysis of the statute and the rest of its context, and plunging into the morass of successive versions of the bill, committee hearings, committee reports, floor debates, and conference reports with a blank mind waiting to be instructed, on the assumption that it is equally probable that the legislature did or did not ‘intend’ a particular result and trying to find out which.”²¹

Hart and Sacks elaborated on this approach at some length in a proposed formulation on the use of legislative history, which is reprinted in Appendix 1 of this article.

Examples

Without burdening this article by discussing American cases, it might be useful to provide a few examples of what I consider to be purposive interpretations largely consistent with the approach of Hart and Sacks. Three brief expositions should suffice. I consider all three to be correct but would acknowledge, however, that, although the first decision was uncontroversial, the second divided the Supreme Court, and the third would surely be considered controversial in the current Supreme Court. In addition, as Hart and Sacks themselves acknowledged, American courts have no consensus on statutory interpretation. Thus, these examples should not be understood as representing the way American judges “do statutory interpretation.” At most, they exemplify how some American judges “do purposive statutory interpretation”, or perhaps how American judges “sometimes do purposive statutory interpretation”.

Robinson v Shell Oil Co

In *Robinson v Shell Oil Co* 519 US 337 (1997), after Shell Oil discharged Robinson, the latter filed a complaint with the federal Equal Employment Opportunity Commission, contending that his firing was racially motivated in violation of Title VII of the *Civil Rights Act* 1964 (US). At that point, Shell Oil, supposedly in retaliation for the filing of the complaint, gave negative job references to potential new employers. Robinson sued under Title VII’s anti-retaliation provision, which makes it unlawful “for an employer to discriminate against any of his employees or applicants for employment” who took advantage of the statute’s protections.²² A majority of the Federal Court of Appeals held that Robinson could obtain no relief.²³ The court concluded that the alleged retaliation

21 Hart and Sacks, op cit n 2, p 1233.

22 *United States Code*, Title 42, s 2000e–3(a).

23 *Robinson v Shell Oil Co* 70 F 3d 325 (1995) (en banc).

was not against an “employee” or an “applicant for employment” but, instead, against a former employee. Tellingly, the opinion noted that Title VII defines “employee” as “an individual employed by an employer”,²⁴ and Robinson did not easily fit within that definition when the alleged retaliation occurred. The judges acknowledged that the result was odd from the standpoint of policy and inconsistent with a broad, purposive understanding of Title VII, but concluded that the statutory text compelled their result.²⁵

The Supreme Court reversed the decision.²⁶ Somewhat disingenuously, the court treated the statutory text as ambiguous. Without a verb inserted, “an employee employed by an employer” could mean “is employed” or “was employed”. On more defensible ground, the court pointed out that the interpretation of the Court of Appeals lacked any purposive quality. Instead, in light of the remedial purposes of Title VII, applying the anti-retaliation provision to former as well as current employees was appropriate.

Robinson is a relatively recent, unanimous decision of the Supreme Court. It was written by Thomas J and joined by Scalia J, the two textualists on the current court. Neither purported to answer the interpretive question by reliance on “ordinary meaning”, however, notwithstanding the supposed primacy of that in textualist analysis. Such an inquiry would seemingly have strongly supported the Court of Appeals. Instead, the opinion by Thomas J appeared to revert to the older plain-meaning approach, concluded that the statutory text was ambiguous, and thus the court was free to reach a purposive conclusion (without any overt consideration of legislative history). Notice how easily this decision could have been written to correspond to the purposivism of Hart and Sacks; it is quite clear that the better purposive result was to apply the statutory prohibition in the circumstances, and the statutory words will bear the interpretation given (even if their “ordinary meaning” points in a more restrictive direction). Although I have not studied the legislative history, it seems quite implausible that it could have revealed a public-regarding, plausible purpose that would have immunised employers from retaliation claims of former employees, but not those of current employees or applicants for employment.

Chisom v Roemer

Chisom v Roemer 501 US 380 (1991) concerned the federal *Voting Rights Act*, which prohibits certain electoral practices that minimise the voting strength of racial minorities. The question was whether a provision of the statute applied to the election of State judges. The section provided that it was violated if it was shown that a racial minority has “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”.²⁷ Scalia J, in dissent, contended that the ordinary meaning of “representative” did not reach even elected judges. Judges may be elected by the people, but they do not represent the people, he concluded,

24 *United States Code*, Title 42, s 2000e(f).

25 See *Robinson v Shell Oil Co* 70 F 3d 325 (1995) at 331–332.

26 *Robinson v Shell Oil Co* 519 US 337 (1997).

27 *United States Code*, Title 42, s 1973.

they represent the law. But a majority of his colleagues disagreed. Stevens J's majority opinion concluded that, based on the broad remedial, civil rights purposes of the statute and clear legislative design to benefit minority voters, in this statute, "representative" meant the winner of a representative, popular election. Had members of Congress intended a narrower definition that would have excluded judges, there would have been some discussion in the legislative history along those lines, which there was not.

Although Stevens J's opinion does not track Hart and Sacks perfectly, there are obvious parallels. For the majority, the legislative history was not used primarily to decide whether Congress "intended" to cover the election of judges. Instead, after the court had reached its tentative conclusion about the purposive interpretation to be attributed to the statute, the legislative history was consulted largely to see whether it revealed a plausible purpose that cut in a different direction.

United States v Witkovich

United States v Witkovich is a venerable (and obscure) case from the long-ago and never-since-lamented McCarthy era of anti-communist hysteria in America. In the case, a deportable alien who was apparently viewed as a subversive had refused to answer a host of remarkable questions asked by the Justice Department. The questions asked, for example, whether he was acquainted with certain persons, had visited certain addresses, or had spoken before or was a member of certain organisations. The questions directly probed what materials he read and with whom he associated, including those from whom he may have asked for help with his legal problems.²⁸

The statute in question authorised the Attorney General to require deportable aliens in Witkovich's circumstances:

"to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper."²⁹

The majority opinion by Frankfurter J began (at 199) by acknowledging that the language of the provision:

"if read in isolation and literally, appears to confer upon the Attorney General unbounded authority to require whatever information he deems desirable ... The Government itself shrinks from standing on the breadth of these words ... once the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words become operative."

28 Among these questions, my personal favourites included: "Do you subscribe to the *Daily Worker*?"; "[H]ave you attended any meeting of any organization other than the singing club?"; "Have you attended any meetings or lectures [at a certain auditorium]?"; "Have you attended any movies [at a particular theatre]?"; and "Have you addressed any lodges of the Slovene National Benefit Society requesting their aid in your case...?" See P Frickey, op cit n 1 ("Getting from Joe to Gene"); *United States v Witkovich* 353 US 194 (1957) at 196.

29 *United States Code*, Title 8, s 1252(d)(3).

Hart and Sacks could have said it no better. Frankfurter J concluded that the Act (when read as a whole) and its legislative history both suggested that the provision authorised only inquiries regarding the alien's continued availability for departure. In short, the purpose of the provision was considerably narrower than its plain meaning. He then clinched the argument by invoking the canon of avoiding serious constitutional questions (in Australia, the author's sense is that this would be similar to a canon promoting "legality" and a canon of avoiding serious intrusions upon fundamental common law liberties). Because supervision of such aliens "may be a lifetime problem", Frankfurter J explained that "issues touching liberties that the Constitution safeguards, even for an alien 'person', would fairly be raised on the Government's view of the statute".³⁰ The case is a classic example of how purposive interpretation may be driven by generous assumptions about the goals of law and the qualities of law-making institutions that help judges resist apparent invasions of individual rights unless the legislature has taken explicit responsibility for the deprivation of liberty.

An American gloss on ss 15AA and 15AB

It is striking how much ss 15AA–15AB of the Act³¹ can be understood as consistent with the Hart and Sacks purposive approach — and how the aspects in which they may differ illuminate important questions of statutory interpretation.

In this discussion, I not only acknowledge my ignorance of Australian cases, I take refuge in it, and write as if all is on a clean slate, while simply attempting to suggest some ways that the Hart and Sacks purposive approach might illuminate Australian practice. In other words, the discussion will not be authoritative, but speculative.

Section 15AA provides:

"In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

Consider how this provision compares to the model of purposivism developed by Hart and Sacks. Recall that, for them, statutory purpose is the touchstone of statutory meaning. Indeed, for Hart and Sacks, constraints on purposivism should be quite limited. In their view, the only important role of statutory text beyond what illumination it provides concerning statutory purpose is to serve as a fairly minimal side constraint: the interpreter is to avoid giving the statutory words a meaning they will not bear. Somewhat more important are well-established policy-based canons of interpretation, for the interpreter is to avoid violating any principle of clear statement.

30 *United States v Witkovich* 353 US 194 (1957) at 201.

31 In the United States, there is no federal statute providing interpretive directions of this sort. Many States do have such statutes. At the federal level, at least, there would be some concern that legislative interpretive directives of this sort intrude upon the constitutional separation of powers. The venerable understanding in the United States is that "[i]t is emphatically the province and duty of the judicial department to say what the law is": *Marbury v Madison* 5 US 137 (1803) at 177. This cliché could be understood as including within the judicial role not simply the attribution of meaning to statutes, but the methodological questions concerning how that meaning is to be gleaned.

At least standing in isolation, it is possible to read s 15AA as seeking to impose such a purpose-dominated approach. Interestingly, much depends on what one makes of the text stating that a purposive interpretation “shall be preferred”. If this language is synonymous with “shall be adopted”, s 15AA arguably mandates purposivism *uber alles*. Alternatively, if s 15AA leaves it to the courts to identify the various permissible constructions available for the statute — and to devise judicial methods for developing the determinants of permissibility — the section could be understood as a mere tie breaker at the end of the judicial analysis (all other things being equal, pick a purposive to a non-purposive interpretation). By acknowledging the existence of non-purposive constructions, s 15AA seemingly implies that it is the judicial role, free from legislative mandate, to figure out the range of plausible interpretive possibilities. But if purposivism comes into play only when all other interpretive aspects (for example, literal meaning, legislative intent, established canons of statutory interpretation) cancel each other out, s 15AA accomplishes little, perhaps almost nothing, since one hardly ever perceives equipoise at the end of the interpretive analysis.

A purposive interpretation of s 15AA itself would seek to avoid such a narrow role for it. The most likely purpose of s 15AA seems to be to impose a purposive interpretive practice that would be important in the full range of cases. An alternative to purposivism as mere tie breaker — and to purposivism *uber alles* — is to understand s 15AA as encouraging courts to consider statutory purpose as an important determinant (along with other traditional tools, such as textual and canonical analysis) in constructing the list of permissible interpretations. One says “encouraging” rather than “mandating” because the latter understanding might, as suggested to the author by James Emmett, trench upon fundamental principles of the Australian constitutional separation of powers as they apply to the judicial power to interpret law.

In any event, s 15AA does not stand in isolation. Section 15AB(1)(a) authorises the consideration of legislative history:

“to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act.”

It makes sense to begin the discussion of s 15AB(1)(a) by noting how it purports to confine the use of legislative history in statutory interpretation in ways similar to that taken by Hart and Sacks. As would Hart and Sacks, the interpreter following s 15AB(1)(a) reaches a tentative interpretation without consideration of legislative history and then consults that material simply to confirm that the material does not fundamentally upset that interpretation. Clearly, s 15AB(1)(a) does not posit that the touchstone of statutory meaning is legislative intent, to be determined by imaginative reconstruction of what the legislature might have done had it considered the precise issue at hand. As Hart and Sacks suggested, that approach would require going to the legislative history first with a blank mind, searching for a definite answer to a concrete question.³² Instead, s 15AB(1)(a) is consistent with their suggestion that the legislative history be consulted last, as merely a guard against having missed a plausible interpretation that should be considered.

³² See Appendix 1, Section 3, on probative value.

Section 15AB(1)(a) also sheds light on the nature of the purposive approach promulgated in s 15AA — whether, as explained above, it imposes a mere tie breaker, purposivism *uber alles*, or purposivism as one important tool of interpretation. Section 15AB(1) suggests that statutes are to be interpreted by a holistic analysis that involves textual and purposive considerations. The provision obviously considers the “ordinary meaning” of statutory text to be relevant — indeed, by placing it first, ahead of context and purpose, perhaps the most important source for divining the meaning to be attributed to a statute.

Recall that, in contrast, Hart and Sacks’s statutory text had two basic roles: it provided a sound basis for ginning up plausible purposes for the statute; and the interpreter was not to give the statute a meaning that its words would not bear. When s 15AB(1)(a) is read in tandem with s 15AA, one might conclude that statutory interpretation in Australia should be a somewhat more eclectic weighing of the sources of statutory meaning — text, purpose, context, canons, perhaps legislative intent — rather than a method grounded as firmly in purposivism as is the Hart and Sacks approach.

Descriptively, that conclusion about eclecticism would fit American interpretive practice better than pure purposivism (or any other singular theory).³³ It might also be more defensible because purposivism, like any other foundational theory of interpretation, faces some difficulties. Problems with purposivism include situations in which purpose is obscure or perhaps even non-existent (as with a statute born of legislative compromise), and situations where the statute could plausibly be understood as embodying two or more purposes that conflict in the context of the case. It is also important to recognise that rarely will a statute plausibly seek to promote a purpose regardless of consequences. In this light, it is important to acknowledge that statutory goals (purposes) must be differentiated from the means chosen to effect those purposes. The means will always be somewhat over or under-inclusive in promoting the purpose.³⁴ Finally, at least robust forms of purposivism are sufficiently indeterminate to leave some disturbing openings for wilful judges to steer statutory meaning toward personal values insufficiently grounded in statutory text, context, established canons and so on.

In addition, the legitimacy of any given judicial interpretation of a statute might seem stronger if supported eclectically by a variety of considerations, rather than mostly grounded on one source of meaning alone. As Posner has put it, we might “prefer the sturdy mongrel to the sickly pedigreed purebred”.³⁵ Read together, ss 15AA and

33 An eclectic weighing process, under which all plausible sources of statutory meaning are admissible but textual meaning is given the most weight, probably better describes the reality of American statutory interpretation than any single theory — textualism, intentionalism or purposivism — does. See WN Eskridge Jr and PP Frickey, “Statutory Interpretation as Practical Reasoning” (1990) 42 *Stan L Rev* 321 at 345–353.

34 For example, a famous American case concerns whether it violates a statute prohibiting employment discrimination on the basis of race for an employer to provide that a minimum number of racial minorities must be included in an apprenticeship program if offered. See *United Steelworkers v Weber* 443 US 193 (1979). Was the purpose of the statute to prohibit all considerations of race in employment decisions, or was it to promote the situation of those persons most victimised by employment discrimination in the past? Could it have both purposes, which unfortunately conflict in this context? Even if the purpose was to open doors to historically disadvantaged persons, could it be that the means chosen to effectuate that purpose was a requirement of colour blindness in employment decisions?

35 See R A Posner, “What Has Pragmatism to Offer Law?” (1990) 63 *S Cal L Rev* 1653 at 1664.

15AB(1)(a) suggest that Australian courts may accommodate these difficulties with pure purposivism by engaging in good-faith purposive inquiries, but not to the exclusion of other sources of statutory meaning.

Section 15AB(1)(b) provides that legislative history may be considered to determine the meaning of the provision when:

- “(i) the provision is ambiguous or obscure; or
- (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.”

This provision can only be understood when read in conjunction with s 15AB(1)(a). In effect, s 15AB(1)(a) says that when the court is confident that the statute has a certain meaning, based on its text, context, and purpose, legislative history may be consulted simply to confirm that the court has not missed a possible plausible purpose that would require re-thinking. This seems clear enough. In contrast, s 15AB(1)(b) applies when the court lacks any confidence about how to proceed. Unfortunately, this provision itself is “ambiguous or obscure”.

When lawyers see language like “the provision is ambiguous”, they naturally are prone to understand the phrase as referring to textual ambiguity. The problem with that understanding is that it is inconsistent with any kind of plausible purposivism — whether the broader approach of Hart and Sacks or the somewhat narrower approach I have identified as suggested by the combination of ss 15AA and 15AB(1)(a). Instead, it tracks the old plain meaning rule. To be sure, s 15AB(1)(b) does not say that the court must follow a plain textual meaning. But by indicating that the legislative history can be consulted when the “provision is ambiguous”, it may imply that when the provision is not ambiguous, that the interpretive inquiry is at an end — not just an exclusion of the consideration of legislative history, but the exclusion of a purposive inquiry as well. But surely s 15AB(1)(b)(i) cannot mean a return to the plain meaning rule, for that would overthrow the very purposive regime established by s 15AA.

Accordingly, it seems that “the provision is ambiguous” must mean something other than “the provision is textually ambiguous”. If, as it says, s 15AB(1)(a) deals with the case in which the court is confident about what meaning to attribute to the statute after taking text, context, and purpose into account, s 15AB(1)(b) must deal with the case in which the court lacks that confidence. Thus, “the provision is ambiguous or obscure” would seem to mean, essentially, that after a careful consideration of text, context, and purpose (and, presumably, canons of interpretation), the court is very unsure what to do. This provides a symmetry across both subsections of s 15AB and treats consideration of legislative history as appropriate only at the end of the process, after other factors have been examined first, as makes sense and as Hart and Sacks suggested.

So understood, the question under s 15AB(1)(b)(i) becomes: how could legislative history help lead the court out of its confusion? Consistent with the purposive (rather than intentionalist) regime established in s 15AA, it cannot be that the interpreter looks

for snippets from the legislative history that purport to answer the concrete interpretive question before the court, unless these dribs and drabs legitimately connect with a more abstract public-regarding purpose. Instead, what the interpreter would hope to find is legislative history identifying a purpose not heretofore recognised that clears up the confusion, or legislative history that provides a legitimate basis for choosing from plausible competing purposes that had already been identified. If neither can be found and if no other good reason emerges to decide the case one way or another, the case is probably a good candidate for applying some sort of canon designed to provide a default rule for the situation. One such canon might be that, when it is obscure whether a statute was designed to change settled law on a particular point, it is presumed that the law remained unchanged.³⁶

Section 15AB(1)(b)(ii) has similar difficulties to those posed by s 15AB(1)(b)(i), in that it also implies a primacy to statutory text that is in tension with the purposive regime of s 15AA.

Section 15AB(1)(b)(ii) will be naturally read by lawyers as embracing the absurd-result exception to the plain meaning rule, often called the “golden rule”.

In a purposive approach — at least one as normatively driven as that of Hart and Sacks — this provision seems unnecessary, for absurd or even unreasonable purposes are generally not permissible. Recall that, for them, all law is presumed to be purposive, and legislatures are presumed to be made up of reasonable people pursuing reasonable purposes reasonably. Only if the words will not bear a reasonable, purposive meaning would Hart and Sacks feel trapped into an unreasonable result; even then, a principle of clear statement might be available to tilt the statute into a more reasonable direction.

Nonetheless, in light of the realistic limitations of purposivism, one can imagine situations in which an interpreter, after having consulted text, context, and purpose, has the unhappy feeling that she should impose an absurd or unreasonable result. One situation in which this could arise is if the statute seems to lack any purpose, or the only purpose that seems to emerge from it is one that is undesirable as a matter of widely shared values (say, significant redistribution from the poor to the wealthy without arguable offsetting benefits to society, or excessively harsh punishment for a minor offence). Hart and Sacks grudgingly acknowledged such circumstances when they said that, “unless the contrary unmistakably appears”, one should assume legislators are pursuing reasonable purposes.

How might consulting legislative history aid the interpreter in such circumstances? It might reveal that the purpose that the judge considers unreasonable was not in fact the purpose the legislators had in mind, or that the legislators themselves did not view that purpose as unreasonable. Within constitutional limits, legislators are allowed to be wrong-headed, of course. Clear statement principles are one technique by which judges can resist implementing nefarious purposes unless the legislature has taken explicit

36 See, for example, *Tome v United States* 513 US 150 (1995) at 163.

responsibility for the dubious endeavour.³⁷ If the legislators have expressed purposes antagonistic to shared public values more clearly in the legislative history rather than in the statutory text, principles of clear statement do provide a court with the authority to bend the statute in a more public-regarding direction. Such decisions in effect remand the problem back to the legislature to see whether there is political will to be explicit in the statute, increasing the likelihood that publicity will temper any legislative reaction. Of course, a happier result would be if the legislative history revealed a more public-regarding purpose than the judge had initially been able to discern.

Section 15AB(2) provides a long list of documentary legislative history that may be consulted. Section 15AB(3) suggests that the weight given to any piece of legislative history should take into account the desirability of persons being able to predict the meaning of law without having to delve into legislative history and the need to avoid prolonging legal proceedings “without compensating advantage”. Moreover, of course, the reason for delving into the legislative history is to shed light on purpose, not particular legislators’ conceptions of how the statute might apply to concrete circumstances (unless, of course, those comments genuinely illuminate broader purposes). Accordingly, s 15AB(2) and (3) seems quite consistent with Hart and Sack’s formulation for the admissibility and use of legislative history: few (if any) exclusionary rules, but useful only to the extent that it illuminates purpose. In both Australia and the United States, therefore, it would seem that comments by individual legislators that purport to guide judicial interpretation of hypothetical cases should have no bearing on statutory interpretation, unless they are consistent with a plausible organising purpose evident to judicial eyes.³⁸

Conclusion

It has been suggested that the purposive approach proposed by Hart and Sacks might contain aspects useful in the Australian context. As mentioned earlier, no pretence has been made that the analysis provided fits Australian case law or the practices of able lawyers. Another caveat is that there are obvious differences in Australian and United States governmental structure that should be taken into account. In a parliamentary system like Australia’s, a legislatively imposed purposive approach to interpretation could be seen as inflating the power of the executive (not just the legislative) enterprise at the expense of the judicial branch. On the other hand, the purposive approach — especially within a broader theory of law’s purposivism, as with Hart and Sacks — provides

37 *United States v Witkovich* 353 US 194 (1957) is an example. When Congress adopted the general statutory language in question, there might have been little reason to fear abuse by administrative authorities charged with enforcement. Once a clear instance of abuse was demonstrated, the court was in a much better position than the enacting legislature had been to consider the implications.

38 Section 3(b) of Hart and Sack’s formulation in the Appendix is a particularly useful approach to this issue. I appreciate Harry Geddes’ comment that loose legislative chatter is much less an issue in the Australian context of parliamentary government and strong parties, where important legislation is hammered out ahead of time within the ministry and the party, such that explanatory speeches and memoranda are carefully prepared and represent the views of the dominant forces. It may well be, as he said, that such materials have an authoritativeness that American legislative history usually lacks.

substantial authority to judges to mould statutes to fit public policy, even sometimes against executive or legislative expectations. It could be understood as a legislative invitation to the judiciary to become more of a partner in the ongoing elaboration, not just of the common law, but of statutes as well.

At one time, it might have seemed that statutes were unprincipled, political intrusions upon the principled, apolitical, rational, normatively superior common law. As such, it was no surprise that common law judges tended to interpret statutes literally and narrowly, leaving as much scope as possible for the retention of the common law. Both Australia and the United States have long ago moved from the age of the common law to the age of statutes. In this context, a legislative invitation to engage in purposive statutory interpretation may be understood as at least implicit authorisation for judges to treat statutes not as weeds invading the common law garden but as somewhat flexible instruments of public policy that, like the common law itself, should be implemented on an ongoing basis by the reasoned elaboration of judges. In a legal regime dominated by statutory rather than common law regulation, judges have lost some of their case-by-case flexibility in making law fit context. Purposive interpretation returns some of that flexibility to the judiciary.

Appendix 1

HM Hart Jr and AM Sacks, “A Suggested Restatement on the Use of Legislative History” in WN Eskridge Jr and PP Frickey (Eds), *The Legal Process: Basic Problems in the Making and Application of Law*, 1994, Foundation Press, New York (originally widely distributed in a tentative edition in 1958) pp 1253–1254.

Section 1: Relevance

- (a) Since the object of interpretation of a statute is to determine the meaning which ought to be attributed to the statute as formally enacted; and Since meaning depends upon context; and Since all aspects of the internal legislative history of a statute which were officially before the legislature at the time of its enactment are part of its context; All such aspects may be directly relevant in determining the meaning which ought to be attributed to the statute.
- (b) Aspects of the internal legislative history of a statute which were not officially before the legislature at the time of its enactment, such as the uncommunicated views of individual members about its meaning, are not directly relevant in determining the meaning which ought to be attributed to it. They are relevant, if at all, only in determining the meaning which the words of the statute are linguistically capable of bearing.

Section 2: Competence

- (a) All aspects of the internal legislative history of a statute which were officially before the legislature at the time of its enactment are competent to be considered in determining the meaning which ought to be attributed to it, unless such consideration would operate unfairly as to any class of persons by increasing as to them the burden of the statute in a way of which they were not reasonably put on notice either by opportunity of access to the material in question or otherwise.
- (b) The views of individual members of the legislature as to the meaning of a statute which were not officially communicated to the legislature prior to its enactment are not competent to be considered in determining the meaning which ought to be attributed to the statute.

Section 3: Probative Value

- (a) Since the enactment of a statute is always a purposive act; and Since the attribution of meaning to a statute therefore requires the attribution of a purpose, or constellation of related purposes, and the selection of a meaning consistent with the purposes; and Since the attribution of purpose and selection of a consistent meaning is a process requiring analysis and ratiocination; and Since the indicia of purpose and consistent meaning which constitute the materials of analysis and ratiocination far transcend in every case the indicia afforded by the internal legislative history; The internal legislative history of a statute should always be read and used not as a separate and self-sufficient record of purpose and meaning but in the light of other relevant materials, and with the object only of resolving doubts emerging from the analysis of the problem as a whole. The interpreter, in other words, should go to the legislative history not with a blank mind waiting to be instructed but with an inquiring mind searching for answers to questions which have been soundly thought out ahead of time ...

- (b) Since legislators are obliged to think in general terms and not in terms of all the specific applications of a statute; and Since, therefore, when legislators do envisage specific applications of a statute they are either doing so irresponsibly or else as bona fide examples of the general purpose:
 - (1) The probative force of materials from the internal legislative history of a statute varies in proportion to the generality of its bearing upon the purpose of the statute or provision in question; and
 - (2) Evidence in the internal legislative history of a statute concerning a specific application envisaged by individual legislators should be given weight only to the extent that the application envisaged fits rationally with other indicia of general purpose.

Comment: This should go a long way to take care of the manipulation problem.



Saving the Literal – Fundamentalism versus Soft Logic in Statutory Interpretation

Professor James C Raymond*

“Words are sometimes as elusive as fish, and reasonable minds often differ on the meaning of cases and statutes, but it is still the actual language that has to guide a judge.”¹

— Scott Turow, *Limitations*

Introduction

This essay is not about how statutes *ought* to be interpreted.

It is about how statutes *are* interpreted.

In other words, the methodology of this essay is not speculative or theoretical. It is inductive: an analysis of four judgments, selected more or less at random from the ultimate courts in four countries:

1. Canada: *R v Mac*.²
2. United States: *Exxon Mobil Corp v Allapattah Services Inc.*³
3. Australia: *Kartinyeri v The Commonwealth*.⁴
4. South Africa: *S v Mhlungu and others*.⁵

Four cases are hardly a scientific sample; but they may function as representative examples — examples that seem typical enough to support plausible conclusions. The only criteria for selection were that the central issue had to be a question of statutory or constitutional interpretation, and that there had to be substantial differences of opinion either within the court itself or between the court and the tribunal below.

The hypothesis tested in this essay is that when the law is ambiguous, the rules and canons of construction serve only to provide plausible arguments in support of a conclusion reached by other means, which may or may not be expressed in the judgment itself.

* PhD, Consultant in Legal Writing and Reasoning, Professor Emeritus University of Alabama, <www.benchandbar.info>.

1 Scott Turow, *Limitations*, 2006, Farrar, Straus and Giroux, New York, p 36.

2 [2002] 1 SCR 856, 2002 SCC 24 (CanLII).

3 No 04—70, 333 F3d 1248, affirmed; and No 04—79, 370 F3d 124, reversed and remanded. Decided 23 June 2005.

4 (1998) 195 CLR 337; [1998] HCA 22.

5 (CCT25/94) 1995 (3) SA 867; [1995] ZACC 4.

If this essay has a thesis, it is perhaps best expressed in an exchange that occurred in a writing course in which I gave a group of judges a set of facts and some relevant law and asked them to produce a judgment.

The case involved the interpretation of a will. One of the participants, a judge from Delaware, construed the will in a way that disinherited the testator's adopted grandchildren on the grounds that the word "issue," as defined by a statute in force when the will was written, referred only to natural children. To others in the group, it seemed obvious that the testator, whose own children had been adopted, would not have intentionally excluded adopted grandchildren, and that the use of "issue" in the will was one of those oversights that occur when busy solicitors rely on standard forms. It was an oversight that enabled some of the heirs to claim the inheritance that was probably intended for their adopted cousins.

The judge from Delaware was adamant. "If you go around re-writing documents on the basis of what you think they are *supposed* to mean," he told me, "then the entire fabric of the law comes unravelled. No document would have any stable meaning."

Another judge, in the group — Vic Hall, was his name, a Texan — interpreted the will to benefit the adopted grandchildren. He justified this result on the principle that in wills, the intent of the testator, when it can be determined, trumps literal meaning. He did not worry that the law would become unravelled. "You kinda look into your heart," he drawled, "and you know what's right. And you can always find a law to make it come out that way."

When I tell this story to judges, some are horrified, clinging to a kind of judicial fundamentalism, a belief in the sacredness and stability of legal language and the possibility of an objective, literal meaning even when the text is incomprehensible and when competent and impartial readers disagree about what it means, if it means anything at all.

Others nod in tacit acknowledgement that this is in fact the way they reach conclusions when the facts and the law are not compelling.

The analysis of cases below seems to support a fundamental, and perhaps scandalous, truth about statutory interpretation: it is not, and can never be, a science. When competent lawyers and judges propose plausible but different readings of the same law, there is no objective test for determining which one is correct. Yet the illusion of a literal meaning has an irresistible attraction. When courts take on problems of interpretation, they almost always argue as if one meaning is surely and objectively correct, and others surely and objectively wrong. Judges are inclined to claim that their own reading of an ambiguous text is objective, faithful to the literal meaning of the law even when the law demonstrably has no literal meaning. In the cases analysed below, however, the canons and rules of construction reveal themselves as what they really are: tropes of argument in support of a preferred result, not tools for extracting an elusive true and objective meaning. They constitute a "soft logic," resulting in an appearance of inevitability, but not definitive or irrefutable arguments.

This is not a criticism. It is simply a description of what occurs, arguably what *must* occur, in a system of jurisprudence that is imperfect and incapable of perfection — and yet arguably the best system ever devised.

Canada — *R v Mac*

The problem of indeterminacy in statutory language is nowhere more clearly illustrated than in a counterfeiting case that reached the Supreme Court of Canada.

The appellant, Minh Khuan Mac, had been convicted of possessing equipment “adapted” for counterfeiting credit cards. This is a crime in Canada — at least according to one reading of s 369(b) of the *Criminal Code*, which includes these words:

“Every one who, ...

(b) ... knowingly has in his possession any plate, die, machinery, instrument or other writing or material that is adapted and intended to be used to commit forgery ...

is guilty of an indictable offence ...”

The Crown contended that “adapted” means “suitable for.” The Defence argued that “adapted” means “altered” or “changed.” And since the accused did not alter or change the equipment, mere possession was not a criminal offence.

The trial judge, applying rules of construction promulgated by the Supreme Court of Canada in *R v MacIntosh*,⁶ held that “adapted” in this context clearly means “suitable for”, and she instructed the jury accordingly.

The Ontario Court of Appeal, however, in a unanimous three-judge panel, ruled that “adapted” is ambiguous in this context.⁷ And in criminal law, the rule that trumps all others is that an ambiguity must be interpreted in a way favourable to the accused. The rule makes sense: people cannot be expected to obey laws that are not clearly written.

The Ontario Court of Appeal was subsequently reversed by the Supreme Court of Canada. Although the Supreme Court conceded an ambiguous statute must be interpreted in the light most favourable to the accused, it held that this principle applies only “where ordinary principles of interpretation do not resolve an ambiguity” (at [4]). The ordinary principle in this case turns out to be one that had occurred neither to the litigants nor to the courts below. It was suggested by the Supreme Court itself (at [4]):

“Our court requested the parties to address the French version in further submissions and rescheduled the hearing of the appeal to facilitate this.”

The fact that the French version of the Code consistently distinguishes between “*modifié*” (“modified”) and “*adapté*” (“adapted”) was taken by the Supreme Court as a sign that Parliament clearly intended the distinction, even when it failed to maintain it in English, where the equivalent words were equally available.

6 1995 CanLII 124 (SCC), (1995) 95 CCC (3d) 481.

7 *R v Mac* 2001 CanLII 24177 (ON CA).

In other words, to determine whether “adapted” means “suitable for” or “modified for” in English, you have to consult the French version of the statute. In this case, the French version had “*adapté*” rather than “*modifié*,” so the court concluded that Parliament intended “adapted” to mean “suitable” rather than “modified.” The ordinary principle on which the Supreme Court relied is one available (though not necessarily recognised) only in jurisdictions like Canada and certain international tribunals where the law and jurisprudence are written in more than one language. Until this case, it had not been an “ordinary” trope of construction in Canada. Each version of the Code had been considered whole and independent in itself, not a translation of the other.

The fact that “adapted” was found to be unambiguous at trial, ambiguous on appeal, and clearly unambiguous in the Supreme Court would seem to suggest that it was, well, ambiguous — unless we assume that the Court of Appeal was biased or incompetent (an assumption that would find scant support in the judgment itself). This is clearly a case in which the ordinary principles and canons of interpretation do not command the assent of all reasonable, impartial, and competent readers. What, then, might have motivated the interpretation preferred by each court?

The Court of Appeal was explicit about the unacceptable consequences it wanted to avoid. The statute was not only ambiguous; it was ambiguous in a way that gave the government more power than we might want the government in a free society to have. As interpreted by the trial judge (and ultimately by the Supreme Court) the statute says that you can be found guilty of a criminal offence just by possessing the means to commit one.

Traditionally, people do not incur criminal culpability even if they intend to commit a crime and have the means to do so, unless they actually do something to put their plan in motion. This may seem a precious distinction, particularly when the instrument in question is a machine with no other use than forging credit cards. But any number of tools and materials — including pens and paper — could be used to commit forgery. Surely the Parliament did not intend to criminalise the possession of pens and paper, even if the possessors intended to use them in an illegal enterprise. If the government can put us in prison simply because we have the means to commit a crime at our disposal, we all could become unwilling guests of the state. For the Court of Appeal, the statute is overly broad (at [20]):

“An intention to commit forgery, combined with the possession of mundane objects like a piece of paper or a pen would come within the reach of s 369(b). The criminalization of such innocuous and harmless conduct, albeit joined with a criminal intent, comes perilously close to imposing criminal liability based solely on the existence of a criminal intention. It has been a fundamental principle of the criminal law for many centuries that criminal liability should not rest solely on an accused’s intention, no matter how worthy of censure that intention might be.”

In reversing this judgment, the Supreme Court of Canada asserts the need to resolve an ambiguity in one official language by consulting the law in the other. The judgment is brief; it includes no rationale for this rule of interpretation. We can only speculate that from the perspective of the Supreme Court, Mr Mac possessed equipment suitable for

making counterfeit credit cards because he intended to make counterfeit credit cards. Why else would he have it? And further, it is clear from the statute that possession was criminalised as a preventive measure. No point waiting for the aspiring counterfeiter to actually do the deed if we can prevent it in advance. A semantic quibble about the meaning of “adapted” should not stand in the way of law enforcement officers who, in this case, had acted in a timely manner to prevent a crime from taking place.

And we can only speculate that for the Supreme Court, the Ontario Court’s concern that the government would prosecute people simply for owning paper and pens was unrealistic.

All three courts had to choose between two mischiefs: on the one hand, acquitting a person who had violated the law by possessing equipment that, arguably, had no other function other than to commit a crime; and, on the other hand, allowing a vague law to remain on the books, thereby granting the government powers that Parliament almost certainly did not intend.

If the Supreme Court was unpersuaded by the Court of Appeal, we might suspect that the Court of Appeal would have been equally unpersuaded by the Supreme Court’s analysis. It presumes, among other things, that citizens of Canada can read their laws in both official languages.

It might be far-fetched to imagine Mr Mac examining the criminal code in either language, much less both, before deciding whether he should purchase equipment for forging credit cards. He probably did not need to consult the law or a lawyer to discover that counterfeiting is a crime. But we can imagine citizens, or at least their solicitors, many of whom are not bilingual, consulting Canadian statutes for guidance on, say, depreciation allowances or fiduciary responsibilities or a host of other matters in which the law is not entirely obvious — and the notion that they need to examine the law in both languages runs counter not only to common sense (presuming a bilingualism that is at best merely an aspiration for many Canadians), but also to the longstanding principle that each version of Canada’s Code is independent of the other.

This is not to say that the trial court and the Supreme Court were wrong, and the Court of Appeal right. The point is that once a text breaks free of the constraints that command an interpretive consensus among most readers, there is no “literal” or “right” meaning. There are only plausible meanings.

United States — *Exxon Mobil Corp v Allapattah Services Inc*

In *Exxon Mobil v Allapattah Services*, the issue is one that, at first glance, should have a simple answer: When there are several plaintiffs in a suit arising from the same alleged tort, does each have to meet the *quantum* required for standing in a federal court individually, or can others join the suit if at least one party meets the requirement?

In the United States, a plaintiff can file a civil suit in federal courts, as opposed to state courts, when the suit concerns federal law. But plaintiffs can also file a civil suit in a federal court when the suit concerns state law if two requirements are met. The first

requirement is that the parties must reside in different States — the diversity requirement. In this way, the federal courts provide a neutral forum, avoiding a real or perceived home court advantage. This requirement is strict and, in multi-party disputes, if even one plaintiff and one defendant reside in the same State, then the court in that State becomes the appropriate forum. The second requirement, the focus in *Exxon*, is for a minimum quantum, currently set at \$75,000. The aim of that is to prevent federal courts from being burdened with petty litigation.

The facts arise from the consolidation of two cases that would seem to have very little in common.

One, *Rosario Ortega v Star-Kist Foods Inc.*,⁸ involves a nine-year-old girl in Puerto Rico who suffered “unusually severe injuries” to her finger when she was opening a tuna can. The other involves 10,000 petrol station operators who sued their supplier, Exxon, for price gouging.

The little girl and her family each filed claims against Star-Kist, the manufacturer, in the United States District Court for the District of Puerto Rico. The suits were dismissed at first because the amount of money involved was less than \$75,000. On appeal, however, the girl alleged damages sufficient to gain standing, but the family’s suit was dismissed on the grounds that *their* claims, independent of the victim’s claims, were less than the required minimum. On further appeal, they argued that once the little girl met the requirement, her family should have standing because their claim arose from the same cause of action.

In the suit against Exxon, considerably more money was at stake, but the issue was the same. Some filling station operators met the \$75,000 requirement. Others did not. The issue, then, was whether the plaintiffs with smaller claims had standing in federal court on grounds that their claims were based on the same acts of price-gouging that the litigants with larger claims had alleged.

In the past, it was not enough that the claims of individual plaintiffs added up to the required total. Each party to the suit, individually, had to meet the quantum requirement. In addition, in *Finley v United States*, the Supreme Court held that when plaintiffs establish standing against particular defendants, this does not automatically enable others to be joined to the suit either as additional plaintiffs or additional defendants.⁹ Each had to be joined on its own merits.

By analogy, this perhaps could be taken to mean that the smaller filling stations could not join the larger ones in their suit against Exxon, and the little girl’s family would not have had standing just because the little girl herself had met the quantum requirement. Some people considered this unfair to litigants with relatively small claims that might have been conveniently settled by courts ruling on large claims arising out of the same facts and issues.

8 370 F3d 124, 135 (2004).

9 490 US 545, 548 (1989).

Congress apparently attempted to address this problem by enacting the *Judicial Improvements Act*, §1367 104 Stat 5089. Section §1367 is at the heart of this case. Here is the relevant part:

- “(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
- (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.”

If you, gentle reader, skimmed over the paragraphs quoted above, or even skipped them entirely, you can hardly be blamed. They are not what any normal reader would call inviting or lucid prose.

If, on the other hand, you diligently perused those paragraphs, there is more than a slight possibility that you were unable to discern their true or literal meaning, and in them, the answer to the question presented in this case. Yet in each case, a federal circuit court ruled that the law was perfectly clear. And each favored an interpretation diametrically opposite to the other’s.

In *Star-Kist*, the Court of Appeals for the First Circuit ruled that the girl’s family did not have standing, but the girl herself did.

In *Exxon*, the Court of Appeals for the Eleventh Circuit reached a different conclusion: once any of the litigants met the *quantum* requirement, those with smaller claims also had standing as part of the same action. According to the Eleventh Circuit, the *Judicial Improvements Act*:

“clearly and unambiguously provides district courts with the authority in diversity class actions to exercise supplemental jurisdiction over the claims of class members who do not meet the minimum amount in controversy as long as the district court has original jurisdiction over the claims of at least one of the class representatives.”¹⁰

In short, appeal courts in the First Circuit and the Eleventh Circuit each found the *Judicial Improvements Act* to be clear and unambiguous — even though the meaning discerned by each was the opposite of that discerned by the other. At this point the United States

¹⁰ *Allapattah Services Inc v Exxon Corp* 333 F 3d 1248 (2003) at 1256.

Supreme Court entered the fray. The majority sided with the Eleventh Circuit, ruling that the *Judicial Improvements Act* may not have been a model of lucid draftsmanship, but it was nevertheless unambiguous. As a result, there was no reason to apply other canons and rules of interpretation, such as an investigation into legislative intent. The little girl's family and the mom-and-pop filling stations were allowed to pursue their claims in federal court.

There were, however, four dissenters who held, not unreasonably, that since the courts below and the members of the Supreme Court themselves could not agree about the meaning of the statute, it would seem to be ambiguous. They therefore resorted to traditional devices for resolving ambiguity by determining legislative intent, in this case citing evidence from a report in the House of Representatives that preceded the enactment.¹¹ Not surprisingly they reached a conclusion different from majority, who held that intent is not to be considered when the language itself is clear. And not surprisingly, the majority found even if it had been necessary to determine intent, the House report was so rife with ambiguity as to be useless for that purpose: "the legislative history of §1367 is far murkier than selective quotation from the House Report would suggest."

All parties agreed that the Act, in some way, overruled *Finley* and increased the possibilities for gaining standing in federal court. The problem, however, was to determine the exact nature of these broader provisions. Was it or was it not necessary for each party in a suit to individually meet the *quantum* requirement?

In interpreting the *Judicial Improvements Act*, the majority applied what Justice Kennedy calls "[o]rdinary principles of statutory construction" — which in this case meant examining the "the statute's text in light of context, structure, and related statutory provisions." In this analysis, §1367(a) provides a broad grant of jurisdiction, subject to exceptions listed in the sections that follow.

Further, §1367(b) says, essentially, that once a federal court has "original jurisdiction" in a case, it also has jurisdiction over other issues and parties involved in the same case, including "the joinder or intervention of additional parties."

In this context, however, "original jurisdiction" is not defined — so the status of claimants who would not qualify for independent standing remains unclear. Nor does it say that additional parties must individually meet the *quantum* requirement. The exceptions listed in parts (b) and (c) withhold jurisdiction over particular classes of litigants, but not those involved in the *Exxon* and *Star-Kist* actions.

The majority reasoned, therefore, that if Congress had intended to impose a *quantum* requirement, it would have done so along with the other exceptions to the broad jurisdiction granted in §1367(a). To rule otherwise, according to Justice Kennedy, would be inconsistent with the court's rulings in earlier cases, and would also require the phrase "original jurisdiction" to have one meaning in the part of the statute dealing with suits based on federal law (§1331) and another in the neighbouring section that deals with suits based on State law (§1332).

11 The House Judiciary Committee Report on the *Judicial Improvements Act*. H R Rep No 101-734 (1990).

The clinching argument perhaps is one from common sense. A strict diversity requirement serves a purpose; a strict quantum requirement does not.

In cases involving litigants from different States there is no point in having federal courts intervene if even one plaintiff is in the same State as a defendant (that is, if even one pair of litigants fails to meet the diversity requirement). There would be no appearance of a home court advantage for either party, and therefore no need for the federal courts to intervene.

But with respect to the *quantum* requirement, once a single plaintiff has met it, no useful purpose is served by excluding other litigants on grounds that the damages they claim are too small. The purpose of the *quantum* requirement is to protect the federal courts from dealing with trivial litigation. Once any plaintiff meets that requirement, it makes no difference how many individuals are joined as plaintiffs, as long as their suits are based on the same facts and law.

Here is how Justice Kennedy expresses it (at p 16):

“The contamination theory, as we have noted, can make some sense in the special context of the complete diversity requirement because the presence of non-diverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum. The theory, however, makes little sense with respect to the amount-in-controversy requirement, which is meant to ensure that a dispute is sufficiently important to warrant federal-court attention. The presence of a single non-diverse party may eliminate the fear of bias with respect to all claims, but the presence of a claim that falls short of the minimum amount in controversy does nothing to reduce the importance of the claims that do meet this requirement.”

Justice Kennedy offers additional arguments from the text itself, perhaps a bit technical for our purposes here, but essentially based upon observations that certain sections of the statute would have no meaning if the interpretation preferred by the dissenters were to prevail. Indeed, the entire *Judicial Improvements Act* would be deprived of one of its apparent goals, namely, to overrule the strict rules for standing promulgated in *Finley*.

Needless to say, the dissenters were not persuaded. From their point of view, if the *Judicial Improvements Act* does not explicitly impose a *quantum* requirement, neither does it remove that requirement, which had until this point been in place. For them, the phrase “any civil action of which the district courts have original jurisdiction” in §1367(a) applies to the suit brought by each and every plaintiff; therefore, if some of the plaintiffs do not meet the *quantum* requirement on their own, the federal courts have no “original” jurisdiction over them even if other plaintiffs do meet it.

There is nothing illogical about this position. In support of it, Stevens J, in addition to concurring with the dissent of Ginsburg J, holds that:

1. The statute is clearly ambiguous, since there is considerable disagreement among competent readers about its meaning.
2. When a statute is ambiguous, courts should attempt to determine legislative intent.

3. In this case, legislative intent is clearly revealed in:
 - (a) the House Report that preceded its enactment;
 - (b) the jurisprudential precedents that the statute was intended to clarify and correct; and
 - (c) the expressed opinion of law professors who were involved in the drafting processes of the legislation.

Justice Ginsburg’s dissent is of an entirely different order — a meticulous analysis of the text itself and its jurisprudential context. The issue, as Ginsburg J frames it, is whether the *Judicial Improvements Act*, despite its ambiguity, overruled two previous decisions of the US Supreme Court: *Clark v Paul Gray Inc* 306 US 583, 589 (1939); and *Zahn v International Paper Co* 414 US 291 (1973). After conceding that the majority’s interpretation of the statute is “plausible,” Ginsburg J offers “another plausible reading ... one less disruptive of our jurisprudence.”

Justice Ginsburg’s analysis traverses a thicket of precise distinctions—including the one between “pendent” jurisdiction¹² and “ancillary” jurisdiction.¹³ Here is her summary of the state of jurisprudence before the passage of the *Judicial Improvements Act*:

“In sum, in federal-question cases before §1367’s enactment, the Court recognised pendent-claim jurisdiction, *Gibbs*, 383 US, at 725, but not pendent-party jurisdiction, *Finley*, 490 US, at 555–556. As to ancillary jurisdiction, the Court adhered to the limitation that in diversity cases, throughout the litigation, all plaintiffs must remain diverse from all defendants. See *Kroger*, 437 US, at 374.”

And so, despite the oft-cited principle of finding meaning within “the four corners” of a text, the cross references to other documents suggest that no legal text exists in splendid isolation. Every word is trapped in a huge web of meaning that extends infinitely in many directions, connecting with words that themselves are entangled in endless webs of meaning.

Why did the majority not find Justice Ginsburg’s analysis persuasive? Perhaps because they found her precedents distinguishable in that they did not concern jurisdiction derived from diversity. Perhaps because they were persuaded by their own argument that the disputed section was actually clear enough, thereby rendering prior case law and legislative history irrelevant. Perhaps because they thought their own interpretation resulted in a policy that just made more sense and gave litigants with relatively small claims an opportunity to have their cases heard efficiently.

Perhaps it was a combination of these factors — as it must have been a combination of factors that compelled Justices Stevens, O’Connor, and Breyer to concur with Justice Ginsburg in her dissent. And they, of course, may have been motivated in part by a desire to exercise judicial restraint, refusing to make new law that the Congress had not clearly intended.

12 Adding claims under State law to a suit filed under federal law.

13 Allowing interested third parties to join a suit.

It is surely hyperbolic to say that to people outside the profession — the laity, as we are called, the folks who might be expected to read, understand, be persuaded, and abide by what judges write — predicting which trope will prevail is something of a gamble. Maybe more like a sporting event, in which a clever bookie can calculate odds based on past performances in analogous situations. But the outcome is never certain, because it depends upon the operation of soft logic (the various canons and rules) applied to an elusive object (a text in naturally ambiguous language whose meaning is determined in part by an amorphous context with indefinite boundaries).

In *Exxon v Allapattah*, the majority opinion seems based ultimately on an assumption that the purpose of the quantum requirement in diversity suits was to prevent the federal courts from being overburdened with petty matters. Once that requirement has been met by any litigant in a multi-party suit, the exclusion of other parties would merely result in a postponement, if not a denial, of justice.

The dissenters seem more concerned with discovering and preserving the literal meaning of the controlling statute. In doing so, however, they reveal a troubling aspect of statutory interpretation that is perhaps easier to see from outside the profession than from within it: the tendency to regard laws as sacred texts, presumed to make sense, rather than as attempts by fallible human beings, sometimes not particularly skilled as writers, to control behaviour that they cannot perfectly predict with language that accommodates multiple meanings with copious promiscuity.

As a result, judges can become entangled in a host of subsidiary issues and hair-splitting distinctions worthy of medieval scholasticism in their various attempts to extract the true meaning of a law that seems to mean, well, nothing at all except perhaps that those who drafted it were having a very bad day.

Australia — *Kartinyeri v The Commonwealth*

Kartinyeri v The Commonwealth, perhaps the most complex set of judgments examined in this study, involves construction of a different sort: building a bridge. It includes an opinion by Chief Justice Brennan and Justice McHugh, a separate concurring opinion by Justice Gaudron, others by Justices Gummow and Hayne, and a dissent by Justice Kirby.

The facts are relatively simple. The government wanted to build a bridge to Hindmarsh Island, but was thwarted by the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). That Act gave the Minister for Aboriginal and Torres Strait Islander Affairs the authority to participate in determining whether a proposed bridge injured or desecrated an area sacred to Aborigines. On 9 July 1994 the Minister declared the area in question to be sacred and therefore prohibited the construction of the bridge.

To remove this obstacle, Parliament enacted the *Hindmarsh Island Bridge Act 1997* (Cth) (the *Bridge Act*), ss 3, 4, Sch 1. The *Bridge Act* did not specifically repeal or amend the earlier act; it simply declared that “[t]he *Heritage Protection Act* does not authorise the Minister to take any action after the commencement of this Act in relation to an application (whether made before or after the commencement of this Act) that relates (wholly or partly) to activity covered by paragraph (1)(a), (b), (c), (d) or (e).” Those sections enumerate activities related to building the bridge and approaches to it.

Opposed to the construction of the bridge, Mrs Doreen Kartinyeri and Mr Neville Gollan, argued that Parliament did not have power under the Constitution to pass the *Bridge Act*.

The issue could have been framed in several ways, but the sole question reserved by the Chief Justice was one of Constitutional construction:

“Is the *Hindmarsh Island Bridge Act 1997* or any part thereof invalid in that it is not supported by s 51(xxvi) of the Constitution or any other head of Commonwealth legislative power?”

In other words, the court was asked to determine whether Parliament’s power to limit the authority of the Minister for Aboriginal and Torres Strait Islander Affairs could be derived from a section of the Constitution, s 51(xxvi), that enables it to enact legislation “with respect to ... [t]he people of any race, for whom it is deemed necessary to make special laws”. This provision is sometimes ominously referred to as “the race power.”

Another way to phrase the issue would have been whether Parliament can take away rights that it had once given. The argument would run this way: no one contests the validity of the *Heritage Act*, or denies that it was enabled by s 51(xxvi) of the Constitution. Hence, the *Bridge Act*, which in effect amends or partially repeals the *Heritage Protection Act*, must be equally valid, since Parliament clearly has the authority to repeal or amend laws it enacts.

This argument might seem to avoid the problem of interpretation entirely: the second law derives its constitutionality by clinging to the coat-tails of the first, which was unarguably constitutional.

However appealing this logic might seem — and indeed, the majority of the High Court seems to have found it persuasive — it avoids the issue of interpretation the court was properly asked to address. According to one view, the *Heritage Protection Act* was authorised by s 51(xxvi) of the *Constitution*, but only because it provided a *benefit* for a particular race, or at least part of one. The *Bridge Act*, on the other hand, is clearly detrimental to a particular race. It would not pass constitutional muster on its own, and it cannot claim constitutionality because of its connection with a law that was clearly opposite in its effects on Aboriginal people — unless, of course, s 51(xxvi) of the Constitution authorises Parliament to enact legislation *contrary* to the interests of a particular race.

And that, as it turns out, is precisely what the majority held.

To someone unfamiliar with Australian history, it might seem strange that a modern constitution would authorise racial discrimination. But, as Justice Kirby frames it in his dissent at [103], that is precisely the issue in this case:

“The essential issue is whether the [Constitution] permits the making of a special law which is detrimental to, and discriminates adversely against, a group of Aboriginal Australians solely by reference to their race.”

Numerous logic trees could be constructed from the arguments in this case, including a bit of Kafkaesque casuistry in which the *Bridge Act* is deemed constitutional only if building the bridge constitutes an act of adverse discrimination, and only if it discriminates against a sufficiently large group of people. The plaintiffs actually use this argument on their own behalf: the proposed bridge would only infringe upon sacred lands held by local Aborigines, not by Aborigines throughout Australia. Hence the *Bridge Act* does not discriminate against “[t]he people of any race” — which, in an exercise of construction based upon the meaning of the definite article (“the”) — the plaintiffs took to mean the *entire* people of a race. To be justified by the race power, therefore, the *Bridge Act* would have had to discriminate against all Aborigines.

This argument was unanimously rejected by the court, but for different reasons. The majority seemed content to say that s 51(xxvi) of the Constitution authorised Parliament to discriminate against the interests of a particular race if it chose to do so, but it was satisfied that the *Bridge Act* was sufficiently discriminatory to be justified under the race power.

While Justice Kirby rejects the notion that s 51(xxvi) empowers Parliament to discriminate against the interests of a particular race, he rejects the plaintiff’s argument on different grounds, holding at [121] that Parliament can enact legislation with respect to the benefit of only part of the Aboriginal population (but only for their benefit): “rural Aborigines,” for example, or “Aboriginal children, Aboriginal health in particular places, Aborigines in disadvantaged areas and so on”.

So the question reserved by the Chief Justice must be addressed in more concrete terms: Does s 51(xxvi) authorise Parliament to enact legislation *against* the interests of a particular race? Yes it does, according to the majority. And the *Bridge Act* is therefore in itself a constitutional exercise of the race power. In addition, the *Bridge Act* can be read as amending or partially repealing the *Heritage Protection Act*; if the latter was constitutional, then the former must be constitutional as well.

This somewhat startling conclusion had to be rationalised as an act of fidelity to the literal meaning of the Constitution — not an exercise of power based upon political or economic considerations. The arguments are extensive: some 4500 words by Chief Justice Brennan and Justice McHugh, 4200 by Justice Gaudron, more than 6000 by Justices Gummow and Hayne. Perhaps the simplest way to review these arguments is to examine Justice Kirby’s fairly systematic attempt to refute them (13,391 words).

The tropes in the dissent, like those in the majority opinions, are not a systematic set of interpretive tools. Rather they are, as they must be, the tools of a *bricoleur* — the French term for an inventive labourer who improvises solutions with the tools and materials at hand, as opposed to an engineer, who works with precise measurements and precision tools.¹⁴ Although there is an apparent logic in rules and canons, it is a soft logic, lacking as

14 The distinction is, of course, the subject of a well known exchange between Jacques Derrida and Claude Lévi-Strauss. See for example Jacques Derrida, “Structure, Sign, and Play in the Discourse of the Human Sciences,” in R Macksey and E Donato (Eds), *The Languages of Criticism and the Sciences of Man: The Structuralist Controversy*, 1970, Johns Hopkins, Baltimore, pp 247–265.

it must be the ineluctability of geometric reasoning, and therefore not necessarily persuasive to anyone indisposed to the conclusions that follow.

Under the heading of “General approach to construction,” Justice Kirby begins by pledging his own allegiance to the literal meaning of the text. Like most judges, including the others on the High Court, Kirby J does not want to seem an “activist,” making laws rather than merely interpreting them (at [132]):

“The duty of the Court is to the Constitution. Neither the Court, nor individual Justices, are authorised to alter the essential meaning of that document.”

His Honour cites with approval at [132] an observation of Justice Kentridge of the Supreme Constitutional Court of South Africa:

“[I]t cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean ... If the language used by the lawgiver is ignored in favour of a general resort to ‘values’ the result is not interpretation but divination.”

(We shall encounter Justice Kentridge’s unflinching devotion to literal meaning in the South African case, discussed below.)

Justice Kirby at [132] opposes “the creative imagination of those who might be fired by the suggested requirements of changing times or by the perceived needs of justice in a particular case”. And in a sentence reminiscent of the “textualism” espoused by Justices Scalia and Thomas of the US Supreme Court, Justice Kirby holds at [132] that:

“The text is the law ... judicial interpretation of the Constitution risks the loss of legitimacy if it shifts its ultimate focus of attention away from the text and structure of the document.”

But this fidelity to the literal meaning of the text is tempered by a bit of judicial realism, a recognition at [132] that “sometimes, words themselves acquire new meaning from new circumstances” and that the meaning of the Constitution actually seems to change from one generation to the next, in part because of evolving societal values:

“Each generation reads the Constitution in the light of accumulated experience. Each finds in the sparse words ideas and applications that earlier generations would not have imagined simply because circumstances, experience and common knowledge did not then require it. Among the circumstances which inevitably affect any contemporary perception of the words of the constitutional text are the changing values of the Australian community itself and the changes in the international community to which the Australian community must, in turn, accommodate.”

Justice Kirby also asserts at [156] that “what ... may be deemed ‘necessary’ and in a ‘special’ form for the people of a race, by reference to race, cannot, and should not, be understood as it might have been in 1901.”.

In addition, Justice Kirby recognises at [132] the inevitable ambiguity of the language of the law, though for reasons that escape me he attributes this to the fact that English is in part a Germanic language and in part a Romance language:

“Add to these considerations the special ambiguity of the English language, in which the document is written, occasioned by its unique fusion of Germanic and Latin sources, and it should not be surprising that constitutional interpretation in Australia, over time, has involved changes in the understanding and exposition of the words used.”

With respect, the ambiguity of English has nothing to do with the fact that it is a hybrid language. *Every* natural language is rotten with ambiguity — which is why scientists and mathematicians invent artificial languages, arbitrary symbols from which ambiguity of natural language has been distilled. Because law everywhere is expressed in natural language, it can never achieve the purity of mathematical or chemical symbols, or even the stability of dead languages, like Latin and Greek, when they are used to identify body parts or to give natural species their official names.

Taken together, these observations accurately express the quandary in which judges find themselves: dedicated to literal meaning; frustrated by that fact that as Scott Turow puts it, “Words are sometimes as elusive as fish.”

From this problematic beginning, Justice Kirby employs many of the usual rules and canons of construction in his quest for the true meaning of s 51(xxvi) and, for good measure, the meaning of the two statutes in question.

Kirby J establishes the goal of each Act by quoting their stated purposes. The stated purpose of the *Heritage Protection Act* was “the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition” (s 4). On the other hand, the stated purpose of the *Bridge Act*, as described in its long title, was “to facilitate the construction of the Hindmarsh Island bridge, and for related purposes.” It would seem that the two statutes are diametrically opposed.

His Honour also invokes the trope of parliamentary intent to determine the purpose of the *Bridge Act*, citing the Ministerial speech introducing the Bill. According to that speech, the object was to prevent the *Heritage Protection Act* “from further impeding the building of the Hindmarsh Island Bridge” (at [113]). The purpose of the *Bridge Act*, then, was to undermine the *Heritage Protection Act*.

Kirby J then turns his attention to s 51 (xxvi) of the Constitution to determine whether it can be construed to authorise legislation, like the *Bridge Act*, contrary to the interests of a particular race. Because s 51 (xxvi) was amended in 1967, his Honour turns to the trope of legislative history to determine how the amendment changed the meaning. There seems to be no disagreement that an earlier (1901) version authorised Parliament to enact legislation that “was either beneficial or detrimental to the people of any race” (at [117]). But in 1967, the words “other than the aboriginal race in any State” were removed from that section. The question then becomes whether the removal of those words enlarged the number of races for which Parliament could enact either beneficial or detrimental legislation, or constrained Parliament to enact only beneficial legislation with respect to any race whatsoever.

Then turning to the precedent trope, Justice Kirby concedes that there has been no judgment directly on point, but notes that some *dicta* in previous decisions have supported the view that the word “for” in s 51 (xxvi) (“for whom it is deemed necessary”) means for the benefit of the affected race, not their detriment. *Dicta* of course are not binding precedent. But they can be persuasive, if not authoritative, in lending support to an argument.

Sometimes in statutory interpretation there are tropes within tropes. In this case, among the dicta cited by Justice Kirby is an argument of Murphy J from an historical or sociological context. According to Justice Kirby at 126, Justice Murphy “described the background of disadvantage and brutalisation necessary to understand the amendment of the race power and how it appears in the Constitution today.”

Justice Kirby at [127] also cites Justice Brennan, who on an earlier occasion (*The Tasmanian Dam Case*¹⁵), invokes historical or sociological context to interpret the effect of the 1967 amendment:

“The approval of the proposed law for the amendment of par (xxvi) by deleting the words ‘other than the aboriginal race’ was an affirmation of the *will* of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial.”

Ultimately, however, dicta on this point are inconclusive, not only because dicta in themselves lack authority as precedent, but also because some of the cases cited support the notion that Parliament can enact statutes that are either beneficial or detrimental to the interests of a particular race. Justice Kirby acknowledges this at [131]:

“In the end it is impossible to derive from the foregoing decisions any sure conclusion as to the scope of par (xxvi) — whether it is confined to the benefit of the people of any race or to laws which do not adversely discriminate against them; or, at least in the case of people of the Aboriginal race, is restricted to the making of laws for their benefit. Differing views have been expressed. Several have been favourable to the plaintiffs’ submissions. Some have not. It is now necessary to resolve the differences.”

History, too, turns out to be inconclusive. Justice Kirby at [135] points out that the original draft of s 51(xxvi) the Constitution Bill of 1891 gave Parliament the power to enact legislation with respect to:

“The affairs of people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community; but so that this power shall not extend to authorise legislation with respect to the aboriginal native race in Australia and the Maori race in New Zealand.”

Reading this passage without a knowledge of its historical context, we might assume that it was intended to leave indigenous peoples free to govern themselves. But the Australian Constitution, like the US Constitution, was drafted in a contest between federal and State powers. The question at stake was whether Aborigines would be under the authority of State governments or of the federal government. The effect of s 51 (xxvi), then, was to allow individual States to control Aboriginal affairs, rather than the national Parliament. Whether this was intended for the benefit or detriment of Aborigines is, as Justice Kirby points out, not clear from the record. Autonomy for indigenous peoples was not seriously considered.

There is, however, ample evidence to suggest that removing the words “other than the aboriginal race in any State” in 1967 had three purposes: first, to empower the

15 (1983) 153 CLR 1 at 242.

federal government to exercise legislative authority that had once been left to the States; second, to empower the federal government to enact legislation for the benefit of a particular ethnic community; and third, to correct the impression that s 51 (xxvi) empowered the government to pass legislation to the detriment of a particular race. As Kirby J explains at [146]:

“There was not the slightest hint whatsoever in any of the substantial referendum materials placed before this Court that what was proposed to the Australian electors was an amendment to the Constitution to empower the Parliament to enact laws detrimental to, or discriminatory against, the people of any race, still less the people of the Aboriginal race.”

Neither the defendant Commonwealth nor the other members of the High Court found this analysis persuasive. Legislative history is irrelevant, the Commonwealth argued; what matters is the text itself. Its literal meaning. “Most readers of the Constitution would be unaware of the Convention and Parliamentary debates.” (Kirby J at [149]). And so there you have it: an interpretive trope that many readers would find persuasive is dismissed by readers who have reason to prefer a different interpretation of an ambiguous text — readers, who must perforce contend that the text everyone is struggling to interpret is actually not ambiguous, but clearly means exactly what they were hoping it would clearly mean.

Justice Kirby also employs the trope of reference to a foreign jurisdiction, in this case, the United States. Obviously, the jurisprudence of one nation is not binding on another. It is sometimes persuasive, however, in supporting an argument that a particular practice is or is not out of step with the rest of the world. The same trope is used to show the inadequacy of the test of “manifest abuse” (the test favored by the majority to determine the validity of a statute enacted under the race power). Some of the old apartheid laws in Africa (for example, laws limiting where people of various races could own property, whom they might marry, with whom they might have sexual contact) applied to all races equally, and for that reason could not be said to be discriminatory or a “manifest abuse” of parliamentary power. And yet, no one denies that these laws were discriminatory in their effects. Similarly, laws requiring the “retirement” of non-Aryans from civil service in the Third Reich might have survived the “manifest abuse” test — but were nonetheless viciously anti-Semitic. Indeed, they would likely survive in Australia if the only test of validity was one of manifest abuse. As Kirby J explains at [163]:

“Laws such as those set out above would, now, be expressly forbidden by the constitutions of both Germany and South Africa. Yet, in Australia, if s 51(xxvi) of the Constitution permits all discriminatory legislation on the grounds of race excepting that which amounts to a ‘manifest abuse’, many of the provisions which would be universally condemned as intolerably racist in character would be perfectly valid under the Commonwealth’s propositions.”

Like all citations of precedent, this trope depends upon reasoning by analogy. The facts in South Africa and in Nazi Germany were not identical to those in Australia, but analogous to them. Within a given jurisdiction, precedent/analogy is the soul of *stare decisis*, the doctrine that requires courts to be consistent in their decisions whenever an analogous set of facts comes before them. In this particular application,

however, the examples of Germany and South Africa serve to predict a future course of events: if we count on Australian courts to intervene only when there is “manifest abuse” of the race power, we may be heading down the slippery slope that led to horrendous discrimination in those countries.

In a somewhat different appeal to foreign jurisdiction, Justice Kirby mentions the examples of New Zealand and Canada, which have been sensitive to international law. Of course, as Justice Kirby concedes, there is no obligation to defer to international law when there is no ambiguity in Australian law. But when, as in this case, Australian law is ambiguous, particularly in an area of human rights “it is legitimate to have regard to international law” (at [166]). And on the subject of adverse discrimination on the basis of race, international law is quite clear: “If there is one subject upon which the international law of fundamental rights resonates with a single voice it is the prohibition of detrimental distinctions on the basis of race” (at [167]).

In the majority view, the *Bridge Act* could be justified in itself (the four corners trope) or by viewing it in its larger textual context — that is, as either an amendment or partial repeal of the *Heritage Protection Act*,¹⁶ or as part of a grand legislative scheme to be interpreted as a whole. In this view, the *Bridge Act* passes constitutional muster no matter how you look at it. Justice Kirby (at [171]) will have none of it: No matter how the *Bridge Act* is regarded, “each of these approaches meets the same result. The *Bridge Act* is invalid.”

Justice Kirby presents his conclusion succinctly at [176]:

“The *Bridge Act* ... does not answer to the description of a law with respect to the people of any race for whom it is deemed necessary to make special laws. It is a special law; that is true. But it is detrimental to, and adversely discriminatory against, people of the Aboriginal race of Australia by reference to their race. As such it falls outside the class of laws which the race power in the Australian Constitution permits. No other head of power being propounded to support the validity of the *Bridge Act*, it is wholly unconstitutional.”

The only escape for the Commonwealth and for the majority of the High Court is to contend that the Constitution of Australia empowers Parliament to enact legislation that discriminates against racial groups. And that is precisely what the majority holds. Their argument, in a nutshell, is that the original version of s 51 (xxvi) clearly enabled the States to discriminate against the Aborigines, and that the 1967 amendment merely extended the power to discriminate, not just against the Aborigines but against any racial group in what might be called a bizarre exercise of fair play. And, in this view, the amendment empowered the federal Parliament to indulge in this sort of discrimination rather than leave it to the States.

16 The notion that the *Bridge Act* amends or partially repeals the *Heritage Protection Act* even though it does not announce this intent is supported by a particularly ingenious stratagem described as “indirect express amendment”: “The *Bridge Act* is an instance of what F Bennion calls ‘indirect express amendment’. It effects a partial repeal of the *Heritage Protection Act*, albeit the text of the *Heritage Protection Act* is unchanged.” *Kartinyeri v The Commonwealth* (1998) 195 CLR 337; [1998] HCA 22 at [9] (citation omitted). In short, an “indirect express amendment” seems to enable Parliament to amend or repeal legislation without saying that it intends to do so, thereby keeping the change below the radar of public scrutiny.

The arguments in support of this position are detailed and ostensibly logical, much like the rigorous logic applied by scholastic philosophers to answer questions that were by their very nature unanswerable. What, one wonders, was the majority really thinking? We can only speculate. They may have been thinking in terms of equity, considering the balance of inconvenience that each party would experience depending on the decision. Ruling in favour of the defendants would mean that sacred lands would have been compromised. Ruling in favour of the plaintiffs would mean that the defendants would lose an opportunity to develop a profitable real estate project. Like many questions of equity, this one has no formulaic solution. Dollars on the one hand. Spiritual traditions on the other.

There is no explicit consideration of equity in the judgments, but this does not mean that it did not play a role in the private ruminations of the judges. Judges, after all, are human beings, not angels or computers. Unlike jurors, they cannot be sequestered from information broadcast in the media while the case is in progress. In this case, they might well have been aware of some factors that were generally known to the public at the time, even though these factors are not explicitly part of the judgment.

They would have known, for example, that Aboriginal objections to the bridge emerged rather late in the process, the original objectors being white residents of Hindmarsh Islands who preferred the area in its undeveloped state; that objections to the bridge on environmental grounds had already been unsuccessful; that the sacred nature of the site had to do with “secret women’s business” — which had been disclosed to a Royal Commission and found to be “lies and fabrication”; and that there were numerous inconsistencies in claims made ostensibly on behalf of Aboriginal women.

Could these considerations have influenced the result?

There is no way of knowing.

One thing is certain: however apparently logical the reasoning of both sides of this question, it failed to produce an irrefutable analysis with an irresistible conclusion. If it had, the decision would have been unanimous. We might speculate that for the majority, the bridge represented progress and economic development. And we might speculate that for Justice Kirby, the overwhelming considerations were to respect Aboriginal traditions, to safeguard the *Heritage Protection Act*, and to prevent a government that had been notoriously racist in the past from asserting a right to enact discriminatory statutes in the future.

But these are mere speculations. One thing is not a matter of speculation: that the canons and rules of interpretation are soft logic, persuasive only to people who prefer the result they support or at least have no reason to resist them.

South Africa — *S v Mhlungu and others*

On 27 April 1994 South Africa adopted a new constitution, invalidating much of the criminal code that had been in place since 1977 and providing defendants with procedural protections that they had never before enjoyed. It also provided for the establishment of a new judicial system.

But there was a problem.

What was to happen to those cases that had been initiated before the new Constitution took effect? The new courts had not yet been established — and even if they had been, it would have been more than a little awkward to transfer them from one regime to another in mid trial.

In addition, another problem seems to have caught the system by surprise: would defendants indicted before 27 April 1994, when the Constitution took effect, be entitled to the protections that the Constitution clearly provided to those indicted after that date? Common sense might seem to settle the question: it would be absurd to deprive some defendants of procedural protections that were afforded to others simply on the basis of when the process began.

But in *S v Mhlungu and others*, common sense ran afoul of what would seem to be the literal meaning of s 241(8) of the new Constitution, which clearly provided that cases pending before the new Constitution came into effect “shall be dealt with as if this Constitution had not been passed.” It is a puzzling passage, particularly in the historical context in which the Constitution of South Africa was written.

The literalists on the Supreme Constitutional Court — Kentridge J and three of his colleagues — could not bring themselves to substitute what they thought the framers of the Constitution might have meant for what they actually said. And it must be admitted that the literalists had a point. The problematic passage, in context, says this:

“All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, *shall be dealt with as if this Constitution had not been passed*: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution.” (emphasis added)

Not exactly lucid writing, this. It does not, for example, specify when a proceeding can be said to be “pending.” When the arrest is made? When the indictment is filed? When a jury is selected? When evidence is presented? But what does seem clear, at least at first glance, is that trials begun before the commencement of the new Constitution were to be dealt with “*as if this Constitution had not been passed.*”

The task for the majority of the court, therefore, was to justify a “literal” meaning of the passage that would allow them to ignore what would seem to be its literal meaning.

And justify it they did — although, as if to prove that there is no science of interpretation, no reliable “canons” to be applied, they disagreed about their reasons even when they concurred in the result.

Writing for the majority, Mahomed J applied a number of interpretive stratagems, none of them entirely determinative in itself, but which in combination produced a result that would strike many readers, but not all, as reasonable.

First, he argues from negative consequences (also known as the “to-rule-otherwise” trope), which in this case amounts to a *reductio ad absurdum*. When judges write “To rule otherwise would be to invite ...” (words generally followed by predictions of dire events), one always suspects that, finding little or no assistance in the letter of the law, they decide *against* what strikes them as unreasonable consequences. It should be noted that an argument from consequence is not, strictly speaking, an interpretive trope. It does not resolve an ambiguity in the text; it merely asserts that one apparent meaning of the text has unacceptable consequences.

As Justice Mahomed points out, if Justice Kentridge’s interpretation of the problematic passage were adopted, then two accused who were indicted one day apart for the same crime would have substantially different rights in court. One might have the right to a public defender, for example, and the other not. For one, evidence obtained by torture might be admissible, for the other not. One defendant might be subject to corporal punishment or even capital punishment and the other not. In addition, if the Constitution were to have no effect on trials in progress before 27 April 1994, defendants prosecuted under old laws that were patently discriminatory and racist would be subject to an oppressive regime that had been spectacularly rejected.

A more particular instance of *reductio ad absurdum*, as Justice Mahomed points out, is that if some defendants were tried without the benefit of the new constitutional protections, the court could impose a penalty — specifically, death — that could not be legally implemented. As Justice Mahomed phrases it with characteristic understatement, “the lawmaker should not lightly be imputed with the intention to authorise the court to impose sentences which could not lawfully be executed” (at [10]). So s 241(8) could not possibly mean what it seems to mean, because it could result in the imposition of legally invalid penalties.

Another common interpretive trope is an appeal to the manifest purpose of the document in question. The literal interpretation preferred by Justice Kentridge, writes Justice Mahomed at [8], would seem “to negate the very spirit and tenor of the Constitution and its widely acclaimed and celebrated objectives”:

“Fundamental to that spirit and tenor was the promise of the equal protection of the laws to all the people of this country and a ringing and decisive break with a past which perpetuated inequality and irrational discrimination and arbitrary governmental and executive action.”

Because this is the first time the issue reached the Supreme Constitutional Court, there were no precedents in South Africa. As often happens in cases like this (in some jurisdictions they are called “cases of first impression”), judges cite foreign jurisdictions, not as binding authorities, but by way of making their own analysis seem less personal or idiosyncratic.

In this regard, Justice Mahomed at [8] cites two cases, one rejecting “the austerity of tabulated legalism” in statutory interpretation (*Minister of Home Affairs (Bermuda) v Fisher* at 328H), and the other for treating the Constitution as an “organic instrument,” the “articulation of the values bonding its people and in disciplining its Government”

(*Government of the Republic of Namibia v Cultura 2000* at 418). Again, as comforting as these precedents may be to readers who are disturbed by the problematic passage, they do nothing to resolve the ambiguity of the text itself.

In deference to the courts below, Justice Mahomed cites three judgments, each limiting the application of the contested section in some way. But even when he accepts their results, he rejects their reasons as insufficiently grounded in the text itself ([16]–[20]). Precedent, then, can be invoked to resolve a textual *aporia* — that is, relentless ambiguity — but it does not necessarily resolve the problem. At the same time, Justice Mahomed’s rejection of the reasons given by the courts below reveal his allegiance to the literal meaning of the text — an allegiance no less fervent than that of Justice Kentridge, who finds in the text a literal meaning entirely different from that preferred by Justice Mahomed.

Arguments from consequences, from manifest purpose, from authority and from precedent are persuasive only if you assume that the framers of the Constitution could not have intended to extend, even temporarily, the injustices of the old regime. Given the historical context of South Africa, it would seem unreasonable that the framers of the new Constitution could have meant what they seem to have written.

Still, these tropes do not provide an ineluctable interpretation of the contested provision. Nor is the problem resolved by the ten additional precedents listed at [9], a list that lends an air of scholarship to the judgment without the inconvenience of a detailed analysis that would in any event be both tedious and inconclusive.

Justice Mahomed seems to recognise that none of his arguments offers effective relief from the nagging insistence of the text itself: cases begun before the new Constitution takes effect “*shall be dealt with as if this Constitution had not been passed.*” And so, casting aside the canon that requires us to read the law according to the common and ordinary meaning of the words, he applies other tactics from the grab bag of interpretive tropes to persuade us that the text literally means something other than what it seems to literally mean.

He turns first to the trope of internal context. If the framers of the Constitution had intended to say that new Constitutional protections did not apply to cases already in progress, they would have had no reason to add the phrase “exercising jurisdiction in accordance with the law then in force” to specify the courts to which this section applied. Obviously the section would not apply to courts that were *not* legally established. So why did they add this phrase? Assuming that the drafters had a purpose, Justice Mahomed opines that it was to signal that this section applied not to the rights of the defendants, but to the operation of the courts.

To explain this purpose, he turns to the trope of historical context. When the Constitution came into effect, the new courts had not yet been established. Section 241(8), therefore, provided continuity in the judicial system, enabling the pre-Constitutional courts to continue hearing cases begun before 17 April 1994. Nothing in the section, however, absolves these courts from observing the new Constitutional protections and rights for defendants.

Justice Kentridge is not persuaded. In fact, he turns to his own argument from internal context to rebut Justice Mahomed's argument. There is no reason to suppose that s 241(8) served merely to keep the old courts temporarily in business. That, his Honour points out at [70], was achieved elsewhere — specifically, ss 241(1) and 241(10). The purpose of s 241(8) could not be merely to confirm the jurisdiction of existing courts, because that jurisdiction was explicitly confirmed in another section.

Justice Kentridge invokes what he calls “the canons of statutory interpretation” — a phrase that suggests there are rules to be followed, standards to be applied, to prevent statutory interpretation from becoming an exercise in willful subjectivity. There are, according to Justice Kentridge, canons to determine whether and when new laws can have retroactive application (at [64]–[67]). One of them is that a new statute is not deemed to have retroactive effect unless it says so. Another is “that a statute is as far as possible to be construed as operating only on facts which come into existence after its passing.” And yet another is “that even if a new statute is intended to be retrospective in so far as it affects vested rights and obligations, it is nonetheless presumed not to affect matters which are the subject of pending legal proceedings.”

At [72] Justice Kentridge invokes yet another common interpretive stratagem: to consider what the text *might* have said. When the framers of the constitution empowered the existing courts to continue operating during the transition period, they also had to tell them how to apply the law. They could have told them to apply the new Constitution, or to ignore it. “Rightly or wrongly the framers of the Constitution chose the latter option, and we are required to give effect to that choice” The same trope is repeated two paragraphs later at [74]:

“If the lawmakers had intended that those provisions of the Constitution which had a procedural character were not to be applied in pending proceedings, whereas purely substantive provisions were to be applied it would not be easy to find less appropriate words than ‘... shall be dealt with as if this Constitution had not been passed’”.

All reasonable tropes, these. Why then, is the majority not persuaded, particularly since the plain meaning of the language seems to support Justice Kentridge's position? Assuming that the judges on both sides are competent and impartial, there can be only one explanation: each side is attempting to avoid what it considers to be unacceptable consequences. The dissenters worry that ignoring the plain language of the Constitution undermines a fundamental principle of jurisprudence. The majority worries that even more harm would be done to respect for the rule of law if literalism resulted in manifest injustice.

Causes, consequences and implications

The protagonist in Scott Turow's *Limitations*, a judge, finding himself forced to choose between two equally plausible readings of the law in a case that for numerous reasons he finds difficult to decide, instructs his clerk to draft two judgments from which he hopes to choose:

“Both drafts make sense, naturally. There's no analytic trick he learned in law school or since then that allows him to pick one or the other apart. For a century and a half, legal

education has been focused on reading the opinions of judges like George who sit on courts of review. In his day, his professors discussed these decisions, just as they would now, in terms of the policy concerns, the political views, the jurisprudential beliefs that drove them. After holding this job for nearly a decade, he regards much of what he was taught as romantic, if not completely wrong.”¹⁷

In addition to the usual intellectual conflicts that tug in opposite directions when the law is ambiguous, in *Limitations* the judge’s decision is complicated by two other factors: the politics and personalities of the appeal court on which he sits; and the recognition that he himself once got away unpunished for an offence similar to the one for which he is being asked to confirm the sentence imposed by the trial court.

Limitations is fiction, of course. But fiction is powerful when it tells a likely story. There is no reason not to suspect that judges, being human, are at least on occasion subject to similar pressures when they render a decision based on an ambiguous law: political preferences, personal histories, relationships with colleagues on the bench, sympathy or antipathy toward litigants, and a host of other factors that are not likely to be revealed in the judgment itself. In the United States, it has been suggested that some judges on the Supreme Court vote against granting leave to appeal, not because they think the case was correctly decided below, but because “the court is so closely divided that neither the liberals nor the conservatives want to risk granting [leave to appeal in] a case in which, at the end of the day, they might not prevail.”¹⁸

The notion that decisions are occasionally rendered for reasons not revealed in the judgment cannot be empirically proved, but it does seem to be supported by the available data. In none of the cases examined above were the rules and canons of interpretation so compelling that they did not allow for reasonable dissent. The Supreme Court of Canada ruled that the word “adapted” in the contested passage was unambiguous, despite the fact that a unanimous Ontario Court of Appeal found it ambiguous. Their stratagem for declaring it unambiguous — consulting the French version of the statute — was not irresistible. One can only speculate that there were unstated reasons, including speculations about the consequences of ruling one way or the other.

In the US case, neither the majority nor the dissenting opinions present irresistible proof about what the muddled statute actually means. In fact, while they all agree that the statute is muddled, they do not agree that it is ambiguous. One can only conclude that, absent irrefutable logic in their interpretation, individuals on the court were influenced by a consideration of consequences — the majority concerned that ruling against the plaintiffs would result in justice denied not only for the plaintiffs at bar, but also for future plaintiffs in similar situations; the minority concerned that ruling in favor of the plaintiffs would be an exercise of judicial activism that they preferred to avoid.

In the Australian case, justifying the *Bridge Act* on the theory that Parliament has the power to enact legislation that discriminates against a racial group is likely to be

17 S Turow, op cit n 1, p 109.

18 L Greenhouse, “Dwindling Docket Mystifies Supreme Court,” *The New York Times*, 7 December 2006, p 1.

persuasive only to people who wanted that bridge to be built for economic reasons and who have little or no sympathy for Aboriginal sensibilities. Others — people who prefer to see wilderness areas undeveloped or Aboriginal traditions respected — are likely to find Justice Kirby's dissent more persuasive.

The South African case, perhaps more than the others, demonstrates how far judges are willing to go to justify a result contrary to the obvious meaning of the text, even while declaring their loyalty to the literal meaning. The dissenting opinion by Justice Kentridge seems based on unassailable logic. But in jurisprudence, logic often melts, like a timepiece in a Dali painting. It would seem that the majority of the court simply refused to be confined to the literal meaning of a problematic text. They declared the meaning to be something other than what it seemed to be. Some observers would agree with Justice Kentridge that the majority acted *ultra vires* in essentially re-writing a provision of the Constitution. Others would say that one of the functions of a wise judiciary is to protect society from injustices that might result from errors in drafting.

If any inference emerges from this study, it is that statutory interpretation lacks the rigour of mathematical or scientific reasoning, even while it constructs illusions of certitude. There are three reasons for this: first, the *language* of the law, unlike the languages of science and mathematics, is rotten with ambiguity; second, it is impossible to locate the *meaning* of any text; and third, the logic of law is a *soft logic* leading to plausible but not inevitable conclusions.

The ineluctable ambiguity of natural language

The ambiguity of natural languages becomes evident when they are contrasted with the artificial languages of mathematics and science. Mathematical and scientific languages consist of symbols from which ambiguity has been distilled. To take a simple example, when geometricians write $a^2 + b^2 = c^2$ (the Pythagorean Theorem), all competent mathematicians everywhere in the world interpret it in exactly the same way: the square of the hypotenuse of a right triangle is equal to the sum of the square of the other two sides. Similarly, when chemists write symbols for sodium (Na) or water (H₂O), those symbols represent the same substances to scientists everywhere, regardless of what these substances might be called in their native languages.

Other sciences — the natural sciences, like biology and zoology — avoid the ambiguity of ordinary language by referring to the objects of their study in a dead language, usually Latin, thereby quarantining their language from the evolution of meaning that occurs in ordinary language use. The humble fruit fly — which in English has a number of aliases (“vinegar fly,” “banana fly,” “garbage fly”) is dubbed “*Drosophila melanogaster*,” which may not mean much to the rest of us or even to the fruit fly, but which designates precisely the same little beast to biologists and geneticists all over the world. Furthermore, the definition of *Drosophila melanogaster* is a matter of empirically observable features universally accepted by entomologists. If a fly shows up on a banana, scientists generally have no trouble determining whether it is a *Drosophila melanogaster* or some other kind of winged creature. They observe the thing itself and determine whether it has the features that define this species, distinguishing it from all others.

Law, by way of contrast, has no artificial language. Granted, it has more than a few terms of art — like “contributory negligence” and “balance of probabilities.” But as anyone knows who has attempted to explain these terms to jurors in plain language, their precise meaning is notoriously elusive. Law is inextricably mired in the messiness of ordinary language, in which definitions are determined by context, and context has no boundaries. It could refer to the phrase in which the word occurs, or the document as a whole, or the document as part of a series of documents, or other occurrences of the word in ordinary discourse, or dictionary definitions, which themselves illustrate different contexts that alter meaning. Even when law resorts to Latin in phrases like *res gestae*, *corpus delicti* or *habeas corpus*, it never achieves the stability and precision of scientific nomenclature. Because terms like these cannot be tied to empirically observable criteria or universally accepted definitions, they become hospitable to a number of plausible interpretations when they are critical to a legal argument.

The artificial languages of science are clearly useful, removing almost all possibility of misunderstanding within the scientific community. But this terminology applies only to what might be called the “Adamic” strain of language, so-called because Adam was its mythological inventor. Science deals with things that exist before they are named, things that exist whether we name them or not, the sort of things Adam named as he walked about the Garden of Eden.

But in *Genesis*, there is another language, a language that God speaks. Instead of naming things that already exist, as Adam does, God *speaks things into existence*. “Let there be light,” God says, and light comes into being.

As it turns out, we humans are the only known species capable of both kinds of language. Like Adam, we name things that exist (for example, platypus, igneous rock, the Mississippi river, etc). But we also call “things” into being with language. “Let there be marriage,” we say as a community — and marriage exists, even though no scientific instrument can discern the difference between a bachelor and a bridegroom. Until some community somewhere said, “Let there be marriage among us” — or words to that effect — there was no marriage, and hence no possibility of divorce, infidelity, abandonment, or widowhood. Where there is no language, there can be no marriage.

Marriage, along with innumerable linguistic creations, exists in what I like to call the *logosphere*, the sphere of entities that are created by language and do not exist outside of it. The logosphere is filled with entities of this sort — real (who would deny that marriage and divorce are real?) — but not objective, not definable by empirical criteria, not subject to measurement or observation, and therefore not the proper object of scientific observation.

Property is another example. When we think of property, we tend to think of physical things — houses, cars, jewelry, etc. But “property” is not a thing. Nor is it discernible in things that are owned. It is a linguistically constructed relationship between people and things. When we buy or sell a house, nothing in the house changes. No measuring rod, spectrometer, or Geiger counter can discern a difference in real estate when its ownership changes.

The list of things we create with language is limitless. It includes honesty, plagiarism, crime, punishment, pretense, plausibility, kingship, geographical boundaries, exemptions, speculations, bonds, promises, contracts, rights, pardons, derivatives, venue, jurisdiction, standing, etc. It includes not only what we traditionally call abstract nouns (like “truth,” “beauty,” “gratitude”), but whatever masquerades as a thing — a noun — even though it is imperceptible to the senses and to scientific instruments. These “things” do not exist among creatures that have no language.

Jurisprudence deals with both kinds of entities — things that exist independently of language and “things” that exist only in language. But it is the latter that differentiates jurisprudence from empirical science. Scientists deliberately and systematically avoid the logosphere; if something cannot be observed and measured, it is not a proper object of scientific study.

Judges cannot avoid the logosphere. They must deal with entities created in and by language. And they must make statements that the logical positivists would deride as “pseudo-concepts,” including statements with descriptors and modes of predication that are illicit in scientific discourse — value judgments expressed by adjectives like “good,” “evil,” “better,” “worse,” “just,” and “equitable,” and verbal modalities like “should,” “ought” and “must.” Words of this sort are taboo in the lexicons of science and mathematics. The systematic blindness that renders these disciplines precise also makes them incapable of addressing an entire range of questions that are essential to the political and ethical universe we humans have created with language.

To make matters more difficult, definitions in the logosphere, unlike definitions in science and mathematics, are infinitely contestable. “You call *that* marriage?” people might say when confronted with a relationship that lacks what they consider to be an essential element (for example, physical intimacy, or fidelity, or monogamy, or heterosexuality, or a willingness to procreate). Dictionaries are powerless to resolve the debate. They can only record how language is used, and that only partially, not “true” meanings, not how words *ought* to be used. Natural language is like nature itself; it can be regulated, but only to a limited extent. It resists legislation, growing, changing, evolving despite our best efforts to control it. Even the Herculean efforts of l’Académie Française to keep the French language pure are doomed to failure.

What does this have to do with statutory interpretation? Courts are frequently required to declare the meaning of words in the logosphere, words for which there is no universally recognised, empirically verifiable definition. When judges say what a term means, they do so *not* on the basis of their superior hermeneutic skills, but on the basis of a quasi-priestly power that society has given them. Words mean what judges say they mean, not because judges have somehow discovered their true meaning, but because courts are empowered to *declare* meaning even in the face of relentless ambiguity. There is no science of definition in the logosphere — which explains why judges can reasonably disagree about the meaning of contested terms.

The elusive location of meaning

The impossibility of locating meaning can be established, paradoxically, by employing common sense against common sense. On the one hand, common sense tells us that words contain meaning, the way a nut contains a kernel, or sea water contains salt. If words did not contain meaning, how could we possibly understand one another when we speak and write?

But the common sense view of language turns out to be as untenable as the common sense view that the earth is flat or that the northern hemisphere is really above the southern. If you look at the words on this page, you see black marks on white space. Meaning is not *in* these physical, material marks, any more than colour is *in* the things we see. Meaning cannot be detected by scientific machinery—microscopes, x-rays, spectrographic analysis. It is not *objectively* there. It does not come into being until it is constructed by readers, just as “colour” does not come into being until creatures, like us, with nervous systems equipped to process light waves in a certain way, experience it.

Meaning is produced by readers responding to the marks as they have learned to respond to them, making meaning of them, not extracting it, but *not* making precisely the same meaning that other readers would make. Every reader and every reading is subtly (and sometimes radically) different, depending on how much prior knowledge the reader brings to bear, how much interest, how much resistance, how much desire to find a particular meaning.

One way of evading this problem is to say that the authentic reading, the true meaning, is what the writer intended. But this poses another set of problems. Because we have no direct access to the mind of the writer, we have no way of telling whether the meaning we infer from their words is what they have in mind. Of course we could ask them, if they happen to be around; but our questions and their answers would be expressed in words—and so the problem of interpretation would not be solved, but simply postponed.

In any case, the author’s or speaker’s response would indicate only what he or she *wants* the text to mean. Ambiguity in an utterance is never cured by an author’s commentary. Authors lose authority over the texts they write. Even if Shakespeare himself were to tell us what he intended an ambiguous passage in *Hamlet* to mean, the words themselves would remain ambiguous. The ultimate defender of authorial authority over meaning is Humpty Dumpty in *Through the Looking Glass*: “When I use a word, it means just what I choose it to mean, neither more nor less.” When Humpty Dumpty asserts his authority over language, we can easily see that reverence for authorial authority has its limits.

In law, to allow writers of statutes and contracts to declare what they *intended* the agreement to mean would render statutes and contracts meaningless. The author’s intent, to the extent that we can discover it, is only one of several things to consider when interpreting a text, and its force varies with context. Sometimes it is almost irrelevant (as when resolving an ambiguity in a contract against the interests of the party who wrote it). Sometimes, quite compelling (as when interpreting a provision of a will on the basis of what we think the testator would have intended). But rarely, if ever, is it absolutely

determinative.

Discerning the intended meaning of a text with multiple authors — a statute, for example, or a constitution — is even more problematic. Individuals involved in corporate authorship are likely to have varying degrees of responsibility for phrasing the text, and various understandings of what it means. Which of these individuals can be presumed to be the custodian of the *true* meaning? Locating the intent of writers, whether individual or multiple, becomes an even more excruciating problem when those authors are unavailable. Or dead. Legislatures and constitutional assemblies, being collective entities, are likely to have multiple motives in approving a text, and multiple understandings of what the text means. There is almost always something in the record that a motivated reader can exploit to support a preferred reading.

Unless we recognise that aporia in language signal occasions when the common-sense notions of language and meaning are illusory, our attempts at definitive interpretation will be equally illusory. And naive. Sometimes dangerously naive. In law, the authority over language claimed by Humpty Dumpty is actually exercised by a particular set of readers: the majority of the court that declares what a disputed text means.

The soft logic of jurisprudence

The logic of the law, like its language, is best understood in contrast to its counterparts in science and mathematics. A classic declaration of logic in these fields occurs in *Language, Truth and Logic*¹⁹ in which AJ Ayer introduced the philosophy of the Vienna Circle to the English speaking world. According to Ayer, there are only two kinds of meaningful propositions: those that are *analytical* (that is, derived from tautology) and those that are *empirically verifiable*.

Mathematical propositions satisfy the first criterion: parallel lines never meet because parallel lines are defined as lines that never meet. Propositions in the empirical sciences generally satisfy the second criterion: to be properly scientific, a proposition must assert something that can be confirmed or refuted by empirical evidence. Propositions that meet neither criterion are “pseudo-concepts,” according to Ayer — essentially meaningless. They can be neither true nor false, and are therefore not worth arguing about.

Logical positivism is largely responsible for the spectacular advances in science during the twentieth century. But it has its limits, the main one being its systematic and purposeful refusal to address the most important questions of our lives: questions of ethics, aesthetics, metaphysics, politics and jurisprudence. More to the point of this essay, logical positivism cannot address questions of meaning because meaning is not something that can be empirically measured or observed. It exists in an elusive nether world involving writer, text, and reader but without a local habitation or physical manifestation that science can observe. Questions of meaning, along with questions in the other fields mentioned above, can be addressed only by soft logic.

By soft logic, I mean patterns of reasoning that are plausible, even persuasive, but not irrefutable. “Soft logic” is not a modern concept. Although Aristotle does not refer specifically to “soft logic,” it is actually at the core of his *Rhetoric* — a work generally

19 *Language, Truth and Logic* (2nd ed), 1946, Dover, New York.

regarded as a manual for speech-making, when it is actually a treatise on how belief is established in areas where certitude is unattainable.

Aristotle was writing in a culture influenced by Sophists, who boasted that they could teach people how to prove or disprove any proposition whatsoever. Plato had no use for sophistry — believing as he did in absolute truth and the possibility of discovering it, regardless of the nature of the question. Aristotle had a more realistic approach. In another work, the *Nicomachean Ethics*,²⁰ he distinguishes between questions that can be answered with absolute precision (for example, mathematical questions), and others for which “mere probability” is the most we can attain:²¹

“[I]t is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician scientific proofs.”

Statutory interpretation (along with literary interpretation and the interpretation of sacred texts) belongs to this second category, questions for which merely probable or plausible answers are the most a reasonable person can hope for.

Aristotle identified numerous patterns of soft logic, including signs, probabilities, and a host of *topes* (τοποι) — literally “places” — where arguments in the realm of the unprovable can be found.²² He divided the *topes*, or topics as they are generally called in English, into two categories: special topics (stratagems of argument peculiar to a specific discipline) and common topics (stratagems of argument that were not limited to a specific discipline).

Unfortunately, the *topes* have been marginalised or even trivialised in history, rarely recognised for what they once were — a collection of quasi-logical arguments that are the necessary and inevitable counterpart to strict syllogistic or inductive reasoning.

In Aristotle’s *Rhetoric*, the topics are illustrated with examples from history and literature. In subsequent centuries, these examples became collections of passages that schoolboys (girls were rarely allowed to study rhetoric) could imitate in writing exercises. This led, in the Renaissance, to the development of “commonplace books” — literally, collections of favorite passages that one might want to remember or to imitate. And from these collections emerged the modern meaning of “commonplace” — which is to say ordinary or clichéd. Thus the notion of *topes* as stratagems of soft logic was diluted and all but lost to history.

20 Aristotle, *Nicomachean Ethics*, I, iii, 350 BCE, trans WD Ross.

21 *ibid.*

22 “*Topes*” and “*tropes*” are sometimes used interchangeably, not only because they are distinguished only by a single letter, but because they are both metaphors for concepts that are closely related. A *trope* (Greek, τροπος) is a twist or turn — or more colloquially, a “move,” in the sense that dancers, athletes, and writers have “moves” that can be named and imitated. A *tope* (Greek, τοπος) is a place (as in English topography). In rhetoric, a *tope* is a place where you can find illustrations of specific moves, or *tropes*. Hence the confusion: a distinction not entirely without a difference, but arguably without a useful difference. In practice, *tropes* usually refer to stylistic moves, like simile, metaphor, anaphora and the like. *Topes* usually refer to argumentative stratagems, illustrated by example. But an argumentative stratagem is really a “move,” too, and so can reasonably be referred to as a *trope*.

But for Aristotle the topes were patterns of argument suitable to the realm of issues that are incapable of being settled by hard logic. That realm included then, as it does now, politics and law. In practice, the distinction between common topics and special topics is still valid in the law.

The rules of inference judges and juries follow in finding facts are examples of common topics. They do not require expertise in a specific discipline, like chemistry, accounting or law. They apply to behavior and events in ordinary life — the realm of common sense. They include judgments of credibility based on numerous considerations that may or may not be reliable, including circumstantial evidence. They include judgments of probability, based on ordinary assumptions about how people are likely to act. They include judgments of proportionality based on the fact-finders' intuitive sense of what is appropriate in a given set of circumstances. Even when assessing expert evidence, jurors are generally told that it is their own judgment that matters; when experts disagree, it is up jurors to determine, without becoming experts themselves, which evidence to accept.

Special topics, lines of argument or analysis reserved for specialists in the field, include all those questions of law that judges do not submit to juries because they require legal training. The canons and rules of interpretation fall into this category: arguments from legal definition, context, precedent, legislative history, legislative intent, etc. These are the exclusive domain of judges, not juries. In both areas, however — that is, in determining facts and settling questions of law — jurisprudence is saturated with soft logic. It is an imperfect system. But there is no better way to address the issues that courts must address. If the questions brought before the courts (both fact questions and questions of law) were capable of being resolved by mathematical reasoning or scientific methods, we would resolve them that way. There would be no need for trials.

It is impossible to estimate the number of cases that turn on the interpretation of a statute or of some other text. “Most of the time,” according to Scott Turow in *Limitations*, “no matter what your political or philosophical stripes, whether you like the law or not, you find that your decision feels preordained.”²³ “The discretion ... professors talked about exists only on the margins, in no better than three or four cases a term.”²⁴ This may be something of an understatement. The correct figure could be determined by adding the number of cases in which one court overrules another on a question of law to the number of cases in which dissenting opinions on questions of law are filed at an appellate level. This number would, no doubt, vary from jurisdiction to jurisdiction.

Whatever the frequency, a crisis occurs when, as in the cases analysed above, there is room for reasonable debate about what the controlling law actually means. Except when they decline to interpret a law after determining that it is incurably ambiguous (as the Ontario Court of Appeal did in *R v Mac*), judges generally claim that their reading of the law is faithful to its literal meaning. They hold that tampering with literal meaning undermines the foundation of law itself, a result to be avoided at almost any cost, including, if necessary, apparent injustice to the litigants at bar — analogous to “collateral damage” in military discourse, unavoidable injury inflicted in the service of a larger cause (as the dissenters were prepared to do in the South African case). There is

23 S Turow, op cit n 1, p 109.

24 S Turow, op cit n 1, p 110.

much to be said for this approach. We want our laws to be made by legislators, not by judges; when judges become lawmakers they undermine the principle that courts are to be above and beyond politics.

Still, poorly written laws can have disastrous consequences, sometimes making the difference between life and death. If judges refuse to exercise their power in these situations, they undermine the law in yet another way. People expect justice from the courts, not fidelity to language created in the chaos of the legislative process, drafted by people who are not always skilled writers, working against unrealistic deadlines, compelled to accommodate the instructions of politicians, and not always able to anticipate the consequences of what they write.

To say that statutory interpretation is not and can never be an exercise in irrefutable logic, is not to say that any result is as good as any other. There will be consequences. In the Canadian case, the Supreme Court's decision either will or will not lead the Crown to charge people with crimes simply because they possess the means to commit them. There either will or will not eventually be an erosion of the principle that in criminal law, an accused is entitled to the benefit of a statutory ambiguity. And the precedent set by this judgment — the notion that the English version of the law should be interpreted by reference to the French version — either will or will not undermine the longstanding principle that each version of the code is independent of the other; and it either will or not require citizens and solicitors throughout Canada to become bilingual in order to find out what the law really means. Only time will tell.

Similar consequences were at stake in the other cases. In the US case, the result empowers litigants with relatively small claims to join those with larger claims in a multi-party suit. Had the minority prevailed, the ability of these litigants to have their claims addressed would have been seriously complicated and compromised.

In the Australian case, the majority decision either will or will not result in further insensitivity to Aboriginal culture, and it either will or will not provide Parliament with an excuse to enact discriminatory statutes. Again, only time will tell.

In the South African case — in which the dissenters seemed to have the most persuasive arguments about the literal meaning of the problematic phrase in the Constitution — had they prevailed, had the majority not constructed a plausible if dubious argument to the contrary, there is no doubt that grave injustices would have been inflicted on accused persons whose trials had begun before the adoption of the new constitution. Will the decision of the majority in this case undermine the principle that the function of courts is merely to apply the constitution, not to write it?

In statutory interpretation, one thing is clear. Courts do not discover the meaning of an ambiguous law. They choose it. And then they declare it. The canons and rules of interpretation resemble the child's game "scissors, paper, rock" (scissors cuts paper, paper covers rock, rock breaks scissors — so that none is the ultimate weapon). In practice, no canon or rule necessarily trumps any other. Legislative history resolves ambiguity, literal meaning trumps legislative history, ambiguity undermines literal meaning. Judging would be much easier if only there were a hierarchy among interpretive tropes, like the rules that determine the winning hand in poker. But this is not the case.

Judges are not even able to agree on whether a text is ambiguous, much less on how to resolve that ambiguity if they agree that it exists.

Questions of interpretation are not resolved by the application of strict logic, but by the iron hand of judicial authority wrapped in the velvet casuistry of interpretive tropes. The casuistry is important: society, and judges themselves, are attached to the notion that the judiciary should apply laws, not write them. But beneath this casuistry, an attentive reader can detect the raw power that judges exercise, sometimes reluctantly, sometimes unwittingly, sometimes quite consciously.

If statutory interpretation were a science, we would have to conclude that scientists of the law are an incompetent lot, since they cannot agree about the meaning of even the most basic terms of their trade. In practice, it consists of a disorderly assemblage of strategies or tropes that can produce, at best, plausible arguments in favor of one interpretation or another.

What, then, can we expect of judges, if they are not controlled by laws or held accountable to strict logic? In this age of science and rationalism, it may seem naive to suggest that the answer is found in mythology — in the story of Solomon, who, when offered any gift whatsoever, chose wisdom. Wisdom defies definition. But a plausible definition is implicit in the story of Solomon's settling the conflict between two women claiming to be the mother of the same infant. In awarding the child to the woman who preferred to give it up rather than have it divided in two, Solomon employed the tope that Aristotle would have called a "probability," an inference based upon what common sense tells us about the way mothers are likely to behave.

Solomon may have been wrong. He had no blood test or DNA evidence to validate his finding. The true mother may have been suffering from post-partum depression, for all we know, happy enough to see the child divided. The other woman may have been clever enough to anticipate Solomon's strategy. Still, one thing is certain — or at least as certain as we can be in human affairs: the child was likely to be better off with the woman who saved its life, whether or not she was the biological mother.

Wisdom, as illustrated in this story, is the ability to read human behaviour and to determine the best for individuals and for society as a whole. It is not a measurable or empirically observable quality. It will not necessarily result in judgments that win universal approbation. It is nevertheless the most important quality that we can hope for in judges. That, and integrity, and knowledge of the law, and an ability to write plausible arguments that make their decisions seem inevitable, even when they are not.

Many judges will be uncomfortable with the thesis of this essay. They want the law to be stable; they want to be seen as instruments of the law, not as its creators. In their approach to texts, they are indistinguishable from religious fundamentalists, insisting on a true, discoverable meaning, confident in their own interpretation, unfazed by the fact that other equally qualified readers find a different meaning. This fundamentalism is often concealed beneath an elaborate web of rationalisation that gives it an air of sophistication and intellectual rigour.

One notable exception might be the distinguished judge and scholar Richard Posner of the US Seventh Circuit. Justice Posner is anything but a radical in judicial philosophy, but he recognises the ultimate indeterminacy of judicial reasoning:

“Almost a quarter century as a federal appellate judge has convinced me that it is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly. When one use terms like ‘correct’ and ‘incorrect’ in this context, all one can actually mean is that one likes (approves of, agrees with, or is comfortable with) the decision in question or dislikes (disapproves of, disagrees with, or is uncomfortable with) it.”²⁵

If by “correct” Justice Posner means an analysis and a conclusion that would command the assent of all competent readers, none of the judgments analysed reached correct conclusions. Since none of them, neither the majority nor the dissenting opinions, are as compelling as a mathematical proof or empirical verification of a scientific hypothesis, the reasons are in fact rationalisations of preferences. The more important question is whether they reached a wise result. In declaring my own opinion in this regard, I cheerfully concede that it is merely that, an opinion, that many readers will not share.

In my opinion, the unanimous judgment of the Ontario Court of Appeal was both more persuasive and wiser than the judgment of the Supreme Court of Canada. I am disturbed by the validation of a poorly written statute, by the erosion of the principle that gives accused persons the benefit of ambiguities in the criminal code, and by the implication that Canadian citizens are expected to read their statutes in both official languages.

When I expressed this last point to a Canadian judge, he responded that Canadians would hire competent lawyers to interpret the law for them. But there is something wrong with this defence: the notion that statutes and judgments are the province of a professional class, that judges and legislators are entitled to write in obscure ways that require ordinary citizens to hire interpreters. The complacency of the legal profession with respect to its unnecessarily arcane language can only undermine public confidence, at least among people who have no patience for what sometimes seems the intellectual sloth, poor writing, and occasional arrogance implicit in documents that defy interpretation, even within the profession itself. In the Canadian case, for example, if Parliament had intended for “adapted” to mean “suited for” rather than “modified,” it could have made the distinction in plain English. The public has a right to expect reasonable precision and clarity in statutory language.

In my opinion, the majority of the United States Supreme Court acted wisely in allowing people with small claims to have these claims considered along with larger claims proceeding from the same set of facts and law. To rule otherwise would provide no benefit for the federal courts and would result in unconscionable inconvenience for individuals less able to finance independent litigation, particularly when the defendants are corporations with very deep pockets. The court acted wisely in interpreting a poorly written statute in a way that made practical sense.

25 “A Political Court” (2005) 119 *Harvard Law Review* 31 at 40.

With respect to the High Court of Australia, I preferred both the reasoning and the result in Justice Kirby's dissent — but in large part on the basis of political and ideological preferences for preserving wilderness areas, for protecting cultural traditions, and for avoiding the possibility of statutes that discriminate against any group on the basis of race. The reasoning of the majority was not defective; it was just unpersuasive to a person of my political and ideological bent.

In the South African case, I regard the reasoning in Justice Kentridge's dissent as more persuasive than the reasoning of the majority; but I applaud the result reached by the majority, even if the reasoning was questionable. Again, my reasons are political and ideological: I believe that the role of courts is to save us from the absurdities and injustices that sometimes result from poorly conceived or poorly written law. They are empowered to do this by a happy accident of history: the invention of constitutional democracies. Once a constitution is established as supreme law, its language will be subject to interpretation in the light of facts unanticipated by those who wrote it.

In constitutional democracies, judges are given an extraordinary power that the constitutional assembly may not have intended. They give a handful of unelected officials authority to tell the other branches of government when they have overstepped their authority. It is unlikely that this concentration of power in so few people would be deliberately approved by an electorate or by a constitutional convention. Most people, including politicians, have what might be called a Platonic view of language: a belief that every word has a true and correct meaning, and that therefore every law has a true and correct meaning. They believe, therefore, that the role of the judiciary is simply to read laws enacted by the legislature, interpret them as they were intended to be interpreted, and apply them to the facts at hand.

But lexicographers long ago abandoned the notion that words in natural language have unequivocal, isolatable meanings, like symbols in science and mathematics. Their meaning is always determined by context. This is why definitions in scholarly dictionaries do much more than list synonyms: they illustrate multiple meanings of each word by quoting various contexts that alter their meaning.

The extraordinary power of judges as high priests of language — declaring meaning, not discovering it — may not have been intended. Whether this is a good thing depends upon how wise courts are in exercising their power, and whether they can write well enough to make their judgments seem both reasonable and just.

Justice Posner's admission of subjectivity in legal analysis is reminiscent of AJ Ayer's pronouncement about the subjectivity of moral judgments:

“[I]n saying that a certain type of action is right or wrong, I am not making any factual statement, even a statement about my own state of mind. I am merely expressing certain moral sentiments. And the man who disagrees with me is merely expressing his moral sentiments. So that there is plainly no sense in asking which of us is in the right. For neither of us is asserting a genuine proposition.”²⁶

26 *Language, Truth and Logic* (2nd ed), 1946, Dover, New York, pp 107–108.

As an example, he argues that the prohibition against stealing is essentially a matter of personal aversion:

“Thus if I say to someone, ‘You acted wrongly in stealing that money,’ I am not stating anything more than if I had simply said, ‘You stole that money.’ In adding that this action is wrong I am not making any further statement about it. I am simply evincing my disapproval of it.”²⁷

As shocking as this proposition was in its day, in denying the possibility of objective morality, logical positivism cleared the way for an ethical system of a different sort, an existential ethics—based on the assumption that we must choose standards in the absence of absolutes. From an existential perspective, the test of a sound ethical choice is whether what we choose for ourselves we would also approve for everyone else. Terrorism, genocide, and theft fail this test, not because they violate moral absolutes, but because in sanctioning these acts for themselves, terrorists, genocidaires and thieves necessarily sanction them for others, resulting in chaos that no reasonable person would choose. Ultimately, existential ethics is grounded in ideology, not in objectivity. Our aversion to chaos, for example, is ideological, but not for that reason inconsequential.²⁸

Life would be simpler if we could discover absolutes; having to choose ethical standards is an awesome responsibility, fraught with anxiety that most people would prefer to avoid. A similar anxiety seems to exist among judges when they are confronted with the necessity of declaring the meaning of a text that has no objective meaning. They are expressing preferences based on their perception of consequences judged in the light of ideological assumptions about good and evil, rationalising their choices with what I would call toposes or tropes of soft logic and what Posner calls “a veneer of legal reasoning,”²⁹ “a grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker’s authority, metaphor, analogy, precedent, custom, memory, ‘experience,’ intuition, and induction.”³⁰

Implicit in Ayer’s position is a disdain for subjectivity and a belief that the only questions worth asking are those that can be answered with objective evidence or irrefutable logic. Ayer is half right. Ethical propositions are not capable of being empirically verified, because they require words like “should,” “ought,” or “must”—modes of predication that cannot be part of science or mathematics. They result in propositions that can be neither empirically tested nor proven with mathematical certitude. Morality is chosen, not discovered.

27 *Language, Truth and Logic* (2nd ed), 1946, Dover, New York, p 107.

28 An unprovable and irrefutable assumption is a belief. A belief becomes an ideology when it is non-negotiable. The notion that “all men are created equal” is an ideological proposition — unprovable, irrefutable and, for some people at least, non-negotiable. We all have ideologies, non-negotiable beliefs about the way the world works or the way people ought to behave. We cannot imagine changing our minds about certain things — our religious beliefs, for example, or lack of them, or our political allegiances, or our moral standards on certain issues. Every ethical proposition is ideological, and from the perspective of logical positivism, a pseudo-concept. But this can be construed as a limitation of logical positivism, not a defect in existential ethics.

29 R Posner, “A Political Court” (2005) 119 *Harvard Law Review* 31 at 34–35.

30 R Posner, *The Problems of Jurisprudence*, 1990, Harvard UP, Cambridge, p 73.

In *Presumed Innocent*, another novel by Scott Turow, a hardened prosecutor describes himself as “a functionary of our only universally recognised system of telling wrong from right, a bureaucrat of good and evil.”³¹ The world is awash in conflicting ethical systems, some based on religious traditions, others entirely secular, all of them at odds with one another in their particulars despite some fundamental areas of agreement. Jurisprudence is the one system that has at least the potential of being “universally recognised.” It is not grounded in a particular religious system or lack of one. It transcends them all. And it seems workable even when transplanted into cultures where it is not indigenous.

In describing the practice of statutory interpretation the way I have, I am not saying that judges *ought* to base their interpretation of ambiguous texts on preferences, on consequences they want to foster or to avoid. I am saying that this is what they actually do. In their most elaborate forms, these justifications resemble nothing so much as medieval scholastic philosophy, in which unprovable and irrefutable propositions (for example, how many angels can dance on the head of a pin, what Jesus was thinking as he died on the cross, the state of the virgin Mary’s soul at the moment of her conception) were addressed with exquisite logic concluding with a triumphant QED (*quod erat demonstrandum*) in an assertion of certitude that now seems more than a trifle naive.

Nor am I saying that statutes and other controlling laws have no effect on decisions. Many judges begin writing with an intuitive sense of what the result should be, but in the process of composing a judgment they discover that “it just won’t write.” The law is like wind to a sailboat. It provides resistance as well as locomotion. In some cases the resistance is virtually impossible to overcome.

The antidote to religious fundamentalism is to recognise that sacred texts, like great literature, are *rich* with ambiguity. We return to the same great plays, re-read the same great novels, contemplate the same historical, mythical, and poetic passages in the Bible or the Koran precisely because they yield different meanings as we ourselves acquire different perspectives.

The antidote to judicial fundamentalism is to recognise that statutes and contracts are *rotten* with ambiguity — an inevitable condition of natural language. Ambiguity is a defect that legal drafters attempt to avoid, sometimes successfully, but often in vain. To recognise this condition is not to cure it. But judges who are adamant in defence of their own reading of ambiguous texts are in their own way as naive and sometimes as dangerous as religious clerics who believe in their own infallibility as readers. In both realms, there are only plausible readings, not definitive readings. The sign of great judges and great clerics is their ability to construct readings that will be most beneficial to those over whom they have authority, and to defend those readings with plausible arguments, including arguments from consequence.

There are also some practical implications in this analysis. First, if judges realised, as Justice Posner seems to, that their reading of a contested law is at bottom subjective, not the result of irrefutable logic, they might be less inclined to treat one another with

31 *Presumed Innocent*, 1987, Farrar Straus Giroux, New York, p 2.

the sort of acerbic and dismissive comments that occasionally mar their opinions and detract from the dignity of the courts. The Supreme Constitutional Court of South Africa is often a model of courtesy; the Supreme Court of the United States can, at least on occasion, be an example of the opposite.

Secondly, if it is true that a consideration of consequences often determines which of competing interpretations judges find persuasive, judgments might be more persuasive if these consequences were mentioned in the judgment. The judgment of the Ontario Court of Appeal was persuasive in large part because the adverse consequences of a contrary judgment were clearly articulated. Similarly, the majority opinion of the Supreme Constitutional Court of South Africa and the dissenting opinion of Justice Kirby in the Australian case were persuasive, at least to me, because they articulated the adverse consequences they wanted to avoid. Articulating consequences may have another salutary effect: it would keep judges honest — keep them from ruling on the basis of considerations they would prefer not to admit.

There are also broader philosophical implications. The belief in the power of rigorous logic to resolve any and all disputes is actually a dangerous obsession. Most disputes — legal disputes, domestic disputes, international disputes — fall into the category of arguments for which, as Aristotle pointed out, there is no irrefutable proof. Were disputants to understand that their positions are all necessarily subjective, they might enter into discussions with more willingness to negotiate, more inclination to understand the other party's point of view. Soft logic is of its very nature not something that can be reduced to a system. System is contradictory to its nature. But one of the most important contributions of common law has been the development of rules of evidence (like those given to juries) and rules of interpretation (like those applied to statutory construction) — imperfect rules, continually evolving, and yet critically articulated in a way that could be immensely valuable in all forms of conflict resolution.

Soft logic is also prevalent in political discourse, particularly in deciding future policy. The American invasion of Iraq was based on soft logic grounded in ideological assumptions. The decision about whether and how best to extricate American troops from Iraq must also be based on soft logic and ideological assumptions. Debates between Palestinians and Israelis are saturated in soft logic and ideological assumptions. There is no scientific or mathematically precise method for determining justice in these situations, or the effects of any particular course of action. It is astounding that although soft logic is at the heart of every important public debate, it is not part of university curricula. In fact, by emphasising the acquisition of “knowledge” without systematically distinguishing scientific and mathematical propositions from the interpretive and speculative activities necessary for public discourse and private decisions, universities contribute to a culture of antagonism based on illusory certitudes. Yet an awareness of logic *and its limits* might well be, as Aristotle pointed out, the mark of a truly educated person.

What if the description of statutory interpretation in this essay were correct? It would lead to a bottomless subjectivity. If the meaning of an ambiguous text is actually a matter of preferences rationalised by merely plausible arguments, any text could be given different interpretations by competent, intelligent and impartial readers. This

would mean that appellate judges could disagree with trial judges, and even among themselves about the meaning of a statute, precedent, or contract. It would mean that judges on courts of final appeal could disagree with any or all of the courts below, and among themselves as well. There would be no objective test for discerning which of them had it right. Jurisprudence would never reach absolute closure. It would evolve with the personalities on the courts, always adjusting to cultural, political, and historical contexts, never reaching a state of finality guaranteed to survive reversal from a higher or subsequent panel of judges.

And that, despite our best efforts and ardent desire to make it otherwise, is precisely what jurisprudence seems to be.

Index

A

- Absurd result exception to plain meaning
 - golden rule, 105, 106, 160, 172
 - reductio ad absurdum, 197
 - to-rule-otherwise trope, 197
 - Access to courts
 - presumed intention not to restrict, 21, 146
 - Accessibility of laws, 3, 4, 43
 - Act read as whole, presumption, 94, 102
 - Acts Interpretation Act* 1901
 - American approach compared, 168–173
 - refinement of principles, 153–157
 - s 15AA, 88, 93, 94, 129–131, 134–136, 148, 153, 159, 169–173
 - s 15AB, 9, 88, 93, 94, 131–135, 138–141, 153, 159, 169–173
 - Administrators of regulatory schemes
 - developing interpretations of law, 10
 - legislation directed to, 10
 - source of legislative change, 83
 - Agencies
 - discretionary powers, provisions conferring, 10
 - institutional competence, 10
 - Alienation of property
 - presumed intention as to compensation, 21, 146
 - Ambiguity, 16–17, 111, 119, 171, 177–215
 - choice of meaning, 200, 209
 - context, use of, 18, 119, 131, 133, 138–140, 171
 - criminal law, 24, 179–181
 - disputed meaning argument, 111–112
 - elusiveness of meaning, 204–205
 - extrinsic materials, use of, 131, 133, 138–140
 - fundamental rights, presumption not to override, 20
 - golden rule, 106
 - international agreements, use of, 149, 152
 - light most favourable to accused, interpretation in, 179
 - mischief rule, 130, 138
 - natural language, of, 201–204, 211
 - penal provisions, 24
 - soft logic, 178, 195, 205–215
 - textual aporia, 198
 - Ambulatory approach, 143, 144
 - Amendments, 4
 - misidentification of provision to be amended, 4
 - parliamentary, 92
 - reprints, 4
 - Appeals, 11
 - Criminal Codes, construction of, 5
 - intellectual property law, 11
 - taxation law, 11
 - Appropriate forum, 182
 - Aristotle, 206–207
 - Associated words, 117
- ## B
- Bilingual legislation, 112, 179–181, 208
 - Bill of rights, lack of, 31, 146
 - Bills *see also* Drafting of legislation
 - approval for introduction, 87
 - drafting, 84–87
 - explanatory memoranda, 41, 87–89
 - outline, 86–87
 - preliminary draft, 86
 - preparation of, 84–87
 - second reading speeches, 41, 89
 - urgent, 86
 - Byers, Sir Maurice, 1, 8, 12
- ## C
- Canada, 105–125, 179–181
 - ambiguity, 179–181, 208, 210
 - bilingual legislation, 112, 179–181, 208
 - Charter values presumption, 119, 120
 - international law, compliance with, 118, 121
 - modern principle *see* Driedger’s modern principle

- presumptions relied on, 117–121
- Chevron* doctrine, 10–11
- Clear statement principle, 26–31, 164
- Commencement of Acts, 94
- Common law, 9
 - adhering to in face of statute, impermissibility, 25
 - changing, 23–25, 38–39, 44
 - codification and modification, 22
 - compared to statutes, 5–8
 - constitutional interpretation method, 72–76
 - interpretive principles, 135–153
 - presumed continuation of, 118
 - presumed intention not to change, 23, 25
 - principles contained in, 7
 - statutes remedying defects in, 6–7, 39
 - tension between statute law and, 38–39
- Conflicting aims of legislation, 35–37, 90
- Consequences of interpreting and applying legislation see Pragmatism
- Constitution
 - balance of powers, 61, 192
 - conciliation and arbitration power, 54, 58, 67–69, 74, 77
 - corporations power, 54, 58, 66–68
 - excise provisions, 12
 - federal balance, 61, 78
 - federal constitutionalism, 7, 8–10, 47, 56, 73, 77
 - inconsistency by operation of s 109, 1
 - interpretation of see Constitutional interpretation
 - passage of laws, 9
 - race power, 188–193
 - separation of powers, 9–10
- Constitutional corporations, 46–47
- Constitutional courtesy, 14, 15
- Constitutional interpretation, 45–79, 187–197
 - absence of consistency, 61
 - choice of mode, 46, 79
 - common law method, 72–76
 - context, 60
 - contrary views on, 47, 48
 - discriminatory legislation, 188–195
 - dissenting judgments, 59, 73
 - doctrinal, 48, 49, 50, 53, 71–76, 79
 - Engineers’ Case* 55–64, 75–78
 - established methods, 52
 - extrinsic circumstances, 56
 - federalism, 47, 56, 73, 77
 - High Court, by, 45–79
 - Hindmarsh Island Bridge case*, 187–195, 201
 - historical/originalist, 49–53, 64–71, 79
 - inferences from structure, 63–64
 - intention, 51, 70
 - literal, 54–60, 190
 - literature on, 45
 - modes of, 49–53
 - natural and ordinary meaning, 54
 - past authorities, 74–75
 - prudential/ethical, 49, 53, 60, 69, 76–79
 - purposive interpretation, 50
 - racism, 188–195
 - structural, 49, 53, 60–64, 79
 - text as whole and coherent document, 63
 - textual, 49, 53–60, 79
 - Work Choices Case* 46–79
- Constitutional referendum, 67, 69
- Consultation in drafting process, 91
- Context, 17–19, 60, 115–123, 131–141
 - Acts Interpretation Act* 1901, s 15AB, 88, 131–141, 159, 169–173
 - ambiguity or obscurity, 18, 119, 131, 133, 138–140, 171
 - audience, 116, 124
 - common law interpretive principle, 135–141
 - Driedger’s modern principle, 107, 108, 115
 - entire context, 107, 108, 115, 119
 - evolving, 111
 - external context, 122–123
 - extrinsic materials see Extrinsic materials
 - immediate context, 108
 - initial consideration, 135–141
 - internal context, 198
 - legal context, 117–122
 - legislative history, 43, 165–169
 - literary context, 116–117
 - mischief rule and, 136, 137

- purpose and, 135–141, 155
- specialised audience, 116, 124
- Contradictory text, 111
 - corrigible mistake argument, 111, 114
- Convention Debates, 67, 68, 69
- Convention on the Rights of the Child, 121
- Corrigible mistake argument, 111, 114
- Counterfactual implication, 117
- Courts as interpreters of law, 3, 9
- Criminal law
 - ambiguity, 24, 179–181
 - appeals on points of construction, 5
 - criminal responsibility, 5, 180
 - Griffith's Code, 5
 - implying words into text, 141–142
 - presumptions under legality principle, 21
 - strict construction, 20, 23, 118, 119
- D**
- Department of Prime Minister and Cabinet, 87
- Dictionaries, 40–41
- Discretionary powers, 10
- Discriminatory legislation, 188–195
- Disputed meaning argument, 111–112
- Doctrinal interpretation, 48, 49, 50, 53, 71–76, 79
- Drafting legislation, 2, 33–35, 44, 81–103
 - analysis of instructions, 85
 - approval for introduction, 87
 - causes of imprecision, 33–34
 - code of communication with courts, 93
 - conflicting aims, 35–37, 90
 - consultation, 91
 - deadlines, 90–91
 - explanatory memoranda, 41, 87–89
 - inconsistencies, 95, 99–102
 - inherent difficulties, 33–35, 89–92
 - instructions, 84, 85
 - intention see Intention
 - intractable concepts, 35
 - irreconcilable concepts, 35–37
 - outline, 86–87
 - parliamentary amendments, 92
 - Parliamentary Counsel, 2, 33, 34, 81, 84, 87
 - philosophies of statutory interpretation, 96–98
 - political imperatives, 91
 - pre-emptive drafting, 92
 - preparation of Bills, 84–87
 - presumptions, 94–95
 - process, 81, 84–87
 - purposive construction affecting, 2, 3
 - second reading speeches, 41, 89
 - sources of legislative change, 82–83
 - sponsors' intentions, 42, 89, 98
 - statutory interpretation and, 2, 3, 93–103
 - subject matter expertise, 91
 - subordinate legislative power, 101–102
 - timeframes, 33, 90–91
 - workload of drafters, 91
 - writing judgments, compared with, 2, 5, 33
- Driedger's modern principle, 105–125
 - beneficial impact, 108
 - doubtful words, identifying, 108
 - entire context, 107, 108, 115, 119
 - harmonisation, 123–124
 - immediate context, 108
 - intention, 109, 119, 124
 - objects of legislation, 109
 - ordinary meaning, 108
 - shortcomings, 111–125
 - statement of principle, 106
 - textualism, 109–111, 119
- Dynamic interpretation, 112
- E**
- Ejusdem generis, 95, 117
- Engineers' Case*, 55–61, 64, 75–78
- Entire context, 107, 108, 115, 119
- Evolving context, 111, 112
 - static vs dynamic interpretation, 111, 112
- Exhaustive code argument, 111, 114
- Explanatory memoranda, 41, 87–89, 131
- Expressio unius est exclusio alterius, 117
- Extrinsic materials, 8–10, 41–43, 119, 131–135, 138–141

- Acts Interpretation Act* 1901 s 15AB, 9, 88, 94, 131–141
- ambiguity or obscurity, 131, 133, 138–140
- American approach, 168–173
- context including, 138
- explanatory memoranda, 41, 88, 131
- Hansard*, 42, 131
- initial consideration, 138
- international agreements, 131, 132, 149–153
- mischief rule, 139
- parliamentary debates, 133
- refinement of principles, 153–157
- reports of law reform bodies, 138
- Exxon Mobil Corp v Allapattah Services*, 181–187
- ## F
- Federal constitutionalism, 7, 8–10, 47, 56, 73
- Freedom of religion
- presumed intention not to interfere with, 21, 146
- Fundamental legal principles, 25
- Fundamental rights and freedoms, 25, 28–30
- ambiguity, presumption not to override, 20
 - clear statement principle, 28–30, 147–148
 - discriminatory legislation, 188–195
 - effect of legislation on, 6
 - immigration law, 28–31, 146
 - intention to limit, clear statement, 28–30, 147–148
 - international law, presumed compliance with, 121, 150
 - interpretation consistent with, 146
 - liberal construction of human rights law, presumption of, 118
 - presumed intention not to interfere with, 20, 28–30, 118, 145–147
 - protection of, 7, 23
- Fussy law vs fuzzy law, 39–40
- ## G
- General words, reading down, 27
- Golden rule, 105, 106, 160, 172
- Government policy becoming statute, 2–3
- Griffith's Code, 5
- ## H
- Hansard*, use of, 42, 131
- Harmonisation, 123–124
- Hart and Sacks, 159–175
- High Court
- constitutional interpretation and, see Constitutional interpretation
- Hindmarsh Island Bridge case*, 187–195, 201
- Historicism, 49–53, 64–71, 79, 163, 199
- constitutional interpretation, 49–53, 64–71, 79
- Holistic analysis, 170, 209
- Human rights see Fundamental rights and freedoms
- ## I
- Immigration law
- clear statement principle, 29–31
 - international law, presumed compliance with, 121, 150
 - judicial activism, 23
 - presumed intention not to interfere with human rights, 29–31, 146
 - procedural fairness, 120
 - unambiguous language, 29
- Implied exclusion, 117
- Implying words into text, 141–145
- Incoherent text, 111
- corrigible mistake argument, 111, 114
- Inconsistency, 95, 99–100
- Act and standards under Act, 99–101
 - golden rule, 106
 - irreconcilable concepts, 35–37
 - pieces of legislation, between, 99–100
 - provisions of Act, between, 95
- Incorrigible gap argument, 111, 113
- Industrial relations law
- constitutional interpretation, 46–79
 - Work Choices Case*, 46–79
- Inexplicitness, 16
- Inference
- rules of, 207

- structure, from, 63–64
- Insider trading laws, 34, 35
- Institutional competence, 10
- Intellectual property law appeals, 11
- Intention, 14–16, 33–44, 109, 191
 - American view, 161, 169
 - clear statement principle, 28–29, 164
 - constitutional courtesy, 14, 15
 - constitutional interpretation, 51, 70
 - declared intention, 109
 - Driedger’s modern principle, 109, 119, 124
 - expressed intention, 37, 109
 - expressed intention vs actual language, 37–38
 - extrinsic materials, determining from, 41–43
 - implied intention, 109
 - imputed parliamentary intention, 153
 - intentionalists, 107
 - ministerial statements obscuring, 42–43
 - necessary intention, 29
 - objective intention, 15
 - original intention, 43
 - presumed intention, 109
 - presumptions as to, 18–23, 38
 - purposivism distinguished, 163
 - sponsors of legislation, 42, 89, 98
 - true meaning, as, 204
 - will of Parliament, ascertaining, 14–16
- Internal coherence, 117
- International agreements
 - ambiguity, use to clarify, 149, 152
 - Convention on the Rights of the Child, 121
 - International Covenant on Civil and Political Rights, 152
 - legislation giving effect to, 149
 - legislation not explicitly connected to, 149
 - presumed compliance with, 118, 121, 149–150
 - Teoh* principle, 150–153
 - use of, 131, 132, 149–153
 - Vienna Convention on Law of Treaties, 132
- Interpretive principles
 - consequences, interpretation by reference to, 78, 105, 124, 156–157, 170, 197, 200–201, 208, 215
 - common law principles, 135–153
 - development in Australia, 127–128
 - drafters’ use of, 93–103
 - Driedger see Driedger’s modern principle
 - legality and, 19–23, 26
 - legislative changes to, 129–135
 - legislative drafting and, 2, 3, 93–103
 - modern principle see Driedger’s modern principle
 - practice vs philosophy, drafting and, 93
 - presumptions see Presumptions
 - statutory provisions, 93–95
- Irreconcilable concepts, 35–37, 90
- J**
- Judgments, compared with legislation, 2, 5–8, 33
- Judicial activism, 23
- Judicial angst, 33
- Judicial fundamentalism, 213
- Judicial legitimacy, 13, 22
- Judicial review, 11
- Jurisdiction, 181–187
- K**
- Kartinyeri v The Commonwealth* 187–195, 201
- L**
- Laws ascertainable by citizens, 3, 4
- Legal context, 117–122
- Legal professional privilege, 148
 - presumed intention not to abrogate, 21, 145, 148
- Legality principle, 19–23, 26
 - clear statement and, 26
 - rebuttable presumptions, 20–21
 - strict construction of statute impinging on, 26
- Legislative change, sources of, 82–83
 - party platforms, 82
 - response to judicial decisions, 83
 - substantive sources, 82–83
 - technical sources, 82
- Legislative history, 43, 165–169, 173–176
 - American view, 165–168

- competence, 175
- probative value, 175
- relevance, 175
- Liberties see Fundamental rights and freedoms
- Limited class, 117
- Literal meaning rule, 105, 106, 130
- Literalism, 54–60
 - Canada, 105, 106, 208
 - constitutional interpretation, 54–60, 190
 - criticism of, 56
 - plain meaning rule, 160, 161, 171
 - South Africa, 196
- Literary context, 116–117
- Logical positivism, 205, 212
- Logosphere, 202–204
- M**
- Master rules of interpretation, 105
- Meaning of words, 105
 - ambiguity of natural language, 201–204, 211
 - elusiveness, 204–205
 - general words, 27
 - immediate context, 108
 - literal meaning, 105, 106, 130, 190, 196
 - obvious meaning, 95
 - ordinary meaning, 26, 54, 108, 116, 163, 166, 170
 - plausible meaning, 117, 181
 - technical meaning, 117
 - words mean what they say, 95–96
- Merits review, 11
- Mischief rule, 41, 105, 106, 130, 136, 137, 139
 - context and, 136, 137
 - extrinsic materials and, 139
- Modern principle see Driedger’s modern principle
- N**
- Native Title Act* case, 9
- Natural and ordinary meaning, 26, 54
- Natural language, ambiguity of, 201–204, 211
- Necessary implication argument, 111, 113
- Negligence law
 - statutory modification of common law, 24
- Non-application argument, 111, 112
- Noscitur a sociis, 117
- O**
- Objects of legislation, 105
 - conflicting, 35–37, 90
 - construction favouring see Purposive construction
 - interpretation of Acts with no objects clauses, 156
 - scheme to achieve, consideration of, 109
- Obscurity, 183–184
 - extrinsic materials, use of, 131, 133, 138–140
 - golden rule, 106
 - mischief rule, 130
- Office of Parliamentary Counsel (OPC) 2, 81, 87, 88, 89, 94
- Ordinary meaning rule, 26, 54, 108, 116, 163, 166, 170, 180
- Originalism, 49–53, 64–71, 79
- Over-inclusive text, 111
 - non-application argument, 111, 112
- Overlapping provisions, 111
 - exhaustive code argument, 111, 114
 - paramountcy argument, 111, 115
 - presumption of overlap, 114
- P**
- Paramountcy rule, 111, 115
- Parliamentary amendments, 92
- Parliamentary Business Committee, 84
- Parliamentary Counsel, 2, 33, 34, 81, 84, 87
- Party platforms, 82
- Penal law
 - ambiguity, 24
 - presumptions under legality principle, 21
 - strict construction, 20, 23, 118, 119
- Philosophies of statutory interpretation, 96–98
 - Australia, in, 96–97
 - practice vs philosophy, 93
 - sources, 97

- Plain meaning rule, 109, 160, 161, 171
- Plausible meaning rule, 117, 181
- Pragmatism, 107, 123, 125, 156, 171, 197, 200–201, 208, 214
- Pre-emptive drafting, 92
- Preparation of Bills, 84–87
- Presumptions, 18–23, 94–95, 117, 118, 145–148
 - access to courts, no restriction of, 20, 145
 - Act read as whole, 94
 - Act read in order, 94–95
 - Canadian courts, relied on by, 117–121
 - common law, no intention to change, 23, 25, 118
 - drafters, used by, 94–95
 - fundamental rights, no interference with, 20, 28–30, 118, 145–147
 - internal coherence, 117
 - international law, compliance with, 118, 121, 149–150
 - legality principle and, 20–21
 - no tautology, 117
 - overlap, 114
 - privilege, no abrogation of, 21, 145, 148
 - straightforward expression, 117
 - uniform expression, 117
- Procedural fairness
 - duty of, 120
 - presumed intention not to deny, 21, 146
- Processes of legislation, 81, 84–87
- Project Blue Sky* case, 99–102
- Property
 - ambiguity of meaning, 203
 - presumed intention not to interfere with rights, 21, 146
 - rights, 7
- Prudential-ethical interpretation, 49, 53, 60, 69, 76–79
- Public inconvenience, 101
- Purposive construction, 2–3, 22, 50, 88, 94, 105, 129–141, 159–174
 - Acts Interpretation Act* 1901 s 15AA, 88, 94, 129–131, 134–136, 148, 153, 159, 169–173
 - ambulatory approach, 143, 144
 - American view, 159–174
 - constitutional policy and, 164
 - context, 135–141, 155
 - deducing relevant purpose, 156
 - golden rule and, 172
 - Hart and Sacks, 159–175
 - implying words into text, 141–145
 - intentionalism distinguished, 163
 - limiting constraints on, 168
 - objects clause, lack of, 156
 - overview, 162–164
 - presumptions see Presumptions
 - refinement of principles, 153–157
 - scheme to achieve purpose, consideration of, 109
 - underlying purpose, 144, 153, 156, 157
- ## R
- R v Mac* 179–181, 208
- Racism, 188–195
- Reading down, 143
 - general words, 27
 - penal provisions, 24
- Reading in extra words, 142, 143
- Rebuttable principles, 20–23
- Recent developments, 40–44
- Reductio ad absurdum, 197
- Regulation-making power, 101–102
- Reprints, amendments in, 4
- Resistance to new legislation, 38, 44
- Retroactive effect, 199
- Risk assessment, 93
- Robinson v Shell Oil Co*, 165–166
- ## S
- S v Mhlungu* 195–199
- Second reading speeches, 41, 89
- Self-incrimination, privilege against, 148
 - presumed intention not to exclude, 21, 145, 148
- Soft logic of jurisprudence, 178, 195, 205–215

- South Africa
 - ambiguity, 196–199, 201, 211
 - discriminatory legislation, 194, 197
 - new Constitution, cases initiated before, 196–199, 208
 - to-rule-otherwise tope, 197
- Static vs dynamic interpretation argument, 111, 112
- Statutes as second class law, 5–6
- Statutory interpretation
 - distinct body of law, 13
 - philosophies, 96–99
 - principles see Interpretive principles
 - problems and approaches to solving them, 111–115
- Straightforward expression, 117
- Strained construction, 141, 143
- Strict construction, 27
 - legality principle, statute impinging on, 26
 - penal law, 20, 23, 118, 119
- Structuralism
 - constitutional interpretation, 49, 53, 60–64, 79
 - inferences from structure, 63–64
 - text as whole and coherent document, 63
- Subordinate legislative power, 101–102
- Supplementation argument, 111, 114
- T**
- Tautology, avoiding, 117
- Taxation law, 11, 130
- Technical meaning rule, 117
- Teoh* principle, 150–153
- Textualism, 107
 - American view, 160–161, 190
 - Canadian view, 109–111, 119, 190
 - constitutional interpretation, 49, 53–60, 79, 190
 - new textualism, 161
 - repudiation by Driedger, 109–111
 - Scalia J, 160, 161, 190
- Topes, 206
- Torts
 - choice of law rules, 12
 - statutory modification of common law, 24
- U**
- Under-inclusive text, 111
 - incorrigible gap argument, 111, 113
 - necessary implication argument, 111, 113
 - supplementation argument, 111, 114
- Uniform expression, 117
- United States of America, 8
 - ambiguity, 181–187, 200, 211
 - jurisdictional issues, 181–187
 - methods of statutory interpretation, 42
 - passing of laws, 9
 - purposive construction, 159–174
- United States v Witkovich* 167–168
- V**
- Vienna Convention on the Law of Treaties, 132
- W**
- Will, interpretation of, 178
- Will of Parliament see Intention
- Work Choices Case*, 46–79

Table of Statutes

COMMONWEALTH

A

Aboriginal and Torres Strait Islander Heritage Protection Act 1984: 187–191, 194

Acts Interpretation Act 1901: 14

s 3: 93

s 5: 94

s 7: 93

s 8: 93

s 15AA: 88, 93, 94, 129–131, 133–136, 140, 141, 146, 148, 153, 155–159, 168–173

s 15AB: 9, 88, 93, 94, 131, 134, 135, 138–140, 153, 157, 159, 168–173

s 15AB(1): 133, 138, 139, 170

s 15AB(1)(a): 133, 169, 170, 171

s 15AB(1)(b): 133, 140, 149, 171

s 15AB(1)(b)(i): 133, 171, 172

s 15AB(1)(b)(ii): 133, 172

s 15AB(2): 10, 133, 139, 173

s 15AB(3): 133, 141, 173

s 18A: 93

s 23: 93

s 25: 93

s 28A: 93

s 46: 156

Acts Interpretation Amendment Act 1984

s 7: 131

Administrative Appeals Tribunal Act 1975: 11

Administrative Decisions (Judicial Review) Act 1977: 11

Australia Sports Drug Agency Regulations 1999
reg 17(1): 156

B

Broadcasting Services Act 1992: 99–102

s 122: 101

s 160: 101

C

Civil Aviation Act 1988: 4

Conciliation and Arbitration Act 1904: 68, 69

Constitution: 45–79, 192

Ch III: 9, 17, 50

s 51: 60, 62, 69

s 51(xx): 54, 57

s 51(xxvi): 188–194

s 51(xxv): 54, 60, 68, 69, 74, 77

s 51(xxix): 9

ss 53–56: 63

s 55: 54

s 58: 9

s 76(ii): 9

s 77(i): 9

s 77(iii): 9

ss 81–83: 63

s 81: 62, 63

s 92: 56, 57

s 102: 62

s 107: 62

s 109: 1

s 114: 51, 54, 64

s 128: 62, 70

Copyright Act 1968: 11

Corporations Act 2001: 4

Corporations Law

s 1002B: 34

s 1002G: 34

E

Evidence Act 1995: 43, 148

F

Family Law Act 1975: 11

Farm Support Act 1992

s 3(2): 144

H

Hindmarsh Island Bridge Act 1997: 187–195, 201

s 3: 187

s 4: 187
Sch 1: 187

I

Income Tax Assessment Act 1936
s 80C(3): 134

L

Law Officers Act 1964: 1

M

Migration Act 1958: 4
s 14: 146
s 189: 146
s 196: 146
s 198: 146
s 475: 143

N

Native Title Act 1993
s 12: 9, 10

P

Parliamentary Counsel Act 1970: 2, 87
Parliamentary Service Act 1999
s 7: 88
s 9: 88
s 14: 88

Patents Act 1990: 4

Proceeds of Crime Act 1987
s 101: 35

S

Statute Law Revision Act 1981
s 115: 129

Superannuation Act 1976: 4

T

Trade Practices Act 1974: 11
s 4M: 127
s 52: 40

W

Workplace Relations Act 1996: 54
Workplace Relations Amendment (Work Choices)
Act 2005: 46, 47, 54, 59

AUSTRALIAN CAPITAL TERRITORY

H

Human Rights Act 1998
s 3: 22

Human Rights Act 2004
s 30: 148
s 30(1): 146
s 30(2): 146
s 31: 146, 148

I

Interpretation Act 1967
s 11A: 135
s 11B: 135

L

Legislation Act 2001
s 6(2): 148
s 138: 135, 139
s 139: 135, 146
s 140: 140
s 141–143: 135
s 141: 139
s 170: 148
s 170(3): 148
s 171: 148

NEW SOUTH WALES

C

Civil Liability Act 2002: 23, 25
Companies (New South Wales) Code
s 556(2): 155

Constitution Act 1902
s 3: 37

Crimes Act 1900: 37

I

Interpretation Act 1987
s 33: 134
s 34: 134

P

Prisoners (Interstate Transfer) Act 1982
s 28(6)(b): 141

V

Victims Support and Rehabilitation Act 1996
Sch 1 cl 5(a): 153, 154

NORTHERN TERRITORY**I**

Interpretation Act
s 62A: 134
s 62B: 134

L

Lands Acquisition Act 2001
s 33(1)(b): 145
s 33(3)(b): 145

W

Work Health Act
s 3(1): 144

QUEENSLAND**A**

Acts Interpretation Act 1954
s 14A: 135

V

Vagrants, Gaming and Other Offences Act 1931
s 7(1)(d): 152

SOUTH AUSTRALIA**A**

Acts Interpretation Act 1915
s 22: 135, 148

C

Controlled Substances Act 1984
s 32: 142
s 32(5)B(b)(ii): 142

TASMANIA**A**

Acts Interpretation Act 1931
s 8A: 134
s 8B: 134

VICTORIA**A**

Accident Compensation Act 1985
s 104B(9): 145

I

Interpretation of Legislation Act 1984
s 35: 134
s 35(b): 134, 139

WESTERN AUSTRALIA**I**

Interpretation Act 1984
s 18: 134
s 19: 134

CANADA**A**

Adoption of Children Act: 114

C

Canada Act 1982: 118
Canada Labour Code: 115
Change of Name Act 1980
s 4(1): 112

Criminal Code: 116
s 369(b): 179

E

Excise Tax Act: 112

H

Human Rights Code: 115

I

Interpretation Act 1985
s 12: 106

P

Patents Act: 112

S

Statutory Instruments Act: 120

NEW ZEALAND

B

Bill of Rights Act 1990
s 6: 22

SOUTH AFRICA

C

Constitution
s 241(1): 199
s 241(8): 199
s 241(10): 199

UNITED KINGDOM

C

Canada Act 1982: 18

H

Human Rights Act 1998
s 3: 22

S

Sale of Goods Act 1893: 2

UNITED STATES

C

Civil Rights Act 1964
Title VII: 165, 166

Constitution: 192
Art I s 7(2): 9
Art III: 183

F

Federal Rules of Civil Procedure
r 14: 183
r 19: 183
r 20: 183
r 24: 183

J

Judicial Improvements Act: 183–186
s 1331: 184
s 1332: 183, 184
s 1367: 183, 184, 186
s 1367(a): 184, 185
s 1367(b): 184

U

United States Code
8 USC s 1252(d)(3): 168
42 USC s 1973: 166
42 USC s 2000e: 165, 166

Table of Cases

A

- Actors and Announcers Equity Association v Fontana Films Pty Ltd (1982) 150 CLR 169: [73](#)
- Al-Kateb v Godwin (2004) 219 CLR 562: [19](#), [20](#), [29](#), [30](#), [146](#), [147](#), [150](#), [152](#)
- Alexandra Private Geriatric Hospital Pty Ltd v Blewett (1984) 2 FCR 368: [139](#)
- Allapattah Services Inc v Exxon Mobil Corp 333 F 3d 1248 (2003): [177](#), [183](#)
- Almario v Allianz Australia Workers Compensation (NSW) Insurance Ltd (2005) 62 NSWLR 148: [138](#)
- Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129: [54–64](#), [75–78](#), [130](#)
- Amos v Brisbane City Council [2005] QCA 433: [138](#)
- Applicant A v Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225: [151](#), [154](#)
- Attorney-General v Prince Ernest Augustus of Hanover [1957] AC 436: [136](#), [137](#)
- Attorney-General (Cth) v Oates (1999) 198 CLR 162: [138](#)
- Attorney-General (Cth) v Schmidt (1961) 105 CLR 361: [59](#), [74](#)
- Attorney-General (NSW) v Quin (1990) 170 CLR 1: [11](#)
- Attorney-General (Qld) v Attorney-General (Cth) (1915) 20 CLR 148: [56](#), [63](#)
- Austin v Commonwealth (2003) 215 CLR 185: [61](#)
- Australia & New Zealand Banking Group Ltd v Commissioner of Taxation (Cth) (1994) 119 ALR 727: [139](#)
- Australian Communist Party v Commonwealth (1951) 83 CLR 1: [18](#)
- Australian Federation of Construction Contractors, Re; Billing, Ex p (1986) 68 ALR 416: [133](#)
- Australian Industry Group v Automotive, Food, Metals, Printing & Kindred Industries Union (2003) 130 FCR 524: [137](#)
- Australian National Airways v Commonwealth (1945) 71 CLR 29: [55](#)
- Australian Tape Manufacturers Association Ltd v Commonwealth (1993) 176 CLR 480: [63](#), [72](#)

B

- B v Director of Public Prosecutions [2000] 2 AC 423: [20](#), [29](#)
- Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817: [120](#), [121](#)
- Bank of New South Wales v Commonwealth (1948) 76 CLR 1: [73](#)
- Bank One Chicago NA v Midwest Bank Trust Co 516 US 264 (1996): [14](#)
- Baxter v Commissioner of Taxation (NSW) (1907) 4 CLR 1087: [64](#)
- Beattie v National Frontier Insurance Co (2003) 68 OR (3d) 60: [113](#)
- Beckwith v The Queen (1976) 135 CLR 569: [24](#)
- Bell Canada v CRTC [1989] 1 SCR 1722: [113](#), [114](#)
- Bell Express Vu Ltd Partnership v Rex [2002] 2 SCR 559; [2002] SCC 42: [106](#), [119](#)
- Bermingham v Corrective Services Commission of NSW (1988) 15 NSWLR 292: [141–145](#), [157](#)

- Beson v Director of Child Welfare for Newfoundland [1982] 2 SCR 716: 114
- Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591: 15, 147
- Blunn v Cleaver (1993) 119 ALR 65: 90
- Board of Fire Commissioners v Ardouin (1961) 109 CLR 101: 21
- Bolton, Re; Beane, Ex p (1987) 162 CLR 514: 15
- Bourke v State Bank of New South Wales (1990) 170 CLR 276: 74
- Bowtell v Goldsborough Mort (1905) 3 CLR 444: 28
- Braverus Maritime Inc v Port Kembla Coal Terminal Ltd (2005) 148 FCR 68: 138
- Brennan v Comcare (1994) 50 FCR 555: 15, 154
- Brodie v Singelton Shire Council (2001) 206 CLR 512: 147
- Bropho v Western Australia (1990) 170 CLR 1: 20, 23, 26, 28, 151
- Burch v South Australia (1998) 71 SASR 12: 138
- Byrne v Australian Airlines Ltd (1995) 185 CLR 410: 15, 147
- Byrnes v The Queen (1999) 199 CLR 1: 4, 14, 135
- C**
- Cabell v Markham (1945) 148 F 2d 737: 17
- Caminetti v United States 242 US 470 (1917): 161
- Canadian Oxy Chemicals Ltd v Canada (Attorney-General) [1999] 1 SCR 743: 119
- Canterbury Municipal Council v Muslim Alawy Society Ltd (1985) 1 NSWLR 525: 21
- Cheatle v The Queen (1993) 177 CLR 54: 165
- Cheng v The Queen (2000) 203 CLR 248: 51
- Chevron USA Inc v National Resources Defense Council Inc 467 US 837 (1984): 10, 11
- Chieu v Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 84: 106
- Chisom v Roemer 501 US 380 (1991): 161, 166–167
- Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1: 149
- Church of the Holy Trinity v United States 143 US 457 (1892): 28
- CIC Insurance Ltd v Bankstown Football Club Ltd (1997): 187 CLR 384: 18, 137–139, 147, 148, 152, 155, 157
- Clark v Paul Gray Inc 306 US 583 (1939): 186
- Clarke v Bailey (1993) 30 NSWLR 556: 142
- Clissold v Perry (1904) 1 CLR 363: 21
- Clunies Ross v Commonwealth (1984) 155 CLR 193: 21
- Coco v The Queen (1994) 179 CLR 427: 7, 20, 28, 30
- Cole v Whitfield (1988) 165 CLR 360: 57, 64
- Coleman v Power (2004) 220 CLR 1: 150, 152
- Commercial Union Insurance Co Ltd v Colonial Carrying Co of New Zealand Ltd [1937] NZLR 1041: 28
- Commissioner for Prices and Consumer Affairs (SA) v Charles Moore (Aust) Ltd (1977) 139 CLR 449: 132
- Commissioner of Australian Federal Police v Curran (1984) 3 FCR 240: 133
- Commissioner of Police v Tanos (1958) 98 CLR 363: 21

- Commissioner of Taxation (Cth) v Westraders Pty Ltd (1980) 54 ALJR 460: [130](#)
- Commissioner of Taxation (Cth) v Whitfords Beach Pty Ltd (1982) 150 CLR 355: [133](#)
- Commonwealth v Haseldell Ltd (1918) 25 CLR 552: [21](#)
- Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1: [73](#), [74](#), [192](#)
- Commonwealth v Yarmirr (2001) 208 CLR 1: [14](#), [147](#)
- Concrete Pipes Case see Strickland v Rocla Concrete Pipes Ltd
- Conroy v Aniskoff 507 US 511 (1993): [43](#)
- Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth) (1981) 147 CLR 297: [18](#), [134](#), [137](#)
- D**
- Daniels Corporation International Ltd v ACCC (2002) 213 CLR 543: [20](#), [21](#)
- David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353: [35](#)
- Deacon Life & Fire v Gibb (1962) 15 ER 630: [15](#)
- D'Emden v Pedder (1904) 1 CLR 91: [56](#), [63](#)
- Denning No 456 Pty Ltd v Brisbane Unit Development Co Pty Ltd (1983) 155 CLR 129: [24](#)
- Dennis Hotels Pty Ltd v Victoria (1960) 104 CLR 529: [12](#)
- Deputy Commissioner of Taxation v State Bank of NSW (1992) 174 CLR 219: [72](#)
- Dietrich v The Queen (1993) 177 CLR 292: [149](#)
- Diez v Director of Public Prosecutions (2004) 62 NSWLR 1: [35](#)
- Director of Public Prosecutions (Cth) v Chan (2001) 183 ALR 575: [143](#)
- Director of Public Prosecutions (Cth) v Chan (2001) 52 NSWLR 56: [143](#)
- Director-General, Department of Corrective Services v Mitchelson (1992) 26 NSWLR 648: [147](#)
- Dodson v Grew (1767) Wilm 272; 97 ER 106: [33](#)
- Donselear v Donselear [1982] 1 NZLR 97: [15](#)
- Dossett v TKJ Nominees Pty Ltd (2003) 78 ALJR 161: [15](#)
- Drughan v Moore [1924] AC 53: [15](#)
- Dugan v Mirror Newspapers Ltd (1978) 142 CLR 583: [133](#)
- Durham Holdings Pty Ltd v New South Wales (1999) 47 NSWLR 340: [26](#), [148](#)
- Durham Holdings Pty Ltd v New South Wales (2001) 205 CLR 399: [21](#)
- E**
- Ealing London Borough Council v Race Relations Board [1972] AC 342: [20](#)
- Eastman v The Queen (2000) 203 CLR 1: [15](#), [47](#), [51](#)
- Egan v Chadwick (1999) 46 NSWLR 563: [18](#)
- Electrolux Home Products Pty Ltd v Australian Workers Union (2003) 78 ALJR 1231; 209 ALR 116: [19](#), [25](#), [28](#), [146](#)
- Ellavale Engineering Pty Ltd v Pilgrim [2005] NSWCA 272: [142](#)
- Enfield City Corporation v Development Assessment Commission (2000) 199 CLR 135: [10](#), [11](#)
- Engineers' Case see Amalgamated Society of Engineers v Adelaide Steamship Co Ltd
- Enzed Holdings Ltd v Wynthea Pty Ltd (1984) 4 FCR 450: [149](#)

Exxon Mobil Corp v Allapattah Service Inc 370 F 3d 124 (2004): 177, 181–187, 200

F

Fairfax v Federal Commissioner of Taxation (1965) 114 CLR 1: 59

Favelle Mort Ltd v Murray (1976) 133 CLR 580: 154

Fell v Fell (1922) 31 CLR 268: 33

Finley v United States 490 US 545 (1989): 182, 184, 185

Fitzgerald, Ex p; Gordon, Re (1945) 45 SR (NSW) 182: 21

Fothergill v Monarch Airlines Ltd [1981] AC 251: 3, 10

Fox v Commissioner for Superannuation (No 2) (1999) 88 FCR 416: 138, 142

G

Gardner Smith Pty Ltd v Collector of Customs (Vic) (1986) 66 ALR 377: 133

Gendron v Supply & Services Union of PSAC [1990] 1 SCR 1298: 115

Gerah Imports Pty Ltd v Duke Group Pty Ltd (2004) 88 SASR 419: 138

Ghaidan v Godin Mendoza [2004] 3 WLR 113: 22

Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269: 25

GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd (2001) 117 FCR 23: 138

Grain Pool of Western Australia v Commonwealth (2000) 202 CLR 479: 65

Green v Bock Laundry Machine Co 490 US 504 (1989): 9, 160, 161

H

Ha v New South Wales (1997) 189 CLR 465: 12, 65

Handa v Minister for Immigration & Multicultural Affairs (2000) 106 FCR 95: 143, 145

Harris v Australian Broadcasting Corporation (1983) 78 FLR 236: 133

Harvard College v Canada (Commissioner of Patents) [2004] 4 SCR 45: 112

Heydon's Case (1584) 3 Co Rep 7a; 76 ER 637: 41, 106, 122, 130

House of Peace Pty Ltd v Bankstown City Council (2000) 48 NSWLR 498: 40

Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330: 57, 58, 66

I

ICI Australia Operations Pty Ltd v Fraser (1992) 34 FCR 564: 133

Ilkiw v Samuels [1963] 2 All ER 879: 35

Insurance Corporation of British Columbia v Heerspink [1982] 2 SCR 145: 115

Isherwood v Butler Pollnow Pty Ltd (1986) 6 NSWLR 363: 137

IW v City of Perth (1997) 191 CLR 1: 153

J

John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503: 12

Jumbunna Coal Mine NL v Victorian Coal Miners' Association (1908) 6 CLR 309: 55

K

K & S Lakes City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309: 18, 40, 136, 137, 138, 155

- Kartinyeri v Commonwealth (1998) 195 CLR 337: 47, 51, 150, 177, 187–195, 201, 208, 211
- Kavvadias v Commonwealth Ombudsman (1984) 2 FCR 64: 133
- Kingston v Keprose Pty Ltd (1987) 11 NSWLR 404: 40, 141, 151
- Koop v Bebb (1951) 84 CLR 629: 12
- Krakouer v The Queen (1998) 194 CLR 202: 21
- L**
- La Campagnie Sucriere de Bel Ombre Ltee v Government of Mauritius (unrep, 13/12/95, PC): 15
- Langer v Commonwealth (1996) 186 CLR 302: 51
- Le v Minister for Immigration & Indigenous Affairs [2004] FCA 875: 150
- Lemair (Australia) Pty Ltd v Cahill (1993) 30 NSWLR 167: 139
- Lembecke v SAS Trustee Corporation (2003) 56 NSWLR 736: 140
- Life Insurance Co of Australia v Phillips (1925) 36 CLR 60: 15
- Luton v Lessels (2002) 210 CLR 333: 48, 52, 57, 62, 63, 65, 72
- Luu v Minister for Immigration & Multicultural Affairs (2002) 127 FCR 24: 150
- M**
- McGee v Gilchrist-Humphrey (2005) 92 SASR 100: 150
- McGinty v Western Australia (1996) 186 CLR 140: 51
- Magrath v Goldsborough Mort & Co Ltd (1932) 47 CLR 121: 21, 26
- Malika Holdings v Stretton (2001) 204 CLR 290: 25, 30
- Marbury v Madison 1 Cranch 137 (1803); 5 US 87 (1803): 11, 168
- Maritime Union of Australian, Re; CSL Pacific Shipping Inc, Ex p (2003) 214 CLR 397: 74
- Masters v McCubbery [1996] 1 VR 635: 140
- Matadeen v Pointu [1999] 1 AC 98: 15
- Maunsel v Olins [1975] AC 373: 25
- Melbourne Corporation v Commonwealth (1947) 74 CLR 31: 59, 61
- Melluish v BMI (No 3) Ltd [1996] 1 AC 454: 42
- Metal Manufacturers Pty Ltd v Lewis (1988) 13 NSWLR 315: 155
- Mills v Meeking (1990) 169 CLR 214: 131
- Minister for Immigration & Ethnic Affairs v Teoh (1995) 183 CLR 273: 149, 150, 151, 152, 153
- Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri (2003) 197 ALR 241: 20, 30, 150
- Minister for Immigration & Multicultural & Indigenous Affairs v VFAD (2003) 125 FCR 249: 150
- Minister for Lands, Planning & Environment v Griffiths [2004] NTCA 5: 144
- MLC Ltd v Deputy Commissioner of Taxation (2002) 125 FCR 37: 138
- Mobil Oil Australia Pty Ltd v Victoria (2002) 211 CLR 1: 48, 52
- Money Penny (1861) 11 ER 671: 15
- Monier Ltd v Szabo (1992) 28 NSWLR 53: 140
- Morishita v Richmond (Township) (1990) 67 DLR (4th): 114

Morris v Beardmore [1981] AC 446: 17

Morrison v Peacock (2000) 50 NSWLR 178: 154

Mount Beauty Gliding Club Inc v Jacob [2004] VSCA 151: 138

MSP Nominees Pty Ltd v Commissioner of Stamps (1999) 198 CLR 494: 135

Munn v Illinois 94 US 113 (1876): 7

Murphyores Incorporated Pty Ltd v Commonwealth (1976) 136 CLR 1: 2, 74

Murray v The Queen (2002) 211 CLR 193: 5

N

NAAV v Minister for Immigration & Multicultural & Indigenous Affairs (2002) 123 FCR 298: 15

NAQF v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 130 FCR 456: 133

Network Ten Pty Ltd v TCN Channel Nine Pty Ltd (2004) 205 ALR 1: 138

New South Wales v Commonwealth (Work Choices Case) (2006) 231 ALR 1: 46–79

Newcastle City Council v GIO General Ltd (1997) 191 CLR 85: 138, 142, 148

Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513: 47, 51

Ngata Apa Ki Te Waipounama Trust v The Queen [2000] 2 NSWLR 659: 20

Nolan v Clifford (1904) 1 CLR 429: 37

O

Ombudsman v Commissioner of Police (1987) 11 NSWLR 386: 133

Owen v South Australia (1996) 66 SASR 251: 135

P

Pacific Coal Pty Ltd, Re; Construction, Forestry, Mining and Energy Union, Ex p (2000) 203 CLR 346: 73, 74

Pacific Hydro Ltd v Office of the Renewable Energy Regulator (2006) 150 FCR 124: 138

Parrett v Secretary, Department of Family and Community Services (2002) 124 FCR 299: 133, 144, 145

Parton v Milk Board (Vic) (1949) 80 CLR 229: 48

Peat Resources of Australia Pty Ltd, Re; Pollock, Ex p (2004) 181 FLR 454: 156

Pennsylvania v Union Gas Co 491 US 1 (1989): 43

Pepper v Hart [1993] AC 593: 42

Perrier Group of Canada Inc v Canada [1996] 1 FC 586: 112

Pidoto v Victoria (1943) 68 CLR 87: 74, 75

Pileggi v Australian Sports Drug Agency (2004) 138 FCR 107: 156, 157

Pilkington (Australia) Ltd v Minister for Justice & Customs (2002) 127 FCR 92: 150

Pinder v The Queen [2003] 1 AC 620: 15

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476: 20, 21, 29, 150

Police v Kennedy (1998) 71 SASR 175: 138

Polites v Commonwealth (1945) 70 CLR 60: 149

Potter v Minahan (1908) 7 CLR 277: 20, 26, 28, 147

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355: 18, 99–102, 137, 138, 151

Public Service Association (SA) v Federated Clerks Union (1991) 173 CLR 132: 26

- Puntoriero v Water Administration Ministerial Corporation (1999) 199 CLR 525: 21
- Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328: 21, 26
- Q**
- Québec (Communauté urbaine) v Corp Notre-Dame de Bon-Secours [1994] 3 SCR 3: 106
- R**
- R v Araujo [2000] 2 SCR 992: 106
- R v Bolton; Beane, Ex p (1987) 162 CLR 514: 15
- R v Boucher [1995] 1 VR 110: 131
- R v Di Maria (1996) 67 SASR 466: 142
- R v Environment Secretary; Spath Holme Ltd, Ex p [2001] 2 AC 349: 42
- R v Firms (2001) 51 NSWLR 548: 34
- R v Gladue [1999] 1 SCR 688: 106
- R v Hill [1996] SASC 5975: 142
- R v Hughes (2000) 202 CLR 535: 14
- R v Jarvis [2002] 3 SCR 757: 109
- R v Kirby; Boilermakers' Society of Australia, Ex p (1956) 94 CLR 254: 48
- R v Mac [2001] CanLII 24177: 179
- R v Mac [2002] 1 SCR 856; [2002] SCC 24: 177, 179–181, 208
- R v MacIntosh [1995] CanLII 124; (1995) 95 CCC (3d) 481: 179
- R v PLV (2001) 51 NSWLR 736: 15
- R v Secretary of State for Home Department; Pierson, Ex p [1998] AC 539: 19
- R v Secretary of State for Home Department; Simms, Ex p [2002] 2 AC 115: 20
- R v Sharpe [2001] 1 SCR 45: 106
- R v Wilson; Kisch, Ex p (1934) 52 CLR 234: 18, 28
- R v Young (1999) 46 NSWLR 681: 15, 27, 142–145, 157
- R (Morgan Grenfell Ltd) v Special Commissioner of Income Tax [2003] 1 AC 563: 21
- Regie Nationale Renault v Zhang (2002) 210 CLR 481: 25
- Registrar-General v Northside Developments Pty Ltd (1988) 14 NSWLR 571: 34
- Repatriation Commission v Vietnam Veterans Association of Australia, NSW Branch (2000) 48 NSWLR 548: 16, 40, 133, 137
- Residential Tenancies Tribunal of NSW; Defence Housing Authority, Ex p (1997) 190 CLR 410: 14
- Rich v ASIC (2003) 203 ALR 671: 21
- Richardson v Austin (1911) 12 CLR 463: 16
- Rickman v Carstairs (1833) 110 ER 931: 15
- Rieson v SST Consulting Services Pty Ltd (2005) 219 ALR 90: 136, 138
- Rizzo v Rizzo Shoes Ltd [1998] 1 SCR 27: 106
- Roberts v Bass (2002) 212 CLR 1: 48, 52, 72
- Robinson v Shell Oil Co 70 F 3d 325 (1995): 165
- Robinson v Shell Oil Co 519 US 337 (1997): 165–166
- Rodriguez v United States 480 US 522 (1987): 154, 155

Rosario Ortega v Star-Kist Foods Inc 370 F 3d 124 (2004): 182, 183, 184

Rowe v Russell [1928] 2 KB 117: 33

S

S v Mhlungu (1995) (3) SA 867; [1995] ZACC 4: 177, 196–199, 201, 208, 211

Salomon v A Salomon & Co Ltd [1897] AC 22: 14, 66

Saraswati v The Queen (1991) 172 CLR 1: 131, 142

Scott v Cawsey (1907) 5 CLR 132: 20

SGH Ltd v Commissioner of Taxation (2002) 210 CLR 51: 47, 48, 50, 51, 52, 54, 57, 64, 72

Sheldrake v DPP; Attorney-General's Reference (No 4 of 2002) [2004] 3 WLR 976: 22

Singh v Commonwealth (2004) 222 CLR 322; 209 ALR 355: 14, 55, 147

Smith v East Elloe Rural District Council [1956] AC 736: 28

Smith v Lucas (1881) 18 Ch Div 531: 15

Smith v Papamihail (1998) 88 FCR 80: 156

Solution 6 Holdings Ltd v Industrial Relations Commission of NSW (2004) 60 NSWLR 558: 138

State v Zuma (1995) (4) BCLR 401; [1995] (2) SA 642: 15

Stock v Frank Jones (Tipton) Ltd [1978] 1 All ER 948; [1978] 1 WLR 231: 15, 16

Stradling v Morgan (1560) 75 ER 305: 27, 28

Strickland v Rocla Concrete Pipes Ltd (Concrete Pipes Case) (1971) 124 CLR 468: 57, 59, 73, 75

Stubart Investments Ltd v The Queen [1984] 1 SCR 536: 106

Sue v Hill (1999) 199 CLR 462: 65

T

Tasmanian Dam Case see Commonwealth v Tasmania

Tasmanian Ferry Services Ltd and Secretary, Department of Transport and Communications, Re (1992) 29 ALD 395: 139

TCN Channel Nine Pty Ltd v Australian Mutual Provident Society (1982) 42 ALR 496: 133

Teoh Case see Minister for Immigration & Ethnic Affairs v Teoh

Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104: 18, 55

Thompson v Byrne (1999) 161 ALR 632: 131

Thompson v Groote Eylandt Mining Co Ltd [2003] NTCA 5: 144

Tisand Pty Ltd v Owners of the Ship MV Cape Moreton (Ex Freya) (2005) 143 FCR 43: 138

Tokyo Mart Pty Ltd v Campbell (1988) 15 NSWLR 275: 28, 142, 143

Tome v United States 513 US 150 (1995): 172

Trade Practices Commission v Orlane Australia Pty Ltd (1984) 1 FCR 157: 133

U

United States v American Trucking Associations Inc 310 US 534 (1940): 161

United States v Wiltberger 5 Wheat 76 (1820): 20

United States v Witkovich 353 US 194 (1957): 167–168, 173

United Steelworkers v Weber 443 US 193 (1979): 170

V

Vabalis, Re (1983) 2 DLR (4th) 382: 112

Victims Compensation Fund Corporation v Brown (2002) 54 NSWLR 668: 153, 154

Victims Compensation Fund Corporation v Brown (2003) 77 ALJR 1797: 153, 155, 156

Victoria v Commonwealth (1971) 122 CLR 353: 55

Victorian Workcover Authority v Wilson (2004) 10 VR 298: 145

Wik Peoples v Queensland (1996) 187 CLR 1: 15, 147

Wilson v Anderson (2002) 213 CLR 401: 14

Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816: 42

Woolmington v Director of Public Prosecutions [1935] AC 462: 5

Work Choices Case see New South Wales v Commonwealth

W

Wacal Developments Pty Ltd v Realty Developments Pty Ltd (1978) 140 CLR 503: 41, 130, 137

Wacando v Commonwealth (1981) 148 CLR 1: 130

WACB v Minister for Immigration and Multicultural Affairs (2004) 79 ALJR 94; 210 ALR 190: 4

Wakim, Re; McNally, Ex p (1990) 198 CLR 511: 47, 51, 71

Walsh and Johnson, Ex p; In re Yates (1925) 37 CLR 36: 27, 28

Wang v Minister for Immigration & Multicultural Affairs (1997) 71 FCR 386: 142

Watson v Lee (1979) 144 CLR 374: 3, 43

Waugh v Kippen (1986) 160 CLR 157: 24, 36, 148

Wentworth Securities Ltd v Jones [1980] AC 74: 141, 142

Western Australia v Commonwealth (1995) 183 CLR 373: 9

Westminster Bank Ltd v Zang [1966] AC 182: 119

Westwood v Lightly (1984) 2 FCR 41: 133

Y

Yager v The Queen (1977) 139 CLR 28: 149

Z

Zahn v International Paper Co 414 US 291 (1973): 186

