

2011 Goldring Memorial Lecture

The Judicial Function in an Age of Statutes

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Introduction

It is a privilege and a pleasure to be asked to deliver this inaugural lecture in honour of the late Jack Goldring on the occasion of the 20th anniversary of the Faculty of Law at the University of Wollongong. I should begin by saying a little about his life.

Jack Goldring was born in Sydney in 1943. He was educated at North Sydney Boys High School and at the University of Sydney where he was awarded Bachelors Degrees in Arts and Law. In 1969, he was awarded the degree of Master of Laws from Columbia University, which he attended as an Australian-American Educational Foundation Fellow.

In 1970, Jack Goldring became a member of the Faculty of Law at the University of Papua New Guinea, where he remained until 1972. Subsequently he joined the Law Faculty of the Australian National University and helped to found the publication known as the *Legal Service Bulletin*, now called the *Alternative Law Journal*. From 1981 to 1987 he was Professor of Law and Dean of Law at Macquarie University Law School. In 1990, he was appointed as the Foundation Dean of Law at the University of Wollongong, an office he held until 1995. He served as a Commissioner of the Australian Law Reform Commission in a full-time capacity from 1987 to 1990 and then part-time until 1992. He was a Commissioner of the New South Wales Law Reform Commission in 1997 and 1998.

In 1998, Jack Goldring was appointed to the District Court of New South Wales and continued in that office until his death in 2009. He was a Foundation Fellow of the Australian Academy of Law and a member of the Council of the National Judicial College. He was also a member of the committee of the Commonwealth Legal Education Association, the Legal Practitioners Admission Board and the Board of Governors of the College of Law of New South Wales.

Jack Goldring's academic production was prodigious. He authored or co-authored some six books and published a large number of articles which appeared in a variety of law journals. His publications covered the fields of public law, torts, consumer law, harmonisation of laws, legal education, evidence, criminal law, Aboriginal land rights, commercial arbitration and many others. His writing style was clear and direct. In one short paper written in the *Legal Service Bulletin* in 1983,¹ he gave his initial reactions to the decision of the High Court in the *Tasmanian Dam* case.² That was a controversial decision at the time it was made. In comments with a contemporary resonance, he asked why the decision had aroused such controversy. His answer underpins reactions to some decisions of the High Court across the years. He said:

The first answer is that the subject-matter of the decision is controversial. States' rights and conservationism are both subjects which are likely to arouse political controversy. Where a nation, such as the United States or Australia, has a written constitution, political issues can often become legal issues. There is a tendency for politicians who wish to avoid hard decisions to turn them into legal issues and leave them for the courts to decide. There is also a tendency for those who oppose political action (or inaction) to hire lawyers to see if the political decision concerned can be turned into a legal question, so that litigation can be used to political effect. Australians are no strangers to this, and the provisions of the Constitution give ample scope to ingenious lawyers to make cases out of political subject matter, especially if the powers of the States or the Commonwealth can be made an issue.³

¹ J Goldring, 'Dams or Floodgates? 'Initial reactions to the dam case' (1983) 8(4) *Legal Service Bulletin* 156.

² *Commonwealth v Tasmania* (1983) 158 CLR 1.

³ Goldring, above n 1 158.

He gave as obvious examples the *Bank Nationalisation* case⁴ and the *Communist Party Dissolution* case.⁵ At the time he wrote his article the Mabo litigation had been commenced. However, the historic and contentious decision to which it led in 1992 was nine years away. The even more contentious decision in *Wik Peoples v Queensland*,⁶ applying the *Mabo* principle to the interaction between pastoral leases and native title, would not be decided until December 1996.

Jack Goldring wrote a good deal about the impact of new statute law. As a member of the Australian Law Reform Commission and the New South Wales Law Reform Commission he had a role in proposals for reform of the law in that respect.

It is the predominance of statute law in our legal universe that directs attention to the role of the judiciary in the exercise of jurisdiction and powers conferred by statute and in the interpretation and application of statutes by the judiciary. Those two issues – statutory powers conferred upon judges and the interpretation of statutes by judges – are the topics of this lecture.

Statutes conferring functions on the judiciary

The powers and functions which can be conferred upon federal courts and judges are confined by the doctrine of separation of powers. As the majority Justices said in *R v Kirby; Ex parte Boilermakers' Society of Australia*:⁷

⁴ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.

⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁶ (1996) 187 CLR 1.

⁷ (1956) 94 CLR 254.

... Chap III does not allow a combination with judicial power of functions which are not ancillary or incidental to its exercise but are foreign to it.⁸

The Court held that it was nevertheless possible, consistently with separation of powers, for a statute to confer upon a federal judge non-judicial powers and functions exercised by that judge not acting in his or her judicial capacity. The term 'persona designata' was used to describe a judge acting in that way – that is, as a designated person not as a judge. This qualification on the separation of powers principle was subject to the requirement that the non-judicial function conferred on the judge be compatible with the exercise of his or her judicial functions. Applying that compatibility test, the High Court has held that federal judges can exercise the statutory administrative function of issuing telephonic interception warrants.⁹ The joint judgment in *Grollo v Palmer* used the term 'persona designata':

as a shorthand expression of a limitation on the principle of *Boilermakers*, acknowledging that there is no necessary inconsistency with the separation of powers mandated by Ch III of the Constitution if non-judicial power is vested in individual judges detached from the court they constitute.¹⁰

Judges sitting in a non-judicial capacity also serve as members of bodies such as the Administrative Appeals Tribunal, the Australian Competition Tribunal and the Defence Force Discipline Appeals Tribunal. However necessary conditions on the use of the persona designata mechanism, in respect of federal judges, are:

- . the non-judicial function, not incidental to a judicial function, cannot be conferred without the judge's consent; and

⁸ (1956) 94 CLR 254, 296

⁹ *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348.

¹⁰ (1995) 184 CLR 348, 363.

- no function can be conferred that is incompatible with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power.

In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,¹¹ the Court held that the appointment of a Federal Court judge to prepare, under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), a report in relation to an area for which a group of Aboriginal people were seeking statutory protection from the Minister, was invalid. The factors identified as leading to a conclusion of invalidity included:

- the judge's report was no more than a condition precedent to the exercise of ministerial power and was an integral part of the process of its exercise;
- the judge preparing the report lacked the usual judicial protections and was in a position equivalent to a ministerial advisor;
- there was nothing to prevent the Minister from giving directions to the judge and the judge deciding to comply with those directions;
- the report involved the preparation of an advisory opinion on questions of law, a function alien to the exercise of the judicial power of the Commonwealth.

The strict constitutional doctrine of separation of powers applicable to federal judges does not apply to State judges. Nevertheless, there are limits to the functions which can be conferred upon them by State statutes. Those limits are imposed because the State courts can, under Ch III of the *Commonwealth Constitution*, be given federal jurisdiction. They are therefore part of a national,

¹¹ (1996) 189 CLR 1.

integrated judicial system. They must, at all times, be suitable repositories for the exercise of federal judicial power. In a number of cases in the High Court, commencing with *Kable v Director of Public Prosecutions (NSW)*,¹² the Court has held that a State parliament cannot confer upon a State court a function which substantially impairs its institutional integrity and which is therefore incompatible with the function of the State court as a repository of federal jurisdiction under Ch III.

When the term 'institutional integrity' is used, it refers to the defining or essential characteristics of a court. They include:

- . the reality and appearance of the court's independence and its impartiality;
- . the application of procedural fairness;
- . adherence, as a general rule, to the open court principle; and
- . as a general rule, the provision of reasons for decisions.

The principle means that a State legislature cannot enact a law conferring upon a State court or judge of a State court, a non-judicial function which is substantially incompatible with the functions of the court. That is so even though the function may be conferred upon a judge of the court in his or her personal capacity, ie as *persona designata*.¹³

¹² (1996) 189 CLR 51.

¹³ *Wainohu v New South Wales* (2011) 243 CLR 181, 210 [47].

Applying these principles, the High Court has, in recent times, held invalid laws in the States of New South Wales and South Australia.¹⁴ Two of the cases concerned statutes, popularly known as 'anti-bikie laws', providing for organisations allegedly involved in serious criminal activities to be declared as such and for control orders to be issued against members of such organisations. The control orders, which the courts were empowered to issue, would have significantly limited the freedom of affected members to associate with each other. It was not for that reason that parts of those laws were held to be invalid. The invalidity had to do, in each case, with the connection between the administrative act of declaring an organisation and the judicial act of issuing a control order. In the South Australian case, *Totani*, the majority was of the view that the State court issuing control orders was effectively being required to do so at the behest of the executive, following a declaration in relation to an organisation made by the Attorney-General. In *Wainohu*, which involved similar legislation in New South Wales, the declaration of an organisation was to be made by a judge of the Supreme Court, acting not as a judge but as *persona designata*. Under the Act, the judge had no obligation to give reasons for making the declaration. The absence of that requirement and the connection of the judge's function with that of the court, of which he was a member in issuing control orders, meant that the function conferred upon him was incompatible with the institutional integrity of the court of which he was a member. In another case in New South Wales, a law requiring a court, at the instigation of an executive authority, to hear an interlocutory application for the freezing of assets without notice to the party affected, was also held to be invalid.¹⁵

The preceding cases indicate some of the limits on the functions that Parliament can confer on judges. That leads to consideration of the nature of the

¹⁴ *Wainohu v New South Wales* (2011) 243 CLR 181; *South Australia v Totani* (2010) 242 CLR 1; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

¹⁵ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

judicial function in this age of statutes and, particularly, the impact of statutes on the role of the judge as law maker.

Statutory interpretation and judicial law-making

While the *Commonwealth Constitution* requires the separation of legislative, executive and judicial powers and while conventions of separation are generally observed, although not mandated in the States, the judicial function necessarily involves an element of law making. That is most obvious in the field of the common law. That is the judge-made law in which principles emerge in decisions made in many cases over a long period of time and evolve through that process. Much of the law of contract, torts, equity, and property, falls within that category. The dominance of statute law in our society might suggest that this interstitial or incremental law-making role of the judges has been much diminished. That is not the case because statutes require interpretation and contested interpretations require choices to be made between competing meanings. The making of such choices can be seen as a species of law-making. It is, however, a species of law-making necessarily constrained by the requirement that the judges confine themselves to interpretation within the range of meanings which the words can bear and not engage in rewriting laws to attain desired outcomes.

It is useful to consider the judicial role in this age of statutes by first considering a general explanation of what it is that judges do.

The High Court of Australia in 1983 described the central function of courts exercising federal jurisdiction under the *Commonwealth Constitution* as:

... the quelling of ... controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.¹⁶

¹⁶ *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ).

That statement supports a simple model of judicial decision-making which is of general application. It applies also to the great run of cases in State courts:

- (i) The judge identifies a rule of law applicable to a class of fact situations.
- (ii) The judge determines the facts of the case.
- (iii) The judge applies the rule of law to the facts of the case to yield a conclusion in terms of the rights and liabilities of parties before the court.

The rules of law which are to be applied may be constitutional rules or statutory rules or the judge-made rules of the common law. One variant of that model applies in criminal cases tried before a judge and jury. In such cases, the judge identifies the relevant rule of law. He or she directs the jury on what the rules are. The jury finds the facts based on the evidence and applies the rules of law to them. It will then decide, on the basis of the application of the rules of law to the facts which it has found, whether the accused person is guilty or not guilty of an offence.

The overwhelming majority of cases involve the application of existing rules, rather than the development of new ones. Even then, however, the language of a rule may be so broad as to allow for developmental choices in its application. Terms such as 'reasonable' or 'unconscionable' or 'foreseeable' or 'remote' or 'good faith' find their place in a variety of common law rules. They leave much to judicial evaluation in their application. Their applications over different classes of case may lead to the emergence of principles. In so saying, it is important to recognise the distinction between a principle of law and an accumulation of similar applications of a particular principle.

As with the common law, there are statutes in which broad terms are used which are capable of application to a wide range of fact situations. Where that is so, it means that Parliament has left the courts to work out the appropriate application of the statute on a case-by-case basis. A new kind of common law evolves derived

from many decisions applying the same broad statutory language. The term 'misleading or deceptive conduct', which found its place in the *Trade Practices Act 1974* (Cth) ('the Trade Practices Act') is a good example. A substantial body of judge-made law has developed around what was s 52 of the Trade Practices Act and its 1987 equivalents in the Fair Trading Acts of the States. The provision has been applied to consumer transactions, advertising, promotional statements, pre-contractual negotiations, statements in prospectuses, professional opinions and advices, logos, trade marks, trade names and get-up.

The statutory prohibition against misleading or deceptive conduct states a legal rule. Its development on a case-by-case application has required logical reasoning. Other words used in common law principles and in statutes, define what Professor Julius Stone called 'legal standards' rather than legal rules. They require value decisions in their application. Stone put it this way:

When courts are required to apply such standards as fairness, reasonableness and non-arbitrariness, conscionableness, clean hands, just cause or excuse, sufficient cause, due care, adequacy or hardship, then judgements cannot turn on legal formulations and deductions but must include a decision as to what justice requires in the context of the instant case. This is recognised indeed, as do many equitable standards, and also as to such notorious common law standards as "reasonableness". They are predicated on fact-value complexes, not on mere facts.¹⁷

Statutes, like the common law rules, often embody legal standards in their language. Terms such as 'good faith' and 'interests of justice' and 'unconscionable' appear in many Acts. Their interpretation and application on a case-by-case basis involve not only the development of a principled approach based on logic, but one which is necessarily informed by value judgments. Another example is terms such as 'in relation to' and 'in connection with', particularly found in taxing statutes. They

¹⁷ J Stone, *Legal System and Lawyers' Reasonings* (Sydney, Maitland Publications, 1964) 263-264.

invite judicial consideration of their general range and evaluative judgments about their application in particular cases.

As appears from what I have just been saying, the judicial function in this age of statutes includes responsibility conferred upon the judiciary by the parliaments for developing the law within broadly stated guidelines. That phenomenon reflects the complexity of our society and the infinite variety of individual circumstances which cannot be anticipated by comprehensive statutory formulations.

The fact that we are living in an age of statutes is demonstrated by the growth of statute law in Australia in the 110 years that have passed since Federation. Not only have the number of statutes and regulations and statutory instruments grown at a very significant rate, but statutes have become longer and more complex. This is so despite attempts to use plain English drafting.

A useful case study is migration legislation. In 1901, the *Immigration Restriction Act 1901* (Cth) contained 19 sections. It was amended in the years that followed, but by 1935 still only consisted of 19 sections. In 1950, it had grown to 64 sections. The *Migration Act 1958* (Cth) ('the Migration Act') repealed the *Immigration Restriction Act 1901*. The 1958 Act comprised some 67 sections. Now it has well over 770 sections and hundreds of supporting regulations, particularly those defining criteria for the grant or refusal of visas. The Migration Act and Migration Regulations 1994 (Cth) are full of official powers and discretions, tightly controlled by conditions and criteria which have to be satisfied before those powers and discretions can be exercised. The Migration Act is by no means the most extreme example of statutory growth in terms of volume or complexity. The *Income Tax Assessment Acts 1936 and 1997* (Cth) and the *Social Security Act 1991* (Cth) dwarf it on both those criteria.

Much of the judge-made law of contract, tort, property and equity has been significantly modified or, in some cases, displaced by statute. This is a phenomenon which dates back to at least the 19th century, but grew significantly in the 20th century particularly in relation to compensation for workplace accidents and fatal

accidents, trade disputes and defamation. A prominent example of the modification of the common law by statute in Australia can be found in the *Civil Liability Acts* of the various States. The *Civil Liability Act 2002* (NSW) applies to the tort of negligence in relation to personal injury and death and to action against public authorities. It now sets out the necessary conditions for a finding of negligence which broadly comprise a not insignificant foreseeable risk, coupled with a failure to take precautions which a reasonable person would have taken. It leaves open to common law principle, however, the circumstances in which a duty of care arises. It speaks of causation as requiring a determination that negligence was a necessary condition of the occurrence of the harm complained of and that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused.

Some of the provisions of that legislation were considered by the High Court in *Adeels Palace Pty Ltd v Moubarak*.¹⁸ The provisions themselves are not necessarily identical with common law principles. As the Court observed in relation to the question of causation:

It is sufficient to observe that, in cases where the *Civil Liability Act* or equivalent statutes are engaged, it is the applicable statutory provision that must be applied.¹⁹

There are a number of ways in which statutes can impact upon the judge-made or common law. In the field of torts these ways include:

- . statutory modification of an existing tort;
- . statutory creation of a new tort, eg the proposal by the Australian Law Reform Commission for a statutory tort of invasion of privacy;

¹⁸ (2009) 239 CLR 420.

¹⁹ (2009) 239 CLR 420, 440 [44].

- . statutory incorporation of an existing common law tort;
- . development of the common law by analogy from a statute;
- . implied creation of a tort by statute;
- . creation by statute of new occasions for the commission of torts; and
- . statutory changes to procedural laws affecting access to justice in relation to tort actions.

Similar surveys may be undertaken in other fields of the common law, particularly in contract.

A recent decision of the High Court²⁰ illustrates the point. It concerns a woman, Mrs Young, living in New South Wales, who purchased a European tour package from a New South Wales tour company called Insight Vacations Pty Ltd ('Insight Vacations'). Part of the tour involved travel on a coach from Prague to Budapest. In the course of the journey Mrs Young got out of her seat to retrieve a bag from the overhead luggage shelf. The coach braked suddenly and she fell and was injured. Her contract with the tour company was governed by the law of New South Wales.

Mrs Young sued Insight Vacations in the Local Court of New South Wales. She sued in contract and found that there was a statutory provision to help her. It was s 74 of the Trade Practices Act, which made it an implied term of her contract with Insight that the services supplied by it would be rendered with due care and skill. She alleged that Insight Vacations had not done that and that as a result she had suffered injury. Insight Vacations, however, pointed to an exemption clause in the

²⁰ *Insight Vacations Pty Ltd (t/as Insight Vacations) v Young* (2011) 43 CLR 149.

contract which said that where a passenger occupies a motor coach seat fitted with a safety belt, neither the operators nor their agents or cooperating organisations would be liable for any injury arising from any accident if the safety belt was not being worn at the time of such accident. The question was whether the exemption clause could defeat the warranty implied by the Commonwealth statute.

Section 5N of the *Civil Liability Act 2002* (NSW) permitted parties to a contract for 'recreation services' to provide by their contract for the exclusion, restriction or modification of liability. The Commonwealth law, the Trade Practices Act, in turn left room for the operation of a State law which limited or precluded liability for breach of an implied warranty created by the Commonwealth law. In this case, however, the Court held, as a matter of statutory interpretation, that the State law allowed the parties to contract an exemption clause, but did not itself create an exemption and was therefore not picked up by the Commonwealth law. In any event, the relevant provision of the State law did not apply to a contract to be performed wholly outside the State of New South Wales. The exemption clause was thus overcome by the implied term created by the Trade Practices Act.

In any event, as the Court noted, the exemption clause began with the words 'Where the passenger occupies a motor coach seat fitted with a safety belt...' It was to be construed as referring only to times when the passenger was seated, not to times when the passenger stood up to move around the coach or to retrieve some item from an overhead shelf or for some other reason. The contract did not require passengers to remain seated at all times while the coach was in motion. The provision of a toilet at the rear of the coach showed that the operator accepted that a passenger could, and sometimes would, get out of his or her seat. The case is a good example of the way in which a contract which derived its legal force from the common law was nevertheless embedded in a matrix of Commonwealth and State statutes which ultimately determined a right of action under the contract.

The growth of statute law has a particular impact on the constitutional relationship between the judiciary and the executive. The exercise by public officials of powers conferred upon them by statute is subject to review by the courts where it is asserted that an official has exceeded his or her powers or has purported to

exercise the power in a way that is not authorised by the statute. This again involves the judiciary in the exercise of statutory interpretation.

Statutory interpretation and judicial review of public power

Today in Australia, we go about our lives under a mountain range of statutory words, imposing obligations and restrictions, creating rights and liabilities and conferring powers on a large array of regulatory bodies, public authorities and officials.

Power may be conferred on officials or public authorities in broad terms limited only by the requirements of good faith and the scope, purpose and subject matter of the statute under which the power is conferred. On the other hand, official powers may be conferred subject to prescribed conditions. If the conditions are not met then the power cannot be exercised. Judicial review of decisions in such cases may involve questions of statutory interpretation. For if the decision-maker has misconstrued the condition upon which the exercise of his or her power depends, then the purported exercise of the power may be invalid for jurisdictional error. The more words that are used in conditioning the exercise of an executive power, the more scope there can be for debate about what they mean and therefore about the circumstances in which the power can be exercised. It was statutory interpretation affecting the exercise of public power that lay at the heart of this Court's highly publicised decision involving the Migration Act in *Plaintiff M61/2010E v Commonwealth*,²¹ concerning the requirements for procedural fairness in onshore processing of persons held in detention under the Migration Act and *Plaintiff M70 v Minister for Immigration and Citizenship*,²² which concerned what was called the 'Malaysia solution'.

²¹ (2010) 85 ALJR 133.

²² (2011) 85 ALJR 891.

Judges and the discovery of legislative intention

Consistency with 'legislative intention' is sometimes seen as a criterion for the legitimacy of the judicial interpretation of a statute. A frequently quoted judgment of the High Court in this context is *Project Blue Sky Inc v Australian Broadcasting Authority*.²³ The case involved the interpretation of the words 'the Australian content of programs' in a section of the *Broadcasting Services Act 1992* (Cth). Under that section, the Australian Broadcasting Authority was required to determine standards to be observed by commercial television broadcasting licensees. The term itself was not defined. The Court held it to be a flexible expression, including matter reflecting Australian identity, character and culture. In their joint judgment, McHugh, Gummow, Kirby and Hayne JJ said, inter alia:

... the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have.²⁴

It is useful to reflect upon what is meant by the concept of legislative intention.

The courts take as their starting point in the interpretation of statutes the ordinary and grammatical sense of the words. This is consistent with the proposition that in a representative democracy those who are subject to the law, those who invoke it and those who apply it are entitled to expect that it means what it says. As Gaudron J said in 1991:

... that rule is dictated by elementary considerations of fairness, for, after all, those who are subject to the law's commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.²⁵

²³ (1998) 194 CLR 355.

²⁴ (1998) 194 CLR 355, 384 [78] (footnote omitted).

²⁵ *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 340.

The concept of legislative intention however, is elusive. The search for authorial intention, whether by the collective makers of a legal text or a single author, can involve the pursuit of a mirage. In their joint judgment in *Byrnes v Kendle*,²⁶ a decision of the High Court delivered in August 2011, Heydon and Crennan JJ considered the question of authorial intention in relation to constitutions, statutes, contracts and trusts. The case raised the question whether a person who signed an acknowledgment of trust had actually intended to create a trust. The Court held that the person's intention was to be found from the words of his written acknowledgment, not from any mental reservations which he might have held. Heydon and Crennan JJ quoted a paper by Charles Fried, published in the *Harvard Law Review* in 1987 in which the author said:

The argument placing paramount importance upon an author's mental state ignores the fact that authors writing a sonnet or a constitution seek to take their intention and embody it in specific words. I insist that words and text are chosen to embody intentions and thus replace inquiries into subjective mental states. In short, the text is the intention of the authors or of the framers.²⁷

In their joint judgment, Heydon and Crennan JJ related this passage, which concerned constitutional construction, to statutory construction and to the construction of contracts. What then is the role of legislative intention? Are the real intentions of the parliamentarians who voted for a statute to be inquired into and somehow assembled by the Court into a collective mental state which may then inform the interpretation of the statute? The answer to that question is no. The concept of legislative intention is a construct. It has been called a 'fiction' on the basis that individual members of Parliament do not necessarily mean the same thing

²⁶ (2011) 243 CLR 253.

²⁷ (2011) 243 CLR 253, 283 [95] quoting C Fried, 'Sonnet LXV and the "Black Ink" of the Framers' Intention' (1987) 100 *Harvard Law Review* 751, 758-759 (emphasis in original, footnotes omitted).

by voting on a Bill 'or, in some cases anything at all'.²⁸ It has also been said that if legislative intention is used as a description of a collective mental state of the body of individuals who make up the Parliament, then it is a fiction with no useful purpose.²⁹

The significance of 'legislative intention' has been considered recently in two decisions of the High Court. The most recent of those was *Lacey v Attorney-General (Qld)*,³⁰ which was delivered on 7 April 2011. Six Justices of the Court set out the approach which is to be applied in construing a provision of the *Criminal Code 1899 (Qld)* permitting appeals by the Attorney-General against sentences imposed on convicted persons. The contested question of interpretation was whether or not it was necessary for the Court of Appeal to identify error on the part of the primary judge before it could intervene in such an appeal. The joint judgment referred to *Project Blue Sky* and the objective of giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have. The joint judgment then said of legislative intention:

The legislative intention ... is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.³¹

In an earlier decision, *Zheng v Cai*, the Court said:

... judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws ... the preferred

²⁸ *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 339 (Gaudron J).

²⁹ (1991) 172 CLR 319, 345-346 (McHugh J).

³⁰ (2011) 242 CLR 573.

³¹ (2011) 242 CLR 573, 592 [43] (footnotes omitted).

construction by the Court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.³²

Although legislative intention does not seem to have any independent reality, the process of interpretation does involve the identification of a statutory purpose. Such purposes may be set out in the Act itself or may be inferred from its terms. It may be found by appropriate reference to extrinsic materials, such as a Second Reading Speech or an Explanatory Memorandum, or the report of a Law Reform Commission whose recommendations have led to the enactment of the statute. Reliance upon such materials is expressly authorised in respect of Commonwealth statutes by the *Acts Interpretation Act 1901* (Cth) ('the Acts Interpretation Act') and, in respect of State and Territory statutes, by similar provisions in State and Territory laws. In the end, however, it is the text of the statute which governs. If it happens that there was a ministerial statement of purpose in relation to a statute which is at odds with the text of the statute itself, then the text will govern.

By way of example, in 1987, the High Court considered the question whether an American citizen who had deserted from the United States Marine Corp in 1970 and had later travelled to Australia, where he acquired permanent resident status, could lawfully be arrested on warrant and delivered to the United States Military. The answer to that question turned upon the interpretation of s 19 of the *Defence (Visiting Forces) Act 1963* (Cth). The Minister's Second Reading Speech had unambiguously asserted that the part of the Act in which that provision was contained related to deserters and absentees whether or not they were from a visiting force. However, Mason CJ and Wilson and Dawson JJ said of the Second Reading Speech:

But this of itself, while deserving serious consideration, cannot be determinative; it is available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law. Particularly is this

³² (2009) 239 CLR 446, 455-456 [28] (footnotes omitted).

so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law.³³

That position is reflected in subsequent decisions of the Court.³⁴

Section 15AB of the Acts Interpretation Act, which authorises resort to extrinsic materials, places an important qualification on that authority. The section requires that in determining whether consideration should be given to any such material, regard shall be had to the desirability of persons being able to rely upon 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. This reflects a concern that the more that resort to extrinsic material is necessary in order to understand the true meaning of a provision of an Act of Parliament, the less accessible that true meaning is to the ordinary reader and the more expensive and labour intensive the business of interpretation becomes. It may be that some would regard this concern as academic having regard to the inexorable increase in the volume and complexity of contemporary statutes. It is important, however, to keep the principle alive.

Interpretation versus rewriting the limits of the judicial function

Common law principle does not authorise the courts, by a process of pseudo interpretation, to change the meaning of a statute or to distort it. One of the questions

³³ *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518.

³⁴ *Mills v Meeking* (1991) 69 CLR 214, 223, 226 (Mason CJ and Toohey J); *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492; *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109, 126 [29].

which was raised in the recent case of *Momcilovic v The Queen*,³⁵ concerning the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter'), was whether the Charter requires the courts to undertake a rewriting exercise in interpreting statutes in accordance with human rights declared in the Charter. Section 32(1) of the Charter provides:

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

Although there was a variety of views in the Court about a number of issues raised in the case, it is clear from the judgments that s 32(1) cannot be used to do other than interpret a statute compatibly with human rights declared in the Charter to the extent that such an interpretation is open on the language of the statute. In this respect the position under the Charter is to be distinguished from the position under the *Human Rights Act 1998* (UK).³⁶ The Charter provision is conceptually analogous to the common law principle of legality which is an important common law rule for the interpretation of statutes. But that rule only permits the choice of an interpretation which the language of the statute can bear.

The principle of legality in Australia appears to have its origins in a frequently quoted passage from the judgment of O'Connor J in the 1908 decision *Potter v Minahan*.³⁷ There, O'Connor J said, referring to the 4th edition of Maxwell *On the Interpretation of Statutes*:

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

³⁵ (2011) 85 ALJR 957.

³⁶ See, eg, *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

³⁷ (1908) 7 CLR 277.

their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.³⁸

That statement was based upon a passage in the judgment of Marshall CJ in *United States v Fisher*.³⁹

The principle enunciated in *Potter v Minahan* has evolved into an approach to interpretation which is protective of fundamental rights and freedoms. It has the form of a strong presumption that broadly expressed official discretions are to be subject to rights and freedoms recognised by the common law. It has been explained in the House of Lords as requiring that Parliament 'squarely confront what it is doing and accept the political cost'.⁴⁰ Parliament cannot override fundamental rights by general or ambiguous words. The underlying rationale is the risk that, absent clear words, the full implications of a proposed statute law may pass unnoticed:

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.⁴¹

The interpretive rule which thus developed can be regarded as 'constitutional' in character even if the rights and freedoms which informs its application are not of that character. There have been many applications of the general rule which, in Australia, had its origin in *Potter v Minahan*. It has been expressed in quite emphatic terms. Common law rights and freedoms are not to be invaded except by 'plain words'⁴² or necessary implication.⁴³

³⁸ PB Maxwell, (*Maxwell*) *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) 122 (footnote omitted).

³⁹ (1805) 2 Cranch 358, 390.

⁴⁰ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131. See also *R v Lord Chancellor; Ex parte Witham* [1998] QB 575; D Dyzenhaus, M Hunt and M Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5.

⁴¹ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131.

⁴² *Re Cuno* (1889) 43 Ch D 12, 17 (Bowen LJ).

The principle of legality has not been limited in its application to only those rights and freedoms historically recognised by the common law. Native title was not recognised by the common law of Australia until 1992. It is nevertheless the beneficiary of the general presumption against interference with property rights. For native title is taken not to have been extinguished by legislation unless the legislation reveals a plain and clear intent to have that effect. This presumption applies to legislation which may have predated the decision in *Mabo (No 2)*⁴⁴ by many decades and in some cases by more than 100 years. It is a requirement which was said, in the *Mabo (No 2)* decision, to flow from 'the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land'.⁴⁵

The common law interpretive principle protective of rights and freedoms against statutory incursion retains its vitality, although it has evolved from its origins in a rather anti-democratic, judicial antagonism to change wrought by statute. It has a significant role to play in the protection of rights and freedoms in contemporary society, while operating in a way that is entirely consistent with the principle of parliamentary supremacy. Whether it goes far enough, or whether we need a Human Rights Act to enhance that protection with judicial and/or administrative consideration of statutory consistency with human rights and freedoms, is a matter for ongoing debate.

Conclusion

The judicial function in Australia and in all representative democracies requires continuing assessment and consideration. In the age of statutes the function of judges in interpreting legal texts has become more, rather than less, important. The

⁴³ *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206 (Higgins J).

⁴⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁴⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 64.

boundaries of that function must be consistent with the concept of a representative democracy in which Parliament makes the laws, the executive administers them, and the judiciary interpret and applies them in the resolution of matters falling within its jurisdiction.

Jack Goldring, academic, educational administrator, law reformer, and judge, made a significant contribution in his lifetime to the understanding and working of our legal and judicial systems. It is a great pleasure to have been able to speak in his honour.