

Bending Words: The Fine Art of Interpretation

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Introduction

Australia's legal landscape is dominated by statutes. The Constitution of the Commonwealth is s 9 of the *Commonwealth of Australia Constitution Act 1900*, a statute of the British Parliament. The Constitutions of the States are statutes which originally derived their legal effect from Imperial Acts and were continued in force by the Commonwealth Constitution. The legislative, executive and judicial powers of the Northern Territory and the Australian Capital Territory are derived from Self-government Acts enacted for each of them by the Commonwealth Parliament. Statutes enacted under the legislative power of Commonwealth, State or Territory Parliaments take their place in a common law environment and tradition which informs the way in which they are interpreted, the meaning of terms used in them and underlying assumptions upon which they may rest.

The 'unwritten' or common law is judge-made law. It comprises doctrines and principles received into each of the Australian colonies to the extent applicable to the conditions of the colony and the terms of the Charter or instrument providing for its government.¹ Since the establishment of the High Court as Australia's final appellate court, the common law, as declared by it, stands as one common law for the whole of Australia.²

The common law is an important source of principles governing the interpretation of statutes. Those principles mark constitutional boundaries between courts and legislatures which must be respected when statutes are interpreted. The function of the common law in relation to the interpretation of statutes therefore has a constitutional dimension. It underpins

¹ Bruce H McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2007) 78–80. See also *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 206–7.

² *Lipohar v The Queen* (1999) 200 CLR 485, 500; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.

the institutional function of the courts as the authoritative interpreters of the law. In so saying, of course, it is necessary to recognise the reality that many other people interpret the law in a way that is effectively final for many members of the community. There are vast volumes of 'soft law' to be found in manuals and guidelines given to public officials who administer the delivery of government services and carry out a vast array of regulatory functions. While that is the reality, the ultimate determinant of interpretation under our system, in the event of dispute, is the judicial process.

Before returning to that constitutional dimension of interpretation and how it affects the approach of the courts — particularly in relation to the idea of legislative intention — it is useful to have regard to the significance of statutes and statutory interpretation in Australia today.

Statutes are everywhere

There are few, if any, cases decided by the High Court today that do not involve the interpretation of one or more statutes or are not resolved within some statutory framework. What is true for the High Court is true for the courts throughout the country. So too for law school examinations. There are few, if any, questions which one could conceive that could realistically propose a problem defined purely in terms of the common law and able to be answered entirely by reference to its principles and doctrines. There are few, if any, contract cases run in the courts today which do not involve an associated claim for misleading or deceptive conduct in pre-contractual negotiations, or breach of a statutory warranty, or invocation of some regulatory or formal requirement, which may go to the legality and thereby the enforceability of the contract. There are not many actions for damages for negligence generating personal injury which do not involve one or more of the provisions of the *Civil Liability Act 2002* (WA). There may be an interaction with workers' compensation legislation and, in some cases, fatal accidents legislation. It is also not uncommon to find in that mix statutory provisions relating to contributory negligence and proportionate liability. Many examples can be cited from recent cases in the High Court.³

³ See for example *Wallace v Kam* (2013) 87 ALJR 648; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; *New South Wales v Williamson* (2012) 248 CLR 417; *Wicks v State Rail Authority of New South Wales*; *Sheehan v State Rail Authority of New South Wales* (2010) 241 CLR 60.

A case study — *Insight Vacations Pty Ltd*

In 2011, the High Court decided *Insight Vacations Pty Ltd v Young*.⁴ The facts read like the facts for a straightforward exam question on tortious and contractual liability arising out of personal injury. Mrs Young, who lived in New South Wales, purchased a European tour package from a New South Wales tour company called Insight Vacations Pty Ltd. A component of the tour involved travel on a coach from Prague to Budapest. During that coach journey Mrs Young got out of her seat to retrieve a bag from the overhead luggage shelf. The coach, which was travelling at a high speed, 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 the tour company in contract in the Local Court of New South Wales. In so doing, she also invoked s 74 of the *Trade Practices Act 1974* (Cth) 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. Insight, however, responded by pointing to an exemption clause in the contract which said that where a passenger occupies a motorcoach 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 that accident. The question was whether that exemption clause could defeat the warranty implied by the statute.

Section 5N of the *Civil Liability Act 2002* (NSW) permitted parties to a contract for 'recreation services' to provide for the exclusion, restriction or modification of liability'. Was that inconsistent with the implied term under the *Trade Practices Act*? Not necessarily. The *Trade Practices Act* expressly 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. The High Court held, as a matter of statutory interpretation, that the *Civil Liability Act 2002* (NSW), which allowed the parties to contract an exemption clause, did not of itself thereby limit or preclude liability for breach of the implied warranty. There was therefore no State law to be picked up by the Commonwealth law. In any event, the relevant provisions of the State law did not apply to a contract to be formed wholly outside the State of New South Wales. The exemption clause in the contract was therefore overcome by the implied term created by the *Trade Practices Act*.

⁴ (2011) 243 CLR 149.

The High Court also observed that the exemption clause began with the words 'Where the passenger occupies a motorcoach seat fitted with a safety belt ...' that clause was to be construed as referring only to times when the passenger was seated not times when the passenger stood up to move around the coach or retrieve some item from an overhead shelf or for some other reason. The passengers were not required to remain seated at all times while the coach was in motion.

That 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.

A large scale case study — statutes and torts

In the field of torts it is possible to set out a variety of ways in which the law of torts is affected by statutes.⁵ They include:

1. Statutory modification of an existing common law tort — for example, codification of defamation law, workers' compensation schemes, schemes for sports injuries and victims of crime, motor accident liability schemes, no fault compensation schemes, occupier's liability legislation and legislation relating to damage by animals, particularly dogs. The *Civil Liability Acts* are a prominent example throughout Australia.
2. Statutory creation of a new tort — for example, a law which gives statutory effect to an existing tort or creates a statutory cause of action imposing liability for damages for interference with a statutory right. A contentious contemporary example is a proposal to create a statutory tort of invasion of privacy.⁶
3. Statutory abolition of a common law tort — for example, the abolition of the torts of loss of consortium, champerty and maintenance. Loss of consortium has been abolished in New South Wales, Tasmania, Western Australia and the Australian Capital Territory. Maintenance and champerty have been abolished in New South Wales, Victoria and the Australian Capital Territory.

⁵ Robert French, 'Torts in Commercial Law: Promiscuous Entanglement or Blessed Union?' in Simone Degegling et al (eds), *Torts in Commercial Law* (Thomsons, 2011) 17, 30.

⁶ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) 888.

4. Statutory incorporation of an existing common law tort — an example is to be found in s 116 of the *Copyright Act 1968* (Cth) which authorises an owner of copyright in a work or other subject matter to bring an action for conversion or detinue in relation to an infringing copy or a device. A less explicit form occurs where a statute imposes a duty in terms reflecting a common law rule, for example, the duty imposed by the *Corporations Act* on company directors by ss 180 and 181.
5. Development of the common law by analogy from statute — this is an area not particularly well developed in Australia and subject to ongoing debate.
6. Implied creation of a tort by statute — the so-called action for breach of statutory duty which has sometimes been regarded as a special case of reasoning by analogy from statute.
7. Creation by statute of new occasions for the commission of torts — when a statute confers powers or obligations on authorities or individuals they may create occasions for the application of common law torts.
8. Statutory changes to procedural laws affecting access to justice in relation to tort actions — for example, the impact of representative or class actions coupled with commercial litigation funding.

Similar taxonomies of the interaction between statute law and common law and equity may be created in relation to contract, property, trusts and equitable doctrines generally.

If there is a legal dispute — look first to the statute

The teaching of statutory interpretation is important not only for its content but also as a means of sensitising lawyers to the importance of identifying statutes relevant to a particular legal problem. Sometimes even highly intelligent practitioners become enthused by an argument about the limits of constitutional power or the application of international law in a domestic setting or new development of the doctrines of the common law and equity and blinkered to the significance of the statutory setting of the case. In a case in which the question whether a statute exceeds constitutional power or infringes a constitutional prohibition is raised, the point of departure must be the construction of the statute.

Another case study — *Evans v State of New South Wales*

Constitutional challenges to the validity of a Commonwealth, State or Territory statute or regulation must begin with the interpretation of the statute or regulation. Judgments as to validity can only be made against the statute or regulation properly construed. In the particular case of inconsistency between Commonwealth and State statutes the first question to be asked is what is the proper construction of each of the laws said to be inconsistent? Only when that question is asked and answered can the question of inconsistency be addressed.

An example in the first category was the decision of the Full Court of the Federal Court in *Evans v State of New South Wales*.⁷ The *World Youth Day Act 2006* (NSW) was enacted in connection with the visit of the Pope to New South Wales in 2008 for a major annual gathering of young members of the Catholic Church in Sydney. A regulation made under the Act empowered police officers and authorised persons to direct people in World Youth Day declared areas to cease engaging in conduct that causes 'annoyance or inconvenience' to participants in a World Youth Day event. The No Pope Coalition challenged the regulation as infringing the implied freedom of political communication. Before that question could be reached however, the prior question had to be answered — was the regulation a valid exercise of the regulation making power under the Act? The Court's answer was that, properly construed, the Act did not authorise the conferring of such a wide-ranging power to regulate annoying conduct. An important principle of construction applied to the limits of that power was the principle of legality. Where the text of a statute presents constructional choices, the principle of legality will favour that choice which least disturbs common law freedoms. A freedom which has acquired a special status at common law is freedom of speech.

The regulation making power under the Act authorised the making of regulations 'regulating ... the conduct of the public'. The Court said:

The term 'regulating ... the conduct of the public' is capable of a range of constructions from the regulation of any conceivable conduct to the regulation of conduct relevant to the events on World Youth Day. It may encompass acts and some or all forms of

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[2008] FCAFC 130.

speech and communication. There are constructional choices open. It is an important principle that Acts be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms.⁸

A discussion of the principle of legality and relevant authorities followed and the Court concluded:

In our opinion the conduct regulated by [the Regulation] so far as it relates to 'annoyance' may extend to expressions of opinion which neither disrupt nor interfere with the freedoms of others, nor are objectively offensive in the sense traditionally used in State criminal statutes. Breach of this provision as drafted affects freedom of speech in a way that, in our opinion, is not supported by the statutory power conferred by s 58 properly construed. Moreover there is no intelligible boundary within which the "causes annoyance" limb of s 7 can be read down to save it as a valid expression of the regulating power.⁹

The regulation having been found to be beyond power, the question whether it infringed the implied constitutional freedom of political communication did not arise.

Another constitutional case study — *K-Generation Pty Ltd v Liquor Licensing Court*

A similar approach was taken in *K-Generation Pty Ltd v Liquor Licensing Court*.¹⁰ That involved a challenge to the validity of s 28A of the *Liquor Licensing Act 1997* (SA), which required the Licensing Court of South Australia to take steps to maintain the confidentiality of information classified by the Commissioner of Police as 'criminal intelligence'. The provision was challenged on the basis that it offended against the principles developed in the line of cases beginning with *Kable v Director of Public Prosecutions (NSW)*¹¹ by directing courts of South Australia to deny procedural fairness in a manner that substantially impaired their institutional integrity and impartiality. In that case the Court held that the impugned provision was valid. Properly construed, it left the Licensing Court and the Supreme Court to determine whether the Commissioner's classification of information as criminal intelligence met the objective criteria supplied by the

⁸ Ibid [68].

⁹ Ibid [83].

¹⁰ (2008) 237 CLR 501.

¹¹ (1996) 189 CLR 51.

definition of that term. It did not deprive those courts of the discretion to determine what weight to attach to such evidence or what steps were sufficient to maintain confidentiality. Nor did it mandate a general exclusion in all circumstances of legal representatives from access to the designated information.¹²

International law — *Maloney v The Queen*

It is important in the interpretation of statutes giving effect to International Conventions to bear in mind that, while the terms of the Convention will inform construction, it is ultimately the statute itself as enacted by the Parliament that determines the rights, duties and liabilities arising under it. In *Maloney v The Queen*¹³, an indigenous resident of Palm Island in Queensland was charged with possessing more than the prescribed quantity of liquor in a restricted area on Palm Island. Palm Island was subject to regulations made under the *Liquor Act* of Queensland declaring it a restricted area and restricting the nature and quantity of liquor which people could have in their possession in the community area on the Island. The community was composed almost entirely of indigenous people. Mrs Maloney appealed against her conviction arguing that the *Liquor Act* and the regulations made under it were invalid by reason of inconsistency with s 10 of the *Racial Discrimination Act 1975* (Cth). That section provides that if a State law has the effect that persons of a particular race do not enjoy a right enjoyed by persons of another race, or enjoy it to a more limited extent, the person adversely affected shall, by force of s 10, enjoy that right to the same extent as the persons of that other race. Another provision of the *Racial Discrimination Act* provided that the provision did not apply in or in relation to the application of 'special measures' to which Art 1(4) of the International Covenant for the Elimination of all Forms of Racial Discrimination applies. In dismissing Mrs Maloney's appeal the High Court held that the relevant provision constituted a special measure within the meaning of Art 1(4) of the Convention. There was an endeavour to argue that interpretations of the special measures provision of the Convention, which had been made by a United Nations Committee established under the Convention, mandated consultation as a condition of the special measures exemption. That submission was not accepted. The text of Art 1 of the Convention, as imported by the *Racial Discrimination Act*, did not bring with it consultation

¹² (2008) 237 CLR 501, 526–27 [73]–[76] (French CJ); 542–543 [147] (Gummow, Hayne, Heydon and Kiefel JJ).

¹³ (2013) 87 ALJR 755.

as a definitional element of a 'special measure'. Nor could that requirement be imported into the text by the subsequent opinion of expert bodies. I should add that there had been in that case evidence of consultation but dispute as to its extent.

Interpretation as law-making

In interpreting statutes the courts undertake a constitutional function which is distinct from the law-making function of the Parliament. However, interpretation often involves choices between plausible competing constructions. In making those choices the courts may be said to be engaged in a kind of interstitial law-making which has long been accepted as part of their legitimate function. While there are many cases in which there is one clearly correct answer to a question of interpretation, there are many others in which competing interpretations are open. Most words have more than one meaning or shade of meaning. The linking of words in a statutory provision may damp down their individual uncertainties or accentuate them.

By way of slight digression I should say that sometimes parliament will legislate in broad terms leaving the courts to determine the application of a statute on a case-by-case basis embodying the processes of the common law. One example is the prohibition against misleading or deceptive conduct in the *Trade Practices Act* and now in the *Australian Competition and Consumer Law*. There have been thousands of cases since that prohibition first entered the Australian legal universe. They have developed principles for its application in a variety of settings not imagined by those who enacted it.

Another example of long-standing recently considered by the High Court, is the criterion, found in the *Patents Act 1990* (Cth), for determining whether something is an invention capable of being patented. In *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd*,¹⁴ judgment in which was delivered on 4 December 2013, the High Court had to decide whether a method of medical treatment of the human body was a patentable invention within the meaning of s 18(1)(a) of the *Patents Act*. The statutory condition for patentability was that the asserted invention was 'a manner of manufacture within the meaning of s 6 of the *Statute of Monopolies*'. The *Statute of Monopolies* was enacted in 1623 and was seen as declaratory

¹⁴ [2013] HCA 50.

of the common law. As the High Court said in 1959 in *National Research Development Corp v Commissioner of Patents*,¹⁵ the term 'manner of manufacture' has always been applied:

beyond the limits which a strict observance of its etymology would suggest, and ... a widening conception of the notion has been a characteristic of the growth of patent law.¹⁶

In the event, the Court held that medical methods of treatment of the human body are patentable.

In statutes involving a narrower focus which require constructional choices, courts apply established principles derived from the common law and Interpretation Acts. They may apply presumptions and principles of interpretation applicable to particular circumstances that have been developed over many years. The touchstone remains always text, context and statutory purpose. 'Legislative intention' is another term which is frequently used. Its meaning and function in statutory interpretation has been the subject of recent consideration by the High Court and ongoing debate.

Imputed legislative intention — *Project Blue Sky Inc v Australian Broadcasting Authority*

In *Project Blue Sky Inc v Australian Broadcasting Authority*¹⁷ the High Court was called upon to interpret the term 'the Australian content of programs' in s 122 of the *Broadcasting Services Act 1992* (Cth), which provided for the Australian Broadcasting Authority to make program standards relevant to broadcasting in Australia. The Court held that the term was 'a flexible expression that included matter reflecting Australian identity, character and culture.' In approaching construction of that broad term, the plurality (McHugh, Gummow, Kirby and Hayne JJ) said:

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. Ordinarily, that meaning (the legal

¹⁵ (1959) 102 CLR 252.

¹⁶ Ibid 269–70.

¹⁷ (1998) 194 CLR 355.

meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.¹⁸ (footnote omitted)

It may be noted that the intention of the legislature in that passage is not presented as some kind of psychological reality, but as an imputed intention. That accords with the way in which the question of authorial intention is approached in relation to legal texts generally, including constitutions, statutes, contracts and trust deeds.

Authorial intention generally — *Byrnes v Kendall*

The question of authorial intention is one which is relevant to many forms of legal text. The question is — does it matter what the author intended to say? Take Mr Byrnes in *Byrnes v Kendall*.¹⁹ He executed an instrument in which he declared that he held on trust for his wife an undivided half interest in their home. After they separated he said he had not intended to create a trust in her favour. The High Court held that he had declared a valid trust and that, absent a vitiating factor, evidence was not admissible to contradict the intention manifested by his declaration. In their joint judgment, Heydon and Crennan JJ considered the question in the context of constitutional statutory construction and the construction of contracts and trusts. In the context of constitutional construction they quoted an observation by Charles Fried, a former Solicitor-General of the United States, who scorned the notion that there was any point, whether in interpreting poetry or the Constitution, in seeking to discern authorial intent as a mental fact. The search for authorial intent would regard the texts of a sonnet or of the Constitution as a kind of second-best:

We would prefer to take the top off the heads of authors and framers — like soft boiled eggs — to look inside for the truest account of their brain states at the moment that the texts were created.²⁰

¹⁸ Ibid 384 [78].

¹⁹ (2011) 243 CLR 253.

²⁰ Ibid 282 [95].

In a passage quoted by Heydon and Crennan JJ, Fried 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.²¹

The joint judgment went on to make the point that those approaches to constitutional construction were matched by approaches to statutory construction which was not surprising given that the Constitution is found in an Imperial Statute. The role of legislative intention in statutory construction has been discussed expressly in recent decisions of the High Court. Two of those decisions *Zheng v Cai*²² and *Lacey v Attorney-General for the State of Queensland*²³ warrant specific consideration.

Real intentions and legislative intentions

In *Zheng v Cai* the Court, in discussing the contrast between actual intentions and legislative intentions, said:

It has been said that to attribute an intention to the legislature is to apply something of a fiction. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor. Rather, 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 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.²⁴

The observations in *Zheng v Cai* were revisited in a joint judgment of six Justices of the Court in *Lacey v Attorney-General for the State of Queensland*. The case involved the

²¹ Ibid quoting 'Sonnet LXV and the 'Black Ink' of the Framers' Intention' *Harvard Law Review*, vol 100 (1987) 751, 758–59 (emphasis in original, footnotes omitted). Fried attributes the reasoning to passages in Dworkin, *Law's Empire* (Harvard University Press, 1986) 54–57, 359–65.

²² (2009) 239 CLR 446.

²³ (2011) 242 CLR 573.

²⁴ Ibid 455–56 [28] (citations omitted).

construction of s 669A(1) of the Criminal Code of Queensland which provided for Crown appeals against sentence to the Court of Appeal of Queensland. The section provided that:

the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper.

The constructional question was whether or not it was first necessary for the Crown to identify an error on the part of the sentencing judge before the Court's discretion to vary the sentence could be enlivened. The High Court answered that question in the affirmative. In so doing, it had regard to the historically exceptional character of the Crown appeal against sentence and the long-standing judicial concern that criminal statutes should not be construed so as to facilitate the erosion of common law protection against double jeopardy.²⁵ The plurality said:

In construing a statute which provides for a Crown appeal against sentence, common law principles of interpretation would not, unless clear language required it, prefer a construction which provides for an increase of the sentence without the need to show error by the primary judge. That is a specific application of the principle of legality. It is reflected in, and reinforced by, the decisions of this Court. Such a construction also has the vice that it deprives the sentencing judge's order of substantive finality. It effectively confers a discretion on the Attorney-General to seek a different sentence from the Court of Appeal without the constraint of any threshold criterion for that Court's intervention. Such a construction tips the scales of criminal justice in a way that offends 'deep-rooted notions of fairness and decency'. It is not therefore a construction lightly to be taken as reflecting the intention of the legislature.²⁶

On the other side of that restrictive approach to construction there was an argument about legislative intention said to be reflected, inter alia, in the Second Reading Speech introducing the provision.²⁷

²⁵ The double jeopardy constraint has been recently expressly precluded by legislation in a number of States relating to Crown appeals: *Crimes (Appeal and Review) Act 2001* (NSW), Pt 8; *Criminal Code 1899* (Qld), Ch 68; *Criminal Law Consolidation Act 1935* (SA), Pt 10; *Criminal Code Act 1924* (Tas), Ch XLIV; *Criminal Procedure Act 2009* (Vic), Ch 7A; *Criminal Appeals Act 2004* (WA), Pt 5A.

²⁶ (2011) 242 CLR 573, 583–84 [20] (footnotes omitted).

²⁷ Ibid 584 quoting Queensland, *Parliamentary Debates*, Legislative Assembly (Hansard), 21 November 1939, 1716–1717.

On the question of legislative intention, the plurality said:

The legislative intention [referred to in *Project Blue Sky*] 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.²⁸

The joint judgment went on to quote the passage from *Zheng v Cai*, which has already been mentioned. It drew a distinction between intention and purpose:

The application of the rules will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.²⁹

It must be recognised that in some cases it is difficult, if not impossible, to define a purpose for a statute or a statutory provision. That is particularly so in areas where the law gives effect to a compromise between conflicting interests. Statutory classes of goods or services attracting particular rates of tax or duties may fall into that category. Some aspects of intellectual property law also reflect an uneasy compromise between the interests of owners and users.³⁰ It sometimes happens that the purpose of a statutory provision cannot be defined more precisely than by reference to its immediate function.³¹

The distinction between purpose and intention reflects ordinary usage. One may discern a purpose for a constructed thing such as a tool without having to inquire about the intention of its maker. It is also possible to say that the purpose of the human eye is to enable

²⁸ Ibid 592 [43] (footnotes omitted).

²⁹ Ibid 592 [44]. Reference was made to s 14A(1) of the *Acts Interpretation Act 1954* (Qld) which provided that 'in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of Act is to be preferred to any other interpretation.'

³⁰ *Stevens v Kabaushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 208 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

³¹ *Monis v The Queen* (2013) 87 ALJR 340, 350–51 [20] (French CJ); 295 ALR 259.

people to see without having to inquire whether it reflects the intention of a deity. Purpose may discern in relation to a statutory provision without conjuring the numinous notion of legislative intention.

Debates about intention

The approach to legislative intention which treats it as an after-the-event declaration of the legitimate application of well-known rules of construction has not gone unchallenged. Some of the arguments against the approach adopted by the High Court are reflected in a recent article in the *Sydney Law Review* by Richard Ekins and Jeffrey Goldsworthy: 'The Reality and Indispensability of Legislative Intention'.³² They contend that what they call 'radical scepticism' about legislative intention is inconsistent with the constitutional allocation of law-making authority to legislatures reflected in orthodox principles of statutory interpretation and their intelligible application in practice. There is a very substantial literature on the topic which stretches back over the last century and before. It continues.

One American academic, Professor Victoria Nourse, writing in the *Yale Law Journal* in 2012, described legislative intent as 'simply a constitutional heuristic used to remind judges that in the end, it is not their decision, but Congress's. Legislative intent, then, is not an accurate description of Congress, but a message for judges about judging'.³³

When does interpretation end and legislation begin?

The limit of statutory interpretation as a constitutional function was the focus of the Court's consideration of the Victorian Charter of Rights and Responsibilities in *Momcilovic v The Queen*³⁴. Section 32(1) of the Charter provided:

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.

³² Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intention', (2014) 35 *Sydney Law Review* 39.

³³ Victoria Nourse, 'A Decision theory of Statutory Interpretation: Legislative History by the Rules', (2012) 122 *Yale Law Journal* 70, 76.

³⁴ (2011) 245 CLR 1.

The human rights referred to in the section included the right set out in s 25(1), which provided:

A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

Ms Momcilovic had been charged with an offence under the *Drugs Poisons and Controlled Substances Act 1981* (Vic) of trafficking in a drug of dependence. Section 5 of the *Drugs Act* deemed a person to be in possession of a substance for the purposes of the Act, if the substance was found upon any land or premises occupied by the person, unless the person satisfied the court to the contrary. It was argued that this provision should be construed, not according to its terms, which imposed a persuasive burden upon the accused, but so as to impose only an evidential burden upon the accused. The Court rejected that proposition, which would have gone beyond interpretation to in effect rewriting the provision. The interpretive provision, s 32(1), was treated in effect as operating in the same way as the principle of legality at common law — that is to say, favouring the choice of a construction, if one were open on the text of a provision which was compatible with human rights. That approach differed from that adopted in the United Kingdom in relation to a similar provision of the *Human Rights Act*. Section 3 of that Act, which required legislation to be 'read and given effect in a way which is compatible with the Convention rights' was construed as 'apt to require a court to read in words which change the meaning of the enacted legislation so as to make it Convention compliant'.³⁵ Its function was described by Lord Stein as 'remedial'. As Lord Phillips later said in *Ahmed v Her Majesty's Treasury*:

the House of Lords has extended the reach of s 3 of the HRA beyond that of the principle of legality.³⁶

³⁵ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 577 [49].

³⁶ [2010] 2 AC 534.

Concluding Observations

It is of fundamental importance that all law graduates, whether going into practice or other forms of law job, should be aware of the central significance of statutes in the Australian legal system. They should be aware of the interactions between the common law and statute law. There are very few problems which are purely common law problems. There are many statutes which assume or incorporate common law principles and terminology. The common law provides rules for the interpretation of statutes. So too do Interpretation Acts. Law graduates should know how to read a statute in a way that enables them to understand its text and to discern alternative meanings where they may be open. They need to have an understanding of the concepts of text, context, and purpose, as well as the specific principles and techniques to be found in the cases and collected in relevant texts, which assist the process of statutory construction. They should be able to apply the provisions of a statute to a particular fact situation and be able to make inferences about rights, powers, duties and liabilities which may arise out of that application.

Statutory interpretation is about a lot more than working out the meaning of words or collections of words. It lies at the centre of the administration of justice and marks off constitutional boundaries between the judiciary, the legislature and the executive. The law cannot be interpreted by executive fiat. The authorised interpreters of the law are the courts.

Competence in using the techniques of statutory interpretation is essential to legal practice today. To provide a basic grounding for the development of that competence is a responsibility of legal educators.