Sir Frank Kitto Lecture
University of New England

What were they thinking?
Statutory Interpretation and Parliamentary Intention

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Introduction

May I begin by paying tribute to the life and works of Sir Frank Kitto, 18th Justice of the High Court of Australia and former Chancellor of this University? He was born in Melbourne but undertook his primary and secondary school education in Sydney. He had to seek paid employment immediately after leaving school and joined the Public Service of New South Wales where he worked in the State Crown Solicitor's Office. However, he won an exhibition to Sydney University where he enrolled as an evening student in the Faculty of Arts.

The young Kitto graduated in Arts in 1924 and with first class honours in law in 1927. He went to the New South Wales Bar in that year. He also took part-time work coaching students and lecturing at the Law School and writing on the law. In 1928, he married Eleanor Howard, a teacher and science graduate from the University of Sydney.

In the 1930s, Frank Kitto carved out a reputation for himself at the Bar in equity, taxation and bankruptcy, but also began to be briefed in the appellate jurisdiction of the High Court and in constitutional cases. He was appointed Challis Lecturer in Bankruptcy and Probate at the University of Sydney in 1930 and continued with that appointment until 1933. He tried to enlist for military service during the war but his enlistment application was not accepted. In 1942 he took Silk. His High Court practice increased, as did his equity practice.

In 1947 he represented English-controlled banks in the *Bank Nationalisation* case[1]. Not long after the appeal from the High Court to the Privy Council in the *Bank Nationalisation* case[2], Kitto was offered appointment to the High Court. He was then 47 years of age. He commenced his term as a Justice of the Court in May 1950 under Chief Justice Sir John Latham. His colleagues were Sir Owen Dixon, Edward McTiernan, Dudley Williams, Sir William Webb and Wilfred Fullagar. He remained on the Bench until 1970. A few years before his retirement, he and Eleanor purchased a property at Armidale where his eldest daughter and her family had moved in the early 60s. He joined the University Council in 1966, became its Deputy Chancellor in 1968 and, upon his retirement from the Bench in 1970, was elected as Chancellor.

In 1976, Sir Frank Kitto became the Inaugural Chairman of the Australian Press Council. After a long illness his wife of 54 years, Eleanor, died in 1981. She died five days after they had travelled together to Sydney University where he received the honorary degree of Doctor of Laws. He also received the honorary degree of Doctor of Letters from this University. He died in February 1994.

Sir Frank Kitto has been described as one of Australia's 'greatest citizens: scholar, advocate, judge, university principal and Press Council administrator'.[3] The late Justice Roderick Meagher who wrote his obituary in *The Australian* said of him:

> It was not only in forensic ability that he excelled: he was probably Australia's leading legal writer.[4]

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

2 *Commonwealth v Bank of New South Wales* [1950] AC 235.

3 R Meagher, 'Champion of justice, knowledge', *The Australian*, 18 February 1994, 13.

4 Ibid.

Writing about him in *The Oxford Companion to the High Court of Australi*a, former Justice Michael Kirby said:

> He shared with Griffith a confident command of nineteenth-century English jurisprudence. He shared with Isaacs the deployment of powerful language in the cause of persuasion. He shared with Dixon the philosophy of judicial restraint. While he did not have Windeyer's inquisitive fascination for the policies that lay behind the common law principles, or for legal history, he wrote in every area of the law he touched with accuracy and precision.[5]

In an often quoted paper which he delivered in 1973 entitled 'Why Write Judgements?', Kitto said:

> [T]he delivery of reasons is part and parcel of the open administration of justice. It is not enough that the hearing of a case has been in public. The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to high judicial performance.[6]

He realised that publishing written reasons provided more ground for others to criticise and to ensure that any censure directed at a judgment would be enduring. Nevertheless, as he said:

> … considerations of despair have no place in the [judge's] thinking.[7]

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[5] M Kirby, 'Kitto, Frank Walters' in T Blackshield et al, *The Oxford Companion to the High Court of Australia* (2003 reprint) 398.

[6] FW Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787, 790.

[7] Ibid 791.

The Importance of Statutes

The focus of this lecture is upon the expression of rules of law in the written word of statutes enacted by the Parliament and the process of their interpretation by the courts. It is the interpretation and application of statutes that dominates the work of the courts and of practising lawyers today. It is statutory interpretation that was at the heart of two recent highly publicised decisions of the High Court, the Malaysian Declaration case, *Plaintiff M70 v Minister for Immigration and Citizenship*[8] and the Victorian Charter of Rights case, *Momcilovic v The Queen*.[9] Its importance is not confined to high profile cases in strongly contested areas of public policy.

A recent decision of the High Court[10], with a considerably lower profile than the *M70* and *Momcilovic* cases, 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 1974* (Cth) ('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 had not done that and that as a result she had suffered injury. Insight, however, pointed to an exemption clause in the contract which said that where a passenger occupies a motor coach seat fitted with a safety belt, neither the operators nor their agents or

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[8] (2011) 280 ALR 18.

[9] (2011) 280 ALR 221.

[10] *Insight Vacations Pty Ltd (t/as Insight Vacations) v Young* (2011) 276 ALR 497.

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.

There was a provision in a State law, s 5N of the *Civil Liability Act 2002* (NSW), which 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.

Now you might well be forgiven for thinking, in light of that example, that if statutory interpretation lies at the heart of much contemporary judicial decision-making and legal practice, judicial decision-making and legal practice are not

suitable occupations for anybody with a spark of intelligence, creativity or imagination.

Interpretation is about language in a legal text. Sometimes the most uninspiring question of statutory interpretation may be resolved by the reference to the use of language in literature. In his poetic 'Essay on Criticism', Alexander Pope included the following lines:

> Knights, Squires, and Steeds, must enter on the Stage.
> So vast a Throng the Stage can ne'er contain.
> Then build a New, or act it in a Plain.

Neasey J of the Supreme Court of Tasmania applied Pope's use of the word 'contain' in 1981 to support his conclusion that a dead blowfly resting on an indentation on the surface of an iced cake could be said to be 'contained' in the cake within the meaning of s 63(1)(ba) of the *Public Health Act 1962* (Tas).[11] That section provided that an article of food is adulterated when it contains a foreign substance.

Statutory interpretation is the field in which Parliament and the courts and, from time to time, the Executive, interact in the discharge of their respective constitutional functions. Parliament makes the laws, the Executive exercises powers and discharges obligations conferred on it by those laws and the courts hear and determine cases including cases about their correct interpretation. When contested interpretations of law are advanced in litigation and close scrutiny of the law is required to resolve the contest, a degree of indeterminacy may become apparent. That can happen in a variety of contexts in the interpretation of the Constitution, or of a statute or, indeed, of contracts or other forms of legal text. It is in the nature of language that words have nuances and shades of meaning. Nuance and shades of meaning do not disappear when words are used in statutes. Combinations of words may narrow their individual indeterminacies, but sometimes can have the reverse

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[11] *Doyle v Maypole Bakery Pty Ltd* [1981] Tas R 376.

effect. It is not at all unusual therefore that, in a contest about the meaning of a statute, more than one reasonable outcome is exposed. Constructional choice is frequently a feature of interpretation. Where the choice is identified and made according to rules which reflect the proper function of the court interpreting the statute, it is legitimate even though reasonable minds may differ as to the outcome.

Before turning to a more general consideration of what the courts do when they interpret statutes, it is useful to place statute law in some kind of constitutional and historical perspective. The law in Australia consists of the Constitution of the Commonwealth and the Constitutions of the States, the Acts of Parliaments or statutes made under those Constitutions, regulations or bylaws, rules and other forms of delegated legislation made under the authority of the statutes and the common law. The term 'common law' refers to a body of principles or rules of law worked out on a case-by-case basis by courts in England and latterly in this country. That judicial law-making process is incremental. It has been described as being like 'the sluggish movement of the glacier rather than the catastrophic charge of the avalanche'.[12] The common law has a constitutional dimension because, among other things, as former Chief Justice Sir John Latham wrote in 1960:

> … in the interpretation of the Constitution, as of all statutes, common law rules are applied.[13]

That constitutional dimension is also reflected in the institutional arrangements which the common law brings with it. At its core are public courts which adjudicate between parties and which are the authorised interpreters of the law which they administer.[14] Professor Goodhart characterised as the most striking feature of the common law its public law dimension, it being '… primarily a method of

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[12] WVH Rogers, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 14th ed, 1994) 17.

[13] J Latham, 'Australia' (1960) 76 *Law Quarterly Review* 54, 57.

[14] F Pollock, *The Expansion of the Common Law (Stephens*, 1904) 51.

administering justice'.[15] The common law has also been referred to in the High Court as '… the ultimate constitutional foundation in Australia.'[16] It has a pervasive influence upon both constitutional and statutory interpretation.

As exemplified by the *Insight Vacations* case, the common law can be, and has been, modified by statutes made by the Commonwealth Parliament and various of the State Parliaments. That reflects the legislative supremacy of parliaments, albeit in Australia that supremacy is subject to the limits imposed by a written Federal Constitution. In dealing with a common law problem it is always the case that the legal practitioner will have to consider whether there are any statutes which affect the question. In New South Wales, if you want to sue somebody for negligence causing personal injuries, it is necessary to have regard to the provisions of the *Civil Liability Act 2002* (NSW) which modifies some of the common law principles of negligence. If the prospective plaintiff was injured in the course of employment, then workers' compensation legislation may be applicable. If the case involves joint wrong-doers, a motor vehicle and a fatal accident, and contributory negligence, then other statutory regimes come into play.

In many cases in which somebody wants to sue somebody else at common law, the question should arise: Is there a statute which confers a right of action for the same conduct? Mrs Young found s 74 of the Trade Practices Act. There are other examples. If a party to a contract alleges that the other party has failed to perform a pre-contractual promise or that a pre-contractual representation has turned out to be false, that failure may give rise to a cause of action for misleading or deceptive conduct under Federal or State consumer and competition laws. Indeed, in some cases the statutory cause of action will be the preferred course because it may require the plaintiff to prove less than has to be proved to make out the common law cause of action. In the cause of action for misleading or deceptive conduct, it is not

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[15] AL Goodhart, 'What is the Common Law' (1960) 76 *Law Quarterly Review* 45, 46.

[16] *Wik Peoples v State of Queensland* (1996) 187 CLR 1, 182.

necessary to prove dishonesty or carelessness. On the other hand, it may be that greater damages will be recoverable under the common law action than might be recoverable under the statutory cause of action. For example, in some cases punitive damages, which may not be recoverable under the statute, may be recoverable at common law.[17] The remedies available under the statutory cause of action will also be defined by statute and will require consideration and interpretation.

The Empire of Statutes

In the 110 years that have passed since the Federation came into existence, there has been a steady and latterly, it seems, exponential growth in the number of statutes and regulations, rules, by-laws and other forms of instrument made under statutes. Moreover, statutes have become longer and more complex despite laudable attempts to use plain English drafting. In Australia today we go about our lives under a mountain range of statutory words which impose obligations and restrictions, create rights and liabilities, and confer powers on a large and varied array of regulatory bodies, public authorities and officials. Two of the largest and most complex statutes of the Commonwealth make the point well. They are the *Income Tax Assessment Acts 1936* and *1997* (Cth) and the *Social Security Act 1991* (Cth).

In 1901, the Commonwealth Parliament enacted the *Immigration Restriction Act 1901* (Cth). When enacted, it contained 19 sections. It was amended in the years that followed its enactment but by 1935 still only comprised 19 sections. By 1950, it had grown to 64 sections. It was repealed by the *Migration Act 1958* (Cth) ('the Migration Act'), which established a completely new statutory scheme for migration, regulating entry into Australia by entry permits, the grant of which was within the power of officers of the Department of Immigration. Although more complex than its immediate predecessor the Migration Act in 1958 comprised some 67 sections. By 2001, the Migration Act contained more than 740 sections with its operation supported by hundreds of regulations set out in two volumes. It is a statute which is

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[17] *Musca v Astle Corporation Pty Ltd* (1988) 80 ALR 251.

replete with official powers and discretions, tightly controlled under the Act itself, and under the regulations, by conditions and criteria which are to be satisfied before those powers and discretions can be exercised. It has not shrunk in the last 10 years.

There is often a trade off between brevity and simplicity on the one hand, and length and precision on the other hand, when it comes to statutory drafting. Some statutes set out broad rules which are left to be worked out over time through the courts. A good example of such a provision was s 52 of the Trade Practices Act, now reflected in s 18(1) of the Australian Consumer Law[18] which, as currently framed provides that:

> A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

That simply expressed prohibition has come to define an important norm of commercial conduct covering a very wide array of different kinds of transactions and dealings in trade or commerce. It covers advertising, pre-contractual representations, expert reports and opinions, and misleading labelling, to name just some. Its application has been worked out case-by-case over many years.

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

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[18] *Competition and Consumer Act 2010* (Cth), Schedule 2.

more scope there can be for debate about what they mean and therefore about the circumstances in which the power can be exercised.

Legislative Intention

A frequently quoted statement from the High Court about statutory interpretation is found in the joint judgment of Justices McHugh, Gummow, Kirby and Hayne in *Project Blue Sky Inc v Australian Broadcasting Authority*.[19] The case concerned the interpretation of s 122 of the *Broadcasting Services Act 1992* (Cth) which required the Australian Broadcasting Authority to determine standards to be observed by commercial television broadcasting licensees. In particular, the section provided that such standards were to relate to 'the Australian content of programs'. That phrase was not defined. The Court held that it was a flexible expression that included matter reflecting Australian identity character and culture. In the joint judgment of McHugh, Gummow, Kirby and Hayne JJ, their Honours 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 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.[20]

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:

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[19] (1998) 194 CLR 355.

[20] (1998) 194 CLR 355, 384 [78] (footnote omitted).

> … that rule is dictated by elementary considerations of fairness, for, after all, those who are subject to the laws commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.[21]

The concept of legislative intention however, is a construct. It has been called a fiction on the basis that neither individual members of Parliament necessarily mean the same thing by voting on a Bill 'or, in some cases anything at all'.[22] 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.[23]

It is a well established proposition that in interpreting legal texts, be they constitutions, statutes, contracts or deeds of trust, the Court is concerned not with 'the real intentions of the parties but with their outward manifestations.'[24]

In a recent decision of the Court concerning the question whether a person who signed an acknowledgment of trust actually intended to create a trust, the Court held that the intention was to be found from the words of the written acknowledgment not from any mental reservations held by its author.[25] In their joint judgment, Heydon and Crennan JJ considered the question of authorial intention in relation to constitutions, statutes, contracts, trusts and Shakespearian sonnets. They quoted a paper by Charles Fried, published in the *Harvard Law Review* in 1987 in which the author said:

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

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

23 (1991) 172 CLR 319, 345-346 (McHugh J).

24 *Taylor v Johnson* (1983) 151 CLR 422 at 428; *Byrnes v Kendle* (2011) 85 ALJR 798 at 814 [59].

25 *Byrnes v Kendle* (2011) 85 ALJR 798, citing 'Sonnet LXV and the "Black Ink" of the Framer's Intention', (1987) 100 *Harvard Law Review* 751, 758-759.

> 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.

In the 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 the question with which the title of this paper begins 'What were they thinking?' Are the real intentions of the legislators 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 significance of the concept 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)*[26], 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

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[26] (2011) 85 ALJR 508.

> the preferred results and which are known to parliamentary drafters and the courts.[27]

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 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.[28]

Text and Purpose

Interpretation does involve the identification of a statutory purpose which may appear from an express statement in the Act itself or by inference from the terms of the statute and by appropriate reference to extrinsic materials, which may include a Second Reading Speech or Explanatory Memorandum relating to the Act and perhaps the report of a Law Reform Commission or other body whose recommendations have led to the enactment of the statute. Reference to such material 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. Ultimately however, it is the text of the statute which governs.

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

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[27] (2011) 85 ALJR 508, 521 [43] (footnotes omitted).

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

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 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.[29]

That position is reflected in subsequent decisions of the Court.[30]

Guides to Interpretation

The common law provides important rules for the interpretation of statutes. It directs the court's attention to the ordinary meaning of the words read in their context and having regard to the purpose of the statute. There are interpretive approaches sometimes called presumptions which guide the constructional choices which a court may have to make between alternative readings of a section of an Act. In addition, statutory rules of interpretation are set out in State and Commonwealth legislation, including the Acts Interpretation Act. Interpretive approaches or presumptions which can be displaced by the clear language of the text to the contrary include:

- If there are two readings of a statute, one of which is valid and the other invalid as beyond constitutional power, the valid reading is be preferred. Sir Owen Dixon said in *Attorney-General (Vict) v Commonwealth*:

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

[30] *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].

> In discharging our duty of passing upon the validity of an enactment, we should make every reasonable intendment in its favour. We should give to the powers conferred upon the Parliament as ample an application as the expressed intention and the recognized implications of the Constitution will allow. We should interpret the enactment, so far as its language permits, so as to bring it within the application of those powers and we should not, unless the intention is clear, read it as exceeding them.[31]

- Legislation is presumed not to have extraterritorial affect and general words are presumed not to extend to cases covered by foreign law.[32] The various Interpretation Acts also provide for references to localities, jurisdictions and other matters and things to be read as localities in and out of the place where the Act has been passed.

- The Crown is to be presumed not to be bound by statutes.[33] Many statutes, however, expressly state that they bind the Crown.

- Legislation is presumed not to limit prerogative powers or property rights of the Crown.[34] In the *Tampa* case in 2001, one of the questions agitated was whether the executive power of the Commonwealth conferred by s 61 of the Constitution extended to a power to refuse entry to asylum seekers and whether, in any event, such power was affected by the provisions of the Migration Act as it then stood.[35]

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[31] (1945) 71 CLR 237, 267.

[32] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J).

[33] *Bropho v State of Western Australia* (1991) 171 CLR 1; *Commonwealth v Western Australia* (1999) 196 CLR 392, 410 (Gleeson CJ and Gaudron J).

[34] *Barton v Commonwealth* (1974) 131 CLR 477, 188 (Barwick CJ), 501 (Mason J), 508 (Jacobs J); *Commonwealth v Western Australia* (1999) 196 CLR 392, 411 (Gleeson CJ and Gaudron J); *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 204 and 209 (French CJ), 228 (Gummow, Hayne, Heydon and Crennan JJ).

[35] *Ruddock v Vadarlis* (2001) 110 FCR 491.

- Legislation is presumed not to impose penal sanctions on the Crown.[36]

- Legislation will be interpreted, if the interpretation be open, so as to be consistent with international law and Australia's treaty obligations.[37]

- Legislation should be interpreted, if the interpretation be open, so as not to interfere with vested proprietary interests or alienate vested proprietary interests without adequate compensation.[38]

- Legislation should be interpreted so as not to operate retrospectively unless it is clear that it does so operate.

- Legislation should be interpreted so as to minimise its impact upon common law rights and freedoms.

- Legislation is presumed not to oust established jurisdictions.[39]

- Exercises of statutory power are presumed to attract the principles of procedural fairness.[40]

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[36] *Cain v Doyle* (1946) 72 CLR 409, 424.

[37] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363; *Polites v Commonwealth* (1945) 70 CLR 60; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.

[38] *Clissold v Perry* (1904) 1 CLR 363, 373; *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552, 563; *Marshall v Director General, Department of Transport* (2001) 205 CLR 603, 623; *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* (2011) 85 ALJR 828, 834 [33]-[34] (Heydon J), 830-831 [7], [12], 832 [18], 833[23] (Gummow ACJ, Hayne, Crennan and Bell JJ)

[39] *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121, 134; *Shergold v Tanner* (2002) 209 CLR 126 at 136.

[40] *Kioa v West* (1985) 159 CLR 550, 609; *Annetts v McCann* (1991) 70 CLR 596, 598; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.

In addition to the common law principles, rules of interpretation are set out in interpretation statutes. The Acts Interpretation Act includes s 15A, which provides:

> Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

In effect, that provision requires the court to construe statutes in such a way as to keep them within the limits of constitutional power and, if such construction is not possible then the section has the effect that the statute continues to operate but only to the extent that it is valid. It may be that the statute cannot be construed so as to save any valid operation.

Purposive interpretation is mandated by the Acts Interpretation Act and equivalent provisions in State and Territory Act. Section 15AA of the Acts Interpretation Act requires that 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.

Section 15AB of the Acts Interpretation Act authorises the Court, in interpreting a provision of the Act, to give consideration to material not forming part of the Act if that material is capable of assisting in the ascertainment of the meaning of the provision. Such material may include relevant reports of Royal Commissions, Law Reform Commissions, Commissions of Inquiry or other similar bodies, Parliamentary Committees, treaties or international agreements referred to in the Act, Explanatory Memoranda relating to the Bill circulated in the Houses of Parliament before the provision was enacted, and the Minister's Second Reading Speech. Importantly, the section does require 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 the 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.

The Common Law, Interpretation and Rights Protection

Australia does not have a constitutional or a statutory Bill of Rights. Victoria has a *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter'), which has been the subject of recent litigation to which I shall refer shortly. Outside the framework of statutory provisions relating to human rights, the common law provides its own rules of interpretation in favour of their protection.

The exercise of legislative power in Australia takes place in the constitutional setting of a 'liberal democracy founded on the principles and traditions of the common law'.[41] The importance of the principles and traditions of the common law in Australia is reflected in the long-established proposition that statute law is to be interpreted consistently with the common law where the words of the statute permit. In a passage still frequently quoted, O'Connor J in the 1908 decision *Potter v Minahan*[42] 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 their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.[43] [Footnote omitted]

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41 *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587.

42 (1908) 7 CLR 277, 304.

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

That statement was based upon a passage in the judgment of Marshall CJ in *United States v Fisher*.[44]

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'.[45] 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.[46]

Although Commonwealth statutes in Australia are made under a written constitution, the Constitution does not in terms guarantee common law rights and freedoms against legislative incursion. Nevertheless, the interpretive rule can be regarded as 'constitutional' in character even if the rights and freedoms which it protects are not. 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'[47] or necessary implication.[48]

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[44] (1805) 2 Cranch 358, 390.

[45] *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.

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

[47] *Re Cuno* (1889) 43 Ch D 12, 17 (Bowen LJ).

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

The presumption, however, has not been limited 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)*[49] 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'.[50]

The interpretive principle in Australia and its equivalent in England suggest that common law freedoms are much more than what is left over when the statute law is exhausted. TRS Allan put it thus:

> The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.[51]

Despite its limits and vulnerability to statutory change, the common law gives a high value to freedom of expression, particularly the freedom to criticise public bodies.[52] Courts applying the common law may be expected to proceed on an assumption that freedom of expression is not to be limited save by clear words or necessary implication.

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[49] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[50] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 64.

[51] TRS Allan, "The Common Law as Constitution: Fundamental Rights and First Principles" in Saunders C (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 148.

[52] *Halsbury's Laws of England* (4th ed, 1989) Vol 8(2), [107].

The application of the principle in support of freedom of expression was seen at the level of constitutional characterisation of powers in the decision of the High Court in *Davis v Commonwealth*.[53] 1988 was the bicentenary of European settlement of Australia. A company was established called the Australian Bicentennial Authority to plan and implement celebrations of the bicentenary. The *Australian Bicentennial Authority Act 1980* (Cth) was enacted to, inter alia, reserve to the Authority the right to use or licence the use of words such as "bicentenary", "bicentennial", "200 years", "Australia", "Sydney", "Melbourne", "Founding", "First Settlement" and others in conjunction with the figures 1788, 1988 or 88. Articles or goods bearing any of these combinations without the consent of the Authority would be forfeited to the Commonwealth. In their joint judgment striking down some aspects of these protections, Mason CJ, Deane and Gaudron JJ (Wilson, Dawson and Toohey JJ agreeing) said:

> Here the framework of regulation … reaches far beyond the legitimate objects sought to be achieved and impinges on freedom of expression by enabling the Authority to regulate the use of common expressions and by making unauthorized use a criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.[54]

The common law can of course only go so far. It does not provide the support for freedom of expression that would accord it the status of a 'right'. It cannot withstand plainly inconsistent statute law.

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

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[53] (1988) 166 CLR 79.

[54] (1988) 166 CLR 79, 100; see also 116 (Brennan J).

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.

Straining the words

Common law principle does not authorise the courts to change the meaning of a statute or to distort it in order to ensure that it complies with common law rights and freedoms. One of the questions which was raised in the recent case concerning the Victorian Charter was whether it required the courts to undertake that kind of exercise in interpreting statutes in accordance with the human rights declared in the Charter. Section 32(1) of the Victorian 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 Victorian Charter to the extent that such an interpretation is open on the language of the statute. In this respect the position under the Victorian Charter is to be distinguished from the position under the *Human Rights Act 1998* (UK).[55] The Charter provision is conceptually analogous to the common law principle of legality but bringing to bear upon the task of interpretation, the declared rights. Many of those rights, in any event, reflect common law rights and freedoms.

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

Conclusion

The task of interpretation of statutes is today of central importance in legal practice and in the work of the courts. No person who graduates from a law school today can afford not to have a basic working knowledge of the principles of this interesting and challenging subject which lies at the heart of the constitutional relationship between the courts and the Parliament.