

Victorian Bar Association 2nd Annual CPD Conference – the New Litigation Landscape – Challenges and Opportunities

Litigating in a Statutory Universe

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Cosmological metaphor is a useful way of elevating pedestrian utterances about statutes into a larger perspective. Sir Owen Dixon was not above cosmological metaphor. He compared the common law to the ether. The ether is relevantly defined in the Oxford Dictionary as:

A very rarefied and highly elastic substance formerly believed to permeate all space, including the interstices between the particles of matter, and to be the medium whose vibrations constituted light (and radio waves) ...¹

In an article which was published in the *Australian Law Journal* in 1955, Sir Owen Dixon said:

The common law is more real and certainly less rigid than the ether with which scientists were accustomed to fill interstellar space. But it serves all and more than all, the purposes in surrounding and pervading the Australian system for which, in the cosmic system, that speculative medium was devised.²

¹ Lesley Brown, *Shorter Oxford English Dictionary* (Oxford University Press, 5th ed, 2002) vol 1, 864.

² Sir Owen Dixon, 'Marshall and the Australian Constitution', (1955) 29 *Australian Law Journal* 420, 424-5.

Our legal universe today is dominated by innumerable statutes and varieties of delegated legislation and legislative instruments made under those statutes. The fundamental infrastructure of that universe is founded in the Constitution of the Commonwealth and, arguably, the Constitutions of the State and the *Australia Acts*. The common law is like the pervasive background radiation left over from the 'big bang' that brought our Federation into existence. The evolution of our legal universe has been dominated by the runaway expansion of statutes, delegated legislation and legislative instruments enacted by Commonwealth, State and Territory governments and their legislative delegates. The common law is today so entangled with statutes that it is difficult to find any legal problem which is able to be defined and resolved solely by resort to the common law. On the other hand, it is not easy to find a statute which does not depend for its interpretation on principles derived from the common law, even if some of them find expression in the provisions of an Interpretation Act.

In its interaction with statutes, the common law has a constitutional dimension. As former Chief Justice John Latham said in 1960:

... in the interpretation of the Constitution, as of all statutes, common law rules are applied.³

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.⁴ Professor Goodhart characterised as the most striking feature of the common law its public law dimension, it being '... primarily a method of

³ Sir John Latham, 'Australia' (1960) 76 *Law Quarterly Review* 54, 57.

⁴ Sir Frederick Pollock, *The Expansion of the Common Law* (Stevens and Sons, 1904) 51.

administering justice.⁵ The common law has also been referred to in the High Court as '... the ultimate constitutional foundation in Australia'.⁶

Nevertheless, ours is a predominantly statutory universe. The Constitution of the Commonwealth is itself s 9 of a British statute, *The Commonwealth of Australia Constitution Act*. Binding force was given to our Constitution by s 5 of that Imperial Act – sometimes called covering cl 5 which provides that: .

This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State ...

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

⁵ AL Goodhart, 'What is the Common Law' (1960) 76 *Law Quarterly Review* 45, 46.

⁶ *Wik Peoples v State of Queensland* (1996) 187 CLR 1, 182.

supported by hundreds of regulations set out in two volumes. It is a statute which is 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. Legislative drafters, in the search for certainty, have put more and more words into the Act. Many of those words which condition the exercise of official powers under the Act, give rise to contested interpretations and, in some cases, the discovery of vitiating jurisdictional error based on wrong interpretations.

The Migration Act is but one example of many. In our litigious universe no question of substantive or procedural law can be investigated, defined or resolved without first identifying the range of statutes which may be applicable to it and the issues of interpretation which they may throw up.

At a procedural level, legislatures have begun to seek to regulate access to the litigious process by the imposition of pre-litigation requirements or protocols. Their imposition, particularly in this State, has been contentious and contested. It is sufficient to refer to Ch 2 of the Report of the Victorian Law Reform Commission in 2008 setting out the arguments for and against pre-action protocols, the passage of the *Civil Procedure Act 2010* (Vic) and the repeal of Ch 3 of that Act by the *Civil Procedure and Legal Profession Amendment Act 2011* (Vic).

The policy of such statutes is clear enough – to create opportunities at an early stage for parties in dispute to resolve their differences before resorting to the litigious process which involves the expenditure of both public and private resources.

Access to the courts is access to a public resource. The plurality judgment in *Aon Risk Services Australia Ltd v Australian National University*⁷, referred to rule 21

⁷ (2009) 239 CLR 175.

of the Civil Procedure Rules of the Australian Capital Territory which introduced Ch 2 of those Rules, setting out as their objective:

- (a) The just resolution of the real issues in the proceedings; and
- (b) The timely disposal of the proceedings and all other proceedings in the Court at a cost affordable by the respective parties.

The rule imposed an obligation on parties to a civil proceeding to 'help the court to achieve the objectives' and in r 21(4) required the court to 'impose appropriate sanctions if a party does not comply with these rules or an order of the court.' After referring to established principles of case management in the courts, the plurality said of r 21(2)(b), relating to the timely disposal of the proceedings at an affordable cost that the rule:

... indicates that the rules concerning civil litigation no longer are to be considered as directed only to the resolution of the dispute between the parties to a proceeding. The achievement of a just but timely and cost-effective resolution of a dispute has an effect upon the Court and upon other litigants.

The creation of statutory requirements regulating or incidental to access to the courts is informed by policy objectives with which most would agree. Inevitably, however, there are transaction costs involved, including the cost of debates about compliance or non-compliance with the requirements. Under the *Native Title Act 1993* (Cth) it was and, I think still is, a precondition for access to the arbitral functions of the Native Title Tribunal in relation to certain future acts that the parties have negotiated in 'good faith'. The jurisdiction of the Tribunal being thus conditioned, it was not surprising that there were a number of cases in which the content of the notion of good faith negotiation was explored and the question whether there had been good faith negotiation determined.

The *Civil Disputes Resolution Act 2011* (Cth), which applies to the Federal Court and the Federal Magistrates Court, requires an applicant who institutes civil proceedings in the court to file a genuine steps statement at the time of filing the application. It must specify the steps that have been taken to try to resolve the issues

in dispute between the parties or the reason why no such steps were taken. A respondent must, in turn, file a genuine steps statement stating that the respondent agrees with the genuine step statement filed by the applicant or if not specifying the respect in which and the reasons why the respondent disagrees.⁸ Importantly, s 10(2) provides that:

A failure to file a genuine steps statement in proceedings does not invalidate the application instituting the proceedings, a response to such an application or the proceedings.

However, a court in performing its functions or exercising powers in relation to civil proceedings before it may take account of whether a person who was required to file a genuine steps statement did so and whether such a person took genuine steps to resolve the dispute.⁹ The concept of 'genuine steps' is defined in s 4(1A) which says that:

For the purposes of this Act, a person taking genuine steps to resolve a dispute if the steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute.

There follows a non-exhaustive list of examples of steps that could be taken by a person as part of taking genuine steps to resolve a dispute.

The implications of these provisions for the litigious process is not clear. No doubt their effects will emerge with time. I would not want to make any predictions. I refer to them and to analogous provisions in other States to illustrate that statutes are reaching into the pre-litigation decision-making processes of legal advisors and their claims not only with respect to their invocation of the substantive law, but also with respect to their initial engagement with parties with whom they are in dispute.

⁸ *Civil Disputes Resolution Act 2011* (Cth) s 7.

⁹ *Civil Disputes Resolution Act 2011* (Cth) s 11.

Turning from the procedural to the substantive law, what presents initially as a common law contract or tort problem is likely, in many cases, to require consideration of interacting and overlapping Commonwealth and State statutes. A small case study which illustrates the point is thrown up by a recent decision of the High Court¹⁰. 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 but 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 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 closest analogue I can find in the *Wrongs Act 1958* (Vic) is s 46(1), which provides that Pt X

¹⁰ *Insight Vacations Pty Ltd (t/as Insight Vacations) v Young* (2011) 243 CLR 149.

of the Act relating to negligence does not prevent parties to a contract from making express provision for the rights, obligations and liabilities under the contract in relation to any matter to which Pt X applies. In the *Young* case, a Commonwealth law, 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. In that case however, the Court held, as a matter of statutory interpretation, that the State law which allowed the parties to contract an exemption clause, did not thereby limit or preclude liability 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.

The Court also noted that 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.

In dealing with what presents as 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 Victoria, if you want to sue somebody for negligence causing personal injuries, it is necessary to have regard to the provisions of the *Wrongs Act 1958* (Vic) which modifies some of the common law principles of negligence. If the prospective plaintiff was injured in the course of employment, 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 provisions come into play. There are also special provisions in the *Wrongs Act*

relating to the question whether a public authority has a duty of care or has breached a duty of care.¹¹

In many cases in which somebody wants to sue somebody else at common law, the question should be asked: 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 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.¹² The remedies available under the statutory cause of action will also be defined by statute and will require consideration and interpretation.

The field of torts provides a rich store of examples of the ways in which the common law and the statute law may interact. A list of those ways, which are neither exhaustive nor mutually exclusive, would include the following:

1. Statutory modification of an existing common law tort.
2. Statutory creation of a new tort.

¹¹ *Wrongs Act 1958* (Vic) ss 79-85.

¹² *Musca v Astle Corporation Pty Ltd* (1988) 80 ALR 251.

3. Statutory abolition of a common law tort.
4. Statutory incorporation of an existing common law tort.
5. Development of the common law by analogy from statute.
6. Implied creation of a tort by statute.
7. Creation by statute of new occasions for the commission of torts.
8. Statutory changes to procedural laws affecting access to justice in relation to tort actions.

I will offer a few brief comments on each of these:

1. *Statutory modification of existing common law tort*

Early examples of this kind of interaction between common law and statute law appeared in the *Workmens Compensation Acts* and trade disputes legislation. *Lord Campbell's Act* and its Australian descendants, provide another example emerging out of the 19th century. Prominent contemporary examples are the *Wrongs Act 1958* (Vic) and the *Civil Liability Acts* of other States. Those statutes cannot be taken as simply restating common law principles. In *Adeels Palace Pty Ltd v Moubarak*¹³ the Court remarked, in relation to the question of causation:

It is not necessary to examine whether or to what extent the approach to causation described in *March v Stramare* might lead to a conclusion about factual causation different from the conclusion that should be reached by applying s 5D(1) [of the *Civil Liability Act*]. 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.¹⁴

¹³ (2009) 239 CLR 420.

¹⁴ (2009) 239 CLR 420, 440 [44] per curium.

2. *Statutory creation of a new tort*

Statute law may create new torts. A law which creates a statutory cause of action imposing civil liability for damages for interference with a right defined by that statute may properly be viewed as creating a statutory tort. An example is the proposed cause of action for a serious invasion of privacy, which the Australian Law Reform Commission recommended in May 2008.

3. *Statutory abolition of a common law tort*

Example of such abolition have occurred in Australia in relation to loss of consortium, champerty and maintenance.

4. *Statutory incorporation of an existing common law tort*

An example of this phenomenon is to be found in s 116 of the *Copyright Act 1968* (Cth). That section authorises an owner of copyright in a work or other subject matter to bring an action for conversion or detention in relation to an infringing copy or a device used or intended to be used for making infringing copies.

A less explicit form of incorporation of tort in statutes occurs where a statute imposes a duty in terms reflecting a common law rule. The duty imposed by the *Corporations Act 2001* (Cth) on company directors may be seen as an example of that form of incorporation.¹⁵

5. *Development of the common law by analogy from statute*

This is an area which is open to ongoing debate and I merely identify it as a head of possible interaction between the common law and statute law.

¹⁵ *Corporations Act 2001* (Cth) ss 180-181.

6. *Implied creation of a tort by statute*

The implied creation of a tort by statute is a reference to the so-called action for breach of statutory duty. That cause of action has been regarded as a special case of reasoning by analogy from statute. There is a difficulty with this cause of action, which was identified by Dixon J in *O'Connor v SP Bray Pty Ltd*.¹⁶ That is that the legislature, in a case where the cause of action is invoked, may have expressed no intention on the subject. Dixon J said:

an interpretation of the statute, according to ordinary canons of construction, will rarely yield a necessary implication positively giving a civil remedy. As an examination of the decided cases will show, an intention to give, or not to give, a private right has more often than not been ascribed to the legislature as a result of presumptions or by reference to matters governing the policy of the provision rather than the meaning of the instrument.¹⁷

7. *Creation by statute of new occasions for the commission of torts*

When a statute confers powers or obligations upon authorities or individuals they may create occasions for the application of common law torts. This was explained by Gaudron J in *Crimmins v Stevedoring Industry Finance Committee*:

In the case of discretionary powers vested in a statutory body, it is not strictly accurate to speak, as is sometimes done, of a common law duty superimposed upon statutory powers. Rather, the statute pursuant to which the body is created and its powers conferred operates 'in the milieu of the common law'.¹⁸

A question whether police officers had a duty of care which they had breached in relation to a man who later committed suicide was considered in *Stuart v Kirkland-Veenstra*¹⁹.

¹⁶ (1937) 56 CLR 464.

¹⁷ (1937) 56 CLR 464, 477-478.

¹⁸ (1999) 200 CLR 1, 18 [26] (footnote omitted).

¹⁹ (2009) 237 CLR 215.

8. *Statutory changes to procedural law affecting access to justice*

Mention should also be made of statutory changes to procedural laws which affect access to justice as relevant to the development of tort law. Representative or class actions, funded by commercial litigation funders, provide access to the courts for litigants who would have been unable to achieve such access without funding. Such arrangements, of course, do raise collateral questions about the relationship between litigation funders and instructing solicitors and counsel and the need for the maintenance of their independence as officers of the court. Some of these issues were considered by the Court in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*²⁰ and in *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd*²¹.

Reference has been made to the interaction of statutes with contract law and with torts. It is sometimes too easy to overlook, in dealing with equitable cases involving equity and trusts, that there are some very important statutes of a general character which may be relevant. So a question about breach of duty by a trustee of real property may raise questions about the powers and duties of the trustee under trustees' legislation and the effects of general property statutes and Torrens title legislation. An example in which reference to such statutes was made in the context of an allegation of breach of trust was *Byrnes v Kendle*²², decided in August 2011.

The pervasiveness of statutes in all areas of the law direct attention to rules of interpretation and the core concept of legislative intention.

Legislative Intention

A frequently quoted statement about statutory interpretation is found in *Project Blue Sky Inc v Australian Broadcasting Authority*.²³ The case concerned the

²⁰ (2006) 229 CLR 386.

²¹ (2009) 239 CLR 75.

²² (2011) 85 ALJR 798.

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.²⁴

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 laws commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.²⁵

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

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 same thing by voting on a Bill 'or, in some cases anything at all'.²⁶ 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.²⁷

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'.²⁸

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.²⁹ 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:

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.

²⁶ *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 339 (Gaudron J).

²⁷ (1991) 172 CLR 319, 345-346 (McHugh J).

²⁸ *Taylor v Johnson* (1983) 151 CLR 422, 428; *Byrnes v Kendle* (2011) 85 ALJR 798, 814 [59].

²⁹ *Byrnes v Kendle* (2011) 85 ALJR 798, citing Charles Fried 'Sonnet LXV and the 'Black Ink' of the Framer's Intention', (1987) 100 *Harvard Law Review* 751, 758-759.

In its application to statutes, this raises the question: What is the role of legislative intention in statutory construction? 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.

'Legislative intention' has been considered recently in two decisions of the High Court. In *Lacey v Attorney-General (Qld)*³⁰, six Justices, in a joint judgment, set out the approach 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 question before the Court was whether 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 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

The Court referred to its earlier decision in *Zheng v Cai* in which it was 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.³²

³⁰ (2011) 85 ALJR 508.

³¹ (2011) 85 ALJR 508, 521 [43] (footnotes omitted).

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

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 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.³³

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

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

The Common Law, Interpretation and Rights Protection

I want to conclude with some further consideration of the role of the common law in statutory interpretation and in the area of 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 in the High Court. 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'.³⁵ 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*³⁶ 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.³⁷ [Footnote omitted]

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].

³⁵ *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587.

³⁶ (1908) 7 CLR 277, 304.

³⁷ 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*.³⁸

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'.³⁹ 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.⁴⁰

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'⁴¹ or necessary implication.⁴²

³⁸ (1805) 2 Cranch 358, 390.

³⁹ *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.

⁴⁰ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131.

⁴¹ *Re Cuno* (1889) 43 Ch D 12, 17 (Bowen LJ).

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)*⁴³ 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'.⁴⁴

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.

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 decision of the Court in *Momcilovic v The Queen*⁴⁵, concerning the Victorian Charter, was whether the

⁴² *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206 (Higgins J).

⁴³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁴⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 64.

⁴⁵ (2011) 85 ALJR 945.

Charter required the courts to undertake that kind of exercise in interpreting statutes in accordance with the human rights which it declared. 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 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).⁴⁶

Conclusion

Much of what has been said in this presentation will be familiar ground for many of you. My own observations, however, of advocacy, both in the Federal Court and later in the High Court, is that it is never a waste of time to remind counsel of the necessity to consider the full statutory universe in which they are operating, the relevant principles of the common law and the interaction of those two aspects of that universe.

⁴⁶ See, eg, *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.