Statutory Interpretation in Australia

Launch of 8th Edition

Chief Justice Robert French AC
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It is often said that we have too many statutes and that our statutes have too many words in them. It is rare to find a kind word said of statutes by lawyers or judges. Nor are they read in a kindly spirit. As Professors Pearce and Geddes observe in the Introduction to the book, which I have the pleasure of launching tonight, 'a drafter cannot assume that a reader will approach legislation sympathetically'.[1] Nevertheless, contemporary criticisms of statutes and statute law should elicit a degree of empathy in the hardest heart for parliamentary drafters who must labour, sometimes under great pressure of time, to meet the contemporary demands of legislative production only to see their products routinely denounced for opacity, prolixity or absurdity depending upon the perspectives of those who seek to shape the laws to their own purposes, those who must apply the laws and those who interpret them.

There was a well-known scene in the film *Amadeus* in which the Emperor congratulated the young Mozart on the performance of a new composition. But he had a reservation. The exchange in the film went like this:

Mozart:	So then you liked it? You really liked it, Your Majesty?
Emperor	Of course I did. It's very good. Of course now and then — just now and then - it seemed a touch elaborate.[2]

When Mozart asked the Emperor to explain his reservation the Emperor said: '[t]oo many notes'. Salieri agreed that there were too many notes. The dialogue finished:

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1 DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 5.

2 *Amadeus*, (Directed by Milos Forman, The Saul Zaentz Company, 1984).

Mozart	This is absurd!
Emperor:	My dear young man don't take it too hard. Your work is ingenious. It's quality work. And there are simply too many notes, that's all. Just a few and it will be perfect.
Mozart	Which few did you have in mind, Majesty?
Emperor	Well, there it is.[3]

It is as pointless for judges and lawyers to complain that statutes have too many words as it was for the Emperor to complain that Mozart's composition had too many notes. They must just get on with the job of interpretation and application. As Professors Pearce and Geddes observe:

> no matter how obscure an Act or other legislative instrument might be, it is the inescapable duty of the courts to give it some meaning.[4]

We can think of the law in general as a kind of societal infrastructure with some Heath Robinson characteristics. Some parts have been built up over centuries, some are the product of considered and thoughtful reform and some are jerry-built components put together in a rush to meet some perceived urgent social or political imperative. When Sir Owen Dixon addressed the Medico-Legal Society of Victoria in 1933, he described the methods of a modern representative legislature and its preoccupations as an obstacle to 'scientific or philosophical reconstruction of the legal system.'[5] The law is not always perfectly coherent and logical and that is a deficiency which we must accept, albeit not without complaint, as a feature of our representative democracy.

Over a long time courts have developed common approaches to the interpretation of a wide variety of statutes. Those common law principles have been added to by Interpretation Acts. They combine to map out and guide us through the constitutional territory which the courts occupy in determining the meaning of legislation. A well organised, coherent and lucid explanation of those approaches, both statutory and non-statutory, is today an

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3 Ibid.

4 Pearce and Geddes, above n 1, 6.

5 Sir Owen Dixon, 'Science and Judicial Proceedings' in Woinarski (ed), *Jesting Pilate: And Other Papers and Addresses* (William S Hein & Co, 2nd ed, 1997) 11.

indispensible tool for all those involved in the working of our legal system. The book, *Statutory Interpretation in Australia*, the 8th edition of which I launch this evening, has provided that indispensible guidance for forty years. Its durability as the leading Australian text is evidence of the value which successive generations of lawyers and judges have attached to it.

The Foreword to the first edition, which was published in 1974, was written by Sir Garfield Barwick. He spoke of finding the reading of it 'both informative and pleasurable'.[6] Although, as I have observed in the Foreword, there are more pleasurable things to do than to read a book on statutory interpretation, pleasure can be found in the avoidance of anticipated pain and the gaining of considerable benefit. I have compared the authors to dentists who deploy their considerable learning and skills to that end. It was interesting to go back to the Foreword to the first edition and to read Sir Garfield Barwick's description of the construction of legislation as the search 'for the intended meaning; though the intention is to be sought through the words used.'[7] He foreshadowed in that observation the often quoted words from the joint judgment of the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*:

> 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.[8]

That passage resonates with the interesting contemporary debate about the underlying theory of statutory interpretation and the function of the concept of 'legislative intention'. It is not necessary to reflect upon that debate now, save to draw attention to the distinction drawn between legislative intention as a conclusionary statement of correct construction and legislative purpose as something which informs construction. Much has been written on the topic in recent times. For those with a philosophical cast of mind it rewards reading if only to deepen consideration of the constitutional aspect of the judicial function in the process of statutory interpretation.

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6 Sir Garfield Barwick, 'Foreword' in DC Pearce, *Statutory Interpretation in Australia* (Butterworths, 1974) vii.

7 Ibid.

8 (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

There are few who would disagree with the proposition that statutory interpretation today pervades every area of the law. There are few, if any, problems upon which practitioners have to advise or courts have to decide that can be resolved purely as a matter of applying the common law of contract or torts or the doctrines of equity. Statutory interpretation lies at the heart of much of what we call 'public law'. When there is a challenge to the validity of a statute on the basis that it falls outside a grant of constitutional legislative power or infringes a constitutional prohibition or guarantee, the question generally cannot be answered without first construing the statute. When it is said that a public official entrusted with a statutory power or discretion has committed jurisdictional error in relation to the exercise of the power, the answer will frequently depend upon whether he or she has properly construed the scope of the power or the conditions for its exercise.

Not for the first time would I urge that the centrality of statutory interpretation in our legal system must be reflected in legal education. For better or for worse, Acts of Parliament, subordinate legislation and various forms of legislative instrument affect most areas of human activity in Australia today. A practicing lawyer who does not have a solid grounding in the topic of statutory interpretation is a lawyer whose clients may be at a significant disadvantage.

In the 8th edition of their book, Professors Pearce and Geddes have provided a logically ordered account of the judicially developed principles and approaches and the statutory rules of interpretation which may, and in some cases must, be deployed in the determination of the meaning of a statute. There is a large number of judicial decisions cited throughout the text which make it a very powerful resource indeed for those who wish to explore particular topics in greater detail. As I have observed in the Foreword, however, those references must be kept in their proper perspective. Sir Garfield Barwick in his Foreword to the first edition questioned whether judicially developed principles of interpretation should be characterised as 'rules'. Indeed, he praised Professor Pearce, who was the sole author of the first edition, for realising that the so called rules of interpretation are but frail guidelines to which recourse is had as a last rather than as a first resort. He suggested that like proverbs, the 'rules' were appropriate only in some circumstances and not in all.[9] My own position, which I state in the Foreword, is that the general task of interpretation requires consideration of the statutory text, context and purpose. That

[9] Sir Garfield Barwick, above n 6, vii.

consideration should define the logical framework of the statute. Many judicially endorsed approaches to interpretation are simply ways of giving effect to that internal logic. Consideration then of the context of a particular provision within a statute is consideration of the way in which that provision interacts with, and gives effect to, the internal logic of the statute. Statutory interpretation, using the internal logic of statutes, applies across all areas of private law. Much public law is concerned with the exercise of statutory powers, duties and discretions. Where their exercise is contested, the contest often turns upon the question whether there has been, in one way or another, a failure of rationality defined by reference to the logic of the statute.

There is much to explore in this work which can lead its explorer to a clearer understanding of the essentials of interpretation which emerge from its comprehensive detail. Its value is known to all of those who are here tonight. We can all be grateful to Professors Pearce and Geddes for their work. I congratulate them upon the publication and declare it launched.