Constitutional Interpretation

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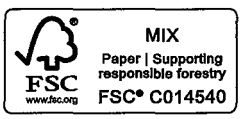

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24. Constitutional interpretation in Australia

James Edelman

In 2009, in Australia's ultimate appellate court, the High Court of Australia, French CJ and Gummow J said that 'diverse and complex questions of construction of the Constitution are not answered by adoption and application of any particular, all-embracing and revelatory theory or doctrine'.[1] This comment reflects the lack of any explicitly acknowledged methodology in many of the significant constitutional decisions in Australia since the adoption of the written Constitution of the Commonwealth of Australia at Federation in 1901. But beneath this usual refusal to acknowledge any methodology of constitutional interpretation in Australia, there are, nevertheless, well-established foundations for interpretation. One of those is that the starting point for constitutional interpretation is the original meaning or, in words used by many Justices, the 'essential' meaning[2] of the words of a constitutional provision. As McHugh J said in *Eastman v The Queen*,[3] 'most Australian judges have been in substance what Scalia J of the United States Supreme Court once called himself – a faint-hearted originalist'. The originalist approach in Australia might even be more faint-hearted than McHugh J suggested because it requires only that essential meaning remains fixed. If the purpose of a provision requires that the essential meaning be characterised at a high level of generality, then there can be considerable scope for change over time in its application or, put another way, in the recognition of inessential meaning and constitutional implications by explicatures and implicatures.

The Constitution of the Commonwealth of Australia was established from a statute of the Imperial Parliament. Sir John Quick and Sir Robert Garran, constitutional founders and authors of one of the most authoritative works on the Constitution,[4] had emphasised that the rules for interpretation of the Constitution should reflect those for the interpretation of

[1] *Wong v Commonwealth* [2009] HCA 3, (2009) 236 CLR 573, 582 [20]. See also *SGH Ltd v Federal Commissioner of Taxation* [2002] HCA 18, (2002) 210 CLR 51, 75 [41]; *The Commonwealth v Australian Capital Territory* [2013] HCA 55, (2013) 250 CLR 441, 455 [14].

[2] For instance, *Attorney-General for NSW v Brewery Employees Union of NSW* [1908] HCA 94, (1908) 6 CLR 469, 560 (Isaacs J) and 616 (Higgins J); *Huddart, Parker & Co Pty Ltd v Moorehead* [1909] HCA 36, (1909) 8 CLR 330, 375 (O'Connor J); *Hughes and Vale Pty Ltd v New South Wales [No 2]* [1955] HCA 28, (1955) 93 CLR 127, 224 (Kitto J); *Dennis Hotels Pty Ltd v Victoria* [1960] HCA 10, (1960) 104 CLR 529, 608 (Windeyer J); *Davis v The Commonwealth* [1988] HCA 63, (1988) 166 CLR 79, 96–97 (Mason CJ, Deane and Gaudron JJ); *Cheatle v The Queen* [1993] HCA 44, (1993) 177 CLR 541, 552, 560 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57, (2000) 204 CLR 82, 93 [24] (Gaudron and Gummow JJ); *Brownlee v The Queen* [2001] HCA 36, (2001) 207 CLR 278, 299 [58] (Gaudron, Gummow and Hayne JJ); *Pape v Federal Commissioner of Taxation* [2009] HCA 23, (2009) 238 CLR 1, 75 [187] (Gummow, Crennan and Bell JJ).

[3] *Eastman v The Queen* [2000] HCA 29, (2000) 203 CLR 1, 44 [140].

[4] And, in the case of Sir Robert Garran, the secretary to the drafting committee for the Constitution.

statutes.[5] Almost from its inception, the High Court of Australia emphasised that, although the high generality of the Constitution means that there are many necessary implications that arise from its text, '[t]he same rules of interpretation apply that apply to any other written document'.[6] Unsurprisingly, therefore, the long-standing originalist methodology of constitutional interpretation in Australia closely echoes the approach taken by many High Court Justices to the interpretation of statutes in which a distinction is often drawn between the connotation of statutory words (which cannot change) and the denotation of those words (which can change).[7] In both statutory and constitutional interpretation, whilst the essential meaning of a provision cannot change, that meaning can apply to new and different circumstances and can evolve to be applied in different ways over time. In that way, the original inessential meaning can change. The higher the level of generality at which the purpose, and, therefore, the essential meaning, is characterised, the more scope there will be for the constitutional or statutory provision to develop and adapt consistently with constitutional fit and justification.

Nevertheless, there remain some differences between statutory and constitutional interpretation in Australia that cannot be attributed merely to the nature of a constitution as an enduring and wide-ranging statute. For instance, it is established that a statute should be interpreted, so far as its language permits, in accordance with international law[8] on the basis that Parliament should generally be taken not to have intended to contravene established principles of international law.[9] But the same approach has not been taken to constitutional

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[5] John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson 1901) 792.

[6] *Tasmania v The Commonwealth of Australia and Victoria* [1904] HCA 11, (1904) 1 CLR 329, 338, 358–360; *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)* [1920] HCA 54, (1920) 28 CLR 129, 161–162; *McGinty v Western Australia* [1996] HCA 48, (1996) 186 CLR 140, 230; *Eastman v The Queen* (n3) 42–43 [135]; *Re Patterson; Ex parte Taylor* [2001] HCA 51, (2001) 207 CLR 391, 426 [106]; *Singh v The Commonwealth* [2004] HCA 43, (2004) 222 CLR 322, 348–349 [52]–[53]; *Pape v Federal Commissioner of Taxation* (n2) 145 [423]; *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253, 283 [97].

[7] For instance, *R v Barger* [1908] HCA 43, (1908) 6 CLR 41, 68 (Griffith CJ, Barton and O'Connor JJ); *Re Professional Engineers' Association* [1959] HCA 47, (1959) 107 CLR 208, 267 (Windeyer J); *Lansell v Lansell* [1964] HCA 42, (1964) 110 CLR 353, 366 (Taylor J); *Lake Macquarie Shire Council v Aberdare County Council* [1970] HCA 32, (1970) 123 CLR 327, 331 (Barwick CJ) and 332 (Menzies J); *R v Jones* [1972] HCA 44, (1972) 128 CLR 221, 229 (Barwick CJ); *Attorney–General (Vict); Ex rel Black v The Commonwealth* [1981] HCA 2, (1981) 146 CLR 559, 578 (Barwick CJ); *State Superannuation Board v Trade Practices Commission* [1982] HCA 72, (1982) 150 CLR 282, 297 (Gibbs CJ and Wilson J); *The Commonwealth v Tasmania (The Tasmanian Dam Case)* [1983] HCA 21, (1983) 158 CLR 1, 302–303 (Dawson J); *Street v Queensland Bar Association* [1989] HCA 53, (1989) 168 CLR 461, 537 (Dawson J); *McGinty v Western Australia* [1996] HCA 48, (1996) 186 CLR 140, 200 (Toohey J); *Re Wakim; Ex parte McNally* [1999] HCA 27, (1999) 198 CLR 511, 551–552 [42] (McHugh J); *Eastman v The Queen* (n3) 45 [142] (McHugh J); *Re Patterson; Ex parte Taylor* [2001] HCA 51, (2001) 207 CLR 391, 427–428 [111]–[112] (McHugh J); *Singh v Commonwealth* [2004] HCA 43, (2004) 222 CLR 322, 343 [37] (McHugh J). More recently, *Clubb v Edwards* [2019] HCA 11, (2019) 267 CLR 171, 318 fn 528 (Edelman J); *Love v Commonwealth* [2020] HCA 3 (2020) 270 CLR 152, 255-256 [275] (Nettle J).

[8] For instance, *Polites v The Commonwealth* [1945] HCA 3, (1945) 70 CLR 60, 68–69, 77, 80–81.

[9] *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20, (1995) 183 CLR 273, 287.

interpretation,[10] although Kirby J commenced a debate by suggesting that it should be so taken.[11] It is possible that both sides of this debate might be correct. For instance, it is hard to see how international law in 2021 could inform the essential meaning of a constitutional provision in 1901. But it may be that international law could be relevant in applying essential meaning to the facts before the court or, put differently, supplying inessential meaning.

There is an obvious and necessary reason for the focus of the High Court in constitutional interpretation upon unchanged essential meaning. The golden triptych for interpretation of written instruments in Australia has been held for more than a century to be (i) text, (ii) context, and (iii) purpose.[12] Each of these interrelated considerations is original: the original text (or the original amendment if the provision has been amended), the original context, and the original purpose. As to the text, this is, by definition, the original text including, where it is amended, the original words of the amendment. The text of a constitutional provision cannot be altered by a court, however undesirable the court might consider the text to be. It can be altered only by a referendum conducted according to the requirements of Section 128 of the Constitution, of which only eight have been successful over the life of the Constitution. As to the context of a constitutional provision, this is the original, public, and contemporary context in which it was enacted. One of the most important matters of context is the debates of the Constitutional Conventions in which the delegates debated and discussed the meaning of proposed provisions. Those debates were, and remain, publicly available,[13] but until the decision of *Cole v Whitfield*[14] in 1988, the High Court did not overtly refer to them in its decisions on constitutional interpretation other than for limited purposes such as to explain the subject matter or mischief to which a provision was directed.[15] The use of Convention Debates is now so commonplace that there is rarely a constitutional case heard in the High Court of Australia in which some reference is not made to them. As to the purpose of a provision, which is itself dependent upon the text and the context of the provision, this is also original. The purpose does not change as time passes.

Difficult issues arise when original meaning is underdetermined. An example is the keystone decision of the High Court, *Cole v Whitfield*.[16] In that case, the High Court considered

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[10] For instance, *Polites v The Commonwealth* (n8) 69, 74, 75, 78, 79, 82–83; *Kartinyeri v The Commonwealth* [1988] HCA 22, (1998) 195 CLR 337, 385 [98].

[11] *Al Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562, 617 [152], 630 [193].

[12] *Ex parte Walsh and Johnson; In re Yates* [1925] HCA 26, (1925) 37 CLR 36, 91–93; *Commissioner for Railways (NSW) v Agalianos* [1955] HCA 27, (1955) 92 CLR 390, 397; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26, (1981) 147 CLR 297, 320; *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2, (1997) 187 CLR 384, 408; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28, (1998) 194 CLR 355, 381 [69], 384 [78]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55, (2012) 250 CLR 503, 519 [39]; *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34, (2017) 262 CLR 362, 368 [14], 374 [37]; *SAS Trustee Corporation v Miles* [2018] HCA 55, (2018) 265 CLR 137, 149 [20], 162 [64]; *Acts Interpretation Act 1901* (Cth) s 15AA.

[13] See the discussion in James Edelman, '2018 Winterton Lecture – Constitutional interpretation' (2019) 45(1) University of Western Australia Law Review 1, 13–14.

[14] [1988] HCA 18, (1988) 165 CLR 360.

[15] *The Municipal Council of Sydney v The Commonwealth* [1904] HCA 50, (1904) 1 CLR 208, 213–214 (in argument).

[16] (n14).

the meaning of the words of Section 92 of the Constitution, which provide, relevantly, that 'trade, commerce, and intercourse among the States ... shall be absolutely free'. A significant issue in identifying the essential original meaning of those words was the question 'free of what'? One of the convention delegates, Isaac Isaacs, later Chief Justice of the High Court, said at the 1897 Constitutional Convention that the words of Section 92, 'taken literally', appeared to mean 'free of everything, even of a licence'.[17] But such a strict meaning of the provision would defeat its purpose. That purpose was identified by delegates such as Sir Samuel Griffith, later the first Chief Justice of the High Court, and Sir John Quick. Sir Samuel Griffith described the purpose as prohibiting interference with the free course of trade and commerce between the states by 'the imposition of preferential or differential' burdens.[18] In an attempt to identify the appropriate original meaning by reference to this purpose, and after decades of confusion, the High Court held in *Cole v Whitfield* that trade and commerce must be free only from unjustified discrimination between the states of a protectionist kind. As the Court explained, the historical context of Section 92 was necessary 'for the purpose of identifying the contemporary [i.e., original] meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged'.[19] Although this decision resolved decades of confusion about the meaning of Section 92, there remained some difficulty. For instance, the essential meaning given by the Court to freedom of 'trade and commerce' (free from unjustified protectionist discrimination) was narrower than that given to freedom of 'intercourse' despite the composite nature of the expression 'trade, commerce, and intercourse'. Most of that difficulty was resolved in early 2021, when the High Court held that the purpose of Section 92 required the essential meaning of freedom of intercourse also to be a freedom of intercourse from unjustified discrimination.[20] One remaining doubt was whether the purpose of Section 92 could support the additional narrowing element, in relation to trade and commerce but not intercourse, that the proscribed discrimination be of a protectionist nature. In other words, is the essential meaning of freedom of 'trade and commerce' narrower than the essential meaning of freedom of 'intercourse' within the single composite expression 'trade, commerce, and intercourse'? These questions of the appropriate original meaning, when it is underdetermined, require more than the focus of a legal historian. They are driven by the purpose of the provision, and they depend upon basic values and principles underlying the Constitution itself.

Although the essential original meaning, once identified, will remain unchanged (as do the text, context, and purpose), the Constitution is not frozen in time. This is because the essential original meaning must be characterised at the right level of generality, which, in a written constitution that was intended to endure, might be highly general, leaving scope for different

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[17] *Official Record of the Debates of the Australasian Federal Convention* (Adelaide), 22 April 1897, 1142.

[18] JA La Nauze, 'A Little Bit of Lawyers' Language: The History of "Absolutely Free", 1890–1900', in AW Martin (ed), *Essays in Australian Federation* (Melbourne University Press 1969) 57, 84, quoting Sir Samuel Griffith, 'Notes on the Draft Federal Constitution framed by the Adelaide Convention of 1897: a paper presented to the Government of Queensland by Sir Samuel Walker Griffith' (Edmund Gregory Government Printer June 1897).

[19] *Cole v Whitfield* (n14), 385.

[20] *Palmer v Western Australia* [2021] HCA 5, (2021) 272 CLR 505.

application or different inessential meaning over time. The essential original meaning, characterised at a higher level of generality, can apply to new circumstances and situations over time consistently with the norms that underlie the Constitution. By contrast, the essential original meaning characterised at a lower level of generality (i.e., with greater specificity) admits less flexible application. An illustrative example showing the characterisation of essential meaning at the right level of generality is the very important constitutional joint judgement of all Justices of the High Court in *Cheatle v The Queen.*[21]

The *Cheatle* case concerned the meaning of 'jury' in Section 80 of the Constitution, which provides, in part, that the 'trial on indictment of any offence against any law of the Commonwealth shall be by jury'. The specific question was whether Section 80 required such juries to be unanimous. In order to determine what is required by a trial by jury, the High Court needed to determine the essential original meaning of 'trial ... by jury'. At the lowest level of generality, a trial by jury in 1901 might be said to be a trial by a body that adjudicates upon facts, comprised of 12 random and impartial representatives of the community, who are unanimous in their decision, are guaranteed confidentiality and anonymity, are kept sequestered, swear an oath, are men, and are property owners. At the highest level of generality, a trial by jury in 1901 might be said to be a trial by a body that adjudicates upon facts. If the essential original meaning were characterised at the lowest level of generality, then women or those who do not own land would not be able to serve on juries.[22] If the essential original meaning were characterised at the highest level of generality, none of these restrictions would apply. A decision on indictment could be given by a single judge rather than by 12 men, there would be no need for members of the community to adjudicate, and no need for unanimity of the multi-member panel. In the result, the unanimous decision of the High Court characterised the essential meaning of a trial by jury somewhere in between these extremes: the 'essential features'[23] that were 'connoted' by the original meaning of a jury were that it was an adjudicative body, comprised of representatives of the community, who were unanimous in any decision reached.[24] The representatives need not be 12 in number.[25] And whilst the denotation of a representative body might have required the exclusion of women in 1901, it prohibited their exclusion in 1993.[26] The purpose of Section 80 was a powerful influence upon the generality of the characterisation of original meaning. That purpose was to provide for certain adjudications of fact in criminal cases to be undertaken, consistently with fundamental tenets of the criminal law, by a body that is representative of the community. It was one fundamental tenet of the criminal law, the standard of proof beyond reasonable doubt, that dictated the requirement for unanimity.

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[21] (n2).

[22] See, for instance, *Jury Act 1847* (NSW) s 1; *Juries Act 1890* (Vic) s 5; *Jury Act 1862* (SA) s 4; *Jury Act 1867*(Qld) s 1; *Jury Act 1898* (WA) ss 3, 5; *Jury Act 1899* (Tas) s 4.

[23] *Cheatle v The Queen* (n2), 557, citing *Huddart, Parker & Co Pty Ltd v Moorehead* [1909] HCA 36, (1909) 8 CLR 330, 375. See also 559–560.

[24] Compare *Apodaca v Oregon* 406 US 404 (1972) with *Ramos v Louisiana* 140 S. Ct. 1390 (2020).

[25] *Brownlee v The Queen* [2001] HCA 36, (2001) 207 CLR 278, 298 [54], the court finding that this was not an 'essential feature'.

[26] *Cheatle v The Queen* (n2), 560–561.

In summary, although most Australian judges purport to abjure any single methodology of constitutional interpretation, there is a core focus upon essential meaning, based upon the original text, context, and purpose. This methodology is reflected in the consistent reference in the High Court of Australia to the debates at the pre-Federation Constitutional conventions and a consistent focus on original purpose of the provisions of the Constitution. But constitutional choices must still be made in adjudication because the original and essential meaning might be underdetermined, and the level of generality at which the original and essential meaning is expressed must be determined for the application of that essential meaning and to ascertain the implications that arise from it. In giving an answer that reflects legal fidelity, these issues will be heavily influenced by the purpose of the provision, the values underlying the Constitution, and the matrix of precedent.