

## The ‘Objective’ Approach to Statutory Interpretation: Views from Abroad

Current Legal Issues Seminar,  
Brisbane, 8 May 2014

- I. Comparing national approaches to statutory interpretation
  1. Why does it matter?
  2. Difficulties for comparative lawyers
  3. Research

D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (Aldershot: Ashgate 1991);

S Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent: eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen*, 2 vols (Tübingen: Mohr Siebeck 2001) – summarised and assessed by H Lücke, ‘Statutory Interpretation: New Comparative Dimensions’ (2005) 54 *ICLQ* 1023

- II. The debate about the ‘aim’ of statutory interpretation
  1. The ‘objective’ approach to statutory construction
  2. The ‘subjective’ approach to statutory interpretation
  3. The debate in Australia

*State of Tasmania v Commonwealth of Australia* (1904) 1 CLR 329, 359, per O’Connor J:

‘The intention of the enactment is to be gathered from its words. If the words are plain, effect must be given to them; if they are doubtful, the intention of the legislature is to be gathered from the other provisions of the Statute aided by a consideration of surrounding circumstances. In all cases in order to discover the intention you may have recourse to contemporaneous circumstances—to the history of the law, and you may gather from the instrument itself the object of the legislature in passing it. In considering the history of the law, you may look into previous legislation, you must have regard to the historical facts surrounding the bringing the law into existence. ... You may deduce the intention of the legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it.’

*Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253 [97], per Heydon and Crennan JJ:

‘*Statutory construction*. ... Soon after the Constitution came into force, O’Connor J correctly propounded a theory of statutory construction which stressed the irrelevance of the subjective intention of legislators. The construction of the statute depended on its intention,

but only in the sense of the intention to be gathered from the statutory words in the light of surrounding circumstances. Even if it were possible to establish the actual mental states of those drafting and voting for a Bill, the inquiry would be irrelevant. The correct approach is also seen in an extra-curial pronouncement by Mr Justice Holmes, only five years before O'Connor J: "we do not deal differently with a statute from our way of dealing with a contract. We do not inquire what the legislature meant; we ask only what the statute means." In the words of the Seventh Circuit of the United States Court of Appeals: "Congress did not enact its members' *beliefs*; it enacted a text." Similarly, Lord Hoffmann described statutory construction as "the ascertainment of what ... Parliament would reasonably be understood to have meant by using the actual language of the statute." However, in recent times in England and in New Zealand, through similar common law developments, and in Australia by statute, extrinsic materials have been routinely examined to ascertain what the legislature meant. It is but one of several objections to that usually unprofitable course that it does not comply with Fried's approach [on constitutional construction, as set out in the previous para of the judgment]. (references omitted)

Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Syd LR* 39:

'For at least six centuries, common law courts have maintained that the primary object of statutory interpretation "is to determine what intention is conveyed either expressly or by implication by the language used", or in other words, "to give effect to the intention of the [lawmaker] as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed".' (references omitted)

Hayne J, 'What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?', Lecture at the Oxford Law Faculty, 4 April 2014, p 23:

'... the claim which is made [and to which Hayne J objects] is that this form of parliamentary intention is both the aim of statutory construction and the standard against which competing constructions are to be judged'.

#### 4. The position of other jurisdictions

BVerfGE 1, 299, 312 (1952):

'Maßgebend für die Auslegung einer Gesetzesvorschrift ist der in dieser zum Ausdruck kommende objektivierte Wille des Gesetzgebers, so wie er sich aus dem Wortlaut der Gesetzesbestimmung und dem Sinnzusammenhang ergibt, in den diese hineingestellt ist. Nicht entscheidend ist dagegen die subjektive Vorstellung der am Gesetzgebungsverfahren beteiligten Organe oder einzelner ihrer Mitglieder über die Bedeutung der Bestimmung. Der Entstehungsgeschichte einer Vorschrift kommt für deren Auslegung nur insofern Bedeutung zu, als sie die Richtigkeit einer nach den angegebenen Grundsätzen ermittelten Auslegung bestätigt oder Zweifel behebt, die auf dem angegebenen Weg allein nicht ausgeräumt werden können.'

['For the construction of a statutory provision the objectivised intention of the legislator that is expressed in the provision, as it follows from the wording of the provision and the context in which it is placed, is decisive. By contrast, the subjective intentions of the legislative organs or these organs' individual members are not decisive for the meaning of the provision. The legislative history of a provision is only relevant for its interpretation insofar as it confirms the correctness of the interpretation on the basis of the aforementioned principles or insofar as it clarifies doubts that cannot be dispelled on the basis of these principles alone.']

Art 1156 Code civil (for contracts):

'On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes.'

['One must in agreements seek what the common intention of the contracting parties was, rather than pay attention to the literal meaning of the terms.']

### III. Rephrasing the problem: a question of ‘weight’ rather than abstract ‘aims’ of interpretation

#### 1. ‘Rules’ on statutory interpretation

#### 2. Rules on admissibility

##### a) Positive

eg Acts Interpretation Act 1901, s 11B(1):

‘Every Act amending another Act must be construed with the other Act as part of the other Act.’

eg Dig 1.3.24 (Celsus):

‘Incivile est nisi tota lege perspecta una aliqua particula eius proposita iudicare vel respondere.’

[‘It is inappropriate to adjudge or advise on the basis of a particular part of the law without considering the whole of it.’]

= Art 1161 Code civil (for contracts):

‘Toutes les clauses des conventions s'interprètent les unes par les autres, en donnant à chacune le sens qui résulte de l'acte entier.’

[‘All the clauses of an agreement are to be interpreted with reference to one another by giving to each one the meaning which results from the whole instrument.’]

= *Lincoln College’s Case* (1595) 3 Co Rep 58b, 59b, CP:

‘The office of a good expositor of an Act of Parliament is to make construction of all the parts together, and not of one part only by itself; *nemo aliquam partem recte intelligere possit, antequam totum iterum atque iterum perlegerit*’.

##### b) Permissive

eg Acts Interpretation Act 1901, s 15AB(1):

‘... in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material: ...’.

##### c) Negative

eg the English ‘exclusionary rule’:

- *Millar v Taylor* (1769) 4 Burr 2003 at 2332 per Willes J (KB);
- *Pepper v Hart* [1993] AC 593 (HL)

#### 3. Rules on weight

##### a) Distinguished from rules on admissibility

eg Acts Interpretation Act 1901, s 15AB(3):

‘In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to: ...’.

b) Distinguished from rigid priority rules

compare *Grey v Pearson* (1857) 6 HLC 61, 106, per Lord Wensleydale:

‘in construing ... all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther’

and Lord Steyn, ‘Does Legal Formalism Hold Sway in England?’ (1996) 49 (II) *Current Legal Problems* 43, 50:

‘the more demonstrably unfair a suggested interpretation is the clearer must be the statutory wording necessary to support it’.

4. The debate about the ‘aim’ of statutory interpretation

- IV. Underlying values
- V. A historical cross-check
- VI. Conclusion