THE "OBJECTIVE" APPROACH TO STATUTORY CONSTRUCTION

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It is a pleasure to have been invited to this Seminar. The pleasure is mixed with terror. One source of pleasure is the company of my good friend Stefan Vogenauer. But he is also a source of terror. For in him you have a world expert. From me you will get only antediluvian prejudices, though they are the prejudices of someone who has read enough statutes to satisfy the needs of a lifetime.

It is a particular pleasure to be speaking in Brisbane – near Ipswich, from which two of the greatest of High Court justices hailed. From one point of view they are the greatest, in view of the unusual problems they experienced.

Sir Samuel Griffith, as first Chief Justice of the High Court, faced two difficulties. The first difficulty was the need to ensure that the High Court gained the respect of State Supreme Court judges. Some of them had opposed the creation of the High Court. They would have preferred that all appeals continued to go, as they had before 1903, straight from Supreme Courts to the Privy Council. In due course the Court, unlike Biblical prophets, did receive honour in its own country. The second difficulty was the need to ensure that the

High Court gained the respect of the Privy Council, particularly in constitutional law. This it did, but only after exchanges of hostile fire between Sir Samuel and Lord Halsbury.

Sir Harry Gibbs, on the other hand, faced the unusual difficulties of working out the Court's best response to the numerous travails through which Justice Murphy had to pass during his last few years on the Court. It is difficult to imagine how anyone could have handled matters better.

THE STATURE OF MR JUSTICE O'CONNOR

I want to structure my remarks around the views of one of Sir Samuel's colleagues – Mr Justice O'Connor, who was, with Griffith CJ and Barton J, one of the three founding justices. For able though Sir Samuel was, Sir Owen Dixon seemed to rate Mr Justice O'Connor more highly. Sir Owen said in 1964 in his address on retiring from the High Court that Griffith CJ had "a dominant legal mind … a legal mind of the Austinian age".[1] Austin's key doctrine, of course, was that law was a command backed by a sanction – a doctrine which Griffith CJ's masterful approach to legal problems may not have found unsympathetic. But Sir Owen went on: "I think – speaking for myself – that Mr Justice O'Connor's work has lived better than that of anybody else of the earlier times".[2] That direct tribute is the more forceful for two reasons. One is

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[1] (1964) 110 CLR viii at xi.

[2] (1964) 110 CLR viii at xi.

that Sir Owen Dixon on that occasion passed on the view of Sir Leo Cussen, though apparently without agreeing with it, that "Barton's judgments were the best, … they had more philosophy in them, more understanding of what a Constitution was about, more sagacity; … they were well written and … they were extremely good".[3] The other is that praise was a somewhat rare quality in Sir Owen's brilliant but sombre and rather tart oration. Further, Sir Anthony Mason agreed with Sir Owen Dixon's view of Mr Justice O'Connor, at least in relation to the foundation justices, for he thought Isaacs J superior in influence and output.[4]

Mr Justice O'Connor was certainly a formidable figure in our history. He was a member of the New South Wales legislature. He was a key framer of the Constitution. He was leader of the government in the Senate. He was a prominent Catholic in a sectarian age. He was a Fenian in an age of Empire. He was universally respected for his calmness, courtesy and probity. At the end of his relatively short tenure, he was a tragic figure as he tried to struggle though nephritis and worked himself to death – for in those days there was no judicial pension to support his family after his premature demise.

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[3] (1964) 110 CLR viii at xii.

[4] "Griffith Court" in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, Melbourne, 2001) p 311 at p 312.

Mr Justice O'Connor's theories of statutory construction appear to be sound in every way, even now. But before they are explained, it is necessary to indicate the point of view from which this lecture approaches the problem.

THE CENTRAL THEME

The central assumption of this lecture is that judges should construe legislation in order to ascertain what it actually provides, quite independently of their personal opinions about what it ought to have provided.

In jurisdictions influenced by English law, whether they are jurisdictions governed by a written constitution or not, the law is made or declared by judges. Their view of it – what we call "the common law" – prevails unless there is a provision in any applicable constitution, or in any applicable statute, to the contrary. The phenomenon of "judicial activism" is commonly seen as arising mainly in relation to constitutional law or common law.

One problem in a judicially activist approach to a constitution is that constitutions are usually very hard to amend. Hence judicial constructions which are seen as wrong, even badly wrong, can for practical purposes be incapable of correction except by later judges. Our Commonwealth Constitution, of course, is generally seen as very hard to amend by the legislative and popular processes mandated by s 128.

A judicially activist approach to the common law, on the other hand, can be corrected not only by later judges but also by the legislature. But correction

can be difficult. Enlisting the aid of the legislature can sometimes be very hard. And the practice of ultimate appellate courts is to abstain from altering what prior authorities have decided unless they are thought to be not only plainly wrong but also productive of serious inconvenience.

Yet judicial activism can be as great a problem in relation to non-constitutional statutes as it is with constitutions and the common law. That is because statutes have no accepted meaning until the courts have construed them. Of course both the human agents of the government, and the governed themselves, have to act on what they take to be the statutory meaning even before any curial construction has taken place. In many instances what they understand to be the meaning is confirmed in due course by the courts. But this is not always so.

The courts, in other words, play an mediatory role between the governor – the legislature, the lawgiver, the commander – and the governed, to whom the laws are given. That mediatory role is in fact very great. Its significance is accentuated by the increasing number and range of statutes nowadays – what Lord Bingham of Cornhill unflatteringly called the "legislative hyperactivity"[5] of the modern scene. Let us remember Bishop Hoadly's sermon preached before King George I on 31 March 1717. The King probably did not understand it, having not long before arrived from Hanover, but in it Bishop Hoadly used words the fame of which is well deserved:

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[5] "The Rule of Law" [2007] CLJ 67 at 70.

> "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them."

And of course our courts have an absolute authority to interpret all written or spoken laws. At the end of the day, the only relevant role in interpreting legislation is that of the courts. The interpretation of legislation is what the courts say it is. People may disagree with a particular interpretation. But they are bound by that interpretation. That is so whether they are legislators, officials or members of the public. There is no sanctuary in which the governed – or indeed the government – can hide away from the consequences of the interpretation. Nothing can be done about an inconvenient interpretation until some fresh step is taken – a change of mind in the courts or a new statute. That remains the case however much the interpretation rejected by the courts is favoured by the public, however much it is unanimously supported by governing elites, or however much it was carefully framed by those advising the executive and the legislature when the legislation was being prepared.

There are abuses, or risks of abuse, inherent in what Bishop Hoadly called "an absolute authority to interpret" the laws. For this "absolute authority" which the judiciary possesses gives it immense power in relation to statutes. You all know the trenchant phrases of Lord Acton which he used to Bishop Mandell Creighton about the latter's *History of the Popes*. On 3 April 1887, he wrote a letter to Creighton to complain about the book's failure to condemn the failings of the medieval papacy more vigorously. He said: "Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men." Perhaps "greatness" is an expression which it is not appropriate to apply to judges. But if it is, there are, no doubt, some great

judges – or judges who have been called great – who have been corrupted by power and who became bad men.

How far can principles of statutory construction control these risks of abuse and corruption? How far do the principles of statutory construction increase those risks?

MR JUSTICE O'CONNOR'S THEORY OF STATUTORY CONSTRUCTION

O'Connor J's theory of statutory construction is a useful starting point – and, indeed, to some minds, a useful finishing point. He stated it in a decision delivered on 8 June 1904, *Tasmania v The Commonwealth*. By that time, the High Court had been in existence for less than a year. The case took up three days of argument. The argument had concluded only five days earlier. Autre temps, autre moeurs, but on that day the three justices each delivered substantial judgments. In his O'Connor J said:[6]

> "I do not think it can be too strongly stated that our duty in interpreting a Statute is to declare and administer the law according to the intention expressed in the Statute itself ... 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 ... In considering the history of the law ... you must have regard to the historical facts surrounding the bringing the law into existence ... You may deduce the intention of the

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[6] (1904) 1 CLR 329 at 358-359.

> legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it."

The case related to the construction of the Commonwealth Constitution. But that Constitution was, in form, only an Imperial statute. Hence O'Connor J's views of statutory interpretation were not only relevant, but crucial, to his view of constitutional interpretation.

O'Connor J's account, both in its restrictive aspects and in its liberal aspects, accorded with the general understanding of the age. One question is how far that understanding has changed.

Restrictive aspects. Let us first examine the restrictive aspects of O'Connor J's theory. They centre on an exclusion of material demonstrating the subjective intention of the legislators as such. For O'Connor J 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 the surrounding circumstances. Many people have said this, before and after O'Connor J. D H Lawrence propounded the same idea for literary criticism. He said: "Never trust the teller. Trust the tale." Since O'Connor J's time in some jurisdictions it has become permissible routinely to examine extrinsic materials to ascertain what the legislature meant.[7] The wisdom of these developments is debateable.

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[7] In England and New Zealand, the change came from common law development: *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 at 630-640; Burrows, *Statute Law in New Zealand*, 3rd ed (2003) at 181-184. In Australia it came through legislative developments: *Acts Interpretation Act 1901* (Cth), s 15AB, and equivalents in some other jurisdictions.

In Australia they now exist in legislation, though they had some common law precursors. An extreme example of their abuse was given at a symposium in 1983 by Sir Anthony Mason. That symposium led to the enactment of the Australian legislation. At it Mr Justice Murphy said he habitually had recourse to Hansard and to Committee reports. He went on: "Indeed, for legislation in the period 1972-75, if I wanted to know what it was all about, I'd go to the Senate *Hansard* and sometimes find a very clear statement of the legislative intent." The period 1972-1975, of course, was the period in which the future Mr Justice Murphy had been the leader of the Government in the Senate and Attorney-General. Later in the symposium Mr Justice Mason said: "Like Mr Justice Murphy, I often look at Second Reading speeches. Unlike him I do not confine my attention to those made by Senator Murphy."[8]

The view that the intention to be searched for can be found in some place other than the legislative words is open to several lines of attack. First, as Charles Fried explained, it rests on a misconception. He deplored the idea that "in interpreting poetry or the Constitution we should seek to discern authorial intent as a mental fact of some sort." He said: "we would not consider an account of Shakespeare's mental state at the time he wrote a sonnet to be a more complete or better account of the sonnet than the sonnet itself." He disagreed "with the notion that when we consider the Constitution we are really interested in the mental state of each of the persons who drew it up and ratified it." On that false notion, he said, the "texts of a sonnet or of the Constitution would be a

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[8] Attorney-General's Department: *Symposium on Statutory Interpretation* (1983) pp 39 and 83.

kind of second-best." On that false notion, the preferred course would be to examine the brain-states of authors and framers for the truest account of their condition at the moment that the texts were created. He continued:[9]

> "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."

Further, there are strong prudential reasons for concentrating on what the words mean as distinct from what officials or legislators say they intended them to mean. It is fundamental to the rule of law as conceived by Friedrich Hayek in *The Road to Serfdom* that laws conform to certain formal criteria. He said that laws must be "fixed and announced beforehand". They must "make it possible to foresee with fair certainty how the [state] will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge".[10] Similarly, even that bleak advocate of supreme state power, Thomas Hobbes, said: "A law is the Command of him, or them that have the Sovereign power, given to those that be his or their Subjects declaring Publickly,

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[9] "Sonnet LXV and the 'Black Ink' of the Framers' "Intention", (1987) 100 *Harvard Law Review* 751 at 758–759 (footnotes omitted). Fried attributes the reasoning to passages in Dworkin, *Law's Empire*, (1986) at 54–57 and 359–365.

[10] *The Road to Serfdom* (University of Chicago Press, Chicago, 1944) p 54.

and plainly what every one of them may do, and what they must forebear to do."[11]

Clarity in legislation is therefore fundamentally important. So is relative ease in ascertaining its meaning. Not all citizens can consult lawyers about the meaning of legislation. Legislation ought to be comprehensible by reasonably intelligent lay people. A great deal of legislation has to be applied by very large numbers of state officials and it has to be applied against even larger numbers of citizens. People in these categories lack both the time and the skill to engage in the analysis entailed by extensive research into the actual intentions of legislators, reflected in legislative debates, travaux préparatoires, committee reports, and the like, let alone an analysis of non-domestic materials like the decisions of the European Court of Human Rights or the United Kingdom Supreme Court on human rights legislation.

Statutes may issue commands. They may also create frameworks within which those subject to them may arrange their affairs as they see fit. There is more likely to be agreement about, and understanding of, what is commanded or what is permitted, if the objective meaning of the words is examined, rather than what might be thought to be the subjective intention of the legislators.

Similar thinking applies in relation to contractual construction. For, like statutes, contracts can compel the parties to do particular things, or can create frameworks within which the parties may choose to do particular things. Contractual construction depends on finding the meaning of the contractual

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[11] J Cropsey (ed), *A Diologue Between a Philosopher and a Student of the Common Laws of England* (University of Chicago Press, Chicago, 1971) p 71.

language — the intention which the parties expressed, not the subjective intentions which they may have had, but did not express.[12] A contract means what a reasonable person having all the background knowledge of the surrounding circumstances available to the parties would have understood them to be using the language in the contract to mean.[13] But evidence of pre-contractual negotiations between the parties is inadmissible for the purpose of drawing inferences about what the contract meant unless it demonstrates knowledge of "surrounding circumstances".[14] Just as statutes can apply to many citizens, so contracts can affect many people other than the immediate parties – that is, many people who are not privy to the negotiations and intentions of the

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12 *Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580 at 1587; [1995] 4 All ER 717 at 724. See also *Rabin v Gerson Berger Assn Ltd* [1986] 1 WLR 526 at 533; [1986] 1 All ER 374 at 379–380.

13 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40]. Thus the question is: "what would the first party have led a reasonable party in the position of the other party to believe the first party intended, whatever the first party actually intended?" See Hoffmann, "The Intolerable Wrestle With Words and Meanings", (1997) 114 *South African Law Journal* 656 at 661; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at 272–273 [51]. See also *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 at 502; *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 at 736; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462 [22]; [2004] HCA 35; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at 1112 [14]. A fact known to one party but not reasonably available to the other cannot be taken into account: *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at 272 [49]. Gleeson CJ, Gummow and Hayne JJ agreed with this in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11]; [2001] HCA 70. See also *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40]; [2004] HCA 52. There is or may be considerable controversy in relation to whether the test turns on what background knowledge was reasonably available to the parties or on what knowledge they actually had; if the former, to whether the knowledge is what each party might reasonably have expected the other to know; and to whether the knowledge of third parties into whose hands the contract may fall is relevant. These issues appear to be less live in relation to statutes.

14 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at 1117–1121 [33]–[42].

immediate parties. For there may be an assignment or a novation or a charge or a declaration of trust over rights. Contracts may attain a quality of negotiation when used as documents of title. Contracts can have only one meaning, and those third parties, who are unaware of subjective meanings known only to the parties, can rely only on objectively established meaning.

This limited recourse to surrounding circumstances known to the parties (other than mere negotiations) is matched by the limited recourse to extra-statutory materials in construing statutes. And another similarity between statutes and contracts is that an examination of pre-contractual negotiations is often as futile and time-consuming as an examination of legislative debates and other travaux préparatoires.

There is a key proposition which is implicit in O'Connor J's stress on the need to search for the meaning of the statute as found in, and found only in, language used in a particular context. The proposition is that once that meaning has been established, it remains constant. That is, a statute enacted in 1900 bears the same meaning in 1904 as in 2004. Hence, as Lord Esher MR said, "the words of a statute must be construed as they would have been the day after the statute was passed".[15] Similarly, if a court is construing a contract or grant of title to land made many years ago, it does so in the light of the meanings of the words used by the parties as understood at that time.[16] "Organic" or "living tree" or

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[15] *Sharpe v Wakefield* (1888) 22 QBD 239 at 242.

[16] It can use dictionaries illuminating meaning at that time, to see, for example, whether reservations in respect of "sand, clay, stone and gravel" extended to rutile, zircon and ilmenite (*Minister for Mineral Resources v Brautag Pty Ltd* (1997) 8 BPR 15,815 at 15,822-15,824) and it can examine histories of the processes by which those minerals were extracted from black sands (at 15,820).

"evolutive" approaches to the construction of constitutions or instruments like the European Convention on Human Rights have become fashionable. These documents are treated as "living [instruments] which … must be interpreted in the light of present day conditions".[17] Statutes tend to be more evanescent, and there is thus less scope for those approaches in statutory construction. But they are starting to intrude even there.[18] This intrusion is highly questionable. For it amounts to legislative amendment by non-legislative means. There would be an uproar if the executive acted on this approach. Why should the judiciary? The idea that a statute can change its meaning as time passes, so that it has two contradictory meanings at different times, each of which is correct at one time but not another, without any intervention from the legislature which enacted it, is bizarre. Australian law at least has not accepted any presumption that legislation is to be given an ambulatory operation. However, in *Brownlee v The Queen*,[19] Kirby J appeared to disagree: " ... with ordinary legislation, expected to have an extended operation, it is increasingly accepted that language lives and meaning adapts to changed circumstances." On the other hand, one unrepentant adherent to anti-originalist construction of statutes appears to be Hayne J, for he

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[17] *Tyrer v United Kingdom* (1978) 2 EHHR 1 at 10 [31].

[18] Examples of the other view can be found. One is where the expression "the tenant's family" in a state enacted in 1920 was construed in 1976 as including a de facto wife: *Dyson Holdings Ltd v Fox* [1976] QB 503 at 511 per James LJ. See also *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705; *Victor Chandler International v Customs and Excise Commissioners* [2002] 2 All ER 315 at 322-323 [27]-[31] per Sir Richard Scott VC; F Bennion, *Statutory Interpretation* (4th ed, 2002) pp 762-763; *Yemshaw v London Borough of Hounslow* [2011] UKSC 3; Cross, *Statutory Interpretation* (3rd ed, 1995) p 51. That conclusion has been criticised: *Helby v Rafferty* [1979] 1 WLR 13 at 25.

[19] (2001) 207 CLR 278 at 321-322 [126].

considered that the only extrinsic materials which may be examined are those which existed at the time the legislation being construed was enacted.[20]

Liberal aspects. So much for the restrictive aspects of O'Connor J's pronouncement. What of the liberal aspects? They turned on examining "the historical facts surrounding the bringing the law into existence". Among the relevant historical facts are the technical meaning of the language as used in a legal context, the subject matter of the legislation, what the law was at the time the statute was enacted which the statute changed, what the law was at the time the statute was enacted which it did not change, and what particular deficiencies existed in the law before the statute was enacted. These were ideas which had been embedded in the common law for centuries.[21]

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[20] *Maloney v R* (2013) 298 ALR 308 at [61].

[21] In *Heydon's Case* (1584) 3 Co Rep 7a at 7b; 76 ER 637 at 638, the Barons of the Exchequer said that statutory interpretation depends on four questions:

> "What was the common law before the making of the Act.
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> ... What was the mischief and defect for which the common law did not provide.
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> ... What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
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> ... The true reason of the remedy ...."

In *Harcourt v Fox* (1693) 1 Show KB 506 at 535; 89 ER 720 at 734 Holt CJ said: "A contemporary exposition of a law, if there be any question about it, as our books tell us, is always the best, because the temper of the law makers is then best known." In *Aldridge v Williams* 44 US (3 How) 9 at 24 (1845) Taney CJ said: "The law as it is passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself, and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed." In *Direct United States Cable Co Ltd v Anglo-*

Footnote continues

A statute, then, must be read as a whole[22] with a view to giving effect to the object and purpose its language expresses.[23] It must be read it in the light of the historical circumstances surrounding its enactment. It must be given the meaning it then bore.[24] This can be a complex inquiry. For as McHugh J in *Theophanous v Herald & Weekly Times Ltd*,[25] with respect helpfully, said:

> "The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture."

That is true not only of textbooks, but only of other legal writings like judgments and statutes. Whether any difference between modern "purposive"

American Telegraph Co Ltd (1877) 2 App Cas 394 at 412 Lord Blackburn said that it was necessary to consider "the subject matter with respect to which [the statutory words] are used, and the object in view". In *Van Diemen's Land Co v Table Cape Marine Board* [1906] AC 92 at 98: "The time when, and the circumstances under which", the statute was enacted "supply the best and surest mode of expounding it".

22 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 151 per Knox CJ, Isaacs, Rich and Starke JJ.

23 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 per O'Connor J.

24 From this point of view it is erroneous to assert that "originalism in Australia was unheard of until ... *Cole v Whitfield*", as Adam A Perlin does: "What Makes Originalism Original?: A Comparative Analysis of Originalism and Its Role in Commerce Clause Jurisprudence in the United States and Australia" (2005) 23 *Pacific Basin LJ* 94 at 98, n 16.

25 (1994) 182 CLR 104 at 196.

principles of interpretation and those of O'Connor J has been exaggerated is a question too large for full analysis tonight.

There are six key approaches to statutory interpretation which in some degree are mandated in the authorities, but which are capable of operating as aids to judicial abuse of power. One is the search for legislative "purpose". A second is the requirement that examination of legislation must proceed in the light of structure and context. A third is the search for the mischief the legislation is dealing with. A fourth is the need to clear up ambiguity. A fifth is the need to avoid constructions which lead to irrationality, absurdity, inconvenience or incoherence. A sixth is the principle of legality.

LEGISLATIVE PURPOSE

The first approach rests on a search for legislative purpose – or object, or objective, or intention, or aim, or policy. For the present the general law distinctions between these words as well as the question whether there is any relevant distinction between them in the field of statutory construction, have to be put aside. References to the importance of legislative purpose are ancient and legion. And certainly it must be conceded that if a statute states explicitly what its objects or purposes are, it is important to have regard to that statement. It is common, however, for those statements to be so vague, anodyne and aspirational that they do not actually assist in construction in any way. No harm is done in searching for legislative purpose so long as the court keeps steadily in mind the idea that the relevant purpose is that which a reasonable reader is to take as emerging from the words used. In a sense the purpose of a statute is no

different from the purpose of a machine. If the search is for what the statute means, what matters is what it does – what its function is. When a machine ceases to work, the way to make it work is to ascertain how it used to work, not necessarily what its designer intended. There are many inventors seeking patents who claim particular functions and properties for their inventions which do not exist. What matters is what the functions and properties are, not what they were intended to be or claimed to be.

This is reminiscent of that increasingly common feature of modern judgment writing – the preliminary claim that "These reasons for judgment will show" some desirable conclusion. A more modest claim would be that the reasons for judgment are intended to show the desirable conclusion. But in either case what matters is what the reasons do in fact show. And ascertaining what they do in fact show is not often assisted by being told what the authors claimed they would show, or hoped they would show. Similarly, what matters is what statutes do, not what it was intended that they do.

However, it has to be admitted that in some instances it is realistic to conduct a search for actual intention, whether or not the law actually allows it. If a particular statute was the brainchild of a powerful and knowledgeable Minister to whom the governing body and the legislature had in effect delegated responsibility for the enactment of the statute, and if that Minister were acting on the advice of a small group of skilled and likeminded experts, a knowledge of what was intended by the Minister and the experts might assist in determining the meaning of a particular provision. But the conditions just described are not easy to establish. Some Ministers are powerful, but hardly

any are omniscient. The form which legislation takes is often the result of internal trade-offs within and between the bureaucracy, ministerial staffers, government members of Parliament, members of the Opposition, members of minor parties whose votes may be crucial, and, above all, parliamentary counsel. Behind all of this surge the tides and storms of public opinion, pressure groups and lobbyists. It can be very hard to find a single collective intention. Further, many disputes about the meaning of legislation do not centre on its application to the problems which those responsible had in mind at the time when they prepared it. They arise out of problems or circumstances the occurrence of which was not foreseen, or even reasonably foreseeable, at that time. The seeming unity of those who prepared the Act might shatter on that rock.

The point to be made consistently with the theme of this lecture is that an excessive concentration on purpose can serve as a cloak for a judge to drift away from the actual words into an interpretation which the judge happens, consciously or unconsciously, to favour but which is not supported by the actual words. The courts have warned against this.[26] But the warning evidences the danger.

The search for purpose, then, can cause meaning to be found where it does not exist. Lord Diplock, speaking extra-judicially, said:[27] "if … the

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[26] *Australian Education Union v Department of Education and Children's Services* (2012) 285 ALR 27 at [28].

[27] "The Courts as Legislators" in B Harvey (ed) *The Lawyer and Justice* (Sweet & Maxwell, London, 1978) p 224.

Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed". It is sometimes forgotten that that much-quoted aphorism commences with the word: "if". It is therefore less extreme than it is sometimes taken to be. The difficulty is that sometimes it is assumed that there is always a target which can be found. On the assumption, the words do not matter. It is an assumption completely inconsistent with what Gageler and Keane JJ recently said, admittedly in dissent:[28]

> "The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair."

To some minds the modern stress on a search for legislative purpose is suspect, because taken to extremes it does no more than revive Edmund Plowden's theory about "the equity of the statute". That theory was expounded over many pages of seductive Elizabethan rhetoric in his celebrated note on *Eyston v Skidd*, but the following is a good example:[29]

> "[I]t is not the words of the law, but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz of body and soul; the letter of the law is the body of the law, and the sense and reason of the law is the sole of the law … And it often happens that when you know the letter, you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more

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28 *Taylor v The Owners – Strata Plan No 11564* [2014] HCA 9 at [65].

29 (1574) Plow 459 at 465; 75 ER 688 at 695.

> large and extensive. An equity … enlarges or diminishes the letter according to its discretion …".

The general understanding came to be that this doctrine permitted the court to extend a statute to some instances which its express words did not cover, and to narrow a statute so that it did not apply to some instances which its express words did cover.

The doctrine came under increasing criticism in the 19th century. In the 20th century, Griffith CJ said that it was "open to the grave objection that the adaptation or extension of the words of a statute to a case not within its actual provisions is the function of the legislature and not of the court".[30] He also said that:

> "It may well be that, if the legislature had applied its mind to the subject, it would have refused to make the suggested adaptation or extension, or would have made it subject to conditions, of which the court can have no knowledge, and on which it has no right to speculate."[31]

Griffith CJ set out[32] Coke's statement of the doctrine:

> "'*Equitie*' is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischiefe, or cause of the making of the same, shall be within the same remedie that the statute

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30 *Commonwealth v Baume* (1905) 2 CLR 405 at 415-416.

31 *Commonwealth v Baume* (1905) 2 CLR 405 at 416.

32 *Commonwealth v Baume* (1905) 2 CLR 405 at 416.

> provideth; and the reason hereof is, for that the law-makers could not possibly set down all cases in expresse terms …".[33]

But Griffith CJ then said: "This doctrine is no longer followed".[34]

"The equity of the statute" doctrine became unpopular for other reasons. It may have been related to the doctrine in *Dr Bonham's Case*,[35] empowering courts to invalidate statutes which are "against common right and reason, or repugnant, or impossible to be performed". That doctrine is quite out of favour now. "The equity of the statute" doctrine may enjoy a ghostly survival in the principle of legality, discussed below. It may also survive in a doctrine which may – the language is obscure – permit the courts to deny claims if they stultified the "scope and purpose", though not apparently the actual provisions, of legislation.[36] And "the equity of the statute" doctrine is also reflected in the thinking of those who wish to stress the importance of legislative purpose. But the more purpose prevails over language, the more risk there is of triggering the forces which drove "the equity of the statute" doctrine into unpopularity.

The search for purpose has been made more popular, and is indeed compelled, by legislation in the form of s 15AA of the *Acts Interpretation Act*

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33 E Coke, *First Part of the Institutes of the Laws of England*, rev by F Hargreave and C Butler 19th ed by C Butler (J & W Clarke et al, London, 1832) vol I, 24b.

34 *Commonwealth v Baume* (1905) 2 CLR 405 at 416.

35 (1610) 8 Co Rep 113 at 118; 77 ER 646 at 652.

36 *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 at [37]-[38] and [110]-[111], relying on *Nelson v Nelson* (1995) 184 CLR 538 at 552 and 554.

1901 (Cth). It was amended in 2011, and now requires the courts to prefer "the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act)" to "each other interpretation". But again, the orthodox search for a purpose is a purpose to be found only in the text when considered against the prior legal background and the relevant mischief, assisted by any materials permissible under s 15AB of that Act.

"TEXT, STRUCTURE, CONTEXT"

The second approach rests on the modern mantra "text, structure, context". In ascertaining the meaning of a particular provision in a statute, it is certainly desirable to explore how the statute works as a whole. That is whether that exploration takes place only where a particular provision is doubtful, as O'Connor J said, or whether it can take place even if it is, considered by itself, plain. Of course, if the whole of statutes had to be read, the rule would be quite unworkable. Some modern statutes are so long and complex that it would take months to conclude how they work as a whole. Hence, in the case of complex statutes dealing with many topics, like, for example, legislation dealing with taxation or companies or competition law or consumer protection, it is sufficient to look at the relevant part of the statute dealing with the material topic. If this is not done, a risk of internal contradiction may arise. The small provision being construed, if construed one way, may obstruct and damage the smooth operation of other provisions because even if it is only a tiny cog, it is a vital one.

Does it add anything to what has just been said to say that interpretation depends on text, structure and context? This collocation has mystical overtones,

pointing away from the actual words of the statute. The "text" is the legislative language, no doubt. The "structure", too, can only be found in the legislative language. Yates wrote:

> "Plato thought nature but a spume that plays,
> Upon a ghostly paradigm of things."

The "structure" of a statute can only be found in its words, not some ghostly paradigm behind them. And much of the context is only to be found in those of the words of the statute which are being read in order to help ascertain the meaning of the words being construed. It is true that other parts of the context are outside the statute – the general law, the historical circumstances, and what is revealed by travaux préparatoires, if this recourse is permissible. But the most immediate part of the context is the words of the statute as a whole. In that way, expressions like "structure", and, to a large extent, "context", may do no more than mislead. That is because the search for "structure" and "context" downplays the importance of text. To talk of "text", "context" and "structure" in a disjunctive way is to imply that the "structure" is somehow different from the text. That is not so.

MISCHIEF

The third factor is the search for mischief. There is no doubt that the search is legitimate. But it is capable of abuse. That is because the wider the mischief identified, the more the interpretation of the statute is likely to change. The problem is that there can be a slide from what the actual mischief is. The movement is first towards what the court thinks the legislature should have perceived the mischief to have been. Then there is a further slide to construing the statute so that it remedies what the court thinks the mischief should have

been perceived to have been rather than what it actually was. The final slide moves towards construing the statute so that it provides what the judge thinks is the best possible method of dealing with the mischief which the legislature ought to have perceived.

AMBIGUITY

Then, fourthly, there is ambiguity. No doubt if there is genuine ambiguity, the court's duty is to choose. A right of choice is a freedom. But it is wrong for courts to confer this freedom on themselves by creating ambiguity. It is possible for language to be plain on its face, but more obscure after recourse is had to materials other than that language. That recourse ought not to be permitted. It is wrong to create an ambiguity in unambiguous language. It will be remembered that O'Connor J said that one only departed from the words of the provision being construed and looked at the rest of the statute and the surrounding circumstances if the words were not plain, but doubtful. O'Connor J's contention was that in construing a particular provision one only looks to the other parts of the Act and the surrounding circumstances if the particular provision is doubtful in meaning. That is inconsistent with the opinion of four justices of the High Court in *CIC Insurance Ltd v Bankstown Football Club*.[37] Their Honours said that if "the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance". Whether

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[37] (1997) 187 CLR 384 at 408.

satisfactory or not, one would have thought that that approach must now be accepted as controlling, were it not for the fact that in 2009 five justices of the High Court said that it is "erroneous to look at extrinsic materials before exhausting the ordinary rules of statutory construction.[38] The problem is that a key element in the search for mischief and objects can now be extrinsic materials. The two pronouncements appear contradictory.

AVOIDING "HORRIBLES"

The fifth matter has been expressed as follows.

> "If two constructions of a provision are open, the Court will prefer that which avoids consequences that are 'absurd', 'anomalous', 'capricious', 'curious', 'extraordinary', 'inconvenient', 'irrational', 'obscure' or 'unjust', 'unlikely' or 'unreasonable'."[39]

These consequences are what Justice Scalia calls "horribles". The proposition quoted is true but dangerous. One preliminary danger is that some of these words have different meanings. To say something is "inconvenient", "unlikely" or "unreasonable" is a soft impeachment, compared with calling it "absurd". Another danger is that what to one observer is anomalous or inconvenient can to another be principled. Everything depends on what a particular observer sees as the key principle. It is too easy for judges to

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[38] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [33].

[39] P Herzfeld, T Prince and S Tully, *Interpretation and Use of Legal Sources* (Thomson Reuters, Sydney, 2013) p 105 [25.1.880].

stigmatise a particular result they dislike as unreasonable or inconvenient, then to think up some outcomes they think to be reasonable and convenient, then to devise the most reasonable and convenient outcome possible, and then to conclude that not only ought the legislature to have arrived at that ideally reasonable and convenient outcome, but that it did.[40]

THE PRINCIPLE OF LEGALITY

The sixth matter is the "principle of legality". What is it? The principle is that, unless clear words are used, the courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms. The fundamental rights or freedoms often relate to human rights and are sometimes described as having a constitutional character. Illustrations include freedom from trespass by police officers on private property, procedural fairness, the conferral of jurisdiction on a court, and vested property interests. To these may be added others: rights of access to the courts; rights to a fair trial; the writ of habeas corpus; open justice; the non-retrospectivity of statutes extending the criminal law; the non-retrospectivity of changes in rights or obligations generally; mens rea as an element of legislatively-created crimes; freedom from arbitrary arrest or search; the criminal standard of proof; the liberty of the individual; the freedom of individuals to depart from and re-enter their country; the freedom of individuals to trade as they wish; the liberty of individuals to use the highways; freedom of speech; legal professional privilege; the privilege against self-incrimination; the non-existence of an appeal from an acquittal; and the

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[40] Lord Sumption, "Judicial and Political Decision-making: The Uncertain Boundary" [2011] JR 301.

jurisdiction of superior courts to prevent acts by inferior courts and tribunals in excess of jurisdiction.

In Australia, O'Connor J may be regarded as the leading progenitor of the principle of legality. That is because in *Potter v Minehan*[41] he quoted a passage from *Maxwell on Statutes* reflecting the principle.

> "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".

That passage has been much quoted since.

Modern judges have endeavoured to explain the principle of legality. Gleeson CJ said that the principle requires the legislative language to indicate "that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment".[42] For some, that is perhaps too subjectivist an approach. Lord Hoffmann made a different point in *R v Secretary of State for the Home Department; Ex parte Simms*:[43] "the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost". This has a no doubt unintended, but unfortunate, air of blame-shifting. It might be thought that the

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41 (1908) 7 CLR 277 at 304.

42 *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19].

43 [2000] 2 AC 115 at 131.

courts are saying: "The modern state sometimes depends on harsh and extreme exercises of power. You, the legislature, must do that particular kind of dirty work. It is not for us". It provokes a retort to the judges: "If you do not want to enforce laws having a meaning which you personally dislike, you should not be a judge".

A more powerful consideration supporting the principle of legality was pointed to by Lord Hoffmann in the same case. He said, in effect, that it was wrong for the courts to give general or ambiguous words a rights-restricting meaning, "because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process".[44] It is common for modern legislatures to create committees having the function of investigating bills before they are enacted to ensure that they are compatible with received conceptions of human rights, or, if they are not compatible, that the adverse impact is minimised. A United Kingdom example is the Joint Committee on Human Rights. The Commonwealth Parliament has an equivalent committee. These bodies perform useful functions, and the principle of legality helps to foster the same goals as they do.

There is another more mysterious utterance about the principle of legality. As justified by Gleeson CJ, the principle appears to be connected with a form of legislative intention. In *Zheng v Cai*[45] five justices of the High Court said: "judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the

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[44] [2000] 2 AC 115 at 131.

[45] (2009) 239 CLR 446 at [28].

making, interpretation and application of laws". This idea has been used several times in Australia, and can be traced back to Lord Steyn in 1997.[46] Is this portentous pronouncement banal or profound? To start with, whenever the High Court starts talking about its constitutional position, or that of the courts generally, it is time to reach for one's gun. Every well-informed Australian knows that legislation can deprive the governed of individual rights or freedoms (provided that the legislation is constitutionally valid). The principle of legality has a healthy operation in ensuring that deprivation will not take place unless the legislative language is clear. What is added by seeking to explain the ideas underlying legislative intention and the principle of legality by reference to what the legislature understands about its constitutional relationship with the judiciary? It does not matter what the legislature understands. The consequences for legislation which is either unconstitutional or insufficiently clear to permit a construction invasive of rights flow whether the legislature understands them or not.

One further opinion of Lord Hoffmann's is worth noting. He said that through the principle of legality the United Kingdom courts "apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document".[47] This opinion is not universally shared. But it does demonstrate power in the principle of legality. The opinion has also led to Lord Hoffmann's view that

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[46] *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587-589: see P Herzfeld, T Prince and S Tully, *Interpretation and Use of Legal Sources* (Thomson Reuters, Sydney, 2013) p 225 [25.1.1940].

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

s 3(1) of the *Human Rights Act* 1998 (UK) is no more than a statutory manifestation of the principle of legality.[48] Now s 3(1) gives the court a power beyond the dreams even of constitutional courts like the Supreme Court of the United States to go beyond striking down legislation to ignoring the actual meaning of the legislation and substituting a rights-compatible meaning. To treat the principle of legality as equivalent to s 3(1) is to treat it as having immense force. However, it must be admitted that Lord Hoffmann's view on this point is a minority one.[49]

The difficulty with the principle of legality is that it is not hard for the courts, on experiencing distaste for a particular statute in its ordinary meaning, to identify a collision between it and some supposedly fundamental right, but to hold that the ordinary meaning is not clear enough to satisfy the principle of legality. The cry goes up: "Yes, of course it's fairly clear, but not quite clear enough". And it is hard to criticise those who emit those cries, or the judicial conclusions they have arrived at, when they conceive themselves to be protecting matters of conscience like fundamental rights.

The requirement that certainty of language exist before fundamental rights can be overthrown can be treated so intensely as to go close to constitutionalising those rights as entrenched – virtually rendering them immune from legislative change. That, perhaps, is why some people call the

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[48] *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 132.

[49] *Ghaidan v Goden-Mendoza* [2004] 2 AC 557.

principle of legality "a common law 'Bill of Rights'."[50] When abused, the principle of legality thwarts the legislature and fails to give effect to the true meaning of its legislation. Yet that is the task of legislative construction.

CONCLUSION

Earlier reference was made to the importance of legislation, if Hayekian rule of law criteria are to be satisfied, being intelligible to a reasonably informed lay person. Legislation can be intelligible to that class of reader if all that has to be read is a clearly drafted statute. But once material additional to the actual words have to be considered – the existing state of the law, the mischief, extrinsic materials, let alone all the factors relevant to the construction of legal texts to which McHugh J referred – the task becomes impossible for a lay person. That circumstance alone gives one pause. It raises an extreme question: is the whole mass of learning on statutory construction – quite a lot now discarded, but replaced by internally conflicting modern doctrines – tending to drown the enterprise of construing statutes? It also poses a less extreme question: if the meaning of the language is clear to a lay reader, should secondary materials indicating a contrary meaning receive no weight? Or must we conclude that it is inevitable that modern statutory laws tend to be so complex, tend to deal with such difficult technical problems, and tend to rest on so subtle and shifting a legal background, as to be incapable of comprehension by lay readers, so that the position of a lay reader must be treated as irrelevant? Is the compliance of our legal system with Hayekian criteria rendered entirely

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50 J Willis, "Statutory Interpretation in a Nutshell" (1938) 16 Can Bar Rev 1 at 17.

dependent on a high caste of arcane, expensive and slow moving legal experts? If so, the rule of law as traditionally conceived will have been significantly damaged.