2018 WINTERTON LECTURE
CONSTITUTIONAL INTERPRETATION

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I INTRODUCTION

In Molière's *The Bourgeois Gentleman,* Monsieur Jordain is learning from his philosophy tutor. His tutor explains the meaning of prose. Monsieur Jourdain asks his tutor, "When I say, 'Nicole, bring me my slippers, and give me my nightcap,' that's prose?" His tutor replies, "Yes, Sir". Monsieur Jourdain responds, "By my faith! For more than forty years now I have been speaking prose without knowing anything about it".[1]

George Winterton was not like Monsieur Jourdain. The depth of his work was due to his awareness of the history and the philosophy of the language in which he was speaking. My late, and very dear, friend Peter Johnston[2] was part of a small group of exceptional public lawyers whose members included George Winterton. Occasionally, after an off-the-cuff opinion from me, he would say, "I think George has written something about that". In his usual polite way, he was directing me to a far more sophisticated exploration of the history or theory of the issue by George Winterton. The area of law about which I will speak this evening is one about which George Winterton had thought deeply. That area is the interpretation of constitutional words.

Although my focus is upon a basic dimension of interpretation of words in a written Constitution, I want to draw out the strands of an approach that has been taken by many judges in Australia and to explore its theoretical foundations. The approach is far from the only approach to constitutional interpretation. But it is useful to explore its foundations, and to see if it can be justified, because it is one that has been taken expressly by many judges and practitioners. Like Monsieur Jourdain, many lawyers adopt this method without knowing it.

The basic point of the theory considered here is that the core of constitutional interpretation involves a theory of language. As a theory of language it is not limited to the words of a Constitution. The same approach is taken when we try to understand the meaning of *any* words. The context might differ but the primary

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[1] Jones (trans) Molière, The Middle Class Gentleman (Le Bourgeois Gentilhomme), 2008, Act II, Scene IV, available at <http://www.gutenberg.org/files/2992/2992-h/2992-h.htm>.

[2] Professor Peter Johnston, who died in 2014, was a distinguished lawyer and academic, being associated with the University of Western Australia Law School for more than 50 years. See Robert French, 'Peter Johnston's Contribution to Public Law in Western Australia' (2015) 39(2) University of Western Australia Law Review 11.

dimension of theory for understanding the meaning of written words in a Constitution is broadly the same as that for a contract, a specialty, a trust deed, a will, a statute, or even a conversation. For many lawyers, in day to day practice, this is the theory that they apply from ordinary experience without always knowing it.

I begin with some basic terminological distinctions. The terminology used here is far from universal. Indeed, I have previously used different language to express these distinctions. The language merely points to a difference in concept. The distinctions that I make, following sophisticated accounts of interpretation dating back to the 19th century, draw a divide between "interpretation" and "construction". Within interpretation, a further division is between semantic interpretation and contextual interpretation. As to construction, there may also be two concepts that are conflated in the single label. Those concepts might be separated by speaking of the meaning applied in the process of construction separately from the meaning applied in the process of adjudication. However, my central concern in this article is with interpretation.

II THE DIFFERENCE BETWEEN SEMANTIC INTERPRETATION AND CONTEXTUAL INTERPRETATION

If words were considered acontextually the central factor for semantic interpretation would be the literal meaning of the words. That literal meaning might have a number of possible answers depending upon the context. So, a notice of termination that refers to termination on January 12, 1995 might mean that termination occurs immediately after midnight on the commencement of 12 January 1995. Or it might mean that termination occurs at the end of the day on 12 January 1995. Or it might mean midday on 12 January 1995. An interpreter who was tasked only to translate these words into another language could legitimately do so by words that had any of these connotations. But, as a matter of semantic interpretation, one thing that 12 January 1995 does *not* mean is 13 January 1995.

However, interpretation, and the manner in which I describe it in this article, is always contextual, although some matters of context might be excluded from consideration in different contexts. Semantic meaning is a relevant consideration in contextual interpretation in determining the reasonably intended meaning that should be applied. It can be a very strong consideration in relation to instruments drafted by lawyers. Nevertheless, there are many examples where legal instruments have been interpreted to mean something beyond their semantic meaning. In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*[3], the House of Lords

[3] [1997] AC 749.

held that the words "12 January 1995", in context, meant 13 January 1995. The language of the parties had just gone badly wrong. There have been decisions that have held that "black" means "white"[4]; "inconsistent" means "consistent"[5]; "shorter" means "longer"[6]; "John" means "Mary"[7]; "coloured blue" means "coloured red and blue"[8]; and a thousand means twelve hundred[9]. In a case in the Federal Court three years ago, I gave the example of French legislation that, translated into English, purported to make it an offence for passengers to get on or off a train when the train was *not* moving[10]. That legislation should be interpreted to mean the opposite of its semantic meaning. No rational person would interpret the legislation as giving a meaning based only upon a semantic interpretation of its words. That literal meaning conjures the image of French railway officers waiting at the station to hand out infringements to everyone who did *not* jump off the moving train.

This distinction between semantic interpretation, which involves the possible range of literal meanings of words, and contextual interpretation, which is concerned with the meaning reasonably understood by the reader to have been intended, is not unique to the law. It is a difference that we experience in everyday use of language. In Sheridan's *The Rivals*[11], Mrs Malaprop constantly uses the wrong word to convey her meaning. But she is understood. When she speaks of her ward, Lydia Languish, as being "as headstrong as an allegory on the banks of the Nile", neither the audience nor Captain Absolute thinks that she is speaking of the hidden meaning of words on the riverbanks. The point about semantic interpretation is that it creates a universe of literal meanings. But interpretation generally requires a search for the meaning reasonably understood by the reader to be intended by the speaker.

III THE DIFFERENCE BETWEEN INTERPRETATION AND CONSTRUCTION

My concern with constitutional interpretation in this article is with the understanding of the meaning of words. When words are read in their context they can bear a number of possible meanings. The process of interpretation involves the selection of the meaning that best fits what the person to whom the words were directed reasonably understands to have been intended by those words. This

[4] Mitchell v Henry (1880) 15 Ch D 181.
[5] Fitzgerald v Masters (1956) 95 CLR 420 at 426-427; [1956] HCA 53.
[6] Saxby Soft Drinks v George Saxby Beverages (2009) 14 BPR 27,213; [2009] NSWSC 1486.
[7] Wilson v Wilson (1854) 5 HLC 40 [10 ER 811].
[8] St Edmundsbury Board of Finance v Clark [1973] 3 All ER 902 at 915.
[9] Smith v Wilson (1832) 3 B & Ad 728 [110 ER 266].
[10] Burragubba v State of Queensland (2015) 236 FCR 160 at 164 [18].
[11] E. Gosse (Ed), The Plays of Sheridan: The Rivals, New York, E. P. Dutton & Company, 1905 at 53.

reasonably understood meaning is then an important matter for constitutional *construction* which is concerned with the applied legal effect of the words.

In constitutional construction, as with construction involving other legal instruments,[12] it is sometimes said that there are constructional choices available. But that expression "constructional choice" should be used with care for three reasons. First, it is not always clear whether the expression is used to describe a choice in the process of interpretation of the words, that is with the determination of the meaning of the words, or whether it is used to describe construction in the sense of the determination of the legal effect of the words as interpreted and applied to the facts. Assuming the latter, the second difficulty is that in many cases there is no "choice". Construction usually involves a straightforward application of the words, as interpreted, to the facts. Nevertheless, there will be cases where the application is not straightforward, such as where the interpretation of the words gives rise to ambiguities, or uncertain boundaries, or contradictions with other provisions, or gaps for which an answer must be given but where the meaning of the text is silent. But, thirdly, in these cases the "choice" must still proceed by reference to the text and purpose of the instrument. It is not a "choice" in the sense of a free option to elect between alternatives. There is only one correct answer.

There is a further complicating factor involved in the applicationof the meaning, or giving legal effect by applying the words, particularly those of a constitution. That factor is developed constitutional practice. There are circumstances where a judge might conclude that words, as properly interpreted and applied to the facts, should give legal effect *x* but, instead, the judge applies the words to give legal effect *y*. Although these circumstances are invariably also described as being part of the notion of construction, they might conveniently be separated by the label "adjudication". Just as the interpretation of words generally leads to a straightforward application, or construction, of their legal effect so too the construction generally leads to a straightforward adjudication. But neither is always the case.

In 2004, George Winterton wrote that the Commonwealth Constitution was "not inscribed upon a *tabula rasa*. It was born into a common law world, albeit one capable of development, for adaptability is one of the common law's most fundamental and valuable qualities"[13]. The world into which the Constitution was enacted was one where the meaning of legislation was a matter of judicial exegesis[14]. To borrow from Ronald Dworkin, although using different language,

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[12] Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104 at 117 [49]; [2015] HCA 37.

[13] G. Winterton, "The Relationship between Commonwealth Legislative and Executive Power", (2004) 25 Adelaide Law Review 21 at 34.

[14] See Brown v Tasmania (2017) 91 ALJR 1089 at 1183-1184 [507]-[508]; 349 ALR 398 at 517-518; [2017] HCA 43.

the process of constitutional adjudication must give fidelity to constitutional practice[15]. Constitutional practice includes judicial decisions that have prescribed a legal meaning to that provision or to related provisions. As George Winterton argued, this includes the reasoning supporting those decisions[16]. It might also include the practice of clear and longstanding professional opinion[17] or even well-developed social understandings.

Let me give a simple example. Suppose that, in 2018, counsel in the High Court of Australia submitted, relying upon arguments made by John Finnis over nearly half a century[18], that the construction taken by the majority of the High Court in 1915 in the *Wheat Case*[19] was erroneous. One response to this submission might be that even if that were considered to be plainly correct, it is too late, a century later, to resurrect the powers of the Inter-State Commission. Proper constitutional adjudication must be faithful not merely to construction, in the sense of applying the interpreted meaning of constitutional words, but also the development of constitutional practice that bears, directly or indirectly, upon the relevant provision. Thus, Windeyer J, who maintained that the essential meaning of the words of the Commonwealth Constitution could not change[20], also described judicial decisions affecting the essential meaning that applied at Federation as, metaphorically, "divert[ing] the flow of constitutional law into new channels"[21].

Putting to one side these adjudication considerations, an example of the difference between interpretation and construction can be seen in the United Kingdom in s 3 of the *Human Rights Act 1998.* That section provides that "so far as it is possible to do so", legislation must be read and given effect in a way which is compatible with European Convention rights. Section 3 does not change the rules by which the words are to be interpreted. As Lord Woolf CJ said, it is "probably self-evident" that unless legislation, as ordinarily interpreted and construed, would be in breach of the Convention then s 3 can be ignored[22]. Put in the language used

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[15] R. Dworkin, Justice in Robes, Cambridge, Mass., Harvard University Press, 2006 at 118.
[16] G. Winterton, "Popular Sovereignty and Constitutional Continuity", (1998) 26 Federal Law Review 1 at 2. See also Re Lambie [2018] HCA 6 at [79].
[17] J.H. Baker, The Law's Two Bodies, Oxford, OUP, 2003 at 66.
[18] See, eg, J. Finnis, "Judicial Power: Past, Present and Future", Speech given for the Judicial Power Project, Grays Inn Hall, 20 October 2015, available at https://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/; J. Finnis, "Separation of Powers in the Australian Constitution – Some Preliminary Considerations" (1967) 3 Adelaide Law Review 159, 163-165.
[19] The State of New South Wales v The Commonwealth (1915) 20 CLR 54; [1915] HCA 17 (construing s.101 of the Commonwealth Constitution).
[20] Ex parte Professional Engineers' Association (1959) 107 CLR 208 at 267; [1959] HCA 47; Damjanovic & Sons Pty Ltd v The Commonwealth (1968) 117 CLR 390 at 406-407; [1969] HCA 42. See also Dennis Hotels Pty Ltd v Victoria (1960) 104 CLR 529 at 608; [1960] HCA 10.
[21] Victoria v The Commonwealth ("the Payroll Tax Case") (1971) 122 CLR 353 at 396; [1971] HCA 16. See also Al-Kateb v Godwin (2004) 219 CLR 562 at 593 [69]; [2004] HCA 37.
[22] Popular Housing & Regeneration Community Association Ltd v Donoghue [2002] QB 48 at 72 [75].

here, the construction of the legislation is an exercise in determining its usual legal effect on the facts. However, legal rules such as s 3 are exercises in determining a different construction. The construction issue created by s 3 has been said to arise after the meaning of the provision is determined according to ordinary principles[23]. Only if this ordinary meaning is non-compliant is the s 3 "remedial" measure in application to the facts said to be necessary[24].

There are numerous difficulties that arise for the task of the judge in (i) issues of construction that depart from interpreted meaning, and (ii) being faithful to both applied constitutional meaning, in the sense of construction, and separate adjudication issues, such as well-developed constitutional practice when those two dimensions conflict. But there is one significant advantage that can be derived from the importance of the dimension of constitutional practice. A line of constitutional decisions can make it much easier to determine the legal meaning to be applied as part of constitutional adjudication. This can be illustrated by an old joke. The joke concerns a painter whose job it is to paint the white lines in the middle of the road. His boss notices that over the first week the number of lines painted becomes fewer and fewer, until one day he only paints one line. The boss demands an explanation. The painter expresses surprise that the question would even be asked. "Every day", he explains, "it takes longer and longer to walk all the way back to the paint can". When construing a Constitution that is 117 years old, it is not usually necessary to walk all the way back to the paint can to work out the meaning of the words to be applied. There is judicial precedent that, particularly if unchallenged, can be conclusive. There are also judicial decisions on analogous provisions, as well as decisions that have subsequently recognised underlying principles and assumptions. These precedents and decisions must be taken into account. Nevertheless, there are cases where precedent is not determinative and, sometimes, not even clear. Then, the dimension of construction becomes particularly important.

It must be reiterated that just as interpretation is not independent of construction, construction is not independent of adjudication. It can be an error to approach the legal meaning by separate steps of determining meaning by interpretation and then applying that meaning by construction and then proceeding to consider issues of adjudication. The relationship between all these dimensions is complex. My focus, and my use of interpretation to exclude issues of construction and adjudication, is simply to elucidate the issues involved.

IV INTERPRETATION OF MEANING

[23] A. Kavanagh, Constitutional Review under the UK Human Rights Act, Cambridge, CUP, 2009 at 23-24; J. Beatson et al, Human Rights: Judicial Protection in the United Kingdom, London, Sweet & Maxwell, 2008 at 472 [5-31].
[24] Sheldrake v Director of Public Prosecutions [2005] 1 AC 264 at 303 [28].

A *Interpreting meaning in ordinary language*

Let me move to explaining some techniques employed by people to understand ordinary speech acts. In conversation, listeners ask themselves, "what does the speaker mean?" The answer may not be just one of the literal meanings conveyed by the process of interpretation in its narrowest sense of semantic interpretation. Interpretation generally requires context. Context is not a matter to be considered *after* text. It is *con* text, a matter to be considered *with* text. Context supplies implications. In every conversation people have, they need to make implications to understand meaning.

Jeffrey Goldsworthy helpfully classifies implications in language and in law into at least four categories[25]. First, there are logical implications that arise from semantic conventions. An apparently simple logical implication might conceal considerable complexity. Whitehead and Russell's *Principia Mathematica* took over 360 pages to prove that one plus one equals two.

Secondly, implications can be required because the expressions used are deficient. Listeners must constantly supply inadvertent gaps and omissions in ordinary conversation. One example is the common use of metonyms. Most of us have no difficulty understanding what is meant when someone says that "Westminster may struggle in its response to Brexit" or "the kettle is boiling". We supply the gap, which is "*the Parliament of the United Kingdom that is colloquially known as* Westminster may struggle in its response to Brexit", and "*the water in* the kettle is boiling".

Thirdly, an implication can involve a deliberate omission. There is an old joke about the captain of a ship who wrote in the ship's log: "Seaman Jones performed poorly today". Below it is an entry from Seaman Jones: "The Captain was sober *yesterday*". Seaman Jones seeks to use his entry to exculpate himself by this technique of implication by deliberate omission.

Fourthly, and most commonly and importantly for legal interpretation, an implication can involve an assumption, even one which has not been consciously considered. These implications are prolific in ordinary language. A modern version of the famous example given by Ludwig Wittgenstein in *Philosophical Investigations*[26] is of a parent who asks me to "show the children a game". I teach the children to juggle sharp knives. The parent then says to me, "I didn't mean that sort of game". The implication here is tacit. It does not matter that the parent did not turn her mind to the possibility that I might try to teach her children to juggle sharp knives.

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[25] J. Goldsworthy, "Implications in Language, Law and the Constitution" in G. Lindell (ed), Future Directions in Australian Constitutional Law. Essays in Honour of Professor Leslie Zines, Sydney, Federation Press, 1994, 150 at 154-159, 164.

[26] L. Wittgenstein, Philosophical Investigations, 2nd ed, Oxford, Blackwell, 1958 at par 70.

There is a very important point to be made about these implications based on background assumptions. The higher the level of generality at which a statement is made, the more implications will be needed in order to understand it. I can illustrate this point by adapting an example from John Searle. Consider the statement "the cat sat on the mat". Whose cat was it? Whose mat was it? Where was the mat? Why did the cat sit on the mat? Why should we care? Background assumptions are filled in by context. If the speaker, call him Dennis, is speaking (i) at his house (ii) as his cat (iii) walked past a brown mat (iv) that was covered in fur, the implications from the statement have the effect: "Dennis' cat sat on Dennis' brown mat in Dennis' house, which is the reason the mat is covered in fur". However, even if the statement is made at a low level of generality, there will still be many background assumptions. So, even if I said "Dennis' cat sat on Dennis' brown mat in his house, which is the reason the mat is covered in fur", more words are needed even to set out very basic assumptions that are taken for granted. According to John Searle, it would be necessary to say that when Dennis' cat sat on the mat at Dennis' house, the mat was "[a]t or near the surface of the earth or some similar gravitational field"[27]. The basic point is that background assumptions are prolific in speech acts, including many that are so obvious that they go without saying.

B *Interpreting meaning in legal documents*

The principles that are employed in the process of interpreting the meaning of ordinary speech acts are generally the same principles that are applied in relation to written legal documents. But there are some important differences that arise from the context in which the words are formulated. One contextual difference between, for example, legislation and ordinary conversation, is that the former is usually drafted by professionals, and debated by members of Parliament, who often have goals that include minimising deficiencies in language. The most significant source of implication for speech in written legal documents is therefore the background assumptions that are present in all language.

There is another contextual difference arising from the careful use of words in legislation, compared with ordinary conversation. The care taken in drafting legislation should mean that the more a particular interpretation of a statute departs from the range of semantic meanings of its words, the more obvious that interpretation must be from the statutory context in order to justify the departure. This is the best way to understand what was meant by the observation in the joint judgment in *Federal Commissioner of Taxation v Consolidated Media Holdings*

[27] J. Searle, Expression and Meaning: Studies in the Theory of Speech Acts, Cambridge, CUP, 1979 at 122.

Ltd[28], that the task of statutory interpretation must begin and end with the text of the statute. This statement cannot mean that the text of a statute must always be construed only according to the range of semantic meanings of the individual words. That would be plainly wrong because it would not allow for plain drafting errors or infelicities of language. The statement means only that interpretation of statutes, like all speech acts, must depend upon the words used in their context. Yet the further the departure from the semantic meaning of words, the stronger the justification that will be required for that interpretation.

Although care is taken in the drafting of statutes, and great care was taken in the drafting of the Constitution, like the ordinary use of language the text of the Constitution still requires many implications. Dixon J suggested that the written Constitution relies more on implications than most other documents[29]. The reason for this is, again, contextual. As I have said, the higher the level of generality at which a point is made, the more implications will be necessary to make sense of the statement. Some of the assumptions upon which implications are based are as fundamental as the gravitational field within which the cat sits on the mat. One such example is the assumption that compliance with the rules expressed in the Constitution can be the subject of judicial review by judges. Others can be much more specific[30].

Although the high level of generality of many constitutional expressions means that implications in a Constitution might not be uncommon, it has also been held that the principles concerning implication in a Constitution do not differ from those concerning implication in a statute[31]. The implication that arises must be one of necessity. And the necessity must be legal necessity, to make the instrument work, not the perception by a judge of some political necessity. In the *Engineers Case*, Knox, Isaacs, Rich and Starke JJ said[32]:

> Not only is the judicial branch of the Government inappropriate to determine political necessities, but experience, both in Australia and America, evidenced by discordant decisions, has proved both the elusiveness and the inaccuracy of the doctrine as a legal standard.

The basis of the theory explored here is that, generally, the words in all written legal documents are interpreted in the same way as ordinary language. Such documents include contracts, wills, statutes, trusts, and constitutions. In 1889, Bowen LJ said that the "rules for the construction of statutes are very like those

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[28] (2012) 250 CLR 503 at 519 [39]; [2012] HCA 55.
[29] West v Commissioner of Taxation (NSW) (1937) 56 CLR 657 at 681; [1937] HCA 26.
[30] Burns v Corbett [2018] HCA 15.
[31] Tasmania v The Commonwealth of Australia and State of Victoria (1904) 1 CLR 329 at 338, 358-359; [1904] HCA 11; Payroll Tax Case (1971) 122 CLR 353 at 394.
[32] Amalgamated Society of Engineers v Adelaide Steamships Co Ltd (1920) 28 CLR 129 at 151; [1920] HCA 54.

which apply to the construction of other documents"[33]. His Lordship's point might have been reinforced by the observation that contracts can be embodied in statutes, such as statutes implementing State agreements or statutes implementing treaties. Across the Atlantic, the same point was made extra-judicially by Justice Holmes: "we ask ... what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were"[34]. He continued: "we do not deal differently with a statute from our way of dealing with a contract"[35]. The same approach was taken by Lord Hoffmann, for whom statutes, written contracts and articles of association all involve a construction of the meaning conveyed by the instrument to a reasonable reader[36]. His Lordship spoke, in the context of interpretation of contracts, of assimilation of the process of judicial interpretation with "the common sense principles by which any serious utterance would be interpreted in ordinary life"[37].

The same reasoning applies to interpretation of the meaning of words in a Constitution. The Commonwealth Constitution is embodied in a statute of the Imperial Parliament. Once this is appreciated, it can be accepted that, as Quick and Garran said in 1901[38], the rules of interpretation of the Commonwealth Constitution are those that apply to interpretation of a statute. In *Byrnes v Kendle*[39], Heydon and Crennan JJ observed how "matched" approaches applied to construction (including interpretation) of contracts, trusts, statutes and constitutions. This statement is, for some, controversial. A common objection to it is that a legal instrument like a contract is made by real people, whereas Parliament is only a notional person. The answer to that objection is that courts are equally unconcerned with the subjective intention of the creators of a contract. The concern with the meaning of the words of a contract is based upon the reasonably understood meaning to have been intended by a notional person in the position of *both* of the parties. In other words[40]:

> 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.

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[33] Curtis v Stovin (1889) 22 QBD 513 at 517.
[34] O.W. Holmes, "The Theory of Legal Interpretation", (1899) 12 Harvard Law Review 417 at 417-418.
[35] Ibid., at 419.
[36] Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988 at 1993 [16]; [2009] 2 All ER 1127 at 1132.
[37] Investors' Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896 at 912.
[38] J. Quick and R.R. Garran, The Annotated Constitution of the Australian Commonwealth, Sydney, Melbourne, Angus & Robertson, 1901 at 792.
[39] Byrnes v Kendle (2011) 243 CLR 253 at 282-291 [95]-[116]; [2011] HCA 26.
[40] Byrnes v Kendle (2011) 243 CLR 253 at 284 [98], relying upon Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101 at 1112 [14].

V INTERPRETING MEANING AND THE INTENTION OF PARLIAMENT

A *Intention of a notional person or objective construct*

For some, like Sir John Laws, the Hon. Michael Kirby, or Professor Andrew Burrows, it is nonsense to speak of the intention of Parliament because the concern of courts is neither with the subjective intentions of members of Parliament individually nor is it with some aggregation of their subjective intentions.[41] Hence, they argue, legislative intention is a fiction that should be abandoned.

These writers are entirely correct that courts are not concerned with identifying the subjective intention of parliamentarians. Nor are courts concerned with identifying the subjective intention of the parties to a contract or the person declaring a trust. As Lord Hoffmann said in *R v Her Majesty's Commissioners of Inland Revenue ex parte Wilkinson,*[42] the intention of Parliament means "the interpretation which the reasonable reader would give to the statute read against its background". The use of a notional reasonable person and a notional Parliament, as reader and speaker respectively, are devices from which to derive the essential meaning of the words of a statute. They should not attract the often confused, Benthamite, description as a fiction[43]. The use of these notional devices is no more a fiction than the use of the device of the reasonable person in the law of torts.

Using Parliament as a notional speaker serves the valuable purpose of providing a speaker for the words. In order to know what is "meant" by spoken words it is essential to know who is speaking the words. The spoken words "[i]f you want to stay healthy, get out of London"[44] can mean something different if spoken by a crime boss than if spoken by a family doctor. Parliament, as a speaker, is a notional person or a construct rather than a real person or an aggregation of real people. The same is true of the construct of a person in the position of both parties to a contract. That is a construct that permits the spoken words to be placed in the context of a person speaking to understand their meaning. My colleague Justice Gageler has said, in a powerful defence of the construct of legislative intention, that it is hardly unreasonable for a court to approach the interpretation of a legislative text on the basis of a construct that the text is the product of "reasonable

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[41] J. Laws, "Publication Review: The Nature of Legislative Intent", (2016) 132 Law Quarterly Review 159; M. Kirby, Judicial Activism: Authority, Principle and Policy in the Judicial Method, (2004) at 77; A. Burrows, "Statutory Interpretation", in The Hamlyn Lectures, available at https://www.law.ox.ac.uk/news/2017-11-10-hamlyn-lecture-2017-andrew-burrows-statutory-interpretation.

[42] [2005] 1 WLR 1718 at 1724 [18].

[43] L. Fuller, "Legal Fictions", (1930) 25 Illinois Law Review 363 at 364-365: a label frequently used as criticism "without demonstration, to furnish an argument against the doctrine".

[44] Berezovsky v Abramovich [2011] 1 WLR 2290 at 2314 [81].

persons pursuing reasonable purposes reasonably"[45]. This is not a novel approach. As Ekins and Goldsworthy have recently argued[46]:

> 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'. This has often been described as 'the only rule', 'the paramount rule', 'the cardinal rule' or 'the fundamental rule...' (footnote omitted).

There is a difference, albeit sometimes a very fine difference, between the attempt to discern the intention that the notional Parliament *did have* from the words that are used, and an attempt to discern the intention that a court thinks Parliament *might have had* if the problem had arisen. There is a famous example that might illustrate where that line has been crossed. That case is *Riggs v Palmer*[47]. In that case, a majority of the Court of Appeals of New York considered a legislative provision that apparently permitted a grandson to inherit most of his grandfather's estate. The question was whether an exception could be created where the grandson had murdered his grandfather in order to obtain the inheritance. Earl J, who wrote the leading judgment, held that *if the lawmakers had been consulted*, they would not have permitted the passage of title to the grandson[48]. This approach might be said to ask the wrong question. It could be said to have moved from asking what is the meaning of the words based on the intention of the legislature to asking what the same notional legislature might have enacted if confronted with this issue. As Lord Wilberforce said in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security*[49]:

> there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question 'What would Parliament have done in this current case – not being one in contemplation – if the facts had been before it?' attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.

If judges are no longer giving effect to the meaning of the law, it is hard to avoid Dworkin's criticism that the concept of legislative intention should be abandoned and it should be accepted that a case like *Riggs v Palmer* involves the

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[45] S. Gageler, "Legislative Intention" (2015) 41 Monash University Law Review 1 at 16, quoting H. Hart Jr and A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law, New York, Foundation Books, 1994 at 1378.
[46] R. Ekins and J. Goldsworthy, "The Reality and Indispensability of Legislative Intentions", (2014) 36 Sydney Law Review 39 at 39.
[47] (1889) 22 NE 188.
[48] (1889) 22 NE 188 at 189.
[49][1981] AC 800 at 822. See also Regina (Quintavalle) v Secretary of State for Health [2003] 2 AC 687 at 696 [10].

judge giving effect to considerations of justice wholly external to the instrument itself[50].

B *Inaccessible documents*

It is important to reiterate that the process of attempting to discern the intention of a notional Parliament, a construct, has nothing to do with the subjective intentions of any member of Parliament, individually or collectively. In *Liversidge v Anderson*[51], Lord Atkin rightly observed that in law, as in life, the meaning of words is not found in the manner of Humpty Dumpty, to whom a word "means just what I choose it to mean, neither more nor less". Words do not mean what they are subjectively believed to mean by the speaker. They mean what the listener or reader reasonably understands the speaker to have intended them to mean. In *Singh v The Commonwealth*[52], Gleeson CJ said that any individual subjective intention, "if it could be established, would not be relevant, because it would not advance any legitimate process of reasoning to a conclusion about the meaning of the text".

There is a related question: should the words spoken by the notional Parliament be understood only from the perspective of a judge as a reader at the time of the adjudication? The answer must be "no". Just as statutes rarely speak only to persons at the time of enactment, statutes are also rarely directed only at some future point in time, such as when an issue is litigated, with the meaning effectively in suspended animation until then. Unless the purpose of a statute, which by definition is the original purpose, is to be disregarded then the starting point must be the perspective of a reasonable person at the time of utterance which, in the case of legislation, is generally the time of enactment.

One very significant consequence arises from the rejection of an approach to meaning which is concerned with the author's subjective views. This consequence is the great care that must be taken before using as context documents that were not reasonably accessible to the reader at the time the instrument was promulgated. Of course, one natural use to which inaccessible documents might be put is simply as evidence of a common understanding of how the relevant words were used at the time[53]. This is merely to use the document in the same way as a subsequently published dictionary of historical usage of words and phrases, or a subsequently published study of legal history. However, to rely upon previously inaccessible documents for their substantive content runs the risk of conflating an objective

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[50] See R. Dworkin, Taking Rights Seriously, Cambridge, Mass., Harvard UP, 1977 at 37.
[51] [1942] AC 206 at 245.
[52] (2004) 222 CLR 322 at 337 [21]; [2004] HCA 43.
[53] See, eg, Wong v Commonwealth of Australia (2009) 236 CLR 573 at 591 [52], 657-658 [277]; [2009] HCA 3. Cf at 625 [185]: Hayne, Crennan and Kiefel JJ referring to the document as also relevant to "disclose the issue ... to which the amendment ... was directed".

enquiry into the meaning of constitutional terms with the subjective state of mind of the author.

Suppose, for example, that a court were referred to posthumously published diaries from Sir Isaac Isaacs to support a submission about the purpose for which a particular phrase was included in the Commonwealth Constitution. Suppose also that the diaries, previously confidential, revealed that Sir Isaac Isaacs considered that the text had an entirely different purpose, one that was not reasonably apparent to any reasonable reader from the words or their public context. If those diaries, inaccessible at the time, were decisive of a change in essential constitutional meaning then that change in meaning, which would necessarily apply retrospectively, might be characterised as (i) arising from the subjective beliefs of only one of the founders, and (ii) undermining a principle that is sometimes said to be part of the Rule of Law: the ability of persons to ascertain the law that applies to them. As Gageler J has said extrajudicially, the use of unpublished or inaccessible material might well mean that persons governed by the law could not know, at the time they acted, of the legal consequences that would flow from their actions[54]. The objection of Gageler J might not be an absolute prohibition because constitutional adjudication can sometimes have this effect, especially if an important decision changes the direction of a stream of constitutional jurisprudence. But it is a very large proposition to say that the essential meaning of constitutional words, separate from issues of constitutional practice, can be one that no person could ever previously have known.

The use of inaccessible documents in this way contrasts, for example, with the Convention Debates or draft Bills, upon which the High Court now commonly relies. The Convention Debates were reported, with contemporaneous press coverage and commentary, including from leading participants in the Convention. Each volume of the transcribed Convention Debates was published and available to the public in the same year as those debates[55]. The provisions in draft Bills were also considered by the delegates at the conventions in the course of the published drafting history of the Constitution, they were commonly quoted in Convention Debates[56], and drafts were sold to the public.[57]

C *Ascertaining parliamentary intention*

[54] S. Gageler, "Legislative Intention", (2015) 41 Monash University Law Review 1 at 5.
[55] See, eg, F. K. Crowley, A Documentary History of Australia: Colonial Australia 1875-1900, Melbourne, Nelson, 1980, vol 3 at 504-506, 516-517, 529-532, 538-540.
[56] See, for instance, the discussion in New South Wales v The Commonwealth (The Incorporation Case) (1990) 169 CLR 482 at 501-502.
[57] The 1891 Draft Bill was sold to the public at 1s 3d: J. A. La Nauze, The Making of the Australian Constitution, Melbourne, Melbourne UP, 1972 at 74.

How then can parliamentary intention be ascertained using the constructs of Parliament as a notional speaker and the reasonable reader as the notional reader? As I have explained, one method of applying those objective constructs is to start by asking what a reasonable, informed person would understand to be the meaning of the words as used by the Parliament. In the case of the Constitution, the notional, informed, reasonable person would be aware that the meaning of the words used by the Imperial Parliament replicated the meaning which those words had when they were settled in the constitutional Conventions.

In some cases it might be difficult to determine Parliament's intention as understood by a reasonable, informed person. Contemporary commentators of the time might also have expressed different views. But difficulty does not absolve a judge of the adjudicative role. In constitutional adjudication, the construct of a reasonable, informed reader is a useful one from which to assess essential original meaning, without attempting to perform the impossible hermeneutic feat of ascertaining original meaning in 1901 by considering the meaning and context in 2018.

Many so-called "rules" of interpretation also assist with the task of determining the meaning that would be understood by a reasonable, informed reader. These are sometimes expressed in Latin. Often the Latin is used to give them a gravitas that they do not deserve. Many of these rules of interpretation are no more than ordinary language conventions that, like ordinary language, can be displaced by context. For instance, consider the *ejusdem generis* principle of statutory interpretation. This is the principle that a list of statutory expressions ending with a general statement is construed such that the general statement is confined to the same genus as the rest of the list. There is nothing special about this. Suppose I have a cake recipe in front of me and I ask my child to go to the shops to buy me some "milk, eggs, flour, et cetera". If my child returns with milk, eggs, flour, and sugar, my instructions would have been followed. But if he returns with milk, eggs, flour, and a Sony Playstation, I can reasonably claim that the Playstation did not fall within the "et cetera".

Other principles are also expressions of common understanding, describing "the readiness of the court to draw certain repeated inferences as a result of common human experience"[58]. The so-called "principle of legality" might be one example. Historically, Parliament would rarely interfere with fundamental rights without expressing its intention with irresistible clarity.[59] Hence, it would be "presumed" that Parliament had not done so on any particular occasion if clear expression were

[58] J. Auburn, "Burden and Standard of Proof", in H. M. Malek (Ed), Phipson on Evidence, 19th ed, Great Britain, Sweet & Maxwell, 2018, 159 at 172 [6-18]. See also Thorne v Kennedy (2017) 91 ALJR 1260 at 1271 [34]; [2017] HCA 49.

[59] Bropho v Western Australia (1990) 171 CLR 1 at 18.

not used. However, in *Gifford v Strang Patrick*,[60] McHugh J observed in relation to non-fundamental or ordinary rights that

> "nowadays legislatures regularly enact laws that infringe the common law rights of individuals ... Given the frequency with which legislatures now abolish or amend "ordinary" common law rights, the "presumption" of non-interference with those rights is inconsistent with modern experience and borders on fiction."

Ordinary speech acts work in the same way. Suppose your friend, a shy, polite and respectful person, makes an ambiguous remark that could be interpreted either as innocuous or as grossly offensive. You will presume that the intended meaning was innocuous because this is not how your friend has previously spoken and behaved.

VI ESSENTIAL MEANING AND NON-ESSENTIAL MEANING

The reasonably understood intention of the notional speaker of the Constitutional utterance in 1901 is the notional Imperial Parliament in 1901. In the case of the Constitution, the objective intention of the Imperial Parliament is discerned from the context of the constitutional Conventions and its drafting history.

Ascertaining this objective intention is generally no different from ascertaining the intention of a person in the notional position of two or more contracting parties, or in the position of a testator, a settlor of a trust, or even simply a party to an ordinary conversation. But there are particularly difficult questions of context that arise where words are used in a manner intended to endure for a long time. These are (i) when the meaning of words can change, (ii) if so, how to know when meaning can change. On the approach that I am considering, the answer to these questions lies in the distinction between essential and non-essential meaning.

A *Non-essential meaning can change*

Suppose that in January 2017 I announced to a group of people that I had agreed to give the Winterton Lecture in 2018. At the time I spoke there was only one planned Winterton Lecture. It was the lecture held in Perth, Western Australia and hosted by the University of Western Australia. Imagine also that last month another university announced that it was also introducing an annual Winterton Lecture. The group to whom I had spoken plainly in 2017 would not be confused. They would not say to themselves, "last year he plainly meant the Winterton Lecture to be hosted by the University of Western Australia, but to which lecture do his words now refer?" This is because, in ordinary conversation, people

[60] (2003) 214 CLR 269 at 284 [36].

naturally assume that the meaning of words is their original meaning. We encounter this phenomenon every day. I am told by my seven-year-old son that the primary meaning of the word "sick" is "great" or "amazing". But we would not even consider this meaning in *Hamlet* when reading Francisco's lament to Barnardo that he was "sick at heart".

The same is uncontroversially true when judges construe the meaning of the words of a written contract. The general rule is to ask "what is the meaning that a reasonable person in the position of the parties would give to the contract *on the date it was concluded?*" As Lord Reid said nearly 50 years ago[61], in a passage affirmed by three Justices of the High Court of Australia in 2008[62], "it is not legitimate to use as an aid in the construction of [a] contract anything which the parties said or did after it was made". Lord Reid explained that otherwise "one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later"[63].

The same has been said to be true of statutes, including Constitutions. Lord Hoffmann has said of the United States Constitution that he does "not see how one can interpret a Constitution framed in 1787 except by considering what its language would have been understood to mean by its audience, the American people, in 1787"[64]. In 2001, in a speech with which Lord Millett agreed, Lord Hoffmann reiterated that the meaning of statutory language could not change over time[65]. Similarly, Lord Bingham, with whom Lord Browne-Wilkinson, Lord Hutton, and Lord Rodger agreed, said in *R v G*[66], "[s]ince a statute is always speaking, the context or application of a statutory expression may change over time, *but the meaning of the expression itself cannot change*" (emphasis added). This approach also has strong support from many judges in Australia who, following J S Mill[67], have expressed the distinction as one between connotation and denotation. In each case, judges have emphasised that the connotation, or meaning, of a statutory or constitutional expression cannot change, although its denotation, or application, can change.[68]

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[61] James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583 at 603.
[62] Agricultural & Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570 at 582 [35].
[63] Unless the conduct were used only to elucidate the original meaning: see Lord Nicholls, "My Kingdom for a Horse", (2005) 121 Law Quarterly Review 576 at 588-589.
[64] L. Hoffmann, "Judges, Interpretation and Self-Government" in R. Elkins, P. Yowell and N.W. Barber, Eds, Lord Sumption and the Limits of the Law, Oxford, Hart, 2016 67 at 68-69.
[65] Birmingham City Council v Oakley [2001] 1 AC 617 at 631.
[66] [2004] 1 AC 1034 at 1054 [29].
[67] J.S. Mill, A System of Logic, Ratiocinative and Inductive, London, John W. Parker, 1843.
[68] This approach was taken by Griffith CJ, Barton and O'Connor JJ (R v Barger (1908) 6 CLR 41 at 68), Barwick CJ (R v Jones (1972) 128 CLR 221 at 229; [1972] HCA 44; Attorney-General (Vict); Ex rel Black v The Commonwealth (1981) 146 CLR 559 at 578; [1981] HCA 2; Lake Macquarie Shire Council v Aberdare County Council (1970) 123 CLR 327 at 331), Menzies J (Lake Macquarie Shire Council v Aberdare County Council (1970) 123 CLR 327 at 332), Windeyer J (Ex parte Professional Engineers' Association (1959) 107 CLR 208 at 267; [1959] HCA 47), Taylor J (Lansell v Lansell (1964) 110 CLR

A similar distinction to that between meaning/application or connotation/denotation is sometimes expressed by the contrasting use of "sense/reference" or "concept/conception". And, in Australian constitutional law, another alternative that avoids the suggestion of the connotation/denotation distinction that meaning cannot change, is the distinction between essential meaning and non-essential meaning. Two well-known examples and two lesser known ones can be given to illustrate circumstances in which the non-essential meaning of constitutional and statutory words does change, although the essential meaning does not.

As to the well-known examples, Art I, § 8 of the United States Constitution provides for the powers of Congress, including the powers to raise and support armies and provide and maintain a navy. Unsurprisingly, in 1787, there was no mention of the air force. But, once mechanical flight became possible the air force was included within the meaning of "armies"[69]. Similarly, in the Commonwealth Constitution, enacted two years before the first flight of the Wright brothers, s 51(i) provides that the Commonwealth Parliament shall have legislative power with respect to trade or commerce. In 1945 that power was held to apply to airline services[70]. In each case, the non-essential meaning of the words of the Constitution changed. At the time of enactment, the words did not mean an air force or airline services, which did not exist. Years later, they did. The overall meaning changed, but not its essence.

As to the two lesser known examples, the first is the decision of the High Court in *Lake Macquarie Shire Council v Aberdare County Council*[71]. In that case, the issue was whether the word "gas" in English legislation in 1884, 1897, and 1906 was confined to coal gas or extended to liquefied petroleum gas. At the time the statutes were enacted, coal gas was the only form of gas in common use for lighting and heating. Barwick CJ, with whom Menzies J agreed, said that although the connotation of the word "gas" was fixed, its denotation could change with changing technologies[72]. In truth, the meaning of the word "gas" had changed. In 1884, it did not mean liquefied petroleum gas, which did not exist in common use. The real

353 at 366; [1964] HCA 42), Gibbs CJ and Wilson J (State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282 at 297; [1982] HCA 72), Dawson J (The Commonwealth v Tasmania (The Tasmanian Dam Case) (1983) 158 CLR 1 at 302-303; Street v Queensland Bar Association (1989) 168 CLR 461 at 537), Toohey J (McGinty v Western Australia (1996) 186 CLR 140 at 200; [1996] HCA 48), McHugh J (Re Wakim; Ex parte McNally (1999) 198 CLR 511 at 551-552 [42]; [1999] HCA 27; Eastman v The Queen (2000) 203 CLR 1 at 45 [142]; [2000] HCA 29; Re Patterson; Ex parte Taylor (2001) 207 CLR 391 at 427-428 [111]-[112]; [2001] HCA 51; Singh v Commonwealth (2004) 222 CLR 322 at 343 [37]; [2004] HCA 43).

[69] Laird v Tatum 408 U.S. 1 at 17 (1972), see also Ex parte Quirin 317 US 1 at 43 (1942); US v Naar 2 CMR. 739 at 745-6 (1951).

[70] Australian National Airways Pty Ltd v Commonwealth (1945) 71 CLR 29; [1945] HCA 41.

[71] (1970) 123 CLR 327; [1970] HCA 32.

[72] (1970) 123 CLR 327 at 331.

point made by Barwick CJ and Menzies J seems to be that the *essential* meaning of the word "gas" had not changed. That essential meaning was a type of energy, typefied by coal gas, which can be used for lighting and heating. They were saying that the essential meaning could not change, although at the appropriate level of generality the statute was not fixed in its application to coal gas. Windeyer J doubted this conclusion but not the essential/non-essential distinction. He also considered the essential meaning but he thought that the essential meaning of the word "gas" had been used at a lower level of generality to mean "coal gas". Nevertheless, he did not dissent because he said that the point was important and it had not been argued nor had it been the subject of any consideration by the primary judge[73].

A more recent example is *Aubrey v The Queen*[74], where the High Court considered whether the ordinary meaning of "inflicting grievous bodily harm", in a criminal statute of 1900 that re-enacted the terms of an 1888 statute, could extend to the reckless transmission of sexual disease by sexual intercourse without disclosing the risk of infection. Four members of the Court, including myself, considered that it could. One aspect of our reasoning considered the position if (contrary to our view) the ordinary understanding of "inflicting grievous bodily harm" did not, in 1888 or 1900, extend to this reckless transmission of sexual disease. We said that this view, to the extent that it prevailed in 1888, was based on a necessarily more rudimentary understanding of infectious diseases [75]. Put another way, the essential meaning of the words was not confined by the understanding of aetiology and symptomology of infection in 1888, just as the essential meaning of "gas" was not confined by the understanding of gas technology in 1884.

The reason that non-essential meaning of constitutional words can change, but the essential meaning generally cannot, lies in the democratic mandate. It might reasonably be assumed that legislation, particularly that which is expected to last for many years, was intended by Parliament to apply to events that did not exist at the time of enactment and to extend to understandings that did not exist at the time of enactment. But the purpose of the provision cannot change. Since purpose does not exist in a vacuum, but can only exist through the medium of the interpretation of words, the essential meaning reflects the purpose at the appropriate level of generality. That level of generality can be high in the case of generally expressed constitutional words. In a famous passage in *Royal College of Nursing of the*

[73] (1970) 123 CLR 327 at 333.
[74] (2017) 91 ALJR 601; [2017] HCA 18.
[75] (2017) 91 ALJR 601 at 610 [24].

United Kingdom v Department of Health and Social Security[76], Lord Wilberforce said:

> when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention ... How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings it if is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed.

This was not a new point when Lord Wilberforce explained it in 1981. As Quick and Garran observed of the Constitution in 1901[77]:

> As such a [constitutional] charter, it is of necessity expressed in broad and general terms, it deals with abstract political conceptions, it affects the most important individual and social relations; and it is of the most vital importance that it should receive, not a narrow and technical, but a broad and liberal construction.

Put another way, the higher the level of generality at which purpose is expressed by the essential meaning of the words, the more scope there is for the meaning of the words, at a lower level of generality, to change as the essential meaning is applied by construction. The high level of generality of some constitutional provisions might contrast with legislation, such as tax legislation, that prescribes what Sedgwick described as "minute directions for the control of those affected by them"[78].

Like the insistence by many judges that connotation cannot change, the reliance upon essential meaning is not a novel concept in Australian constitutional interpretation. For many judges it is orthodoxy. It was used in relation to:

1) s 51(xviii) of the Constitution – by Isaacs and Higgins JJ in 1908[79], Mason CJ, Deane and Gaudron JJ in 1988[80], and Gaudron and Gummow JJ in 2000[81];
2) s 75(v) of the Constitution – by Gaudron and Gummow JJ in 2000[82];

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[76] [1981] AC 800 at 822. See also Regina (Quintavalle) v Secretary of State for Health [2003] 2 AC 687 at 696.
[77] J. Quick and R.R. Garran, The Annotated Constitution of the Australian Commonwealth, Sydney, Melbourne, Angus & Robertson, 1901 at 793.
[78] T. Sedgwick and J.N. Pomeroy (Eds), The Interpretation and Construction of Statutory and Constitutional Law, 2nd ed, New York, Baker, Voorhis & Co, 1874 at 417.
[79] Attorney General of NSW v Brewery Employes Union of NSW (1908) 6 CLR 469 at 560, 616.
[80] Davis v The Commonwealth (1988) 166 CLR 79 at 96-97.
[81] Re Refugee Tribunal; ex parte Aala (2000) 204 CLR 82 at 93 [24].
[82] Re Refugee Tribunal; ex parte Aala (2000) 204 CLR 82 at 93 [24].

3) s 80 of the Constitution – by O'Connor J in 1909[83], the whole Court in 1993[84], and Gaudron, Gummow, and Hayne JJ in 2001[85];
4) s 81 of the Constitution – by Gummow, Crennan and Bell JJ in 2009[86];
5) s 90 of the Constitution – by Griffith CJ in 1904[87], and Windeyer J in 1960[88];
6) s 92 of the Constitution – by Kitto J in 1955[89]; and
7) s 77 of the Constitution – by Spigelman CJ in 2006[90].

In a decision in 2017, although dissenting in the result, I also adopted that approach in relation to s 75 of the Constitution[91].

B *How to characterise essential meaning*

There is, on this approach, a large issue concerning the characterisation of words. If the essential meaning of words is characterised at a low level of generality, that is, with a high degree of particularity, then there will be less scope for the meaning of those words to apply to new or changed circumstances in the process of construction.

Consider the jury in 1901, to which reference is made in s 80 of the Constitution. The meaning of "jury" could be expressed at different levels of generality, from the highly abstract to the very particular. So, when the High Court was confronted with this question in *Cheatle v The Queen*[92], the possible meanings of a jury – from the highest level of generality to the lowest, with numerous potential permutations in between – might have been described as follows:

1) A body that adjudicates upon facts.
2) As the Solicitor-General for New South Wales submitted, a body that adjudicates upon facts; comprised of random and impartial members representing the community[93].

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[83] Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330 at 375.
[84] Cheatle v The Queen (1993) 177 CLR 541 at 552, 560.
[85] Brownlee v The Queen [2001] HCA 36; (2001) 207 CLR 278 at 299 [58].
[86] Pape v Federal Commissioner of Taxation (2009) 238 CLR 1 at 75 [187].
[87] Peterswald v Bartley (1904) 1 CLR 497 at 508: "[t]he fundamental conception".
[88] Dennis Hotels Pty Ltd v Victoria (1960) 104 CLR 529 at 608.
[89] Hughes and Vale Pty Ltd v The State of New South Wales [No 2] (1955) 93 CLR 127 at 224.
[90] Trust Company of Australia Ltd v Skiwing Pty Ltd (2006) 66 NSWLR 77 at 89 [69].
[91] Graham v Minister for Immigration and Border Protection (2017) 91 ALJR 890 at 909 [79]; 347 ALR 350 at 369; [2017] HCA 33.
[92] (1993) 177 CLR 541; [1993] HCA 44.
[93] The submission of Mr Mason QC, the Solicitor-General for New South Wales: (1993) 177 CLR 541 at 546.

3) A body that adjudicates upon facts; comprised of random and impartial members representing the community; who are unanimous in their decision.
4) the submission of Mr Borick for the appellants: a body that adjudicates upon facts; comprised of 12 random and impartial members representing the community; who are unanimous in their decision; who are guaranteed anonymity and confidentiality; who are kept sequestered; and who swear an oath[94].
5) a body that adjudicates upon facts; comprised of 12 random and impartial members representing the community; who are unanimous in their decision; who are guaranteed anonymity and confidentiality; who are kept sequestered; who swear an oath; and who are men.
6) A body that adjudicates upon facts; comprised of 12 random and impartial members representing the community; who are unanimous in their decision; who are guaranteed anonymity and confidentiality; who are kept sequestered; who swear an oath; who are men; and who own property.

The High Court adopted as the essential meaning of "jury" in 1901 something close to the third of these: A body that adjudicates, comprised of members representing the community, who are unanimous in their decision. The Court held that one essential characteristic was unanimity[95]. The Court also said that in Australia in 1993, a law that sought to exclude women from jury service would be invalid[96]. This must be because, in modern times, the essential meaning that the jury represent the community would no longer be satisfied by a body that excluded women.

Later, in *Brownlee v The Queen*[97], the High Court held that a statutory reduction in the number of jurors from 12 to 10 was permitted. The requirement that a jury have 12 members was not an essential part of its meaning. As Gaudron, Gummow and Hayne JJ said, this would not destroy an "essential feature" of the institution of trial by jury, at least where the reduction was only to 10 persons[98].

In contrast, in the United States, where the same conclusion about a requirement of unanimity had been reached in relation to the Seventh Amendment, upon which s 80 of the Commonwealth Constitution was modelled[99], there was a significant divide about the level of generality at which to assess whether the

[94] The submission of Mr Borick for the appellants: (1993) 177 CLR 541 at 542.
[95] (1993) 177 CLR 541 at 552, 562.
[96] (1993) 177 CLR 541 at 560-561.
[97] (2001) 207 CLR 278; [2001] HCA 36.
[98] (2001) 207 CLR 278 at 298 [54].
[99] (1993) 177 CLR 541 at 555-557.

meaning of "jury" in the Seventh Amendment encompassed fewer than 12 persons. In *Colgrove v Battin*[100] a majority of the Court, in an opinion delivered by Brennan J and in which Burger CJ, White, Blackmun, and Rehnquist JJ joined, characterised the Seventh Amendment broadly. They held that the Seventh Amendment guarantee of trial by jury in civil cases permitted the jury to be composed of only six persons. They rejected the notion that "if a given feature existed in a jury at common law ... then it was necessarily preserved in the Constitution"[101]. In their dissent, Marshall and Stewart JJ insisted upon a narrower characterisation of the original meaning of "jury". They said that their colleagues had "mount[ed] a frontal assault on the very nature of the civil jury as that concept has been understood for some seven hundred years", and that the characteristic of 12 persons was an "essential feature" of the jury[102].

The level of generality at which essential meaning is characterised is therefore fundamental to the extent to which the meaning can change in application or construction. But how does a judge choose what meaning is essential and what meaning is not? If the concept of essential meaning is the purpose as manifested in the interpretation of the words, the guiding principle must be found in the original purpose or function of the enactment. A reasonable, informed person would draw the essential meaning of a provision from that function and purpose of the provision in its constitutional context. For instance, in *Brownlee v The Queen*[103], Gleeson CJ and McHugh J relied upon the function of s 80 to conclude that the common law rule that a jury be composed of 12 members was not an essential feature of a jury trial. Quoting from White J in the United States Supreme Court,[104] their Honours said:

> The purpose of the jury trial ... is to prevent oppression by the Government... Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury.

C *Can essential meaning change?*

I began this paper by saying that my exploration was only of the underlying basis of one approach to constitutional interpretation in Australian law. There are, of course, other approaches. The extent to which the approaches might coalesce

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[100] 413 US 149 (1973).
[101] 413 US 149 at 158 (1973).
[102] 413 US 149 at 166 (1973).
[103] (2001) 207 CLR 278 at 288-289 [21].
[104] Williams v Florida 399 US 78 (1970) at 100.

might depend upon the extent to which essential meaning of constitutional provisions can change in this exercise of interpretation. Putting to one side any extremely unusual legislative provisions that might somehow be said to have no essential meaning[105], or ones that might somehow be said to provide expressly or impliedly that their essential meaning can change[106], the expressed or implied assumption in interpretation has been that essential meaning cannot change. An approach to constitutional interpretation that might be thought to contrast with this is sometimes described as the "living tree" approach to interpretation.

The strongest view of living tree interpretation rejects the notion that any meaning, even essential meaning, is fixed. It caricatures any fixed meaning with metaphors such as "slavery to the past" or the "dead hands of the founders". The living tree approach maintains that constitutional words and expressions bear only the meaning that they have for a person *today.* Any meaning that the words bore to a reasonable, informed person at the time of enactment is irrelevant or, more softly, as not being "crucial or even important".[107]

The use of the label "living tree" to describe this theory of constitutional interpretation was a stroke of marketing genius. Much like the school of legal philosophy that describes itself as "realist", thereby raising the question of whether every other school is "fantasist", the living tree is a metaphor of beauty. The Hon. Dyson Heydon, with tongue firmly in cheek, described how the living tree metaphor captures the imagination: "[w]hat is more beautiful in nature than a living tree, its leaves gently moving as the breezes change? And what is more attractive than its shelter from the blazing Australian summer sun as the weary pedestrian trudges along?"[108]

The first problem with this theory of interpretation is that its name is a misappropriation from the context in which it was used. Its label was borrowed from the decision of the Privy Council in *Edwards v Attorney General for Canada*[109]. But that decision was expressly and avowedly concerned with the essential original meaning of the constitutional words. In that case, the Supreme Court of Canada had held that the word "persons", in relation to qualifications for the Senate in s 24 of the *British North America Act* 1867 (Imp), meant "men". This was because the word "persons" had to be read in light of common law history, including the disability of women to hold public office. The Privy Council, whose

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[105] That is arguably one view of the various reasons of the majority in Brown v Tasmania (2017) 91 ALJR 1089; 349 ALR 398.
[106] Western Australia v Commonwealth ("the Native Title Act Case") (1995) 183 CLR 373 at 486-487; [1995] HCA 47; Australian Competition & Consumer Commission v C G Berbatis Holdings Pty Ltd (2000) 96 FCR 491.
[107] Grain Pool of WA v Commonwealth 202 CLR 479 at 525 [118]; [2000] HCA 14.
[108] J.D. Heydon, "Theories of constitutional interpretation: A taxonomy", in N. Perram and R. Pepper (Eds), The Byers Lectures 2000-2012, Sydney, Federation Press, 2012, 132 at 155.
[109] [1930] AC 124.

advice was given by the Lord Chancellor, overturned that decision. A number of reasons were given for doing so. They are uncontroversial. They included (1) there were other sections in the Act where the same word, "persons", must include women, and (2) there were other sections in the Act where the words "male persons" were used because there was an intention to confine those sections to men. The Privy Council gave another reason. It essentially said that in a constitutional document intended to last for many generations, the original meaning of the words used should be given a "large and liberal" interpretation. Then the Privy Council used the famous words, saying that the Act had "planted in Canada a living tree capable of growth and expansion within its natural limits"[110]. The metaphor of a living tree was used in that case to describe the centuries-old point that, in an instrument like a Constitution, the essential, *original* meaning of words generally requires an interpretation at a high level of generality. The proper meaning of this metaphor was understood by Evatt J in *Dignan's Case*[111], when he said that the "Australian Constitution should receive the same 'large and liberal interpretation'" and, quoting from Isaacs J, that this should permit the Court "to apply *established principles* to the new positions which the Nation in its progress from time to time assumes"[112].

The inaptness of the "living tree" label for this school of constitutional interpretation, which permits departure from essential meaning, can be seen by giving the school a different description – "wholly dynamic" interpretation – and applying that approach to concrete examples. One example is the decision of the United Kingdom Supreme Court in the case of *Yemshaw v Hounslow London Borough Council*[113]. The issue in that case was succinctly described at the opening of the leading judgment of Lady Hale as being the meaning of the word "violence" in s 177(1) of the *Housing Act* 1996 (UK)[114]. As Lady Hale acknowledged, the effect of s 177(1) had remained the same since the initial statute was passed in 1977, before later consolidations and other amendments. Its effect was to deem a person who is at risk of violence to be homeless[115]. The question for the Court was: is the word "violence" limited to physical conduct or does it include other forms of violent conduct? The Court concluded that the word included forms of non-physical violence[116].

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[110] [1930] AC 124 at 136.
[111] Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan (1931) 46 CLR 73 at 114-115; [1931] HCA 34.
[112] Commonwealth v Colonial Combing, Spinning and Weaving Co (1922) 31 CLR 421 at 438-439; [1922] HCA 62 (emphasis added).
[113] [2011] 1 WLR 433.
[114] [2011] 1 WLR 433 at 435 [1].
[115] [2011] 1 WLR 433 at 436 [7].
[116] [2011] 1 WLR 433 at 443 [28], 447 [46], cf at 448 [48].

Lady Hale's judgment focused heavily upon the contemporary meaning and understanding of "violence". Her Ladyship relied upon a 1993 House of Commons Home Affairs Committee Report on Domestic Violence[117]. She relied upon the adoption in 1992 of a General Recommendation by the United Nations Committee that monitors the Convention on the Elimination of all Forms of Discrimination against Women[118]. She also relied upon the Department of the Environment's 1991 Code of Guidance for Local Authorities on Homelessness[119]. The Court was assisted by the Secretary of State for Communities and Local Government and the Women's Aid Federation of England, who intervened in the appeal. Lady Hale concluded[120]:

> whatever may have been the position in 1977, the general understanding of the harm which intimate partners or other family members may do to one another has moved on. The purpose of the legislation would be achieved if the term 'domestic violence' were interpreted in the same sense in which it is used by Sir Mark Potter P, the President of the Family Division, in his *Practice Direction (Residence and Contact Orders: Domestic Violence) (No 2)* [2009] 1 WLR 251, para 2, suitably adapted to the forward-looking context of sections 177(1) and 198(2) of the Housing Act 1996: ' 'Domestic violence' includes physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm.'

Lord Brown had some concerns. His Lordship referred to the contrary approach taken in relation to this section in two unanimous decisions of the Court of Appeal: of Mummery, Jacob and Neuberger LJJ[121]; and Waller, Laws and Etherton LJJ[122]. In particular, in the leading decision prior to *Yemshaw*, Neuberger LJ had concluded that the statutory test was clear[123]. However, Lord Brown said that although he had "very real doubts" about overturning these decisions, "[a]t the end of the day, however, I do not feel sufficiently strongly as to the proper outcome of the appeal to carry these doubts to the point of dissent. I am content that the views of the majority should prevail"[124].

What is noteworthy about *Yemshaw* is not the conclusion. That conclusion might have been reached by a characterisation of the essential, original meaning of "violence" at a higher level of generality. The noteworthy part of the decision is how the conclusion was reached. The exercise of statutory interpretation in which the Supreme Court engaged *began* by looking at the meaning of "violence" in a

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[117][2011] 1 WLR 433 at 440 [21].
[118][2011] 1 WLR 433 at 440 [20].
[119] [2011] 1 WLR 433 at 441 [22].
[120][2011] 1 WLR 433 at 443 [28].
[121] Danesh v Kensington and Chelsea Royal London Borough Council [2007] 1 WLR 69.
[122] Yemshaw v London Borough of Hounslow [2009] EWCA Civ 1543.
[123] Danesh v Kensington and Chelsea Royal London Borough Council [2007] 1 WLR 69 at 77 [28].
[124] [2011] 1 WLR 433 at 451 [60].

contemporary setting, including the meaning given to it by the executive Government. The Court expressly said that it was not concerned with the meaning of the word "violence" when the legislation was passed in 1977. However, the decision can also be understood as consistent with a concern not to alter essential meaning. Lady Hale said that the "essential question" was "whether an *updated* meaning is consistent with the statutory purpose"[125]. Assuming the reference to purpose to be the original purpose as revealed by the words in their essential meaning, the *Yemshaw* approach could not be characterised as wholly dynamic interpretation. But the statutory purpose qualification was subsequently omitted when the decision was applied by Sir James Munby P in *Owens v Owens*[126]:

> where, as here, the statute is 'always speaking' it is to be construed taking into account changes in our understanding of the natural world, technological changes, changes in social standards and, of particular importance here, changes in social attitudes.

If, as one commentator has suggested[127], the approach in *Yemshaw* is to be understood as one which is concerned only with the current meaning of the statutory words in light of current conditions and norms, and not concerned even with the essential meaning of the words in 1977, then difficulties arise. Why would courts ever consider the context in which the words were enacted? If we were only concerned with the current meaning of the statutory or constitutional words then Convention Debates, historical background, legal history, and any contemporary context at the time of enactment would surely be irrelevant. Indeed, those contextual materials, from a bygone society more than a century ago, could only distract from and distort the judicial task of giving a modern meaning to the words of the Constitution, suitable for today's economic, social, political, and technological issues and attitudes. Perhaps those who consider that the Constitution should only be given a meaning appropriate to modern society should apply a rule requiring that no regard be had to any historical context that informed essential meaning at 1 January 1901.

Another difficulty for the wholly dynamic approach lies in the need, on almost any view, to focus upon the purpose of a provision. When we speak of purpose, we do not mean the purpose that we would like the provision to have today. We mean the original (and, therefore, continuing) purpose of the provision. Yet, how is the original purpose of statutory words to be divorced from the meaning of the words? Suppose I were to say, with apologies to Lewis Carroll, "All mimsy were the borogroves, and the mome raths outgrabe". How could you even begin to ascertain the meaning of those words without considering my original purpose when I used them?

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[125] [2011] 1 WLR 433 at 443 [27] (emphasis added).
[126] [2017] EWCA Civ 182 at [39].
[127] R Ekins, "Updating the meaning of violence", (2013) 129 Law Quarterly Review 17 at 19.

There is a further obstacle to the wholly dynamic approach. If the words of a Constitution are to be given the meaning appropriate only for society in 2018, then a change in social views or attitudes could, without more, change the essential meaning of the words of the Constitution. Suppose that a significant social understanding occurred in the 1980s on a universal scale so that the Constitution could be construed consistently with 2018 society rather than, say, society between 1900 and 1970. On the wholly dynamic approach, that social change, without more, would have the result that that the essential meaning of the Constitution in 1970 was no longer the essential meaning of the Constitution in 2018. The social change by itself would have changed the basic or core meaning of words in the Constitution. In *Pape v Federal Commissioner of Taxation*, Heydon J said[128]:

> 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, surely, to be polite, a minority opinion.

These quoted words apply with even greater force to essential meaning. It is one thing for widespread, and accepted, social understanding to alter non-essential meaning. It is quite another for it to alter the essential meaning. Moreover, it would do so retrospectively. Legislation that was validly passed before 1980, and consistent with constitutional purpose, and the essence of the constitutional meaning, could become invalid some time before 2018. And that invalidity would apply retrospectively because in Australia, the notion of prospective overruling was held in 1997 to be inconsistent with judicial power[129]. I should emphasise that I do not suggest that the essential meaning applied as a matter of adjudication can never change. In the process of adjudication it might do so where precedent or long standing practice requires. The focus of this paper is only upon interpretation. To suggest that essential meaning is unimportant, and can generally change as part of interpretation, is certainly, at best, a minority opinion.

VII CONCLUSION

It is always tempting to attempt to describe any detailed thesis of construction with simplistic labels like "originalist", "literalist", "textualist", or "legalist". None of these labels can accurately describe the approach that I have explored in this article, and attempted to place in its strongest light.

On the approach that I have described, interpretation has regard to the original meaning of words, and hence to materials such as Convention Debates and to the common law preceding the Constitution. To that extent, this approach must be

[128] (2009) 238 CLR 1 at 145 [423].
[129] Cf Ha v New South Wales (1997) 189 CLR 465 at 504; [1997] HCA 34.

originalist. However, it is possible to depart from non-essential original meaning in interpretation, so in that respect the approach is non-originalist. Further, constitutional interpretation, in the narrow sense that I have described it, is only one dimension of constitutional construction although it is a highly significant one. Most significantly, the process of adjudication, which is usually conflated within construction, includes considerations of subsequent constitutional practice which are, by definition, non-originalist.

As for literalism, as I explained at the outset, constitutional interpretation involves consideration of the semantic meaning of the words used. To that extent it is literal. But although the literal meaning of the words can be a strong guide, interpretation is not confined to the literal meaning of the words. So to that extent it is not literal.

Constitutional interpretation cannot disregard the text of the Constitution, so to that extent it is textual. But the meaning of the text is not ascertained in a vacuum. The meaning of the text requires *con*text, matters to be read *with* text, so the reader can understand the reasonable intention of the notional speaker. So, to that extent it is not textual.

Nor can the process of constitutional interpretation properly be understood as "legalist". Although ultimately the question of adjudicated meaning is a legal question, and although that legal question includes the dimension of constitutional practice and precedent, interpretation generally relies upon the ordinary, metaphysical, non-legal concepts involved in the understanding of language.

Ultimately, the strength of the approach to interpretation of a Constitution that I have examined here, like that of interpretation of legislation, is that the interpretation is objective. It uses the construct of the reasonable speaker (Parliament) and the reasonable reader to determine the intention to be imputed to the notional body that enacted the instrument. However, to reiterate, constitutional adjudication requires more than merely a theory of interpretation. Constitutional adjudication can require difficult questions of construction in the application of the interpretive meaning. Constitutional adjudication also includes the dimension of constitutional practice. There are large questions involved: how should constitutional construction deal with issues of vagueness, or issues of ambiguity, or gaps when applying the meaning as interpreted? Apart from precedent, what will count as constitutional practice? What other legal issues are legitimately encompassed in constitutional adjudication? What techniques apply to reconcile constitutional practice with a conflicting conclusion about construction? How far can issues of constitutional practice, including systemic expositions, permit the process of adjudication to depart from any reasonably open constitutional constructions? What role do the underlying functions and purposes of the constitutional instrument have in recognising constitutional practice and in

reconciling those conflicts? Expounding those dimensions and reconciling them with a theory of interpretation are questions for another lecture and another day.