

## **JUDICIAL OFFICERS' BULLETIN**

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### **BOOK REVIEW**

Title: *Statutory Interpretation - Principles and Pragmatism for a New Age*

Editor: Tom Gotsis

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Reviewed by Justice Michael Kirby

Anyone wanting to obtain a good overview of the current approaches and principles being adopted in statutory interpretation would do well to take in this book. There are some insensitive souls who would regard a good detective story, a Barbara Cartland pot boiler or a much loved classic from schooldays as preferable reading in winter. On the other hand, for judges and lawyers, statutory interpretation is now the name of the game. A book like this, which draws together many threads, provides an excellent overview of the main themes and honestly confronts the big debates that this form of legal activity inevitably involves.

No one can doubt the centrality of the task of statutory interpretation in the present age. Every now and again a nice juicy common law problem is presented - say wrongful birth or so-called

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wrongful life - and lawyers can sink themselves once again into the beauties of judicial prose, with its rhetoric, imagery and contextual detail. But for the most part, the work of modern lawyers and judges involves pouring over texts - whether constitutions, statutes, regulations, bylaws or rules of court. Every now and again a contract, conveyance or will shows its face. Legal words are now the focus of most of our work. In recognition of this, Harvard Law School in 2006 dropped the case book method for teaching law. At Harvard, the first year course now opens, and concentrates on, the subject of this book: statutory interpretation.

The book starts with an excellent editor's note by Tom Gotsis. He summarises the main points of each contribution and emphasises a development not really elaborated in the book: the expansion of information technology and the part it now plays in delivering accurate legislative language.

The essays in the book are all well crafted. A number of them have interesting quotations from outside the law. Chief Justice Spigelman not only writes a foreword but also a chapter. Each of his essays is replete with telling quotations, ranging from Joseph Joubert (I had to look him up) to Eliza Doolittle (whom we all know and love).

The opening essay by Justice W M C Gummow of the High Court begins with an affectionate tribute to Sir Maurice Byers and a story of Sir Maurice's admiring relationship with Mr John Q Ewens, who for many years was First Parliamentary Counsel of the Commonwealth. Working

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under successive federal governments, Ewens taught how federal statutes, crablike, could edge themselves sideways into federal legislative power. I worked with Mr Ewens in the ALRC and marvelled at his capacity to translate broad policy into succinct text. In thirty-three years I have never allowed myself the indulgence of denouncing parliamentary drafters. Their task, often performed under fearsome pressures of time and political drama, is described by John Ewens's successor, Hilary Penfold QC in her chapter.

Justice Gummow, like Chief Justice Spigelman, notes the distinct shift in Australia over the past twenty-five years from a generally literalistic, textual approach to statutory interpretation to one informed by context, purpose and history. He emphasises that there is a limit to straying from the text in the name of purpose. The same point is also made by Chief Justice Spigelman, whilst remarking that, in this context, 'clarity' of the text is like beauty: it exists in the eye of particular beholders.

Justice Keith Mason, President of the Court of Appeal, collects many of the current authorities on approaches to statutory interpretation. This is a practical utility of this book. Reading it for this review, I noted down seven excellent quotes that, in due course, will illuminate, and reinforce, my own opinions. At one stage, President Mason was Solicitor-General for New South Wales. He gives us an insight, from his life as a law officer, to what it is like in the engine room where statutes are actually manufactured. He recounts how a good point was pressed

on the federal officials by their State counterparts. The Feds agreed. But it was too late to get the statute changed. A senior adviser offered the next best thing. They would slip into the Minister's Second Reading Speech an averment about how the text was intended to operate. That would fix things up!

President Mason is rightly critical of judges who are hostage to dictionaries. On the other hand, in a recent decision, where my colleagues gave what appeared to me to be an artificial meaning to a word, I could not restrain my pleasure in quoting seven Australian and international dictionaries of the English language to show how they were straying from the word's primary meaning.

Justice Susan Kenny of the Federal Court contributes an insightful review of constitutional interpretation, as we practise it in Australia. She uses for her purposes the decision of the High Court of Australia in the *WorkChoices Case*, decided in 2006. She prefers abandoning the effort to have a single theory of constitutional interpretation. This is all very well. I can understand pragmatism as well as the next person. But it does not look good if one day judges are true 'originalists', combing amongst the Convention debates and the next day they are 'functional verbalists', trying to make the text work in a new age. One or two critics out there might say that the judges concerned are simply invoking a theory that gets them to their desired result.

Justice Kenny puts her finger on a tricky point which the dissenters faced in *WorkChoices*. Basically, Justice Callinan is an originalist. For him, therefore, to permit the corporations power to swamp other powers was contrary to the original intent of the Constitution. I am not an originalist, so I could not agree with his approach. For me, the key to *WorkChoices* was the need to ensure that both the corporations and industrial powers, each being in s 51 of the Constitution, could work together. Despite our best efforts, the strict literalism of the *Engineers' Case* of 1920 swamped the dissenters disparate reasons. The corporations power now rules.

Hilary Penfold's chapter is laid out, as one would expect, with pristine logic and clarity. It is interesting to read how parliamentary drafters work. Clearly, they have a high sense of non-partisan professionalism. At the end of her chapter, Mr Penfold gets her own back on the occasional judge who takes a pot-shot at the legislative drafters. The former Justice Meagher springs to mind. She makes the point that, now that it is generally recognised that judges make law, it is reasonable to expect that they should do so with greater clarity and precision. Ouch!

Ruth Sullivan from Ottawa writes of the legacy of Elmer Driedger, the great Canadian guru on legislation who led the repudiation of textualism in that country. Associate Professor R S Geddes of the University of New England notes a little essay of my own in *Statute Law* concerned with an "emerging grand theory" of interpretation that would

rope contracts, wills and other documents into the same contextual approach as we now take with legislation.

A footnote in Professor Geddes's chapter reminds me of a point I should have made in *WorkChoices*. The most extreme version of literalism, then in its Britannic heyday, was expressed in the concurring reasons of Justice Higgins in the *Engineers' Case* (1920) 28 CLR 128 at 161. If, gradually, crab-like, we have moved away from such extreme literalism in the interpretation of other texts, how in Australia do we justify our persistence with such extreme literalism in constitutional interpretation? Why, in that task of giving meaning, do we not take into account the context of all the other heads of legislative power and, as well, the context of federalism which is a system of government particularly suited to the modern age of concentrated political power? I will save that point up for some future case; although time is running out so I make it here.

There follow chapters by two North American scholars. Professor Philip Frickey of the University of California at Berkeley examines the way in which American lawyers have got to a similar point as that now adopted in Australia without the benefit of ss 15AA and 15AB of the *Acts Interpretation Act* 1901 (Cth) (and equivalent State provisions). Professor James Raymond examines a number of instances of interpretation including, in Australia, the case of *Kartinyeri v The Commonwealth* (1998) 195 CLR 337. As he dissects the majority views, and my dissenting opinion on the ambit of the races power in the federal

Constitution, he seeks to get behind the given reasons of the High Court to try to understand the real motivations that led the judges to their different conclusions. He finishes his essay on a rather sombre note: "The canons and rules of interpretation are soft logic, persuasive only to people who prefer the result they support or at least have no reason to resist them".

Judges and lawyers who have to grapple all the time with difficult choices of statutory interpretation generally like to think that there is something more to the task than intuitive conclusions that are then dressed up with respectable reasoning. However, this book reveals, once again, the nebulous character of many of the so-called rules and the flexibility which they exhibit when they are put to work in a particular case.

The text is well produced with good tables of statutes and cases. The editor and the Commission are to be congratulated on another useful monograph. It will be a good companion for judicial officers for the most frequent legal function they now have to perform. It would be desirable if complimentary copies could be made available to legal practitioners and law schools so that advocates will understand better the inescapable quandaries that this activity presents for those who must venture upon it.

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