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**Introduction**

Nobody to my knowledge has been able to enact, in relation to a complex subject matter, legislation so clear and unequivocal as not to require interpretation.


Consider these three quotations from judges in three jurisdictions:

Words are certainly not crystals, but they are after all not portmanteaus. We cannot quite put anything we like into them. And we may not disregard them in statutes. The real question in statutory interpretation is just what we shall do with them

(O W Holmes, *Towne v Eisner* 245 US 418 at 425 (1918))

… in the field of statute law the judge must be obedient to the will of the Parliament as expressed in its enactments. In this field Parliament makes and unmakes the law, the judge’s duty is to interpret and to apply the law, not to change it to meet the judge’s idea of what justice requires. Interpretation does not, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment

(Lord Scarman, *Dupont Steel v Sirs* [1980] 1 All ER 529 at 551)

A recent High Court said in relation to statutory interpretation:

In Australia, an important exposition of the new approach for the courts by McHigh JA in *Kingston v Keprose Pty Ltd* … It has been approved in this Court in *Bropho v Western Australia*. In the last decade there have been numerous cases in which members of this Court, referring to statutory and common law developments, have insisted that the proper approach to construction of federal legislation is that which advances and does not frustrate or defeat the ascertained purpose of the legislation, to the full extent permitted by the language which Parliament has chosen … This Court should not return to the dark days of literalism.

(Kirby J, *Commissioner of Taxation v Ryan* (HCA Feb 3 2000))

Rules of any kind, expressed in words or symbols, require interpretation. The interpretative problems may differ depending on the circumstances and the consequences of one view being accepted over another will differ, but the fact of interpretation remains. We concentrate on legal rules in this chapter and, even more specifically, on legal rules made by Parliament, but bear in mind that, as lawyers, your bread and butter work is interpretative. You must have a love of language (or develop one) and learn to use it well.

There is no doubt that there has been an explosion of legislation, both in the sheer number of Acts and in their length and complexity. One of the corollaries of this has been the increasing need for lawyers and judges to devote time and energy to the interpretation of complex and often obscure legislation.

The *Income Tax Assessment Act* is replete with wonderful examples. McHugh J refers to some in the article just mentioned. For instance, in *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 the following sub-section was in issue:
A disposal of an asset that did not exist (either by itself or as part of another asset) before the disposal, but is created by the disposal, constitutes a disposal of the asset for the purposes of this Part …

Who interprets this? How was it interpreted? Could the intention of Parliament have been expressed more clearly? How?

Thus, although legislation has emerged as the dominant law-making source, the courts play a vital role. What is the nature of that interpretative role? You will gain an appreciation of the relationship by attempting the following exercises.

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**Learning resources**

**Prescribed textbook**


**Reading**


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**Theories of statutory interpretation**

**Reading**

Please read Corcoran 2005, (extract in the reader) and answer the following questions:

**Question 6.1**

What important observation was made by Justice Harlan Stone of the United States Supreme Court regarding statutes?

**Question 6.2**

What do you think Justice McHugh meant by his statement in *Singh v Commonwealth* that ‘intention in the context of statutory interpretation is “an obvious fiction”’?

**Question 6.3**

What is the doctrine of equity of the statute, when may it operate and what, if anything, is its contemporary relevance?

**Question 6.4**

Do you think that the doctrine of equity of the statute may sometimes have involved ignoring or even amending the words of a statute?

**Question 6.5**

What is the doctrine of judicial review of legislation?

**Question 6.6**

Why did the rise of the doctrine of parliamentary sovereignty cause the doctrine of equity of the statute to fall into disfavour in England?
What according to Corcoran is the common characteristic of intentionalist theories?

What is the literal approach and what according to Corcoran is its ‘most obvious criticism’? How does this approach differ from an ‘imaginative reconstruction’ of legislative intent?

What difference, if any, can you see between an ‘imaginative reconstruction’ of legislative intent and ‘purposive interpretation’?

What is the primary focus of textualist theories of statutory interpretation? What distinguishes ‘soft’ from ‘hard’ plain meaning textualist theories?

What is the core principle of dynamic theories of statutory interpretation?

What four dynamic theories does Corcoran identify?

Are dynamic theories of interpretation open to the charge of being undemocratic in the sense of providing judges with a tool to give their own, preferred, meaning to a statute rather than that of the people as expressed through the laws of Parliament?

Statutory interpretation: The Australian position

At common law

Please read Cook et al. 2005, pp. 210–215 and answer the following questions:

What are the two common law approaches to statutory interpretation? To which of the theories that we have examined do they most closely correlate?

In what way might the golden rule be regarded as a common law manifestation of the doctrine of equity of the statute?

At common law, could a judge choose which of the approaches to employ?

Under statute

Please read Cook et al. 2005, pp. 218–224 and answer the following questions:
Why have most Australian parliaments chosen to supersede the common law approaches by enacting legislation that say how statutes are to be interpreted?

What is the fundamental rule of statutory interpretation established by s 15AA of the Acts Interpretation Act 1901 (Cth) and its State and territory equivalents? In your view, to which of the theories of interpretation (or combination thereof) that we have examined does s 15AA most closely correlate?

Do s 15AA and its equivalents incorporate the common law golden rule?

Use of extrinsic materials

Please read Cook et al. 2005, pp. 225–237 and answer the following questions:

**Common law**

What are extrinsic materials?

At common law, could they be used to aid the interpretation of a statute? How would an adherent to the ‘hard plain meaning textualist theory’ (like Justice Scalia of the United States Supreme Court) answer this question?

When, at common law, can an international agreement (e.g. a treaty) be used to aid the interpretation of a statute?

**Under Statute**

What rule regarding the use of extrinsic materials is established in s 15AB of the Acts Interpretation Act 1901 (Cth) and its State and territory equivalents? In your view, to which of the theories of interpretation (or combination thereof) that we have examined does s 15AB most closely correlate?

How, if at all, has s 15AB and its State and territory equivalents modified the common law?

Must a court consider extrinsic material placed before it pursuant to s 15AB?

Are there any limitations on a court’s use of s 15AB? (Note: Are the comments of Mason CJ, Wilson and Dawson JJ in Re Bolton; Ex parte Beane an endorsement of the hard plain meaning textual theory of interpretation or do they refer to something else?)
Can Victorian courts refer to extrinsic materials in the absence of ambiguity or doubt on the face of the statute?

Context, presumptions and obligations:  
Additional considerations and tools to assist in the interpretation of statutes

With your copy of the course legislation in hand, please read Cook et al. 2005, chs 10 & 11 and answer the following questions:

**Context**

*Why is the context of a statute so important to its interpretation?*  
*What does context mean in this sense?*

*What maxims of interpretation represent the principle that words in a statute should be interpreted with reference to accompanying words?*

*Why is it critical to consider legislation as a whole when interpreting specific provisions? What parts of the course legislation can and cannot be used in its interpretation?*

*What kinds of words and phrases are defined in the Victorian and Commonwealth Interpretation legislation? (Electronically access the relevant provisions as noted on p. 250 of Cook et al.) Are any of these words and phrases relevant to the interpretation of the course legislation?*

*Can any dictionary be used in the interpretation of statutory words and phrases?*

*Why do you think modern courts suggest the principle that says ‘the express mention of one thing is to the exclusion of another’ must be applied with caution?*

*What do courts do when the meaning of a statutory word or phrase has changed or evolved from the time when the legislation was first enacted? Are there any exceptions to this approach? (Is this approach consistent with any of the theories of interpretation that we have considered?)*

*If a statutory word or phrase has both a technical legal meaning and a popular non-legal meaning, which prevails?*

**Common law statutory presumptions**

First, when interpreting legislation it is worth keeping firmly in mind that when Parliament enacts legislation it does so with the rich and pre-existing system of common law as a back-drop. So, when relevant, the common law
may sometimes inform the interpretation of a statute. Second, the common law statutory presumptions that we shall now consider are a small but important component of this legal back-drop. And third, being presumptions and creatures of the common law, they can always be rebutted by clear words in a statute.

After familiarising yourself with some of the more important common law statutory presumptions and with a copy of the course legislation in hand, now answer the following questions:

Question 6.36
Does the course legislation have a retrospective operation?

Question 6.37
An increasingly important presumption is that Parliament does not interfere with fundamental rights. But from where do these rights originate and which ones are fundamental?

Question 6.38
Why do you think the presumption that legislation does not bind the Crown is not so strong in modern times? Does the course legislation bind the Crown?

Question 6.39
How might the presumptions that penal provisions are strictly construed and that property rights are not taken away without just compensation be considered specific manifestations of the fundamental rights presumption?

Question 6.40
Does the course legislation have an extra-territorial operation?

Question 6.41
Does international law have any relevance to the interpretation of the course legislation?

Statutory obligations or discretions?

Question 6.42
Why is it important to ascertain whether legislation imposes an obligation or discretion upon an office-holder?

Question 6.43
What statutory words tend to suggest an obligation? What about a discretion?

Question 6.44
What guidelines did the High Court lay down in Project Blue Sky Inc v Australian Broadcasting Authority for determining what consequences follow from a breach or failure to perform a statutory obligation?

Question 6.45
What reasons did the High Court give for finding that the breach of the Act in Project Blue Sky Inc v Australian Broadcasting Authority did not result in the invalidation of any act done in breach of the relevant section?
Does the course legislation impose any obligations or provide any discretionary power?

Further resources