CURRENT ISSUES IN THE INTERPRETATION OF FEDERAL LEGISLATION

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On one view, tonight's topic assumes that current issues in interpreting federal legislation differ in some way from those arising with respect to state and territory legislation. These differences are not my concern this evening. Instead, I propose to consider issues that concern all Australian jurisdictions in more or less equal measure. These issues emerged following a discussion with Mr Daniel Snyder, from the Commercial Bar, whose comments both then and subsequently I found particularly insightful.

At the practical level, Australian lawyers today are, it seems, yet again facing questions about the extent to which it is appropriate to rely on extrinsic materials in statutory interpretation. Allied to this question, there is a further question as to the effect of a renewed emphasis on the importance of the text, as opposed to context. At the doctrinal level, two further issues arise. First, has the goal of statutory interpretation been redefined recently? Secondly, has any supposed redefinition a consequence for the means by which a preferred interpretation is identified?

Has the goal of statutory interpretation been redefined recently? In a well-known passage in *Federal Commissioner of Taxation v Munro*,[2] in 1926, Justice Isaacs wrote that "[c]onstruction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the collocation it has used them". This passage was relied on recently, in the 2012 plurality judgment in *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia*.[3] Although the stated aim remains the same, there remains the possibility that the idea of **legislative intent** has itself been redefined. This is, so it seems to me, what has in fact happened.

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[2] (1926) 38 CLR 153 ('*Munro*'), 180.
[3] (2012) 86 ALJR 862, 876-7 [64] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

As William Eskridge said in his book, Dynamic Statutory Interpretation, since the early 1980s, in the United States, "theories of statutory interpretation have blossomed like dandelions in spring".[4] Indeed theories about 'legislative intent' have flourished around the common law world. Significant academic literature challenges the utility of the concept[5] and the proposition that the 'discovery' of 'legislative intent' is the aim of the interpretative process.[6]

Conscious of these challenges perhaps, there is evidence that, in recent years, the High Court has chosen **to redefine** the concept of legislative intent, by reference to the function the concept plays in "common law constitutionalism", to adopt the expression of Chief Justice French in *Momcilovic*[7].

There is now little judicial support for the proposition that, in searching for legislation intent, judges are seeking to ascertain the collective mental state of the members of the Parliament at the relevant time. Thus, in *Zheng v Cai*[8], in 2009, five members of the Court[9] rejected the idea that "legislative intent" involved "the attribution of a collective mental state to legislators". Rather, so their Honours said, "judicial findings as to legislative intention" were "an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws". Professor Jeffrey Goldsworthy will address on the relationship between objective legislative intention and "the subjective intention of the legislators". For now, I want to examine the Court's particular statement more closely, because it indicates what work the concept now does.

So far as lawyers are concerned, statutory interpretation is not merely the attribution of meaning to a text, such as a newspaper or a book. The authoritative status and

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[4] William N Eskridge, Jr, *Dynamic Statutory Interpretation* (Harvard University Press, 1994) 1.
[5] See, eg, Ronald Dworkin, 'Statutes' in Law's Empire (Becknap Press, 1986); Jeremy Waldron, Law and Disagreement (Oxford University Press, 1999); Jeremy Waldron, The Dignity Of Legislation (Cambridge University Press, 1999). Judges too have challenged the utility of the concept: see, eg, Michael Kirby, 'Towards a Grand Theory of Interpretation: The case of Statutes and Contracts' (2003) 24 *Statute Law Review* 95, 98-9; Nye Perram 'The perils of complexity: why more law is bad law' (2010) 39 *Australian Tax Review* 179, 180-181.
[6] Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) ('Legislative Intent'), 4. See also Dworkin, above n 4 and Waldron, 'Law and Disagreement', above n 4; Waldron, 'The Dignity of Legislation', above n 4.
[7] *Momcilovic v R* (2011) 245 CLR 1 ('*Momcilovic*'), 47-48 [46].
[8] (2009) 239 CLR 446 ('*Zheng v Cai'*), 455 [28].
[9] Chief Justice French and Justices Gummow, Crennan, Kiefel and Bell.

legal nature of the statutory text is significant. It is the legislature's own constitutional role that impresses a statutory text with its true significance. The very point of the legislature is, of course, to make law and, in our system, to give effect to the principle of representative democracy. In the straightforward case, to quote Sir Philip Sales of the English High Court, "[t]he judges complete the law promulgated by Parliament by applying it".[10]

Generally speaking, we are not troubled by this constitutional paradigm. The problem is the more complex case, where more is involved than merely applying the law according to its uncontested meaning. Unsurprisingly, there are constitutional and common law rules that govern the "who, what, and when" of contested meaning determinations. These rules expose the fact that no arm of government has an uncontrolled capacity to decide what the accepted meaning will be.

One rule derives from the nature of the power confided to each branch of government, a limit which receives confirmation in the separation of powers operating most strongly in the Commonwealth constitutional context.[11] Another is the nature of the judge's competence, which is limited to stating how the statute should apply in the particular case. A third constraining common law rule is that the **only** goal of statutory interpretation is to ascertain legislative intent. Legislative intent is revealed as an entirely common law concept and, as such, is defined by it.

The utility of the concept is that it operates to constrain the judge in her interpretive role in a constitutionally appropriate way. A statute is not said to have the meaning that the reader gives it[12] but that which the legislature is taken to have intended it to have (accepting that the legislative intent is **not** the collectivity of parliamentarians'

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[10] Phillip Sales, 'Judges and Legislature: Values into Law', (2012) 71(2) Cambridge Law Journal 287 at 292. As French CJ said in *Momcilovic* (2011) 245 CLR 1, 45 [39] "if the words of a statute are clear, so too is the task of the Court in interpreting the statute with fidelity to the Court's constitutional function. The meaning given to the words must be a meaning which they can bear".

[11] See, eg, Richard Darrell Lumb, The Constitutions of the Australian States (University of Queensland Press, 5th ed, 1991) 132, 137 n 103; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 67 (Brennan CJ), 78 (Dawson J) and 92 (Toohey J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 598-9 [37] (McHugh J), 614 [86] (Gummow J), 655 [219] (Callinan and Heydon JJ); *Wainohu v State of New South Wales* (2011) 243 CLR 181, 212 [52] (French CJ and Kiefel J); and *The Australian Workers' Union of Employees, Queensland v State of Queensland, Industrial Union of Employees & Anor* [2012] QCA 353 at [51], [59] (Holmes, Muir and White JJA) (Special leave application refused on 6 June 2013 (Hayne and Bell JJ)).

[12] Contrast *Momcilovic* (2011) 245 CLR 1, 175 [441] (Heydon J).

minds). A statute is not to be read as one would another document. Rather, a statute is read according to its own rules. Giving meaning to a statutory provision is therefore a highly controlled task. When the judge says that the goal of statutory interpretation is to ascertain what the legislature intended, the judge is acknowledging her constitutional relationship with the legislature. So far as a judge is concerned, the concept of legislative intent provides the correct constitutional orientation.
The effect of the recent redefinition of legislative intent is to draw attention to the function of the concept of legislative intent, rather than to undermine it.

Has redefinition of legislative intent a consequence for the interpretive process?
The answer is clearly yes. The emphasis on the common law source of the legislative intent concept focuses attention on the significance of the statutory construction rules. This is because the common law provides that legislative intent can **only** be arrived at by the application of these rules. Legislative intent is moreover arrived at not only by reference to the **rules** of construction, but also consistently with the **assumptions** on which the rules are based.

Recent statements in the High Court in cases such as *Lacey v Attorney-General (Qld),*[13] in 2011 and *Zheng v Cai*, [14] confirm this analysis. Thus, the joint judgment in *Lacey* stated, the "[a]scertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts".[15]

How does this doctrinal refocussing inform the practical questions about the use of extrinsic material and the supposed primacy of the text? Applying the rules of construction, the interpreter necessarily begins with the text of the contested statutory provision, having regard to the whole of the statute and the law in the area with which it is concerned. This initial focus on the text and the salient law assumes that the legislature acts rationally so as to create a law that sits reasonably with, or as one

[13] (2011) 242 CLR 573 ('*Lacey*').
[14] (2009) 239 CLR 446 at 449-450. Similarly, in *Zheng v Cai*, the plurality affirmed "the preferred construction by the court of the statute … is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy" at 455-456.
[15] *Lacey* (2011) 242 CLR 573, 592 [43]. See also *Momcilovic* (2011) 245 CLR 1, 85 [146] (v) (Gummow J).

scholar[16] has said, is "coherent and consistent" with the rest of the statute and other relevant laws. This explains why Justices Crennan and Kiefel said in *Momcilovic* that the statutory direction in s 32(1) of the Victorian Charter – to keep Charter rights in mind in statutory construction – was "not, strictly speaking, necessary".[17]

Although the first port of call is the text, this is clearly **not** the end of the voyage. Although in cases such as *Alcan*[18] in 2009 and *Consolidated Media*[19] in 2012, the High Court has emphasized the primary importance of the text, it is not to be supposed that it has diminished the role of context. Thus, the plurality in *Alcan* stated:[20]

"*[T]he task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language … of legislation is the surest guide to legislative intention."*

This statement and a similar one in *Consolidated Media*[21] would go too far if it were understood to assert that the text was to be given some unyielding primacy, and I do not think this was intended. The cases with which the Court is ordinarily concerned show that issues of statutory interpretation most frequently arise precisely because the meaning of the text is uncertain[22]. To adopt a new textual primacy or even a renewed literalism would be to introduce a degree of circularity in the Court's analysis, which cannot have been intended.

Any perceived difficulty with these statements arises, I think, as a result of a misplaced exegesis: reasons for judgment must be read as a whole and in context. When read properly, I doubt that it can be said that the Court was signalling a change in the rules with respect to statutory interpretation because, in *Alcan*, *Consolidated Media* and elsewhere, the High Court has also acknowledged that the text falls to be

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[16] John Bell, 'Interpreting Legislation' in Peter Cane and Joanne Conaghan (eds), The New Oxford Companion to Law (Oxford University Press, 2008) 630, 630.
[17] *Momcilovic* (2011) 245 CLR 1, 217 [565].
[18] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46-7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).
[19] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257, 268-269 [39].
[20] (2009) 239 CLR 27, 46-7 [47]
[21] (2012) 293 ALR 257, 268-269 [39]
[22] Uncertainty may arise for various reasons: whether ambiguous, obscure, or having an ordinary meaning with an unreasonable or absurd result.

considered in its context, by reference to its purpose and policy as disclosed in its legislative history and other extrinsic materials. To say (as in *Consolidated Media*) that an understanding of context "has utility if, and in so far as, it assists in fixing the meaning of the statutory text"[23] is to say no more than to be taken into account the contextual materials must be relevant to the matter in issue.

Furthermore, a notion of unyielding textual primacy would ignore other powerful assumptions on which the rules of construction are based. These are that the legislature acts reasonably, having regard to its purpose in making a law, its constitutional role and those of the other branches of government, and the rights, freedoms and immunities that the common law protects because they are seen as key in a liberal, representative democracy.[24] It is improbable that the High Court would disregard these key assumptions, which have been referenced in recent cases, including *Hogan v Hinch*[25] and *Momcilovic*[26].

The statement, which appears in both *Alcan* and in *Consolidated Media*,[27] to the effect that historical matters and extrinsic materials cannot displace the meaning of the statutory text, should not be read out of context. If read literally, it would be inconsistent with s 15AB(1)(b)(ii) of the Acts Interpretation Act, which permits reference to extrinsic material "to determine the meaning of [a] provision when …the ordinary meaning … leads to a result that is manifestly absurd or is unreasonable". Most likely, the Court's non-displacement statement signals only that statements in extrinsic materials, such as an explanatory memoranda or second reading speeches, cannot be permitted to govern the meaning given to a statutory text that is not unclear and does not fall within s 15AB(1)(b)(ii). If the Court was simply repudiating attempts to reformulate a statutory text in the terms of an explanatory memorandum or the like, it was doing no more than applying the traditional rules of construction to determine legislative intent, properly understood.

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[23] *Consolidated Media* (2012) 293 ALR 257, 269 [39].
[24] See Ekins, 'The Intention of Parliament' (2012) Public Law 709, 709: 'interpreters infer from the text in its context what the presumptively rational, reasonable legislature intended to convey'. Also Ekins, 'Legislative Intent', 245, 258.
[25] (2011) 243 CLR 506.
[26] (2011) 245 CLR 1.
[27] As above ns 17 and 18.

It is important to bear in mind that not all supposed extrinsic material is relevant in the interpretative process. Since legislative intent is not a reference to some collective (objective or subjective) state of mind of the legislators,[28] extrinsic material (such as explanatory memoranda and second reading speeches) that merely evidence that state of mind is not, to adopt the language of s 15AB(1) of the Acts Interpretation Act "capable of assisting in the ascertainment of the meaning of the provision". Material relied on merely to show the state of mind of the proponents of a proposed provision is therefore irrelevant and draws attention back to an erroneous reliance on the parliamentarian's mind rather than to the legislature as it is constitutionally understood. This explains the remarks of Chief Justice French and Justice Hayne in *Certain Lloyd's Underwriters*[29] in 2012 that:

"The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted the legislation may have had in mind when it was enacted."

The final issue I would mention this evening concerns a supposed postponement of the consideration of contextual matters. It has been said that, over recent years, there has been a shift away from the approach in *CIC Insurance*[30] (which would have context considered at the outset of the interpretive task) to an approach which would have context considered at some later stage. In this connection, reference is commonly made to *Saeed*[31] in 2010, in which the High Court referred to the dissenting judgment of Justices Brennan and Gaudron in *Catlow*[32] in support of the proposition that it was "erroneous to look at extrinsic materials **before** exhausting the application of the ordinary rules of statutory construction".[33]

I very much doubt, however, that *Saeed* signifies that consideration of contextual matters ought be postponed in some way. To the extent that the reference to *Catlow*

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[28] *Zheng v Cai* (2009) 239 CLR 446, 455 [28]; *Lacey* (2011) 242 CLR 573, 592 [43].
[29] *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 293 ALR 412 at 418-419 [25].
[30] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 ('*CIC Insurance'*), 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).
[31] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 ('*Saeed'*), 265 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
[32] *Catlow v Accident Compensation Commission* (1989) 167 CLR 543 at 550.
[33] Ibid. In *Catlow*, Justices Brennan and Gaudron had said that it was "only when the meaning of the text [was] doubtful … that consideration of extrinsic material might be of assistance".

supports this understanding, the reference was perhaps unfortunate. To understand properly what the Court in *Saeed* meant, one must again read the Court's reasons in context. A key to understanding what was intended is to consider the use that the Minister made of an explanatory memorandum and a second reading speech. The Minister relied on this extrinsic material to show that the proponents of the provision sought to address perceived shortcomings of the existing legal framework in light of the High Court's earlier decision in *Ex parte Miah*.[34]

The Court, as interpreter, began with the text of the contested provision, which it considered having regard to the whole of the statute and the salient law; and from this derived the legislative intent. The proponent's objective (which was accepted to be as stated in the extrinsic materials) [35] did not prevail because this factor was outweighed by considerations of statutory text and structure; and, in any event, since legislative intent is not concerned with a proponent's mental state, might properly be regarded as irrelevant. Properly understood, *Saeed* is just another example of the application of the traditional rules of construction.

Saeed is not authority for the proposition that the interpreter "postpones" consideration of context; rather consistently with *CIC Insurance* and s 15AB(1)(a) of the Acts Interpretation Act, the interpreter is obliged to consider contextual matters as soon as the issue of interpretation falls for consideration**.**

In *Saeed*, the text of the statute could not wear the Minister's stated objective. That is, the total context within which the provision was interpreted was incapable of supporting this objective**.** In such a situation so long as the interpreter travels via the constitutional concept of legislative intent, there can, arguably, be no difference in outcome between an interpretation commencing or ending with a interpretive factor. The meaning to be given to the words, after all, "must be a meaning which they can bear" (to quote Chief Justice French in *Momcilovic* at 45 [39]). I know Mr Mark

[34] *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57.
[35] *Saeed* (2010) 241 CLR 252 at 265 [34]. The Court in fact accepted that the context and objective was as stated in these materials, although it considered that it was "hardly necessary" to resort to them, presumably because these matters were self-evident having regard to the provision itself and the salient law at the time of enactment.

Moshinsky will be taking you to Justice McHugh's comments in *Isherwood v Butler*[36] and Justice Gaegler's comments in *Baini*[37]. These cases alert us perhaps to the possibility of other situations, albeit rare, where, unlike *Saeed*, the point of departure may effect the interpretive result.

Saeed possibly raised an altogether different issue about the relative weight due to the different factors bearing on the ascertainment of legislative intent. Is it possible to identify a hierarchy of contextual considerations? Weight apparently depends on the provision and the cogency of contextual factors, judged by reference to the accepted rules of construction. This may be an inelegant, somewhat messy situation, but does it work? Perhaps there is nothing about the concept of legislative intent that would **require** a fixed hierarchy of worth. This is, however, an issue for another day.

[36] *Isherwood v Butler Pollnow* (1986) 6 NSLWR 363 at 388.
[37] *Baini v The Queen* (2012) 246 CLR 469.