

Current Issues in Statutory Interpretation

Federal Court

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Speaking Notes

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I'll focus on a theoretical issue of great practical importance. For at least six centuries, common law courts have maintained that the paramount rule of statutory interpretation is to give effect to the legislature's intention that can be inferred from the text together with the context in which it was enacted. This is of obvious constitutional importance. As Gleeson CJ has said, "Judicial exposition of the meaning of a statutory text is legitimate so long as it is an exercise . . . in discovering the will of Parliament: it is illegitimate when it is an exercise in imposing the will of the judge."¹

In the High Court, this fundamental principle is now in question. In several recent cases, High Court judges have described legislative intention as a "fiction" or "metaphor".² In *Momcilovic* the word "intention" is frequently put in scare quotes, implying that it is very dubious indeed.³ In *R v Lacey*, six Justices said:

"Ascertainment 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."⁴

¹ The Hon Murray Gleeson, "The meaning of legislation: Context, purpose and respect for fundamental rights" (2009) 20 *Public Law Review* 26, 27.

² *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56 [25]; *Zheng v Cai* (2009) 239 CLR 436, 455-56 [28]; *Lacey v A-G of Queensland* [2011] HCA 10 [44]; *Momcilovic v R* [2011] HCA 34 [38] (French CJ).

³ *Momcilovic v R* [2011] HCA 34, [111-12] (French CJ); [146 (v)], [170], [261], [270] (Gummow J); [315], [319] and [322] (Hayne J).

⁴ *Lacey v A-G of Queensland* [2011] HCA 10 para 43.

This suggests that legislative intention is not something that exists before judicial interpretation, but instead, is a product or construct of interpretation.⁵ In *Momcilovic*, Hayne J put the point bluntly:

“‘Intention’ is a *conclusion* reached about the proper construction of the law in question *and nothing more*.”⁶

This radically sceptical view about legislative intention, if taken to its logical conclusion, could diminish judicial willingness to recognise and accept the policy choices made by legislatures. Let me mention just a couple of reasons for my concern.

I start with an issue that is currently of great concern to the profession: whether the High Court is now giving more emphasis to the statutory text as opposed to contextual evidence of its purpose. Orthodox principles of statutory interpretation leave open room for disagreement between so-called "textualists" and "purposivists" about this. I suggest that it is impossible to resolve the disagreement without first deciding what the objective of statutory interpretation is. If legislative intention really exists, and is the object that interpreters should aim to discern, then this provides the main criterion for resolving the disagreement: is the textualist or the purposivist methodology more likely accurately to discern the legislature's intention? But if there is no such thing as legislative intention, it *cannot* provide a criterion for resolving the disagreement. Textualists and purposivists could not sensibly disagree about the best method for discerning legislative intention if no such thing exists. Their disagreement would have to be resolved by reference to other concerns, such as the rule of law (the meaning of a law should not be too difficult for those subject to it to grasp) and efficiency (the interpretive process should not be too costly in terms of time and resources). Both of these considerations favour textualism, suggesting that the viability of purposivism depends on the existence of legislative intention.

Secondly, if there is no legislative intention to serve as the lodestar guiding application of the principles of statutory interpretation, then the enterprise is

⁵ In *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56, at [25], French CJ and Hayne J said that “the identification of statutory purpose and legislative intention is the product of those processes [of statutory construction], not the discovery of some subjective purpose or intention”.

⁶ *Ibid*, [2011] HCA 34 [341] (emphases added).

likely to become a kind of game played to reach desired results. The traditional maxims and presumptions of interpretation would be a jumble of often contradictory directives, able to be selectively marshalled to support whatever interpretation is preferred on policy grounds. Only when it is accepted that clarification of a statute's meaning requires taking into account all admissible evidence of legislative intention, can it be appreciated that there may be many items of evidence – some pointing one way, some another –and that a final judgment requires weighing them against one another. Sceptics about legislative intention lack an intelligible criterion or object to determine how to weigh up these considerations.

Some arguments for legislative intention:

1. The natural and common sense approach to understanding statutes is to treat them like other communications – as having been deliberately designed to intentionally communicate particular meanings in order to achieve certain purposes.
2. We depart from literal meanings to avoid absurdities and correct obvious drafting errors. This was traditionally justified by the notion that the literal meaning could not have been intended by the legislature. If that justification is not available, then we are left with judicial tampering with the meaning of the text that is very difficult to justify at all.
3. The recognition of tacit assumptions and other implications in a statute logically depends on the existence of an unexpressed but nevertheless discernible legislative intentions.
4. Standard interpretive principles such as *eiusdem generis*, *expressio unius*, and so on make sense only on the assumption that the text was carefully designed to communicate some intended meaning.
5. The relevance of context is very hard to explain if legislative intentions do not exist – context is surely relevant only because it provides evidence in addition to the text of the intentions of the speaker or author.
6. The relevance of purpose in interpretation is similarly hard to explain – a purpose is a kind of intention, and it must be either the actual legislature's intention or a fabrication of the interpreter.

Arguments against legislative intention:

There are good reasons – based on the rule of law - for doubting the relevance of hidden intentions to statutory interpretation: the public is entitled to know what the law is, without having to search for hidden intentions. It is often said to follow that the only relevant intention is an “objective” intention that is independent of the actual, “subjective” intentions of individual legislators, which must be irrelevant. But this does not follow. The solution is to require publicly available evidence of subjective intentions – in other words, that they be publicly manifested. If subjective intentions were non-existent (as with monkeys pounding randomly on keyboards), or irrelevant, there would be no sense in talking about objective intentions either. The ideas of intention and purpose cannot intelligibly be divorced from what is or was going on in the minds of some number of real legislators. An “objective” intention is the intention that publicly available evidence suggests was the actual intention of the legislature, understood as an interlocking of the subjective intentions of individual legislators – in the way that I will now explain.

The Ekins Theory

Richard Ekins, in his book “The Nature of Legislative Intent” (OUP, 2012), defends the notion that a legislature can have an intention, although it is constituted by an inter-locking of the intentions of its individual members.

A group is formed when two or more people join forces to co-ordinate their pursuit of a common goal. In the simplest case, all agree on a plan designed to achieve that goal. Consider a team of cricketers planning to win a match – the plan they all agree on is the team’s plan, or intention. In a more complex case, the group does not have a single, specific objective, but is devoted instead to the on-going pursuit of general goals by adopting and implementing an indefinite number of particular plans. Consider how an army or a trading corporation pursues general goals by adopting or changing particular plans as and when needed. These are the army’s or corporations plans, or intentions.

A complex group establishes procedures to formulate and adopt plans in pursuing its general goals. A legislature adopts procedures for developing plans put forward by members, and for making a final decision to adopt or reject them

by majority vote. These procedures are designed to ensure that the legislature can develop and adopt plans that are coherent and reasoned – or in other words, so that it can exercise rational agency, like a single reasoning and choosing person.

In a well-functioning legislature, all its members accept that this is its ultimate goal, and they also accept the procedures (including majoritarian decision-making) that have been adopted to pursue it. When particular plans are adopted in accordance with those procedures, they are adopted by the legislature, due to the prior acceptance of those procedures including majority voting. As with a simple group, those plans are the legislature's plans, or intentions. And it does not matter if many individual members knew very little about the details of a particular plan. The size and complexity of the modern legislative agenda requires a division of labour. Of necessity, members develop specialised interests and expertise, and rely on the guidance of their peers and party leaders.

A bill, or (after its enactment) a statute, is not just a text with a sparse, literal meaning: it is a plan consisting of a presumptively coherent means designed to achieve certain ends. To endorse the plan it is not enough to endorse the literal meaning of the text. All communications through a natural language rely on the ability of the intended audience to infer the speaker's intended meaning from contextual as well as textual clues. Hence, when reasonable legislators vote for or against a bill, they understand that what they are voting for is not merely a text with a sparse literal meaning, but a complex and reasoned plan involving both means and ends, which the text was designed by their colleagues to communicate. Even if they have not given much thought to its detailed provisions or even bothered to read them, the plan is “open” to them, in that they could easily learn more about it if they wanted to.

Ekins’ theory does not entail that resort to Hansard or other extrinsic evidence of legislative intent is required or even permissible. There is plenty of other contextual evidence of legislative intent, and he emphasises the dangers of inappropriate reliance on legislative history that have led British Commonwealth courts to be very wary of it.

But in a Westminster parliament, most legislation is prepared and sponsored by the government, and passed with the support of the majority of members it commands (at least in the lower House). Should the legislature be regarded as having endorsed the government's understanding of its ends and the means for

implementing them? That understanding will usually have been conveyed to the legislature during the responsible Minister's second reading speech. If the legislature can reasonably be deemed to have endorsed the plan that the bill was designed to communicate, and that plan was essentially the government's, it seems hard to resist the conclusion that the legislature endorsed the government's understanding of the plan. No other understanding of the plan is a plausible candidate for endorsement. But that might justify subsequent interpreters consulting the Minister's second reading speech, on the ground that it formed part of the context open to the legislature and is also (now that Hansard is readily accessible) open to the general public, or at least to competent legal advisers.

More details of these ideas are contained in a forthcoming article by Richard Ekins and Jeffrey Goldsworthy, "The Reality and Indispensability of Legislative Intention". See also my review of Ekins' book, titled "Legislative Intent Vindicated?" (2013) *Oxford Journal of Legal Studies* (forthcoming, but already on the journal's advance online website).