Judges and statutes

The following article is an edited version of a presentation by the Hon Justice Frank Callaway, Victorian Court of Appeal at the 'Working with statutes' conference, hosted by the New South Wales Bar Association and the Australian Bar Association, in Sydney, on 18-19 March 2005.

Mr Chairman, Your Honours, ladies and gentlemen, so that your expectations are not raised unduly, I shall first read to you part of the letter that I wrote to Mr Walker in reply to his invitation to participate in this conference. He had suggested that there was room for more rigour in the analysis and interpretation of statutes. I replied as follows:

> I am not sure that statutory interpretation is susceptible of a great deal of intellectual rigour. The factors bearing on the construction of any given statute are so many and various that the problem can rarely be solved by applying a rule or method. What is required is an exercise of sound judgment. It is not a discretionary judgment but, with that qualification, it bears an analogy with sentencing as practised in this state, i.e. an instinctive synthesis of all the relevant factors.
>
> This may sound somewhat like the 'masters of equity' doctrine: correct equitable principle is what good Chancery judges do and the true construction of statutes is what good judges say it is. Although that is a parody, there is a grain of truth in it. You do not need to be a post-modernist or a judicial activist to appreciate that there is often a very considerable range of choice. What is required is not so much intellectual rigour as moral rigour, a sense of responsibility and of the limits of the judicial office.

In any event, the best way to get a bad statute repealed or amended is to enforce it. The moral for counsel is that you should not give the impression that your argument is an invitation to defy the will of the legislature.

I went on to say that those views probably disqualified me from participating but that, if pressed, I would come and make some ex tempore remarks for (say) half an hour and then, if you wished, field questions.

Even in the case of ex tempore remarks, as opposed to a structured paper, it is desirable to have an aim. My aim is quite simple: it is to tell you, as frankly as I can, how I go about construing statutes. Because most of you are barristers, I hope that that will be of practical use. (For those of you who are solicitors, let me say that, in the rest of these remarks, 'barrister' has the same inclusive meaning as in Justice McHugh's judgment in *D'Orta-Ekenaike.*[1]) Advocacy is about persuasion and, as every advocate knows, half the battle is to understand the mind that you are seeking to persuade. I do not think that my mind is idiosyncratic. I believe that most appellate judges approach the interpretation of statutes in much the same way.

I shall say nothing of constitutional interpretation, because the approach is significantly different, even if the text and structure of the Constitution are ultimately controlling. All my remarks this morning will be directed to what might be called 'ordinary statutes'. Nevertheless, some of you will observe a family resemblance between my approach and something Justice McHugh said last year in the inaugural Sir Anthony Mason lecture.[2] He remarked that Sir Anthony saw precedent as 'an exercise in judicial policy which calls for an assessment of a variety of factors in which judges balance the need for continuity, consistency and predictability against the competing needs for justice, flexibility and rationality' and that he adopted a similar attitude in relation to constitutional interpretation. It is a dangerous attitude, but unavoidable. The hazard it presents is the reason for my reference to moral rigour in my letter to Mr Walker.

Photo: Fairfax Photos

Just as most questions at common law or in equity are susceptible of one good answer, or at least a relatively narrow range of good answers, so the meaning of most statutes is clear, or at least there is a relatively narrow range of truly available meanings. Those statements pre-suppose a reasonable consensus among judges about common law and equitable principle and about the way in which statutes are to be construed. They also pre-suppose that good lawyers will be appointed to the bench and that, once appointed, they will not be self-indulgent. I admit that there are exceptions to the rule that there is a relatively narrow range of good answers. One exception is statutes drafted at a high level of generality, like Part 1A of your *Civil Liability Act 2002*[3] and s398A of the Victorian *Crimes Act 1958*.

In most cases, however, in my view, it is not difficult to construe a statute. Of course, you need to be aware of technical rules of the kind found in the relevant Interpretation Act. They are the framework in which the exercise of construction takes place. The exercise itself is an act of the mind, partly unconscious, not a process of applying rules. You read the provisions fairly, in context, and you say what they mean. Modern 'precision drafting', as it is called, should make that task easier. Usually, although not always, it does. Cases at the cutting edge are not typical. That is why later, in the three or four examples I propose to give, I have included an instance

of words that are clear and not to be twisted, however beguiling the arguments of counsel.

In his correspondence with me, Mr Walker suggested that it might be fruitful to compare the interpretation of statutes and the interpretation of private instruments. There are obvious differences, but there are similarities too. Some of them are unexciting. They follow logically from the fact that both exercises are concerned with language. There are only two similarities that I wish to mention at this stage. It may be that you will raise others in the course of questions.

When a contractual provision is ambiguous, a judge will prefer a construction that is reasonable and convenient. When a statutory provision is ambiguous, a judge will prefer a construction that is just and convenient. Authority could be cited for those propositions, but they are really common sense. They are inherent in the nature of the process. The interpretation of contracts is part of doing justice between the parties. The interpretation of statutes is an element in the system of justice as a whole.

But that does not mean that the parties to a contract should be rescued, by a spurious process of interpretation, if they have made an unreasonable or inconvenient bargain. The oft repeated proposition that a term cannot be implied in a contract unless it is 'reasonable and equitable' flies in the face of contractual autonomy.[4] An unreasonable or inequitable contract may well contain an unreasonable or inequitable implied term. The remedy lies not in interpretation but, for example, in consumer protection legislation or the jurisdiction of equity to relieve against unconscionable bargains.

So, too, if a judge thinks that the true construction of a statute produces injustice or inconvenience – and I emphasize the *true* construction, which is not the same thing as the literal construction – it is the judge's duty to give effect to it. To pretend that the statute means something else is to detract from parliamentary sovereignty as surely as the corresponding approach to contracts detracts from the parties' autonomy. In any event, the best way to get a bad statute repealed or amended is to enforce it. The moral for counsel is that you should not give the impression that your argument is an invitation to defy the will of the legislature.

Let me digress for a moment. Lord Reid famously remarked that the declaratory theory of the common law was a fairytale. Lord Reid was a great judge but, in doing so, he did a disservice to the law and to public confidence in it. More importantly, he misunderstood the declaratory theory. For the most part, it was not meant to be taken literally. It was an ideal. Some of you will be familiar with Pericles' funeral oration. It paints an idealised portrait of Athens; of an Athens that never was. But, by doing so, it tells us a good deal about the real Athens, as well as the ideal for which the Athenians, or some of them, strove. So, too, the declaratory theory told us a good deal about judges and the ideal of the common law. The law does change, but it should change in ways that pay heed to consistency and continuity. To adapt Professor Dworkin's analogy, there must at least be successive chapters in the *same* novel.

Similarly the common law ideal is that, in construing a statute, a judge divines the intention of parliament. In a sense, that, too, is a fiction. But, in the vast majority of cases, it should be possible to speak plausibly of what parliament did or did not intend. That is one of the control mechanisms, preventing a judge from going on a frolic of his or her own. I respectfully differ from Justice Kirby on this subject. Reading Chief Justice Spigelman's paper, I find that I am not alone.

Second reading speeches and explanatory memoranda are of limited use and are often a distraction.

The other similarity between statutes and private instruments to which I wish to refer is of a quite different kind. It has to do with technique. In the case of both contractual and statutory provisions, or for that matter the provisions of a will, sometimes, no matter how hard you try to understand them, they simply do not make sense. The draftsman (a word, like 'chairman', that I regard as common, and not masculine, in gender) may have made a fundamental error that can no longer be identified or the text may have been repeatedly and inconsistently amended or the provisions may represent a compromise between irreconcilable ideas, as can easily happen in the course of contractual negotiations or in the course of legislation being hammered out to accommodate the interests of competing stakeholders. The judge must then simply do the best he or she can and the true construction may come as a surprise to the parties to the contract or the participants in the legislative process. Like André Gide, they wait for others to tell them what they meant.[5]

Very often, however, the contractual or statutory provisions did once make sense to someone. The trick is to find the right perspective and, all of a sudden, you understand the words as the parties or the draftsman did. Such provisions are like an impressionist painting: unintelligible dots until you find the right place in the room, and the right distance, from which to view them. Mr Bennion mentions a statutory requirement that the inside walls of factories be washed every 14 months. To understand that apparent anomaly, you need to know that factory spring cleaning in England took place at Easter and Easter Day may fall at any time between 22 March and 25 April. Never give up too soon in the search for the right perspective.

If you are a barrister, you then have to convey that perspective to the judge. When I was a junior, my leader and I once lived with a provision in an iron ore royalties agreement over a period of years until eventually it made its way from the Supreme Court of Western Australia to the Privy Council. In the course of time the scales fell from our eyes and we saw

what the parties meant but, although we won the case, we were unable to communicate that vision to any of the nine judges who heard it.

In searching for the right perspective, you may find it helpful to read Hansard, but I wish parliament would repeal the legislation that enables you to cite Hansard to the court. The real value of reading parliamentary debates used to be to suggest ways in which the language of the statute could plausibly and sensibly be construed. Provisions like s15AB of the *Acts Interpretation Act 1901* and s35(b) of the Victorian *Interpretation of Legislation Act 1984* have made advice and litigation more expensive and, in my view, have burdened judges unnecessarily. Cases take longer to prepare and to argue. Judgments take longer to write. Justice delayed is justice denied. It would have been better to take a liberal view of the mischief rule and to authorise recourse to specific extrinsic material on a case by case basis. By the 'mischief rule' I mean the rule in *Heydon's* case[6] in its modern *CIC Insurance*[7] guise, not Sir Frederick Pollock's ironic remark 'that parliament generally changes the law for the worse and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds'.[8]

Second reading speeches and explanatory memoranda are of limited use and are often a distraction. The primary task is always to construe the words of the statute.[9] In *Hilder v Dexter*[10] Lord Halsbury, LC said:

> My Lords, I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done. For that reason I abstain from giving any judgment in this case myself; but at the same time I desire to say, having read the judgments proposed to be delivered by my noble and learned friends, that I entirely concur with every word of them. I believe that the construction at which they have arrived was the intention of the statute. I do not say my intention, but the intention of the legislature. I was largely responsible for the language in which the enactment is conveyed, and for that reason, and for that reason only, I have not written a judgment myself, but I heartily concur in the judgment which my noble and learned friends have arrived at.

It is a case that deserves to be better known.

Judges do not decide cases by the mechanical application of rules. I cannot remember the last time I opened my copy of Bennion before receiving Mr Walker's invitation. (I had opened Pearce and Geddes more recently, but not so recently as I should like to pretend out of courtesy to one of our distinguished speakers yesterday.) You are very unlikely to win a case just by saying that the meaning for which you contend is required by one of the so-called canons of interpretation.

The starting point is to find a plausible reading of the provisions that does not do violence to the words, their context or the purpose of the legislation and then to persuade the judge that that reading is consistent with the kind of intention that parliament may be taken to have had. You endeavour to persuade the judge that it produces a result that is both just and workable not only in this case but in other cases. Appellate courts, in particular, always have an eye to the effect of their decisions on other cases.

Elegance and simplicity help too. It is said that, when one of the researchers into DNA was shown a model of the molecule as conceived by Crick and Watson, she said that it was too beautiful not to be true. Just as it is easy to underestimate the attraction of elegance in science, so it is easy to underestimate the attraction of elegance in the law, and yet the expression *elegantia juris* goes back to the Roman lawyers. It is an aspect, not just of culture, but of the wiring of the human mind that you are trying to persuade and perhaps, as Keats said, 'Beauty is truth'.

You endeavour to persuade the judge that it produces a result that is both just and workable not only in this case but in other cases. Appellate courts, in particular, always have an eye to the effect of their decisions on other cases.

Let me give you some examples. They are all Victorian[11] , but that is better than if I pretended a familiarity with New South Wales cases about which you know more than I do.

The first example illustrates the proposition that judges are not free to do what they like, that the words of the statute are ultimately controlling and that there are some interpretations that cannot be accepted.

One of the questions in *Village Roadshow Ltd v Boswell Film GmbH*[12] concerned the meaning of s257D(1) of the *Corporations Act 2001*. That section is concerned with selective buy-backs. It speaks of a special resolution passed at a general meeting with 'no votes being cast in favour of' the resolution by persons whose shares are proposed to be bought back or their associates.

I said earlier that the literal construction is not the same thing as the true construction. Section 257D(1) does not mean that the resolution is invalid if, through incompetent chairmanship, a proscribed vote happens to be cast in favour of the resolution. It simply means that that vote is not counted. Santow J decided that, in relation to comparable legislation, in *Re Tiger Investment Co. Ltd*.[13] In *Village Roadshow* we rejected the proposition that the words 'no votes being cast in

favour of' could be read as if they said 'no votes being cast in favour of *or against*'. The explanatory memorandum, which supported counsel's argument, was simply inaccurate. The language of the statute was clear and persons seeking to comply with the law, or like ASIC seeking to enforce it, were entitled to rely on it. An argument from alleged anomaly, as well as the explanatory memorandum, was wholly unpersuasive.

The explanatory memorandum, which supported counsel's argument, was simply inaccurate. The language of the statute was clear and persons seeking to comply with the law, or like ASIC seeking to enforce it, were entitled to rely on it. An argument from alleged anomaly, as well as the explanatory memorandum, was wholly unpersuasive.

The *Civil Aviation (Carriers' Liability) Act 1961* applies to a contract for the carriage of a passenger 'between a place in Victoria and another place in Victoria'. (I am simplifying, but that is sufficient for present purposes.) In *Mt Beauty Gliding Club Inc. v Jacob*[14] the plaintiff was a passenger on a glider flight from Mt Beauty that was intended to return to Mt Beauty. Instead the glider became lodged in the canopy of a tree and the plaintiff suffered injury. His action was statute barred if the Act applied. Counsel for the defendant submitted that the words 'between a place in Victoria and another place in Victoria' simply meant 'wholly within Victoria' *or that* they should be read as if they said 'between a place in Victoria and a place in Victoria' (omitting the word 'another') or even 'between a place in Victoria and that or another place in Victoria'.

The trial judge and the Court of Appeal rejected all those submissions, because they all involved rewriting the statute. Indeed the third was reminiscent of *Village Roadshow*. It is one thing to say that *p* includes *q*. It is another thing altogether to say that *p* includes not *p*. The plaintiff nevertheless failed. The construction adopted by the majority of the Court of Appeal was that, for the reasons explained in the judgments, the words 'between a place in Victoria and another place in Victoria' refer to a place of departure in Victoria and a place of destination in Victoria respectively. It matters not that they are the same geographical place. That was a bridge too far for the dissenting judge, but the important point is that, rightly or wrongly, it ascribes a meaning to the words that parliament used. It does not supply words to fill a *casus omissus*.

There are other points of statutory construction that *Village Roadshow* and *Mt Beauty Gliding Club* illustrate. Some of you may find them interesting to read. For those with strong stomachs, I commend *R v Best*[15] and *R v TJB*[16]. Both cases illustrate the choices that sometimes have to be made in construing legislation, the common law context in which it may fall to be construed and given effect, the need to devise new rules of practice as a result, the mischief rule and the use of extrinsic material.

Cato the Censor used to conclude every speech in the Roman Senate with the words *Delenda est Carthago*, Carthage must be destroyed. It might have been a motion concerning the sewage system of the eternal city. Cato ended with a reminder that the real problem was Carthage. Let me end with one of my own deep concerns. Everything I have said, beginning with my letter to Mr Walker and ending this morning, reflects my belief that the quality of statutory interpretation and, to that extent, the quality of justice depend upon the judge rather than upon rules that can be put into a textbook or expounded as such. We therefore rely on lawyers with the right qualifications being willing to accept appointment to the bench, notwithstanding the fact that judicial life is much less attractive than it was 30 years ago. Unless we can roll back the rate of refusal, to which Chief Justice Gleeson referred in his speech on 'A changing judiciary' four years ago[17] , it is not only statutory interpretation that will suffer. It is the whole common law system, which is fundamentally dependent on the quality of the judges.

1 *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 at fn.133.

2 Banco Court, Sydney, 26 November 2004.

3 Compare the Victorian *Wrongs and Other Acts (Law of Negligence) Act 2003*.

4 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283.

5 Compare *Vardon v The Commonwealth* (1943) 67 CLR 434 at 444.

6 (1584) 3 Co.Rep.7a.

7 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

8 Sir Frederick Pollock, *Essays in jurisprudence and ethics* (1882), 85, quoted in Glanville Williams, *Learning the law* (7th ed. 1963), 102-103.

9 Compare *R v Young* (1999) 46 NSWLR 681 at 686 [5].

10 [1902] AC 474 at 477-478.

11 Three examples were given at the conference, together with some discussion of *R v Best* [1998] 4 VR 603 and further discussion of the two examples that are retained in this edited version.

12 (2004) 8 VR 38.

13 (1999) 33 ACSR 438 at 445 [40].

14 [2004] VSCA 151 (to be reported).

15 [1998] 4 VR 603.

16 [1998] 4 VR 621.

17 Judicial Conference of Australia, Uluru, 7 April 200