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First you see it, then you don't –

Harry Houdini and the art of interpreting statutes

By

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Federal Court of Australia

1 So much ink has been spilled by learned commentators over the concepts and mechanics applied and used by courts when interpreting statutes that I am a reluctant presenter on the topic today. Am I sufficiently credentialed to speak on the topic, is my first inner inquiry. My second is whether it is possible to say anything new or useful on the topic. By reason of these doubts I decided to choose an attention-seeking title that might cause you, the participants, to assume, even fleetingly, my entitlement to speak and that I might have something useful, if not new, to say.

2 So far as the reference in the title to Harry Houdini is concerned, I am sure you will all recall that in the early part of the 20th century, Houdini was considered the world's most famous magician. No matter how tight, boxed in or imprisoned his position seemed to be in any given circumstance, he could always find a way out. His most famous act was what he called the "Chinese water torture cell" in which he was suspended upside down in a locked glass and steel cabinet, full to overflowing with water. Even from that position he would escape. A popular view is that judges see themselves as Houdini, challenged by the legislature to find their way around an inconvenient statutory text to a more satisfying result in the circumstances of the case!

3 The reality, of course, is that for most judges, whether we are on a court like my Court, the Federal Court of Australia or the Federal Magistrates Court (soon to be the Federal Circuit Court of Australia), which are entirely statutory and derive their jurisdiction from statute, or on a State or Territory court that may, particularly in the case of the Supreme Courts, have a more general jurisdiction (at law and equity) as well as a statutory jurisdiction, so many matters falling for determination involve the interpretation of statutes. We work with statutes daily. Much of the time the provisions of the statutes we work with, which

dictate a person's legal liability for things said or done, have well understood or uncontroversial meanings (I hesitate to say "obvious" meanings). In those cases decision-making usually involves fact finding to which that meaning is then applied.

4 On some occasions, however, we are called upon to interpret either for the first time or in new circumstances, a novel or interesting provision of a statute, regulation or rule which is not well understood, or which may be controversial (and which does not have an obvious meaning). It is on these occasions that we come to fully appreciate our responsibility, as judges, to interpret and apply the law which has been enacted in the relevant Federal, State or Territory legislature, or by a local government. We then come to grips with the long-standing discussion – sometimes a ferocious debate – about whether only legislatures "make" the law or whether the courts – judges – have a law-making function as well. Where the judicial interpretation is perceived to depend upon the forming of a value judgment by a court – where value judgments may differ – the debate about the role of the courts vis-à-vis the legislature is highlighted and differing theories of statutory interpretation tend to be advanced.

5 Shortly, I will invite you to consider the legal meaning of the word "parent" in a particular statutory context to test out what I am beginning to outline, but before doing so, I would like to briefly develop some of the competing theories of interpretation and techniques we are sometimes inclined to appeal to in the process of interpreting statutes.

6 In *Interpreting Statutes*[1], edited by Professors Suzanne Corcoran and Stephen Bottomley, is to be found a wonderful collection of essays on this topic. At one end of the interpretive spectrum Professor Tom Campbell, in an essay entitled *Ethical interpretation and democratic positivism*, argues that in a democracy the only acceptable rule of recognition is one that makes Parliament the source of law and that the law should not contain value terms that require courts to make moral and political judgments. Professor Campbell says of this approach to statutory interpretation[2]:

> This is a normative theory of law as a system of value-free rules (that is rules which,

[1] Corcoran S and Bottomley S (eds), *Interpreting Statutes*, (The Federation Press, 2005)

[2] At p 87.

> although hopefully morally justified, do not require moral judgments to be made in order to determine what they mean in practice). It is a form of legal positivism that may be called 'democratic positivism'.

7 Professor Campbell recognises, however, that legislation is not always drafted in a way that facilitates the advancement of democratic positivism, as he describes it, and that courts are, in effect, obliged to deal with undoubted interpretation problems. His ultimate plea[3] is to encourage legislative drafters, legislators, subjects and courts to adopt the positivist approach to legislation so that the function of courts does not involve the forming of the sorts of value judgments that he considers should be left to legislators.

8 By contrast, towards the other end of the spectrum, Professor Corcoran, in an essay entitled *The architecture of interpretation: dynamic practice and constitutional principles*, argues[4] that statutory interpretation cannot be divorced from general principles of justice and fairness. She contends that the use of such a principled approach to interpretation theory gives decision-makers the flexibility required to reach just and fair results when interpreting individual circumstances. Professor Corcoran concludes[5]:

> It is, of course, based upon a necessary degree of trust; trust that the judicial system will exercise its discretion appropriately. But that trust is a fundamental aspect of Australian constitutional arrangements. Executive Government, and even Parliament, may not always be happy with judicial interpretation of statutes, but that is the task that the judicial branch has been given.

9 Thus, Professor Corcoran considers interpretation involves a "dynamic process", one that always starts with the words of the text, but one that accepts that words are clumsy tools and to the words of the text must be added insight and understanding if one possible interpretation is to be preferred to another.

10 Professor Corcoran in *Interpreting Statutes* contributes a further essay entitled *Theories of Statutory Interpretation*. There she notes historical antecedents to current approaches including the "equity of the statute" approach, to which I will make further

[3] At p 98.

[4] At p 50.

[5] At p 50.

reference later. She then turns to the principal theoretical positions advanced by contemporary thinkers in common law jurisdictions, which she labels under "intentionist theories" (including the literal approach, imaginative reconstruction, purposive interpretation), "textualist theories" (including soft plain meaning theories, new textualist (hard plain meaning) theories) and "dynamic theories" (which are categorised as "best answer theories" (relying on what she refers to as a "moral reading" or the moral reality of the statute) and "community-based theories" (which depend upon which identified a portion of the community is considered the audience for the decision made), critical theories and pragmatic theories).

11 There is, I think, universal agreement amongst all commentators on all approaches with the observation that one must always start with the words of the text when interpreting a statute. It is, however, also important to recognise that words indeed are often clumsy instruments and that the context in which words have been used is important to understanding their meaning, and that if context is always regarded the meaning first suggested on a literal or grammatical that may not turn out to be the preferred meaning[6].

12 There is a tendency to forget that, as open to broad discussion as the topic of statutory interpretation is, Parliaments in Australia have in fact endeavoured to direct courts on how to interpret their enactments. Courts therefore, as a matter of statutory law, are not entirely free agents in deciding how to go about the task. First, s 15A of the *Acts Interpretation Act 1901* (Cth) (and its equivalents[7]) should be noted, which provides (in relation to Commonwealth statutes) that:

[6] See generally Hon JJ Spigelman AC, Chief Justice of New South Wales, "The poet's rich resource: issues in statutory interpretation", address to the Government Lawyers' Convention, Sydney, 7 August 2001, where the Chief Justice, in particular, recounts the *Kisch* case, *R v Wilson; ex parte Kisch* (1934) 52 CLR 234 where the High Court ultimately held that Scottish Gaelic was not a "European language" which could be administered to an entrant into Australia under the migration laws.

[7] The provision is to be found in the Interpretation Act of each jurisdiction as follows: *ACT Legislation Act 2001* s 120; NSW s 31; NT s 59; Qld s 9; SA s 22A; Tas s 3; Vic s 6 and WA s 7.

15A Construction of Acts to be subject to Constitution

> Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

Section 15A therefore provides a constitutional context for the interpretation of Commonwealth statutes and reflects a general prescription that what has been done is within power.

13 Section 15AA (and its equivalents[8]) then provides further guidance by emphasising what is often called the "purposive approach" to statutory interpretation is to be preferred, by stating:

15AA Interpretation best achieving Act's purpose or object

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

14 Section 15AB (and its equivalents[9]) further provides for the use of extrinsic material in the interpretation of an Act, in the following terms:

15AB Use of extrinsic material in the interpretation of an Act

> (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account

[8] The State and Territorial provisions based on s 15AA are as follows: *Interpretation Act 1987* (NSW) s 33; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Interpretation Act 1984* (WA) s 18; *Acts Interpretation Act 1931* (Tas) s 8A; *Legislation Act 2001* (ACT) s 139 and *Interpretation Act* (NT) s 62A.

[9] The State and Territory provisions based on s 15AB are as follows: *Legislation Act 2001* (ACT) ss 141-143; *Interpretation Act 1987* (NSW) s 34; *Interpretation Act (NT)* s 62B; *Acts Interpretation Act 1954* (Qld) s 14B; *Acts Interpretation Act 1931* (Tas) s 8B; *Interpretation of Legislation Act 1984* (Vic) s 35(b) and *Interpretation Act 1984* (WA) s 19.

its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;

(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;

(c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;

(d) any treaty or other international agreement that is referred to in the Act;

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and

(h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

15 Section 15AB is very broad in its terms as (2) emphasises.

16 Section 15AA, s 15AB and provisions like it, are not, however, to be understood as mandating the purposive approach and require their own interpretation by courts! The language of s 15AA is that such an interpretation "is to be preferred" where other interpretations may be open. But such an interpretation is not required. Indeed s 2 of the *Acts Interpretation Act* expressly provides that, while the Act applies to all Acts (including the Act itself), the application of the Act or a provision of the Act to an Act or a provision of an Act is "subject to the contrary intention".

17 The leading case in Australia today on the proper approach to statutory interpretation – or at least the one oft-cited in this regard – is *Project Blue Sky Inc v Australian Broadcasting Authority*[10] where the High Court was required to interpret s 122 of the *Broadcasting Services Act 1992* (Cth) dealing with standards in relation to the Australian content of programs. In the joint judgment of McHugh, Gummow, Kirby and Hayne JJ their Honours accepted that the Australian Content Standard developed under the Act was authorised by the literal meaning of s 122(2)(b). However, their Honours then addressed "the legal meaning" of s 122 and said[11] as follows:

> However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction (56) may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

18 In footnote 56 in this passage, their Honours referred to the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic common law rights, freedoms or immunities, as explained in *Coco v The Queen*[12]. The passage from *Project Blue Sky* tends to control statutory interpretation in Australia today. In doing so it may be thought to sideline the purposive approach to interpretation apparently provided for by s 15AA. Section 15AA, however, is not necessarily

[10] [1998] HCA 28; (1998) 194 CLR 355.

[11] At [78].

[12] (1994) 179 CLR 427 at 437.

inconsistent with what is stated by their Honours in *Project Blue Sky*. Indeed it may be said that the *Project Blue Sky* requirement to regard:

- context;
- the consequences of a literal or grammatical construction;
- the purpose of a statute; and
- the canons of construction,

is designed to facilitate the approach to interpretation preferred by s 15AA. Nonetheless, it should be said s 15AA did not form part of the discussion in the joint judgment in *Project Blue Sky*.

19 This approach to stating the "legal meaning" of a legislative provision explained in *Project Blue Sky* to my mind rather supports the pragmatic and more dynamic approach to interpretation proposed by Professor Corcoran rather than the democratic positivist approach suggested by Professor Campbell. There are, however, those cases where courts will finish up adopting what might be described as a democratic positivist construction of a statutory term, simply because Parliament has made it abundantly clear what the legal meaning is by clear, blunt drafting – thus proving Professor Campbell's point. Nonetheless, even in those cases where what I might call the "first blush" meaning suggests one meaning, a competing meaning will often arise from an examination of context, consequences and the purpose of the legislation. In my experience, this examination will usually be greatly assisted by an examination of the legislative history of the provision, at least where there is one.

20 Examining the legislative history of a provision may be a difficult, lengthy and weighty process in itself, as Justice Allsop, then a judge of the Federal Court and now President of the New South Wales Court of Appeal emphasised in a 2005 paper to the New South Wales Bar Association[13]. One may note, however, that s 15AB(3) provides and indication that the Court does not necessarily have to go to great lengths in considering

[13] Justice James Allsop "Statutes: some comments on context and meaning with particular regard to enactment and pre-enactment history", paper presented to the NSW Bar Association, 18 March 2005.

extrinsic materials to, apart from other relevant matters, the desirability of persons being able to rely on the ordinary meaning conveyed by the text or the provision and the "need to avoid prolonging legal or other proceedings without compensating advantage".

21 Indeed, it is accepted, by reference to both s 15AA and its equivalents and the approach described in *Project Blue Sky*, that context, consequences, purpose and the canons of construction should be considered as part of the process of interpreting a provision at the outset of the process, not merely as a separate exercise to be conducted if, and only if, there is thought to be some ambiguity or doubt about the first blush meaning. This was emphasised by Dawson J in *Mills v Meeking*[14] in relation to the Victoria equivalent of s 15AA, s 35(a) of the *Interpretation of Legislation Act 1984* (Vic), where his Honour stated[15]:

> The approach required by s 35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction.

The same point was made in *CIC Insurance Ltd v Bankstown Football Club Limited*[16], by Brennan CJ, Dawson, Toohey and Gummow JJ.

22 However, as Dawson J went on to point out in *Mills v Meeking*, this approach does not permit a court to ignore the actual words of a statute. His Honour observed:

> Reference to the purposes may reveal that the draftsmen has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible as a matter of construction to repair the defect, then this must be done. However, if the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes and it must be consistent with the wording otherwise adopted by the draftsmen. Section 35 requires a court to construe an Act, not to rewrite it, in the light of its purposes.

23 The High Court has also made it clear that provisions like s 15AB cannot be relied upon to in effect substitute the words of the Minister for the text of the law

[14] (1990) 169 CLR 214.

[15] At 235.

[16] (1997) 187 CLR 384 at 408.

(*Re Bolton; ex parte Beane*[17]; that it is inappropriate and impermissible to use speeches made in Parliament to evade the requirement that an Act shall be construed so as not to exceed legislative power or fundamental principles of statutory interpretation (*Baker v The Queen*[18]); that the provision cannot be used to construe a legislative provision unless the construction suggested is "reasonably open" (*Newcastle City Council v GIO General Limited*[19]).

24 In these regards, the recent decision of the Full Federal Court in *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd*[20] is also instructive. The Full Federal Court had to deal with the meaning of the word "make" in the *Copyright Act 1968* (Cth) in circumstances where Optus was said to be unlawfully using the intellectual property of the appellants. The Court[21] noted that two matters bearing on interpretation had been themes in the case, the first being what was described as a "technologically neutral interpretation", the second being described as "interpretation informed by legislative policy". The Court accepted[22] that the desirability of technological neutrality – of not limiting rights and defences to technologies known at the time when those rights and defences were enacted – had been acknowledged for some time and was one of the declared objectives in the explanatory memorandum to the 1999 Bill amending the Act. However the Court[23] (Finn, Emmett and Bennett JJ) stated:

> We are conscious that the construction which we are satisfied the language of s 111 requires is one that is capable of excluding, and does in fact in this instance exclude, the later technological development in copying. However, no principle of technological neutrality can overcome what is the clear and limited legislative purpose of s 111. It is not for this Court to re-draft this provision to secure an assumed legislative desire for such neutrality: *R v L* (1994) 49 FCR 434 at 538.

[17] (1987) 162 CLR 514 at 518.

[18] (2004) 223 CLR 513 at [15] (Gleeson CJ).

[19] (1997) 191 CLR 85 at 113 (McHugh J).

[20] [2012] FCAFC 59; (2012) 289 ALR 27 (special leave to appeal to the High Court refused).

[21] At [95].

[22] At [95].

[23] At [96].

25 This led the Court to address the issue it called "interpretation informed by legislative policy". It observed[24]:

> In varying guises and to differing extents, this has been a tool of statutory interpretation for many centuries. Its historical exemplar was the doctrine of the 'equity of the statute': see *Nelson v Nelson* (1995) 184 CLR 538 at 552-554; *Comcare v Thompson* (2000) 100 FCR 375 at [40]-[43]. Its principal modern manifestation is in that form of purposive construction enjoined by s 15AA of the *Acts Interpretation Act 1901* (Cth). However, if the apparently confined words of a statute are to be given a more extended scope, not only must they be capable as a matter of language of sustaining such an extension, there must also be some indication in the legislation, its purpose and context of whether, and if so how, the legislature would wish to extend what, on its face, is the confined scope of the statute or of a section of it: see *Woodside Energy Ltd v Federal Commissioner of Taxation* (2009) 174 FCR 91 at [51].

26 To this end, the Court noted that the High Court has recently emphasised in *Australian Education Union v Department of Education and Children's Services*[25], that a court cannot adopt:

> … a judicially constructed policy at the expense of the requisite consideration of the statutory text and its relatively clear purpose. In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.

27 The Full Court finally considered[26] that if such choices are to be made, then they should be made by the legislature, not by the courts.

28 In many situations, however, the general principle that legislation will be interpreted as "always speaking" will be applied, although it must be clear that the words in question are being used in a generic sense. Legislation may carry a sufficient contrary intention (as in the *Optus* case), or for example, where "motion picture films" was held to be an expression that did not include video cassettes (*Wilson v Commissioner of Stamp Duties*[27]).

[24] At [97].

[25] [2012] HCA 3; (2012) 285 ALR 27 at [28].

[26] At [99].

[27] (1988) 13 NSWLR 77.

29 There is an interesting debate, however, as to the position where *meanings* have changed, as distinct from the scope of what may be embraced by an expression. It may be argued that the current meaning should be applied, except perhaps in the case of "very old" legislation (*Fitzpatrick v Sterling Housing Association Ltd*[28]) or where the Act expressly or impliedly indicates that changed meanings are not to be applied[29].

30 So far as the "equity of the statute" is concerned, in *Nelson v Nelson*[30] Deane and Gummow JJ noted that the doctrine had the support of common law judges led by Sir Edward Coke in the 17th and 18th centuries, who looked back to a time before the rise of the doctrine of Parliamentary sovereignty and the subjection to it of the common law. Their Honours explained that the notion of the equity operated in two ways: first, the policy of the statute, as so perceived, might operate upon additional facts, matters and circumstances beyond the apparent reach of the terms of the statute; secondly, it was said that although courts of equity did not differ from those of law in the exposition of statutes, they did so in the remedies given and the manner of applying them.

31 Their Honours went on to explain that following the criticism of Bentham, the doctrine fell deeply into disfavour in England and the United States with the rise of legal positivism in the 19th century. However, their Honours added[31]:

> Nevertheless, the doctrines developed in equity survived. In the legal system as a whole there remained, and indeed entered the statute law itself, particular applications, developed by the eighteenth century judges, of the broader concept of the equity of the statute. One such instance in the modern law of bankruptcy is the avoidance of preferences. This was first devised by Lord Mansfield, as it was said, 'without any positive enactment' [footnote omitted] and as a protection or furtherance of the policy disclosed by the existing statute law.

[28] [1999] 4 AllER 705 at 726.

[29] See discussion in *Brownlee v The Queen* (2001) 207 CLR 278 at [126] (Kirby J) who suggested that words are not necessarily confined to the meaning that would subjectively be ascribed to them by the Parliament that enacted them. See also *Coleman v Power* (2004) 220 CLR 1 at [245] (Kirby J).

[30] At 552-554.

[31] At 553-554.

32 In a recent exploration of the continued reach of the "equity of the statute" approach, Justice James Edelman of the Supreme Court of Western Australia in a recent paper[32], concludes[33] that in the areas of construction of a constitution, a trust, a contract and a statute it is possible to see remnants of the uncommon interpretative approach of the equity of the statute, where courts have departed from the premise that a search for the objective meaning to be given to words in a statute is always possible. Justice Edelman, referring to Professor Atiyah's article "Common law and statute law"[34], suggests that to the extent that such uncommon interpretation techniques are to survive in our law, then there is "real force" in Professor Atiyah's observation that these techniques are not of construction or interpretation at all and, if they are to be accepted as legitimate in a modern plural democracy, then their justification must be found elsewhere.

33 Well, if the equity of the statute has little to commend it, what of the "new textualist" theory of statutory interpretation[35], referred to by Professor Corcoran as an intentionist approach to interpretation, for which Justice Antonin Scalia of the United States Supreme Court has become famous in legal and political circles (see Antonin Scalia, *A matter of interpretation: federal courts and the law* (1997)). On a strict or "hard" textualist theory, the meaning of a word or expression at the date of its enactment is the true legal meaning. While a source that might be consulted to this end would include a dictionary of the period of the enactment, other material should not be, including legislative history. (The soft plain meaning approach is however not so didactic!)

34 Not surprisingly, the new textualist theory of statutory interpretation has drawn its detractors. The debate it engenders, as I noted earlier, tends to bring out the extent to which a judge believes or perceives his or her function when interpreting a statute is, on the one hand, to avoid making value judgments or, on the other, to assist the legislature by making value

[32] The Hon Justice James Edelman "Uncommon statutory interpretation" *Constitutional Centre Twilight Seminar* (30 May 2012)

[33] At p 29.

[34] (1985) 48 Modern Law Review 1.

[35] Discussed in Corcoran S, "Theories of Statutory Interpretation" in *Interpreting Statutes* [footnote 1], at pp 20-21.

judgments which help make the statute work effectually in contemporary and changing circumstances. There is a real risk, in my view, that the new textualist theory fails to recognise that, where a statutory provision is capable of conveying more than one meaning, it serves the contemporary community more for the court to seek to understand the context, consequences and purpose before construing it. To deny the court this function in order to give a sensible meaning in a current context to, say, an ambiguous expression is, in my view, more likely to frustrate citizens than encourage them. The danger, of course, is that judges might construe the more purposive approach of *Project Blue Sky* and s 15AA as an invitation to "rewrite" legislation, contrary to the admonition of the High Court not to fall into that trap.

35 One must also pause to ask whether the adoption of a textualist approach, or indeed any other approach, is not merely another, perhaps subtle, way of making a value judgment about the content of a statutory provision in any event and a means to justifying an end. This question often arises in constitutional interpretation where the intersection between politics and law can be very sharply defined. Where judges take differing views as to the proper interpretation of a constitutional provision, it is not uncommon for commentators and lawyers alike to question the process by which the constructional outcome was achieved. For example, it might be considered relevant to ask whether the sole dissent of Latham CJ in the Communist Party case[36] is to be explained more by his politics and his apparent continued involvement in political issues, even when he was Chief Justice[37], than by the process of interpretation of the Constitution adopted by the majority that struck down the *Communist Party Dissolution Act 1950* (Cth).

36 In a recent essay published by the Judicial Commission of New South Wales entitled "*Saving the Literal – Fundamentalism versus Soft Logic in Statutory Interpretation*"[38]

[36] *The Australian Communist Party v The Commonwealth* (1951) 83 CLR 1

[37] As to which see Professor Fiona Wheeler, "Sir John Latham's extra-judicial advising" (2011) 35 Melb. U. L. Rev. 651.

[38] Professor James C Raymond, *Saving the Literal - Fundamentalism versus Soft Logic in Statutory Interpretation,* Statutory Interpretation: Principles and pragmatism for a new age (Tom Gotsis (ed), Judicial Commission of New South Wales, Sydney, 2007) pp 177-215.

Professor Jim Raymond, Professor Emeritus of the University of Alabama and a consultant to many Australian courts in legal writing and reasoning, tests the hypothesis that when the law is ambiguous, the rules and canons of construction serve only to provide "plausible arguments in support of a conclusion reached by other means, which may or may not be expressed in the judgment itself". In doing so, Professor Raymond considers decisions from four jurisdictions: Canada, United States, Australia and South Africa. For Australia he selects the decision of the High Court in *Kartinyeri v The Commonwealth of Australia*[39]. *Kartinyeri* concerned the building of the bridge to Hindmarsh Island in respect of which the Minister's approval was required if a place of significant Aboriginal heritage were to be affected under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The Minister declared the area under the Act, which had the effect of prohibiting construction of the bridge. But that was in 1994.

37 In 1997, Parliament enacted the *Hindmarsh Island Bridge Act 1997* (Cth) which did not expressly repeal or amend the earlier Act but declared that it did "not authorise the Minister to take any action after the commencement of this Act in relation to an application (whether made before or after the commencement of this Act) that relates (wholly or partly) to activity covered by [sections which enumerated activities related to building a bridge]". The question stated was whether the 1997 Act was invalid as not supported by s 51(xxvi) – the so called "race power" of the Constitution. At issue was whether the amendments to s 51(xxvi) effected in 1967 resulted in the Commonwealth no longer being able to pass legislation that discriminates against racial groups. To quote Professor Raymond's conclusion of the majority outcome:

> Their argument, in a nutshell, is that the original version of s 51(xxvi) clearly enabled the States to discriminate against the Aborigines, and that the 1967 amendment merely extended the power to discriminate, not just against the Aborigines but against any racial group in what might be called a bizarre exercise of fair play. And, in this view, the amendment empowered the federal Parliament to indulge in this sort of discrimination rather than leave it to the States.

38 Professor Raymond accepts that the arguments in support of the majority position are "detailed and ostensibly logical" but wonders what the majority was really thinking. He says

[39] [1998] HCA 22; (1998) 195 CLR 337.

there is no explicit consideration of "equity" in the judgments, but says that this did not mean it did not play a role in the private ruminations of the judges, observing that "Judges, after all, are human beings, not angels or computers". They would have known, for example, that Aboriginal objections to the bridge emerged rather late in the process, the original objectors being white residents of Hindmarsh Island who preferred the area in its undeveloped state; that objections to the bridge on environmental grounds had already been unsuccessful; that the sacred nature of the site had to do with "secret women's business" – which had been disclosed to a Royal Commission and found to be "lies and fabrications"; and that there were numerous inconsistencies in claims made ostensibly on behalf of Aboriginal women. Professor Raymond asks, perhaps a little disingenuously: "Could these considerations have influenced the result?". As he also notes, there is no way of knowing.

39 The point that remains for all of us to consider, is this: to what extent does the realpolitik subtly, or not so subtly, bear upon the interpretation of statutes.

40 Penultimately, I would perhaps be delinquent if I did not more expressly refer to the canons of construction alluded to by the High Court in *Project Blue Sky* and which are the subject of exhaustive analysis in a leading text such as Pearce and Geddes "Statutory Interpretation in Australia"[40]. These include a range of presumptions, for example:

- The presumption made explicit by s 15A that legislation is within power.
- The presumption that common law doctrines and expressions have their common law meanings.
- The presumption that a statute is not intended to alter or abolish common law rights unless it evinces a clear intention to do so (as held in *Coco* above).
- The presumption against retrospectivity of substantive (as against procedural) provisions.
- The presumption against construing a statute as creating a private right of action.

[40] Pearce DC and Geddes RS, Statutory Interpretation in Australia (6th ed).

- The presumption that references in an Act to the "Crown" are references to the Crown only in right of the enacting jurisdiction.
- The "syntactical" presumption (as Pearce and Geddes call it) *noscitur a sociis* whereby the meaning of a word is to be ascertained by references to other words used in the relevant legislative context[41]. For example, a prohibition against book making in a "house, office, room or place" was held not to apply to a public lane. In context "place" was read as akin to house, office or room.
- The syntactical presumption *ejusdem generis*, directed at a situation where a statute lists a number of specific items then adds some more general ones. The inquiry is to establish a genus of meanings so that general words that follow specific words can be read as a continuation of that meaning.
- The syntactical presumption *expressio unius exclusio alterius*, being that an express reference to one matter indicates that other matters are excluded.
- The syntactical presumption *generalia specialibus non derogant*, that where there is a conflict between general and specific provisions, the specific provision will prevail (this assumes that one can agree on what the general provisions are and which are the specific ones[42]).

41 The historic difficulty with the canons of construction, as Professor Karl N Llewellyn explained in his well known article "Remarks on the theory of appellate decision and the rules or canons about how statutes are to be construed"[43], is that statutory interpretation speaks a "diplomatic tongue" and there is a technical framework for manoeuvre that permits one party to "thrust" for one interpretation and another party to "parry" for another. As Professor Llewellyn suggested, there are two opposing canons on almost every point. Thus one party might contend that a statute cannot go beyond its text, to which another party might reply that to effect its purpose, the statute may be implemented beyond its text. To grapple

[41] For example in *Prior v Sherwood* (1906) 3 CLR 1054.

[42] See *Civil Aviation Safety Authority v Central Aviation Pty Ltd* [2009] FCA 49 (Perram J).

[43] (1950) 3 Vand L Rev 395 at 401-406.

with this situation, the theories of interpretation I referred to earlier directed as a means of providing a more satisfying approach.

42 Finally, I should add that I am in this presentation consciously staying away from the distinction often drawn in the authorities between the proposition that the ordinary meaning of a word is a question of fact, but the effect or construction of a term whose meaning or interpretation is established is a question of law, as discussed, for example, in *Collector of Customs v Pozzolanic Enterprises Pty Ltd*[44]. This decision has been commented upon as to the complexity of the distinctions drawn in a number of instances. For example, in *OV & OW v Members of the Board of the Wesley Mission Council*[45], Basten JA and Handley AJA[46] considered the distinction identified encourages a three stage approach in identifying the construction of a statutory provision. Thus, the first question asked is whether a particular word is used in its ordinary meaning, rather than a technical meaning; if so, the second question is to identify the ordinary meaning and the third question is to place that meaning into the statutory context, in order to identify the proper construction of the provision. Their Honours considered[47] that approach is misconceived as it fails to treat words in a sentence as "building blocks this meaning cannot be affected by the rest of the sentence"[48]. Their Honours also noted[49] that the High Court in *Collector of Customs v Agfa-Gevaert Limited*[50], accepting that the notions of meaning and construction are interdependent, said "it is difficult to see how meaning is a question of fact while construction is a question of law". In this particular case, their Honours considered the better approach was to look at the structure of the provision in question, which concerned the meaning of the word "religion".

[44] [1993] FCA 322; (1993) 43 FCR 280 at 287.

[45] [2010] NSWCA 155.

[46] At [29].

[47] At [30].

[48] Being a reference to what Lord Hoffmann said in *R v Brown* [1996] AC 543 at 561.

[49] At [31].

[50] [1996] HCA 36; (1996) 186 CLR 389 at 397.

43 President Allsop made additional comments accepting the criticism of the distinctions contended for in *Pozzolanic*. He considered the comments of the High Court in *Agfa-Gevaert* cast a significant qualification upon the utility of the distinction in many cases between meaning or interpretation as a question of fact on the one hand, and construction as a question of law, on the other, at least for the purposes of the distinction between a question of law and a question of fact. The President, however, did not wish to deny a conceptual distinction between the ascertainment of semantic meaning (interpretation) and determining legal effect or legal content (construction) of a legal text.

44 With these introductory remarks, let me turn to my interactive exercise to test out some of these theories and points, and to discover where you are placed on the spectrum of theories of construction!

Interactive exercise

45 ***Assume these facts:*** Annie A is a citizen and resident of Fiji, born there on 11 December 1988. Her mother was a citizen of Fiji.

46 On 16 December 2008, Annie A applied for Australian citizenship under s 16(1) of the *Australian Citizenship Act 2007* (Cth). The application named Mr Bob A as the applicant's father and stated he was an Australian citizenship by birth.

47 The Minister for Immigration, whose approval of the application is required to the application, refuses the application on the basis that Annie A "did not have an Australian citizen parent at the time of birth".

48 The facts of the matter are that Bob A is not the biological father of Annie A. However, during the time leading to Annie A's conception, her mother had intimate relationships with Colin C and Bob A.

49 While Annie A's mother was pregnant, Bob A visited Annie A's mother, from Australia, on several occasions and then again shortly after her birth. He and Annie A's mother selected Annie A's name and her birth certificate states that Bob A is her father. At that time he was unsure whether he was the biological father, but blood tests subsequently

conducted suggested that he was of the same blood type as Annie A and so he accepted he was Annie A's biological father.

50 Before Annie A's birth, Bob A purchased a house for Annie A and her mother and provided financial support for Annie A throughout her childhood and when she was a small child, Annie A and her mother visited Bob A in Australia and they maintained regular contact and thereafter Bob A regularly visited Annie A in Fiji at least once a year. The Minister accepted that Bob A had provided "both material and emotional support" to Annie A and assumed as best he could a father's role.

51 In 1999, a DNA test indicated that Bob A was not Annie A's biological father and this test was subsequently accepted by all to be correct. It was assumed at that point that the other man, Colin C, was the likely biological father of Annie A.

52 ***Question of construction:*** Leaving aside the question of Colin C's citizenship, can it be said that Bob A was a "parent" of Annie A for the purposes of s 16(2)(a) of the Act?

53 ***The Act:*** Note that the Act has three parts: Pt 1 – preliminary; Pt 2 – Australian citizenship; Pt 3 – other matters.

54 Part 2 – Australian citizenship has five divisions:

- Division 1 – automatic acquisition of Australian citizenship.
- Division 2 – acquisition of Australian citizenship by application.
- Division 3 – cessation of Australian citizenship.
- Division 4 – evidence of Australian citizenship.
- Division 5 – personal identifiers.

55 Division 2 – acquisition of Australian citizenship is broken down into a further four subdivisions:

- Subdivision A – citizenship by descent.
- Subdivision AA – citizenship for persons adopted in accordance with the Hague Convention on Intercountry Adoption.

- Subdivision B – citizenship by conferral.
- Subdivision C – resuming citizenship.

56 Subdivision A is in these terms:

Subdivision A – Citizenship by descent

57 Section 15A, the first provision in Subdiv A, has the heading "Simplified outline" with the first paragraph of the simplified outline states:

> You may be eligible to become an Australian citizen under this Subdivision in 2 situations:
>
> - you were born outside Australia on or after 26 January 1949 and a parent of yours was an Australian citizen at the time of your birth: see subsection 16(2); or
> - you were born outside Australia or New Guinea before 26 January 1949 and a parent of yours was an Australian citizen on 26 January 1949: see subsection 16(3).

58 Section 16 is in the following terms:

16 Application and eligibility for citizenship

(1) A person may make an application to the Minister to become an Australian citizen.

Note: Section 46 sets out application requirements (which may include the payment of a fee).

Persons born outside Australia on or after 26 January 1949

(2) A person born outside Australia on or after 26 January 1949 is eligible to become an Australian citizen if:
  (a) a parent of the person was an Australian citizen at the time of the birth; and
  (b) if the parent was an Australian citizen under this Subdivision or Subdivision AA, or section 10B, 10C or 11 of the old Act (about citizenship by descent), at the time of the birth:
    (i) the parent has been present in Australia (except as an unlawful non‑citizen) for a total period of at least 2 years at any time before the person made the application; or
    (ii) the person is not a national or a citizen of any country at the time the person made the application and the person has never been such a national or citizen; and
  (c) if the person is or has ever been a national or a citizen of any country, or if article 1(2)(iii) of the Stateless Persons Convention applies to the person, and the person is aged 18 or over at the time the person made the application—the Minister is satisfied that the person is of good character at the time of the Minister's decision on the application.

Persons born outside Australia or New Guinea before 26 January 1949

(3) A person born outside Australia or New Guinea before 26 January 1949 is eligible to become an Australian citizen if:
   (a) a parent of the person became an Australian citizen on 26 January 1949; and
   (b) the parent was born in Australia or New Guinea or was naturalised in Australia before the person's birth; and
   (c) if the person is or has ever been a national or a citizen of any country, or if article 1(2)(iii) of the Stateless Persons Convention applies to the person—the Minister is satisfied that the person is of good character at the time of the Minister's decision on the application.

59 The Act does not contain an express objects clause but the preamble is in the following terms:

Preamble

The Parliament recognises that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity.

The Parliament recognises that persons conferred Australian citizenship enjoy these rights and undertake to accept these obligations:

(a) by pledging loyalty to Australia and its people; and

(b) by sharing their democratic beliefs; and

(c) by respecting their rights and liberties; and

(d) by upholding and obeying the laws of Australia.

60 The word "parent" is not defined in the *Australian Citizenship Act*, but "responsible parent", "stepchild", "defacto partner" and "child" all are. "Responsible parent" is defined in s 6 as follows:

6 Responsible parent

(1) For the purposes of this Act, a person is a ***responsible parent*** in relation to a child if and only if:
   (a) the person is a parent of the child except where, because of orders made under the *Family Law Act 1975*, the person no longer has any parental responsibility for the child; or
   (b) under a parenting order the child is to live with the person (whether or not the person is a parent of the child); or
   (c) under a parenting order the person has parental responsibility for the child's long-term or day-to-day care, welfare and development

(whether or not the person is a parent of the child); or

(d) the person (whether or not a parent of the child) has guardianship or custody of the child, jointly or otherwise, under an Australian law or a foreign law, whether because of adoption, operation of law, an order of a court or otherwise.

(1A) In paragraph (1)(a):

parental responsibility has the same meaning as in Part VII of the *Family Law Act 1975.*

(2) Expressions used in paragraphs (1)(b) and (c) have the same meaning as in the *Family Law Act 1975.*

61 Section 3 of the Act defines "child" as follows:

child: without limiting who is a child of a person for the purposes of this Act, each of the following is the ***child*** of a person:

(a) an adopted child, stepchild or exnuptial child of the person;

(b) someone who is a child of the person within the meaning of the *Family Law Act 1975*.

62 Assume also that the Act was amended in 1984 in order, as stated in the Explanatory Memorandum, "to remove all discriminations from the *Australian Citizenship Act 1948*", and that the Minister in the Second Reading Speech on the Bill stated:

> The existing Act discriminates on the basis of sex and marital status. Mothers, for example, do not have the same rights as fathers in determining their children's citizenship. It has been decided to amend the Act to place mothers and fathers on an equal footing for all purposes related to citizenship, and the citizenships of their children. All other discrimination on the grounds of gender and marital status will be removed.

63 ***Dictionary definitions:*** Assume the following dictionary definitions of the word "parent".

- Oxford English Dictionary. Noun 1. a person who has fathered or given birth to a child; a biological father or mother; a person who holds the position or exercises the functions of such a parent, a protector, a guardian.
- Macquarie Dictionary 4th ed. Noun 1. A father or a mother. 2. a progenitor. 3. an author or source. 4. a protector or guardian.

64 ***Other legislation:*** Assume also, that relevant State legislation including the *Children, Youth and Families Act 2005* (Vic) accorded the word "parent" a wide meaning not restricted to a biological parent.

65 Assume at material times when the Minister was required to determine the citizenship application of Annie A that the *Family Law Act 1975* (Cth) contained the following presumptions:

- As to parentage arising from marriage.
- As to paternity arising from cohabitation.
- As to parentage arising from registration at birth.

66 Further assume that at material times the *Family Law Act*:

- Permitted a parenting order in favour of parents or other persons.

67 ***Scholarly research:*** Assume also, that scholarly research strongly supports the existence of a widely held view that the legal basis and social significance of parenthood is "one of the major and most complex issues throughout the history of mankind".

68 You should also assume that the concept of "citizenship" is able to be altered under Australian law by legislation which, as a result, is able to keep pace with changing social and cultural realities.

69 ***Minister's concession:*** The Minister contends that "a parent" in s 16(2)(a) means a biological parent – although the Minister also accepts that, in the case of artificial conception, parenthood might not be biological parenthood and may include the person who supplied the biological material that produces the child.

70 ***Questions:*** In dealing with the construction of the word "parent" in s 16(a):

- Does the word "parent" have an unquestionable, literal meaning?
- What is the relevance of s 15AA of the *Acts Interpretation Act 1901* (Cth)?
- Is context everything?

- What is the relevance of the State legislation definition of "parent"?
- What is the relevance of the *Family Law Act* provisions?
- Assuming that s 16(2)(a) appeared in the original 1948 form of the Act and in the 1984 amendment, as well as in the Act as re-enacted in 2007, what difference would that make to the proper construction or interpretation of the word "person"?
- What is the significance of the heading to subdiv A – "Citizenship by descent", noting that by s 13(2)(d) of the *Acts Interpretation Act* the headings of a subdivision are "part of an Act"?
- If you were to find that the word "parent" in s 16(2)(a) were to include Bob A in relation to Annie A, would you be guilty of searching for the "equity of the statute" and, if so, would that be wrong?
- Is it not abundantly clear that, by having regard to the general structure of the Act, the heading to subdiv A and the dictionary meanings, Bob A cannot be considered the "parent" of Annie A because he is not the biological parent?
- If you were to take a "modern" view of who a "parent" is in Australia today, for the purposes of construing the *Australian Citizenship Act*, given the facts of this case, would you not be likely to "open the floodgates" to a range of citizenship applications that the Minister would be bound to approve in the future?
- Why should you not finally accept that "parentage" is not just a matter of biology but of intense commitment to another, expressed by acknowledging that other person as one's own and treating him or her as one's own?
- If you accept that view, is it not open to the Minister to accept that Bob A, as a matter of fact, is the "parent" of Annie A for the purposes of the citizenship application?
- What is the right, correct or preferable construction, of the word "parent" in s 16(2)(a)?

71 For a discussion of a similar interpretation issue, see: *H v Minister for Immigration and Citizenship*[51].

[51] [2010] FCAFC 119; (2010) 188 FCR 383.