INTERPRETATION
AND USE OF LEGAL SOURCES

THE LAWS OF AUSTRALIA

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Foreword

The Hon Michael Kirby AC CMG

Lawyers and Meaning

Lawyers spend much of their time puzzling over the meaning of words. Inescapably, this is an important part of their function in a rule-of-law society. Some advise on documents to govern the legal relations of their clients. Others have the unpleasant duty of trying to understand the documents clients have drafted, unaided. Some have the highly important function of drafting statutes and subordinate legislation, by which most of our public law is now expressed. A few rare birds enjoy the responsibility of drafting or interpreting instruments of international law. Where uncertainties arise as to the meaning of these and other instruments, it normally falls to lawyers to unravel the ambiguities and to give an authoritative interpretation. Those privileged with that task are mostly advocates and judges, working in the symbiotic relationship of a common law system. They, in turn, must help expound what earlier judges declared to be the law, so that society can act with certainty and consistency in applying the law.

Many lawyers can get through their busy lives without an intimate acquaintance with many particular subjects of the law examined in *The Laws of Australia* (TLA). But none can get very far without a working familiarity with the approaches and rules that govern legal interpretation. Interpretation constitutes the key that unlocks the door to the meaning of law. This therefore is a topic of great relevance to every other particular topic of law. Necessarily, every such topic must be expressed in words (sometimes figures, symbols, formulae and other images). To say what the words and images mean, every professional lawyer must be acquainted with the material covered in this Title. It is because that material has undergone many statutory and common law changes in recent decades, that this Title has been completely rewritten. A new taxonomy is offered. It has greatly expanded the references and illustrations to guide the lawyer in performing this indispensable task.

I congratulate Perry Herzfeld, Thomas Prince and Stephen Tully for their leadership in the revision of this Title, a major task. Also the TLA editorial team who have also been engaged. And the publisher which has given full support. Because of the cross-disciplinary implications of any study of legal interpretation, it has been usual, until recently, to teach law students about the approaches and rules of interpretation within the context of particular sub-topics of the law. In the past decade, stimulated by initiatives first begun in leading law schools of the United States of America, Australian faculties have also started to introduce instruction in legal interpretation as a specific topic. Given the huge shift in my lifetime from the common law to statute

law, as well as the other developments noted here, this is a natural and indeed necessary innovation, which I welcome. As I finished reading the manuscript for this revised Title, I reflected on how useful it would be for a contemporary law student and beginner in the Australian legal profession to have read, digested and reflected upon the material in these pages. Of course, some of the contents will occasionally seem confusing or inconsistent because it reflects a topic which is itself in the course of a significant evolution. But no one can doubt the importance of this subject matter to anyone who claims to be a lawyer in Australia today. That is why the publication of the Title as a monograph, available to a wider audience, is to be particularly welcomed.

A New Taxonomy

The analysis of the topic is new and follows an approach that will reveal techniques of interpretation as they arise in 25.1 "Australian Domestic Laws" (mostly the Australian *Constitution* and statutes), 25.2 "International Law" (mainly treaties), and 25.3 "Private Law". The first two Subtitles examine approaches to the meaning of public law, made by or under the authority of an accepted lawmaker, either national or supranational. The third Subtitle, on the other hand, examines problems of meaning in various instruments that do not have the force of law as such, binding on third parties, but which have legal consequences for the individual parties and others according to their terms. So far, so good.

It is the next Subtitle, 25.4 "Judicial Statements", that may be seen as controversial in some circles. Australia is a common law country, with a single, national common law constantly in the course of development and elaboration by hundreds of judicial officers with the responsibility of deciding cases in federal, State and Territory courts. In the absence of any inconsistent provision in the Australian *Constitution* or in State, federal and Territory – and any residual Imperial – legislation, an authoritative statement of the common law by a judicial officer with power to make it will be just as much part of the law of Australia as a statutory enactment made within the constitutional power to legislate. Because of the radical enlargement of legislation as a source of law in Australia in recent decades (including subordinate legislation made under such power), the spaces within which judge-made law can still operate have diminished; but they have not disappeared. It is therefore essential that Australian lawyers should know how to approach the ascertainment of any rule of the common law applicable to given circumstances. Explaining the approach to be adopted, and the rules to be observed, is therefore essential to closing the circle on the true ascertainment of the law in Australia. The circle could not be closed without paying attention to any relevant judicial statements of the law. Hence this Subtitle, which I welcome.

Including 25.4 "Judicial Statements" in a study addressed to the topic of interpretation and construction must not be allowed to mislead the reader into thinking that judicial reasons can be parsed and analysed in the same way as legislation and subordinate legislation. Discursive reasoning in judicial opinions typically lacks the precision, and the function, performed by legislative texts. Only rarely do judges attempt to formulate a common law principle having that degree of certainty. Nevertheless, with the declining role of judge-made law as a part of the law of Australia, it is timely to include a section that gives the contemporary Australian lawyer ready reference to the applicable statutory and common law rules that exist to govern the interpretation of judicial orders, the analysis of judicial reasons, and the elucidation of binding rules of law derived from judicial sources. The task of interpretation will be different. So will

most of the applicable rules. But ascertainment of any relevant binding rule of law will still require interpretation of written texts. So it is relevant and useful to include the section in a taxonomy addressed to ascertain the law of Australia, whatever its constitutional source: legislative, executive, or judicial.

A Changing Discourse

An uninstructed Australian lawyer of the 1950s (when I began my legal studies), reading this Title, would scarcely believe the change that has come over the world of legal interpretation. In those days the approach to interpretation was usually highly literal and formalistic, although the mischief rule sometimes softened the more absurd consequences of that approach. Already in 1947, in *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629, Dixon J at 647 acknowledged "the greater freedom with which courts now use all rules and admonitions as to the interpretation of written instruments … [i]n the modern search for a real intention covering each particular situation litigated".

Gradually, that "greater freedom" was facilitated both by the common law rulings and statutory provisions described here. Interpretation, whether of national or international texts, or of public instruments or private documents, promoted an increasingly urgent search for the real meaning of any contested language. The main object of the analysis collected in these pages is to describe the approaches and rules that have been adopted to allow this sensible approach to take hold. It is to explain how the text remains the anchor of the lawyer's skill in interpretation, but how context, purpose and policy (and, increasingly, human rights considerations) assume significance in the deployment of the lawyer's art, and also to illustrate the ongoing uncertainties, hesitations and apparent inconsistencies that appear in the emerging techniques. In this sense, this study is a presentation of a still-changing body of Australian legal doctrine, warts and all.

As with the task of interpretation itself, the proper approach to comprehending and understanding all of the information contained in these pages is not to be had by plucking a particular decision, here or there, out of context. Anyone can do that. And doubtless they will. Support can be had for almost any proposition. Desirably, one should rather familiarise oneself with the whole. One should perceive the entire landscape which this work encourages and permits: seeing the ways that the different parts fit together, and above all, comprehending the overall direction in which the judges and legislatures have driven the law and practice of interpretation in recent decades. It is, I suggest, a desirable direction because it brings the legal approach into closer harmony with the way human beings normally understand the meaning of words in everyday life. The former judicial approach had its justifications. It was designed to diminish the cost, time and inconvenience of wider enquiries. But the result was all too often frustratingly narrow and lacking in good sense. Hence the new approach and the need for this work to describe and explain it.

With Good Humour

Hidden away in these pages are occasional hints of the inescapably human elements, attitudes and values that enter into any task of interpretation, certainly when it is performed by judges. Thus, Lord Westbury, writing of an earlier decision, is found lamenting "I am amazed that a man of my intelligence could have been guilty of giving such an opinion": see [25.4.300]. And an unnamed "old" American judge is

recorded as castigating his colleagues' *obiter dicta* as "a gratuitous opinion – an individual impertinence": see [25.4.530]. Of course he was never guilty of the same sin!

So interpretation is rarely dull. It can be fun. And it lies at the very heart of defining the law and the profession that practises it. That is why this work is so important. And timely. And intriguing. It deserves to be widely known and widely read.

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