



Interpretation and Use of Legal Sources — The Laws of Australia by Perry Herzfeld, Thomas Prince and Dr Stephen Tully, Thomson Reuters (Professional) Australia Ltd, 2013, 764 pages, ISBN 97804552309799, \$139.00 (paperback).

In a recently published book of essays, the acclaimed novelist and former WA Supreme Court Judge, Nicholas Hasluck QC, wrote that:

The law in action endeavours to eliminate mystery. Words are chosen with a view to avoiding ambiguity, cultivating a neutral tone, a voice that will echo the lawyer's habit of confidentiality and discretion. Sentences sound logical, authoritative, right. The rigorous, Latin-based prose, like a phalanx on the march, leaves an impression of unblinking uniformity.¹

While that may be the aspiration, the more complex reality was described by a distinguished American academic:

The central activity of law is the reading of texts — cases, statutes, regulations — and their imperfect reproduction and arrangement, in compositions of our making, in contexts to some degree distinct from those in which they were made. It is in fact a kind of translation, and this knowledge should shape both the way we engage in it ourselves and the way we judge the productions of others.²

Any kind of translation, including what might more traditionally be described as legal interpretation, needs a generally accepted body of rules as to how it should be done, guidelines as to how the text is to be read. The book under review is also published as part of Title 25 of *The Laws of Australia* encyclopaedia. However, the publishers have rightly identified that both the essential importance of the topic and the quality of the work more than justifies it being made available as an individual text.

The book brings together, it would seem for the first time, the principles of interpretation applied across a number of legal areas. Its basic division is into four sections: Australian domestic laws, international law, private law and judicial statements.

The first of these sections is itself divided into consideration of constitutions, statutes and subordinate legislation. The section on constitutions only touches briefly on the state and territory constitutions and understandably focuses on the Commonwealth Constitution. While commencing with the general principle that 'it is difficult to state definitely the principles that apply in interpreting the constitution', the authors go on to treat thoroughly and logically the various express and implied principles of constitutional interpretation applied by the High Court. I have no doubt that even specialist constitutional lawyers will find this section illuminating.

As might be expected, the subsection concerned with the interpretation of statutes is the longest individual part of the work, comprising slightly more than a third of the entire book. What Gleeson CJ speaking extra-judicially described as an 'orgy' of legislation has succumbed to neither satisfaction nor

1 N Hasluck, *Legal Limits*, The Federation Press, 2013, p 7.

2 J Boyd White, *Justice as Translation: An Essay in Cultural Legal Criticism*, University of Chicago Press, 1990, pp 240–1.

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In those circumstances, practitioners will find much of assistance in the sub-section on statutes and the following shorter treatment of subordinate legislation. General principles, the meaning of specific words (sometimes anything but 'natural and ordinary'), construction as a whole, presumptions, extrinsic material, amendments and repeal and particular kinds of statutes are all topics covered in great detail.

The section on international law contributed by Dr Tully is a welcome inclusion in a work of this kind. International law can no longer be regarded as the exclusive domain of academics and government lawyers. Australian courts in some circumstances will now look to international law as a guide for developing the Australian common law. If that exercise is to have any real utility, practitioners need to be familiar with the principles concerning the interpretation of international law. Furthermore, treaties and conventions now reach into many domestic legal concerns, sale of goods and arbitration being two obvious examples. Finally, Australia's geography means that much occurs by air and sea, necessarily invoking applicable international enactments.

The third section on private law deals with the construction of private documents. It again moves from general principle to particular examples. One notable feature of this section is the accurate and detailed consideration of the various maxims of construction, still often referred to by their Latin tags. These sections bring to mind Lord Hailsham's attempt to correct the understanding of the expression 'actus reus' where his Lordship said 'before the understanding of the Latin language has wholly died out of these islands, it is as well to record this as it has frequently led to confusion'.³ Latin has become just as, if not more so, unfamiliar in our island Australia, and this part of the book will go a long way to clearing up the confusion caused by inappropriate recourse to Latin tags whose meaning is no longer generally understood and the principles they represent.

The final part of the private law section deals with specific documents such as contracts, deeds, wills and trusts. Norton on Deeds has long been difficult to find, even in its facsimile edition. The present work is helpful in that it avoids so much of the learning on the interpretation of deeds that is now truly only of historical interest and includes modern (and not so modern) authorities which pick up where Norton left off. Similarly, specialists and generalists alike will find the treatment of the interpretation of wills and trusts to be a useful supplement to specialist books on those topics.

The fourth section of the book, dealing with judicial statements, is perhaps its most distinctive. In his foreword, the Honourable Michael Kirby suggests this section may be seen as controversial in some circles. That may be because lawyers may once have treated controversy and novelty as similes. If that were ever truly the profession's default position, it is to be hoped that it is no longer so.

The novelty of the fourth section is that it brings together a series of principles which apply to the interpretation of judicial statements. Despite the

³ *Haughton v Smith* [1975] AC 476 at 492; [1973] 3 All ER 1109; (1973) 138 JP 31; [1974] 2 WLR 1.

ongoing 'orgy' of legislation referred to earlier, judge-made law remains an important part of the Australian legal system. So it is that this section treats the rules of precedent, the interpretation of orders, the foundation and interpretation of practice directions and questions of interpretation associated with the doctrines of *res judicata* (or cause of action estoppel) and issue estoppel. The exposition of each of those topics is in and of itself unremarkable. The novelty, if it be such, is bringing them together in a way designed to show how they all cast light on the proper interpretation of judicial statements. The inclusion of this section is the product of an insight for which those who conceived this book are to be commended. I have no doubt it will be consulted just as often as the other parts of the book which proceed on more familiar lines.

The interpretation of both public and private acts has undergone a sea change over the lives of the last generation or two of Australian lawyers. Some of this is due to the ascendancy of the 'plain English drafting' movement. That has brought many benefits. However, one price that has been paid is the decline in familiarity with and use of what were once called 'terms of art'. The difficulty was that those terms of art may have been understood by lawyers but were impenetrable to everyone else. Supplanting those terms with 'plain English' has increased the need to apply more general principles of interpretation where that may not have been required before. Furthermore, what were once thought to be settled principles have had to be applied to new situations brought about by social, technical and economic developments. As was observed at the outset, interpretation is fundamental to legal practice. This work deserves to be a key point of reference on every lawyer's shelf.

Justice François Kunc
Supreme Court of New South Wales

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