A Recent Development in Statutory and Constitutional Interpretation in Australia

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INTRODUCTION

Stephen Sedley in 2012 criticized the two-step approach of interpretation-as-ascertainment followed by interpretation-as-construction found in accounts of interpretation and says, 'I believe this to be a false dichotomy. You cannot ascertain the meaning of words except in relation to known or supposed facts'.

Entirely consistent with that view, I have developed a particular theory for the judicial interpretation of statutes founded on philosophical and practical grounds. The theory is of an interpretive process, which I call *concurrent interpretation* and Australian judges call *characterization*: the meaning of statutory words is realized in application of the words to the facts of a case, in the task of resolving the particular conflict before the court.

I call the alternative theory *prospective interpretation*: the attempt to give authoritative meaning to a rule in advance of application, an approach consistent with interpretation-as-ascertainment followed by interpretation-as-construction.

I first summarize matters fundamental to statutory interpretation before describing, and distinguishing between, concurrent and prospective interpretation. I explain why the distinction matters. I introduce some philosophy, especially with regard to the nature of legal rules and norms. I discuss the interpretative process.

I come to the development referred to in the title of this lecture and discuss how current judicial practice, most candidly expressed in the High Court of Australia, underpins my approach. I conclude with suggested consequences of my approach.

An important matter ancillary to and consequential of my central argument is the intentionalist thesis, both strong and moderate. That is a large topic in itself and was deliberately omitted from the abstract announcing this lecture. I hope I have the opportunity to debate that topic another time soon. But, first things first; let us attempt to lay a foundation for concurrent interpretation and allow time for discussion.

Also in that spirit, I will not take time with footnotes. These can be found in the references set out in the abstract. [For readers I footnote recent legislation and HCA cases, and set out references, in which relevant footnotes appear, at the end of this record of the lecture.]

FUNDAMENTALS

It is worthwhile to recall some fundamentals, which provide a context for any theory of judicial interpretation. We are concerned with texts that are generic to law, which commonly contain references to legal concepts and, as such, have their own structure and contain language officially recognized as appropriate for legal texts. They are intrinsically authoritative. They are primary rules.

As texts expressed in written language they may contain faults of expression. We are familiar with words that have more than one meaning, with sentences that are vague or general. Eradication and strict control are neither possible nor necessarily desirable.

Such texts are expressed in the past and in general terms. They are invoked in the context of conflicts arising in the future between parties in real-life fact-situations that are not and cannot be anticipated by Constitutional Framers or Parliaments or drafters. Legal texts come before courts in the future for interpretation in the task of resolving particular conflicts, hence the need for interpretation.

Another fundamental, which I address shortly and which requires more extended discussion, concerns the relationship between legal rules and norms.

PROSPECTIVE AND CONCURRENT INTERPRETATION

An analysis of cases and literature indicates that there are two distinct approaches to statutory interpretation, being prospective and concurrent interpretation.

Prospective interpretation: In interpreting an authoritative legal text one first ascertains the meaning of the text by considering the words used and sometimes the context of the text's production. Then one applies the text so interpreted to the fact situation of the case in a deductive fashion. In effect interpretation is in advance of application hence prospective.

This account accords with legal tradition and positivism, with originalism (including the intentionalist theses) and with the two-step approach of interpretation-as-ascertainment followed by interpretation-as-construction. It is consistent with the idea that previous interpretations by courts are justifications that are applied successively by deductive reasoning, rather than providing analogous material that will have more or less utility in subsequent cases.

Concurrent interpretation: In interpreting an authoritative legal text one first identifies the text relevant to the conflict before the court. Then the text and the real-life fact-situation are concurrently brought into correspondence, the facts are identified and characterized in terms of the text and the words of the text in terms of the situation. In this process the meaning of the text is realized in application and in effect retrospectively.

This account claims that meaning is a combined process of interpretation, understanding and application. The real-life fact-situation is vital to interpretation. An entry into this idea is assisted by a discussion of the relationship between *legal rules* and *norms*.

RULES AND NORMS

We are concerned with law found in statutes and constitutions. John Bell, a co-editor of *Cross on Statutory Interpretation*, in a discussion about the importance that statutes play in the formulation of legal rules, refers to their distinctive character as legal texts and says:

> The legal text is to be understood not as revealing something about the author or the times in which she was writing, but as creating a norm within the context of a legal order which must be applied to concrete fact situations. It is this special character of *application* which makes legal interpretation, along with theological interpretation, a distinctive activity.

And he adds: "Kelsen was right to suggest that statutory texts do not contain the norm to be applied, but rather provide essential materials out of which the legal norm is to be constructed." This 'construction' is necessarily in application case by case. Hans Kelsen says: "… the judge who applies the law ought to know the law. [That is, be able to identify the relevant statutory rule and its criteria.] But this knowledge is not the essential element of their functions; it is only the preparation for their functions." Kelsen describes the "constitutive character of the judicial decision" as a process from the general (abstract) to the individual (concrete). Only in the judicial process "does the norm become applicable in the concrete case, and thereby a legal situation is created for this case which did not exist before the decision." It is an error to see the judicial process as a merely declaratory function.

The central point is that law assumes the existence of rules and that these contain norms. There cannot be any legal decision without a norm, without a measure. But law is not found in the static promulgation of a rule but is found in the realization of law. That is the judicial role, to decide actual cases here and now. Inevitably such norms are general and abstract. They are realized as law in application to the particular case, and for the particular case, in a process of concurrent interpretation. Law is found in the relation between norm and case.

It may assist in grappling with this argument to consider rules as laying down criteria for conduct. The particular case is then about whether or not all the criteria are met so that the rule applies to that case. As Lord Steyn explains, the question for the court is whether or not the words of the rule cover the particular case.

An example is a rule that I return to, the rule prohibiting conduct in trade that is misleading or deceptive or is likely to mislead or deceive. It can be seen that there is a number of criteria that must be satisfied if the rule is to cover the particular case. The criteria are properly to be found in the text of the rule, and not in any prospective interpretation of the text.

Fundamental to this argument is the undeniable fact that from case to case, and regardless of the case, the **text** of the rule remains the same. (If a text is amended by enactment is becomes another rule.) But each case is decided differently and that is because each case has its own real-life fact-situation. It follows that the meaning of the text does not lie solely in the text but also must lie in the particular fact-situation in respect of which the text is invoked.

A classic example concerns what constitutes a "weapon" for the purpose of a statutory prohibition of possession. Something can be a weapon today that did not exist at the time of enactment, but notwithstanding that fact, in a particular case it may be decided that an object has the characteristics of a weapon so that the prohibition applies. But the words of the text remain the same. The meaning of the text does not lie solely in the text but also must lie in the particular fact-situation in respect of which the text is invoked.

Of course we do think that a statutory rule is a law and it certainly looks like one in its formulation and status as an official text. However, on analysis a rule is merely the statement of the norm or norms and a silent guide to conduct. By itself it does not have substance as law. The text of a rule only has substance when we relate it to a real-life fact-situation. We do this by our thoughts and in that way reach a preliminary view of what the law is. A final view of what the law is for a particular case is obtained in the judicial decision that brings a case to an end. That is when the meaning of the text is realized. The decision may of course by analogy influence future decisions where the same rule is invoked and the facts (the narratives) are similar.

Let us look at a commonplace example, the road user rule requiring a driver to stop at a stop sign:

> A driver approaching or entering an intersection on a roadway where the vehicles that are moving in the direction in which that driver is travelling are controlled by a stop sign at or near the intersection must –
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> a. stop his or her vehicle before entering the path of any possible vehicle flow at such a position as to be able to ascertain whether the way is clear for the driver to proceed; and
> b. give way to any vehicles approaching or crossing the intersection from a roadway not controlled by a stop sign.

It is obvious from reading the rule that there is more to the rule than a mere norm requiring a driver to stop at a stop sign. There is a real-life fact-situation to which the rule must relate or correspond if there is to be a breach of the rule. The rule being a traffic regulation attempts to describe elements of that real-life fact-situation for example, the direction of travel, the stop sign, its location, where to stop, what the driver must then do. In other words the norm has no substance or meaning until by thought or action we engage with the text of the rule in a real-life fact-situation, whether that is imaginary or actual and whether it is something we think about as we read the text or at the point of action or at the point of a judicial decision or sometime in between.

HOW WE DO CONCURRENT INTERPRETATION

The crux of the case for concurrent interpretation is that the meaning of words and sentences is realized when the words and sentences are applied to a real-life fact-situation. We engage in a process that is largely instinctive and is informed by our familiarity with language. The process may be described by way of three elements for explanatory purposes: (i) guess, (ii) validation, and (iii) application.

GUESS

When we see a legal text we recognize it as such and on reading it ‘guess’ its meaning. Our experience and our knowledge of language, grammar and literary codes enable us to make this ‘guess’. We are directed to generic concepts that may narrow the scope of possible meanings. For example we will read a legal text differently to a poem. We will not be so concerned with symbolic or metaphorical meanings. At this point in the process there are often misunderstandings. We may recall an occasion when an initial impression turned out to be a horrible misunderstanding.

VALIDATION

Instinctively we engage in a process of validation by which we test our guess. This cannot be a process of empirical verification as found in the natural sciences. Interpretation is more concerned with the logic of probability. A text may have multiple interpretations but not all of them are equally plausible. We engage in both validation and invalidation. An interpretation must not only be probable, but more probable than another interpretation. Probabilities and risk assessment are well understood by lawyers and their clients. There are few absolutes in legal praxis.

We exercise our best judgment. It is well known that some lawyers are better at this than others, and that expertise in advising on statutory rules in a particular area, such as trade practices or intellectual property, is an advantage. But even then, there can be no claim to know the meaning in any absolute or prospective sense.

This does not mean the system has failed. Rather it explains the existence of the system: why there is litigation.

I must now introduce a neglected but essential aspect of the interpretative process: the role of narratives.

Courts, in a process of validation culminating in application, appropriate here and now the rule expressed by the legal text, and the facts of the case, and produce a plausible narrative where the rule and the facts resonate. We begin with a legal text that only has a linguistic sense that is, internal relations or structure. The text is interpreted when the court constructs a new imaginary reference, a referential illusion that does not exist before interpretation by the court. This is done in the form of a narrative that makes sense of time passed. The reference is constructed onto the legislative text in the form of an illusion: *as if* it were referring to the case to be decided.

We have an ordinary competence of identifying, ordering and articulating actions in the world of 'as if'. We look for fit and narrative coherence. We do this by thinking of and constructing real-life fact-situations and relating the text to, and testing our guesses against, such situations.

There is more to interpretation than is currently understood and taught. The significant questions are: How do we construct the narrative of the facts of a case and the narrative originating from the legislative text? How are legal decisions constructed where the two narratives (text, including the norm found in the text, and the particular facts) resonate (or do not resonate)?

All those concerned with litigation, including clients, solicitors, counsel, juries and judges engage in the construction of the two narratives. In particular the judge will form, and eventually express, her own narratives, which are informed by the entire court process.

APPLICATION

The statutory rule inevitably contains a norm. It is not always immediately clear that the case should be placed beneath this norm. What is required is a process of application of the norm to a particular case. Thereby the meaning of the rule is realized in an interwoven process of interpretation. On the one side, that of the particular case: a plausible narrative of what happened is reconstituted in the court process including the evidence of witnesses, who attempt to recount what has happened in the past.

On the other side, that of interpretation of the words of the rule itself: relating the norm to the facts and asking if the norm fits the facts so there is a correspondence of case and norm. This correspondence does not exist in advance. It must be produced in an assimilation of the norm and the particular real-life fact situation.

The meaning of the statutory text is realized for the particular case and by concurrent interpretation.

Of course we bring to the process of interpretation the interpretative tools (not rules) and exercise judgment in their use. A tool of particular importance is ascertaining the purpose of the particular rule as it bears on the particular fact situation. Previously decided cases may provide analogous material.

WHY THE DIFFERENCE MATTERS

Soon I will discuss the Australian cases, which illustrate consequences of preferring the concurrent approach. Before so doing I provide two clear examples of the difference in practice.

The first is the well-known case of *Yemshaw* (2011), already the subject of previous lectures. The issue in that case was whether or not Mrs Yemshaw qualified for rehousing because she suffered violence in her present accommodation. A previous prospective interpretation of the word ‘violence’ was that violence means physical violence and this interpretation was successively applied in cases including that of Mrs Yemshaw. She did not meet the prospective requirement of physical violence but she did claim to be the victim of domestic violence. The UK Supreme Court overruled the prospective interpretation and remitted the case to the Council for reconsideration. The case has been criticized as updating whereas I suggest, in publications, the case is about using the correct interpretative approach.

The second example concerns the prohibition in both Australia and New Zealand of conduct that is misleading or deceptive or is likely to mislead or deceive.[1] Until recently the history of the judicial treatment of this statutory rule has been most unfortunate. In grappling with a new phenomenon courts have engaged in prospective interpretations that effectively rewrite the rule and in many cases reduce its effect. One of these is the judicial pronouncement that the conduct must be in the nature of a misrepresentation, perhaps in an effort to bring the rule within what were then usual principles. Perhaps the most startling prospective interpretation is found in the case of *Heaven* (1997), in which the NZCA sets out a three-part test for all such cases.

> The first step, which focuses on the conduct in question, is to ask whether that conduct was capable of being misleading. The second step is to consider whether the Heavens were in fact misled by the relevant conduct. This step focuses on the effect of the relevant conduct on the Heaven's minds. The **third step** requires consideration of whether it was, in all the circumstances, reasonable for the Heavens to have been misled. This is where, as with the first step, the objective dimension comes in. it is not enough for the Heavens to show they were misled if reasonable people in their shoes would not have been misled.

As a result many a deserving case has been lost because the claimant was deemed not to have acted reasonably, clearly a matter only relevant to remedy. And the CA more recently has on the same basis sought to distinguish between commercial and lay claimants. The NZ Supreme Court has now gone some way to address such problems.

HIGH COURT OF AUSTRALIA

There has been a change in recent years in the approach to constitutional and legislative interpretation by the High Court of Australia (HCA). Now High Court Judges both in judgments and extra-judicially are candid about the way they undertake the interpretative task. There is remarkable unanimity.

This is seen most dramatically in the treatment of the rule, already referred to, that prohibits

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[1] Section 52 *Trade Practices Act 1974* (Cth), also found in Australian State and Territory *Fair Trading Acts.* Now s 18 *Australian Consumer Law* (ACL) found in Sch 2 *Competition and Consumer Act 2010* (Cth). And in New Zealand in s 9 *Fair Trading Act 1986* (NZ).

conduct that is misleading or deceptive or is likely to mislead or deceive.

In nearly 40 years of application of this rule, the HCA has come to recognize that the task is "[t]he application of a statutory text, expressed in general terms, to particular facts." [*Butcher v Lachlan Elder Realty Pty Ltd* (2004)].[2] This approach was approved in *Campbell v Backoffice Investments Pty Ltd* (2009).[3] French CJ in his treatment of an equivalent of s 18 ACL describes the court's task as one of "characterisation of the conduct." French CJ sets out the relevant statutory framework and then considers whether or not the conduct can be characterized as misleading or deceptive.

In a joint judgment in the same case Gummow, Hayne, Heydon and Kiefel JJ expressly approve a citation from the judgment of McHugh J in *Butcher v Lachlan Elder Realty Pty Ltd*:[4]

> The question whether conduct is misleading or deceptive or is likely to mislead or deceive is a question of fact. In determining whether contravention of s 52 has occurred, the task of the court is to examine the relevant course of conduct as a whole. *It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself. It invites error to look at isolated parts of the corporation's conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct …*

An interesting and recent case is *Google Inc v ACCC* (2013),[5] in which the HCA examined the liability of an internet search engine for misleading advertising in sponsored search results.

The joint judgment of French CJ, Crennan and Kiefel JJ begins with a neat summary of basic principles in the application of an equivalent of s 18 ACL.[6] This is followed by a concise discussion of the facts, in the task of identifying the relevant "conduct". Essentially they construct a narrative

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2 *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at [80].

3 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, [24]-[56] under the heading "The characterisation of conduct as misleading or deceptive".

4 Ibid at [102], emphasis in original, citing McHugh J in *Butcher* op cit n2 at [129].

5 *Google Inc v Australian Competition and Consumer Commission* (ACCC) (2013) 249 CLR 435.

6 Ibid at [4]-[16].

that may or may not resonate with the relevant text. Their Honours conclude that Google itself did not engage in contravening conduct and allowed the appeal.[7]

The concurring judgment of Hayne J is also interesting, especially the paragraphs commencing with the heading "Section 52 and identification of impugned conduct".[8] His Honour is concerned with first identifying the conduct and then focusing on whether or not the conduct has the "requisite character"; that is, the process of characterization.

Counsel for ACCC must be of the old school. The Transcript of argument records his insistence on referring to the conduct as "misrepresentations" to the annoyance of Hayne J and you can see how French CJ let this flow without being at all convinced. I make this observation to illustrate what I say soon about the important task that an advocate has of constructing a narrative that will advance a case. As it turned out, this case was not about misrepresentations but whether or not Google engaged in the relevant conduct. The most compelling narrative, advanced by counsel for Google, characterized the conduct in such a way as to exclude Google. A prospective approach to meaning may be a distraction from the essential task.

Hayne J discusses the utility of other cases and advises caution as each case depends on its own facts: "Analogical reasoning is important but analogies can be drawn only after understanding the full factual context in which it was held that s 52 did or did not apply."[9]

Consumer Law is not a special case. I refer to some constitutional cases and a criminal law case.

Clarke v *Commissioner of Taxation* (2009),[10] concerns the validity of the Commonwealth's attempt to impose a surcharge tax on members of State parliaments, based on their notional entitlements under defined benefit superannuation schemes. This was held to be constitutionally invalid, because it would impair or interfere with the capacities or functions conferred on the States. The decision clearly depends on a full assessment of the particular facts.

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7 See the process at ibid [67]-[73].

8 Ibid at [89]-[98].

9 Ibid at [102].

10 *Clarke* v *Commissioner of Taxation* (2009) 240 CLR 272.

The treatment by French CJ at [34]–[36], includes: "… the application of the implied limitation requires a multifactorial assessment."[11]

In *Singh* v *Commonwealth* (2004),[12] a case concerning the interpretation of 'aliens' as it appears in section 51(xix) of the Australian Constitution, Gummow, Hayne, and Heydon JJ in a joint judgment explain that the word 'aliens' does not have a fixed legal meaning. They say, questions of interpretation "require particular answers to particular questions arising in a live controversy between parties. ... The task of the court is not to describe the metes and bounds of any particular constitutional provision ..."[13] And, "Metaphorical references to 'the founders intentions' are as apt to mislead in the constitutional context as are references to the intentions of the legislature when construing a statute ..."[14]

In *Pollock* v *The Queen* (2010)[15] the HCA overruled accumulated judicial exegesis in the interpretation of the statutory defence of provocation, replacing the exegesis with an instruction to juries to apply the text of the relevant provision of the Criminal Code to the facts of the particular case. The text of s 304 *Queensland Criminal Code 1899* (Qld) provides a defence of manslaughter to the charge of murder where a person does the act of unlawful killing "in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool".

Queensland courts over time and in prospective interpretations had replaced the statutory text with a seven-part test, even incorporated into the model directions on provocation contained in the Bench Book of Queensland Courts.

In *Betfair* v. *Racing NSW* (2012)[16] the HCA considered the scope of s 92 of the Constitution requiring freedom of trade among the states and a potential interpretation that would extend the reach of the section without reference to state boundaries. In the end the HCA declined to decide

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[11] Ibid at [34]-[36]. I acknowledge that further consideration should be given to the difference between implications and prospective interpretations. I suggest that implications have arisen to meet specific fact-situations and have been modified with each case. The implication of a freedom of political communication is a classic example.

[12] *Singh* v *Commonwealth* (2004) 222 CLR 272.

[13] Ibid at [152].

[14] Ibid at [159].

[15] *Pollock* v *The Queen* (2010) 242 CLR 233.

[16] *Betfair* v. *Racing NSW* [2012] HCA 12, (2012) 286 ALR 221.

this interpretative issue because, "This is clearly a large question and requires a particular set of facts to illuminate it. This case does not involve such facts": Keifel J.[17]

French CJ is prolific in presenting lectures on a variety of topics at many different venues. In most of them he includes a discussion of judicial interpretation. Perhaps the most comprehensive lecture directed to statutory interpretation is one delivered to the University of Western Australia, Faculty of Law in 2014.[18] He gives purpose an ordinary and broad application, consistent with our ordinary competence to detect that things, like workman's tools, have a purpose. In his concluding observations he says:[19]

> Law graduates should know how to read a statute in a way that enables them to understand its text and to discern alternative meanings where they may be open. They need to have an understanding of the concepts of text, context, and purpose, as well as the specific principles and techniques to be found in the cases and collected in relevant texts, which assist the process of statutory construction. They should be able to apply the provisions of a statute to a particular fact situation and be able to make inferences about rights, powers, duties and liabilities which may arise out of that application.

In this and other lectures he challenges intentionalism. Intentionalists have objected to this development but that is not for discussion today.

CONSEQUENCES AND CONCLUSION

It is axiomatic that we live in a world of statutes. French CJ constantly emphasizes this and expresses concern that advocates often prefer the common law and overlook statutory law that is directly or indirectly relevant. Textbooks tend to supplant the text of legislation with explanations. Sometimes there is the practice of fitting legislation into common law contexts, of constructing tests, and in effect rewriting statutory rules so they look like common law.

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[17] Ibid at [127], the plurality concurring at [157].

[18] "Bending Words: The Fine Art of Interpretation", delivered to the University of Western Australia, Faculty of Law on 20 March 2014.
http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20Mar14.pdf

[19] Ibid at page 17.

Instead we should give emphasis to locating law in legislation, usually in the form of rules, and to teaching how to read the text, including all of its criteria, in context and to consider its purpose in context, in a process of application to particular fact situations.

I suggest that we acknowledge some practical problems that arise from prospective interpretations. First, prospective interpretations also require interpretation. Secondly, such interpretations have a deleterious effect on the rule of law values of advance notice of laws and accessibility of laws. Instead of looking to the statutory text a citizen might have to consider what prospective interpretations have been attempted.

Thirdly, prospective interpretations may offend the concept of separation of powers whereby parliament makes laws and the judiciary apply and enforce laws. Fourthly, engaging in prospective interpretation is a distraction from the task essential to the most successful way to prepare and argue a case, which brings me to my final point.

I suggest that we teach law students about the nature and function of narratives, and about how they are constructed in the process of interpretation. Litigation is essentially a contest to construct the most compelling narrative, in respect of which a relevant rule does or does not resonate. One of the courses I teach is legal advocacy. It is mainly about the theory of the case that is, identifying the relevant law, mainly in statutes, and the construction, as far as is possible, relevant and permissible, a focused narrative which forms the foundation for preparation for trial and the work in court. I suspect the best barristers do this instinctively.

It is instructive to read recent judgments of the HCA, and often the transcripts of hearings, to see first-hand how the learned Judges go about the task of constructing narratives in a process of validation and application. Interpretation is a process culminating in the outcome for the particular case before the court. That is where meaning resides.

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