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DL Newsletter

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Holistic statutory interpretation — from beginning to end

"Holistic"?

The collected legislation of a parliament can be described, figuratively, as the statute book. It comprises Acts which have been made by the parliament. One concept of an Act, therefore, is that it is a subset of the statute book.

An Act can, alternately, be seen as a collection of legislative provisions assembled around a topic. On this view, the provisions have connection with the topic, but not necessarily with each other. This conception, whether or not it ever was insightful, is is not now tenable.

In the later years of the twentieth century, the style of legislation changed. Increasingly, preambles have been replaced by statements of objectives and purposes forming part of the legislation. An Act now include provisions which are intended to affect the meaning of the whole of the Act, and which encourage readers to consider the meaning of the Act read as a whole.

Accompanying these changes, interpretation legislation has been amended, to encourage the courts to consider the purposes of the legislation.[1]

This interpretation task is not always simple. Legislators create legislation for a purpose, or, more accurately, for a multiple, generally interrelated, purposes. Finding those, reconciling them and applying them to the interpretation of a provision can be challenging. Nevertheless, an understanding of the purposes of legislation is critical to the understanding of the legislation itself.

The courts, in the past, have insisted that the words of a statute should speak for themselves, and that parliamentary intention is to be found in the literal meaning of the words.[2] A remnant of that approach is the threshold clarity test – only if "the words of the statute"[3] are unclear will the courts embark on the task of statutory interpretation, saying that to do otherwise would be to cross the line from interpreting to legislating.

It can be expected that over time this remnant of earlier times will fall away, by modification of the test - by broadening the concept of "words of the statute" or the concept of "clear", or, more simply, by abandoning the requirement entirely.

Whether or not this occurs, the interpretation task, once embarked upon by the courts, requires identification of the purposes of legislation. That task, articulated by Justice Kirby in *Pfeiffer v Stevens* (High Court, 2001) is to:

> give effect to the identified purposes of the legislation, assisted by any extrinsic materials that may be relevant and elicited in a context of basic principles and presumptions that are attributed to the lawmaker.[4]

Australian courts no longer consider provisions in isolation. The primary object of statutory construction is "to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute".[5]

Each provision of a statute forms part of a whole, and the whole has been created in order to achieve a purpose. An improper purpose – for example, the unjustified restriction of political communication

by state or Commonwealth legislation – can lead to legislation being annulled.[6] A proper purpose will affect the interpretation of each provision of the legislation so that, consistently within the court's constitutional function, it will be interpreted to align with that purpose.

This edition of the *DL Newsletter* looks at some aspects of holistic interpretation. If the whole of an Act is to be considered, what significance is there in a name? Are purposes to be found in the use of examples, or in the content of schedules?

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[1] In relation to interpretation of a treaty, Brennan CJ has observed, "The holistic approach to interpretation may require a consideration of both the text and the object and purpose of the treaty in order to ascertain its true meaning: *A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225 (24 February 1997).

[2] *Pfeiffer v Stevens* [2001] HCA 71 at CLR 82; [92] per Kirby J.

[3] *Momcilovic v The Queen & Ors* [2011] HCA 34 at [39].

[4] *Pfeiffer v Stevens* (2001) 209 CLR 57; [2001] HCA 71 at [92], Kirby J. His Honour cited, in support of this proposition, *Bropho v Western Australia* (1990) 171 CLR 1 at 20, applying *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424 per McHugh JA, and also referred to s 14A of the *Acts Interpretation Act 1954* (Qld).

[5] *Project Blue Sky Inc v Australian Broadcasting Commission* (1998) 194 CLR 355.

[6] *Coleman v Power* [2004] HCA 39 at [76] per McHugh J.

What's in a name?

If the whole of an Act is to be read in order to find its meaning, does this include its short title?

The question is banal in many cases - there is little nuance in the title of (say) the *Seeds Amendment Act 1982* (WA). Several time in recent years, however, value-laden terms have been used in the name of legislation or in defined terms. Some terms are strongly pejorative. The *Road Safety Amendment (Hoon Driving Act) 2010* (Vic) did not use the term "hoon" other than in its title, but the title alone conferred legitimacy on enforcement agencies using their powers against persons who came within its purview.[1]

Still stronger values were expressed by the short title of the *Vicious Lawless Association Disestablishment Act 2013* (Qld). This Act, consistently with it short title, included a definition of "vicious lawless associate", as being a person who committed a declared offence in the course of participating in the affairs of a relevant association. Despite the bland meaning given to the term, the strong language of the title was highly pejorative. From the courts' perspective, this had the potential to adversely affect the administration of justice. In *Kuczborski v Queensland* [2014] HCA 46, French CJ at [67] considered that the expression was inapt, and likely to mislead in at least two ways: the expressions was suggestive of a much narrower focus of the Act than was the case, and, at trial, could only create prejudice and divert attention from the issues which a jury would have to decide. From an enforcement agency's perspective, a title of that type suggests that resources would be better deployed in taking action against a "relevant association" than in other pursuits.

The use of pejorative terminology is not new. The terms "infamous offence" and "infamous crime" are not used in modern legislative drafting, but a reverberation of their one-time use remains in s 38 of the *Interpretation of Legislation Act 1894* (Vic), which sets out a meaning of these terms.

Not all values suggested by titles are negative. In 2014, the Queensland Government collated several amendments to create the "Safe Night Out Legislation Amendment Regulation (No 1) 2014". In that case the unifying objective was embedded in the short title of the amending regulations.

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[1] See also the *Transport Legislation Amendment (Hoon Boating and Other Amendments) Act 2009* (Vic) and the *Road Safety Amendment (Hoon Driving and Other Matters) Act 2011* (Vic).

Examples

A quite common drafting technique is to include examples of the application of the legislation. The technique is not new.

Some older legislation expressly used examples.[1] It also frequently included lists of powers together with a general power: the lists can be seen as examples of the application of the general power. In older cases this was interpreted by the courts using the Latin term *ejusdem generis.* The modern approach is to read the general power as extending to "related or analogous topics" which, because of the relationship or analogy, can be characterised coming within the general term [2].

Recent legislation is more explicit, aided by interpretation provisions[3]. Examples are typically bland, intended to ensure that the legislation has its intended coverage. Thus, under s 112 of the *Water Act 2014* (NSW), notices may be served on persons by "electronic transmission (including, for example, over the Internet)". The example here makes it clear that sending notice over the internet is "electronic transmission", without limiting the possibility of other forms of electronic transmission.

If short titles have been used to make policy statements, it is possible that, sooner or later, similar use will be made of examples. An example might recite the circumstances of current events, possibly in pejorative language, and indicate that those events constitute an offence.

If that occurred, it might be expected that the reaction of the High Court would be disapproving. It would also raise a constitutional issue: the Commonwealth's legislative power is constrained by Chapter III of the Constitution, which vests the judicial power of the Commonwealth in the courts. If the Commonwealth were to enact a law which adjudged persons guilty of a crime or imposed punishment on them, it could amount to trial by legislature and a usurpation of judicial power.[4] The consequence of this reasoning is that the Commonwealth cannot enact a bill of attainder – legislation which inflicts punishment without judicial trial. This is despite the absence of an express constitutional prohibition on bills of attainder.[5]

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[1] Section 32 of the *Evidence Ordinance 1893* of the Straits Settlements (Penang) was an evidentiary provision dealing with evidence of a person's age, allowing evidence of statements by deceased blood relatives to be given. Appended to the section the "illustration" of a letter from a deceased father announcing a person's birth. In *Mahomed Syedol Ariffin v Yeoh Ooi Gark* (1916) 2 AC the Privy Council accepted the validity of the "illustration". It was the duty of the court to accept, where possible, illustrations "as being of relevance and value in the construction of the text."

[2] *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 at [40], French CJ.

[3] Such s 14 *Acts Interpretation Act 1954* (Qld).

[4] *Polyukhovich* (1990-91) 172 CLR 500, Mason CJ.

[5] Such as exists in the United States Constitution: Article 1 of the United States Constitution.

Schedules

At (or near) the end of many Acts are schedules. In the past these often set out forms and fees - the details of public administration which more properly belong to executive government. In support of provisions which prescribe forms, interpretation legislation provides that substantial compliance with the prescribed forms is sufficient compliance with the legislation.[1]

With the greater volume of legislation, the faster pace of change and the arrival of electronic transactions, schedules are no longer commonly used for this purpose. A more flexible approach is taken to administrative detail, facilitating rapid response to changes in technology (such as online applications). This approach delegates administrative powers to government agencies, so that the agencies are able to specify the manner and form of applications and, within parameters, the amount of fees.

Schedules, nonetheless, are frequently used in modern legislation. In some legislative schemes

model legislation is enacted as a schedule to an Act of one jurisdiction, to be adopted by reference by the legislation of other jurisdictions, complete with complicated "deeming" provisions. Criminal Codes can be created by enactment as a schedule to an Act.

Other schedules deal with complicated or technical issues, such as technical standards. Some legislation, such as land acquisition legislation,[2] has provisions designed to be adopted by sectoral legislation (not necessarily set out in a schedule), thereby triggering the operation of other provisions.

A schedule forms part of the legislation to which it is attached.[3] However, it does not have operative effect unless it is referred to in the legislation – and then, only to the extent that the legislation gives it that effect. For example:

- a schedule which sets out an international agreement for the purpose of identifying the functions of a government agency does not import the terms of the agreement into Australian law;[4]
- a schedule which sets out criteria for a Minister's decision to revoke local laws does not empower the courts revoke local laws on the basis of those criteria.[5]

Can holistic interpretation be applied to schedules? They form part of the Act so holistic interpretation does indeed apply. However, in some cases the Act does little more than provide context and authority for a schedule. In those cases, it may be more appropriate to apply holistic interpretation to the schedule as a single, coherent document.

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[1] s 53 *Interpretation of Legislation Act 1984* (Vic); s 48A *Acts Interpretation Act 1954* (Qld); s 25 *Acts Interpretation Act 1915* (SA);

[2] See the *Land Acquisition and Compensation Act 1986* (Vic).

[3] s 13(2) *Acts Interpretation Act 1901* (Cth); s 36(1) *Interpretation of Legislation Act 1984* (Vic); s 14 *Acts Interpretation Act 1954* (Qld);

[4] *Minogue v Williams* (2000) 60 ALD 366; [2000] FCA 125 at [21]) (FC).

[5] *Payne v Port Phillip City Council* [2007] VSC 507.