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STATUTORY INTERPRETATION: THE MEANING OF MEANING

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THE MAIN TASK OF MODERN LAWYERS

Although we still describe ours as a common law system (to distinguish it from the countries of the civil law tradition), the label is now looking somewhat dubious.

The distinctive feature of contemporary Australian law derives from the overwhelming importance of the laws made by or under parliament. I refer to statutes, regulations, by-laws, executive instruments, rules of court and all the other ways in which the written law now manifests itself. In my youth, the statutory law of the State of New South Wales was collected in twelve manageable volumes, supplemented by a three-volume index[1]. These books included many important statutes commencing in the colonial period, some of which, like the *Crimes Act* 1900 (NSW), still apply today.

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[1] R.J. McKay (ed.), *The Public Acts of New South Wales* 1924-1957, Vols.1-15, Law Book Co. Sydney 1958.

The volumes also included notes on important case law and various annotations. The legislation of parliament was expressed more briefly in those days, leaving more space for judges to expound and apply the principles of the common law as derived from their forebears in England. Even in my early days in the law, some judges regarded statute law as an unpleasant intrusion on the judge-made law. When I attended law school in the 1950s and early 1960s, most of the time was spent learning how to analyse judicial pronouncements on the law and to apply those pronouncements to the facts of any new problem.

Today there is nothing modest about the output of federal, State and Federal legislation. Every year it is contained in multiple volumes of printed paper. Happily, it is now more readily accessible by the advances that have occurred in electronic technology. The shift in the expression of law from judge-made expositions to statutory and other rules has led to a number of changes in how statutory interpretation is undertaken.

First, by the mid-twentieth century, it was generally appreciated that the words of judges, written in their opinions, should not be subjected to the precise analysis appropriate to statutory and similar texts. Deriving the *ratio decidendi* of judicial holdings was recognised to be an art. Yet it was still commonly thought that securing the meaning of legislation was more of a science.

The explosion in the variety, detail and complexity of legislation has sorely tested this 'scientific' theory. It has undermined the view that legislation has but one accurate meaning, which those bound by it only

need to search long and hard enough to find. The growth in the quantity of the written law has led to demands for plain English expression. However, it has also resulted in an appreciation that deriving the meaning of such laws presents 'leeways for choice'[2], which courts, lawyers and others need to make in a transparent, consistent and principled manner.

Secondly, the growth in the size and importance of the laws made by and under parliament, has also led to changes in the rules applicable in Australia to the performance of statutory construction. Some of those rules have been enacted by parliament itself. Examples include the federal, State and Territory statutory provisions requiring preference for a construction that promotes the purpose of legislation over one that does not[3], and the authorisation of access by the interpreter to a wider range of extrinsic materials to assist him or her in this endeavour[4]. These statutory provisions effectively endorse moves that were already afoot in the judiciary of the common law both in England[5] and Australia[6].

SOME BASIC RULES OF APPROACH

In addition to the encouragement of a purposive interpretation, legislative provisions have appeared designed to promote the interpretation of legislation in ways consistent with enacted provisions

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[2] J. Stone, *Social Dimensions of Law and Justice*, (Maitland, Sydney, 1966), 649. Referring to the writings of Professor Carl Llewellyn, "The Normative, the Legal and the Law Jobs", 49 *Yale Law Journal*, 1355 (1940.

[3] See e.g. *Acts Interpretation Act* 1901 (Cth), s15AA; *Interpretation of Legislation Act* 1984 (Vic), s35(a).

[4] See e.g. *Acts Interpretation Act* 1901 (Cth), s15AB; *Interpretation of Legislation Act* 1984 (Vic), r38(b).

[5] Discussed J. Barnes "Statutory Interpretation" (Ch29) in I. Freckleton and H. Selby (eds.) *Appealing to the Future* (Thomson Reuters, Sydney, 2009), 721 at 736. See e.g. *Forthergill v Monarch Airlines Ltd.* [1981] CA 251 at 272.

[6] *CIC Insurance Ltd. v. Bankstown Football Club Ltd.* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Ltd.* (1997) 191 CLR 85*; Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]. See discussion *Kingston v Keprose Pty. Ltd.* (1987) 11 NSWLR 404 at 421-424 (CA) per McHugh JA, followed in *Bropho v Western Australia* (1990) 171 CLR 1 at 20.

expressing basic civil and human rights[7]. In this respect too, parliaments in Australia have followed a long line of common law authority favouring the expression of the law in a way upholding traditional common law principles over one that would diminish basic rights[8].

During the past decade or so, the High Court of Australia has unanimously endorsed other principles as necessary to the accurate reading of legislation. Amongst the most important of these principles have been:

- That where the applicable law is expressed in legislation the correct starting point for analysis is the text of the legislation and not judicial statements of the common law or even judicial elaborations of the statute[9]
- That the overall objective of statutory construction is to give effect to the purpose of parliament as expressed in the text of the statutory provisions[10]; and
- That in deriving meaning from the text, so as to fulfil the purpose of parliament, it is a mistake to consider statutory words in isolation. The proper approach demands the derivation of the meaning of words from the legislative context in which those words appear.

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[7]. See e.g. *Potter v Minehan* (1908) 7 CLR 277; *Bropho v Western Australia* (1990) 171 CLR 1 at 15; *Coco v The Queen* (1974) 179 CLR 427, 437; *Human Rights Act* 1988 (U.K.), 3(1) ["So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with the Convention rights"]. See A. Lester, D. Pannick and J. Herbert (Gen. Eds), *Human Rights Law and Practice* (3rd ed, LexisNexis, 2009), 42 [par.2.3.1]. See also *Human Rights Act* 2004 (ACT), s30; *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s32(1).

[8] See e.g. *R v Secretary of State for the Home Department; Ex parte Simms* [1999] 3 AllER 400, 412-413 (HL). An important point made in the Symposium at which this article was discussed by First Parliamentary Counsel of Victoria (Ms. Gemma Varley) was that the enactment of the *Charter* in Victoria had encouraged drafting instructions and the drafts of legislation to conform, as far as possible, to the provisions of the Act, so as to avoid possible later inconsistencies.

[9] Some of the cases are collected in *Visy Paper Pty Ltd v Australian Competition & Consumer Commission* (2003) 216 CLR 1 at 10 [24], fn35.

[10] See e.g. *Project Blue Sky Inc v AMA* (1998) 194 CLR 355 at 381 [69]; cf. M.D. Kirby, "Towards A Grand Theory of Interpretation: The Case of Statutes and Contracts" (2003) 24 *Statute Law Review* 95 at 99.

> Specifically, it requires the interpreter to examine at the very least the sentence; often the paragraph; and preferably the immediately surrounding provisions (if not a wider review of the entire statutory context) to identify the meaning of the words in the context in which they are used[11].

These and other explanations of the contemporary function of statutory interpretation have increasingly taken courts in Australia away from the previous "literal", or so-called "objective" or "plain meaning" approach to interpretation. The notion that a word of the English language has a single, objective and scientific meaning, that had only to be discovered, has gradually given way to a more candid recognition of the choices that face those who interpret the written law and the way in which values and policy considerations can influence the making of those choices[12]. That realisation presents the third element in contemporary statutory interpretation in Australia. So today, that task requires a combined exercise involving analysis of the *text*, *context* and *policy* of the statute in question.

The foregoing developments have begun to influence legal education, including Australia. In the nineteenth century, it was the Harvard Law School in the United States of America that pioneered the use of the case book method to teach law to its students. That method spread throughout North America and greatly influenced the teaching of law to twentieth century students in Australian law schools. Law was often

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[11] *Collector of Customs v Agfa Gevaert Ltd*. (1996) 186 CLR 389 at 397 applying *R v Brown* [1996] 1 AC 543 at 561 per Lord Hoffmann. See also *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 36 [109]; *SGH Ltd. v Commissioner of Taxation* (2002) 210 CLR 51 at 91 [88].

[12] M.D. Kirby, *Judicial Activism Authority, Principle and Policy in the Judicial Method*, (Sweet & Maxwell, London, 2004) (Hamlyn Lectures), p32; D.C. Pearce and R. Geddes, *Statutory Interpretation in Australia*, (6th ed., LexisNexis Butterworths, 2006, Sydney) [2.35].

taught from books containing lengthy extracts from judicial explanations of the principles of the common law or of the Constitution as well as relevant legislation. The judicial utterances were attractive to teachers and law students alike because they contained elaborations and expositions; illustrations and examples; descriptions of the relevant historical background; and discussion of the statutory policy and purposes. All of this was undertaken with the rationality and persuasiveness that the judges typically manifested, at least to the eyes of most members of the legal profession.

With the growing dominance of legislation as a source of contemporary law, a new technique had to be adopted in legal education. In 2006, the Harvard Law School modified the case book method of teaching law to undergraduates. Out of recognition of the high increase in legislation in the United States, as much as in other common law countries, a new means has been adopted for teaching the syllabus. This is based on a close analysis of the techniques of statutory interpretation as expressed by the legislature or approved by the higher courts. This change is now also gaining support in Australia.

To this time, statutory interpretation has not been given the importance in Australian law schools that its significance for the daily practice of the law demands. True, particular statutes, of necessity, require close examination, with attention to the leading decisions on the meaning of their texts. This is obviously true of constitutional law which, in the Australian federal context, requires the closest possible examination of the text of the Australian Constitution and of the decisions of the High Court of Australia upon it. But other important subjects in the law school curriculum likewise demand instruction in the law as stated in

parliamentary enactments. So it is in federal taxation law; trade practices; court practice and procedure. Likewise, evidence law, where the former common law and statutory rules are now replaced in most Australian jurisdictions, by the operation of the *Uniform Evidence Acts*.

Out of recognition of this trend towards the substitution of statutes for the common law in Australia, the Australian Conference of Law Deans has been considering a proposal to add to the core curriculum to be taught in all Australian law schools a specific subject on statutory interpretation. So far, this proposal has attracted much discussion. However, agreement is yet to be achieved over the detail of what a national curriculum subject on statutory interpretation should contain. And how the topic should be taught to prepare lawyers for the task that will occupy most of them over the course of their professional lives.

DIGGING DEEPER FOR MEANING

Questions of construction of statutory language are notorious for generating opposing answers, no one of which is indisputably correct[13]. That makes the task of statutory interpretation so challenging, interesting and important for the content, application and future of the law. The fascination of its puzzles extends far beyond appellate judges. Because, of its character, legislation affects all those who are bound by its commands.

Nevertheless, because in a rule of law society it is ultimately the responsibility of the judges to decide and explain the meaning of contested legislation, it is natural that judges should give much attention

[13] *Al-Kateb v Godwin* (2004) 291 CLR 562 at 630 [191], citing *News Limited v South Sydney District Rugby League Football Club Ltd*.(2003) 215 CLR 563 at 580 [42].

to what they are doing. Especially so where (as often happens in appellate courts) there are divisions of opinion about the meaning of a statute or of the Constitution. In such a case, the judge must try to explain how his or her mind has arrived at a result different from that favoured by colleagues who, by definition, have been trained in the same discipline, apply the same statutory instructions for interpretation and have generally endorsed the same injunctions about the approach that is to be taken in the task.

Reflecting upon such differences, judges who are in disagreement must necessarily dig into their conscious minds to endeavour to reach concurrence if they can and, if this proves impossible, to explain why they cannot. In undertaking these tasks, judges are now assisted by courses on judicial reasoning that encourage them to confront the sources of their disagreements and to explain these in the most persuasive language they can offer.

For example, one well-known teacher, who engages in judicial education in good writing techniques both in North America and Australasia, Professor James Raymond, has recently attempted to identify what he suggested were as the "real motivations" that led several judges of the High Court of Australia to their sharply divided opinions in the decision in *Kartinyeri v The Commonwealth*[14]. That decision related to the meaning and ambit of the "races" power in s51(xxvi) of the Australian Constitution and, specifically, whether the head of power, as amended by referendum in 1967, should be interpreted as limited to the making of beneficial legislation *for* the people of any "race". Or whether it could be interpreted to permit the making of laws that should be classified as

[14] (1998) 195 CLR 337. Referring to the *Constitution Alteration (Aboriginals)* 1967.

discriminating against ("not for") people of the Aboriginal race in Australia.

By a dissection of the majority and minority views in the case, Professor Raymond concluded that it was essential to go behind the given reasons of the High Court judges in order to try to understand the "real motivations" that led them to their respective differing conclusions. He finished his essay on the rather sombre note that[15]:

> "The canons and rules of interpretation are soft logic, persuasive only to people who prefer the results they support or at least have no reason to resist them."

It is this suggestion by Professor Raymond, that we should attempt to dig as deeply as we can in order to identify the *real* reasons for disagreement over statutory interpretation, that I address in the balance of these remarks. I will do so by reference to a case in which I participated in the High Court of Australia. It was a case of divided conclusions. In it, I dissented from the majority interpretation.

By the convention of our judiciary, judges, in or out of office, do not to add to what they have written in explaining their opinions in a particular case. What is written, is written. For good or for bad, persuasive or unpersuasive, my reasons for the orders I favoured in this case are those expressed in the published decisions of the High Court. They are not elaborated by second thoughts that I have had in these later words.

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[15] In T. Gotsis (ed), *Statutory Interpretation: Principles & Pragmatism for a New Age*, (Judicial Commission, NSW, Sydney, 2007).

Nevertheless, there is a useful point in Professor Raymond's observations that we should recognise and respect. I want to apply his injunction to myself. This requires me to dig just a little deeper in searching for the reasons for disagreement in the case that I have selected. Doing so obliges me to face up to the ultimate quandary that arises in all cases of statutory interpretation. What is the meaning of meaning? How far can, and should, judges explore their conscious and even sub-conscious minds to explain why they prefer one approach to the meaning of words over another? How can judges accept Professor Raymond's appeal that they should be as candid and transparent as possible in providing their reasons, without delving into pop psychology? Is it useful, or simply distracting and irrelevant, for judges to attempt to identify the really deep-lying considerations that lead them to differing judicial conclusions?

I will explore these intriguing questions by reference to the decision of the High Court in *Carr v Western Australia*[16]. That case helps to bring out a few useful themes.

A BANK ROBBERY AND *CARR'S CASE*

The decision in *Carr* concerned the meaning of the provisions of the *Criminal Code* (WA) ss570(1) and 570D. The facts of the case explain how the problem of statutory interpretation arose. The legislation in question was designed to address questions that had earlier arisen in the reception of the evidence of police in criminal trials concerning confessions or admissions made to them by a criminal accused.

[16] (2007) 232 CLR 138.

The facts of the case were straight-forward. On 8 April 2003, an armed robbery was committed at the South Perth branch of the Commonwealth Bank of Australia. On 30 July 2003, police went to a home in Perth where Mr. Michael Carr lived with his mother and sister. They searched the premises. A video film of the search was taken. Mr. Carr made no admissions. No incriminating evidence was found at the home to implicate Mr. Carr in the bank robbery.

Subsequently, Mr. Carr was taken to the Kensington Police Station in Perth to be questioned by police officers. For this purpose, he was escorted into a room described on its door as “the interview room”. There a conversation took place which, in accordance with s570D of the *Code*, was recorded on video tape. As the record of the conversation showed, it began at 6.57pm. It concluded at 7.26pm, the times of the beginning and end being precisely noted. The lead detective indicated that he and his colleague were “here to interview you” in relation to any knowledge of a bank robbery. The questioning did not proceed far before Mr. Carr indicated that he did not wish to say anything “without my lawyer present anyway pretty much”. The police officer accepted this request (“no dramas”). The questioning continued for a little while. However, it soon ground to a halt in order to permit Mr. Carr to consult a lawyer.

At the end of this interview, recorded in this way, Mr. Carr was taken to another room, described as the “lock up” where the detectives had to “process” him. Unbeknown to Mr. Carr, the lock up was under constant surveillance by video cameras and sound recording. The detectives, on the other hand, knew that these facilities were in place.

The detectives began engaging Mr. Carr in informal conversation. This included chit chat and ultimate strong swearing by a detective, the very antithesis of official language. Mr. Carr entered into a like banter. The ensuing conversation was in contrast to the formal and polite exchanges that had taken place in the recorded interview in the "interview room". Mr. Carr started to boast. In answer to a question, he described what he had allegedly said to bank officers at the time of the robbery. The detectives knew that Mr. Carr had been a heroin addict in 1996-7 and that he was participating in a methadone programme. At a certain point in the lock up conversation, one of the detectives approached the camera and recording device and said quietly words indicating that Mr. Carr did not know of the fact that he was being recorded.

At the end of this conversation, Mr. Carr was charged with the offence of bank robbery. In a pre-trial hearing, Mr. Carr unsuccessfully sought to have the lock up recording excluded from the evidence at his trial, *inter alia* on discretionary grounds. Subsequently, in the trial, a repeated objection to the recording was overruled. The recorded conversation was placed before the jury. Inferentially, Mr. Carr's given excuse, that he was simply "teasing" the police, was rejected by the jury. Unsurprisingly, in the face of the evidence, Mr. Carr was found guilty by the jury. He was duly convicted and sentenced.

THE DECISIONS OF THE COURTS

The Court of Appeal of Western Australia dismissed Mr. Carr's appeal against his conviction[17]. That court held that there was no offence to the language or purpose of s570D of the *Code* which, it declared, was "to prohibit, subject to the exceptions [in s570D], the reception at trial of

[17] *Carr v Western Australia* (2006) 166 A Crim R 1 (CAWA).

unrecorded admissions by an accused to the police". The court held that the word "interview" was to be construed broadly. It was not confined to a formal interrogation. Accordingly, the recording of what had been said in the lock up was admissible. It sustained the jury's verdict and Mr. Carr's conviction.

The High Court granted Mr. Carr special leave to appeal. By a majority (Gleeson CJ, Gummow, Heydon and Crennan JJ; myself dissenting), the further appeal was dismissed[18]. The conviction was confirmed. As we consider his case, Mr. Carr is serving his sentence. But should he be?

The majority judges in the High Court held that the word "interview" in s570D of the *Code* encompassed *any* conversation between a member of the police force and a subject, including an informal conversation such as had occurred between Mr. Carr and the police in the lock up room. The majority also held that the lack of consent by Mr. Carr to the videotaping of his admissions was no bar to their admissibility. Because, in the High Court, Mr. Carr did not persist with his arguments that the evidence should have been rejected on discretionary grounds, the result was that his conviction was sustained. Justices Gummow, Heydon and Crennan, in joint reasons, held that, once there was an admissible "videotape" of an "interview", in which the accused made an "admission", the requirements of s570D of the *Code* were satisfied. Their Honours therefore held that there was no need to consider arguments concerning the presence or lack of consent of the accused person. The existence of an admissible videotape was sufficient and it was conclusive.

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[18] *Carr* (2007) 232 CLR 138.

It should be noted that both the majority and minority reasons in the High Court recorded details of the facts surrounding the "admissions" by Mr. Carr. In my own reasons, I emphasised the need for a fuller understanding of those facts. In the application of the law to a given situation, it is sometimes very useful to have a detailed statement of the facts. In a sense, the mind plays on that factual detail, repeatedly asking itself whether the law in question was intended to operate on the facts in the ways contended by the opposing parties. A fuller statement of the facts "may be tedious". But in Mr. Carr's case, without them, his arguments could not be fully understood[19].

It was for that reason that I extracted further factual detail including the bravado and swearing in the conversation in the "lock up". This could then be contrasted with the much more formal, professional and official character of the interview in the "interview room" that had preceded it. If an element of formality was inherent in the statutory notion of an "interview", as required in the relevant provisions of the *Code*, it was certainly present in the recording in the "interview room". But it was absent from the conversation recorded in the "lock up". Such an interplay between legal meaning and factual circumstances has been noted in several contexts[20]. Factual evidence is sometimes useful to an appreciation of the meaning and application of the law[21]. This is a point that I made on several occasions in the High Court.

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[19] (2007) 232 CLR 183 at 165 [86].

[20] See e.g. *Ryan d'Orta v Victoria Legal Aid* (2005) 223 CLR 1 at 74-75 [226]-[230]; *Wurridjal v The Commonwealth* (2009) 137 CLR 309 at 415 [279].

[21] See e.g. *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 265-266 [138]; applying *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 694.

From the precision of the commencing time and of the conclusion time of the recording in the "interview room", the detectives apparently assumed that the "interview" process had a clear beginning and a clear end that demanded the observance of a high degree of formality and precision. The *sotto voce* exclamation to the camera by one of them reinforced this understanding. Of course, the detectives could have been wrong in their understanding. Obviously, the title of the room where the "interview" was first conducted could not be determinative of the legal character of the conversations that followed there. But, for me, the course of events in the police station could throw some light on the mutual understanding amongst the participants about the "interview", whose character the courts were asked to define in the course of deciding whether or not the resulting recorded conversations satisfied the statute and were admissible.

THE APPLICABLE STATUTORY PROVISIONS

The statutory provision applicable to the case was contained in Chapter LXA of the *Code*. In that chapter, the governing obligation was found in s570D(2). That sub-section said:

> (2) On the trial of an accused person for a serious offence, evidence of an admission by the accused person shall not be admissible unless –
>
> (a) the evidence is a videotape on which is a recording of the admission.

There were further exceptions and exclusions. However, that in par (a) was the only one on which the Prosecution succeeded. The others can be ignored for present purposes.

In s570D(1) of the *Code*, the word “admission” was defined to mean, relevantly, an admission made by a suspect to a member of the Police Force. The phrase “serious offence” was defined elsewhere in the *Code* to mean an indictable offence of such a nature that “it cannot be dealt with summarily”. Armed robbery was such an offence. Accordingly, the “serious offence” requirements of the *Code* applied to the admissibility of any admission made by Mr. Carr to the relevant members of the West Australian police.

The requirement that the evidence be “a videotape” enlivened a further special definition contained in the *Code*, namely in s570(1). There, “videotape” was defined for these purposes to mean “any videotape on which is recorded an interview ...”. Thus, the requirement that the evidence of an admission against a suspect in a serious criminal offence must be recorded on “videotape” imported the requirement that the admission had to be recorded in the form of an “interview”. It followed that the outcome in Mr. Carr’s appeal turned primarily on the meaning of that word in the factual context. It was on that issue, substantially, that the High Court divided.

The view of the statutory language, which the majority adopted, is, with respect, an available one. The word “interview” was not itself defined in the *Code*. It is not, as such, otherwise a scientific or technical word or one that, in a legal context or otherwise, invariably has a single fixed meaning importing formality. So what considerations, apart from the evidentiary ones that I have mentioned, led me to the conclusion that the pre-conditions of the *Code* had not been fulfilled? Obviously, I was not full of sympathy for Mr. Carr. I did not approach his arguments regarding him as a person who was possibly innocent of any criminal

offence and trapped into his predicament by police-led misconduct. At the end of my reasons, I disclaimed any such considerations[22]:

> "It is an undeniably uncongenial outcome to discharge a prisoner, evidence of whose guilt is seemingly established by his own words. Such an order is not made within enthusiasm. I can understand the tendency of human minds to resist such an outcome ... He was a smart alec for whom it is hard to feel much sympathy."

However, when I applied to the legislative text, the considerations earlier mentioned, which are now standard for the ascertainment of meaning, led me to a conclusion that an important requirement laid down by the *Code* had not been fulfilled in Mr. Carr's case. It followed that his objection to the admissibility of the incriminating evidence of admissions, secretly recorded, had to be upheld and the evidence excluded. The chief considerations leading me to that result were: the text, context; and policy (or purpose) of the legislation.

TEXT, CONTEXT AND PURPOSE

The text: As to the *text*, the question that was first presented was the meaning of the word "interview". Did that word itself import a notion of formality? Or was that not required, as the majority concluded?

To answer this question, I started in a usual way by examining dictionary meanings of the word "interview". This is a common first port of call in discovering the meaning of an undefined word of the English language that is in ordinary use. When I looked to the dictionaries, they uniformly provided a primary meaning of "interview" that imported a requirement for an element of formality. Thus, the first definition in the *Macquarie*

[22] (2007) 232 CLR 138 at 187 [168], 188 [170].

Dictionary of Australian English, which is the first one to which Australian courts now ordinarily resort, is: "A meeting of persons face to face, especially for formal conference in business, etc., or for radio and television entertainment etc.". Formality was likewise included in the primary definition contained in the *Oxford English Dictionary* (" ... sought or arranged for the purpose of formal conference on some point"). There were similar references to formality in other dictionaries which I quoted. In fact, if one goes back to the *Dictionary of the English Language* of Samuel Johnson of 1755, it too includes "a formal or appointed meeting or conference"[23].

These dictionary definitions could not be conclusive as to the meaning of "interview" in the context of the *Code*. However, in so far as *text* is the anchor for the ascertainment of the purpose or intention of parliament in a legal enactment, the use of the word "interview" was a point in favour of Mr. Carr's submissions. For this reason, I remarked[24]:

> "This Court can, as it pleases, dismiss the argument that "interview" when used in the Code involves an element of formality and structure with mutuality between the participants in the communication in question. However, it must realise that it does so in the fact of the unanimous opinion of the great dictionaries of the English language."

In so far as courts in other jurisdictions have had to grapple with the implications of the use of the word "interview" in such a context, their reasoning also lent support to the submission of a requirement of formality[25].

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23 *Dictionary of the English Language* (1755) (Facsimile Edition, Times Books, London, 1979).

24 (2007) 232 CLR 138 at 176 [121].

25 See e.g. *R v McKenzie* [1999] TasSC 36 at [14]; noted (2007) 232 CLR 138 at 177 [122].

The context: Having passed that point, it remained to ask whether the *context* threw a different light on the meaning of the requirement that the videotape should be in the form of an "interview"? There are great dangers in taking the word "interview", or virtually any word, out of context. The issue was not whether the word, as such, imported a requirement of formality and mutual interchange. It was whether it did so in the particular circumstances of the Western Australian *Criminal Code*.

My reasons therefore turned to address a number of contextual considerations. When I considered them, they lent support, and did not undermine, the attribution to the word, in this context, of the primary meaning earlier explained:

(1) In statutes in other jurisdictions where provision had been made for the recording of admissions to police, statutory *formulae* were used that avoided the requirement of "interview". Commonly, such words contemplated conversations of a less formal character. Thus, in United Kingdom legislation for a similar general purpose, the phrase used in the law was "official questioning". Moreover, in the South Australian legislation, in force before the applicable provisions of the Western Australian *Code* commenced, a special definition of "interview" was provided by parliament[26]. This extended the ordinary meaning of the word, with its usual notions of formality, to apply to "(a) a conversation; or (b) part of a conversation; or (c) a series of conversations". Had such an extended definition been used in the Western Australian *Code*, it would have put paid to Mr. Carr's submission. The failure to follow the South Australian definition, that was available to the Western

[26] *Summary Offences Act* 1953 (SA), s74E.

Australian drafter, gave Mr. Carr's submission further contextual force.

(2) Additional force was afforded by the fact that the chapter in which s570D of the *Code* appears is titled "Videotaped Interviews"[27]. This heading suggested that the existence of a videotape (or secure recording) was of itself not sufficient. More was required, namely that the videotape should be in an "interview" form; and

(3) Other Australian legislation in which the word "interview" had been used was likewise examined. It lent still further support for the suggestion that, if particular persons were in a vulnerable situation, the legislature had used the word "interview". Inferentially, then, the words was used to mandate the character of the interchange that took place[28].

It followed that contextual factors lent weight to Mr. Carr's argument that the use by the *Code* of the word "interview" was deliberate. The combined requirements of "videotaping" an "interview" were designed to address a dual problem faced by persons in police custody undergoing official interrogation. Such problems were, at once, the *integrity* of the record and the *acceptability* of the way in which the admissions were procured for the record. Adopting the submissions of the prosecution in *Carr* meant that the requirement of *integrity* predominated to the exclusion of the requirement of acceptability or fairness that was arguably imported by the obligation that the videotape should be in the form of an "interview".

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[27] *Carr* (2007) 232 CLR 138 at 178 [128].

[28] (2007) 232 CLR 138 at 178-179 [129].

Also, against the prosecution's submission was a long line of common law authority, including in the High Court itself, recognising the psychological disadvantages that accused persons suffer when undergoing official interrogation. Perhaps the clearest statement of such disadvantages appears in the reasons of Dixon J in *R v Lee*[29]:

> "The uneducated – perhaps semi-illiterate – man who has a 'record' and is suspected of some offence may be practically helpless in the hands of an over-zealous police officer ... Such persons stand often in grave need of that protection which only an extremely vigilant court can give them. They provide the real justification for the Judges' Rules in England and the Chief Commissioner's Standing Orders in Victoria and they provide ... a justification for the existence of an ultimate discretion as to the admission of confessional evidence."

Similar words were later expressed by McHugh J in *Pollard v The Queen*[30].

Given that the requirement for videotaped recording of admissions, provided for in s570D of the *Code* was limited to *serious* indictable offences (of the kind faced by Mr. Carr), an interpretation obliging a degree of formality in the conduct of the interrogation by way of "interview" was arguably justified to meet the problem of the power balance to which judges and others[31] have often referred.

Accordingly, as my reasons sought to explain, Mr. Carr succeeded in his arguments both on the tests of text and context. But what of the

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[29] (1950) 82 CLR 133 at 1589. See also (2007) 232 CLR 138 at 180 [136].

[30] (1991) 176 CLR 177 at 235. See (2007) 232 CLR 138 at 179 [133].

[31] See e.g. David Dixon, "Regulating Police Interrogation" in Williamson (ed) *Investigative Interviewing* (2006) 318 at 323-324.

purpose or policy of the legislation? Should the broader view that was adopted by the majority be preferred on the footing that Mr. Carr's interpretation was unduly narrow and technical and such as to defeat the really important *purposes* of the *Code*? Those purposes, so it was suggested, were to overcome the evil of police "verbals" and to ensure the integrity of the record of interview which was adequately satisfied by the accurate recording available in Mr. Carr's case.

The purpose and policy: When the purpose or policy of the legislation was considered, it arguably included not only that of the *integrity* of the record but also the objective of controlling the interchange of questions and answers in such a way as to neutralise, or at least reduce, the "psychological disadvantages for the interviewee"[32].

True it is, legislation such as the provisions of the *Code*, in question here, followed twenty years or more of law reform reports and judicial decisions demanding sound and video recording of confessions or admissions to police as an assurance that such admissions might be accepted in the trial process as a safe foundation for the conviction of an accused[33]. It was accepted that a judicial discretion existed to exclude an admission that was secured involuntarily, unfairly or otherwise contrary to public policy. This remained in place to supplement the express requirements of the *Code*. However, the *Code* provisions were expressed in strong language. Although confined in its application to serious indictable offences, it did not leave exclusion of the damaging evidence to a judicial discretion. It provided expressly for exclusion in plain legislative terms. In this respect, it clearly reflected a strong

[32] (2007) 232 CLR 138 at 182 [142].
[33] (2007) 232 CLR 138 at 168 [82]-[83].

resolve on the part of the Western Australian Parliament. At least arguably that resolve was addressed not only to the *integrity* of the record, but also to the *acceptability* of the interview.

The provision for an interview" format was thus a reinforcement for the discretionary exclusion of unfairly obtained admissions. It was apparently enacted to achieve high legislative purposes. If parliament required a conversation of police officers to proceed, in defined cases, with the formality of an "interview", it was not for police officers to ignore or override that requirement. As public officers, they were obliged to conform to the law. Especially so because the legislative provision was drafted against the backdrop of the ordinary entitlement of an accused person, under interrogation, to decline to answer official questioning. Specifically so, where that person had sought to have the advice of a lawyer. Mr. Carr's entitlement to such advice had been recognised, and accepted, by the police in the way they terminated the "formal interview". But they then effectively tricked him into continuing a recorded conversation, although they knew (as he did not) that his answers were being recorded.

In such circumstances, it was reasonable to ask whether this was the way in which the provisions of the Code, viewed as a whole, were intended to operate. It seemed unlikely to me that it was. It would reduce the careful procedures for recording the interview to something approaching a charade. Police could begin, and apparently conclude, a formal "interview" in the "interview room" and then take the accused into another room and proceed to engage in informal questioning there, with banter and swear words, designed to deceive the accused into making

admissions that would be recorded but contrary to the accused's asserted 'right to silence'[34].

> "The State's contention can be measured against the possibility that what happened on this occasion might become a common practice. In that event, police officers, frustrated by the irksome insistence of the suspect on the legal right to silence and the request for access to a lawyer, would simply lead him or her from the formal interview conducted in the interview room, into the lock up or a tea room or some other facility monitored by surveillance devices, perhaps a bar or a public park[35] and there engage in banter, informal conversation and apparently innocent questioning. The psychological dynamic of the "interview", where, by the strictures of law, the power relationship between the interviewer and the interviewee is to some extent equalised, would be completely changed. The offence to basic principles would not be cured by the mere fact that the conversation was recorded reliably. This is not a discretionary determination. It is concerned with the fundamental character of the requirement of the statutory "interview" for which s570D of the Code provides."

So if I reflect upon the injunction of Professor Raymond, that judges and other decision-makers should honestly reveal the considerations that they take into account (including policy considerations) in preferring one interpretation of legislation over another, can I be accused in *Carr* of hiding or disguising the consideration that played a part in my thinking? I think not. Have I resorted to a purely verbal or linguistic explanation of my interpretive preference in order to avoid the accusations of formalists that I had exceeded the bounds of judicial legitimacy or impermissibly permitted congenial policy considerations to influence my decision instead of "sticking to the text"? Certainly not. Have I, on the other hand, fallen into the trap of indulging in amateur psychology whilst searching the crevasses of my mind and memory to explain the factors

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[34] (2007) 232 CLR 138 at 187 [165].

[35] *Em v The Queen* (2007) 232 CLR 67.

that led me to my decision? In short, in explaining my dissenting view in *Carr*, have I given reasons that adequately respond to the judicial obligation to explain a differing view about the meaning of the statutory text in question?

DIGGING FURTHER FOR "DEEP LYING" CONSIDERATIONS

It is for others to answer the last question. However, I suggest that my opinion in *Carr* does reveal the "deep-lying" considerations that brought me to my conclusion:

- *Constitutional bedrock*: The task of a judge in interpreting statutory (constitutional or subordinate) legislation is fundamentally a textual one. It is impermissible to stray too far from the text by importing relevant considerations of context and policy. The text is the anchor for the judicial task, as it is for the task of any lawyer or citizen called upon to interpret and apply legislation[36]. Obedience to the text has a constitutional foundation. It is based on the respect demanded of courts towards the democratic character of parliamentary law-maker, speaking to the courts in the words that the law-maker has formally adopted.

  This is why all members of the High Court gave a great deal of attention in *Carr* to the ordinary meaning of the word "interview", leading in my case to the conclusion that it imported notions of formality. The "interviews" that judges perform for their personal staff certainly usually observe that requirement, i.e. of a structured conversation observing certain rules of discourse. In the facts of *Carr*, the parties too reflected this view of what an

[36] *Trust Co. v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [66[-[68].

"interview" was. What they did in the "interview room" observed the pre-conditions of such a conversation. The interchange in the lock up was of an entirely different character. It did not fit comfortably within the required statutory pre-condition of a videotaped "interview". Thus, in a sense, the text was conclusive of the answer to be given to the statutory puzzle. Yet there was more. And it reinforced the same conclusion.

* *History and law reform*: When the contextual history was taken into account, it lent support to the foregoing view of the text. Most importantly, the history of the problems that the administration of criminal justice in Australia had faced in the abuse of official power when suspects allegedly made admissions to people in authority. This problem had bedevilled trials and the reputation of public officials, especially police, for more than thirty years before, successively, law reform bodies, courts and legislatures sought to introduce requirements for oral and visual recordings of communications between officials and suspects. In the Australian Law Reform Commission, I had myself taken part in proposals urging the recording of such conversations[37]. I had witnessed the opposition by police commissioners, police associations and some politicians to the Commission's proposals. I always believed that, if secure and acceptable recordings were introduced, they would not only restore the reputation of police. They would also provide a powerful forensic tool to the prosecution to secure the conviction of accused persons based on reliable confessions and admissions which the decision-maker could see and hear

[37] Australian Law Reform Commission, *Criminal Investigation* (ALRC 2, Interim), 1975, AGPS, Canberra.

directly. The usefulness of this history was not limited to the reliability of the admissions then recorded. It was also concerned with the acceptability of the admissions because of frequent allegations of oppressive conduct, trickery and violence on the part of the interrogating officials. No doubt my awareness of (and involvement in) some of the background events that led to legislation such as that in the *Code*, would have influenced my conception of what the *Code* was getting at. That influence was effectively acknowledged by me in my reasons[38].

∗ *Accusatorial trial*: Another "deep-lying" consideration represented a recurring theme in a number of opinions that I wrote in criminal appeals. I refer to the peculiar nature of the accusatorial criminal trial, as it is observed in Australian trial practice[39]. The accusatorial trial is not always understood by the general public; nor even among experienced lawyers. Yet it is very important for the character of our society and for maintaining proper controls over the intrusion of the organised state into the lives of individuals. As such, the purpose of a criminal trial is not, as such, to discover whether an accused person is innocent or guilty. The purpose is defined by the obligation of the state and its officials to prove the accused's guilt beyond reasonable doubt. That obligation places an important check on the intrusion of public officials into the lives of individuals who may be suspected of a crime. Doubtless, on occasions, the limitations are intensely frustrating to officials.

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[38] *Carr* (2007) 232 CLR 138 at 164 [82].

[39] Cf. *R v RPS* (2000) 199 CLR 620 630-633 [22]-[30]; *Em v The Queen* (2007) 232 CLR 67 at 134-135 [227]-[231]; *R v Swaffield and Pavic* (1998) 192 CLR 159 at 201.

But the frustrations must be borne because they safeguard important attributes of freedom by controlling the state and its officials. The police in *Carr* correctly acknowledged the suspect's desire not to speak further until he had seen a lawyer. If the Prosecution's submissions were correct, the observance of the accused's "right to silence" could be easily circumvented by tricking the accused into abandoning his entitlements; and by involving him or her in an unstructured conversation which was designed to overcome the impediment presented by the invocation of the accusatorial character of the process. Parliament may amend, and perhaps even abolish, the accusatorial trial of criminal accusations. However, against the important protective features of that system and its history, any such modification would have to be made by very clear laws. At the very least, in Mr. Carr's case, the language of s570D of the *Code* fell far short of a clear departure from the accusatorial trial which, on the contrary, parliament seemed rather intent on protecting and reinforcing.

* *Policy, public officials*: Still, in the end was it acceptable, in the face of reliable evidence of damning admissions made by the accused, to have him walk free although captured on videotape and sound recordings acknowledging his involvement in a serious crime of bank robbery? Would such an outcome be an affront to decent members of society? Should the *Code* not be read so as to avoid such a result? Would the community reject an accused person's escaping justice, on a technicality? In *Carr*, I acknowledged that such considerations would be in the back of the mind of many observers of the arguments advanced

in the appeal. However, what had been done to lead Mr. Carr into his unsuspected admission was done by public officials bound to uphold the law[40]:

> "... [T]he order [of acquittal] is not made only for the accused, but as an assurance of the adherence of our institutions to the rule of law[41]; to steadfast observance of the requirements of the accusatorial system of criminal justice hitherto followed in Australia; and to the neutral judicial application of the requirements laid down by parliament in s570D of the Code. [That section] is a strict and unusual provision. It was enacted to deal with a large and endemic problem. We do the law no service by failing to observe the requirements that appear in the provisions of s570D of the Code because the appellant, who claims their benefit, becomes their uncongenial beneficiary. ... He was a smart alec for whom it is hard to feel much sympathy. But the police were public officials bound to comply with the law. We should uphold the appellant's rights because doing so is an obligation that is precious for everyone. It is cases like this that test the Court. It is no real test to afford the protection of the law to the clearly innocent, the powerful and the acclaimed[42]."

If Mr. Carr had been a "white collar" criminal, dealt with on summons, escorted by his lawyer to the Kensington police station, can it be seriously suggested that the police would have respected his rights in the interview room but then engaged him in an unsuspected but recorded conversation in the lock up aimed to secure admissions? To adapt the words of Justice Tobriner in *People v Dorado*[43], the *Code's* protections are not withdrawn from accused persons who are "stupid and ignorant".

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40 (2007) 232 CLR 138 at 187 [168].

41 Cf. *Blackburn v Alabama* (1960) 361 US 199 at 207; *R v Oickle* [2000] 2 SCR at 42-44 [68]-[70].

42 Cf. *Em v The Queen* (2007) 232 CLR 67 at 134-135 [230]-[231].

43 398 P (2d) 361 at 369-370 (1965) quoted in *Miranda* 384 US 436 at 471 (1966).

> To do that would be "to favour the defendant when sophistication or status had fortuitously" made the need for protection unnecessary (or less necessary). A true commitment to equality before the law required that Mr. Carr's argument be given credence. Lawyers in their ceremonies repeatedly assert that the law is there for everyone; that it must be upheld though the heavens may fall; and that their heroes (like Thomas More) were exemplars of this tradition. This is why a case like *Carr* tests lawyers, judges and courts in their loyalty to the rule of law.

THE CHALLENGE OF EXPLANATION AND PERSUASION

None of the foregoing really expands upon the reasons that I expressed in my minority opinion in *Carr*. However, the "deep-lying" considerations that I have mentioned in this article help perhaps to identify why the task of statutory interpretation is at once complex, contestable and fascinating.

In the place of the approach of earlier times, that lawyers should search for judicial opinions on analogous common law questions, today's practitioners are normally tied closely to statutory texts. Finding the relevant law obliges contemporary lawyers to examine and define the critical words in those texts by reference to the language and context of the statutory provisions. However, the modern approach to interpretation also obliges today's lawyers to endeavour (so far as the text permits) to give effect to the purpose and policy apparent in the statutory language.

As in *Carr*, this approach will require the interpreter to dig more deeply so as to understand not only how the text works, viewed in its entirety, but, so far as possible, how its objects may be upheld. Today, there is no satisfaction in a court (as there sometimes appeared to be in earlier times) in holding that the enacted text has failed to hit its obviously intended mark[44]. So far as they can, judges now endeavour to interpret the enacted law so as to achieve its objects. But finding what those objects are is sometimes elusive as the differences within the High Court in *Carr* demonstrate.

Thus, one judge's examination of text, context and policy, will appear to some expert commentators to exceed the bounds of judicial legitimacy[45] or to amount to an example of impermissible judicial activism[46] or false judicial heroism[47]. Yet another judge's definition of (and approach to) judicial problems may appear to other expert commentators to be a deliberate frustration of remedial legislation and an activism on the part of the judge impermissible because it is designed to defeat the intention of Parliament[48].

In *Carr*, was the requirement of the *Code* enacted solely to secure the *integrity* of the recorded admissions? Or was it also to ensure the *acceptability* of the circumstances in which the admissions came to be made? If the latter, did that conclusion reinforce an interpretation of the word "interview", as requiring a measure of formality of discourse that

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[44] Lord Diplock, Holdsworth Lecture, cited by McHugh JA in *Kingston* (1987) 11 NSWR 404 at 421.

[45] A.M. Gleeson, "Legal Interpretation: The Bounds of Legitimacy", unpublished lecture, University of Sydney Law School, 16 September 2009.

[46] J.D. Heydon, "Judicial Activism and the Death of the Rule of Law" (2003) 23 *Australian Bar Review* 110; M.D. Kirby, "Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty" (2006) 30 *Melbourne University Law Review* 576.

[47] J. Gava, "The Rise of the Hero Judge" (2001) 24 *UNSW Law Journal* 747.

[48] Margaret Thornton, "Disabling Discrimination Legislation: The High Court and Judicial Activism" (2009) 15 *Aust. J Human Rights* 1 at 2, 4.

was plainly missing from the interchange in the lock up? Or was it sufficient that the conversation should be recorded, removing any doubt that it contained admissions actually made by the accused?

The value of *Carr* and cases like it, is that it shows the way experienced interpreters can differ over seemingly simple statutory language. When that happens, if those who are in disagreement are lawyers or judges, they are normally obliged to explain, and to attempt to justify, their differences. Doing so tests not only their intellect, but also their inclination to candour and their willingness to explore and reveal the considerations that have led them to their respective conclusions.

What words mean is often a puzzle. But I agree with James Raymond that the exposition of meaning will be more convincing if it moves beyond purely linguistic explanations. It is when the interpreter discloses “deep-lying” responses to a linguistic problem that he or she will truly explain why the conclusion stated was reached. And then the decision-maker may do so with explanations that persuade the reader to the same conclusion.

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