MICHAEL WILL ADDRESS: LEGISLATION IN THE COURTS

The Hon Justice Hilary Penfold QC*

I begin by acknowledging the traditional custodians of this land and pay my respects to their elders past, present and emerging and especially to any Indigenous people who are here tonight.

Next, I acknowledge the presence here of Michael Will and the well-deserved honouring of Michael by his long-time friend Geoff McCarthy. I have only met Michael a few times — most recently at a farewell dinner for my husband, Mark Cunliffe, who finally retired last week — and I do not know him well, but I do know of him from his dealings with Mark and also our daughter Jancis, and everything I know of him is good.

Jancis worked with Michael at DLA Piper for a while, and he was involved not only in her recruitment but also, perhaps more importantly, in looking after her during her time there. I know that she thinks of him fondly still and has stayed in touch even after moving on.

Mark, of course, has dealt with Michael on and off over the years and holds him generally in very high regard, but he mentioned to me the other day that one of Michael's particular strengths was his skill as an educator — which makes perfect sense of Michael's willingness to mentor our daughter when she needed it.

So, knowing how highly regarded Michael is, not only within the ACT legal community, as Geoff has explained, but also within my own family, I am so pleased and gratified to have this presentation named in his honour.

My topic tonight covers a multitude of sins but in particular gives me scope to make some observations about legislation and what I have learned about it during my time on the Supreme Court, which is a perspective few legislative drafters ever experience.

Most of you know enough about my past, so tonight I note only that, relevantly, it involved 25 years as a legislative drafter in the Commonwealth, four years as the Secretary of a newly-created parliamentary department and then 10 years as a judge of the ACT Supreme Court. There is a lot that could be said about my time in the Department of Parliamentary Services but relevantly for present purposes it was my first experience of how real people use legislation. In 10 years in the Supreme Court I did not just watch other people struggle with legislation (although there was a bit of that) but I also had to make actual binding decisions on what legislation meant and how it worked. That has led me to think about a lot of things that affect how legislation is created, how it is used and what can be done to improve both of those processes, although I have not so far had time to take it further. I confess, however, that 25 years as a legislative drafter is not easily put aside, so, if these observations occasionally sound a bit defensive, they probably are.

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* *The Hon Justice Hilary Penfold QC is a judge of the ACT Supreme Court. Justice Penfold delivered this inaugural Michael Will Address at the 2018 Annual General Meeting of the Australian Institute of Administrative Law, in the presence of Michael Will and his family and friends.*

My observations encompass, very briefly, some sweeping generalisations about legislation, a couple of brief stories and some thought bubbles. The really interesting question, at least to me, is whether there are things that can be done (whether by those involved in making legislation, those involved in using it or others) to make the part played by legislation in our legal system even more efficient and effective and even more supportive of the rule of law in general. Unfortunately, I am not going to get far beyond the thought bubbles.

My first generalisation is that mostly legislation works pretty well — as would be shown by any statistical analysis (if anyone could ever be bothered doing the counting) of how many things are done or dealt with perfectly adequately under legislation without ever coming before any tribunal or court. How many Centrelink clients are paid correctly each week compared with the number who approach a tribunal, or find themselves before a magistrate, because someone seems not to have applied, or complied with, the law properly? I could go on, but instead of multiplying examples I make the further point that a significant proportion of matters dealt with in legislation that does finish up in courts or tribunals does not raise questions about the meaning or operation of the law but only issues of whether the facts fit within that law.

Next, I concede that, sometimes, legislative drafters simply get things wrong. One of my colleagues in the Commonwealth Office of Parliamentary Counsel famously drafted a series of amendments, of whatever the Act dealing with the postal service was called at the time, to address the emerging use of electronic mail. He did, in effect, a 'search and replace' by inserting a reference to electronic mail into each provision creating an offence in relation the use of postal services. It was fairly effective in general, although it did have people scratching their heads at the prohibition on sending explosive devices by electronic mail.

My own favourite drafting disaster (although it would not necessarily have been regarded as a disaster by most of the population) was to inadvertently, and briefly, deprive all federal politicians of all travel allowance entitlements. That lasted from late one Thursday night, when the legislation was drafted and passed, until lunchtime on the Friday, when amending legislation was passed — because no member of Parliament was willing to leave Canberra until the travel allowance entitlement was reinstated.

On other occasions, the drafting process can go wrong. The most common flaw in the drafting process, in my experience, arises in cases involving an interface between legislation and the common law, especially the criminal law, where neither the legislative drafters nor, importantly, their instructors (and certainly not the legislators) know enough about how the common law works and, in particular, enough about the language of the common law. These are areas where the common law has been so important for so many centuries, and the task of codifying it, or integrating legislation with bits of it, can be quite fraught.

However, accepting these problematic areas, there are many areas of law in which legislation is remarkably useful, and effective, in the courts. For instance, in the ACT courts, legislation is routinely applied, easily and efficiently, in various areas — operations are facilitated in all sorts of ways by the road maps, or perhaps checklists, provided by sentencing legislation, the Bail Act and the Evidence Act (even the Court Procedures Rules, at least for anyone who can work a table of contents). This, of course, does not mean that you will not hear the odd whinge from people who were much happier when they were able to make it all up as they went along.

Next, I suggest, much litigation about legislation arises from a compliance failure or an objection to policy, not from a drafting failure. There are two main cases in which people go

to court to fight about what legislation really means, or how it operates, when there is nothing actually wrong, or relevantly wrong, with the legislation as such. The first case is when a process provided for, or regulated by, a legislative scheme has gone wrong because someone has not complied with, or operated within, the scheme. For instance, one party to a legal relationship or process regulated by legislation (perhaps a tenancy agreement or the process of negotiating a motor accident claim) slips up — they miss a deadline or serve the wrong document, say — and the other party swoops, sometimes immediately and sometimes only later when the other party is not happy with how things are going. What the court is asked to determine is how the legislation should work when the process has gone right off the rails and outside the process set out in the legislation. That, of course, does not stop people criticising the legislation, in effect, for not making clear provision at each point about what should happen if the legislation is not complied with and the process does go off the rails (often while also complaining about how long Acts are these days).

The second case is where the policy expressed in, or implemented in reliance on, the legislation simply does not suit someone. Often, in fairness, the policy is extreme, but sometimes it is only extreme in not suiting a particular litigant with plenty of money to spend on litigation.

In another class of these cases, the litigation involves an unrepresented litigant (disproportionately often a person with legal qualifications who no longer practises) who will raise all sorts of more or less bizarre challenges to legislation just because it does not suit what he or she is attempting to establish against a defendant. Again, there is rarely anything actually wrong with the legislation as such, but that does not stop such litigants dragging the other party and the court through all sorts of thickets before the matter can be properly disposed of.

So, to summarise my comments so far, Australian legislation is a lot more fit for purpose than you might think from some of the commentary, although I would not argue that there is no room for further enhancements.

I turn now, also briefly, to what happens to legislation in the courtroom. My first proposition here is that purposive interpretation in its current form may not be an unmitigated Good Thing. Routinely these days, statutory interpretation in the courts involves recourse to the purpose or object of the legislation concerned. However, I have started wondering whether purposive interpretation in its current form invites litigators, and possibly obliges judges, to try their hands at policy-making in ways that are not always or necessarily positive.

At this point a potted history of purposive interpretation may be useful. In 1981, after much soul-searching, consultation and learned conferences, the *Acts Interpretation Act 1901* (Cth) was amended to include the following provision:

> 15AA. (1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

That was then adopted by some (possibly all) other Australian jurisdictions, and certainly in the ACT. I shall refer to this provision as ‘s 15AA’, although obviously the equivalent provision is numbered differently in the ACT and other relevant jurisdictions.

In 1990, in *Chugg v Pacific Dunlop Ltd*[1] (*Chugg*), three members of the High Court (Dawson, Toohey and Gaudron JJ, the plurality in a five-person bench) pointed out, correctly, that provisions in this form only required the rejection of constructions that would

not promote the purpose or object of the Act and did not require the adoption of the construction that would best promote that purpose or object.

It would not be fair to describe this comment as a 'throwaway line', but it is fair to say that the plurality did not suggest that this was a flaw in the provision. The significance of the comment was only that the provision in its then form did not help the party who sought to rely on it to impose an onus of proof on a defendant employer prosecuted under a particular workplace safety provision (by implication, because neither of the suggested interpretations of the provision could be identified as impeding or frustrating the Act's identified purpose of 'the promotion of occupational health and safety').[2]

Furthermore, their Honours did not suggest that, if the provision had required or permitted a search for the 'best' interpretation in terms of the purpose of the Act, it would have been more helpful. In fact, their Honours' conclusion was ultimately based on a consideration that appeared to weigh the overarching aim of promoting occupational health and safety against the practical impact on relevant court proceedings if employers were found to bear an onus of proof in defending a prosecution for a workplace safety offence (at [24]) — even though occupational health and safety might have seemed to be promoted by putting more stringent obligations on employers.

Some years later, and despite the details of the consideration in *Chugg*, Queensland, the ACT and in due course the Commonwealth (and some other jurisdictions) amended the provision in question to 'respond' to *Chugg* by referring to an interpretation or meaning that best achieves the aim of the legislation. The new s 15AA of the Commonwealth Act, inserted in 2011, read:

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

See also, for instance, s 139 of the *Legislation Act 2001* (ACT), as amended in 2003.

On the face of it, this might seem to be a perfectly sensible advance on the original provision, but I am starting to think that it raises real problems.

Put shortly, the original version of the provision was, as I recall, a polite way of telling the High Court, in interpreting the income tax laws, to stop looking after tax evaders. It is also my memory that by the time the provision was passed it had become apparently unnecessary (as someone put it at the time, 'the walls of Jericho fell before a single trumpet sounded': the provision came into effect on 12 June 1981; exactly a week earlier, on 5 June 1981, the High Court had handed down judgement in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*,[3] in which the Court, to the benefit of the Commissioner of Taxation, 'corrected' a 'draftsman's mistake').

Be that as it may, the provision did no harm in standing as a permanent reminder to the judiciary that the legislation, and the aims of the legislature, needed to be respected rather than obstructed.

However, the new provision, especially in its use of 'best' rather than 'better', can be (and I think sometimes is) read as an open invitation to judges to second-guess the drafters, the policy-makers and the legislature by reference to explicit or inferred high-level policy objectives.

Most if not all of you, I expect, have had enough experience of the policy-making process from one perspective or another to realise that making good policy is hard work. Not only is it hard work; it is also work that should be done against a background of real evidence, processed through the filters of theory (including such things as basic principles of economics or psychology) and of values, including political values, and it is work that routinely involves a balancing act.

Furthermore, whatever process the new version of s 15AA is referring to, it is not just inviting that process but obliging judges to engage in it, and it is imposing an obligation that will be almost impossible to perform properly. The provision considered in *Chugg* is a useful example of the kinds of problems the amended provision could cause.

The question in *Chugg* was whether, in a prosecution for an offence of failing to maintain a safe working environment so far as is practicable, the prosecutor (the regulator) or the defendant employer bore the onus of proof in relation to what was 'practicable'. In the end, the High Court decided that the onus should be borne by the prosecutor, because this would ensure that the scope of the charge, and the investigation into what was practicable, would be determined, and confined, by the particular failure to maintain a safe working environment that was identified by the prosecutor in the charge. If the onus in respect of practicability was placed on the defendant employer, the judges said, the employer would be required to establish the *impracticability* of every possible response to the particular safety breach 'which the ingenuity of … counsel can suggest'.[4] The plurality said:

> It is impossible to read into s 21 of the Act an intention to place the onus of proof of the issue of practicability on a defendant *when that onus would entail the additional burden of anticipating and negating the practicability of every possible means of avoiding or mitigating a risk or accident that might be raised in the course of cross-examination*.[5]

That is, the judges decided that the weight of the burden placed on the employer should be moderated for reasons of practicality in relation to court proceedings.

But could the court have reached that point if the current version of s 15AA had applied or would they have felt obliged to decide that, in order to promote occupational health and safety, the legislative requirement to do something 'so far as was practicable' *should* include imposing the additional burden identified by the judges? That additional burden might well have seemed to some people a further way of promoting occupational health and safety — the expressed object of the Act.

It would be even easier to come up with examples where the 'best' requirement is problematic by looking at legislation that is clearly intended to balance competing considerations and aims and where that balance is a matter for the legislature, advised by expert policy-makers. In such cases the search for the 'best' interpretation may require, and can certainly be taken to require, the judge to determine where that balance should be struck. This may be especially problematic where the provision in question is not a core provision, for which the purpose of the legislation might seem to provide an obvious answer, but a subsidiary or procedural provision such that it is not necessarily obvious in the particular circumstances how the legislative purpose is best promoted. Without access to all the information and assumptions used in the original policy-making process, how can the judge, assisted only by counsel who will generally have no more policy-making expertise than the judge, hope to find the meaning that would best achieve the purpose of the Act?

The search for the 'best' meaning for a provision also raises another particular danger, indirectly adverted to by Deane J in *Chugg*,[6] being the increased risk that different cases, with different facts or different implications, might generate different interpretations of the

same provisions; in fairness, this may have been a minor risk under the old version of s 15AA, but I think it is more of an issue with the new version of the provision requiring the court to find the 'best' meaning by reference to purpose, because the version of the provision in question that seems to best achieve the purpose of the Act could vary depending on the facts of the particular case. Where does this leave the legislation and its unfortunate users?

I have long had a particular respect and admiration for former Chief Justice of the High Court Robert French, not least because he has always had an interest in legislation and an understanding of its significance in the legal system. In *International Finance Trust Company Limited v New South Wales Crime Commission*,[7] in the context of interpreting legislation to ensure its constitutional validity, his Honour identified the following caveat:

> The court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity. There are two reasons for this. The first is that if Parliament has used clear words to encroach upon the liberty or rights of the subject or to impose procedural or other constraints upon the courts its choice should be respected even if the consequence is constitutional invalidity. The second reason is that those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen. To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss, the accessibility of the law to the public and the accountability of Parliament to the electorate are diminished. Moreover, there is a real risk that, notwithstanding a judicial gloss which renders less draconian or saves from invalidity a provision of a statute, the provision will be administered according to its ordinary, apparent and draconian meaning.[8]

His Honour's warning about the dangers of providing counterintuitive judicial glosses in interpreting legislation for constitutional purposes is, in my view, equally applicable to the risks inherent in setting judges up as supervisors of the detailed implementation of legislative policy. This is especially so if, as cannot be ruled out, judges can be induced to read the revised s 15AA as a licence to ignore the actual words of the legislation in favour of their own, not necessarily informed, views of what the details of the legislation ought to have said in order to achieve, in matters of fine detail, the high-level policy apparently intended.

Finally, I recount a brief story about a litigant who was obviously hoping for a bit of counterintuitive judicial gloss on the Australian *Constitution*, specifically s 117, which, you will all of course remember, says:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

This litigant, apparently a resident of, and admitted legal practitioner in, the ACT, turned up in front of me wanting to challenge a decision by the ACT Law Society to refuse him a practising certificate, and he wanted to use s 117 to do it. I decided not to waste everyone's time by asking him about the significance of the fact that the ACT is not a State, so instead I asked him:

> Which State are you a resident of, and in which other State are you subject to a disability or discrimination that would be not applicable to you if you were resident in that State?

And he said 'Well, if your Honour's going to read it that way …'.

Thank you all, and to you, Michael, and to your family Fiona, Johnny and Patrick, my very best wishes for the future. It has been an honour to be here.

Endnotes

1 [1990] HCA 41; 170 CLR 249, 262.
2 Ibid 262.
3 [1981] HCA 26; (1981) 147 CLR 297.
4 [1990] HCA 41; 170 CLR 249, [24]
5 [1990] HCA 41, [24] (emphasis added).
6 Ibid 254.
7 [2009] HCA 49; 240 CLR 319.
8 Ibid 349 (citation omitted).