JCA COLLOQUIUM
5 OCTOBER 2012

COMMENTARY ON THE PAPER OF BARKER J ON STATUTORY INTERPRETATION

I begin by complimenting Michael Barker on his presentation and on his leading us through the interactive session this afternoon.

Without intending in any way to diminish the quality of his paper or the manner of the interactive session, I would like particularly to commend Michael on the title to his paper. The selection of a title for an academic paper or a judicial address has in modern times become something of an art form. Presenters typically select a title which is either whimsical, ironic, involves a pun or, absent any of those qualities, has some illusion to the classics or to literature. Michael's title is an exemplar of its type and has done its job in piquing our interest in his presentation this afternoon.

I do have to admit, however, when I read Michael's paper for the first time the remark attributed to Michael Kirby came to mind, namely, "Pity the Federal Court Judges, they have to work all the time with statutes"!

Michael's interactive exercise has served to remind us that the end result of the sometimes dry process of statutory interpretation will often be an impact of the law on real people with significant effects in their lives.

It is not only the Federal Court which must work frequently with statutes. The fact of the matter is that Acts of Parliament now dominate the practice of the law by both practitioners and judges. By way of example, in 1975 the published

consolidation of the then current Acts of the South Australian Parliament occupied some ten and a half lever arch volumes. Now the current legislation of the South Australian Parliament occupies some 19 lever arch volumes, a near doubling over the period of 37 years. No doubt the experience in the other States and Territories is similar. The consequence is a significant impact on the work of all of us.

I would like to pick up or emphasise a couple of the points made by Michael.

The first is that it is in the process of interpreting statutes that the judiciary interacts most often with the legislature and to a lesser extent the executive. Chief Justice French made this point in the paper entitled "The Courts and the Parliament" which he presented in the Queensland Supreme Court on 4 August 2012.

The Chief Justice discussed some of the implications arising from the recognition of that interaction. I mention two in particular for today's purposes. First, the assertion of the courts of their function in interpreting statutes is in effect an assertion of the sovereignty of the courts, just as is the assertion by the legislature of its power to make laws.

Secondly, and this perhaps follows from the first, both the legislature and the judiciary should respect the role of the other. That is to say, neither institution should attempt to trespass on the role of the other. Courts should not

attempt to assume the legislative function of Parliaments in making laws but there are also respects in which the Parliaments should respect the function of the courts in construing the laws which it has enacted. In relation to the former, Michael's reference to a passage in the judgment of the High Court in *The Australian Education Union v The Department of Children's Services*[1] is pertinent, ie, the statement that in construing the statutes it is not for a court to construct its own idea of a desirable policy, to impute that policy to the legislature and then to characterise it as the statutory purpose.

Chief Justice French made the point that the rules relating to statutory interpretation serve to mark the constitutional boundary between the judiciary and the Parliament, even when the result of the process is a form of law-making. We have to be careful, in other words, that the interpretation of the statutes in which we engage does not go beyond the proper scope of the constitutional function of courts.

The second point I wanted to remark on from Michael's paper is the influence of a Judge's own value judgment in interpreting statutes. I do not remark on this to suggest that it is necessarily a bad thing. Judges are after all appointed to make judgments in an endeavour to reach just outcomes in accordance with the law. Some value judgments are inevitable in that process. But we should recognise that that is sometimes what is involved a matter of value

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1 [2012] HCA 3.

judgment. This has the consequence that not all Judges will make the same value judgment. Reasonable minds can differ as to the proper approach.

I am often conscious of this when reaching a decision on a difficult point of construction. When I reach a fork in the road in the process, I try to resolve the choice to be made in a principled way but all the while I am conscious of the possibility that I may be reasoning to a conclusion which I have already reached by other means. This is reflected in the somewhat sceptical observation of Professor Jim Raymond to which Michael referred, namely, that the rules and cannons of construction often serve only to provide "plausible arguments in support of a conclusion reached by other means, which may or may not be expressed in the judgment itself".

I remember being particularly conscious of this possibility in a decision of our Full Court[2] in which I reasoned, in the context of criminal assets confiscation legislation, that although the statute had used the word "must" it actually meant "may" so that the Court did have a discretion as to the making of a particular form of confiscation order. My reasons contained, I hope, a principled basis for that conclusion but I did ask myself at the time, and have asked myself since, whether the principles and approach which I applied were, in Professor Raymond's words, simply plausible arguments to support what I considered to be a just outcome.

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[2] *Director of Public Prosecutions v George* [2008] SASC 330; (2008) 102 SASR 246.

Another area in which we see this tension is in the law relating to the consequences of non-compliance by a public official with the statutory conditions for the exercise of the power. In *Project Blue Sky Inc v Australian Broadcasting Authority* (PBS),[3] the majority of the High Court said, in a well known passage, that whether or not an act done in breach of a condition regulating the exercise of the power is invalid depends on whether there is a discernible legislative purpose to invalidate any act which fails to comply with the condition. The existence of the purpose is to be ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of hold void every act done in breach of the condition. The majority went on to accept, however, that the finding of such a purpose, or no such purpose, in this context often reflects a contestable judgment. That is obviously so because frequently there is no clear signpost one way or the other. The discernment of the relevant legislative purpose, or absence of such a purpose, often involves a very fine analysis of many matters.

Hence the scope for the exercise of at least some individual value judgment.

I try to be conscious in making decisions of this kind of limiting my own value judgments, which sometimes involve my own views about what are desirable and undesirable outcomes.

The authorities indicate that relevant matters to consider include:

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[3] [1998] HCA 28; (1998) 194 CLR 355.

1. whether the condition regulates the exercise of a function already conferred on the statutory authority rather than imposing an essential preliminary to the exercise of its function. Generally a breach of a condition of the former type does not result in invalidity;[4]

2. non-compliance with a requirement that a power or function be carried out in accordance with matters of policy will not ordinarily result in the invalidity of the exercise of the power or function. If the condition with which the public official must comply is really a policy about which reasonable minds may differ, it may be unlikely that non-compliance should result in invalidity;[5]

3. a failure to have regard to matters expressed in general or aspirational terms will not generally be regarded as intended to produce invalidity;[6]

4. the consequences of holding that the act done is valid or invalid, as the case may be;[7]

5. the public inconvenience which would result from a declaration of the invalidity of the act in question is a very pertinent consideration, with a statutory purpose to cause such inconvenience generally being considered to be unlikely;[8]

6. the purpose and objects sought to be achieved by the legislation as a whole;[9]

7. the purpose of the particular power under consideration;[10]

8. the significance, if any, which the statute itself attaches to non-compliance, for example, in other provisions of the same Act;[11]

9. any restriction, including time limits, which the statute may impose on the right to challenge validity.[12] The imposition of such restrictions may indicate both a legislative purpose that non-compliance should

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4 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [94]; (1998) 194 CLR 355 at 391.
5 Ibid at [95]; 391.
6 Ibid at [96]; 391-2.
7 Ibid at [91]; 389.
8 Ibid at [97]; 392.
9 Ibid at [91], 389; *Smith v Wyong Shire Council* [2003] NSWCA 322 at [14].
10 *Gribbles Pathology (Vic) Pty Ltd v Cassidy* [2002] FCA 859 at [136]; (2002) 122 FCR 78 at 103.
11 *Commissioner of the Australian Federal Police v Oke* [2007] FCAFC 94 at [33], (2007) 159 FCR 441 at 447; *Mikhman v Royal Victorian Aero Club* [2012] VSC 42 at [34].
12 *Smith v Wyong Shire Council* [2003] NSWCA 322 at [28].

result in invalidity and also limit the possible adverse consequences of the invalidity;

10. the ease with which the public official may comply with the obligation in question or rectify a breach;[13]

11. whether a declaration of the invalidity of non-complying conduct is necessary or desirable to ensure compliance by the public official with the requirements of the statute;[14]

12. whether a declaration will invalidate the whole of the public act in question or whether some severance is possible;[15]

13. whether the subject matter of the power involves an exclusion of a person or class of persons from an entitlement otherwise available, or an abridgment of established liberties;[16]

14. whether the statute contemplates exemption from compliance with the obligation in particular circumstances. If exemptions are contemplated, non-compliance is more likely to be intended to result in invalidity;[17] and

15. the time in the context of an overall process at which the particular power is to be exercised.[18]

This is not an exhaustive list of the matters to which the Courts have regard. Nevertheless, I think they are the kinds of matters to which many Judges would have regard with a view to checking their own value judgments about what is just or fair controlling the outcome of the enquiry as to whether invalidity is the intended consequence of non-compliance.

Once again, I commend Michael's paper to you and recommend a re-reading of it.

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[13] *Commissioner of the Australian Federal Police v Oke* [2007] FCAFC 94 at [34]; (2007) 159 FCR 441 at 447.
[14] *Smith v Wyong Shire Council* [2003] NSWCA 322 at [40].
[15] Ibid at [30].

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[16] *Epstein and Morton v WorkCover Corporation* [2003] SASC 231 at [49], (2003) 85 SASR 561 at 575; *Watkins v State of Victoria* [2010] VSCA 138 at [67], (2010) 27 VR 543 at 560.

[17] *Goulburn Murray Rural Water Authority v Rawalpindi Nominees Pty Ltd* [2010] VSC 166 at [251].

[18] *Mikhman v Royal Victorian Aero Club* [2012] VSC 42 at [35].