

# Policy and Parliamentary Counsel: A marriage made in hell? Or, policy, hogwarts and all

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*The infamous judicial comment about policy being an unruly horse, and not one suited to being judicially ridden, stems from the first half of the nineteenth century. We are now in the first half of the twenty first century: times change and with the times, societal perceptions, needs and governmental machinery. How far can the law go in accommodating those changes?*

*It might be noted immediately that policy canters into court in various equine disguises: from common law precepts, to community standards to expressions of policy provided for in statutes, explicitly or implicitly. Chief Justice French, prior to moving to the central chair, published a paper proclaiming the capacity for judges to digest policy into their decisions without pretence: but what was the nature of that policy?*

*The High Court has become reticent as to judicial capacity to assess community values, but Parliaments, urged on by populist governments, rely on just such assessment. Is this a horse of a different colour and more docile behaviour to the unruly ancestor? On the one hand, Judges eschew, in line with “unruly horse” analysis, the search for a policy based in community standards, but statutes embodying policy must be given effect: how will that policy underlying the statute be addressed?*

*All legislation reflects a “policy”, but what of a court that sets out to apply that policy where the actual words of the legislation do not reach? Courts may fall into this error with ease. This paper attempts a process of equine selection of policy horses, in the hope that Parliamentary Counsel may see their way to attracting more uniform riding habits amongst Judges dealing with statutes.*

Chief Justice Gleeson wrote at the end of his term of office in 2008:

The system of parliamentary government that we inherited did not involve, either originally or for most of its history, an expectation that Parliament would be a standing law reform agency constantly turning out detailed rules affecting the rights and obligations of citizens. Its origins lay in the occasional need of the King to assemble representatives of his subjects (or representatives of the most important of them) in order to seek their consent to some measure (typically, the imposition of taxation) for which such consent was necessary, or at least desirable. Neither the Sovereign nor Parliament was expected to be concerned with constantly changing the common law. Alteration of the ancient laws and customs, rights and privileges of the people was regarded as subversive of good order. Law in general was something that was declared, not freshly made. Changing the law was not seen as an inherently worthy activity, whether it was undertaken by parliaments or judges.

After World War II, the popularity of socialism, and of collectivist ideals, was accompanied by an increase in legislation. The public became more accustomed to detailed statutory regulation of personal and economic activities. In the 1970s, with the popularisation of law reform, it came to be accepted that there was no area of law that might not properly become the object of parliamentary attention. Furthermore, some topics which already had been the subject of legislation became much more intensively regulated. The point can be demonstrated by comparing the size of the *Income Tax Assessment Act 1936* (Cth) with the present income tax legislation, or that of the *Uniform Companies Acts of 1961* with the *Corporations Act 2001* (Cth).

Making new law in all areas, civil and criminal, is a central part of the work of modern parliaments. Consequently, applying legislation is now the largest part of the work of modern judges.

It would be wrong to assume that judging in such an environment involves no more than diligent search for the relevant legislation, and its mechanical application once found. Much legislation draws upon the common law and is designed to interact with it. Only a very small part of Australian legislation takes the form of codification. Most of it is intended to supplement, or modify, judge-made law, rather than to replace it. Furthermore, legislation often takes its desired effect by conferring broad discretions which require courts to make normative evaluations of conduct, circumstances, and possible consequences. **The meaning of the word "policy" is protean, and its unexplained use is often a source of confusion, but in one of its senses judges nowadays are commonly required, by Acts of Parliament, to make what could fairly be described as policy choices about a wide range of matters. They cannot avoid this responsibility when it is conferred by statute. Even a black-letter lawyer is compelled to respond when Parliament legislates in technicolour.** (emphases added)

Gleeson CJ **"The meaning of legislation: Context, purpose and respect for fundamental rights"** published in (2009) 20 PLR 26, at 26-27

My apologies for such a long epigraph, but Chief Justice Gleeson raised, as might be expected, the key reasons that statutory interpretation is now so important, and is at the heart of this paper. I differ only from this general conspectus in thinking the legislative avalanche began, not with the onslaught of socialism after World War II, but rather, progressively after about 1840, as the legitimacy entailed in a more popularly elected Parliament began to take hold, and the needs of Britain's cities begged for legislative action. The model for the future lay in the **Metropolis Management Act 1855**, which amongst other matters, swept away the idea of landownership as sacrosanct. Thereafter, town planning principles would be in the ascendant, and defiance of those principles would attract condign official response, as Mr Cooper, of ***Cooper v Wandsworth Board of Works*** (1863) 14 CB (NS) 180; 143 ER 414 found out to his cost, although the Judges were plainly taken by surprise at the sweeping power arrogated under statute by mere urban councils. To spare Mr Cooper from having his newly built, but unapproved extensions demolished, the Judges found that Mr Cooper had not received natural justice, thus demonstrating a first modern example of the Principle of Legality, a matter to which I will return.

### **The different uses of Policy in common law and statutes**

The word which I have doubly emphasised from Gleeson CJ's material is "policy", and I want to discuss how that word sits in statutory construction, quite differently from its appearance in the common law. The meaning of "policy" is perhaps not so much protean, as the Chief Justice said, but rather used in different ways in different legal machinery.

The common law and statutes have a joint ancestry back to the reign of Edward I, ie to the late thirteenth century. But even when the statutes were drafted by the same men as determined the common law, the Judges, there was a fundamental difference in function. The common law was based in perception of community standard, and hence looked backward in time, while statutes were framed to deal with inadequacy in common law standards, when such standards failed to address changed social circumstances and needs. Statutes were thus a considered “governmental” response to social requirement, and as such were based in a “policy” as to what was defective in the prior legal position.

It is thus apparent that the common law rested on “policy” in so far as it recognised, and obtained its legitimacy, from community standards. That was backward looking discovery, while statutes were always, as the Elizabethans were acutely aware, looking to the defect or “mischief” in the existing law<sup>1</sup>, and hence rested on “policy” of a different type: policy that was intended to look to the future, and hence had no empirical underpinning.

### **Policy, the “unruly horse” of the common law**

But wait, I hear you say, we have all heard the catch cry: “policy is an unruly horse”, and that phrase encapsulates the concept that lawyers deal in exact (if not tangible) concepts, ideas that have been set down as common law principle, or are clear statutory words, and “policy” is more ephemeral than that. The actual phrase appears as follows.

In a contract case, *Richardson v Mellish* (1824) 2 Bing 229; 130 ER 294, Burrough J. said at 251; 303

When they argued this case at the bar in arrest of judgment, it was said there was no con-[252]-sideration, and if there was it was illegal. Now the count happens to be framed in a way that avoids all possible question. It states the whole agreement as it existed, and then states mutual promises ; and it is clear that there is something to be done on each side: the one is a good consideration for the other. Whoever reads the count will see something is to be done on each side; that has been held to be a good consideration. The declaration is framed upon that. Then the next point is, that it is illegal. I am of opinion, that on the face of this count there is no legality. If it be illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. **I, for one, protest, as my Lord [Best CJ] has done, against arguing too strongly upon public policy ; -it is a very unruly horse, and when once you get astride it you never know where it will carry you.** It may lead you from the sound law. It is never argued at all but when other points fail. Why should you not enter into such a contract, independent of public law? I know no law against it; I see no public policy against it at all. The Legislature do not consider the East India Company as a public company; they may in some senses, but not in all. They have the exclusive trade to the East Indies, and employ persons (not in what may be considered as offices) to command ships; they own ships; all this is in the course of private trade, and so far public policy does not relate to such a subject. They have a right to make bye-laws to regulate that trade. As to the point of public policy, a great deal has been said, many cases have been mentioned, and in *Blachford v. Preston*, a great number of general phrases were made use of by the learned Judge. **But you ought not to govern courts of justice by general expressions used in the administration of the law. They may have some weight, but they ought not to govern; you must [253] look to what the point of decision was.** (emphasis added)

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<sup>1</sup> Most famously in *Heydon’s case* (1584) 3 Co Rep 7a at 7b; 76 ER 637 at 638, but nearly a quarter century earlier see *Stradling v Morgan* (1560) 1 Plo 198 at 203; 75 ER 305 at 311, both cases being decided in the Exchequer Court.

But this case, famous for its unruly horse, dates from the period prior to the huge expansion in statutes which began with the new found legitimacy of Parliament after the Great Reform Bill of 1832. The surge in statutes would highlight “policy” that was not mere ephemera, but which could be clearly inferred.

The policy under discussion in *Richardson* was “public policy” that judges in that case were thought not be able to call on to filter out socially undesirable contracts. However, lawyers of my generation were brought up on *Pearce v Brooks* (1866) LR Ex 213, decided four decades after the unriden public policy, *Pearce* being the case in which the prostitute who had hired the brougham carriage to advertise her availability and her wares was found not to be party to an enforceable contract, as any relevant agreement was void for immorality, which was inferentially, and on the strength of uncited precedent, against public policy. The woman avoided having to pay as the “contract” had provided. Good work if you can get it.

*Pearce v Brooks* does not contain the word “policy”, but the point is obvious. Judicial perception of community standards drove, and drives the common law, but once a general principle is enunciated reflective of the mores of a particular period, it may be very difficult to move the law along to the attitudes of a later day: it is for the Parliament to change the law and so forth. Seeking community standards in the shape of “public policy” is a fraught exercise, and one which Australian judges have become increasingly reluctant to engage in<sup>2</sup>.

Curiously, we have arrived back at the attitudes of 1824 enunciated in the “unruly horse case” nearly 200 years after the event. I acknowledge that *Cattanach v Melchior* (2003) 215 CLR 1 does not, with its 96 references to “public policy”, sit easily with my generalisation, but the analysis performed by Justice French, as he then was, in “*Dolores Umbridge and policy as legal magic*” (2008) 82 ALJ 322 at 328-329 reflects how past “public policy” is transmuted into “the policy of the law”, and becomes prone to rigidity:

They [McHugh and Gummow JJ in *Cattanach*] rejected a distinction between public policy as something that would defeat the enjoyment of legal rights and legal policy which is the policy of the law. They quoted Cresswell J in the old case of *Egerton v Earl Brownlow* (1853) 4 HLC 1 at 87 [10 ER 359]:

... we are not asked our opinions as to public policy, but as to the law; and I apprehend that when in our law-books of reports we find the expression, it is used somewhat inaccurately instead of "the policy of the law". Thus, contracts in restraint of trade have been said to be illegal as against public policy, but in truth it is part of the common law that trade shall not be restricted ... and unreasonable contracts in restraint of trade violate the policy of that part of the common law, and are therefore illegal.

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<sup>2</sup> See eg *A v Hayden* (1984) 156 CLR 532 at 559 per Mason J, taken up, inter alia, in *Barac (Trading as Exotic Studios) v Farnell* (1994) 53 FCR 193 at 205-206, the case of the broken armed brothel “receptionist” (apostrophes were the Full federal Court’s, not mine). Mason J said: “The refusal of the courts to enforce contracts on grounds of public policy is a striking illustration of the subordination of private right to public interest. The problem is one of formulating with any degree of precision the criteria or the circumstances which will justify a court in refusing to enforce a contract on the ground that there is a countervailing public interest amounting to public policy. The difficulties in ascertaining the existence and strength of an identifiable public interest to which the courts should give effect by refusing to enforce a contract are so formidable as to require that they 'should use extreme reserve in holding such a contract to be void as against public policy, and only do so when the contract is incontestably and on any view inimical to the public interest', to use the words of Asquith LJ in *Monkland v Jack Barclay Ltd* [1951] 2 KB 252 at 265 ... ”

So, while, as Lord Radcliffe said in an article quoted in the judgment, public policy is "the proper subject of the minister or the member of the legislature" the law speaks "for a system of values at any rate less mutable than this". [citation removed] What courts are and remain concerned with on this approach, with which I respectfully agree, is the policy of the law which can be described in terms of a social purpose or purposes.

But just as that reluctance to pursue changing "public policy" in respect of the common law is becoming (re)manifest<sup>3</sup> (while allowing for the enforcement of "legal policy", itself originally resting in the "public policy" of bygone ages), a quite different pressure to recognise policy is upon us, and given the modern disparity between the reach of statutes and the rump of the common law, this is a very important distinction.

### **Policy in the interpretation of statutes**

I draw the following material from the "**Dolores Umbridge**" article referred to above, at 331-332 (emphasis and numbering added):

- (1) **The judicial function as described in relation to the construction of statutes** ... frequently involves **consideration of the purpose of the statute** ... and thus of its **policy**. **Policy** is an ineradicable element of the legal landscape.

Given the integral role of **policy** and the judicial function of interpreting and applying the law and even in finding the facts, it is hard to view it as some recent erosion of the separation of powers. It is entirely consistent with what judges are required, by the very nature of their office, to do.

- (2) **Legislative purpose and therefore policy** is required to inform all interpretation. Purpose is often expressed in law in terms of legislative intention. To that extent it is cloaked by a fiction.
- (3) Bennion has written of legislative intention as "not a myth or fiction, but a reality founded in the very nature of legislation" and has criticised as "anti-democratic" the idea that there is no true intention behind an act of Parliament.
- (4) It would seem, with respect, that what is being spoken of by Bennion is an attributed and not a "true intention", and consistently with his approach, legislative intention is not used in statutory construction to describe some antecedent mental state of the Parliament but rather an attributed intention based on inferences drawn from the statute itself.
- (5) It requires reference to matters which were before the Parliament when the law was enacted, the first and most important of these being the words of the statutes themselves and their ordinary meaning.

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<sup>3</sup> The earlier reference to *Pearce v Brooks* illustrates that Judges will on occasion assume that "public policy" is so clear that it may be given effect without any further analysis: it would not have occurred to the mid-Victorian bench that a century and more later the "public policy" regarding prostitution would not be recognised as an assumption, see *Barac* at fn2 above. The process of assumed knowledge of community standards (expressed in some instances as "public interest", of which the High Court was very doubtful in *Oschlack v Richmond River Council* (1998) 193 CLR 72, at 75 [3]; 84 [30]; 98-99 [71]; and 124 [136]) marches in step with judicial assumptions without expert evidence as to the course of history: see Churches "Courts and Parliament" in *Appealing to the Future: Michael Kirby and his Legacy* 2009, Thomson Reuters at p280, referring to Kirby J in *Yougarla v WA* (2001) 207 CLR 344 at 389 [130].

- (6) So, when the words used by Parliament are interpreted by the court according to commonly understood rules of interpretation, a court is entitled to make the normative statement that it has interpreted them in accordance with legislative intention. **The rules of interpretation allow for consideration of policy which may be determined in a variety of ways beginning with the text and context of the statute itself.** The text may include statements of object or purpose. The **extrinsic materials may illuminate the purpose and therefore the policy of the Act.**

When the court has regard to purpose and to extrinsic materials, it is not engaged in some creative usurpation of the legislative function. It is doing what the legislature itself has commanded in the **Acts Interpretation Act 1901** (Cth) . This is so even though purpose is to a degree constructed by the court. But if generally accepted rules are used there can be no doubt about the democratic legitimacy of that approach.

These are powerfully expressed arguments for judicial references to “policy” in statutory interpretation. The reference in (6) above to the **Acts Interpretation Act 1901** (Cth) is very important, see s 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.

The **Acts Interpretation Act 1915** (SA) s22 is not identical, but also instructs a place for “purpose” in the process of construction.

The High Court has given express imprimatur to the “purpose” approach in ***Project Blue Sky Inc v Australian Broadcasting Authority*** (1998) 194 CLR 355 at 381 [69] per McHugh, Gummow, Kirby and Hayne JJ, saying:

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.

Note also in (6) above the reference to the use of “extrinsic materials”. The **Acts Interpretation Act 1901** (Cth) provides at s15AB:

- (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
  - (b) to determine the meaning of the provision when:
    - (i) the provision is ambiguous or obscure; or
    - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

- (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:
- (a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;
  - (b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;
  - (c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;
  - (d) any treaty or other international agreement that is referred to in the Act;
  - (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;
  - (f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;
  - (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and
  - (h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.
- (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:
- (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
  - (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

South Australia's **Acts Interpretation Act 1915** contains no such reference to the use of extrinsic materials (and the common law was formerly opposed to their use) but in ***K-Generation Pty Ltd v Liquor Licensing Court*** (2009) 237 CLR 501 French CJ (as he had become post "**Dolores Umbridge**") was clear that South Australian statutes might be interpreted by reference to Hansard and like materials: 237 CLR at 521 [51] ff.

It is useful at this point to step back from the "**Dolores Umbridge**" analysis and look at what Gummow J said in a Full Federal Court decision, ***Brennan v Comcare*** (1994) 50 FCR 555 at 574-575, particularly as to the complete distinction between common law and statutes in the "interpretive" process, and as to the importance of text in statutory construction.

If **Ogden** [[1970] AC 113] has any significance for this appeal, it is in the statement of their Lordships (at 127):

It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself.

Those remarks apply a fortiori where what is involved is the translation of remarks construing one statute to the construction of another. They also point to a significant difference in the tasks of the courts in applying the common law and in construing statutes.

The judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law. In the latter class of case, the task is to interpret the legal concepts which find expression in the various language used in the relevant judgments. The frequently repeated caution is against construing the terms of those judgments as if they were the words of a statute. The concern is not with the ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts to which expression was sought to be given.

The distinction is usefully expressed in the following passage from R A Posner's work *The Problems of Jurisprudence* (1990), p 248:

Translation may be imperfect and alter the meaning of the original doctrine; nevertheless many common law doctrines have a stable meaning, though expressed in a variety of different ways. We are not afraid that we would lose the meaning of negligence if we put it in different words from those used by Learned Hand, or William Prosser, or some other authoritative expositor of the concept.

Statutory law differs in that the statutory text — the starting point for decision, and in that respect (but only that respect) corresponding to judicial opinions in common law decision making — is in some important sense not to be revised by the judges, not to be put into their own words. They cannot treat the statute as a stab at formulating a concept. They have first to extract the concept from the statute — that is, interpret the statute. (There is a sense in which common law judges "interpret" common law, but it is the sense in which "interpretation" means "understanding".)

The starting point in statutory construction was enunciated with clarity by Hayne, Crennan, Kiefel and Bell JJ said in ***Spencer v Commonwealth of Australia*** (2010) 241 CLR 118 at 138 [50]:

Consideration of the operation and application of s 31A of the **Federal Court Act** must [footnote] begin from consideration of its text. (emphasis added)

The footnote reads as follows:

See, for example, **Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)** (2001) 207 CLR 72 at 77 [9], 89 [46]; **The Commonwealth v Yarmirr** (2001) 208 CLR 1 at 37-39 [11]- [15], 111-112 [249]; **Stevens v Kabushiki Kaisha Sony Computer Entertainment** (2005) 224 CLR 193 at 206 [30], 240-241 [167]-[168]; **Weiss v The Queen** (2005) 224 CLR 300 at 312-313 [31]; **Stingel v Clark** (2006) 226 CLR 442 at 458 [26]; **AK v Western Australia**; (2008) 232 CLR 438 at 455 [52]- [53]; **Gassy v The Queen** (2008) 236 CLR 293 at 300 [16]; **Cesan v The Queen** (2008) 236 CLR 358 at 394 [126]; **CTM v The Queen** (2008) 236 CLR 440 at 446 [5].

Note other recent High Court decisions referring to the “primacy” of the statutory text: **Foots v Southern Cross Mine Management Pty Ltd** (2007) 234 CLR 52 at 75 [62] per Gleeson CJ, Gummow, Hayne and Crennan JJ, (but see 83 [96] and 86 [102] – 87 [105] per Kirby J on the need to go wider than the text) and **International Air Transport Association v Ansett Australia Holdings Ltd** (2008) 234 CLR 151 at 182 [78] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

The ascertaining of meaning, let alone what “policy” is involved, may be a little more contentious than might be thought, given that extrinsic materials have come into play in Australia only in the last quarter of a century (with the arrival of s15AB, above), and the point of their utility is assumed to be to help, rather than cloud elucidation. But as in love, the path may be more problematic than at first seemed or was assumed.

### The use of extrinsic materials

The High Court dealt with an attempt early on in the life of s15AB to utilise Hansard to expand the meaning of words in a statute: **Re Bolton; ex p Beane** (1987) 162 CLR 514. Mr Beane was an American serviceman who flew from service in Vietnam to Australia during the Vietnam War. He determined not to go back to his unit, but stayed under cover in Australia. Two decades later he was tracked down, and the Commonwealth attempted to hand him over to US military authorities pursuant to the **Defence (Visiting Forces) Act 1963** (Cth). That Act provided for Australia to hand back foreign servicemen who absented themselves from foreign military units **in Australia**. Mr Beane had not absented himself from his unit in Australia, but rather, in Vietnam. The Commonwealth argued by reference to the Minister’s Second Reading Speech, which contained references to the forced return of foreign servicemen who came to Australia after absenting themselves elsewhere. But the text of the Act was quite clear, and it did not cover Mr Beane’s facts, and he stayed.

Contrariwise, in **K-Generation** (above) French CJ was confronted with words of the following clarity in the **Liquor Licensing Act 1997** (SA), s28A (as it then was):

- (1) “No information provided by the Commissioner of Police to the [Liquor] Commissioner may be disclosed to any person (except the Minister, a court or a person to whom the Commissioner of Police authorises its disclosure) if the information is classified by the Commissioner of Police as criminal intelligence.”
- (5) “In any proceedings under this Act, the [Liquor] Commissioner, the Court or the Supreme Court —
  - (a) must, on the application of the Commissioner of Police, take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives

...

His Honour set out the Hansard record of the Attorney General's speech introducing the "criminal intelligence" provisions (at 237 CLR 522 [54] ff). But at 237 CLR 525 [71] French CJ said:

The Attorney-General's assertion in the Second Reading Speech that the Court "must hear the information in a court closed to all, including the applicant ... and that person's representatives" was a statement of his intention. It is not a substitute for the actual words of s 28A(5). Nor does it require those words to be interpreted so as to mandate exclusion of legal representatives of an applicant from a hearing in which evidence is received and argument entertained about criminal intelligence.

Then at 237 CLR 526 [73] his Honour was able to conclude:

The better view, which is permitted by the language of the statute, is that the Court is authorised but not required to exclude legal representatives from that part of the proceedings in which it receives evidence or hears argument about the classified information.

**K-Generation** illustrates how far afield one may reason from *Mr Beane's case*, where the statutory text was relied on to restrain the attempt to enlarge the statutory power to match the "policy" intended by the Government, but plainly not addressed in the statutory words. In **K-Generation** the Hansard record of Governmental intention seems to match exactly the "intention" that may be gleaned from the statute (in Bennion's terms: see the "Dolores Umbridge" material (3) and (4) above), an intention that the affected party **and** the party's legal representatives not be allowed access to "criminal intelligence". But with constitutional invalidity looming if that were the case (Chapter III courts would then be ordered to dispense with natural justice), s28A was interpreted as allowing legal representatives to be privy to the secret materials.

The Court appeared to gloss the point of the concept in s28A(5) of "including steps", and the case law on the use of the concept in statutes of "including" is clearly against the decision in **K-Generation**: see Spigelman CJ in *Victims Compensation Fund v Brown* (2002) 54 NSWLR 668 at 674 [30] (dissenting, later upheld by the High Court without reference to this point: see 201 ALR 260). Spigelman CJ said:

"... even though the primary meaning of 'include' is expansive, where the words that follow would ordinarily fall within the meaning of the general word, the fact that they are expressed will often indicate an exhaustive or exclusive use of 'includes'". (authorities were cited)

The limitations on the utility of reliance on extrinsic materials, in particular Hansard, are delightfully set out by Jeffrey Barnes in his essay "Statutory Interpretation" in Appealing to the Future: Michael Kirby and his Legacy, 2009 Thomson Reuters at p738ff. Barnes used *Palgo Holdings v Gowans* (2005) 221 CLR 249 as his example. Kirby J, dissenting, made large inference of particular purpose in Pawnbroker legislation, drawn from general purposes referred to in the Second Reading Speech. The majority refused to draw those specific inferences. Both sides set out their deductions of what Hansard carried by way of information. Barnes asked mischievously (at p739): "How can it be that great minds would differ?" Barnes noted that the NSW Parliament amended the legislation in the same calendar year as the High Court decision, to give effect to Kirby J's inference as to meaning: the inference is that Kirby J "read the Parliamentary mind", but of course, that is difficult to maintain, as the head Act was passed in 1996. One could argue that Kirby J read the mood, if not the mind, of the NSW Parliament in 2005.

## Objectives, intentions or policy not to overbear the search for statutory meaning

The High Court decision in *Victims Compensation Fund v Brown* (2003) 201 ALR 260 is a salutary lesson in not letting objectives determine construction, even when the objectives are apparent from the general purpose of the statute itself: see “**Dolores Umbridge**” (6) above. The **Victims Support and Rehabilitation Act 1996** (NSW) provided at Clause 5 of Sch 1 for compensation to be paid under (inter alia) the following circumstances:

The following applies to the compensable injury of shock:

- (a) Compensation is payable only if the symptoms **and** disability persist for more than 6 weeks. (emphasis added)

Mr Brown and his partner had been the subject of home invasion, and in Mr Brown’s case, brutal physical attack, but at the time they made their claim on the Fund, they both displayed disability, but no symptoms.

The legislation had an apparent or assumed (by the NSW Court of Appeal majority) ameliorative objective. Of this, Heydon J wrote for a unanimous High Court (including Kirby J), saying (at 201 ALR 269 [33])

To begin consideration of issues of construction by positing that a “liberal”, “broad”, or “narrow” construction will be given tends to obscure the essential question, that of determining the meaning the relevant words used require. Although the purpose of the Act is beneficial, it does not follow that recovery is contemplated for every act of violence or every consequence that could be described as an injury. The numerous injuries set out in the table to Sch 1 (which extends over 12 pages) are identified with considerable precision. The clauses in Sch 1 which precede the table, too, are drafted with some attempt at precision. The legislation confers benefits, and no doubt it should not be construed restrictively, but in dealing with specific limited words like those of cl 5, it is not open to apply much liberality of construction. It is difficult to state the legislative purpose except at such extreme levels of generality that it is not useful in construing particular parts of the legislative language. As Spigelman CJ said: “The issue before the Court is the determination of the circumstances in which compensation is payable.” The legislation has endeavoured to define these circumstances in precise language which does not permit universal recovery; and hence “[t]he Court is not required to give the most expansive possible interpretation of such circumstances”.

Another recent example of a court of final appeal having to dismantle a penultimate appellate court’s fantasy about the role of supposed “legislative intention” ie the imagining of Governmental policy, may be seen in the case of *R v Bentham* [2004] 2 All ER 549, where Kennedy LJ for a unanimous Court of Appeal had to deal with the concept of “possession” of a firearm. Section 17(2) of the **Firearms Act 1968** (UK) relevantly provided:

If a person at the time of his committing ... an offence specified in Schedule 1 to this Act [robbery is there specified], **has in his possession** a firearm or imitation firearm, he shall be guilty of an offence ... (emphasis added)

Section 57(4) defined “imitation firearm” as: “any thing which has the appearance of a firearm ...”

Referring to the “possession” section, 17(2), Kennedy LJ said, at 553 [24]:

That section, as we read it, is **clearly designed to protect victims** presented with what they reasonably believed to be a firearm or an imitation firearm. We agree ... that one has to ... adopt, to some extent, a purposive approach to the interpretation of the 1968 Act. Many of its sections, as ... pointed out, ss 16A, 17(1) and (2), 18(1) and 20, all deal with imitation firearms and **the protection which the Act seeks to afford is protection to the public who are being put in fear.** (emphasis added)

Lord Bingham gave this reasoning short shrift for a unanimous House of Lords: *Bentham* [2005] 1 WLR 1057, which destroyed the Court of Appeal’s reasoning in a manner that should deter all common law judges from the easy mounting of political hobby horses, no matter how pressing and timely they may appear.

Lord Bingham said (at 1061, [8], [9] and [10]):

8 In my respectful opinion, the conclusion reached by the lower courts is insupportable. **One cannot possess something which is not separate and distinct from oneself.** An unsevered hand or finger is part of oneself. Therefore, one cannot possess it. Resort to metaphor is impermissible because metaphor is a literary device which draftsmen of criminal statutes do not employ. What is possessed must under the definition be a thing. A person's hand or fingers are not a thing. If they were regarded as property for purposes of section 143 of the 2000 Act the court could, theoretically, make an order depriving the offender of his rights to them and they could be taken into the possession of the police. *R v Morris (Harold)* (1984) 79 Cr App R 104, cited by the Court of Appeal, does not assist on this point, since the defendant in that case had with him, with intent to commit robbery, a separate object, namely two metal pipes bound together, which had the appearance of a double-barrelled shotgun. The criticisms of the Court of Appeal's decision made by Richardson (Criminal Law Week Issue 45, 15 December 2003, para 6 and "Comment") and Professor Spencer ("Is that a gun in your pocket or are you purposively constructive?" [2004] CLJ 543) are in my opinion unanswerable.

9 Parliament might have created an offence of falsely pretending to have a firearm (although not an imitation firearm). But it has not done so. And the appellant was not accused of falsely pretending to have a firearm but of possessing an imitation firearm. The offence would have been complete (if at all) even if, assuming there to have been a robbery, the alleged existence of an imitation firearm had not been disclosed to A. But both the lower courts attached importance to the impression made on the victim, a matter irrelevant to possession. It was, of course, very highly reprehensible conduct by the appellant to pretend that he had a gun, understandably frightening the victim, but it was conduct which the judge could take fully into account when passing sentence for the robbery, and it appears from her sentencing remarks that she intended to do so.

10 **Rules of statutory construction have a valuable role when the meaning of a statutory provision is doubtful, but none where, as here, the meaning is plain. Purposive construction cannot be relied on to create an offence which Parliament has not created.** Nor should the House adopt an untenable construction of the subsection simply because courts in other jurisdictions are shown to have adopted such a construction of rather similar provisions. (emphasis added)

## **Intention and policy not identical: the legislature provides measures for the implementation of policy**

The message is simple (*pace K-Generation*): if the text is clear, stay strictly within its embrace, and do not wander. This message was delightfully set out in a case no longer cited, despite its relative youth. In *Tullamore Bowling & Citizens Club Ltd v Lander* [1984] 2 NSWLR 32, Mahoney JA (as he then was) confronted an argument that the then new **Anti-Discrimination Act 1977** (NSW) should be read liberally and extended to meet a litigant's anti-discrimination needs, in accordance with the policy, but alas, not the text of the legislation. His Honour had this to say (at 52-53):

Miss Simpson [later Simpson J] submitted, in effect, that policy should play a significant part in the interpretation of the present Act and, as I understand the thrust of her argument, that if the terms of the Act according to their ordinary meaning do not apply in the present case, the court should see the policy of the Act as warranting a different interpretation of them.

I agree that, in this area of the law, policy has a particular significance. The policy which informs this Act, viz, that there shall be no discrimination on the ground of sex, should, in my opinion, stand high in the order of social priorities and will generally be seen as such. But to say this is not to accept what Miss Simpson's argument suggests. For it is necessary to have in mind the role which policy can and may play in the construction of a statute.

It has become, if not common, at least fashionable to assert that courts cannot, or do not, give effect to policy in the construction of legislation. This, of course, is wrong. The courts have, in the interpretation of statutory materials, always sought to determine and give effect to the policy of the legislation before them. Four hundred years ago the courts saw the policy of **31 H 8 c 13** [the Act for the Dissolution of Monasteries] to be to further dissolution of the religious foundations and the confiscation of their lands and gave effect to that policy by holding a copyhold to be an estate for life within the terms of the statute: *Heydon's Case* (1584) 3 Co Rep 7a at 7b, 8a76 ER 637 at 638, 639. The rules then formulated have been applied ever since: see generally *Halsbury's Laws of England*, 4th ed, vol 44, pars 855 et seq at 522 et seq.

But in considering the effect to be given to policy in this regard, certain things must be borne in mind. First, there is a difference between policy and intention. The legislature may espouse a particular policy, eg, that there be no discrimination on the ground of sex. And that policy may move it to enact legislation. But that which it intends the legislation to do will not necessarily be the full implementation of that policy. Except in special cases: cf *Marks v Commonwealth* (1964) 111 CLR 549; that which the legislature enacts by its legislation is not policies but measures which carry policies into effect, to the extent to which, in the particular instance, it is intended that they be effected: see *R v Bhagwan* [1972] AC 60 at 82; *R v Home Secretary; Ex parte Mahmood* [1981] QB 58 at 61, 62. And therefore, for the most part, the courts are concerned, not with policy as such but with intention of the kind to which I have referred.

Second, that to which effect is to be given, as policy or intention, must be that of the legislature and not that of the individual judge or a fortiori sections of the community interested in furtherance of particular forms or aspects of that policy. It is the constitutional assumption that legislation embodies the will of the community. The function of the judge is to give effect to that will, whatever view he may take of the values which it embodies.

I do not mean by this that there is no room for a judge's view on policy. In some cases the legislature, by the form of the legislation or the words it uses, invites the judge to fill that form with content. And I appreciate that declarations of human rights sometimes take that form. But unless the legislation be thus, or unless there be overriding issues of established public policy, the judge's views of policy do not prevail over the intention of the legislature as expressed by the words that it has used.

This is as good as an analysis of the subject as I know, but it has no place in modern texts, because NSW completely overhauled its **Interpretation Act** in 1987, and the now legislation makes the usual call (at s33) for recognition of legislative purpose: see the reference to the Commonwealth s15AA above. The failure to cite **Tullamore** reflects a sad assumption on the part of the profession that the new statutory reference to “policy” has displaced Mahoney JA’s caution. **Brown’s case** (above, and see Spigelman’s dissent, agreed in by the High Court) illustrates that caution with respect to “policy” is in fact appropriate, and that **Tullamore** should continue to be a reference point.

### **How can Parliamentary Counsel provide clear parameters to judicial discretion in searching for “policy” in a statute?**

The problem is, I think, one of varying judicial imaginations. Barnes’ essay, “Statutory Interpretation”, referred to above, is very important in its subject area generally (it will, of course, die, hidden as it is in a collection of essays, the sales of which have been minimal), and in particular on this point. Under the heading: “A Perception that Statutory Interpretation by Judges is Dominated by the Private Values of the Judge” (p745), Barnes teased out both legal scholarship and social commentary (Janet Albrechtsen) on this subject. He cited Albrechtsen comparing Kirby J with Kiefel J (p746 fn 169): the latter “looks at the words of a statute for guidance on the law rather than imposing her personal, political views of justice. In other words, she is no Michael Kirby.”

This was, of course, an outrageous slur on Kirby J, but as **Palgo Holdings** illustrated, his was the larger “imagination” as to what the legislature meant. It is also noteworthy that Barnes (at 746) quoted D Robinson in a 1998 study of the jurisprudence of the House of Lords, saying:

In many cases ... [the Law Lords] work ‘bottom up’, from a basic instinct that the plaintiff or the defendant ought to win an argument that makes him a winner.

The decision in **Bentham** should put paid to this charge, at least against the top deck of the British judiciary (although perhaps not against the next echelon in the English Court of Appeal).

Bringing the analysis partially, if not full circle is the argument noted by Barnes (at p747) from Professor John Braithwaite that even if judges do interpret statutes “bottom up” by intuitions, “those intuitions are legal ones”, “grounded in professional training more than personal values.”

To return to the main theme of this paper, Judges are to eschew calculations of “policy” in the common law, based in “community standards”, but to some extent they may intuit the meaning of a statute based on their insight into its “policy”.

Parliamentary Counsel are left with few restraints on the possibilities inherent in sometimes powerful judicial imaginations, those imaginations fired by the words of statutory text, read in context (the preceding state of the law may be a fertile field of judicial investigation, the Preamble to a statute could be a minefield, and **K-Generation** and **Palgo Holdings** (see above) illustrate the boundless possibilities of reading Hansard).

## An Example of Principle of Legality reasoning as background Context to interpretation

I note that Parliamentary Counsel, other than in Victoria and the ACT, may now assume that their working lives will not be intruded upon by a Bill of Rights. As the Commonwealth Attorney General signalled well before the final public announcement of a veto on such a Bill at Commonwealth level, we do not need a Bill, as we have the Principle of Legality (see speech of the Hon. R McClelland AG to the Castan Centre of Human Rights, 17 July 2009)<sup>4</sup>. That Principle demands that recognised “rights” under the common law (no one seems to have a definitive list of the “rights”) can only be removed by legislation employing express words, and that inferences will not do.

In line with that approach is the presumption that statutes do not bind the Crown (given statutory force in Tasmania and Queensland, but despatched as to Acts passed after 20 June 1990 in South Australia: **Acts Interpretation Act 1915** s20). On that date the High Court handed down the decision in ***Bropho v WA*** (1990) 171 CLR 1, which watered down the presumption of Crown immunity from the operation of statutes. To my mind the critical phrase in the joint judgment (Mason CJ, Deane, Dawson Toohey, Gaudron and McHugh JJ, Brennan J concurring in the result) was the following (at 21-22):

... once it is accepted that a legislative intention to bind the Crown may be disclosed notwithstanding that it could not be said that that intention was "manifest from the very terms" of the statute or that the purpose of the statute would otherwise be "wholly frustrated", fundamental principle precludes confinement of the general words which the legislature has used in a way which will defeat that intention. **Such a legislative intent must, of course, be found in the provisions of the statute - including its subject matter and disclosed purpose and policy** - when construed in a context which includes permissible extrinsic aids. If such a legislative intent does appear from the provisions of a statute when so construed, it must necessarily prevail over any judge-made rule of statutory construction including the rule relating to statutes binding the Crown. (Emphasis added)

My point is that the presumption of Crown immunity may be resisted by turning to the policy of the Act under consideration. I think that this involves a variation from mere concern as to “meaning” of legislation in the light of statutory policy: this involves understanding policy in the wider context of determining the ambit of statutory application. Did Parliament intend the Act to apply generally ie to the Crown as well as the community generally?

I now place my understanding of the utility of ***Bropho***, and in particular the phrase extracted above, in the context of a critical assumption or principal underlying the law: equality of application. I see that principal as generating a “policy” requiring protection every bit as much as the common law “rights” attract the Principle of Legality. In a Bill of Rights-less Australia, the presumption of Crown immunity from the operation of statutes cannot be sustained. It must now require prescriptive words, or very powerful inference (military security?) to exclude the presumption of equality of application of legislation. In other words, the Principle of Legality, including protection for the Principle of Equality of application of the law, is a “policy” available to Judges, quite external to the text of any statute they may be construing.

Needless to say, I am not describing an accepted present, and certainly not one accepted by the Australian judiciary. In the more than two decades since ***Bropho***, I have only counted a handful of whole hearted acceptances of the spirit of that decision, but many more artful revisitings of the pre-***Bropho*** “rule” of Crown immunity. An electronic search for references to “disclosed purpose and policy” in the context of the Crown reveals four superior court decisions, other than those in or heading to the High Court. Of those four,

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<sup>4</sup> <http://www.law.monash.edu.au/castancentre/events/2009/conf-09-mcclelland-paper.pdf>

one, *In re Northbuild Constructions Pty Ltd* [1998] QSC 196 (Shepherdson J) was overturned (by majority: Davies JA and Wilson J: see [2000] 2 QdR 600), *Bropho* being accorded a footnote in the Court of Appeal (see 609, fn9) which did not concern the matter of the use of policy. Davies JA had been counsel in *Bropho*: I merely see this approach as in line with most of the Australian judiciary's protective attitude to a niche of common law eccentricity.

### The policy of legislation providing the ambit of discretionary power

A different problem arises with respect to the exercise of power, particularly discretionary power, provided for under legislation. A body of law has grown in less than a half century requiring such power to be exercised in accordance with statutory policy, but in the light of the exploration above, caution will need to be exercised in reaching any conclusions as to what legislative policy is. It would seem safest if the cautions expressed above were exercised in construing the statute, before any assumptions were made as to what the Government wanted by way of policy. Once the process of construction is complete (what does the Act mean?), the second step can be embarked upon of determining whether discretionary power has been exercised in accordance with the policy that can be ascertained behind the legislation. The construing as a first step is necessary to ensure that imaginings of policy are not driving the judicial exercise. Policy will be found in the "mischief" cured, but after we know what the Act means in its relevant sections.

Thus, in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, (borrowing from the headnote) the **Agricultural Marketing Act 1958**, contained (inter alia) provisions relating to a milk marketing scheme. By section 19:

- (3) A committee of investigation shall - ... (b ) be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on ... any complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers' committee. ... (6) If a committee of investigation report to the Minister that any provision of a scheme or any act or omission of a board administering a scheme is contrary to the interests of consumers of the regulated products, or is contrary to the interests of any persons affected by the scheme and is not in the public interest, the Minister, if he thinks fit to do so after considering the report - (a ) may by order make such amendments in the scheme as he considers necessary or expedient for the purpose of rectifying the matter; (b ) may by order revoke the scheme; (c ) in the event of the matter being one which it is within the power of the board to rectify, may by order direct the board to take such steps to rectify the matter as may be specified in the order. ...

Under the scheme, producers had to sell their milk to the Milk Marketing Board, which fixed the different prices paid for it in each of the eleven regions into which England and Wales were divided. The differentials reflected the varying costs of transporting the milk from the producers to the consumers, but they had been fixed several years ago, since when transport costs had altered. The South-Eastern Region producers contended that the differential between it and the Far-Western Region should be altered in a way which would incidentally have affected other regions. Since the constitution of the board, which consisted largely of members elected by the individual regions, made it impossible for the South-Eastern producers to obtain a majority for their proposals, they asked the Minister of Agriculture, Fisheries and Food to appoint a committee of investigation and when he refused applied to the court for an order of mandamus.

It was held by the House of Lords that the order should be made, directing the Minister to consider the complaint according to law. In summary, **Parliament conferred a discretion on the Minister so that it could be used to promote the policy and objects of the Act which were to be determined by the construction of the Act**, this was a matter of law for the court. Though there might be reasons which would justify the Minister in refusing to refer a complaint, his discretion was not unlimited and, **if it appeared that the effect of his refusal to appoint a committee of investigation was to frustrate the policy of the Act, the court was entitled to interfere.**

Lord Reid said at 1030:

It is implicit in the argument for the Minister that there are only two possible interpretations of this provision—either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. **Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court.** In a matter of this kind it is not possible to draw a hard and fast line, but **if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court.** So it is necessary first to construe the Act. (emphasis added)

The Australian High Court's riposte to *Padfield* may be seen in *R v Toohey ex p Northern Land Council* (1981) 151 CLR 170, which involved a declaration by the Executive Government of the Northern Territory under the **Planning Act 1979 (NT)** that the boundaries of Darwin were large enough to allow for a city of some millions of people, a declaration intended to defeat the application of the **Aboriginal land Rights (Northern territory) Act 1976 (Cth)**. Of this ruse, Gibbs CJ said (at 187):

In the present case, it is not open to doubt that the powers conferred by s. 165 of the **Planning Act**, read in conjunction with the definition of "town" in s. 4(1), are to be exercised only for planning purposes, using that expression widely to include such matters as subdivision and development. It is incontestable that the power is not intended by the Act to be conferred for the purpose of defeating the traditional land claims of Aboriginals. If it was used for that purpose the exercise of the power was invalid, unless the Administrator enjoys some privilege that enables him to transcend and disregard the limitations which the statute on its proper construction imposes. It would be surprising in principle if this were so. It seems fundamental to the rule of law that the Crown has no more power than any subordinate official to enlarge by its own act the scope of a power that has been conferred on it by the Parliament.

And at 192-193 his Honour said:

[A] reason suggested [for curial inaction] is that the courts should not substitute their views for those of the executive on matters of policy. That is of course true, but it does not mean that the courts cannot ensure that a statutory power is exercised only for the purpose for which it is granted.

Stephen J said at 215:

The recent decision of the Appellate Division of the Alberta Supreme Court in *Re Heppner* [(1977) 80 DLR (3d) 122] provides a particularly apt analogy to the present case. It concerned an Order in Council of the Governor under environmental legislation which was held invalid because although on its face within power it was proved to have been made for a purpose alien to the

legislation; see especially at pp. 117- 120. See also *Re Doctors' Hospital and Minister of Health* (1976) 12 OR (2d) 164, a further instance of a decision of a Lieutenant-Governor in Council, on its face within power, being held to have been vitiated because the discretionary power was exercised otherwise than "in pursuance of the objects and policy of the Act" (1976) 12 OR (2d), at p 176.

Things had really moved on from the High Court's acceptance three decades earlier of decisions excluding Italian originated farmers from irrigation areas on the grounds of their unsuitability as former enemy combatants and being pronounced as poor irrigation farmers, grounds which had no statutory basis.

*Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 involved the **Irrigation Act 1912-1944** (NSW) which constituted the Water Conservation and Irrigation Commission, gave it control of irrigation areas and empowered it to dispose of lands in irrigation areas under the law relating to Crown lands. The **Crown Lands Consolidation Act 1913-1944** (NSW) provided, by s. 145A, that an irrigation-farm lease should not be transferred without the consent of the Commission and that the granting or refusing of consent "shall be entirely in the discretion of the Commission"; and, by s. 241, that aliens might acquire leases in irrigation areas, provided they became naturalized within a certain period.

It was held that it was not beyond the Commission's discretion to refuse its consent to a transfer of an irrigation-farm lease on the ground that the proposed transferee, though naturalized, was of enemy origin. One may note regarding the implicit reasoning of Dixon J (below) that the nature or objects of statutory matter only became limiting factors if they were expressed in an exclusive sense. If they were expressed openly, then discretionary decision making beyond such objectives did not offend principle. *Toohey* is plainly a necessary and important advance in principle: policy behind a statute is a limiting factor in the application of power, not a springboard to unfettered discretion.

In *Browning* Latham CJ said (at 497):

The suitability of applicants for admission to such a community is a matter which the Commission, in administering an irrigation area, may, in my opinion, quite properly take into account. The introduction of foreigners or an increase in the number of foreigners, and particularly of foreigners who belong or have belonged to an enemy country, may reasonably be thought to be unwise in the interests of the smooth and efficient development of the area. It is not for this Court to determine whether or not such an opinion is in fact well founded. But such matters should not, in my opinion, be held to be irrelevant to the discharge by the Commission of its functions in controlling and developing an irrigation settlement.

Dixon J said (at 505-506):

... though the discretion is neither arbitrary nor completely unlimited, it is certainly undefined. I have before remarked on the impossibility, when an administrative discretion is undefined, of a court's doing more than saying that this or that consideration is extraneous to the power (*Swan Hill Corporation v. Bradbury*). But there must be some warrant in the provisions, the nature or the subject matter of the statute before so much can be said of a particular consideration that has been acted upon. What warrant have we in point of law for saying that the considerations governing the Commission's refusal of consent to the transfer to Carbone can be material to no purpose falling within the scope and object of the Commission's discretion?

The Commission is responsible for the successful development of irrigation areas as well as for superintending and controlling them. The width and variety of its powers are enough to show that matters of policy are by no means withheld from the Commission. The growth and character and components of the community by which an irrigation area is worked is not a matter altogether foreign to the Commission's responsibilities. One of the very reasons why transfer of irrigation holdings is not permitted, except by the consent of the Commission, is to enable it to decide the suitability and desirability of the individual proposed and whether it is or is not advantageous to have him. The grounds of suitability, desirability and advantage are matters for the Commission's judgment. If the Commission considers divisions arising from race or from hostile affiliation undesirable, what is there in the statute to show that it is a consideration wholly outside the Commission's province? If it sees advantage in having returned soldiers, it is not easy to see any legal ground why the Commission should not take that into account. There may be much reason to doubt the validity of the reasoning by which the opinions of the Commission have been reached. But that is not for us. The honesty of the Commission's conclusions is not in question and it does not appear that, in giving effect to them, the Commission has been actuated by anything but what appears to it to be the welfare of the irrigation area and of the Commission's administration of the area.

## Conclusion

Determine the meaning of an Act by primary reference to the text: do not set out to find meaning on an assumption as to what the Legislature, or the Executive wanted from the Act. The process, in the light of modern technique, relying on "context", and **Interpretation Act** references to "purpose" and "intention", is plainly antipathetic to literalism as a simplistic solution. But wrestling with the problem<sup>5</sup> in the light of the primacy of text, and not policy, is the key. Kirby J expressed disenchantment with majority judgments that in his view re-introduced literalism into statutory interpretation: see eg **Minister Administering the Crown Lands Act v NSW Aboriginal Land Council** (2008) 237 CLR 285 at 289 [7]; **Palgo Holdings Pty Ltd v Gowans** (2005) 221 CLR 249 at 264 [35], [36]; and **Foots** above. Other examples of Kirby J's concern as to a return to "literalism" are set out in Barnes' essay "Statutory Interpretation" at p723 fn 10. But to remind you that this is not a science with easily predictable results, note that Kirby J was one of the four Justices who agreed with Heydon J's demolition of "objective" driven interpretation in **Brown** (above). That is to say, he concurred in a text based result.

An Act is to be construed without an undue reliance on (and God forbid, a predetermination as to) "policy", but nonetheless, the construction to be informed by knowledge of that "policy". But after that process of interpretation has been performed, it may be that the "policy" of the legislation needs to be grappled with again with a view to determining, for example, the ambit of application of the Act (does it bind the Crown, which, in my view, it should be presumed to do). Or, have discretionary powers under the Act been performed in accordance with the "policy" of the legislation.

There is no escaping the presence of "policy" in statutory *geist*. Given its troubled utility in interpretation, and its place in statutory application, one can only ask for clarity in making "policy" known through the medium of statutes. I defer at this point to the alchemy of modern Parliamentary Counsel.

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<sup>5</sup> I am indebted to the essay by the Hon JJ Spigelman "The Intolerable Wrestle: Developments in Statutory Interpretation" now published at (2010) 84 ALJ 822. It was Lord Hoffmann who first wrote on the wrestling metaphor: "The Intolerable Wrestle with Words and Meanings" (1997) 114 South African Law Journal 656.