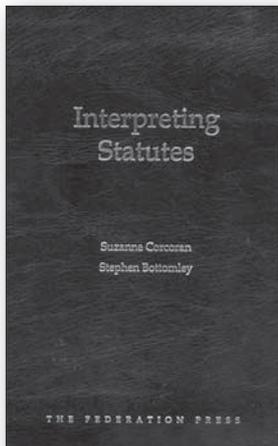


Interpreting Statutes

Suzanne Corcoran and Stephen Bottomley (Editors) | The Federation Press, 2005



No lawyer would gainsay Spigelman CJ's now oft-quoted words in his August 2001 extra-curial address that:

The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of law has escaped statutory modification.

These days, every competent legal practitioner needs to have ready access to helpful texts on legislative interpretation, such as Pearce and Geddes' influential work, *Statutory Interpretation in Australia* (now in its 6th edition), and the equally significant work of Pearce and Argument, *Delegated Legislation in Australia* (3rd edition).

But those texts are of a fundamentally different character to the collection of essays which make up the book being reviewed. This collection does not purport to provide a black and white digest of legal principles and canons of construction or, indeed, merely focus on judicial interpretation of primary and secondary legislation. Rather, the value of this collection of essays lies in the fact that they seek to grapple with more fundamental questions arising from the task of interpretation. Those issues include the proper role of the judiciary in interpreting both statutory and constitutional instruments; the symbiotic relationship and interaction between legislation and the common law; the need for legislation to be understood not only by judges and

legal practitioners but also by those whose conduct and affairs are affected by it; and the practical need not to lose sight of the fact that, in most areas of human endeavour, the 'non-statutory picture' has to be taken into account. Thus recognition must be given to the role and function of non-judicial interpreters (such as administrative tribunals and regulators) in interpreting and enforcing not only primary legislation, but also delegated legislation, policy statements, practice notes, guidelines, codes and other unconventional law making instruments.

The book is the product of a project funded by The Australian National University. Many, but not all of the contributors, are associated with the ANU. The book will do no harm to that University's pre-eminent reputation in the field of public law.

The book is divided into two parts. Part One is devoted to 'Fundamental Themes'. In two essays, Professor Corcoran describes various competing legal theories of statutory interpretation in various international jurisdictions, including Australia. They include the literal approach, textualist theory, purposive interpretation and various dynamic theories.

Professor Leslie Zines contributes an essay on constitutional interpretation which is as succinct and illuminating as his many admirers have come to expect. His contribution is notable for its clarity, insight and erudition. The same could be said for the chapter on 'Statutes and the Common Law' written by one of Professor Zines' disciples and erstwhile colleagues, Justice Paul Finn.

Part Two of the collection largely focuses on discrete areas of statutory regulation. Those specific areas of law include human rights and discrimination law, native title, corporate law, employment law, criminal law and health. It should not be thought, however, that those specialist chapters will be appreciated only by specialists in the relevant fields. For example, I found Professor Bottomley's essay entitled 'A Framework for Understanding the Interpretation of Corporate Law in Australia' particularly stimulating and of much wider relevance. He makes the point that

any proper understanding of interpretive practices in the corporate law area needs to confront the growing complex web of statutory and non-statutory rules, but also the fact that the key interpreters of corporations law are not always judges, but also other regulatory or disciplinary bodies, such as the Takeovers Panel, the Companies Auditors and Liquidators Disciplinary Board, the Australian Securities and Investment Commission, the Australian Stock Exchange and standards-setting authorities such as the Australian Accounting Standards Board.

His analysis and discussion of these matters in a corporations law context is valuable not only for specialists in that field, but for practitioners in other fields which are similarly regulated and structured. For example, much of his analysis and commentary could apply equally to the area of compensation for motor vehicle injuries and death in New South Wales. The days are long past since that area was governed substantially by common law or, indeed, merely by judicial interpretation of statutes. Consideration now has to be given not only to those matters, but also to the meaning and operation of a vast body of sub-statutory and non-statutory instruments, including Regulations, Guidelines issued by the Motor Accidents Authority and other administrative publications emanating from bodies such as the Claims Assessment Resolution Service, not to mention the practical significance of the interpretation and enforcement of those instruments by persons other than judges, including claims assessors and medical assessors. That is not to say that administrative processes have entirely replaced judicial processes and the common law in the field. The New South Wales Court of Appeal's recent decision in *Nominal Defendant v. Gabriel* [2007] NSWCA 52 is a timely reminder of the ongoing interplay between interpreting statutes and the context of the common law, a theme which is explored at some length in several of the essays in this book.

Many of the remarks above concerning the relevance of Professor Bottomley's commentary to the New South Wales Motor Accidents Compensation Scheme could equally be applied to the subject

of environmental law, with its complex interweaving of common law, primary and secondary legislation (including multiple layers of environmental planning instruments), policy statements, development control plans and guidelines which have to be interpreted not only by courts, but also by councils and other regulators.

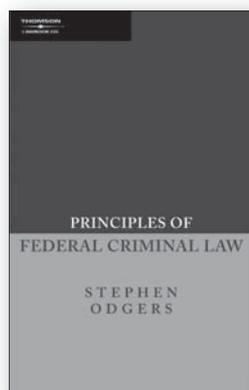
It would also be wrong to dismiss the work as one which is likely to appeal only to law academics and students. Legal practitioners who are called upon to give advice or argue issues which turn upon the interpretation of statutory or non-statutory publications of general application will also find it to be an informative and thought-provoking work. Or to put

that another way: even personal injuries advocates ought not to be embarrassed about displaying a copy of this book on their library shelves. Its possession will unquestionably assist in coming to grips with the new challenges and opportunities presented by recent legislative reforms in that area.

Reviewed by John Griffiths SC

Principles of Federal Criminal Law

Stephen Odgers SC | LawBook Co, 2007



Stephen Odgers SC's exposition of the principles of federal criminal law takes the form of an annotation to Chapter 2 of the Commonwealth Criminal Code.

Like the Evidence Acts, the Criminal Code started life as an attempt to enact consistent legislation at the federal and the state level. For those who have been involved in any prosecution under the Commonwealth Criminal Code it has come as no surprise that Chapter 2 of the Code remains a solely federal endeavour.

The focus of his analysis is Part 2.2 of the Criminal Code; and for good reason. Part 2.2 codifies 'the elements of the offence' and introduces the concepts of 'physical elements' (conduct, result of conduct, or circumstance) and 'fault elements' (intention, knowledge, recklessness or negligence) to each Commonwealth offence (unless the relevant offence legislation provides otherwise).

Odgers expressly disavows any engagement with the debate on the merits of the provisions of Chapter 2 of the Code, although he must have been sorely tempted. Instead he aims to 'explain and elucidate the principles established in Chapter 2'.

To do so, he lays out his annotation in a way which will be familiar to readers of his annotated *Uniform Evidence Law*: the text of the provision is set out in grey, with commentary from the 1992 report of the Model Criminal Code Officers' Committee. This is followed by his analysis of the provision supplemented by case law that has applied the provision or dealt with an equivalent concept under other criminal law statutes or the common law.

Odgers brings a wealth of knowledge and experience to the analysis of the criminal law principles in Chapter 2 (especially Part 2.2) and the book succeeds as an annotation of Chapter 2. The book is written from the perspective of a practitioner engaged in criminal law. Attempts by others to elucidate Chapter 2 reveal more about the intention of the legislature than the likely interpretation and application of the provisions in criminal proceedings and he has no hesitation in expressing disagreement with earlier suggested interpretations.

Ongoing judicial consideration of the Code will no doubt form the basis of further editions. It may be that Odgers' certainty as to the interpretation of some of the provisions and the successful application

of the legislature's intentions will be tested. For example, he seems certain that the offence of importing a 'border controlled drug', an offence now against s307.1 of the Criminal Code, has been successfully re-drafted so that the fault element of intention only applies to the fact of importation and not to the substance being imported. Judicial interpretation of s307.1's predecessor is one indication that the legislature's intention may not be borne out.

Odgers has also introduced a novel addition to his format: the provision being 'elucidated' is reproduced in small typeface in a box on the left-hand side of each pair of pages which deal with that provision. It may be that this format anticipates the likely length of this work by the third or fourth edition. But it may not be to everyone's taste and does not necessarily assist in the use of the current edition, which is not lengthy; and when used for provisions such as ss11.1 (attempt) and 11.2 (complicity and common purpose) the format creates the unsettling sensation of reading text in columns.

This however is a very minor criticism. I for one welcome the research and rigour of analysis which he brings to this complex and novel piece of Commonwealth legislation. The book will have a wide appeal as a ready reference, not only among criminal lawyers, but also for the increasing number of non-criminal lawyers who are required to advise corporate clients and their directors and officers.

Reviewed by Kate Morgan