"Purposive" interpretation of taxing statutes – a critical comment

Dr Terry Dwyer*

The following is a commentary on Justice Gordon's article published in the November 2009 issue of this Journal.

The history of English law does not support the 19th century notion that law is merely the will of a sovereign, let alone despotic, parliament.[1] On the contrary, the history of English law shows the law is organic and existed prior to parliament. What is now referred to (perhaps disparagingly) by parliamentary draftsmen as the "unwritten law" preceded, and was logically prior to, parliament's "written law".[2]

The article by Justice Michelle Gordon, "Trends in Tax Advice and Litigation – What to Do When it All Turns on a Word or Two" (2009) 38 AT Rev 202, therefore raises profound questions.

1. Do the courts exist to defend the ancient liberties of the subject and the law (in some deeper sense) against usurpation or violation by Ministers, their Parliamentary claques and their (public?) servants?
2. Is a tax levied by statute just as much a part of the law as the common law and equity?
3. Or is taxation something different, a consensually granted gift from the people?
4. Or do the courts exist as an increasingly subordinate branch of government to effect the perceived purposes of the Legislature and Executive?

To ask these questions may seem strange to modern readers but the interpretation of taxing statutes owes a lot to how one answers them.[3]

For generations, taxation has been the central point of conflict between the most basic human rights and the State. The power to tax is the power to destroy. Hence, the great struggles between Crown and Parliament as the representatives of the common people which resulted in the *Bill of Rights 1688*. I must confess to mixed feelings about that struggle, given that a relative, Sir Richard Nagle, was Attorney-General to James II at the time and the anti-Catholic bigotry of the age is hardly attractive. But whether or not one has Jacobite sympathies, seen in a broader context, the struggle was one against absolutism.

To understand the struggle, one must go back to the ancient understanding of the mediaeval English fiscal constitution. Put simply, the basic principle was that the King should live of his own.[4]

* Dwyer Lawyers, Canberra City. Visiting Fellow, Crawford School of Economics and Management, Australian National University.

[1] For example, the argument of William Hunt in *The History of England from the Accession of George III to the Close of Pitt's First Administration 1760-1801* (Longman, London, 1905) p 62 that "taxation is an attribute of sovereignty, and parliament had a right to tax the colonies because sovereign power resided in it. Where else could it reside? To deny the right to tax and to admit the right to legislate was inconsistent." The mediaeval man would have responded that sovereignty lies with God and the King is the Lord's Anointed: the modern democrat would say it resides with the people – neither would concede absolute power to Crown or Parliament.

[2] As Professor Edward Jenks remarked in *The Book of English Law* (John Murray, London, 1928) p 16, the idea that parliaments *made* laws "would have seemed blasphemous" to the ordinary Englishman of the 8th or 9th century. Law came from custom and common law was merely "the universal custom of the realm". Right up to the 18th century, there was a general view that Parliament should not interfere with the law but content itself with the proper administration of the country. Lord Melbourne's distaste for legislative reform perhaps owed something to this sentiment.

[3] For example, the Hon Murray Gleeson QC in his *Justice Hill Memorial Lecture on Statutory Interpretation* (2009) 44(1) *Taxation in Australia* 26 puts aside as no longer commanding judicial acceptance "the proposition that a taxing Act interferes with rights of property and therefore should be construed narrowly and in favour of the taxpayer". By contrast, the traditional answers to the four questions would have been Yes, No, Yes, and No. The trend in Australia and the United Kingdom since the 1980s seems to be to reverse these answers.

[4] Thus James Coffield opens his *A Popular History of Taxation* (Longman, London, 1970) with the concise observation that "the ancient theory of taxation in England rested upon the triple columns of government – King, Lords, and Commons assembled in

The Crown was entitled as owner of the territory of the Kingdom to its feudal rents; likewise it was entitled to its customary dues levied on merchants for the upkeep of the Royal Navy to defend the trade and commerce of the Kingdom.[5] What the Crown was not entitled to do was invade men's houses and seize their property. Quite the contrary, the Crown was pledged by the Coronation Oath to uphold the common law and customs of the Kingdom.[6]

The Crown was only entitled to the goods of the subject if the subject gave them to the Crown.[7] A collective consent could be given by a grant of taxation from the Commons. As Pitt the Elder pointed out when speaking about the American colonies, taxation was not legislation in the normal sense but a gift by the House of Commons to the Crown of the property of the common people.[8] That is why taxes were described as aids or subsidies for much of our history.

Hence the historic sharp distinction between the hereditary and customary revenues of the Crown and legislated inland revenues (a distinction observed until recently in Australian and the United Kingdom by the separation of Customs from Commissioners of Inland Revenue or Taxation).

Against this background, the tradition of strict interpretation of taxing statutes as penal statutes makes perfect sense.

Why should one assume that the taxpayer has offered to give more of his money to the Crown than the words of his representatives in Parliament clearly say he has?

Taxation is, by definition, an invasion of property rights and the onus should be on he who would take to establish his claim. This was the universal view, rightly and properly, held by the courts in Australia and the United Kingdom until the 1980s.

Since that time, as Justice Gordon has reminded us, the courts have moved to adopt purposive interpretation of taxing statutes with the result that taxpayers can no longer rely either on a strict literal approach to force the Crown to sustain its claim, or upon previous case law to be regarded as hard precedent.

The purpose of this comment is to suggest that purposive interpretation not only conflicts with the defence of the ancient liberties of the subject (which is a proper role of the courts) subordinating him to be the servant, rather than the master, of his elected representatives in Parliament, but is doomed to become an exercise in futility.

I venture this observation, having served in the Treasury, the Department of Prime Minister and Cabinet, having taken Cabinet notes through a tax reform era, having served as Private Secretary to a Senator, having drafted legislative amendments, and having made submissions to tax reviews and consultations.

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parliament. The King was expected to fulfil all his royal functions out of his own income. On extraordinary occasions he would approach the Commons for a grant-in-aid which could only be financed by additional taxation". See also Ormond W M, "England in the Middle Ages" in Bonney R (ed), *The Rise of the Fiscal State in Europe, c 1200-1815* (Oxford University Press, 1999) p 21.

[5] As William Kennedy notes in *English Taxation 1640-1799* (G Bell, London, 1913) pp 8-9, this financial system held sway till the Civil War and it continued to echo in the prevailing 18th century view that the poor man (that is, the ordinary wage earner) should not be expected to pay tax (pp 152-153). The later idea that taxation is the price everyone has to pay for civilization only became a reality because of war.

[6] John Locke's labour theory of property rights, resting as it does, on God's gift of mind and body to each individual sits comfortably within this tradition, the Crown being subordinate to God and unable to take away what God had granted, except by consent.

[7] As Frederick Maitland in *The Constitutional History of England* (Cambridge University Press, 1920) p 67 observes, "the feudal theory that the man makes a free-will offering to relieve the wants of his lord seems to have subsisted; the consent which the theory requires is rather a consent of the individual taxpayer than that of the national assembly". See also pp 92-96.

[8] Pitt the Elder, in his 1766 speech to the Commons on the right to tax America, declared: "Taxation is no part of the governing or legislative power. The taxes are a voluntary *gift* and *grant* of the Commons alone. In legislation the three estates of the realm are alike concerned; but the concurrence of the peers and the Crown to a tax is only necessary to clothe it with the form of a law. The gift and grant is of the Commons alone …. The distinction between legislation and taxation is essentially necessary to liberty. The Crown and the peers are equally legislative powers with the Commons. If taxation be a part of simple legislation, the Crown and the peers have rights in taxation as well as yourselves; rights which they will claim, which they will exercise, whenever the principle can be supported by power."

From a strictly logical point of view, one might have thought the purpose in question is the Crown's, since it is Royal Assent which turns a Bill into law, as the old preface to Bills reminded us with its opening words "Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons". However, the purpose sought is usually "Parliament's" legislative purpose, by which is meant the purpose of one or both Houses. Swiftly skipping over the fact that all Parliamentarians as legislators are equal and there are two Houses[9] whose consent is necessary to passage of a Bill, the purpose hunter often then seeks to find the "purpose", not even in the whole debate but in the Second Reading Speech of a Minister or his Explanatory Memorandum to a Bill, which may sometimes actually contradict the words of the law as enacted. But why should the words approved by the whole body of legislators be contradicted by the gloss of one super-legislator? To accord the words of Minister supremacy over the words of an Act is to elevate Ministers into super-Parliamentarians, which they are not. The position becomes even worse when one seeks to modify or explain around the words of an Act by recourse to non-Parliamentary extrinsic materials such as reports, tabled or un-tabled.

A second reason for futility is the attempt to find the "purpose" of a taxing statute in economics. As Justice Gordon recognises, economics and the law are strangers. The fact is there are often competing economic theories and none can supply a substitute for the words of a statute. There are few things more amusing to a professionally trained economist than watching a judge become an amateur economist.[10] Far better for judges to take the view that it is for economists to get their thoughts in order and define what they mean in words which are precise and intelligible to ordinary people. If economists, with the aid of the Parliamentary draftsman, cannot do so, the courts may politely decline the useless and thankless task of trying to make silk purses out of sows' ears.

The third reason why searching for "purpose" leads to futility is that the lawmaking process (often described as "sausage making") can be quite dishonest. The judicial searching for "purpose" was, of course, promoted by ss 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth). One may, of course, observe that questions could be raised about whether ss 15AA and 15AB are ultra vires the separation of powers.[11]

Leaving aside such questions, when Senator Gareth Evans put forward amendments to the *Acts Interpretation Act 1901* with ss 15AA and 15AB, a senior tax officer told the author the Australian Taxation Office (ATO) did not want the courts looking at Explanatory Memoranda or *Hansard*. It turned out the ATO sometimes told Ministers they would not interpret the law in a given way when they actually intended to do so (after the responsible Minster had left office) and therefore the ATO did not wish to be bound by soothing and deceptive Ministerial statements in *Hansard*. The ATO was worried that they would be retrospectively bound by hollow statements in *Hansard*.

The tax officer need not have worried. Once taxing statutes are interpreted by reference to underlying "purpose" or "policy" of the legislation, the ATO must win more often than not – after all, the purpose of a taxing statute is to raise revenue.

To appreciate just how slimy and greasy the business of Parliamentary sausage-making can be, readers might like to contemplate how interesting a thing it is to sit in a Senator's office and be briefed

[9] This point was ignored (to his detriment) by Mr EG Whitlam who, as Prime Minister, prior to his removal from office, was personally referred by the Clerk of the Senate, Mr JR Odgers to the relevant pages of the 1972 edition of *Australian Senate Practice*. At pp 311-317 and 350-364, there is a full discussion of the Senate's power in relation to money bills. I am grateful to Mrs Odgers for telling me this in her husband's presence over afternoon tea around 1981, in reply to my inquiry of Mr Odgers as to whether the Prime Minister had been aware of the Senate history on money bills prior to his dismissal from office on 11 November 1975.

[10] If judges were economists and economic historians, they would know that the optimal tax rate on labour and capital was zero and that only a tax on unimproved land values is non-distorting. From the point of view of an economic optimum, the mediaeval approach where the Crown's land revenues paid for the running of the country and the Church's lands provided the social services therefore had much to commend it. Similarly, by restraining tax burdens on labour and capital, the strict construction for taxing statutes would seem to contribute more towards an economic optimum than purposive interpretation.

[11] Construing Acts is the function of courts, not Parliaments. It is one thing for the Legislature to supply the Judiciary with a dictionary of commonly-used terms in an interpretation Act but quite another to tell the Judiciary to become a supportive and subordinate "second-draftsman" for fixing up badly drafted statutes.

on a Bill by public servants, to ask questions, to get answers and discover later that you were lied to. It is even more interesting when the lying is to your face and you are aware of it at the time.[12]

Fortunately, such deliberate dishonesty is rare. However, arrogance, over-enthusiasm and policy incoherence are less rare. More common is the simple frustration of trying to get the Bill "right" against a background of Ministerial haste to achieve a political end. Legislation by press release creates unworkable timetables. Anyone interested in a concrete example might care to put in a freedom of information request for the legislative memorandum to Cabinet on the introduction of the capital gains tax.

A fourth reason for the search for "purpose" ending in futility is that the "purpose" will be made obscure deliberately by vague drafting. Anyone who has participated in a consultation on draft legislation will realise there is no meeting of minds to clarify what is intended. The Treasury will read submissions, make no answers to questions and pick and choose what it likes without explanation. Far better for a Treasury these days not to answer questions precisely and have ambiguities left in a Bill. With Parliament pushed into guillotining or rubber-stamping a Bill and the judges ready to look at "purpose", it makes sense for bureaucrats to forget about old ideas such as respect for the "Rule of Law".[13] Leave the legislation vague with traps in it so that the authorities can always hit "tax avoiding" miscreants later with Rulings, knowing that these Rulings will be treated with the greatest respect by the courts as expositions of the "purpose" of the law.

Against this background, one must wonder whether it is wise for anyone to seek the "purpose" of an obscure phrase in a taxing statute on the assumption that there is some hidden intellectual integrity in the legislation which will make all things clear. One may be as surprised as Dorothy when she discovered the truth about the Wizard of Oz.

Unfortunately, the historic approach to interpretation of taxing statutes has been turned on its head. The revenue raising "purpose" now effectively trumps any notion that taxation is penal and a derogation of the subject's rights, which derogation is to be construed strictly.

However, it may not be too late to suggest that the old approach has merit and may be defended, not merely by reference to mediaeval and constitutional history but by modern democratic theory. Neither concedes supremacy to Parliament as the sole source of law or sovereignty.

If one takes the republican view that the people are sovereign and that the Parliament is comprised of their chosen representatives, it still makes sense to read the purpose of a law against a background that one assumes the masters (the people) do not intend their servants (otherwise known as politicians) to have licence to invade the liberties and property of the masters more than expressly authorised.[14]

Hence, one would still approach all legislation with a presumption in favour of common law rights and with a duty to construe any ambiguity in favour of upholding the democratic citizen-master's right to his life, liberty and property.

One may still hope that, even in this age of the electronic surveillance State, the cause of what used to be regarded as basic human rights has not been already hopelessly lost.

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[12] Gleeson, n 3, p 31 observed: "Judges, too, may benefit from a closer understanding of the process of production of the legislation they have to interpret." Such understanding may indeed reveal the dangers of purposive interpretation. One of the best arguments a conscientious civil servant can use against a bad policy being peddled by meretricious actors seeking to curry favour with Ministers is to say: "We may ram this through Parliament and sneak it past the Senate but it will fall apart in the courts – non possumus." That argument disappears when one can no longer count on the external quality control department to reject defective sausages, and Ministers and senior officials learn to count on the timidity or assistance of the courts. As in accounting or actuarial supervision, a decline in external quality control leads to internal management sloppiness or fraud.

[13] Not even the rules of English grammar are respected when a phrase like "sole activities" (surely, a "most unique" use of the English language) is left in the 2009 employee share schemes legislation notwithstanding its linguistic infelicity being pointed out to Treasury long before the Bill was rammed through the Senate in two minutes.

[14] Another reason which might be offered for strict interpretation is the contra proferentem rule if one recognises that Treasury and the ATO formulate the words of the taxation Bills Parliament is called upon to pass. A taxpayer can rightly say "They wrote this rubbish – let them wear the consequences of any defect".