

Legislation as Stipulation

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Page 9:

“Let’s suppose, for the sake of discussion, that there was a hippopotamus in this room.”

Page 10:

The general pattern can be illustrated thus:

$$B + S \rightarrow C$$

Page 12:

If a dog is a collie, usually it is intelligent.

Pages 13–14:

Let N be the natural number having the following properties ...

Examples of legislation (pages 13–14):

- The High Court [of Australia] shall have jurisdiction . . . to hear and determine appeals from all judgments, decrees, orders and sentences . . . of the Supreme Court of any State (*Australian Constitution*, s 73);
- There is established by this Act a Commission by the name of the Australian Human Rights Commission (*Australian Human Rights Commission Act 1986* (Cth), s 7(1));
- A person commits an offence if the person does any act in preparation for, or planning, a terrorist act (*Criminal Code* (Cth), s 101.6(1));

- A person who is before a prescribed authority for questioning under a warrant issued under this Division must not fail to give any information requested in accordance with the warrant....
[T]he person may not fail ... to give information ... in accordance with a request made of the person in accordance with the warrant, on the ground that the information ... might tend to incriminate the person or make the person liable to a penalty (*Australian Security Intelligence Organisation Act 1979* (Cth), s 34L(2),(8)).

Reference (page 30): two alternatives (in both, x is the referring term whose reference is being given):

(i) By x I intend to refer to *this* (whatever *this* might happen to be);

(ii) By x I intend to refer to instances of that thing which the person who taught me the word x used it to refer to.

Gummow J's argument in *Wik* (pages 36–37)

S Certain leases may be granted [as stipulated by the statutory text];

B1 In the absence of express words or necessary implication to the contrary, a statute should be interpreted, where possible, so as to minimise its burden upon prior property rights [background commitment: the principle of legality];

B2 The land in respect of which the statute permits grants of leases includes land which was subject to prior native title rights [background commitment: an uncontested fact that motivates the legal inquiry];

B3 The statute contains no express words or necessary implication that those prior rights should be burdened [background commitment that arises by consideration of the statute in question];

Therefore (as *B1*, *B2* and *B3* together entail),

C1 If possible, the power stated by *S* should be interpreted so as to minimise the burden upon the prior native title rights;

- B4* If the word *lease* is interpreted as referring to tenure of the traditional common law kind (ie as being used with a type-(*ii*) referential intention), grants of leases under the statute will extinguish prior native title rights [background commitment that arises from consideration of the relevant land law];
- B5* If the word *lease* is interpreted as referring to tenure of a novel statutory kind (ie as being used with a type-(*i*) referential intention), grants of leases under the statute may permit native title to survive [background commitment that arises from consideration of the relevant land law together with consideration of the statute in question];
- B6* Both *B4* and *B5* are open as possible understandings of the reference of the word *lease* as it appears in the statute [background commitment that arises from the inquiry undertaken by Gummow J in the first part of his judgement, discussed above];
- Hence, as the interpretation stated in *B5* is the one that leads to a lesser statutory burden on prior property rights,
- C2* The word *lease* as it appears in the statute refers to tenure of a novel statutory kind.

Statutory offence *mens rea* (page 39):

S1 It is an offence to *A* [statutory text];

S2 The statute uses the word *offence* in the received sense [identifying the content of the legislative stipulation];

B Everything else being equal, an offence in the received sense has a fault element (or elements) [background commitment arising from familiarity with legal history and practice];

Hence,

C If everything else is equal, the offence of *A*-ing has a fault element.