Implications

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Every day of our lives we recognise implications in the meaning of written and oral words, in conversations, in books and in newspaper articles. Implications are ubiquitous in language. In order to understand the legal rules for recognising implications in legal instruments it is necessary to appreciate the theory of how our everyday conventions of language are applied to the process of drawing inferences. This appreciation explains why our rules for recognising implications look and operate the way that they do and it helps to understand the meaning of rules for recognising implications in legal instruments and why, whether the instrument involved is a contract, a trust deed, a statute or the Constitution, some implications are easy to recognise but others are more difficult.

Theory and Practice

An old joke is told about a professor of physics who cautioned his students against undertaking a particular experiment. "But", objected the students, "the experiment seems to work in practice". "Maybe so", replied the professor, "but does it work in theory?"

In ordinary conversation and everyday life, our principles of interpretation of language are much like this. The principles work well in practice even if there is very little understanding of them in theory. So too, in the interpretation of legal instruments. But at the margins, where the issues are highly contested, it is important for lawyers and judges who seek to provide the best possible interpretation to understand the theory of what our language is doing. The purpose of this article is, unashamedly, an exploration of the theory of one important aspect of the principles of legal interpretation, namely implications.

Implications in Everyday Life and in the Law

As Professor Haugh has observed, the nature of an implication is explored in an episode of *The Simpsons* from 2005 entitled Mommie Beerest. Bart remarks to Homer that Marge has been spending even more time at Moe's Tavern than Homer. Lisa says that Marge and Moe seem "awfully chummy". Homer turns to Lisa and asks, "Just what are you inferring?" Lisa responds, "I'm not inferring anything. *You* infer, *I* imply". To which Homer replies, "Well, that's a relief".[1]

This exchange from *The Simpsons* neatly illustrates the point made by the United States philosopher of language, Professor Horn, that "speakers implicate" but "hearers infer".[2] The implication contained in, and intended by, Lisa was that Marge was having an extramarital affair. If Homer had thought about this he would have drawn this inference from her statement. In broad terms, Lisa was implying and Homer would have been inferring.

In everyday life, we interpret the meaning of sentences that we hear or read by a process that involves two concurrent, interrelated elements. We consider the semantic meaning of the words and we draw inferences from the words, relying upon their context and the purpose for which they were uttered. The process of drawing inferences that enriches semantic meaning is called pragmatics. Every meaningful sentence involves pragmatics and requires some inferences to be drawn.

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[1] For more detail, and the article from which this example was borrowed, see M Haugh, "Inference and Implicature" in CA Chapelle (ed), *The Encyclopedia of Applied Linguistics* (Blackwell, 2013).

[2] L Horn, "Implicature" in L Horn and G Ward (eds), *The Handbook of Pragmatics* (Blackwell, 2004) 3, 6.

It is no coincidence that lawyers use the same techniques of ordinary language to interpret written instruments such as the *Constitution*, statutes, contracts, wills, and trusts. The basic techniques for interpretation of legal instruments are our tools of language. They are not secret spells possessed only by lawyers. If these techniques were unique to lawyers, we could not morally justify compelling the public to follow written rules which they did not have the skills to interpret. Nor would it make sense for laws to be enacted by a Parliament composed of members many of whom are not lawyers. In this article, I explain how an understanding of the different types of implication, and the inferences we draw as readers, can permit us to understand the legal rules concerning implications.

This article is divided into three parts. The first part explains the nature of an implication and the spectrum of different possible implications that can exist. The key point that will be made is that there is a spectrum of implications which range from those where very little pragmatic input needs to be added to the semantic content of the words to those where substantial pragmatic input needs to be added.

The second part explains three key principles to understand in drawing inferences that recognise implications. Those key principles are as follows. First, the meaning of words, in law as in life, depends upon what the speaker or writer of the words is understood to intend by the use of the words. Where there is no actual person who is speaking, we understand meaning by reference to the intention of a notional person: a Parliament; a reasonable person in the position of contracting parties; a reasonable settlor and trustee; and so on. Second, with limited exceptions, when we interpret the meaning of a legal provision, just as when we interpret the meaning of a sentence in ordinary life, the semantic or literal meaning of the words is considered at the same time as the pragmatic inputs of context and purpose. Third, and perhaps the largest point that I will make in this article, the further that a proposed implication is along the spectrum, which ranges from little pragmatic input to much pragmatic input, the more necessary the implication must be in order for it to be recognised.

The third part of this article then turns to a controversial example in constitutional law of the application of these building blocks of the philosophy of language. The example is the implied freedom of political communication.

I. The Nature of an Implication

This article commenced with the error made by Homer Simpson in describing the speaker's process of implying as one of inferring. Lawyers and judges usually make the opposite error to that made by Homer. Instead of mistakenly using *infer* for *imply*, lawyers and judges frequently use *imply* for *infer*. As Bryan Garner has observed, "[t]hrough the process of hypallage", lawyers have come to use "the word *imply* … in reference to what the judges do, as opposed to the circumstances" by which meaning is included in what is expressed.[3] Common examples of this confusion are lawyers and judges who speak of whether an implication can be *made* from a statute and whether a term can be *implied into* a contract. The error in terminology arises because the implication is already there. It is identified by inference.

In the High Court of Australia, the same point was made by Isaacs J, who said that an implication is something that the speaker or writer should be understood to have "meant by what is actually said, though not so stated in express terms".[4] Nevertheless, Isaacs J said that the implication is "included in what is expressed".[5] Or, perhaps more precisely, as the *Oxford English Dictionary* defines the adjective

[3] BA Garner, *Black's Law Dictionary* (11th ed, 2019) "imply", quoting BA Garner, *Garner's Dictionary of Legal Usage* (3rd ed, 2011) 430–431.

[4] *Merchant Service Guild of A/asia v Newcastle & Hunter River Steamship Co Ltd (No 1)* (1913) 16 CLR 591, 624. See also *Lubrano v Gollin & Co Pty Ltd* (1919) 27 CLR 113, 118; *R v Rigby* (1956) 100 CLR 146, 151; *Wurridjal v Commonwealth* (2009) 237 CLR 309, 368 [120]; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, 478–479 [166]; 390 ALR 590, 632; [2021] HCA 17.

[5] *Merchant Service Guild of A/asia v Newcastle & Hunter River Steamship Co Ltd (No 1)* (1913) 16 CLR 591, 624. See also *Lubrano v Gollin & Co Pty Ltd* (1919) 27 CLR 113, 118; *R v Rigby* (1956) 100 CLR 146, 151; *Wurridjal v Commonwealth* (2009) 237 CLR 309, 368 [120]; *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, 478–479 [166]; 390 ALR 590, 632; [2021] HCA 17.

"implied", an implication is "involved in what is expressed". Hence, as Windeyer J said of implications, "our avowed task is simply the revealing or uncovering of implications that are already there".[6]

There are, however, difficult questions concerning what is meant by an implication being "already there". The philosopher of language, HP Grice, drew a distinction between (1) what is *said* and (2) what is *implicated.*[7] Grice's notion of what is "said" is essentially the semantics of the sentence, which Grice described as the "conventional meaning" of the sentence.[8] Everything else, he said, was an implicature. Grice saw "what is said" as the literal, context-free meaning of the sentence. Everything else was "implied, suggested, meant".[9] The process of identifying everything else depends upon pragmatics, that is, upon context and purpose. Although Grice prompted a revolution in linguistics in the latter part of the 20th century, his distinction between what is said and what is implicated is controversial. The meaning of "what is said" in a sentence, rather than the meaning of a single word, will rarely be only conventional applications of literal meaning. Pragmatics, that is, context and purpose, are everywhere in language.

There is an old joke that epitomises the importance of pragmatics – context and purpose – in interpretation. On the eve of retirement, a judge is asked whether there is anything that they regret over a long career in the judiciary. The judge pauses for a long time and then replies, "Dwelling on the semantics at the expense of the pragmatics". The interviewer looks puzzled and asks, "Could you explain what you mean?" The judge replies, "Yes, I *could* explain". The point of the joke is that only the slightest pragmatic input is needed for the interviewer's question to be understood as asking the judge if they *would* explain what was meant.

Implications are better understood as falling on a spectrum. At one end of the spectrum, an implication, like that involved in the interviewer's question, requires very little pragmatic input. Only a little pragmatic input needs to be added to the semantic meaning of the words. At the other end of the spectrum, the pragmatics of context and purpose do almost all of the work in providing the implication.

The spectrum of implications usually contains, at one end, "explicatures", where the implication is most substantially based upon the text. As one moves towards the other end of the spectrum, the explicatures fade into "implicatures", where the implication is less substantially based upon the text and relies more upon the pragmatics of context and purpose.

As Sperber and Wilson observe:[10]

> An explicature is a combination of linguistically encoded and contextually inferred conceptual features. The smaller the relative contribution of the contextual features, the more explicit the explicature will be, and inversely.

A. Explicatures

Relevance theorists in the philosophy of language have described an explicature as *explicating* meaning directly from the words of the instrument. It is an inference from the "linguistically provided template".[11] The primary focus of legal interpretation commonly involves these inferences that are drawn out from the words.

The technique of relying on explicatures is almost never treated in judicial decisions as involving the recognition of an implication. It is just seen as ordinary interpretation, unfortunately usually without noticing the inferences that are involved.

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[6] *Victoria v Commonwealth* (1971) 122 CLR 353, 402.

[7] H Grice, *Studies in the Way of Words* (Harvard University Press, 1991) 24–25.

[8] Grice, n 7, 25. See also R Carston, "Relevance Theory and the Saying/implicating Distinction" in L Horn and G Ward (eds), *The Handbook of Pragmatics* (Blackwell, 2006) 633.

[9] Grice, n 7, 24. See also Horn, n 2, 3.

[10] D Sperber and D Wilson, *Relevance: Communication and Cognition* (Blackwell, 2nd ed, 1995) 182.

[11] Carston, n 8, 633.

Express terms will almost always require something additional in order to give them their intended meaning. That addition comes from the pragmatics of context and purpose. The pragmatic inference might be about the correct semantic or literal meaning of the words in cases where there are a number of possible meanings. The pragmatic inference might even have the effect that the words bear a different, even completely opposite, meaning from their semantic meaning. Or the pragmatic inference might be the correct level of generality for the meaning of the words. In each case, the pragmatic inference draws meaning outwards, from the words.

An example from everyday life is the notice that states, "Dogs must be carried on the escalator". It was joked among Chancery lawyers that semantic common lawyers would sit and wait for hours for someone to supply a dog in order for the lawyers to be able to get on the escalator. The common lawyers' response to that joke was that Chancery lawyers would wait even longer because they understood the sign to mean that there must be at least two dogs carried in order to get on the escalator.

The same use of pragmatics in explicatures is necessary in legal interpretation. An example is s 34 of the *Constitution*. Section 34 provides for the qualifications of members of the House of Representatives and states that until the Commonwealth Parliament otherwise provides, "*He* must be of the full age of twenty-one years". Section 48 refers to an allowance that each senator and each member of the House of Representatives shall receive "from the day on which *he* takes his seat". Similarly, the Governor-General is described with the pronoun "he" (ss 5, 58, 126), senators are described with the pronoun "he" (ss 15, 46, 48), Ministers of State are described with the pronoun "he" (s 64), and Justices of the High Court are described with the pronoun "he" (s 72). Even the rights of the residents in States are referred to by reference to a resident with the pronoun "he" (s 117). But on no reasonable view of the intended meaning of these provisions would the use of "he" be understood to have been intended to mean only a man. In 1901, s 23(a) of the *Acts Interpretation Act 1901* (Cth) provided that, unless the contrary intention appears, "[w]ords importing the masculine gender shall *include* females" [emphasis added].

The inclusion of people other than men in the meaning of the word "he" arises by pragmatics, with the drawing of an inference to recognise an explicature in the following way. The pronoun, "he", must be given meaning at the intended level of generality. "He" could have several levels of generality of meaning. In some contexts it could mean "a male human". In other contexts it might be used more generally to mean "any human". More generally still, it might be used to mean "any animal, human or otherwise".

I venture to suggest that the intended meaning in the *Constitution* is "any human". It was not intended to apply at the lowest level of generality to confine the operation of each of these provisions to male humans. Nor was it intended, at the broadest level of generality, to permit, for example, a member of the Parliament to be a fish. Perhaps less facetiously, it could not be said that an intelligent chimpanzee is a resident in a State for the purposes of s 117.

B. Implicatures

While explicatures use pragmatics in a limited way to draw meaning out from the words, an explicature will shade into an implicature as the exercise moves from being less of an exercise in ascertaining the meaning of express words to being more of an exercise of identifying by inference the additional words that are implied in the provision.

Sometimes it is clear that an implicature must exist but it is unclear what that implicature is. A recent constitutional decision illustrates this. The case of *Burns v Corbett*[12] concerned State legislation in New South Wales which had conferred jurisdiction on the Civil and Administrative Tribunal of New South Wales (NCAT). It was accepted that NCAT was a tribunal and that it was *not* a court. The State legislation establishing the tribunal included the power to decide some disputes between residents of different States.[13] Under the *Constitution*, a dispute "between residents of different States", sometimes called "diversity jurisdiction", is recognised as part of concurrent State jurisdiction (sometimes described as

[12] *Burns v Corbett* (2018) 265 CLR 304.

[13] *Civil and Administrative Tribunal Act 2013* (NSW).

jurisdiction "belonging to" the State) and federal jurisdiction.[14] The question in *Burns v Corbett* was whether constitutional provisions contained an implication that only State *courts* could exercise that diversity jurisdiction and not State *tribunals.*

The constitutional provisions said to contain this implication were provisions that empowered the Commonwealth Parliament to make laws (1) investing any court of a State with jurisdiction over disputes between residents of different States (ss 77(iii), 75(iv)), and (ii) defining the extent to which such jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States (s 77(ii)).[15] At the time of Federation, a diversity matter was a matter that "belonged to" the courts and the tribunals of the States. There were numerous tribunals, which would not today be regarded as courts, that decided such disputes alongside the courts. There would be no point in s 77(ii) giving a power to the Commonwealth Parliament to make the jurisdiction of federal courts exclusive of State courts if it could not also be made exclusive of State tribunals.

There are three possible implications that could give effect to the purpose of s 77(ii). The first, for which no party argued but which would have encountered a number of difficulties, would have been to treat the words "courts of the States", as containing an explicature, so that "courts of the States" included any tribunal of the State. As Isaacs J said nearly a century ago, a court is "some organ as constituted by the State to exercise judicially some portion of the King's judicial power".[16] Insofar as a State tribunal exercised judicial power, on that view it would be a court.

Putting this to one side, there are two possible implicatures that could give effect to the purpose of s 77(ii) in empowering the Commonwealth Parliament to make the jurisdiction of federal courts exclusive.

The majority effectively held that there is an implicature to the effect in italics:

> [T]he Commonwealth Parliament may make laws "defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States *and jurisdiction over those subjects can only belong to, or be invested in, courts and not tribunals of the States*".

The minority effectively held that there is an implicature to the effect in italics:

> [T]he Commonwealth Parliament may make laws "defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts *or tribunals* of the States".

I was a member of the minority. In my view, the difficulty with the implicature accepted by the majority is that there was no intention prior to, or at, Federation to abolish the existing *State* diversity jurisdiction or (in relation to another matter within s 77(ii)) admiralty and maritime jurisdiction. As I explained in my dissenting reasons in *Burns v Corbett*,[17] at the time of Federation, jurisdiction over diversity, admiralty or maritime matters was exercised by State Customs Commissioners, local Land Boards, Marine Boards, and Boards of Railway Commissioners. These non-court administrative bodies were also rapidly expanding. That context militated against the larger implicature that extinguished all the State jurisdiction over that subject matter exercised by all of these State bodies.

C. Presuppositions

Presuppositions are a type of implication that span across the spectrum of explicatures and implicatures. Like explicatures, some presuppositions are heavily dependent upon the semantic content of a sentence or provision. For instance, "The King of France is bald" presupposes from the semantic content of the sentence that there is a King of France. "The Minister is to consider a valid application for a visa" presupposes from the semantic content of the provision that there is a Minister responsible for the administration of the *Migration Act 1958* (Cth). Presuppositions are endemic in the use of language as a

[14] *Constitution*, s 75(iv).

[15] *Constitution*, s 77(ii), 77(iii) read with s 75(iv).

[16] *Le Mesurier v Connor* (1929) 42 CLR 481, 510.

[17] *Burns v Corbett* (2018) 265 CLR 304, 393 [206].

communicative tool. As Professor Pinker has observed, "language itself could not function if it did not sit atop a vast infrastructure of tacit knowledge about the world".[18]

John Searle has rightly pointed out that "for a large number of cases the notion of the literal meaning of a sentence only has application relative to a set of background assumptions, and furthermore these background assumptions are not all and could not all be realized in the semantic structure of the sentence in the way that [semantic] presuppositions … are".[19] These presuppositions, in the nature of background assumptions that are much less dependent upon the semantic content of a sentence, rely much more on the pragmatics of context and purpose.[20] An example is the presupposition enunciated in *Marbury v Madison*,[21] that it is for the courts rather than for the Parliament to decide which laws are invalid because they exceed the limits of legislative power. That principle was described by Fullagar J as "axiomatic".[22]

The prolific nature of presuppositions can be illustrated with a fictional anecdote. A professor of linguistics is on a train giving a tutorial to one of his students. As the train passes through the countryside, the professor points to the sheep in the paddock and directs the student to say something about the sheep without presupposition. "Look at the sheep in that paddock", says the hapless student. "You can do better than that", says the professor. "Look at the things in the paddock that look like sheep", replies the student. "Try again", says the professor. "Look at the things in what looks like a paddock that look like they have white wool on them", says the student. "You can still do better", says the professor. The student pauses and tries one more time. "Look at the things in what looks like a paddock that look like they have white wool on them *on at least one side*".

As in language generally, presuppositions in legislation are common. Historically, the common law supplied many presuppositions in the nature of background assumptions based upon strong expectations that are often rooted in the same values and principles of the common law. Coke wrote that the "surest construction of a Statute is by the rule and reason of the Common Law".[23] That "reason" of the common law was the foundation for the celebrated decision of Byles J in *Cooper v Wandsworth Board of Works*,[24] where his Honour said of the rules of procedural fairness that, "although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature". As Brennan J said in *FAI Insurances Ltd v Winneke*,[25] the "justice of the common law is the matrix of legislation and where legislation is silent as to conditions governing the exercise of a statutory power, it may be inferred that the legislature intended that the justice of the common law" should supply these rules of procedural fairness. As Deane J said in *Haoucher v Minister for Immigration and Ethnic Affairs*,[26] the rationale for this implication "is to be found not so much in sophisticated principle as in ordinary notions of what is fair and just".

A further example is the inference that the conferral of a statutory power requires the power to be exercised reasonably. In *Plaintiff M1/2021 v Minister for Home Affairs*,[27] four members of this Court explained, in the context of a duty upon the Minister to engage with representations made by an applicant, that it was "well-established that the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness". What is reasonable, as shaped by the legislation, is generally determined by everyday expectations based upon deep values of dignity and respect.

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[18] S Pinker, *The Blank Slate: The Modern Denial of Human Nature* (Penguin, 2002) 210.

[19] J Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (CUP, 1979) 120.

[20] R Stalnaker, *Context and Content: Essays on Intentionality in Speech and Thought* (OUP, 1999) 47–62.

[21] *Marbury v Madison*, 5 US 137, 177–180 (1803).

[22] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262.

[23] E Coke, *Institutes of the Laws of England* (1628) pt 1, bk 3, Ch 8, s 464, 272.

[24] *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, 194; 143 ER 414, 420.

[25] *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 408.

[26] *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 652.

[27] *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497, [25]; [2022] HCA 17.

Moving from civil law to criminal law, one presupposition in criminal law is usually that a statutory offence will only be taken to be proved if the trier of fact is satisfied of guilt beyond reasonable doubt. As Kirby J said in *R v Tang*,[28] in dissent but not on this point, it "would require very clear statutory language to render the mere performance of an act criminally blameworthy, without regard being had to the 'golden thread'" that is the proof of guilt beyond reasonable doubt. Another presupposition which has been recognised for hundreds of years as "a fundamental principle … for which no authorities need be cited" is that guilt of an offence requires a "criminal mind",[29] such as knowledge or intention. This has been described as a "common law presumption" in legislation.[30] The presupposition operates as an implicature that inserts into the offence words such as "with intention" or "with knowledge". Hence, in *Sweet v Parsley*,[31] Lord Reid described the implication as one that is recognised by "reading in words":

> [T]here has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.

The importance of these presuppositions is sometimes overlooked. A recent appeal to the High Court of Australia, *Bell v Tasmania*, concerned the operation of s 14 of the *Misuse of Drugs Act 2001* (Tas). That section provided that "A person must not supply a controlled drug to a child". There was a separate offence in s 26 for supplying a controlled drug. As Gleeson J and I observed, counsel for the appellant "repeatedly disclaimed" any submission that s 14 contained any mental element, relying only upon a submission that the criminal conduct had been excused.[32] It might be thought surprising that the Parliament of Tasmania would be taken to have intended that a person had committed the offence of supplying drugs to a child if the person did not have sufficient knowledge that what was supplied was drugs or did not have sufficient knowledge that the recipient was a child. If *neither* were required then, subject to excuses, a person could be criminally liable for the offence of supplying drugs to a child if the person did so believing that they were supplying food to an adult. It is hard to understand how that could have been intended by Parliament.

II. Basic Principles in Recognising Implications

Whether the implication is an explicature or an implicature, there are three basic principles involved in the drawing of pragmatic inferences to identify implications.

First, our concern with the meaning of any legal provision is a concern with what philosophers of language call *speaker* meaning, although the speaker is usually a notional person such as a reasonable Parliament, reasonable person in the position of contracting parties, a reasonable settlor and trustee of the trust, and so on. In this respect, the approach to meaning is not fundamentally different from the everyday use of language. The basic meaning of written legal instruments such as statutes or the *Constitution* can therefore be understood by any person, lawyer or not, using ordinary conventions of language. If legal instruments were not able to be so understood, there would be a serious threat to those aspects of the rule of law that are concerned with clarity, intelligibility, and accessibility.[33] Moreover, institutional problems would arise for the many members of Parliament not possessing legal qualifications if the words of the bills upon which they voted were not to be understood according to the ordinary conventions of language.

Second, the interpretation of language functions at the level of the sentence, not the single word. Although the meaning of words is important, the ultimate search for speaker meaning is for the speaker

[28] *R v Tang* (2008) 237 CLR 1, 46 [103], citing *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481.

[29] E Keedy, "Ignorance and Mistake in the Criminal Law" (1908) 22 *Harvard Law Review* 75, 81.

[30] *He Kaw Teh v The Queen* (1985) 157 CLR 523, 539; *B (a minor) v Director of Public Prosecutions* [2000] 2 AC 428, 460.

[31] *Sweet v Parsley* [1970] AC 132, 148.

[32] *Bell v Tasmania* (2021) 96 ALJR 22, 35 [71]; 395 ALR 589, 605; [2021] HCA 42.

[33] LL Fuller, *The Morality of Law* (rev ed, 1969) Ch 2.

meaning of sentences in legal provisions. The meaning of a sentence requires consideration of the *semantic* or literal content of the words *at the same time* as considering their pragmatic content, which is the context and purpose of the words. It is, emphatically, not a two-step process of identifying a range of possible semantic meanings of words and then choosing the best of those meanings. In this respect, the fashionable expression "constructional choice" can be highly misleading.

Third, the extent to which it is necessary to draw an inference will usually depend upon the extent to which the semantic content of a provision contributes to the inference. In other words, in instruments like legislation or professionally drafted contracts, there will need to be a more compelling case to recognise an implicature that draws little from the written words rather than an explicature that draws substantially from the written words. I will deal with each of these three points in turn.

A. Meaning Is What Was Intended by the Speaker or Notional Speaker

It is necessary to begin with how meaning, express or implied, is derived from legal instruments, be they contracts, trust deeds, statutes or constitutions. There are two approaches that compete for acceptance in the field of interpretation. The first is that the meaning of a sentence in the instrument is interpreted by reference to the meaning that the listener expects to have been intended by the speaker or notional speaker. We can call this "expected speaker meaning". The second is that the meaning of a sentence is interpreted autonomously from anything that a speaker, or notional speaker, might be thought to have intended. We can call this "autonomous meaning".

In everyday life, we are almost always concerned with expected speaker meaning. The words "If you want to stay healthy, get out of Brisbane" will probably mean something entirely different if spoken by a doctor to a patient with heat-induced asthma than if spoken by a crime boss to a rival. By having regard to each of context and purpose, the pragmatics of the sentence, one interpretation will be objectively better than the other in each case. The context and purpose reveal the best fit with the speaker's intention. On the other hand, a scholar who is interpreting a poem will ordinarily be concerned with autonomous meaning. With autonomous meaning, the interpretative process is essentially creative. Whether one interpretation is better than another will often be a matter of subjective preference.

For centuries, judges have interpreted legal instruments by reference to speaker meaning. In a famous passage on statutory interpretation quoted by Theodore Sedgwick,[34] Francis Lieber wrote that a sentence can only have one true meaning and "[w]ords are, therefore, to be taken as the utterer probably meant them to be taken".[35] Where the legal instrument is a statute, the utterer is the construct or notion of the Parliament. Dr Ekins and Professor Goldsworthy have traced this notion of speaker meaning to the 15th century with adherents across time, including Plowden, Selden, Coke, Bacon, Blackstone, and Dwarris.[36] At Federation, this notion was unchallenged. As Griffith CJ emphasised in quoting a passage from the *Sussex Peerage Case*,[37] to which he would return again,[38] and again,[39] and again[40] in the early years of the High Court, "the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act". Further, "[t]he same rules of interpretation apply [to the *Constitution*] that apply to any other written document".[41] This approach

[34] T Sedgwick, *A Treatise on the Rules which Govern the Interpretation and Application of Statutory and Constitutional Law* (John S Voohries, 1857) 286.

[35] F Lieber, *Legal and Political Hermeneutics* (Little and Brown, 1839) 120.

[36] R Ekins and J Goldsworthy, "The Reality and Indispensability of Legislative Intentions" (2014) 36 *Sydney Law Review* 39, 40.

[37] *Sussex Peerage Case* (1844) 11 Cl & F 85, 143; 8 ER 1034, 1057.

[38] *Local Board of Health of City of Perth v Maley* (1904) 1 CLR 702, 710.

[39] *Master Retailers Association of NSW v Shop Assistants Union of NSW* (1904) 2 CLR 94, 107; *Dixon v Todd* (1904) 1 CLR 320, 326–327.

[40] *Higgins v Berry* (1908) 6 CLR 618, 625.

[41] *Tasmania v Commonwealth and Victoria* (1904) 1 CLR 329, 338. See also *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469, 611–612; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 332; *Victoria v Commonwealth* (1971) 122 CLR 353, 394–395; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 183.

to speaker meaning justifies the insistence by courts that there is only one right answer or one correct meaning in the interpretation of legal instruments.[42]

There is a competing view which suggests that the words of legal instruments have an autonomous meaning. The most powerful defence of that approach is that of Lord Burrows. In the Hamlyn lectures, Lord Burrows argued that, although statutory interpretation is constrained "by the words, context and purpose of the statute":[43]

> [The] task of deciding on the best interpretation of a statute with the benefit of hindsight falls to the judges, and it is, in this sense, somewhat analogous to their role in interpreting a common law precedent.

There are four fundamental difficulties with an approach which treats provisions in statutes or other legal instruments as having an autonomous meaning independent of any search for a notional intention.

First, if we really believed that a provision had an autonomous meaning then it would make no sense to insist upon consideration of context or purpose. Context and purpose are the pragmatics that reveal intention. An attempt to interpret the meaning of a poem need not be governed by the poet's purpose in writing the poem or the context in which they wrote it. But we insist upon legislation being interpreted by reference to the Parliament's "purpose" and the context of the legislation. This is only explicable if we are concerned with the Parliament's intention.

Second, the notion that the words of a statutory provision have a range of possible meanings from which a judge can choose is in tension with the rule of law value that the meaning of legislation should be accessible and able to be understood by the public generally.[44] The manner by which the public understands and interprets written laws is by the ordinary tools of language, which involves discerning meaning by drawing inferences about the intention of the speaker. Without those tools the public would have no way of accessing and understanding the meaning of legislative provisions.

Third, if the governing principle were not a search for the intention of the Parliament then how could a court ever contradict the plain semantic meaning of a provision? For instance, in *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*,[45] the High Court considered the meaning of the expression "10 days of paid personal/carer's leave". A minority of the Court held that 10 days meant "10 periods each of 24 hours".[46] Such a literal or semantic meaning is undeniable. If meaning were autonomous then it would be impossible to contradict this conclusion. But a majority of the court, including me, held that "10 days" instead meant:[47]

> [F]or every year of service equivalent to an employee's ordinary hours of work in a week over a two week (fortnightly) period, or 1/26 of the employee's ordinary hours of work in a year.

No dictionary, and no ordinary use of language, would ever attribute this meaning to the expression "10 days". The majority's approach can only be justified as an application of speaker meaning. It could only be achieved by the context in which the legislation was enacted making it plain, in my view, that the Parliament had intended only to simplify the expression of a similar complex formula but not to change the meaning of that formula.

Fourth, many of the principles by which legislation is drafted and the well-known maxims by which legislation is interpreted are conventions of language based upon speaker meaning. These conventions of language are inseparably bound up with the intention of a speaker. For instance, when my 14-year-old

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[42] *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60, 78–79; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 582 [127].

[43] A Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement* (CUP, 2018) 31.

[44] *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279.

[45] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818; 381 ALR 601; [2020] HCA 29.

[46] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 830 [46]; 381 ALR 601, 614; [2020] HCA 29.

[47] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 830 [45]; 381 ALR 601, 614; [2020] HCA 29.

daughter saw a preview for a movie that said "not suitable for children 12 and under", she understood that to mean that there was no restriction upon children who were 13 years or older. No one needed to tell her that she was applying a Latin maxim called *expressio unius est exclusio alterius.* And when I gave my son my credit card to purchase flour, milk, eggs and butter etc, he did not need to be able to translate *ejusdem generis* to know that the "etc." did not cover a Sony PlayStation. Our legal maxims of interpretation are the ordinary conventions of language which we use to infer intention.

B. No Separation of the Semantic from the Pragmatic and the General Rules of Language

It is now well established that the process of interpretation of legal instruments is not a two-stage process of identifying a context-free literal or semantic meaning and then enriching that meaning with pragmatics such as context and purpose. Interpretation is a single process. In legal interpretation as in ordinary life, the meaning of a sentence depends upon a concurrent consideration of the semantic or literal meaning of "what is said", and the pragmatic effect of purpose and context that supplies implications. This is why in *CIC Insurance Ltd v Bankstown Football Club Ltd*,[48] Brennan CJ, Dawson, Toohey and Gummow JJ said that interpretation of meaning "insists that the context be considered in the first instance" and that context includes "such things as the existing state of the law and the mischief which, by legitimate means … one may discern the statute was intended to remedy".

Nevertheless, it is not impossible for legislation expressly or impliedly to create a rule that the interpretation of a provision must ignore some or all pragmatics such as context or purpose. In *Westfield Management Ltd v Perpetual Trustee Co Ltd*,[49] the High Court held that extrinsic evidence was not admissible to establish the manifested intention of the parties to an instrument registered under a Torrens scheme of title. The reason for this exclusion was that a person inspecting the register "cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee".[50]

Legislation can also alter or amend ordinary language conventions. A controversial example of this is the decision of the Supreme Court of the United States in *Bronston v United States*.[51] Mr Bronston was a failed movie producer. His company, Samuel Bronston Productions Inc, went bankrupt. At a bankruptcy hearing, the following exchange took place between a lawyer for one of the creditors of Bronston Productions and Mr Bronston.[52] The lawyer believed, correctly, that Mr Bronston had previously had a Swiss bank account:

> Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?
>
> Bronston: No, sir.
>
> Q. Have you ever?
>
> Bronston: The company had an account there for about six months, in Zurich.
>
> Q. Have you any nominees who have bank accounts in Swiss banks?
>
> Bronston: No, sir.
>
> Q. Have you ever?
>
> Bronston: No, sir.

The question for the Supreme Court was whether Mr Bronston had committed perjury. The relevant offence in the federal statute was committed by a witness who "willfully … states … any material matter which he does not believe to be true". Delivering the opinion of the Court, Burger CJ accepted that it

[48] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

[49] *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528.

[50] *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528, 539 [39].

[51] *Bronston v United States*, 409 US 352 (1973).

[52] *Bronston v United States*, 409 US 352, 354 (1973).

might be reasonable in casual conversation to interpret Mr Bronston's answer to the question about whether he had ever had a Swiss bank account as containing a negative implication. In other words, in casual conversation to "state … any material matter" would include both things that are expressly stated and things that are impliedly stated. But, Burger CJ continued,[53] "we are not dealing with casual conversation and the statute does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true".

In effect, the reasoning of the Court was that the federal statute had altered the ordinary conventions by which language is to be understood. One of those very conventions is what Grice called the maxim of relation or relevance:[54] a contribution to a conversation transaction needs to be appropriate to the immediate needs at each stage of the transaction. But the federal statute had not completely abolished the ordinary conventions of language. It could hardly do that. This is illustrated by one of the very examples given by the Court in *Bronston*, which involved recognising another of Grice's maxims, that of quantity.[55] That is the maxim that the correct quantity of information will be supplied.

Suppose a defendant on trial for stealing from a shop is asked in cross-examination "how many times did you go to the store that day?" Suppose that the defendant went to the store 30 times in preparation for the theft but that they answered that they had been to the store "five times". Literally they would be telling the truth. The defendant *had* been to the store five times. They had also been there six times, seven times, eight times, and so on. The Court in *Bronston* said that the answer "five" would be perjury.[56] But the reason it is perjury is because the application of the conversational maxim would permit the cross-examiner to infer that the defendant had been at the store *only* five times.

Turning from the United States to Australia, the High Court in *BVD17 v Minister for Immigration and Border Protection*[57] might be seen, on one view, to have amended the conventions of language in concluding that Div 3 of Pt 7AA of the *Migration Act* had, without saying so, excluded any implicature concerning procedural fairness. The reasoning of the majority relied upon a section of the *Migration Act*, which said that certain provisions were "an exhaustive statement of the requirements of the natural justice hearing rule". In effect, their Honours held that this meant that the only requirements of the natural justice hearing rule were those that were expressed in the Division rather than those that were implied.[58] In other words, the Parliament's reference to an "exhaustive statement" had changed our conventions of language in relation to that Division to require the interpretation of words by reference only to expressed meaning and not to implied meaning. A contrary approach, which was the basis for my dissent, was that the requirements of natural justice for a hearing under Pt 7AA, whether express or implied, were to be found only in the provisions to which reference was made.[59] That dissenting approach relied upon the difficulty in separating expressed and implied meaning and the opposite conclusion that had been reached only a few months earlier in relation to a provision in the same Act with very similar wording including the reference to an "exhaustive statement".[60] The similarity between those provisions led three of the leading Australian academic writers on administrative law to described the decision in *BVD17* as one that is "acutely sensitive to context".[61]

[53] *Bronston v United States*, 409 US 352, 357–358 (1973) (emphasis in original).

[54] Grice, n 7, 26–28.

[55] Grice, n 7, 26–28.

[56] *Bronston v United States*, 409 US 352, 355–356 (1973).

[57] *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29.

[58] *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29, 44 [33].

[59] *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29, 49–52 [49]–[57].

[60] *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421.

[61] M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 7th ed, 2022) 452 [8-170], referring to *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421.

C. The More Pragmatic Input That Is Required, the More Necessary an Implication Must Usually Be

A general principle of language is that, the closer the association between a potential implication and the semantics of a sentence, the more likely it is that the implication was intended. Although an explicature, which relies heavily upon text for meaning, is rarely treated in law as an implication, this principle applies to both explicatures and implicatures. As Sperber and Wilson observe of explicatures:[62]

> The greater the inferential element involved (and hence the greater the indeterminacy), the weaker the explicature will be. In particular, *ceteris paribus*, the greater the gap between the encoded meaning of the word and the concept conveyed by the use of that word, the weaker the explicature will be.

The same is true of implicatures, which usually require the court to read a provision as if it contained additional words. The greater the contribution that must be made by the missing words, which are pragmatically inferred, the more unlikely it will be that the implication was intended. As French CJ, Crennan and Bell JJ said in *Taylor v Owners – Strata Plan No 11564*:[63]

> The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".

A substantial implication is made when what is involved requires not merely the addition of missing words but to supply an entirely new term. Sometimes this is described as an implied term. Even though the implication might be of an entire term, the exercise remains one of interpretation. As Mason J said in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*,[64] the implication of a term in a contract is "an exercise in interpretation, though not an orthodox instance". And in *Attorney-General of Belize v Belize Telecom Ltd*,[65] in remarks approved by three members of the High Court of Australia in *Commonwealth Bank of Australia v Barker*,[66] Lord Hoffmann said that a court must be satisfied that an implied term "is what the contract actually means". The way I put the point in *H Lundbeck A/S v Sandoz Pty Ltd*[67] was to say that it is the same process of recognising implications that is involved whether the concern is with the meaning of express words of a clause, inferences that recognise additional meaning in a clause, or inferences that recognise an entire implied term in a legal instrument.

A leading case concerning implied terms that has been referred to for a century and a half is the English decision in *The Moorcock*.[68] In *The Moorcock*, the appellants entered into an agreement with the respondent in which the respondent agreed to pay the appellants for a right to moor a vessel at the appellants' jetty. The respondent's vessel was damaged when it was moored at the appellants' jetty due to the uneven riverbed. The appellants owned the jetty but not the riverbed. Nevertheless, the Court of Appeal of England and Wales held that there was an implied term in the contract that the jetty, and therefore the riverbed, was reasonably fit for loading and unloading. Bowen LJ said that "the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have".[69] As later courts have emphasised, the reference by Bowen LJ to the intention of the parties was to "that of notional reasonable people in the position of the parties at the time at which they were contracting".[70] In *Attorney-General*

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[62] D Wilson and D Sperber, *Meaning and Relevance* (CUP, 2012) 78.

[63] *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531, 548 [38] (citations omitted).

[64] *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 345.

[65] *Attorney-General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, 1994 [22]; [2009] 2 All ER 1127, 1134.

[66] *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 186 [22].

[67] *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 96 ALJR 208, 227 [93]; 399 ALR 184, 204–205.

[68] *The Moorcock* (1889) 14 PD 64.

[69] *The Moorcock* (1889) 14 PD 64, 68.

[70] *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, 754 [21].

for Queensland v Attorney-General for the Commonwealth,[71] Griffith CJ said that the same rule – "that the implied obligation or restriction set up *must* have been intended by the parties to the compact" – was a rule for "necessary implication" that applied to instruments generally, including to the *Constitution*.[72]

This point was made more recently by the High Court in the course of rejecting the existence of a constitutional implication of freedom of movement in *Gerner v Victoria*.[73] In a unanimous joint judgment, the High Court relied upon the leading Australian decision on the implication of contractual terms: *Codelfa Construction Pty Ltd v State Rail Authority of NSW*.[74] In *Codelfa*, it was said that the court will consider what reasonable people in the position of the contracting parties "would have intended to convey by the words chosen".[75] The High Court in *Gerner* thus said that it "would be a distinctly unsound approach to the interpretation of the constitutional text actually adopted by the framers to attribute to that text a meaning that they were evidently 'united in rejecting'".[76]

In *Codelfa Construction Pty Ltd v State Rail Authority of NSW*,[77] Mason J (with whom Stephen and Wilson JJ agreed) described five "conditions necessary" to ground the implication of a term. One of those conditions was that the proposed implied term "must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it". Similarly, in constitutional interpretation it is commonly said that an implied term in the *Constitution* will be recognised only when it is "necessary".[78] In the *Engineers' Case*,[79] for example, the joint judgment spoke of "expressed or necessarily implied meaning".

Professor Goldsworthy, whose thinking in this area is among the deepest of any Australian author, has argued that a distinction exists between implications based upon two different types of "necessity".[80] First, he says that there are "legitimate" implications that arise because the intention of the author or speaker is so obvious that the implication cannot reasonably be denied. In other words, the implication is so clear that it must necessarily have been intended. Second, there are "dubious" implications, arising because it is, in the words of Mason CJ,[81] "logically or practically necessary for the preservation of the integrity of [some constitutional] structure" or, in the words of Dixon J,[82] an implication as based upon what "the efficacy of the system logically demands".

With great respect, these two types of "necessity" are not distinct. The latter is an indicator of the former. In other words, the more logically or practically necessary a term is considered to be for the preservation of the integrity of the constitutional structure, the more obvious it becomes that such a term was intended by the notional body enacting the instrument.

In any event, there may be difficulty with the language of "necessity" when discussing requirements for the implication of a term. If "necessity" were really used in its ordinary sense (inevitable, indispensable, unavoidable) such that the instrument cannot operate without it, most constitutional implications would

[71] *A-G (Q) (Ex rel Goldsbrough Mort & Co Ltd) v A-G (Cth)* (1915) 20 CLR 148, 163.

[72] Citing *Deakin v Webb* (1904) 1 CLR 585. See also 603.

[73] *Gerner v Victoria* (2020) 270 CLR 412, 429 [34].

[74] *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 347. See also *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 605–606 (Mason J).

[75] *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 353.

[76] *Gerner v Victoria* (2020) 270 CLR 412, 429 [34].

[77] *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 347, quoting *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283. See also *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 605–606 (Mason J).

[78] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 561. See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136; *Gerner v Victoria* (2020) 270 CLR 412, 426–427 [23]–[24].

[79] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 155.

[80] J Goldsworthy, "Constitutional Implications Revisited" (2011) 30 *University of Queensland Law Journal* 9, 19–20.

[81] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135.

[82] *Melbourne Corp v Commonwealth* (1947) 74 CLR 31, 83.

not be made. In a written *Constitution* which was intended to be sufficiently flexible to apply for hundreds of years, the notional enacters should not be taken to have intended such a limited literal approach. As Dixon J said in 1937,[83] "[s]ince the *Engineers' Case* a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied".

A better approach, at least in the constitutional context, might be to see the references to "necessity" as involving a different "shade of meaning"[84] in relation to the implication of terms, akin to the meaning in proportionality testing, namely as a requirement of "reasonable necessity", rather than a requirement of impossibility or unworkability without the implication. The larger the implication that is sought to be made, and the further that the implication departs from the semantic text of the instrument, the more reasonably necessary, in the sense of more obviously intended, must be the existence of the term.[85]

III. Constitutional Explicatures and Implicatures

In remarks repeated in the High Court of Australia on numerous occasions, Griffith CJ said that "[t]he same rules of interpretation apply [to the *Constitution*] that apply to any other written document".[86] The point that the Chief Justice was making is that the same rules and conventions of language apply to the interpretation of the *Constitution* as they do to the interpretation of any other legal instrument. Nevertheless, the nature of the instrument, being a constitution that was intended to endure, is a relevant matter of context that can make an implication more reasonably necessary than, for example, a tax statute that is frequently amended. Much, however, may depend upon where on the spectrum the implication falls between explicature and implicature.

The stronger textual basis for an explicature will often have the effect of excluding any implicature to the same or similar effect. For instance, I have already mentioned that a pragmatic inference permits us to identify a constitutional explicature from the pronoun "he" in the *Constitution*. The explicature is that "he" means "a human person". It would only be if "he" had the purely semantic content of "a male human" that it would be necessary to consider whether to infer that the relevant provisions contained an implicature of "she or they", as though those words were also contained in the provision. If, however, the absurd conclusion were reached that "he" was intended to have the purely semantic content of "a male person" then it would be hard to contradict that by an implicature that inserted "she or they". The short point is that identifying the relevant explicature will sometimes leave no room for further implicatures.

An example of an exception is the freedom of political communication that is implied by the *Constitution*. Sections 7 and 24 of the *Constitution* provide, respectively, that the members of the Senate and the House of Representatives shall be "directly chosen by the people" of the State and the Commonwealth. One explicature that arises from "directly chosen by the people" is that there are limits to the extent to which the Parliament can disenfranchise any group of adult citizens.[87] Another explicature arising from those provisions, set out in *Australian Capital Television Pty Ltd v The Commonwealth*[88] by Dawson J, is that a choice "must mean a true choice" requiring, at least at the time of an election, "an opportunity to gain an appreciation of the available alternatives". Thus there are limits to the extent to which the Parliament can impair, at least at the time of an election, the ability for an elector to "make an informed choice".[89]

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[83] *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681.

[84] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 199 [39].

[85] See also *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 536 [202]; 391 ALR 188, 242–243; [2021] HCA 18.

[86] *Tasmania v Commonwealth and Victoria* (1904) 1 CLR 329, 338. See also *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469, 611–612; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 332; *Victoria v Commonwealth* (1971) 122 CLR 353, 394–395; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 183.

[87] *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

[88] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 186–187. See also *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 555 [301]; 391 ALR 188, 268; [2021] HCA 18.

[89] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 189.

An explicature of a similar nature to that described by Dawson J arises in s 128, which provides for altering the *Constitution* where "the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives". The requirement that the proposed law be "submitted … to the electors" includes the explicature that those electors have "access to information that might be relevant to the vote they cast in a referendum".[90]

A further explicature arises from provisions such as ss 62 and 64, which require the establishment of a "Federal Executive Council to advise the Governor-General in the government of the Commonwealth" and the administration of "such departments of State of the Commonwealth as the Governor-General in Council may establish". The effective operation of a Federal Executive Council and departments of State requires information to be able to be communicated between "the electors and their representatives … concerning the conduct of the executive branch of government throughout the life of a federal Parliament".[91]

A question then is whether, beyond these *explicatures* implied by the text, there are any further *implicatures*. One suggestion was made by Murphy J, who concluded that there was a very large constitutional implicature of a general freedom of movement and communication. In *Buck v Bavone*,[92] Murphy J said that the liberty of persons to move freely across State borders was an "almost absolute" liberty deriving not from s 92 of the *Constitution* but from the "union of people in an indissoluble Commonwealth".[93] That notion soon developed to his Honour's view that elections to the Federal Parliament, and also in between elections, the system of representative government, required a "nearly" absolute freedom of movement, speech, and other communication, not only between the States but in and between every part of the Commonwealth.[94] Later, his Honour added that these implicatures also arose from the "nature of Australian society" as democratic[95] and as a "union of free people".[96]

The broad implicatures of freedom of movement and freedom of communication that Murphy J had inferred have never been accepted by a majority of the High Court. The existence of a general constitutional implication of freedom of communication was rejected in *Miller v TCN Channel Nine Pty Ltd*.[97] In that case, Mason J said that he could not "find any basis for implying [by which his Honour meant inferring] a new s 92A into the Constitution".[98] This pithy statement was repeated in *Gerner v Victoria*,[99] where the High Court in a unanimous judgment rejected the existence of a constitutional implication of freedom of movement.

However, a more confined implication of freedom of political communication was recognised by the High Court in *Lange v Australian Broadcasting Corporation*.[100] The core of the reasoning of the Court in *Lange* was that the explicatures in provisions such as ss 7, 24, 128, 62 and 64 together reflected a constitutional implicature, as a presupposition, which constrained the legislature from imposing a disproportionate burden upon freedom of communication.[101] The recognition of this implication has not been uncontroversial in either its existence or its method of application. Ultimately, like many implicatures, it involves a judgment call. Here, the judgment call concerns a constitutional presupposition,

[90] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 561.

[91] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 561.

[92] *Buck v Bavone* (1976) 135 CLR 110, 137.

[93] *Buck v Bavone* (1976) 135 CLR 110, 137.

[94] *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88.

[95] *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670.

[96] *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266, 312. See also *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581–582.

[97] *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 569, 579, 615, 636–637.

[98] *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 579.

[99] *Gerner v Victoria* (2020) 270 CLR 412, 429 [34].

[100] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.

[101] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 561–562.

with evidence of this intention being the various explicatures to related effect in provisions such as ss 7, 24, 128, 62 and 64.

Perhaps the most sustained criticism of the existence of the implication was made by Callinan J in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.[102] One aspect of his reasoning was that, "even if implications may be inferred from the Constitution, the occasions for doing so could only be ones of the greatest necessity".[103] As his Honour noted, a similar form of reasoning might be taken from statements in the *Engineers' Case*, where the reasoning of four members of the Court appeared to suggest that the text of the *Constitution* should be interpreted without any implications from matters outside the *Constitution*.[104] The essential lesson in this article is, however, to the opposite effect.

Although reasonable minds might differ as to the content of implications, in law as in life implications are everywhere. Sometimes the implication might only be a small explicature from the words of a legal instrument. Sometimes the implication might be a larger implicature in the instrument. In every case, the implication is recognised by an inference drawn by the reader, based upon a reasonable exposition of the intention of the author or notional author. The inference must take into account matters of context and purpose that derive outwith as well as from within the instrument. The context outside the instrument includes basic, accepted foundational values that inform the expected meaning of the notional author. The context within the instrument includes the nature of the instrument. As Dixon J once explained,[105] the notion expounded by some since the *Engineers' Case* that "in interpreting the Constitution no implications can be made … would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied". Only one qualification needs to be added. That qualification is that the further that the implication departs from the words of the instrument, the more reasonably necessary it must be that the implication was intended by the notional author.

[102] *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 330–339 [337]–[348].

[103] *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 338 [348].

[104] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 155.

[105] *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681.