2007

Theories of constitutional interpretation: A taxonomy

The Hon Justice JD Heydon AC

Introduction

Justice Heydon was appointed to the High Court in February 2003 from the New South Wales Court of Appeal to which he had been appointed in 2000. Before that he was at the private Bar in Sydney to which he was called in 1973. He was appointed a Queen's Counsel in 1987. He is the author or co-author of several authoritative works (including the current editions of *Cross on Evidence*, *Jacobs' Law of Trusts in Australia* and *Equity: Doctrines and Remedies*) together with a large number of articles and essays.

In his lecture, Justice Heydon surveys the various approaches that might be taken to the interpretation of the Constitution. A useful backdrop to this survey is *Cole v Whitfield*[1] where the High Court described (in unanimous terms) the reasons why recourse to the history of the Constitution was a useful endeavour:

> Reference to the history of s 92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.

There was thereby settled a long running, if not especially passionate, debate. When this lecture was delivered in 2007 it continued to be orthodox. Justice Heydon nevertheless detailed seven distinct originalist theories and four strands of non-originalist theories. Those 11 theories may be further divided into three classes: those endeavouring to construe the Constitution by reference to what it meant at the time it was drafted; those seeking to interpret its provisions by reference

1 (1988) 165 CLR 360 at 385.