

SAMPLE NOTES:

Judicial Philosophies

Legal Correctness

Legal correctness is founded on the percept that the law can be set out in a series of rules, principles, definitions and exceptions, to which there will always be a single correct answer to the legal issue. The law must be consistent and timeless in its correctness.

Legal Formalism

Legal formalists take a textual approach – they apply the words of the law. A legal formalist will take the law and apply it to a specific fact situation, without considering whether the outcome is fair or just. Legal formalism was the standard of Australian courts until the 1970s, when legal realism and judicial activism gained support.

Legal Realism

Legal realism stands in contrast to legal formalism in that it assesses how judges really judge, rather than pontificating about how they should. Julius Stone (1907-85) referred to ‘leeways of choice’ open to judges. He said that there is a degree of flexibility and discretion in the way judges use previous cases, legal principles and public policy. Courts do not merely follow precedent, but exercise leeways of choice in reaching their decisions.

Judicial Activism

Activist judges view their role as promoting justice. This is in contrast to legal formalists, who view their role as promoting certainty. Justice Kirby proposed four ‘guideposts’ as the boundaries on judicial activism, to ensure that judicial law making is principled and not merely idiosyncratic:

- **Opportunity** – Judges must be given the opportunity to address gaps in the law by having a case that raises such an issue before them
- **Need** – Judges need to have a certain amount of judicial humility and restraint, and a sense of when there is really a need for judicial activism. It has to be where it is believed that reform is unlikely to happen if it is left to parliament, such that there is a legal vacuum.
- **Inclination** – Judges have to be inclined to change the law. Some judges are conservative and some are activist, and that is how it is
- **Methodology** – A new protocol or methodology for the judicial function is needed, where judges identify leeways of choice and use social and economic data to assess the likely consequences of the choice being made either way, and also receive input from selected interest groups.

(ARGUMENTS AGAINST JUDICIAL ACTIVISM ON PAGE 450)

Problem Solving Using Precedent (pg. 451)

The first thing to do is to analyse the legal problem, to identify the issues of law involved. Then, find cases that are relevant to those legal issues. Decisions that are from courts high in the judicial hierarchy, and which are majority or unanimous decisions, are preferred. It is essential that you establish which precedents are binding, persuasive, or largely irrelevant in the court in which your case will be heard. Once you have identified your strongest cases, check the case citatory, or CaseBase, to ensure that they have not been overruled and are thus still good law.

TOPIC 5: Statutory Interpretation

Statutory Interpretation: How do courts interpret legislation?

Statutory interpretation is essentially working out what legislation means. This in practice, means the courts interpreting the meaning of legislation and applying that to cases that come before it.

There are a few different approaches the courts can take when it comes to interpreting the legislation:

Modern Statutory Approach:

The modern statutory is for courts to interpret statutes in accordance with rules made by parliament:

The Commonwealth and each of the states have their own interpretation act.

- *Acts Interpretation Act 1901* (Cth)
- *Legislation Act 2001* (ACT)
- *Interpretation Act 1987* (NSW)
- *Interpretation Act 1978* (NT)
- *Acts Interpretation Act 1965* (Qld)
- *Acts Interpretation Act 1915* (SA)
- *Acts Interpretation Act 1931* (Tas)
- *Interpretation of Legislation Act 1984* (Vic)
- *Interpretation Act 1984* (WA)

Which Interpretation Act should you use?

That depends on the act you're interpreting. If you're interpreting a Commonwealth Act, you would use the Commonwealth interpretation Act, etc.

Each of the Interpretation Acts speaks of giving effect to the purpose of the legislation. Section 15AA of the Commonwealth Act provides:

"In interpreting a provision of an Act, an interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation."

There are a couple of ways in which the courts can find the purpose of an Act of parliament. They usually use intrinsic and extrinsic materials in order to find the intention.

Intrinsic materials

Are words used inside the statute itself, like the long title, the preamble, any statement of purpose or objects clause, the division of the Act into parts and divisions, headings and schedules. (pg 469)

Extrinsic materials

are documents and sources outside, external, and separate to the statute, which may be used to interpret and statute, including second reading speeches, law reform commission reports and international conventions. (pg 470)