

**THE VIEW FROM THE OTHER SIDE -  
Judicial Experiences of Legislation**

**Justice Keith Mason  
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In *Rowe v Russell*,<sup>1</sup> Scrutton LJ concluded his judgment stating:

*“I regret that I cannot order the costs to be paid by the draughtsmen of the  
**Rent Restrictions Acts**, and the members of the Legislature who passed  
them, and are responsible for the obscurity of the Acts....”*

Similar expressions of judicial angst are collected in the texts on statute law. The harder the problem of statutory interpretation, the more likely judges will inveigh against the person they think responsible, namely parliamentary counsel. Often the frustration directed at the drafter treats that personage as some sort of Thomas the Tank Engine Fat Controller, someone who has the full capacity to prevent all misunderstandings and avoid all litigation.

The personal criticisms are seldom justified.

Sometimes they proceed from ignorance as to the exigencies of the legislative drafting process. Judges may need to remind themselves that legislative drafters often work to produce gold from dross within particularly short timeframes. From personal experience, judges know that the very discipline of writing a reserved judgment can itself expose issues and problems requiring further attention. That

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<sup>1</sup> [1928] 2 KB 117 at 130.

is the main theme of Sir Frank Kitto's famous essay, "Why Write Judgments?"<sup>2</sup> Alas for parliamentary counsel, there may not be time for a further draft. And the attention span of those giving instructions may be limited, at least in the amount of time that the policy makers are able to invest in a particular project.

Chief Justice Wilmott wrote in 1767 that "*words are only pictures of ideas on paper*".<sup>3</sup> Sometimes the principles of legislation are themselves inadequately formed by those who are responsible for the policies designed to be embedded in statute. Their rosy vision of desired outcomes may blind them to the need to cover all bases so as to pre-empt the avoidance techniques of those not favourably disposed to the new dispensation.

Alternatively, the policy-makers may be unable to resist having an each-way bet. This occurred, in my opinion, in the insider trading legislation discussed in the 2001 Court of Criminal Appeal decision of *R v Firns*.<sup>4</sup> There is continuing debate about the theories offered for prohibiting insider trading. Some experts emphasise fairness and "equal access" to a market as the overriding goal. Others contend that insider trading is inefficient, because it damages the integrity of the financial market. The former policy was adopted by the Griffiths Committee on whose Report the 1991 legislation was drafted, according to the Explanatory Memorandum. Even insiders were to be permitted to rely on "*generally available information*", defined in effect as information disclosed by the company in a manner that would be likely to bring it to the attention of a reasonable investor in a

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<sup>2</sup> (1992) 66 ALJ 787.

<sup>3</sup> *Roe d Dodson v Grew* (1767) Wilm 272 at 278, 97 ER 106 at 108, cited by Isaacs J in *Fell v Fell* (1922) 31 CLR 268 at 276.

<sup>4</sup> (2001) 51 NSWLR 548. The key provisions were ss1002B and 1002G of the **Corporations Law**.

reasonable time. But the Bill as introduced and passed also permitted the clever, swift and efficient to act forthwith if they relied upon “*readily observable matter*”, an undefined term. The upshot was that an insider was permitted to get the jump on the market by dealings on the Stock Exchange in Sydney effected immediately after the announcement by the Supreme Court of Papua New Guinea of a price-sensitive judgment.

Those having the carriage of the legislation thus produced a clearly bifurcated enactment of legislative policy. In my reasons (with which Hidden J agreed) I said:<sup>5</sup>

*“The language of the statutory definition of “generally available” and the drafting history of that definition demonstrate that the Griffiths Committee’s clear vision of an underlying policy of promoting fairness in the market through equal access to information became badly blurred in the legislative process. This did not happen through oversight, although it is possible that different participants in the legislative process concentrated on one factor to the exclusion of the other or persuaded themselves that two essentially conflicting policies could be brought into sharp focus at the point of statutory definition. Regrettably for the courts at least, this has not happened. The result has been a form of legislated astigmatism because the attempt to converge essentially incompatible policy goals has produced a patchy blurring of the image ...”*

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<sup>5</sup> At 558[53].

There is little that parliamentary counsel can do if faced with unresolved and unresolvable divergences of policy instructions. The best one can hope for is that the problem is laid before the legislative masters before the Bill is finalised. Like Walter Bagehot's monarch, parliamentary counsel have the right to warn if alerted to potential problems. In doing so they may alert starry-eyed or astigmatic policy makers. The art of drafting hopefully develops minds "*alveolated with suspicion*", to pick up a phrase of Justice Michael McHugh.<sup>6</sup> But crystal balls are not yet standard issue.

As a last resort, the government that perceives a problem that must be addressed, but does not know how to do so, can always pass the problem to the judiciary. When this occurs one often finds a weak instruction about doing what is just and equitable in the circumstances accompanied by a non-exclusive checklist of factors to be taken into account.

Sometimes enacted concepts resist reduction to sharp-faced rules, despite the best of intentions. Laws attempting to define insider trading or unfair contracts are prime examples. Judges who complain about the vagueness of such legislation should remember that the common law is full of similar problems, although it has had hundreds of years to get its rules stated clearly and sharply prioritised. Diplock LJ once remarked that:

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<sup>6</sup> ***Registrar-General v Northside Developments Pty Ltd*** (1988) 14 NSWLR 571 at 599 per McHugh JA.

“... *the law is nearly almost most obscure in those fields in which the judges say: ‘the principle is plain, but the difficulty lies in its application to particular facts’.*”<sup>7</sup>

Or as Dawson J put it in the ***David Securities Case***.<sup>8</sup>

“*Facts tend to be black or white but the law very often is not.*”

Putting “*the law*” into a statute does not necessarily make its concepts more tractable.

Judges sometimes get snaky when faced with apparently contradictory statutory commands. There is a tendency to blame the drafter, because it is assumed that the difficulty would have been removed had it been perceived before the legislation was enacted. It is certainly a step along the way to solving a problem to know that it exists, but many policies and legal principles are ambiguous and contradictory in their nature. Even the canons of statutory interpretation have been said to be incompatible one with the other.<sup>9</sup>

Most difficult questions of statutory interpretation involve reconciling competing commands. The clash may only become apparent when litigants ask questions never dreamed of by legislators or posed to parliamentary counsel. Difficulties are multiplied when the apparent conflict exists between different statutes. Contending parties may agree that the meaning of a statute is plain, but violently

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<sup>7</sup> ***Ilkiw v Samuels*** (1963) 2 All ER 879 at 889.

<sup>8</sup> ***David Securities Pty Ltd v Commonwealth Bank of Australia*** (1992) 175 CLR 353 at 402-3.

<sup>9</sup> Karl Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed” (1950) 3 ***Vanderbilt Law Review*** 395.

disagree about what is revealed. The New South Wales Court of Appeal recently had cause to construe s101 of the **Proceeds of Crime Act 1987 (Cth)**. Santow JA wryly observed<sup>10</sup> that:

*“there is some irony in the fact that both appellant and respondent began by considering that s101 as it stands is clear and unambiguous. Yet they come to diametrically opposed views as to that supposedly patent meaning. That is usually a precursor to finding either ambiguity or a wholly specious argument for one of the supposedly competing interpretations”.*

Judges who criticise the drafter for ignorance or oversight do well to remember that prioritising and reconciling generally stated legal principles is the very pith and substance of the common law. In matters of general law we are used to wrestling without the aid of clear hierarchies of principle. We look to hierarchies of precedents and of appeal courts to guide us. But legislation purports to speak in a single imperious voice and at a constant volume. To pursue the metaphor, we accept as an ultimate principle of statutory interpretation that *“the legislature cannot speak with a forked tongue”*.<sup>11</sup> This, of course, is a myth, but a necessary one. It would be intolerable for a court to tell a litigant that he or she is caught in a cross-fire of conflicting statutory demands. The problem for judges is that we take up the strain of reconciling conflict between statute and common law and between statute and statute. Judges do not have the option of saying *“It is too hard”* or *“No answer to your problem is available”* or *“The matter is remitted to Parliament to have a second attempt at explaining itself”*.

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<sup>10</sup> **Diez v Director of Public Prosecutions** (2004) 62 NSWLR 1 at 8[24].

<sup>11</sup> **Waugh v Kippen** (1986) 160 CLR 156 at 165 per Gibbs CJ, Mason, Wilson and Dawson JJ.

Sometimes therefore the judicial labour becomes Herculean because the reality is that the conflict was not perceived by those who made the earlier statutory or common law rules; or because it was perceived, but deemed incapable of resolution other than by fuzzy legislation or honest delegation to the courts. These difficulties will be with us to the end of time. My point is that the bedrock principle that the law is a coherent unity<sup>12</sup> forces the court to come up with answers and drives the court into searching for a sometimes non-existent intention.

Judges need to recognise that their experience of legislation is bound to be jaundiced. Most issues of statutory interpretation are resolved on the advice of lawyers. Few persist into the public well of the courtroom. Of those that do, many will be genuine and some quite vexing in their complexity.

The exigencies of the drafting task and the constancy of human imperfection guarantees that hard questions of statutory interpretation will always be with us. Parliamentary Counsel will never have to adopt the work practices of the rug weavers of Qum who deliberately insert a mistake into their handiwork because only Allah is perfect. Those who write judgments are in a similar position.

Legislation may be the end product of the process of debate, in which amendments are inserted to obtain assent without always having the opportunity to check the flow-on effects. Thankfully it is now permissible to track the parliamentary history, thereby ascertaining changes made to the Bill as presented

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<sup>12</sup> See Justice Keith Mason, "The Unity of the Law" (1998) 4 **TJR** 1.

to Parliament. Of course, the Bill itself will often be the product of last minute horse-trading. Late changes may hit their target, but at the cost of skewing the thrust of the instrument unintentionally. Yet these will usually be undetectable to the reader of the Act. For example, if there are changes to a draft Bill set out in a schedule to a law reform commission report then there may be no legitimate way of learning why they were made. Is there a role for the Explanatory Memorandum to contain a schedule from the drafter explaining the textual changes not intended to reflect changes in substance?

As often happens, when several people are involved in settling a report or agreeing on a Bill, some only read the draft when it is at its final stage. Others may have read it earlier, but only twig late to its impact in a particular matter.

I was a member of the Special Committee of Solicitors General during the final stages of preparing the **Cross-Vesting** legislation. The Commonwealth had the carriage of the drafting exercise. I remember well the response of Mr Dennis Rose QC, then Chief General Counsel in the Commonwealth Attorney General's Department, in relation to a sensible suggestion for amendment to the "final draft" of the Bill that was being settled by the Committee. *"Your point is a good one, but it is just too late to take the Bill back to Parliamentary Counsel. But let me promise this: I will have a statement put into the Minister's Second Reading speech saying that the legislation is intended to operate in the way you have proposed."*

I will tell you another Second Reading speech story later.

My anecdote reminds about the danger of confusing the expressed intent of the promoter and the language adopted by Parliament. I recently had my attention drawn to the early decision of *Nolan v Clifford*,<sup>13</sup> where the High Court was considering the interpretation of a section of the **Crimes Act 1900 (NSW)**. That was a consolidating statute, although there were some changes recorded in the note of the consolidating commissioner. Barton J pithily expressed the judicial task in the following terms<sup>14</sup>:

*“We have been asked to refer to the brevier, the note of the consolidating commissioner, to find out what he meant. I do not think this reference is of any value, because we are not to consider what the commissioner thought, but what Parliament has said, and what it meant by what it has said.”*

Sometimes judges make unjustified assumptions about the relationship between the Executive and Parliament at the time when the legislation was enacted.

Legislation used to be enacted by the Crown on the petition of Parliament. The old approach may still be reflected in Constitutions such as the New South Wales **Constitution Act** that speaks of the Legislature as *“His Majesty the King with the advice and consent of the Legislative Council and the Legislative Assembly”*. During the medieval era the King’s Council drew statutes based on proposals that had been initiated by Parliament. In this context, the judges often had a leading role in drafting. This explains the remark of Hengham CJ who told counsel in 1305:

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<sup>13</sup> (1904) 1 CLR 429.  
<sup>14</sup> At 449.

*“Do not gloss the statute: we know it better than you do, because we made it.”*<sup>15</sup>

In the eighteenth and early nineteenth century, when the executive government was relatively weak, legislation tended to become more verbose and variegated in style. Holdsworth has observed that:<sup>16</sup>

*“History shows that those periods in which Parliament has had a large amount of independence, and the Executive has had a small amount of control, have been periods in which the statute book has shown the greatest lack of symmetry.”*

Presumptions of interpretation based on consistency of style or concept are at their weakest in such contexts. Sir Harold Kent, a legislative draftsman, referred to the statutes of the mid-nineteenth century *“with their appalling tracts of unparagraphed, unpunctuated matter, with the conveyancer’s predilection for repeating everything again and again”*.<sup>17</sup> It would be careless to construe legislation of this era by assuming that different words are necessarily intended to convey different ideas.

These phenomena are not just a matter of distant history. They may impact on modern legislation and it may be something that judges need to take into account before venting their spleen on Parliamentary Counsel. For a time when I was Solicitor General for New South Wales the government of the day controlled neither House of Parliament. This made it cautious about introducing any

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<sup>15</sup> Year Book 33-35 Ed I (RS) 83, cited Holdsworth, **A History of English Law** vol XI p366. For other examples, see F Bennion, **Statutory Interpretation** 4<sup>th</sup> ed, 2002 p553.

<sup>16</sup> **A History of English Law** vol XI p371.

<sup>17</sup> Quoted in F Bennion, **op cit**, p352.

legislation into Parliament and it certainly made it harder for Parliamentary Counsel to get his hands on amendments, particularly late amendments, to Bills. There were of course mechanisms for providing confidential drafting assistance to opposition and cross-bench members, but these were not always availed of. Non-governmental MPs are naturally free to draw on private legal assistance. But, as occurred in the eighteenth century, this can mean that accumulated drafting wisdom is by-passed and that more than the usual number of “i”s are not dotted or “t”s crossed. It helps the judges at least to be aware of this phenomenon.

Most statutes are designed to take the law outside the judicial comfort zone (ie the realm of the common law). This causes many judges to get their hackles up, often unreasonably. History is littered with prolonged rearguard battles by judges reluctant to understand or accept ground-breaking legislation. Consider for example the judicial response to the Statute of Frauds or the business records provisions of the Evidence Acts. In the process of resisting change to the familiar wisdom of the common law, judges may feel like hitting out at the messenger rather than the message. Many statutes transport judges into a universe of discourse in which they have no familiarity at all. That is often Parliament’s intent.

Change usually generates opposition from those who are most affected. Changing law affects judges sharply, especially if it challenges attitudes we have taken over half a lifetime to learn.

Sir Robert Torrens did not accuse the legal profession of seeking to feather its own nest in opposing his reforms. Rather, he reflected upon the difficulty which

any body in control of an arcane and complex art has as regards the **capacity** to see the need for reform. In his partly autobiographical work **Registration of Title**<sup>18</sup> he wrote this, under the heading “Professional bias incapacitates for the work of reform”:

*The work of law reform has been left in the hands of lawyers; and without adopting the ancient proverb, “Hawks dinna paik out hawks’ een,” [Hawks do not pick out hawks’ eyes] and without attributing any sordid motive, there are other influences no less powerful which operate to deter the professional mind from realizing the idea of thorough radical reform of the law. As Lord Brougham says – “They love and revere the mysteries which they have spent so much time in learning, and cannot bear the rude hand which would wipe away the cobwebs, in spinning which they have spent their zeal and their days for perhaps half a century.” The effect of education may be such as to prevent men seeing clearly or judging impartially. How else can we account for the fact that in the most important affair that can occupy the mind of men here below – “religion” – we find men adhering to that creed, be it what it may, in which they have been brought up?*

*It would seem as though the mind, confined for a length of time to run in grooves, loses the power to draw out from the deep-worn track. Hence, upon examining the projects of law reform emanating from legal men, even the most learned, we find them to be little better than palliatives.*

Oliver Wendel Holmes once observed that “*ignorance is the best of law reformers*”.<sup>19</sup>

Legislation today is very different from older enactments in form and structure. But the greatest distinguishing point lies in the modern drafting style which has been labelled as “fussy”, in contrast to the “fuzzy” law of the past or as found in the civilian tradition in Europe. Fussy law concentrates on detailed distinctions thrown up by a focus on specific circumstances. Fuzzy law on the other hand, provides general principles in the context of broad legislative purposes. The differences

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<sup>18</sup> (1859), pp5-6.

<sup>19</sup> **The Common Law**, p64.

and their consequences are expounded in an excellent article called “Legal Drafting Styles: Fuzzy or Fussy?” in the Murdoch University Electronic Journal of Law.<sup>20</sup> The author, Lisbeth Campbell, points out that the English/Australian style of drafting that is elaborate and complex is a response to sustained and continuing judicial reluctance to permit statutory tinkering with the common law. Campbell points out that:

*“By being specific in its instructions to drafters Parliament sought to control judicial construction of its enactments. Courts responded by becoming even more literal and restricted in their reading of statutes thus generating a vicious spiral of convoluted detail which resulted in the lack of intelligibility referred to by the Renton Report which was set up to address this problem.”<sup>21</sup>*

Fussy law has advantages and disadvantages that are pointed out by the author. Australian judges may not be consciously aware of the distinction between fussy and fuzzy law, but they should be prepared to change gear when confronted with an interpretative task involving law of the latter character. The prime example in the present era is s52 of the **Trade Practices Act 1974**. It took several years before judges came to accept that this thin provision was designed to drag them brutally away from their comfort zone. It compelled them to apply a radical, widely intrusive provision in situations where neither Parliament nor Parliamentary Counsel had provided many clues. As we know, judicial grumbling on this account

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<sup>20</sup> Vol 3 No 2 (July 1996).

<sup>21</sup> This is a reference to **The Preparation of Legislation**, Report by the Committee appointed by the Lord President of the Council (the Renton Committee), HMSO London May 1975.

has led to a cluster of later fussier provisions surrounding and partially qualifying the core enactment in s52.

Recent developments in the law of statutory interpretation have dramatically assisted the search for the true (though limited) intentions of those who frame or promote legislation. The real issue is whether the judges are interested in discovering those intentions, and if not, why not. I shall return to that topic.

For the moment it is well to remember that only within the last generation has it become compulsory to consider legislative context in the first instance, and not merely at some later stage when ambiguity might be thought to arise.<sup>22</sup> Nowadays, we acknowledge the permissibility (indeed essentiality) of purposive construction, yet this was a radical idea before the judgment of McHugh JA in **Kingston v Keprose Pty Ltd (No 3)**.<sup>23</sup>

Thankfully, we have moved away from the belief that the meaning of a statute can often be discovered by consulting dictionaries and encyclopaedias of words and phrases. In the **House of Peace** case I observed:<sup>24</sup>

*A dictionary may offer a reasonably authoritative source for describing the range of meanings of a word, including obsolete meanings. Dictionaries recognise that usage varies from time-to-time and place-to-place. However, they do not speak with one voice, even if published relatively concurrently. They can illustrate usage in context, but can never enter the*

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<sup>22</sup> **K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd** (1985) CLR 175 at 315; **Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc** (2000) 47 NSWLR 548 at 575-6.

<sup>23</sup> (1987) 11 NSWLR 404.

<sup>24</sup> **House of Peace Pty Ltd v Bankstown City Council** (2000) 48 NSWLR 498 at 505.

*particular interpretative task confronting a person required to construe a particular document for a particular purpose. I agree with the following remarks of Judge Randolph of the United States Court of Appeals for the District of Columbia Circuit:*<sup>25</sup>

*“... citing ... dictionaries creates a sort of optical illusion, conveying the existence of certainty – or ‘plainness’ – when appearance may be all there is. Lexicographers define words with words. Words in the definition are defined by more words, as are those words. The trail may be endless; sometimes, it is circular. Using a dictionary definition simply pushes the problem back.”*

I would not want this to discourage you from inserting Dictionaries into statutes. They are most helpful, especially where the dictionary itself is easily identifiable and where the reader is directed to it in the substantive text.

The mischief rule has been around for at least as long as **Heydon’s Case** in 1584,<sup>26</sup> but only comparatively recently have judges been assisted by knowing what materials may be consulted in order to determine the mischief addressed by Parliament and by having ready access to those materials. When, in 1978, Mason J suggested that courts might consult Law Reform Commission reports to identify the mischief at which a statute was directed<sup>27</sup> this was a controversial proposition. His Honour added that he did not favour resort to Law Reform reports for any broader purpose. How things have changed since then!

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<sup>25</sup> “Dictionaries, Plain Meaning and Context in Statutory Interpretation” (1994) 17 **Harvard Journal of Law and Public Policy** 71 at 72.

<sup>26</sup> 3 Co Rep 7a, 76 ER 637 at 638.

<sup>27</sup> **Wacal Developments Pty Ltd v Realty Developments Pty Ltd** (1978) 140 CLR 503 at 520-1.

Of course, matters can be taken to extremes. I once heard the submission that an enactment meant X because, when the Bill was in the Committee stage, an opposition member urged a particular amendment, asserting that if it were not made X would follow. The amendment was opposed, but without the minister denying the assertion. Counsel was about to take the Court to the caselaw on admissions by silence when the judge exploded.

My former colleague, Mr Tom Pauling QC, the Solicitor General for the Northern Territory, once told me about research he had done concerning a statute dealing with riparian rights. He went to the South Australian nineteenth century parliamentary debates. In the Lower House, the minister told the members that this was a reforming statute that would open up the great waterways of South Australia to smallholding farmers. The promoter's speech in the Upper House commenced with the words:

*"Fellow pastoralists need have no fears about this legislation..."*

This reminds us that Parliament is sometimes the venue of genuine debate, where reports, explanatory memoranda and second reading speeches are designed to persuade a particular audience, not just to inform the public.

Judges like Antonin Scalia in the United States who scorn interpretative assistance from secondary sources have actually been accused of being undemocratic in outlook, anxious to avoid anything that reflects messy democracy in action. In polities like ours, responsible government paradoxically ensures a greater level of Executive control over Parliament. The cold reality may be that

the majority in Parliament intend the legislation to mean whatever the Government of the day intends it to mean. In this context, judges who resist being taken to the secondary materials are really advancing principles about of the proper place of Parliament vis a vis the Executive rather than searching for the political realities of the lawmakers' "intent". The judicial viewpoint is thus unashamedly "*from the other side*" to that of the politicians and those who act on the instructions of politicians, including parliamentary counsel. I am not apologising for this instance of judicial stubbornness in importing high constitutional principle into an essentially interpretative task. Rather, my concern is that we should try to view things as they are.

As you know, the House of Lords has been very reluctant to go down the path of accessing Hansard to construe legislation. *Pepper v Hart*<sup>28</sup> opened the door in 1993, but only so far as permitting consultation of clear statements made by the minister or other promoter of a Bill directed to the very point in question in the litigation.<sup>29</sup> Later decisions of the House of Lords have confined English courts to permitting reference to statements in Parliament only where (a) legislation was ambiguous or obscure, or led to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together, if necessary, with such other parliamentary material as might be necessary to understand such statements and their effect; and (c) the effect of such statements was clear.<sup>30</sup>

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<sup>28</sup> [1993] AC 593.

<sup>29</sup> See *Melluish v BMI (No 3) Ltd* [1996] 1 AC 454 at 481.

<sup>30</sup> See *R v Environment Secretary, Ex parte Spath Holme Ltd* [2001] 2 AC 349 at 391.  
See also *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816.

The precise application of these principles in Australia is not my present concern. But I do wish to identify the constitutional principles perceived by the judges, here and abroad, as colouring their frequent unwillingness to follow the Executive's at times sloppy signposts and move away from the enacted text of legislation. What lies behind this judicial reluctance is a mixture of distrust of the prescience of ministers, suspicion that ministers sometimes know that what they are saying is not necessarily reflected in the text, and affirmation of the high constitutional principle about statute law being the prerogative of Parliament, not the Executive.

These views have been articulated most clearly in an influential article by Lord Steyne, "Pepper v Hart; A Re-Examination".<sup>31</sup> My anecdote about the drafting of the Cross Vesting legislation suggests that caution should be the order of the day, even (or particularly) with the statements of ministers promoting legislation. The House of Lords has recently moved from caution to positive mistrust, basing their stance upon constitutional principle. In *Wilson v First County Trust Ltd (No 2)*<sup>32</sup> their Lordships were at pains to demonstrate that reliance on ministerial statements actually skews the court away from the true, so called objective or enacted intention of Parliament, the only source of law-making power (judges aside). Lord Nicholls said<sup>33</sup> that "*[i]t should not be supposed that members necessarily agreed with the minister's reasoning or his conclusions*". Lord Hobhouse was even blunter in stating<sup>34</sup> that it was "*a fundamental error of principle to confuse what a minister or a parliamentarian may have said (or said he intended) with the will and intention of Parliament itself*".

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<sup>31</sup> (2001) 21 **OJLS** 59.

<sup>32</sup> [2004] 1 AC 816. See also Aileen Kavanagh, "Pepper v Hart and Matters of Constitutional Principle" (2005) 121 **LQR** 98.

<sup>33</sup> At 843[66].

<sup>34</sup> At 864[139].

There is also a strong judicial preference for the accessibility of law. In *Watson v Lee*,<sup>35</sup> the case about gazettal of regulations, Barwick CJ asserted that:

*“No inconvenience in government administration can ... be allowed to displace adherence to the principle that a citizen should not be bound by a law the terms of which he has no means of knowing.”*

The text of a statute is always available, not so the secondary materials. For example, the vital Australian Law Reform Commission **Interim Report on Evidence**<sup>36</sup> is a rare collector's item. In this context, it is harsh to criticise a judge or litigator for not going behind the text of the **Evidence Act**, especially since it was intended as a ready tool of practical assistance.

Judicial and statutory permission to examine extrinsic materials may well lessen the chances of the true intention of the framers being disregarded, at least by default. But if anything, it has heightened the stringency of the academic and judicial debate about “legislative intent”. As you know, the stakes are at their highest with virtually unamendable statutes, ie Constitutions. But, if the American experience is anything to go by, those who are most insistent on “original intent” are generally the most hostile about going behind the text on ordinary legislation. It is a curious paradox.

My favourite Scalia quote is his reference to the use of legislative history as *“the equivalent of entering a crowded cocktail party and looking over the heads of the*

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<sup>35</sup> (1979) 144 CLR 374 at 381.

<sup>36</sup> ALRC 26 (1985).

guests for one's friends".<sup>37</sup> Scalia added that *"the greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislatures."* Equally pithy, was his statement in ***Pennsylvania v Union Gas Co***<sup>38</sup> that:

*"It is our task, as I see it, not to enter the minds of the Members of Congress – who need have nothing in mind in order for their votes to be both lawful and effective – but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times."*

This is the notion developed by the House of Lords in explanation of its extreme reluctance to give weight to ministerial statements.

As well as significant developments in the law of statutory interpretation, there have been recent improvements in the science of legislative drafting. Some changes are bound to be faddish, but most represent welcome developments based on the accumulated wisdom of experts. This conference is a tribute to the emerging art. I encourage you in your endeavours. May I also thank you for the opportunity to speak at it. I urge you to continue your attempts to engage legal practitioners, especially judges, in your endeavours. Dialogue will increase mutual understanding about needs and the best means to address them.

We live in an exciting time of transition. The great commons of the common law are being engulfed by a tsunami of legislation. Even the principles of statutory

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<sup>37</sup> ***Conroy v Aniskof*** 507 US 511, 519 (1993).  
<sup>38</sup> 491 US 1 (1989).

interpretation are increasingly found in statute. In these circumstances, it is amazing that law schools are do not include a greater component of statute law in the curriculum. Courts themselves have been slow in developing the common law for the age of statutes (to pick up Guido Calabresi's phrase).<sup>39</sup>

Judges are forced daily to adjust and accommodate the existing body of reasonably coherent law with the engulfing tide of new statutes. We have to reconcile the sometimes irreconcilable commands of the primary lawmaker, Parliament. At times, judicial stubbornness is due to concern to protect core values, including key constitutional principles and basic fairness as embodied in the doctrines of natural justice. But sometimes judges are just angry that they do not have Parliament's option of doing nothing when faced with a problem.

One thing is sure. The dialogue between the three arms of government will continue to be vigorous and constructive.

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<sup>39</sup> Guido Calabresi, **A Common Law for the Age of Statutes**, Harvard University Press, 1982.