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the Hon. J J Spigelman, AC, Chief Justice of NSW in 2008**

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**ADDRESS ON THE RETIREMENT OF
THE HONOURABLE JUSTICE VIRGINIA BELL
BANCO COURT, SUPREME COURT OF NEW SOUTH WALES
19 DECEMBER 2008**

It is singularly fortunate in any personal journey to meet someone who simply lights up your life. Virginia Bell is such a person. You have done it for me and I am quite confident in saying that you have done it for every other member of this Court.

I wish at the outset to acknowledge on behalf of us all what a wonderful companion you have been. Not least because of your influence on all of us over the last nine years, the sense of collegiality to which you have made such an important contribution will endure. It may well be the case that where you are going the need for companionship is greater than ours. We are content to make that sacrifice.

Your contribution in this respect was to a substantial degree determined by your personality – your equable temperament, your interest in people, your broad range of interests, your penetrating intelligence, your wit and your wisdom.

You have long been the preferred commentator at all those collegial events such as dinners and celebratory occasions by which the members of any institution strengthen their bonds with each other. Your command of the language manifest on those occasions was as mellifluous as it was concise. The penetrating insights and the wit with which you always addressed us was characterised by a generosity of spirit. Your wit is never demeaning of others, it contains no needle, no undertones, no standing on dignity. It is, as one poet put it, “mirth that has no bitter springs”.¹

All the personal qualities to which I have referred were reflected in your judicial work where you manifested the generosity and fairness of someone who knows her roots and who is confident in her intellectual capacity. Your conduct in court was unfailingly polite. You brought to your work a high level of social consciousness, compassion for the unfortunate and a strong sense of justice, whilst recognising that those instincts could only be properly expressed within the bounds of fidelity to the law. If there was one word I would use to describe your approach it is “balanced”. Furthermore, your judgments reflect an exquisite

ability to cut incisively to the real point in issue. And you do it every time.

Over eight years as a trial judge and one year as a judge of appeal you have been involved in some of the most difficult cases which have come before the Court. The competence with which you have disposed of all of these cases is admired by all of your colleagues.

One case that comes to mind took the best part of a year in the high security court at the Downing Centre. It involved multiple murders in a family dispute, with four co-accused tried together. Few judges could have done this successfully.² This was only one of numerous criminal trials that you conducted to universal acclaim.

Your Honour also delivered landmark judgments on such matters as the validity of an indictment not signed by a Crown Prosecutor;³ on the failure to pay group tax deductions as defrauding the Commonwealth;⁴ the pioneering judgment on the application of the new system for detaining serious sex offenders

after their sentence had been served;⁵ and the applicability of the privilege against self-incrimination in the Coroners Court.⁶

Perhaps the judgment that stands out for me, and which has been relied upon in every subsequent case in the field, is your exposition of the structure of the Commonwealth Criminal Code. You accurately converted into a format capable of use, and even into a format capable of explanation to a jury, the convoluted circularity and cascading definitions of the criminal responsibility provisions of that Code, which deploy words in a manner hitherto unknown in the history of the English language. Subject to those provisions being amended, we will be forever in your debt in this respect.⁷

Your Honour also delivered important judgments in civil matters such as a medical negligence case where a doctor had not informed a woman that her husband had AIDS.⁸ And, in a fine example of the common law adapting to contemporary circumstances, your Honour held that it was not defamatory in this day and age to accuse a person of engaging in homosexual intercourse.⁹

As a trial judge and in the Court of Appeal your Honour became involved in the full range of this court's jurisdiction, particularly at common law. To the depth and intensity of your experience in criminal law as a practitioner, your years as a judge added breadth to your legal knowledge.

I was aware at the time of your elevation to the Court of Appeal, reinforced at the time of the announcement of your elevation to the High Court, that you are acutely conscious of the fact that your legal experience has primarily been in criminal law. Let me assure you that this is not a weakness but a strength, as the Commonwealth Attorney-General emphasised when announcing your appointment.

Every judge of this Court and, I have reason to believe, every judge in other Australian jurisdictions, who sits in criminal trials or on a Court of Criminal Appeal welcomes the appointment to the High Court of someone with your criminal trial experience and expertise.

One of the most significant developments in the Bar over recent decades has been the increased specialisation of legal practice, particularly in the field of crime where practitioners these days generally either do none, or do nothing else. The days of generalist practice, when most senior members of the Bar did a significant amount of criminal trial work, are gone.

If the High Court is to have judges with real experience of criminal trials then contemporary appointees will all have a background that is significantly specialised in that field. I assure you that your Honour's appointment is welcomed for this reason.

Your Honour had a unique Sydney upbringing. During your childhood years your naval officer father served as the General Manager at Garden Island. Your family lived in a house on the base. You and your brother were the only children on the island and had a unique, in the strict sense, Sydney Harbour frontage experience of exploring the rocks and waters with which you were surrounded.

As the only girl on the island you acquired some of the popularity of *The Daughter of the Regiment* and, as with Marie in Donizetti's Opera of that name, it has transpired that you are of aristocratic blood.

It is, therefore, appropriate for me to conclude with two lines from the most famous aria of that Opera, an aria which has been called the "Mount Everest" for tenors as it features nine high C's. I do not propose to sing the lines.

Ah! mes amis, quel jour de fête?

Ah! my friends, what a day of celebration?

In view of our prospective relationship it is also appropriate to mention the next line.

Je vais marcher sous vos drapeaux.

I shall march under your flags.

So be it.

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- ¹ Rudyard Kipling *The Childrens Song*.
- ² See *R v Darwiche & Ors* [2006] NSWSC 1167. See also *R v Darwiche* [2006] NSWSC 848, 878, 922, 923, 924, 926, 927, 928 and 929.
- ³ *R v Halmi* (2005) 62 NSWLR 263.
- ⁴ *R v Iannelli* (2003) 56 NSWLR 247.
- ⁵ See *R v Tillman* [2007] NSWSC 528; *Attorney General for the State of NSW v Tillman* [2007] NSWSC 605.
- ⁶ *Correll v Attorney General of NSW* [2007] NSWSC 1385.
- ⁷ *R v Sengsai-Or* (2004) 61 NSWLR 135.
- ⁸ *BT v Oei* [1999] NSWSC 1082.
- ⁹ *Rivkin v Amalgamated Television Services Pty Ltd* [2001] NSWSC 432.

LAUNCH OF *REDISCOVERING RHETORIC*¹
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
BANCO COURT, SYDNEY
14 NOVEMBER 2008

For several centuries the Inns of Court were called “The Third University” on the basis that they were as significant a centre of learning as Oxford and Cambridge. Although the centrality and quality of that function declined after the civil war, it never disappeared. This was not, however, one of the functions of the Inns which their epigoni in the Australian bar associations chose to imitate.

This has changed over recent years, most notably in the intensity and quality of the Readers’ Courses organised by the New South Wales Bar Association. However, the series of lectures on rhetoric, which are now published, is, so far as I am aware, the most innovative and intellectually challenging education project that the New South Wales Bar Association has ever attempted.

I congratulate Michael Slattery SC for instigating the project and Justin Gleeson SC and Ruth Higgins for both organising a series of the highest intellectual quality and producing this book as a permanent record.

One of the most distinctive characteristics of contemporary legal practice is the degree of specialisation in legal practice. It is at the heart of the continued virility, indeed the continued existence, of a separate and independent Bar that advocacy should be understood to be a form of specialisation.

The great classical tradition of learning on the subject of rhetoric, as a distinct body of knowledge and technique, is a powerful affirmation of the existence of such a specialisation. For that reason, the whole Bar is indebted to the organisers of this project.

The first part of the book contains papers of great learning about the classical tradition. This part expanded my knowledge to a significant degree. Rhetoric was a subject upon which I collected one or two books over the years but, save for dipping into

Cicero both in his collected works and biography, this was a field into which I never had the time to delve in depth.

I am very grateful to the authors of these chapters for making their learning available. I am particularly grateful to the editors for inviting me to launch this book so that I actually had to set aside the time to do the reading. My speaking engagements are not always as fruitful as this.

Part two of the book focuses on the practice of advocacy at the Bar. Michael McHugh mourns the passing of a golden age, whereas Michael Kirby, as is his wont, finds the promised land still ahead of us. Between them, these two great products of the New South Wales Bar, tell us much about where we came from and illuminate the issues ahead of us. Dyson Heydon, who never takes any shortcuts, is thorough and insightful in the manner to which we have all become accustomed. There is much practical wisdom in his chapter, which any barrister can read to advantage.

The declining role of orality in legal advocacy has been identified, notably by the late Bryan Beaumont and by Arthur Emmett.² Contemporary case management practices have

considerably expanded the extent to which evidence and submissions are in written form. This was originally designed to save time and therefore costs. As the preparation of statements has become more refined, and written submissions have become more elaborate, I doubt that there is any cost saving today. There is no doubt that the ability to test propositions in face to face debate improves the quality of the decision-making process. There are very real costs in the decline of orality.

The change of practice in this respect, particularly the greater involvement of judges in procedural matters and in testing submissions on substantive law, are manifestations of a process of convergence between common law and civil law systems. Just as common law systems have adopted what might be regarded as investigatory elements, so civil law systems have adopted adversarial elements. Nevertheless, a significant difference of emphasis exists between the two.

At the heart of this difference, reflecting many centuries of political and legal development, lies a fundamental difference of approach to the relationship between a citizen and the State. Our institutional tradition in this respect is deeply rooted in our social

history and which, for over two centuries, has been reflected in the distinctive role of advocacy in an adversarial trial.

In our tradition, each autonomous individual is permitted a considerable degree of control over the judicial decision-making process that affects their lives, in a manner which is in no sense subordinate to the representatives of the State. Not only does this inform every aspect of our procedure, it is reflected in the very physical structure of our courtrooms.

By contrast, in civil law nations, the tradition of the architecture of a courtroom has been distinctly different. The prosecutor in a criminal trial, who is part of the same career structure as the judge, often entered the courtroom from the same door as the judge and wore the same kind of robes. In the courtroom itself the prosecutor was not located on a basis of equality with the advocate for the accused, but sat on an elevated platform in a distinct part of the court rather than, as in our tradition, at the same bar table as the accused's counsel. This is changing as part of the convergence to which I have referred.

There is a long standing debate about the virtues of the two systems in terms of which is best designed to reveal the truth. This is not a matter about which I can elaborate on this occasion. There is very real issue as to whether truth best emerges by a process of Socratic dialogue, on the one hand, or by inquiry expressly directed to ascertaining the truth, on the other hand. Absolute truth is not the only value to be served by the administration of justice. Procedural truth has its own value. That is where advocacy performs a critical social function.

A contemporary philosopher, the late Stuart Hampshire, to whom Gleeson and Higgins refer, has placed the value of fairness in procedure at the heart of his political philosophy. Hampshire was no stranger to the frustrations of advocacy, particularly that sense of dejection one has upon thinking of one's best point after the case is over. Hampshire worked in intelligence during the war and, many years later, came to regret that he had never shared with anyone the view he frequently expressed to himself in the privacy of his own room at Bletchley Park: "There is something the matter with that chap Philby".

Hampshire adopted a dictum of Heracleitus that “justice is conflict”. He said:

“Fairness and justice in procedures are the only virtues that can reasonably be considered as setting norms to be universally respected.”

And:

“... no procedure is considered fair and just, anywhere and at any time, unless the particular procedure employed is chosen to be, or to become, the regular one ... Human beings are habituated to recognise the rules and conventions of the institutions within which they have been brought up, including the conventions of their family life. Institutions are needed as settings for just procedures of conflict resolution, and institutions are formed by recognised customs and habits, which harden into specific rules of procedure within the various institutions – law courts, parliaments, councils, political parties and others.”³

Advocacy lies at the heart of this institutional contribution. This was what the classic rhetoric scholars understood. It is no less significant today.

The third part of the book focuses on political rhetoric. It contains an insightful contribution by Graham Freudenberg, my old comrade, as E G Whitlam used to call us – and still does.

This is in many respects the most topical part of the book because of the election last week of Barack Obama as President of the United States of America. The chapter entitled “The Political Rhetoric of American Aspiration” by Susan Thomas correctly assesses the rhetorical skills of President-elect Obama in terms of the transformative possibility of his oratory. That prospect has now come to pass.

The author highlights the contrast between Abraham Lincoln’s address at Gettysburg, and the florid official orator on that occasion, whose words are lost to memory. The 272 words of the Gettysburg Address have appropriately been described by Garry Wills as “the words that remade America”.⁴ The chapter

assesses the eloquence of Obama's announcement of his candidacy in Abraham Lincoln's home town of Springfield, Illinois.

The speeches in this volume were delivered in the period up to October 2007. Later, in March 2008, Barack Obama had to deliver a speech on the subject of race, in the immediate wake of the revelations of some potentially devastating comments by Reverend Jeremiah Wright, Obama's preacher at his Church. No doubt, in confronting the race issue directly, Obama drew on John F Kennedy's address to a conference of Protestant ministers during the 1960 campaign, in which there was a widespread belief that the American people would never vote for a Catholic. There is an even more telling comparison.

Garry Wills has published a detailed analysis comparing Obama's speech on race to Lincoln's address at the Cooper Union⁵, when Lincoln also had to face the explosive issue of race and to confront a charge of extremism.

Obama and Lincoln both had limited political experience: briefly in the Illinois legislature and then, two years in the House of Representatives for Lincoln, and four years in the Senate for

Obama. In each case the leading candidate for their party's nomination was a Senator from New York of greater reputation and experience. Each had taken a stand against what had been initially a very popular war: in Lincoln's case, the invasion of Mexico on the false pretext that American territory had been attacked; in Obama's case, the invasion of Iraq on the false pretext that that nation was accumulating weapons of mass destruction. It was the way in which they faced their greatest challenge – the charge of being soft on extremism – that created the foundation for their success. In each case, oratory was how that was done.

Lincoln spoke in the wake of the execution of the radical abolitionist, John Brown, who had attempted to incite a slave rebellion. Lincoln successfully distanced himself from the radical abolitionist, without expressly rejecting all his opinions.

The speech at Cooper Union was widely reprinted and led the powerful editor of the *New York Tribune* to say:

“Mr Lincoln is one of nature's orators, using his rare power solely and effectively to elucidate and to

convince, though the inevitable effect is to delight and to electrify as well.”⁶

These words could equally have been written about Obama’s speech on race in March of this year. He effectively, and eloquently, distanced himself from Reverend Wright’s ravings and, like Lincoln in the wake of the Cooper Union speech comments about John Brown, Obama was accused of not sufficiently distancing himself from his preacher. Later he had to, but on this occasion his refusal to completely disown the man, who had been so influential in his life, displayed a strength of character and of conviction.

It was a supporter of John Brown, Ralph Waldo Emerson, who, a century and a half ago, had divided the political landscape into the Party of Memory and the Party of Hope. From the title of his autobiography – “The Audacity of Hope” – and throughout his campaign, *hope* was a central theme of Obama’s rhetoric, down to the victory speech that moved so many of us last week.

Many commentators have emphasised the extraordinary rhetorical capacity of President-elect Obama and his power to

persuade: his cadences, his rhythm, his conversational tone, the subliminal implications of his repetitions – hope, change, something happening – and the invocation of the words of the founders and of Lincoln. The rhetorical techniques of logos, pathos and ethos – invoking logic, appealing to emotion and relying on personal credibility – are all on full display. The contrast with eight years of malapropisms from George W Bush is clear.

America's cottage industry of advice on how to become a leader has already produced a volume entitled *Say it Like Obama*. Obama's inauguration speech promises to be a classic. For those of us who regard politics as a spectator sport, we have had a wonderful two years, with more to come. Political oratory is back.

I conclude on a less contemporary note. The Australian contribution to international rhetoric is not as well regarded as our contribution to world sport. However, in terms of the power of conveying information and, on many occasions, of persuasion, perhaps the most significant contribution Australians have made over recent decades is in the form of the tabloid headline. Primarily because of the expansion of the News Corporation

internationally, but not only because of that, Australian sub-editors have made a disproportionate contribution to the punch of tabloid newspapers, particularly in London and New York.

In international politics, we have seen this skill on full display in phrases like “war on terrorism” or “axis of evil” or “mission accomplished”.

Let me share with you my favourite set of newspaper headlines which appeared in *Le Moniteur Universel*, the principal French newspaper during the French Revolution and for many years thereafter. It was virtually the official journal of the French government, including during Napoleon’s rule.

During the 100 days – the Cent-jours – between Napoleon’s escape from Elba and the restoration of the Bourbons, *Le Moniteur* remained loyal to the government. On the day of his escape *Le Moniteur* led with the following headline, as compiled by John Julius Norwich: ⁷

“The Cannibal has left his Lair.”

Thereafter there appeared the following sequence:

“The Corsican Ogre has just landed at the Juan Gulf.”

“The Tiger has arrived at Gap.”

“The Monster slept at Grenoble.”

“The Tyrant has crossed Lyons.”

“The Usurper was seen 60 leagues from the Capital.”

“Bonaparte has advanced with great strides – But he will never enter Paris.”

“Tomorrow, Napoleon will be under our ramparts.”

And then:

“The Emperor has arrived at Fontainbleau.”

And finally:

“His Imperial Royal Majesty entered his palace at the Tuileries last night in the midst of his faithful subjects.”

Perhaps the most important aspect of all advocacy is the ability to adapt to changing circumstances. *Le Moniteur* is an example to us all.

I conclude with the last sentence of Aristotle’s *Rhetoric*:

“I have spoken, you have listened, you have (the facts), you judge.”⁸

I have much pleasure in launching this excellent book.

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- ¹ Justin T Gleeson and Ruth C A Higgins (eds) *Rediscovering Rhetoric: Law, Language, and the Practice of Persuasion* Federation Press, Sydney, 2008.
 - ² See Bryan Beaumont “Written and Oral Procedures: The Common Law Experience” (2001) 21 *Australian Bar Review* 275; Arthur R Emmett “Towards the Civil Law?: The Loss of ‘Orality’ in Civil Litigation in Australia” (2003) 26 *University of New South Wales Law Journal* 447.
 - ³ Stuart Hampshire *Justice is Conflict* Princeton University Press, Princeton NJ, 2000 at 53-54.
 - ⁴ See Garry Wills *Lincoln at Gettysburg: The Words that Remade America* Simon & Shuster, New York, 1992.
 - ⁵ Garry Wills “Two Speeches on Race” *The New York Review of Books* Vol LV May 1 2008 at 4.
 - ⁶ David Donald *Lincoln* Jonathan Cape, London, 1995 at 239-240.
 - ⁷ See John Julius Norwich *Still More Christmas Crackers* Viking, London, 2000 at 329.
 - ⁸ George Kennedy (ed) *Aristotle on Rhetoric: A Theory of Civic Discourse* Oxford University Press, Oxford, 1991 at 282.

**CROSS-BORDER INSOLVENCY: CO-OPERATION OR
CONFLICT?**

**ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
INSOL INTERNATIONAL ANNUAL REGIONAL CONFERENCE
SHANGHAI, 16 SEPTEMBER 2008**

The topic for this session asks a question: in the context of cross-border insolvency is there “conflict or co-operation”? The answer to that question is yes. There is either conflict or co-operation and little in between.

In the contemporary global economy, in which corporations engage in transnational investments and contracts to an extent that is unprecedented in human history, the way in which those involved in insolvency conduct their affairs is of critical economic significance. The task of all of us, whether lawyers, judges, administrators, accountants or other independent professionals, is to ensure the orderly, efficient and cost effective reorganisation or winding-up of a corporation, in a manner which reverses improper disposition of assets or preferences and avoids wasteful litigation, unnecessary expense and excessive delay.

Transaction Costs¹

There are many perspectives from which insolvency practice can be viewed. When dealing with transnational elements of insolvency a critical perspective is the promotion of the economic welfare of citizens of all nations, by reducing barriers to mutually advantageous exchange by trade and investment. Over recent decades the benefits of globalisation have become manifest as numerous restraints upon trade and investment, that had been imposed in the exercise of national sovereignty but which reduced the standards of living of citizens, have been modified.

One of the barriers to trade and investment, as significant as many of the tariff and non-tariff barriers that have been modified over recent decades, arises from the way the legal system impedes transnational trade and investment, by imposing additional and distinctive burdens including:

- Uncertainty about the ability to enforce legal rights;
- Additional layers of complexity;
- Additional costs of enforcement;
- Risks arising from unfamiliarity with foreign legal process;

- Risks arising from unknown and unpredictable legal exposure;
- Risks arising from lower levels of professional competence, including judicial competence;
- Risks arising from inefficiencies in the administration of justice, and in some cases, of corruption.

These additional transactions costs of international trade and investment are of a character which do not operate, or operate to a lesser degree, with respect to intra-national trade and investment. These increased transaction costs impede mutually beneficial exchange by means of trade and investment.

As recognised by the active involvement in these matters by UNCITRAL, the World Bank, the Asia Development Bank and APEC, insolvency practice plays a vital role in ensuring the efficiency of capital markets.² The availability of capital to corporations which operate in a multinational context, whether by way of direct investment or by way of corporate debt or the availability of working capital through trade credit, must be affected by the additional risks and complexities of the character I have identified. One object of co-operation between courts in the

context of transnational insolvency is to minimise these risks and transaction costs so that transnational trade and investment is not unduly burdened.³

Furthermore, the period of administration in insolvency has the adverse consequence for economic welfare that capital is to some degree frozen and unable to be put to its best entrepreneurial use. Liquidators are not entrepreneurs. Liberating frozen capital by the fair, efficient and expeditious conclusion of an insolvency is a major objective of the system. Insofar as additional delay is involved in insolvencies which have transnational elements, then the liberation of that capital takes even longer than would be the case for a corporation which operated within national boundaries.

Perhaps most significantly, the fear of the unknown inhibits creditors when dealing with multinational corporations in the absence of a significant level of assurance that the difficulties of cross-border enforcement in insolvency will not impede the collection of debts.

The history of the Asia Pulp and Paper collapse in 2001, when the company unilaterally declared a moratorium on US\$13.9 billion in debt, without substantial consequences to the company or its controllers, remains a sobering example for any creditor. The inability of international creditors to pursue assets, particularly in Indonesia but also in China, forced virtually everyone to submit to what was euphemistically called a restructuring which they had no choice but to accept.

The Need for Co-operation

Insolvency is concerned with civil rights and obligations of a commercial character. With respect to commercial disputes in which insolvency does not intervene and which are, accordingly, able to be resolved by international commercial arbitration, the adoption of the UNCITRAL Model Law on International Commercial Arbitration as enforced under the New York Convention for the Enforcement of Arbitral Awards and of the Washington Convention for Investment Disputes, is so widespread that the resolution of such disputes can be conducted in almost the same borderless manner as was the case when the rights and obligations were originally created. When insolvency intervenes, the position is entirely different. Instead of a widely accepted

international regime, there is a patchwork quilt of particular provisions of varying degrees of comprehensiveness and efficiency.

Divergences in the respective national regimes for insolvency, together with the direct intrusion of policy considerations in the statutory framework, prevent the kind of seamless regime that exists for international commercial arbitration from being replicated in the context of an insolvency or in the context of a restructuring in the shadow of insolvency.

When the official courts are engaged, as they traditionally are when insolvency intervenes, then the underlying commercial substance of the disputes that need to be resolved is often overlooked. A perspective of national sovereignty is given priority, because the courts are regarded as a manifestation of the state. This is why co-operation between courts becomes necessary in order to minimise the additional transaction costs that arise when an insolvency has cross-border elements. Such co-operation can only occur in the exercise of a court's jurisdiction which, generally, requires express statutory provision.

Co-operation between judges in transnational insolvencies arises pursuant to four different kinds of express provisions:

- For judicial assistance in civil proceedings generally;
- For judicial assistance in insolvency proceedings specifically;
- For judicial assistance in the preservation of assets;
- For judicial assistance in obtaining evidence or information.

In legal systems of the common law tradition judicial co-operation has also developed in the absence of express statutory provision as a matter of judge-made law. Legal systems in the civil legal tradition find this difficult in practice and impossible in form.

The principal focus of much of the literature is the additional costs of parallel proceedings when a particular corporation has assets in more than one jurisdiction. However, co-operation is not limited to this consideration. Provision is required for freezing and determining claims, preserving and realising assets, obtaining evidence from local residents and identifying voidable, including fraudulent, transactions.

I do not wish to enter the spirited debate between advocates of “universalism” and advocates of “territorialism” in these matters. I note, however, that “modified universalism”, depending on the degree of “modification”, may prove to be indistinguishable in practice from “co-operative territorialism”, depending on the degree of “co-operation”.⁴

The UNCITRAL Model Law

As this audience is well aware, the UNCITRAL Model Law on Cross-Border Insolvency has been the principal global initiative for establishing judicial co-operation. However, in the Asia Pacific region the Model Law has, as I understand it, only been adopted by the United States, Australia, New Zealand, Korea, Japan and is enacted, but not proclaimed in Canada. It is under consideration in India. The lack of success in this region reflects the reluctance many Asian nations have manifested with respect to other provisions for co-operation in civil and commercial litigation, e.g. the Hague Conventions.

The UNCITRAL Model Law is not based on the principle of reciprocity, which is of central significance in international negotiations on commercial matters and which is given great

weight in many Asian nations. When adopted as a law of a state, the Model Law requires the courts of that state to help liquidators appointed in another state, even though the courts of that other state would not assist liquidators appointed by the first state. This is, and remains, a step which many states are reluctant to take. Indeed some have included a reciprocity requirement when purporting to implement the Model Law.⁵ Indeed, in many nations, the Model Law has no realistic chance of adoption unless the executive retains a right to specify the nations to which it applies.

Corporate Groups

The Model Law does, of course, have its limitations which have been extensively considered in the relevant literature.

Perhaps the most significant limitation of the Model Law is that it only applies to individual corporations.⁶ I am aware that efforts are being made in UNCITRAL Working Group V to extend its application to corporate groups. Traditionally, the decision as to whether a corporation with international dealings chooses to operate in a particular jurisdiction via a branch or via a wholly-owned subsidiary is, subject to statutory requirements, generally determined by taxation considerations.

A good example of the limitations of the Model Law, even if adopted, is the position in the People's Republic of China. The emergence of China as a major commercial power, manifest in the choice of the location for this Conference, has and will raise important issues in cross-border insolvency. The flow of trade with, and capital into, China over recent decades is, in its scale and speed, unprecedented in history.

The new *Enterprise Bankruptcy Law* 2006 took effect on 1 June 2007 and for the first time introduced comprehensive provisions for corporate insolvency. It is clear that international standards played a significant role in the formulation of this new Law.

Article 5 makes provision for the People's Court to evaluate applications seeking recognition in enforcement of foreign bankruptcy judgments involving the debtor's property in China. This is to occur in accordance with international treaties to which China is a party and in accordance with the principle of reciprocity. The recognition and enforcement of such judgments is, however, subject to restrictions that protect national interests, extending as

far as not harming the “legitimate rights or interests of creditors in China”. There is no express provision for judicial assistance but there are other arrangements for such assistance.

A number of views have been expressed as to the way in which the reciprocity provision is likely to be administered and what precisely is the scope of the “recognition and enforcement” of foreign orders.⁷ The scope of this provision is, however, limited by the requirements of the three separate regimes, applicable in China, to foreign investment.⁸ In most cases, conducting business in China requires a local subsidiary.

China’s Foreign Equity Joint Venture structure requires a limited liability company to be incorporated in China. The Foreign Co-operative Joint Venture structure permits the joint venture to determine whether or not to create a separate legal entity. The Wholly Owned Enterprise structure is generally set up as a Chinese limited liability company. It appears that simple cross-border issues, when foreign companies operate within China by branches rather than in the form of a subsidiary, will arise infrequently.

Insofar as assistance may be sought from Chinese courts, with respect, for example, to obtaining evidence from Chinese residents for purposes of the winding-up of corporations in foreign nations, including perhaps subsidiaries of Chinese corporations, there is no express provision other than in general judicial assistance treaties. Because of the significance of the Chinese economy, these are matters which will require attention. I will return to this topic.

COMI

The issue of corporate groups is related to the central concept of the Model Law: the “foreign main proceedings”, being proceedings in the “centre of main interest” (COMI). The place of incorporation is the default position. It may prove to be the case that even a wholly-owned subsidiary will have a different COMI to that of its parent. Indeed that will often be the case. There is, of course, much scope for disputation in determining the COMI.

I have found particularly helpful the range of relevant considerations set out in the judgment of Lifland J, one of the most highly regarded United States bankruptcy judges, in the *Bear Stearns* case,⁹ a judgment which has engendered some

controversy. It is pertinent to note that the case was unique on its facts because of a statutory prohibition in the Cayman Islands upon an exempt company, as the hedge funds in issue were, from carrying on business there except in furtherance of their business outside the Cayman Islands. It is also relevant to note that Chapter 15 of the US Code uses the word “evidence”, rather than the word “proof” suggested in the Model Law, when stating the test for overturning the presumption that the registered office is the COMI.

The strict approach of the European Court of Justice, in the quite distinct context of *EC Regulation 1346/2000*, in the *Eurofood* case, represents the other end of the spectrum, within which each national court will have to interpret its own statutory enactment of the Model Law.¹⁰ Decisions of this Court must, however, be treated with considerable reserve because of a fundamental principle that all European courts must be treated as equal on the basis of mutual trust between member states. Accordingly, it is impermissible for a court to assume jurisdiction when a party has instituted proceedings first in another jurisdiction, even if those first proceedings are an abuse of process, for example to exploit the

excessive delay of Italian civil justice – a technique known as “the Italian torpedo”.¹¹

As this audience is well aware, the concept of COMI is derived from the European Regulation. On the basis of case law and practice in Europe, it appears there are circumstances in which the COMI concept invites venue disputation and a search for first mover advantage, of a character that has plagued other forms of international commercial litigation and has, at least in common law jurisdictions, spawned a cottage industry of anti-suit injunctions, anti-anti-suit injunctions etc, etc. It does appear that there is a degree of court competition for high profile insolvencies within Europe which has led some to question the efficacy of the Model Law.

Statutory Arrangements for Co-operation

The progressive integration of European economies, including regulatory and judicial structures, is the clearest example of regional co-operation on such matters. There are also longstanding arrangements of this character in Latin America and, more recently, in Central Africa and the NAFTA states. To similar

effect is the adoption of parallel legislation permitting co-operation amongst states in the British Commonwealth.

Australia is a participant in this arrangement, based on our historic legal ties with England. In 1988, we adopted a parallel provision to that inserted into the English legislation in 1986, conferring power on a court to issue and receive letters and requests for assistance in insolvency matters from other courts. This provision, now found in s 426 of the English *Insolvency Act* 1986 and s 581 of the *Corporations Act* 2001 of Australia, can be traced back to the mid nineteenth century in bankruptcy legislation for individual, rather than corporate, bankruptcy.¹²

This scheme permits but, unlike the UNCITRAL Model Law, does not mandate, co-operation. Furthermore, it is not applicable to every foreign insolvency proceeding. It requires the executive arm of government to promulgate a nation as one to which the scheme applies. They have generally been states within the Commonwealth of Nations or, as in case of Hong Kong, who once were. There is an element of reciprocity in these executive designations, but that is not an essential criterion.

This system has proven to be flexible and effective. Indeed, recently in my court, the liquidator in a long running cross-border insolvency has chosen to seek under this statute a letter of request to the High Court in England for that court to conduct an examination of persons resident in London, even though both Australia and England have now enacted the UNCITRAL Model Law. The applicants stated that they found the procedure under this Commonwealth scheme more efficient than the Model Law, as it did not involve obtaining an order from the English court recognising the Australian insolvency proceeding as “foreign proceedings”.¹³

This occurred in proceedings involving the liquidation of Australia’s second largest insurer, HIH Insurance Ltd. In that matter, the House of Lords earlier this year handed down a judgment which is, if I may say so with unfeigned respect, a model of international co-operation applicable to any legislative scheme, including the UNCITRAL Model Law.

These proceedings, to which the Model Law did not apply, will be well known to many participants in this conference from common law jurisdictions. The HIH group of Australian insurance

companies operated in England and had important assets, as well as creditors, there. Specifically there were claims on reinsurance contracts. A provisional liquidator had been appointed and the conduct of the provisional liquidation in England was the subject of an arrangement between the first instance judges in Sydney and London, which would answer the description of a protocol of the kind that has emerged over recent decades.

The application for assistance was made under the s 426 of the *Insolvency Act* for the remittal of funds raised in England by the provisional liquidator to the Australian liquidator. Under Australian statute law, preference is given to claimants under insurance contracts, of a character which was not consistent with the generally applicable *pari passu* principle. Accordingly, many creditors would be disadvantaged or advantaged, depending on whether the distribution occurred in England under English law or in Australia under Australian law.

This existence of differences in priorities is, of course, a frequently occurring phenomenon in cross-border insolvency. In the spirit of modified universalism, which the House of Lords found to underlie the express statutory provision for assistance, their

Lordships unanimously held that the fact that Australian public policy departed in specific respects from the *pari passu* principle, which was applicable in England, was not of sufficient significance to prevent an English court from offering assistance to what, in Model Law discourse, one would refer to as the COMI.¹⁴

Over and above such provisions which are directed to insolvency, there are numerous bilateral arrangements for judicial assistance of a general character or for specific assistance, such as for taking evidence, that may be relevant to insolvency.

For example, China has over 30 treaties with other nations for assistance in civil matters. South Korea has legislation which provides generally for court-to-court assistance (the Act on *International Mutual Assistance in Civil Matters* 2006) and has entered into a broadly based treaty with Australia. Some nations have legislation which authorises freezing orders in aid of foreign proceedings or, as in Australia, have developed such principles as judge-made law.¹⁵ Although often helpful, there is nothing systematic about these arrangements. Most significantly, a company on the eve of liquidation, seeking to prefer some credit or to favour insiders, can readily avoid them.

Judicial Arrangements for Assistance

In common law jurisdictions, with which I am most familiar, judicial co-operation has emerged over the last two decades as judge-made law, even in the absence of express statutory authority.¹⁶ Indeed, the success of such judicial co-operation has been used as an argument against the adoption of the Model Law, which appears to be more rigid. This has been suggested in Canada where proclamation of the legislation to implement the Model Law has been long delayed.¹⁷

Two of their Lordships in the recent *HIH* case held that the ability to co-operate was not confined to the express statutory power and asserted that modified universality was the longstanding policy of the common law. Two other of their Lordships held that it was so confined and the fifth found it unnecessary to decide. I note that in the *Cavell Insurance Company* case, Justice Farley of the Ontario Superior Court, who has been actively involved in cross-border insolvency debates, has acted on the basis of an inherent jurisdiction to recognise a foreign court order on the basis of comity. His approach was approved on appeal.¹⁸

The concept of an inherent jurisdiction to provide assistance to foreign courts as a matter of common law principle remains a matter of contention in a context where the artificial legal personality involved is a product of statute and is subject to detailed statutory regulation, including express provision in the relevant respect.

In civil law jurisdictions, with their different approach to the status of courts, the concept of an inherent jurisdiction would be unacceptable. There are, however, common law jurisdictions which have not adopted a general assistance provision or the UNCITRAL Model Law, for example Singapore and Hong Kong, which may have to decide whether there is such an inherent jurisdiction.

The possible existence of an inherent jurisdiction raises one of the most intractable issues in this context, namely the divergent traditions concerning the role and status of judges between, broadly, common law legal systems and civil law legal systems. Common law judges have an inheritance of judge-made law and, despite the growth in the significance of statutes, their authority is

not entirely derivative from a legislative act. Despite the process of convergence of the two systems, emphasised by comparative law scholars, significant differences remain.¹⁹

The common law judicial mindset means that co-operation with judges in other states appears natural. The dichotomy between legislative and judicial authority is not as strict. Accordingly, the emergence of co-operation between courts is not inhibited by a concern that the court's jurisdiction or competence is being exceeded. There are now numerous examples of such judicial co-operation in the absence of express statutory authority.

The helpful guidelines prepared by the American Law Institute with the International Insolvency Institute, as well as the large number of individual protocols that have been entered into, are accessible on the internet.²⁰ They have been reviewed and debated at the Judicial Colloquia organised jointly by UNCITRAL and INSOL.²¹ Judges who have had the benefit of this level of co-operation at the coalface of insolvency practice are, so far as I can determine, unanimous in concluding that such protocols are useful, although views vary as to the degree of utility. Ad hoc case-

specific protocols, usually influenced by the guidelines, appear to be regarded as most effective.

In this respect necessity, to deploy a still serviceable cliché, has been the mother of invention.

A similar process has occurred in family law, where the ease of contemporary travel has required co-operation between judges determining the custody of a child who has been taken by one parent to another nation. Operating under the *Hague Child Abduction Convention* 1980 judges have established an international network with its own newsletter and have appointed liaison judges, being a judge in each participating jurisdiction designated to serve as a channel of communications with Central Authorities and with other judges. This network has been in operation for about a decade and has overcome inhibitions based on national sovereignty considerations and concerns about natural justice, to establish a functioning system of direct judicial communications, which has saved time and costs in numerous cases.²²

It may well be that a similar network could serve a useful role in insolvency practice, particularly between jurisdictions whose judges are not familiar with each other's legal system. Perhaps the next INSOL/UNCITRAL Judicial Colloquium in Vancouver next year would be an appropriate forum to consider this idea.

Direct Communications Between Courts

As in the case of child abduction, a significant aspect of cooperation between courts in insolvency matters is the emergence, over the last decade or two, of a practice of direct communication between courts. Of course such contact must occur with the knowledge, and usually the approval, of parties to the proceedings.

It is noteworthy that there is a complete disconnect between the willingness and ability of commercial corporations to operate and interact across borders in a seamless manner, on the one hand, and the restrictions that are still imposed upon public authorities, both regulatory and judicial, from acting in a similar manner. The freedom of commercial communication must be compared with the distrust of, and inhibition upon, communications between public authorities. Anything that can be interpreted as impacting on the sovereignty of a jurisdiction, by reason of the

intrusion of any manifestation of the sovereign power of another jurisdiction, is subject to restrictions that have been abolished with respect to private actors. As I have indicated above, the comparative ease with which international commercial arbitration is conducted stands in marked contrast to any kind of commercial dispute resolution in which an official court is engaged.

Direct communication is expressly permitted by Article 25 of the Model Law, which reflects what has been happening in practice, almost exclusively in jurisdictions of the common law tradition, without formal legislative approval and without the hitherto requisite intermediation of a manifestation of the executive branch of government.

Direct court-to-court communication in the context of cross-border insolvency is a particular manifestation of the new sense of international collegiality that has emerged amongst judges of different nations, who now meet in many different multilateral, regional and bilateral contexts. This phenomenon has variously been called “judicial globalisation”,²³ a “global community of courts”,²⁴ “international judicial negotiation”.²⁵ Protocols between courts have even been characterised as “mini treaties”.²⁶

Traditionally, the communication of requests from one court to another have been required to be made through an executive government agency. International agreements on legal matters have reflected historical communication mechanisms, employing the convoluted language of traditional diplomatic communication in which one head of state presents his or her compliments to another head of state and proceeds through a series of arcane verbal formulae before getting to the point. All of this takes time, as it always has. I recollect the story of President Thomas Jefferson writing to his Secretary of State James Madison to the effect “We have not heard from our ambassador in Paris for two years. If we do not hear from him by the end of this year, let us write him a letter”.²⁷ Diplomatic communications have changed since then.

It is no longer appropriate or necessary to engage in traditional forms of diplomatic communication: a court sends a request to its ministry of justice, which forwards it to the ministry of external affairs, which communicates it to its embassy in the relevant nation, which passes the message on to the ministry of external affairs of the other nation which will in turn pass it on to its

ministry of justice, to be sent in turn to the local court. However, unless there is some form of treaty or convention or express statutory authority, this is what must be done. Surely it is sufficient that such executive agencies are informed of any direct communication between courts, without the necessity for such an agency to act as the post office.

The formalistic tradition of letters rogatory and letters of request pursuant to international arrangements for judicial assistance, is reflected in the indirect and slow mechanisms for communication in the Hague Service Convention and the Hague Evidence Convention, both of which have been widely adopted. Indeed, in the absence of adoption of the UNCITRAL Model Law, or other direct statutory authority authorising assistance, it is to conventions of this character, and bilateral arrangements, that courts have to turn in order to get such limited assistance as they can obtain for the purposes of cross-border insolvency.

A good recent example in the context of the HIH litigation, is the request for an examination of witnesses resident in Hong Kong by the New South Wales Supreme Court to the Hong Kong High Court, pursuant to Hong Kong legislation that authorises such

assistance to an overseas court.²⁸ Hong Kong has not adopted the Model Law, nor any other form of general insolvency co-operation. Reliance must be placed on specific authority of this character, subject to any future decision on the existence of an inherent jurisdiction.

The form of communication approved in these international arrangements remains old fashioned, requiring written rather than electronic communication – snail mail rather than email. It is long overdue that the Hague Conventions, and other such arrangements, should be systematically reviewed to bring the mode of communication up to date. There is some indication that this is likely, not least because the ease of other forms of communication frequently means that the Hague Conventions are simply bypassed, for example by taking evidence via video conferencing.²⁹

One of the most successful of the Hague Conventions is the Apostille Convention 1961. The Hague Conference is now undertaking an e-Apostille Pilot Programme (e-APP) which allows a Competent Authority to apply to a Certificate Authority for a digital certificate to “sign” an electronic PDF document. This

procedure, together with a new searchable e-Register of Apostilles replaces, respectively, the traditional paper and staple method and hard copy registers which are not readily accessible. In an age of what has been called “digital diplomacy” the emergence of such arrangements must be welcomed.

Practice under the Hague Conventions are also being adapted to permit direct court-to-court communications by taking advantage of provisions for appointment of an “additional authority” to the “Central Authority” that can make and receive requests. Courts in Australia have been identified as such “additional authorities”. More significantly, only last month, in England and Wales, the High Court has been identified as the Central Authority for purposes of the Hague Service and Evidence Conventions, completely substituting for any government executive agency. This precedent is more likely to be adopted by nations in the common law tradition. However, the identification of courts as “additional authorities”, with a right of override in the Central Authority, may be more widely acceptable.

A Broader Context

The difficulties of international agreement on cross-border insolvency are, in almost all respects, identical to those which arise in the course of seeking international agreement with respect to trade and investment issues generally. Negotiations for bilateral, regional or multilateral treaties and conventions gives rise to the same tensions between national self-interest, on the hand, and mutually beneficial international exchange, on the other hand. For many years, the principal focus of attention was on trade in goods and more recently, in services. However, over recent decades, multilateral and bilateral commercial arrangements have also focused on investment.

Lawyers, accountants and administrators who are involved in insolvency issues have often operated in their own separate context without being closely involved, as in my opinion they should be, with other multilateral regional and bilateral discussions about trade and investment. Insolvency practitioners must be careful that their conduct does not become self-referential to the point of becoming self-absorbed. Some degree of isolation reflects the fact that much of traditional insolvency practice is a zero sum

game. It is difficult, in an insolvency context, to focus on a mutually beneficial outcome.

However, as this audience is well aware, in the three decades since Chapter 11 was added to the United States Bankruptcy Code, corporate rescue in the form of reconstruction has moved to the forefront of insolvency practice. Insolvency practice need no longer be a zero sum game and the mutually beneficial outcomes now available are similar to the traditional outcomes of trade and investment negotiations. Furthermore, as I have indicated, liquidation practices play a critical role in capital market efficiency, including by liberating dead capital and redirecting assets to their best use.

At a regional or international level, discussion of cross-border insolvency tends to occur in special purpose organisations such as UNCITRAL Working Group V and INSOL. However, the experience of Europe has shown that much can be achieved by participating in broader based regional arrangements. In the Asia Pacific region such issues could arise, in the context of APEC or ASEAN, and in the latter, could perhaps extend to ASEAN plus 3 or the East Asian Summit. Furthermore, such issues can be

raised in the context of the numerous bilateral free trade agreements that have been, or are being, negotiated, precisely because of the failure of regional and multilateral free trade agreements.

Throughout the Asian region there appears to be a great deal of reluctance to adopt the Model Law or to enter into regional arrangements.³⁰ It appears that, in the short term, bilateral arrangements are most likely to be adopted. The principal focus in this region should remain on capacity building in the national judiciaries and the insolvency professions. Further, progress appears to me to require stepping beyond the context of insolvency itself, to engage the international clout available in negotiations on broader issues of trade and investment, where international discussions deploy diplomatic and political capital at the highest level of government.

The starting point is the recognition that imposing domestic policy priorities, or ensuring that local assets are retained for the purpose of maximising the payout to local creditors, are forms of preferential treatment, equivalent, in their commercial substance, to non-tariff barriers on trade and investment. “Ring fencing” local

assets is plainly a form of preference, equivalent to the kinds of restrictions on trade, commerce and investment which have long been the subject of international negotiations at bilateral, regional and multilateral levels. It does not seem to me that there is any reason why issues associated with cross-border insolvency could not be added to these continuing high level negotiations.

Differences between insolvency regimes of a policy character could be negotiated in such discussions. I have in mind, for example, the kinds of issues that arise where the statutes of two jurisdictions have different lists of priority creditors. Some form of individual recognition or adjustment in such a context could be negotiated. Similarly, the kinds of provisions that exist in the Model Law with respect to an automatic stay of proceedings, or express authority for the preservation of assets, or other forms of assistance to an external insolvency, could also be incorporated. Furthermore, the kinds of provisions that exist in all legislative schemes for the avoidance of past transactions, particularly fraudulent transactions, can also be the subject of international or bilateral agreement.

Provisions permitting or mandating co-operation between courts in insolvency matters could be included in any regional or bilateral free trade agreement which, in contemporary circumstances, typically go well beyond issues of trade to cover a range of issues associated with investment.

Of course there are policy differences between states as to what kinds of creditors should be the subject of preference. From the point of view of international capital markets the principal concern is with contract creditors. There are, however, other kinds of creditors, for example tort creditors or those with statutory causes of action or statutory defences.

Issues of policy and fairness arise with respect to the recognition of persons entitled to sue a corporation in tort. Many nations will find it difficult to accept claims based on the US approach to tort liability, which virtually everyone else regards as extravagant.

Similar policy issues arise with respect to those jurisdictions where, as in Australia, specific statutory rights of action against a corporation are conferred upon shareholders who can, as a matter

of substance, convert their status from a shareholder of a company, not entitled to distribution until all creditors are satisfied, into an unsecured creditor of the company, entitled to a *pari passu* distribution. (The statutory position in Australia is under review.)

Perhaps the most difficult issue with respect to cross-border insolvency is the treatment of corporate groups. It does not appear that much progress is likely in the UNCITRAL context. It may prove more rewarding to focus on bilateral arrangements, particularly between nations with similar legal systems and similar stages of development, or regional arrangements where there is a broader-based agreement about trade and commerce.

In my opinion, the problem most worthy of international attention, arises from the ease with which assets, especially intangible assets, can be moved internationally. This facilitates fraud and preferential treatment, short of fraud, of corporate insiders or of specific creditors, in a manner which insolvency regimes have always sought to control after a company can be seen to have entered a period of financial stress capable of leading to insolvency. Indeed, there are many examples of

companies moving their place of incorporation in such circumstances.

This is the aspect of insolvency practice that is most in need of international co-operation, particularly the availability of provisional measures to prevent fraud and to protect assets. The automatic stay provisions in Article 20 of the Model Law, which take effect upon recognition, could well be replicated in other arrangements by nations reluctant to adopt the Model Law. Indeed, those nations which give their courts express authority to make such orders could similarly be encouraged to extend them to ensure they are available to persons acting to stabilise the commercial situation in a construction or liquidation context.

International discussions, whether multilateral, regional or bilateral to prevent corruption, fraud or other questionable commercial conduct have been disappointing.³¹ However, all nations have an interest in regulating fraudulent dispositions and it may well be that regional or bilateral arrangements directed on the first instance to the insolvency context, could provide the basis for a more general approach.

The ability to control the use of insolvency havens is as difficult as the ability to control tax havens in revenue law or flags of convenience in shipping law. Nevertheless, we must try even if, like Sisyphus, we find ourselves rolling a stone up a hill to see it roll back as evasion techniques adjust to the new regime. Such consequences emphasise that the formulation of abstract rules – for example presumptions that the COMI is the registered office – can never be rigidly applied.

Nor can the cost advantages of a single insolvency proceeding, reflected in the “modified universalism” approach, be permitted to absolve corporations preferring particular creditors, let alone fraudulently disposing of corporate assets, in a manner which, in substance, is not able to be untangled in a subsequent insolvency proceedings in the COMI. There are both benefits and costs of formal regimes which establish presumptive rules.³²

It may be my common law background which leads me to prefer the pragmatic development of practices on the basis of case by case experience before a legal principle is formulated. In any event, I can see more value in provisions for assistance and co-

operation than in provisions which seek to establish abstract rules for what result should ensue.

Conclusion

Whether insolvency issues should be considered in broader-based international negotiations will be affected by the practical significance of the difficulties that actually arise in cross-border insolvency. Issues of priority necessarily arise when determining whether to devote negotiation resources to such issues. It is up to insolvency practitioners to convince those who participate in high level trade and diplomatic negotiations on commercial matters that their concerns are worthy of receiving attention at that level. That will not happen if insolvency practitioners only talk to each other.

Judicial assistance provisions, such as the UNCITRAL Model Law, the English legislative model, or the provisions potentially supportive of insolvency practice that exist in the Hague Conventions, for example on service and evidence, or the recent Hague Choice of Court Convention, are capable of being included in a regional or bilateral treaty or convention.

I am not suggesting that further steps directed only to insolvency are not worth pursuing. In many respects, it may be more expeditious for states to offer co-operation in this specific context, without invoking the principle of reciprocity that is critical in other areas of international commercial negotiation. However, insofar as it appears that projects such as the Model Law or equivalent co-operation provisions are unlikely to be adopted in a significant number of nations, particularly in those of growing significance in international trade and investment such as Brazil, China, Russia and India, then attempting to piggy-back on whatever bilateral or regional negotiations are being undertaken in the trade and investment area may prove to be the most fruitful course.

Indeed it is the failure in recent decades to progress multilateral negotiations that has led to the growth of “second best” bilateral free trade agreements. In this respect the slow progress in the context of cross-border insolvency is only a specific manifestation of a general difficulty.

I wish to conclude by congratulating INSOL for the substantial contribution it has made, and continues to make, to ameliorating this situation in the context of corporate insolvency.

¹ This address develops themes of two earlier addresses. J J Spigelman “Transaction Costs and International Litigation” (2006) 80 *Australian Law Journal* 438; J J Spigelman “International Commercial Litigation: An Asian Perspective” (2007) 35 *Australian Business Law Review* 318, also published in (2007) 37 *Hong Kong Law Journal* 859.

² See for example “World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, 2001” especially at pars [20]-[44] accessible at <http://go.worldbank.org/6ZX70ESCOO>.

³ A comprehensive collection of international instruments may be found in Bob Wessels (ed) *Cross-Border Insolvency Law: International Instruments and Commentaries* Kluwer.

⁴ See J L Westbrook “A Global Solution to Multinational Default” (1999-2000) 98 *Michigan Law Review* 2276; L M Lo Pucki “The Case for Co-operative Territoriality in International Bankruptcy” (1999-2000) 98 *Michigan Law Review* 2216; L M Lo Pucki “Universalism Unravels” (2005) 79 *American Bankruptcy Law Journal* 143; R K Rasmussen “Where are all the Transnational Bankruptcies?: The Puzzling Case for Universalism” (2007) 22 *Brooklyn Journal of International Law* 983; A M Kipnis “Beyond UNCITRAL: Alternatives to Universality in Transnational Insolvency” (2008) 36 *Denver Journal of International Law and Policy* 155.

⁵ For example, Romania.

⁶ See for example C G Paulus “Group Insolvencies – Some Thoughts on New Approaches” (2007) 42 *Texas International Law Journal* 819.

⁷ See J Shi “Twelve Years to Sharpen One Sword: The 2006 Enterprise Bankruptcy Law and China’s Transition to a Market Economy” [2007] 15 (5) *Journal of Bankruptcy Law and Practice* Article 2 ; S Bufford “The New Chinese Bankruptcy Law: Textual Limited Corporations Analysis” Ibid Article 3; M I “Bankruptcy Law in China” in P Blazey and K Chan *The Chinese Commercial Legal System* (2008) Lawbook Co.

⁸ See K Chan “Foreign Investment Law in China” in Blazey and Chan (eds) above n 7.

⁹ In *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Limited* 374 BR 122 (Bankr, SDNY, 2007).

¹⁰ *Re Eurofood IFSC* [2006] 1 Ch 508.

¹¹ See the cases discussed by Sir Anthony Clarke “The differing approaches to commercial litigation in the European Court of Justice and the Courts of England and Wales” 23 February 2006, accessible at www.judiciary.gov.uk/publications_media/speeches/2006/sn230206.htm.

¹² See originally s 220 *Bankruptcy Insolvency Amendment Act* 1861 (24 & 25 Vic Act c.134); s 74 *Bankruptcy Act* 1869 (UK), s 122 *Bankruptcy Act* 1914 (UK) and s 29 *Bankruptcy Act* 1966 (Cth).

¹³ See *McGrath and Honey as Liquidators of HIH Insurance Ltd* [2008] NSWSC 881.

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- 14 *Re HIH Casualty and General Insurance Ltd; McGrath v Riddell* [2008] UKHL 21; [2008] 1 WLR 852.
- 15 See Spigelman “International Commercial Litigation” above n 1 at 332-333.
- 16 See for example *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Limited* [2006] UKPC 26; [2007] 1 AC 508.
- 17 See J Ziegel “Canada – United States Cross-Border Insolvency Relations and the UNCITRAL Model Law” (2007) 32 *Brooklyn Journal of International Law* 1042 esp at 1061-1063.
- 18 See *R v Cavell Insurance Company* [2005] 25 CCLI (4th) 230 esp at [20]; on appeal [2006] 39 CCLI (4th) 159; 269 DLR (4th) 679 at [34]-[38], [48]-[54], [60].
- 19 For a detailed analysis of the different approaches of the two systems in this respect see P Schlosser “Jurisdiction and International Judicial and Administrative Co-operation” (2001) *Recueil des Cours, Collected Courses of the Hague Academy of International Law 2000 Tome 284* Hague Academy of International Law.
- 20 Accessible at www.iiiglobal.org.
- 21 Accessible at www.insol.org.
- 22 See papers by Justice Thorpe and Justice Kay in *International Child Protection: The Judge’s Newsletter* Volume III Autumn 2001; papers by Justices Celeyron-Bouillot, Gaudet, Carl, Wall, Singer and Ding in *International Child Protection: The Judge’s Newsletter* Volume IV Summer 2002.
- 23 A Slaughter “Judicial Globalisation” (2000) 40 *Virginia Journal of International Law* 1103.
- 24 A Slaughter “A Global Community of Courts” (2003) 44 *Harvard International Law Journal* 191 at 193, 213 ff.
- 25 J L Westbrook “International Judicial Negotiation” (2003) 38 *Texas International Law Journal* 567.
- 26 See A Slaughter “A Global Community of Courts” above n 23 at 193, 213 ff.
- 27 See W P Dizard *Digital Diplomacy: US Foreign Policy in the Information Age* (2001) Praeger at 100.
- 28 See *McGrath and Honey and Liquidators of HIH Insurance Ltd* [2008] NSWSC 780.
- 29 See M Davies “Bypassing the Hague Evidence Convention: Private International Law Implications of the Use of Video and Audio Conferencing Technology in Transnational Litigation” (2007) 55 *American Journal of Comparative Law* 205.
- 30 See for example Spigelman “International Commercial Litigation” above n1 esp at 329-331.
- 31 See for example K Percy “Fighting Corporate and Government Wrongdoing: A Research Guide to International and US Federal Laws on White Collar Crime” 15 August 2002 <http://www.llrx.com/features/whitecollarcrime.htm>; U4 Anti-Corruption Resource Centre “Anti-Corruption Conventions and Treaties” <http://www.u4.no/document/treaties.cfm>.
- 32 See for example A M Kipnis above n4.

LORD MANSFIELD AND THE CULTURE OF IMPROVEMENT
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
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THE IDEAS OF THE ENLIGHTENMENT IN THE 21st CENTURY
CONSILIUM
COOLUM, QUEENSLAND, 2 AUGUST 2008
BIG IDEAS FORUM
SYDNEY, 4 AUGUST 2008

The multiple national enlightenments of 18th century Europe had common themes which justify the continued use of the term The Enlightenment. I will concentrate on one such theme and illustrate it with one man's achievement.

The theme is the culture of improvement: the widespread conviction that by the application of reason, things can be done better. One of the great achievements of The Enlightenment was the inculcation of a belief that no individual, nor society at large, was doomed by God or by nature or by fate to continue to do things the way they had always been done.

I distinguish an ‘improver’ from a ‘reformer’. As Senator Roscoe Conkling, a New York Republican who defended the spoils system against proponents of civil service reform, once put it: “When Samuel Johnson said that patriotism was the last refuge of the scoundrel, he did not have in mind the possibilities of the word ‘reform’”.

A reformer proceeds on the basis that something needs fixing or that someone has done something wrong. An improver proceeds on the basis that, however effective or efficient current practices are, they could be made better and we should always seek ways of doing so.

Lord Mansfield, Chief Justice of the Court of Kings Bench for an unsurpassed long term – from 1756 to 1788 – was a man of affairs, not an armchair *philosophe* on the Continental model. The English Enlightenment was characterised by a pragmatic focus on what worked, a quality which attracted the admiration of Continental thinkers like Montesquieu and Voltaire, but not Rousseau who, like Marx in the next century, found refuge from intellectual persecution in England. Both displayed a remarkable lack of curiosity about why it was that England could produce a society in which each could find such refuge.

The culture of improvement was manifest in every 18th century debate about social relations or constitutional change and, perhaps most spectacularly, in science and technology. In England, primarily because of Lord Mansfield, it was also manifest in the law. He played a critical role in the subsequent success of London as a commercial and financial city, of which its residents remain the beneficiary to this day.

The common law was a fertile ground for the display of Enlightenment values. It had developed over the centuries, not as a manifestation of revelation or dogma, but by the application of formal reasoning. Precedents were applied through articulated thought processes. Principles and new rules emerged by express reasoning invoking logic, usually inductive albeit sometimes deductive. The weight of tradition and precedent – the idea still manifest amongst some lawyers that nothing must ever be done for the first time – slowed down the process, but did not prevent it.

Outside legal circles, Mansfield is best known as the creator of Kenwood, his wonderful Hampstead home that continues to delight visitors, and as the judge in the landmark slave trade decision, *Sommerset's case*, who famously is supposed to have said: "The air of England is too pure for any slave to breathe. Let the black go free". His

actual rhetoric was not quite as memorable, but the version is close enough and it would be churlish to correct it.

For lawyers, however, Mansfield is remembered for, virtually single-handedly, creating English commercial law.

Born in Scotland in an aristocratic Jacobite family, a disloyal connection which would bedevil his political career, William Murray, the future Lord Mansfield, left for England for high school – Westminster – followed by Oxford and Lincoln's Inn, never to return. He was not a member of the Scottish Enlightenment but his Scottish origins were significant.

He displayed a Scottish francophone tendency. He read French authors and became attracted to French jurists. His classical education – particularly his reading of Cicero – convinced him of the strength of Roman jurisprudence, the systematic order of which contrasted with the chaos of the common law. He proposed that William Blackstone prepare the first comprehensive outline of the common law, which became the *Commentaries*, probably the most influential text on the law of England ever published, which self-consciously invoked the spirit of the age.

Most significantly, Mansfield's personal and educational background meant that he did not share the insularity of most common lawyers. He was prepared to adopt the practices of international traders to fashion a commercial law, especially maritime law, that was self-consciously global in perspective. He was convinced that the functional requirements of commercial law – particularly certainty – were the same everywhere. He accepted the common law method and tradition, without deifying it.

Mansfield's determination to improve the legal system was manifest on the first day he sat as a judge. He delivered his first judgment on the spot, *ex tempore* as we lawyers still say. This was not then the practice. Plainly it minimised delay for the parties. It was also a much more efficient use of judicial time. His initiative remains the dominant tradition of English judges, who deliver a much higher proportion of "*ex temps*" than we do, much as we try.

His concerns and solutions have a decidedly contemporary ring. The excessive delays and costs of litigation were attacked by taking control of the progress of cases from the profession: imposing time limits on counsel preparing submissions on legal points after a jury had

found the facts, forcing practitioners to justify adjournments and abolishing the practice of hearing cases in order of the seniority of counsel, very lucrative for the senior bar, but unfair to any litigant who could only afford junior counsel. He set an example for hard work and drove the profession to appear when needed. However, when he proposed to sit on Good Friday, he relented after the exasperated barrister pointed out that the last judge to do that was Pontius Pilate. On another occasion when he proposed to sit on a holiday, the whole bar met and agreed not to turn up.

Mansfield's greatest contribution was the development of commercial law. Like Augustus who said "I found Rome a city of brick and left it of marble", so Mansfield found English law a feudal inheritance, preoccupied with real property, and left it with a vibrant set of principles for a commercial, and soon an industrial, society. The comparative significance of property was transformed during this era – from real or tangible physical property to pieces of paper bearing promises: government debt, insurance policies, bank notes, bills of exchange, shares in joint stock companies, options and contracts of all kinds.

The internationally recognised Law Merchant, hitherto spasmodically enforced by trade guilds, local courts in sea towns and by the Court of Admiralty was brought into the mainstream to be recognised and enforced by the central courts. The law of every kind of insurance – marine, life, fire etc – of negotiable instruments, of sale of goods, of intellectual property and every aspect of maritime law – collisions, wrecks, charter parties, freight – all in a form recognisable today – was established or reinforced at this time.

In his prior political career – not entirely abandoned on his appointment – he manifested a keen interest in and understanding of commercial issues, not least in the investment advice he was called upon to give to his spendthrift party leader, the Duke of Newcastle. An early reader of Adam Smith, Mansfield objected to government interference with trade: attacking restrictions on food imports established in what he described as “the imaginary private interests of our landed gentry” and deploying all his formidable oratory against a bill that would prohibit British insurance of French ships in times of war. His views did not prevail at a political level until the repeal of the Corn Laws.

When he became Chief Justice he was able to develop commercial law in accordance with these principles. He was determined

that the law should be based on freedom of contract – “not to dictate but to interpret”, as he put it. He established the practice of giving commercial contracts a flexible business-like interpretation, recognised the need for good faith in commercial dealings, accepted negotiable instruments as a form of currency, validated the role of insurance and enforced established legal rules, even those he thought were wrong, on the faith of which commercial arrangements had been made. The overriding principle was, if there was no existing rule, the law would adopt the customs of the particular trade.

At the time, issues of fact in his court had to be tried by jury. Mansfield was well aware of the defects of the common law jury trial and its inability to determine the facts in complex disputes. He made two fundamental changes to jury trials in commercial cases.

Mansfield institutionalised a system of special juries of merchants who would sit with the judge and determine what commercial practice in the particular trade required. These specialist jurors also acted in other cases as expert witnesses or as arbitrators.

Secondly, he used his authority to refer such matters out to independent arbitration. He often nominated the arbitrator and made

detailed orders for the conduct of the arbitration, enforced by contempt proceedings. His orders by-passed inefficient technical rules of court procedure eg the contemporary rule that a party could not give evidence. His efforts to get parties to settle were relentless. He was an interventionist judge at a time when the adversary system was still being formed. All of this has resonance today as judges, led by commercial judges, assume more and more responsibility for case management.

The flexibility and resilience of English commercial law was established in Mansfield's term of office. He sat on thousands of cases over his 32 years and was rarely overturned. He failed in his attempt to abolish the need for consideration in the law of contract and, more dramatically, failed in his attempt to fuse law and equity, so that parties could get equitable relief or equitable procedural advantage in a common law court, without instituting separate proceedings in the Court of Chancery. That change would require legislation, a century later or, in New South Wales, two centuries later. The profession in my state remains an international bastion of evangelical equity scholarship, amongst whom Mansfield is still treated as a heretic.

Lord Mansfield could be characterised as a judicial activist, which would be an odd description of one of the most conservative political figures of his time.

This was not an age in which most such matters were ever expected to be the subject of legislation. The common law developed from the ground up, by the identification of principle through the slow accretion of practical knowledge about the range of issues that actually arise, rather than by the application of an inflexible predetermined verbal formula in a statute or code. Mansfield was much admired by Edmund Burke – his political opponent on issues such as the American Revolution and hardly the champion of activism – who said: “Mansfield’s ideas go to the growing melioration of the law by making its liberality keep pace with the demands of justice and the actual concerns of the world, conforming our jurisprudence to the growth of our commerce and of our empire”.

Mansfield accepted that he was bound by precedent, but the common law method permitted adjustment within this constraint and, as an improving judge, Mansfield could often ensure a just result.

As Judge Richard Posner, an American legal polymath, has observed, the law is the *only* sphere of discourse in which the word “innovative” has a pejorative connotation. The word “improvement” has no such connotation. Mansfield was an improver.

The culture of improvement has been at the forefront of judicial developments over the last two or three decades. Every participant in the administration of justice has been concerned with reducing the delays and costs of court proceedings. Judges are no longer passive umpires who allow lawyers to dictate the timing and pace of proceedings. The adversary system, which was only fully developed in the 19th Century, has been modified.

The demise of the jury has meant that specialist juries of merchants are not required. However, functionally equivalent structures which directly involve commercial actors in dispute resolution has emerged. I refer, for example, to the Takeovers Panel.

Led by commercial judges, the role of the judiciary in case management more closely resembles the practices of Lord Mansfield than it did for about a century and a half before, about, the mid 1980's. Judges now control the proceedings by seeking to identify the issues

really in dispute at an early stage, by refusing adjournments, by minimising delays, by encouraging settlements, by no longer treating commercial arbitration as a trade rival, by controlling the length and pace of trials.

A culture of improvement has again become the framework for judicial practice.

**ADDRESS ON THE RETIREMENT OF THE
HONOURABLE JUSTICE MASON AC
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
BANCO COURT, SUPREME COURT OF NEW SOUTH WALES
SYDNEY, 30 MAY 2008**

Today marks the culmination of 23 years of public-spirited service to the legal system of this State that has rarely been surpassed. With a degree of personal sacrifice, about which your Honour has never been known to comment, let alone complain, you turned your back on a lucrative career at the commercial bar to become the full-time Chairman of the Law Reform Commission in the middle of 1985.

From the Law Reform Commission you were appointed in early 1987 as Solicitor-General of this State, where you served for a decade to universal acclaim and, in the light of the contemporary attitude of the High Court to State submissions on constitutional matters, with considerable fortitude. Bloodied but not bowed, your Honour was appointed President of the Court of Appeal on 4 February 1997 and it is the culmination of your service in that post that we commemorate today.

The long term significance of your term of office will be found in the intellectual leadership you have displayed for the judiciary of this State and the development of the law. Your Honour has delivered judgments of the highest quality and depth of learning over the entire jurisdiction of this Court – torts, contracts, trusts, fiduciary duties, insurance, defamation, environmental law, conflicts, restitution, estoppel, evidence, procedure, criminal law, as well as the full range of statutes which have required exegesis of the principles of statutory interpretation. By reason of your experience as Solicitor-General you understood the interface between government and the law and the weft and weave of current issues in constitutional law.

As one who has sat with you often, I can testify to the open mindedness, diligence and courtesy with which you approached each and every hearing and the sense of joy you always brought to the investigation of legal principle, although, over the years, there seemed to be more and more statutes and authority to which the word joy would not be an appropriate description of your Honour's reaction.

The quality of your judgments, both in terms of exposition of facts and depth of understanding of the law, are widely recognised throughout the State, indeed, throughout Australia. Many of your judgments will

stand the test of time though, perhaps regrettably, you will frequently suffer the obscurity of an intermediate appellate judge whose reasoning is accepted, and often enough replicated, in an unsuccessful appeal to the High Court, whose judgment will in the future stand alone as authority for the proposition first articulated with force and clarity by your Honour. This was, for example, the case with your Honour's judgment on litigation funding.¹ I also have in mind a case when your Honour sat at first instance, in which your Honour came to a conclusion on a particular basis, rejected by the Court of Appeal, but upheld by the High Court without express reference to your Honour's reasons.²

Your Honour delivered a number of important dissenting judgments on matters about which reasonable minds could and did differ and about which your Honour's reasons stand as a full exposition of the minority view which, by reason of the quality of your judgment and the continuance of disputation on issues at the borders of the legal discourse, such as wrongful birth,³ and the award of exemplary damages in equity,⁴ will guarantee your Honour a life in academic legal footnotes for many years to come, and, possibly, vindication by a future High Court.

Beyond cases which are of sufficient difficulty or significance to attract the attention of the High Court, stands a formidable body of judgments by your Honour which have clarified the law in virtually every field of legal discourse and which will guide practitioners and judges in matters of significance in the administration of justice in this State for many years to come. I can only identify a handful of the scores of such judgments encompassing: recovery for psychiatric injury;⁵ the finality of commercial arbitral awards;⁶ the concept of notional estate in the *Family Provisions Act*;⁷ the equitable doctrine of contribution;⁸ duties owed by employers in labour hire arrangements;⁹ the ownership of poker machine licences;¹⁰ the existence of a contractual duty of good faith;¹¹ abuse of process in criminal proceedings;¹² on comity between Australian intermediate appellate courts;¹³ the scope of statutory remedies.¹⁴ I could go on for much longer if time permitted.

Of equal significance is the body of judicial decisions which may not be of broader significance but each of which was of considerable importance to the parties. Whether in civil or criminal appeals and, on some occasions, sitting at first instance, your Honour approached every case with the same high level of dedication and commitment.

You brought all your formidable intellectual skills to bear on the frequently complex range of specific facts involved in this core of the appellate jurisdiction. These are not the cases which make it to the law reports or excite academic interest. Nevertheless, they constitute the day-in day-out service that the judiciary provides for the fair and effective operation of our economy and society. They require personal empathy, an understanding of individual motives and societal forces, a capacity to bring practicality to bear on legal learning and an ability to identify the relevant legal principles and apply them to the circumstances of each case. All of which you consummately displayed.

Your conduct has been characterised by the seriousness with which you approached your tasks, both as a leader of the Court and as a judge. You have addressed with diligence, erudition and sensitivity, on an annual basis, the difficult task of explaining to judges of the District Court precisely how and why the Court of Appeal has exercised its appellate jurisdiction with respect to their judgments.

You set high standards for the relations between judges and each other, particularly for judges such as yourself towards the top of the judicial hierarchy who have more than the usual range of opportunities to treat others in a manner in which they would not wish to be treated

themselves. We have all been chastened by your careful analysis of the importance of civility on the part of appellate courts when explaining why it is that an appeal should be allowed, so that adverse conclusions are expressed without any sense of discourtesy to the judge below and, perhaps even more importantly, without diminishing the status and respect of that court in the public eye. You were always scrupulous in this respect yourself.

You have always understood the importance of certainty in the law and the role of an intermediate appellate court in observing prior and higher authority, whilst accepting the opportunity, when it arises, to develop the law in accordance with the common law method. You brought to this task a set of ethical principles which found their origin in your religious beliefs and the strength of your faith.

I hesitate to attribute to you the appellation of that much misused term “reformer”, which has the connotation that there is something wrong. *You* are an improver. You always proceeded on the basis that things can be done better.

You would, I believe, find comfort in the pithy dictum of an American judge, the polymath Richard Posner, who said that: “only in

law is 'innovative' a pejorative"¹⁵ and in his consequential observation: "American law is too vague, too complicated, too expensive; and it is these things in part because judges are too fond of sterile verbalisms and outmoded distinctions."¹⁶ That could never be said of your Honour.

You have always had to hand an unnervingly accurate moral compass to guide your decisions and conduct, both as a judge and in your active role over many years in the Anglican Church.

It was this moral compass that led you to engage in the movement to encourage the ordination of women in your Church. That moral compass was also, I believe, the foundation of your intellectual interest in the law of restitution, a subject on which you are the co-author of the basic Australian text. In neither case was the strength of your principles capable of being diverted with the answer that that is not the way it has been done before.

You are perfectly, indeed uniquely, placed to investigate and explain to us all how it has come to pass that Sydney has become a world centre, indeed one of the bastions, of both evangelical Anglican theology and evangelical equity scholarship. Is there a connection?

To every aspect of your professional life, whether it be the course of administration, the conduct of hearings, the writing of judgments, the interaction with your colleagues, or the topics and content of the numerous addresses you made to public and legal audiences, you manifested a remarkable combination of an intellect of the highest order, an exceptional equanimity of temperament, personal civility bordering on grace and moral strength that is exceedingly rare.

This remarkable combination of personal characteristics endeared you to everyone with whom you came into contact in your professional life, including every member of this Court. Your performance of the administrative and pastoral functions of the leader of the Court of Appeal has always been exemplary. Your multiple kindnesses, often at personal expense, to all of the members of the Court, their staff and court employees will never be forgotten. You continued the practice of some, but not all, of your predecessors, of courtesy to practitioners and consultation with all judges of appeal. You took an interest in the activities, concerns, achievements and the comings and goings of the staff of the Judges of Appeal, which was one of many manifestations of your profound concern for other people.

From the time of my appointment as Chief Justice, the tenth anniversary of which was last Sunday, to this day I relied on your experience, advice and support. I am and will always remain personally profoundly grateful to you. Furthermore, I know I speak on behalf of every judge of this Court and every judge who had the pleasure of serving on this Court during your period as President, when I express our most heartfelt of thanks for your leadership and collegiality in all of our interactions with you as a President, as a colleague and as a friend.

Your quiet self-confidence, which often appeared self-effacing without any sense of false humility, led you to abjure any need to display your considerable ability or to seek celebration for it. No doubt this occasion, and perhaps these remarks, may be a little uncomfortable for you. However, it is our need not yours to celebrate the extraordinary breadth of your achievement. We, and I, will miss you greatly.

¹ *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203.

² *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* [2003] HCA 65; (2003) 219 CLR 325.

³ *Harrington v Stephens* [2004] NSWCA 93; (2004) 59 NSWLR 694.

⁴ *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10; (2003) 56 NSWLR 298.

⁵ *Kavanagh v Akhtar* (1998) 45 NSWLR 588; *Morgan v Tame* [2000] NSWCA 121; (2000) 49 NSWLR 21.

⁶ *Raguz v Sullivan* [2000] NSWCA 240; (2000) 50 NSWLR 236.

⁷ *Kavalee v Burbidge* (1998) 43 NSWLR 422.

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- 8 *Cockburn v GIO Finance Ltd (No 2)* [2001] NSWCA 177; (2001) 51 NSWLR 624.
- 9 *TNT Australia Pty Ltd v Christie* [2003] NSWCA 47; (2003) 65 NSWLR 1.
- 10 *Jabetin Pty Ltd v Liquor Administration Board* [2005] NSWCA 92; (2005) 63 NSWLR 602.
- 11 *CGU Workers Compensation (NSW) Ltd v Garcia* [2007] NSWCA 193; [2007] 14 ANZ Ins
Cas 61-746.
- 12 *Adler v Director of Public Prosecutions (Cth)* [2004] NSWCCA 352; (2004) 149 A Crim R 378.
- 13 *Tillman v Attorney General (NSW)* [2007] NSWCA 327.
- 14 *Akron Securities v Illiffe* (1997) 41 NSWLR 353.
- 15 See *United States v McKinney* 919 F 2d 405 (7th Cir 1990) at 421 per Posner J.
- 16 Ibid p423.

LEGITIMATE AND SPURIOUS INTERPRETATION
THIRD LECTURE IN THE 2008 MCPHERSON LECTURES
STATUTORY INTERPRETATION & HUMAN RIGHTS
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
UNIVERSITY OF QUEENSLAND, BRISBANE
12 MARCH 2008

On 31 March 1717 Benjamin Hoadly, the Bishop of Bangor, delivered a sermon before George I of Great Britain entitled “The Nature of the Kingdom of Christ”. His text was John 18:36, “My Kingdom is not of this world”. His sermon ignited what became known as the Bangorian Controversy, named after Hoadly’s see. The appellation was conferred apparently without irony, although the central message of his sermon was that there was no biblical justification for *any* form of Church government, which presumably excluded bishoprics. He proclaimed that Christ had not delegated his authority to any representative, no doubt including all bishops. His theological position proved attractive to George I and George II, who acted as his patrons and protected him from his episcopal colleagues.

In the course of denying the right of any person to intercede between the ultimate source of sovereignty and the individual worshiper,

Bishop Hoadly proclaimed a theory denying any right of interpretation.

He said:

“Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.”¹

American realist interpretation scholars who are fond of quoting Hoadly² do not make it clear that the bishop was concerned only with a text which reveals the word of God and which, accordingly, cannot be amended. He expressly excluded secular legislation, which can be changed if interpreted wrongly. Nevertheless, as in the case of a written constitution, that ability may sometimes be more theoretical than real.

The dictum of Bishop Hoadly reflects views sometimes expressed by those who emphasise the purity of other sovereign authority, whether parliamentary sovereignty or the sovereign people. We can refer to this as the Bangorian school of statutory interpretation. It is reflected in the Benthamite approach, common in civil law jurisdictions, that understanding legislation is a simple mechanical task. That has never been the common law tradition.

Notwithstanding the fulminations of parliamentary drafters, who often proclaim the obviousness of their intent and the clarity of their words which a court has misunderstood, the process of statutory interpretation has always been regarded as raising real issues that require analysis. Unlike the civil law we have never had a “Low Court” tradition, equivalent to the “Low Church” tradition represented by Bishop Hoadly.

The contrast in approach appears, perhaps most notably, by comparing typical judgments of common law courts with those of civil law courts. In the former, reasons are set forth in full. In most civil law jurisdictions, though there have been changes in this respect in some over recent decades, the reasons for judgment are curt, by reason of the pretence that all that has to be done is a mechanical application of the words of a code. This comparative lack of transparency in the true process of reasoning that led to a result, explains to a significant degree why the bureaucratized judiciary in many civil law countries does not have the status, nor the respect of the public, to the degree to which we have become accustomed.

Even the three basic rules of traditional formulation: the literal rule, the golden rule and the mischief rule – which, as I have said in my first

lecture have contemporary echoes in textualism, contextualism and purposive interpretation, respectively – were each regarded as legitimate. They did not, indeed could not, lead to the same result. The choice of which rule to apply often involved a dialectic process in an intellectual tradition which can be traced back over five centuries.

The Austinian Approach

As I indicated in the first lecture, the salience that human rights considerations have acquired over recent decades represents the resurgence of natural law and the partial demise of legal positivism. In the nineteenth century when legal positivism replaced the remnant of natural law thinking in the English common law tradition, one of the battlegrounds was statutory interpretation.

In his *Lectures on Jurisprudence*, the foundational text of legal positivism, John Austin denounced what he called “spurious interpretation”.³ To make his position quite clear he further characterised this approach as “bastard interpretation”. He said:

“There is a species of interpretation or construction (or rather of judicial legislation disguised with the name of interpretation) by which the defective but clear provisions of a statute are extended to a case which those

provisions have omitted ... [T]his species of interpretation or construction is *not* interpretation or construction properly so called ... [A]dopting the current but absurd expression, the judge *interprets* the law *extensively*, in pursuance of its reason or principle.

The so-called interpretation ... is widely different from the *genuine* extensive interpretation which takes the reason of the law as its index or guide. In the latter case, the reason or general design is unaffectedly employed as a *mean* for discovering or ascertaining the specific and doubtful intention. In the former case the reason or principle of the statute is itself erected into a law, and is applied to a *species* or case which the lawgiver has manifestly overlooked.”⁴

The approach to statutory interpretation to which Austin was responding had come to be referred to as the “equity of the statute”. This was a doctrine pursuant to which the courts sought to effectuate the will of Parliament by extending the operation of a statute in accordance with the justice of a particular case.⁵ Insofar as the doctrine operated to restrict the scope of a statute, that approach can still be seen to be

applied today. However, insofar as the doctrine was used to extend the scope of the statute, that is a matter of some controversy which I will discuss below.

The doctrine of the equity of a statute reflects the historical origins of the institutions of government in the British system. Originally the King met in Council and there was no distinction between legislative, executive and judicial functions. Over time the Council, originally comprised of the nobility only, developed into the Parliament as we know it. A committee of councillors, wielding the executive power, developed into the Cabinet as we know it. The judicial power came to be exercised by specialist judges, rather than by the King in Council and the prerogative courts like Star Chamber and High Commission disappeared or, like Chancery, were judicialised. The very word “court” reflects the origin of the judicial function amongst those in the immediate presence of a King.

Over the centuries, when statutes were in fact quite uncommon, Parliament was regarded primarily as a court in the modern sense. That clearly has changed. More significantly, for most of those centuries, judges were regarded as a manifestation of executive authority. Indeed

judges often drafted the statutes.⁶ As a thirteenth century Chief Justice, Ralf de Hengham, once berated a pleader:

“Do not gloss the statute; we understand it better than you, for we made it.”⁷

The doctrine of equity of the statute reflected this admixture of functions and, as has recently been comprehensively established,⁸ it is quite inconsistent with a separation of powers of the contemporary character, whether as strict as Article III of the US Constitution or Chapter 3 of the Australian Constitution, or of the more flexible kind which applies, for example, in the United Kingdom and in the Australian States.

Although reference is made to the equity of the statute approach in Blackstone’s *Commentaries*, by his time the emphasis was plainly on judicial interpretation in the contemporary sense. Judges sought to identify the intention of the legislature.

One American author on statutory interpretation has classified judicial approaches to interpretation in the following manner:

- Textualists who give precedence to the literal words of the text;
- Purposivists who employ purpose to clarify an ambiguous text;

- Strong purposivists who rely on purpose to depart from a clear statutory text.⁹

All three categories, nevertheless, find their rationale in what the author describes as the “faithful agent theory”. He went on to distinguish the revival of interest in the “equity of the statute” of a traditional character, which had some residual support at the time of the creation of the United States, not least in Blackstone’s *Commentaries* which were so influential at the time. If there was an inherent judicial power to adapt legislation at the time of the formulation of the Constitution of the United States, this would be a form of interpretation attractive to originalists, who have in the past tended to be strong textualists. The author sets out a convincing refutation of this theory.

The traditional equity of the statute approach has had a residual influence on the law of statutory interpretation. Justice Gummow has identified a number of principles of interpretation as continuing the equity of the statute approach under different terminology.¹⁰ Justice Finn of the Federal Court has expressed a similar opinion¹¹ and, his Honour notes, the statutory requirement to prefer an interpretation which promotes the purpose or object underlying an act may be seen as reflecting at least in part a similar process.

The resurgence of interest in human rights does raise again the Austinian distinction between genuine and spurious interpretation. This is reflected in debates about judicial activism, in debates about whether to adopt a bill of rights and in debates about the judicial implementation of a bill of rights. The determination of when interpretation has become “spurious” is a matter upon which reasonable minds can and will differ. It is, however, a real issue.

About a century ago Roscoe Pound developed and commented upon the Austinian concept of spurious interpretation and its contemporary relevance makes it worthy of extensive quotation:

“The difficulty calling for interpretation may be (a) which of two or more coordinate rules to apply, or (b) to determine what the lawmaker intended to prescribe by a given rule, or (c) to meet deficiencies or excesses in rules imperfectly conceived or enacted. The first two are cases for genuine interpretation. The third case, when treated as a matter of interpretation, calls for spurious interpretation.

The object of genuine interpretation is to discover the rule which the lawmaker intended to establish; to discover the intention with which the lawmaker made the rule, or the sense which he attached to the words wherein the rule is expressed ... Employed for these purposes, interpretation is purely judicial in character; and so long as the ordinary means of interpretation, namely the literal meaning of the language used in the context, are resorted to, there can be no question. But when, as often happens, these primary indices to the meaning and intention of the lawmaker fail to lead to a satisfactory result, and recourse must be had to the reason and spirit of the rule, or to the intrinsic merit of the several possible interpretations, the line between a genuine ascertaining of the meaning of the law, and the making over of the law under the guise of interpretation, becomes more difficult. Strictly, both are means of genuine interpretation. They are not covers for the making of new law. They are modes of arriving at the real intent of the maker of existing law. The former means of interpretation tries to find out directly what the lawmaker meant by assuming his position, in the surroundings in which he acted, and endeavouring to gain

from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy. The latter, if the former fails to yield sufficient light, seeks to reach the intent of the lawmaker indirectly. ...

On the other hand, the object of spurious interpretation is to make, unmake, or remake, and not merely to discover. It puts a meaning into the text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery. It is essentially a legislative, not a judicial process ..."¹²

Pound characterised spurious interpretation as an anachronism in an age of statutes and also as inconsistent with the separation of powers.

The current version of the equity of the statute approach manifests itself as "dynamic interpretation". A principal United States proponent of this approach described it thus:

"Because they are aimed at big problems and must last a long time, statutory enactments are often general,

abstract and theoretical. Interpretation of a statute usually occurs in connection with a fact-specific problem (a case or an administrative record) which renders it relatively particular, concrete and practical. As an exercise in practical rather than theoretical reasoning, statutory interpretation will be dynamic. It is a truism that interpretation depends heavily on context, but the elasticity of context is less well recognized. The expanded context of cases and problems engenders dynamic interpretation. Because statutes have an indefinite life, they apply to fact situations well into the future. When successive applications of the statute occur in context not anticipated by its authors, the statute's meaning evolves *beyond* original expectations. Indeed, sometimes in subsequent applications reveal that factual or legal assumptions of the original statute have become (or were originally) erroneous; then the statute's meaning often evolves *against* its original expectations."¹³

This "dynamic" approach has been noted with approval in Australia.¹⁴ Lady Justice Arden has applied a similar, but not identical, distinction by way of characterisation of the effect given to s 3 of the

Human Rights Act of the United Kingdom by the English cases I discussed in the second lecture.¹⁵

Her Ladyship said:

“[25] What does the interpretative duty mean in practice? Significantly, in relation to the interpretation of legislation under the *Human Rights Act* 1998, we move from an Agency Model to the ‘Dynamic Model’. The judge is not simply looking at the wording and trying to apply it. He is looking at the wording critically. He is considering whether it complies with the Convention. This approach works on the basis that what Parliament intended was that statutes should have the effect of operating in conformity with human rights unless the contrary conclusion could not be achieved as a matter of interpretation. But, in truth, it is no longer a matter of looking at Parliamentary intention. This is highlighted by the fact that new approach applies to legislation whenever passed. At the highest level of generality, the court is acting as the guardian of human rights and constitutional rights. Its role is a dynamic one, and hence I call the model in this context the Dynamic Model.”

Her Ladyship goes on to discuss the implications of what she calls the Dynamic Model for the role of the judiciary.

This development in England raises many of the issues to which Roscoe Pound referred a century ago. It appears that in jurisdictions from which Australians once drew guidance, including both the United Kingdom and Canada, the dominant view may differ from ours. In Australia the debate is still continuing.

The Limits of Interpretation

The application of the principles listed in the Common Law Bill of Rights, the subject of the first lecture, and the application of the rights compliant interpretation provisions, the subject of the second lecture, raise analogous, indeed probably identical, issues about the judicial role. Determining the boundary between interpretation and legislation arises in both respects.

The English case law on their rights compliant interpretation provision, discussed in the second lecture, goes beyond what most Australian judges would regard as “interpretation”. English judges are, of course, well aware that there is a constitutional boundary beyond

which they should not travel. They recognise that interpretation cannot become, in substance, amendment of legislation.

Lord Nicholls identified the issue in the following manner:

“[38] ... Section 3 is concerned with interpretation ... and, indeed, section 3(2)(b) presuppose[s] that not all provisions in primary legislation can be read Convention compliant by the application of section 3(1). ...

[39] In applying section 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament.

[40] Up to this point there is no difficulty. The area of real difficulty lies in identifying the limits of interpretation in a particular case. This is not a novel problem. ... What one person regards as sensible, if robust, interpretation,

another regards as impermissibly creative. For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment.”¹⁶

In Lord Bingham’s judgment in *Sheldrake*, quoted in my second lecture, which synthesised the English authorities, his Lordship indicated clearly that there were limits to the deployment of s 3 and outlined a number of formulations identifying those limits, including:

- “Inconsistent with a fundamental feature of legislation”;¹⁷
- “Incompatible with the underlying thrust of the legislation”;¹⁸
- “Change the substance of a provision completely”;¹⁹ and
- “Remove the very core and essence, ‘pith and substance’ of the measure Parliament had enacted”.²⁰

To an Australian judge, those are not restrictive criteria. Because of the express reference to the purpose of Parliament – either by express subsection in the current ACT formulation or in terms of ‘consistency’ in the Victorian and new ACT formulation – Australian provisions differ in a critical respect from that of the UK. What is regarded as “interpretation” in England would not necessarily be so

regarded here, even under the rights compliant interpretation provisions.
English case law must be deployed with care.

In the first lecture I identified a range of processes which come within an orthodox statement of the interpretive task:

- Deciding the meaning of ambiguous or obscure words;
- Deciding whether to read down general words;
- Deciding whether implications are to be drawn from a text;
- Considering whether to depart from the natural and ordinary meaning of words by adoption of a strained construction;
- Deciding whether or not a statutory definition does not apply on the basis of an intention to the contrary;
- Giving qualificatory words an ambulatory operation; and
- Reading words into a statute by filling gaps (more controversially).

In the time available I propose to discuss three of these processes as they often arise in the application of the principle of legality and of rights compliant interpretation provisions. These are: strained construction, reading down general words and reading words into a statute.

Strained Construction

There are numerous references in the authorities to the permissibility of adopting, in particular circumstances, what is described as a “strained construction” of statutory language. Bennion, in accordance with the requirements of the approach of his text as a “code”, identifies strained construction with any approach which fails to implement a clear grammatical meaning or one of the possible grammatical meanings.²¹ An appropriate statement of strained interpretation in a purposive context is that of MacKinnon LJ who said:

“When the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used, and of which the plain meaning would defeat the obvious intention of the legislature. It may even be necessary, and therefore legitimate, to substitute for an inept word or words that which such intention requires.”²²

In Australia the most systematic statement of circumstances in which a strained interpretation is appropriate is that of Justice McHugh, first in the Court of Appeal of New South Wales and then in the High Court.²³ I will deal separately with the processes of reading down

general words and reading words into a statute. His Honour identified circumstances in which a strained construction has been adopted as including:

- Where the operation of the statute appears to be absurd, capricious or irrational;²⁴
- Where terminology has been inadvertently used;²⁵
- Where words have been omitted, particularly words which constitute a failure to deal with an eventuality required to be dealt with if the purpose of the Act is to be achieved;²⁶ and
- Where the purpose of the provision indicates that Parliament did not intend the grammatical meaning to apply.²⁷

Nevertheless, in each respect, what must be undertaken is a process of interpretation and this imposes a significant restraint upon the ability of a court to effectuate what the court identifies to be the true legislative purpose.

The task of the court is to interpret the words used by Parliament. It is not to divine the intent of the Parliament.²⁸ The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say.²⁹

A good example of permissible strained construction is a recent judgment of the Queensland Court of Appeal as to whether an unregistered motor cycle was subject to the indemnity provisions of the *Motor Accidents Insurance Act 1994 (Qld)*. The definition of a motor vehicle was such as to support the insurer's contention that the obligation to indemnify applied only to registered uninsured vehicles, but not to unregistered uninsured vehicles. Nothing could be more clearly inconsistent with the purpose of compulsory third party insurance. The difficulty arose because the obligation to indemnify for an uninsured motor vehicle was expressed in terms of an accident "on a road or in a public place", whereas the obligation to register a vehicle was expressed in terms only of use "on a road", without reference to a "public place". By means of a strained interpretation, the reference to motor vehicle was interpreted to include reference to a vehicle for which registration was not required until such time as the regulation required such registration.³⁰

This case probably falls into the absurdity or irrationality category. The analysis is a clear application of the relevant principles within proper bounds of the interpretative task.

The limits of strained construction are well expressed by Lord Reid who said:

“It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can chose between those meanings, but beyond that you must not go.”³¹

I am aware that in the NSW Court of Appeal, Justice McHugh suggested that this passage did not “express the modern law of statutory interpretation”. However, he did not repeat this statement in the High Court judgments in which he repeated his analysis.³²

McHugh JA’s characterisation of Lord Reid’s reasoning has not been subsequently adopted. Indeed, the joint judgment of Mason and Wilson JJ in *Cooper-Brookes*, which is usually cited, including by McHugh J, as the basis of contemporary Australian doctrine in this regard, expressly adopted a “reasonably open” test when their Honours said:

“[T]here are cases in which inconvenience of result or improbability of result assists the court in concluding that

an alternative construction *which is reasonably open* is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent *discernible from other provisions in the statute.*"³³

A strained construction is sometimes permissible, but the process must be able to be characterised as genuine not spurious interpretation. The overriding test is that the meaning must be reasonably open.

Reading Down General Words

When should general words used in a statute be read down so as to have a narrower meaning than that of which they are literally capable? It is actually quite rare to find an English word that cannot be applied at different levels of generality or cannot otherwise be circumscribed in its application.

For those who seek comfort in the "plain meaning" approach, it is necessary to recognise, in the words of Lord Wilberforce, that general words do not necessarily have a "plain meaning".³⁴

Reading down general words, particularly by the application of presumptions attributed to the legislature, is a well established means of statutory interpretation.³⁵

As long ago as 1560, in *Stradling v Morgan* the Barons of the Court of the Exchequer said:

“And the Judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular where the intent was particular.”³⁶

A fuller quotation from this judgment of 1560 has a decidedly contemporary ring:

“the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of

the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.”³⁷

Of course during this period the judges were still under the influence of the doctrine of the equity of the statute. Nevertheless, this technique of interpretation survived the demise of that doctrine. Even in 1890, Lord Halsbury LC described *Stradling v Morgan* as a “great case”.³⁸

There are numerous examples of reading down that could be cited. Perhaps the best known example in legal history, from the time when the law of real property was of central significance to economic and social life, occurred in the context of the Statute of Frauds. The object of requiring contracts for the disposal of land to be in writing was two-fold: first, to avoid fraud and secondly, to ensure certainty. At the expense of the second objective the courts came to give the first object

primary significance in what would today be described as a purposive interpretation.

The courts proceeded on the basis that a statute, which had as one purpose the avoidance of fraud, could not be used as “an engine of fraud” or as an “instrument of fraud”.³⁹ After the doctrine of the equity of the statute had receded from judicial memory, one can detect some embarrassment with formulations of this character.⁴⁰ An alternative formulation was suggested so that doctrines such as that of part performance, which avoided the strict application of the statute, were necessary because otherwise, in Lord Selbourne’s words:

“injustice of a kind which the statute cannot be thought to have had in contemplation would follow on.”⁴¹

As Justice Hope explained the development:

“No sooner had the Statute of Frauds been enacted in 1677 than the courts set about relieving persons of its effect in cases where it was thought that the legislation could not have been intended to apply. In general terms, it was said that the courts would not allow the *Statute of Frauds* to be made an instrument of fraud, and that it did not prevent the proof of fraud ... The general approach ...

spread into a number of fields where a statute requires writing ... The fields ... include, as well as the doctrine of part performance, the rule that parol evidence is admissible to show that an absolute conveyance was in truth by way of security only, the principle that oral evidence can establish that a person has taken a transfer of property as trustee or agent for another, the doctrine whereby equity gave relief upon a breach by the survivor of two persons of a contract they had made to make mutual wills, and the principle whereby equity will compel beneficiaries who have agreed to accept their interests under the will upon communicated trusts to perform those trusts.”⁴²

In several ways the seemingly absolute requirement of writing was read down on the basis of an imputed intention of Parliament. The process of reading down general words has a rich legal history. It is an acceptable, indeed essential, technique of interpretation.

The operation of the principles of statutory interpretation which I have collectively discussed under the heading “Common Law Bill of Rights” in the first lecture have often been applied in this way.⁴³ So will

the rights compliant interpretation provisions discussed in the second lecture.

In the United States the classic application of this approach is an 1892 decision of the United States Supreme Court. The Church of the Holy Trinity in New York contracted with an Englishman to come to the Church as its rector and pastor. The issue was whether this violated a Federal statute which made it unlawful for a person to “assist or encourage the importation or migration of any alien ... under contract or agreement ... to perform labour or service of any kind in the United States”. In finding that the contract was not within the statute the Court said:

“It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in the statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding its enactment, or of the

absurd results which follow from giving such a broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act”.⁴⁴

The Court identified the circumstances which led to the passage of the legislation as a concern with the importation of cheap unskilled labour. Hardly applicable to a man of the cloth.

The Court concluded:

“It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of a country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the Act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.”⁴⁵

Justice Scalia of the United States Supreme Court, has attacked the line of authority which includes the *Church of the Holy Trinity* case on the following basis:

“Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former ... *Church of the Holy Trinity* is cited to us whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life giving legislative intent. It is nothing but an invitation to judicial law making.”⁴⁶

Justice Scalia’s approach has not prevailed in the United States, although the new configuration of the majority in the Supreme Court may well indicate increased support for his critique, particularly in the area of constitutional interpretation.

Nevertheless, there are limits to what the Court can do whilst still performing the legitimate task of interpretation. Oliver Wendell Holmes Jr stated the position with his customary epigrammatic brevity. Speaking of a statute which he described as “a foolish law” – it happened to be the *Sherman Act* – he said: “If my fellow citizens want to go to Hell, I will help them. It’s my job”.⁴⁷

The technique of reading down general provisions can, of course, be used to deny human rights as well as to implement them. In the early twentieth century, the House of Lords and the Privy Council used the technique to frustrate the ambitions of the women's movement.⁴⁸

- By reading down the word “person” in the Act entitling university graduates to vote for the university's seat in Parliament as not including women;⁴⁹
- By holding that the *Sex Disqualification Removal Act* 1917 which provided that no person should be disqualified on the grounds of sex from “the exercise of any public function” did not extend to modify letters patent of a peerage that permitted male heirs, but not female heirs, to sit in Parliament;⁵⁰
- By overruling the Canadian Supreme Court to hold that the word “persons” in the section of the *British North America Act* 1876 governing the appointment of new Senators denoted only “male persons”.⁵¹

From a human rights perspective, this well-established technique of interpretation can be seen to be neutral, a quality which enhances its contemporary deployment.

Reading Words Into an Act

Some authorities and texts refer to a process of “reading words into an Act”. This terminology appears to me to offend a fundamental principle of our constitutional arrangements. In my opinion, the relevant authorities are consistent with a process of interpretation by which the court interprets the words actually used by the Parliament by giving them effect *as if* they contained additional words which must be complied with or as if some words were deleted for a specific application. This does not, in my opinion, introduce words into the Act. It involves the interpretation of the words actually used, perhaps by means of one of the specific techniques of interpretation I have set out above.⁵²

The most frequently cited passage to this effect is from Lord Diplock in *Jones v Wrotham Settled Park Estates*, where he sets out restrictive conditions before anything of this character can occur. His Lordship said:

“My Lords, I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains

one of construction, even where this involves reading into the Act words which are not expressly included in it.”⁵³

It is important to reconcile the two, apparently contradictory, elements in this passage. How is it possible to “read words into” an Act, whilst engaging in a task of “construction”? From my review of the authorities, and I acknowledge this is not the only possible understanding of those authorities, the court may not supply words omitted by the legislature, *per se*. Rather, what a court may do is construe the words actually used by the legislature as *if* certain words appeared in the statute. The words are notionally “included” to reflect in express, and therefore more readily observable form, the true construction of the words actually used, by way of a strained construction.

I re-emphasise the words from Lord Diplock that I have quoted: the task of the Court “remains one of construction”. In order to be able to characterise the process as one of construction – which remains a constitutional restriction on the role of the judiciary – it is best to avoid describing the process as one of “introducing words into the Act”. It remains a process of construction only if what the Court is doing is to interpret the words actually used by the Parliament.

The issue of “text” versus “purpose” has been traced back to Aristotle.⁵⁴ The reformulation of a statutory provision with additional or fewer words should be understood as a means of expressing the Court’s conclusion with clarity, rather than as a description of the actual reasoning process which the Court has conducted.

Interpretation must always be text based. As I have said above, the task is to interpret the words of the legislature, not to divine the intent of the legislature.⁵⁵

In Australia, the basic authority on legislative inadvertence is *Cooper-Brookes v Commissioner of Taxation*,⁵⁶ which in fact affirms the centrality of the text. The joint judgment of Mason and Wilson JJ stated:

“[T]he propriety of departing from the literal interpretation ... extends to any situation in which for good reason on a literal reading does not conform to the legislative intent as ascertained *from the provisions of the statute*, including the policy which may be discerned *from those provisions*.”⁵⁷

In my opinion, *Cooper-Brookes* is not a case of reading words into an Act. What the Court concluded was that in a particular paragraph, the word “company” should not be given the extended meaning, which one section said that all such references should be given. In the full context of the whole Act, and of the legislative history, the section which made provision for the extended meaning was read down so as not to apply to the specific reference in one paragraph.⁵⁸

To similar effect is a later judgment of the House of Lords, *Inco Europe*, which, notwithstanding a statement about reading words into the Act, took words of general application, namely “any decision of the court under that Part” and concluded that that particular composite phrase had to be read down, so that the phrase “under that Part” applied only to some sections in the Part.⁵⁹

As I indicated above, Lord Diplock had identified three conditions before a court can undertake the process that he referred to as “reading words into an Act”. In *Inco Europe* these conditions were expressly relied on and the Court emphasised that such a process was limited to what could be characterised as “drafting mistakes”. Lord Nicholls of Birkenhead said, in a passage worthy of extensive quotation:

“It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. ...

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretive. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have

used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation ...

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching.”⁶⁰

This approach, which I understand to be the same as Australian authority that has adopted Lord Diplock’s three conditions,⁶¹ constitutes genuine, rather than spurious, interpretation. References in judgments of Justice McHugh to a court giving effect to the legislative purpose “by addition to, omission from, or clarification of, the particular provision” should be so understood.⁶²

The radical application adopted by the House of Lords for the UK rights compliant interpretation section, discussed in the second lecture, encompasses reading words into an act. In an influential judgment, Lord

Steyn expressly referred to the application of s 3 of the UK Act leading to “the implication of provisions”.⁶³

In *Ghaidan*, Lord Steyn characterised that case as having “read words into” the Act.⁶⁴

He said, authoritatively:

“Section 3 ... is ... apt to require a court to read in words which change the meaning of enacted legislation, so as to make it Convention compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is ‘possible’, a court can modify the meaning, and hence the effect of primary and secondary legislation.”⁶⁵

The Supreme Court of Canada has also adopted, admittedly in a constitutional context, a practice of reading into legislation words in order to ensure compliance with the Canadian Charter of Rights. This has been of particular significance with respect to the equality clause which prohibits discrimination on one of a number of grounds. It appears that the Canadian Supreme Court has adopted terminology from United States jurisprudence about the equal protection clause,

which characterised legislation in terms of “under inclusiveness” or “over inclusiveness” for purposes of concluding that a statute had, respectively, failed to include persons who should have been included or included persons who should not have been included.⁶⁶

As the learned author of one of the basic texts on Canadian constitutional law has put it:

“An interesting phenomenon has been the Supreme Court of Canada’s use of the remedy of ‘extension’, under which the court extends the reach of a statute that the court finds to be ‘under inclusive’. An under inclusive statute is one that excludes some group that has a constitutional right to be included. Sometimes this is accomplished by ‘severance’, deleting from the statute the language that excludes the group. Other times this is accomplished by ‘reading in’ inserting new language into the statute to add the excluded class.”

Accordingly, in one case the Supreme Court of Canada held that a provision of the *Unemployment Insurance Act 1971* which allowed more generous childcare benefits to adoptive parents than to natural parents was ‘under inclusive’, but the court stayed its hand from striking down

the legislation so as to permit the government to determine whether to alter the law. However, the court asserted that it would have had the right to read in corrective terminology.

Lamer CJ said:

“ ... extension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. ... In the case of reading in the inconsistency is defined as what the statute wrongly *excludes* rather than what it wrongly *includes*. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down ... It would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently.”⁶⁷

‘Reading in’ was regarded as an “appropriate and just” remedy to provide for an infringement of the Charter, within s 24 of the Charter. I doubt whether Australian judges will follow these precedents, whether in

the application of the principle of legality – with the enhanced salience many of the sub-principles are receiving – or in the application of rights compliant interpretation provisions.

If I can again commit the sin of self-quotation:

“[87] The process remains one of construction if the words actually used by the Parliament are given an effect as *if* they contained additional words. That is not, however, to ‘introduce’ words into the Act. It is to construe the words actually used. Interpretation must always be text based. The reformulation of a statutory provision by the addition or deletion of words should be understood as a means of expressing the court’s conclusion with clarity, rather than as a precise description of the actual process which the court has conducted.

[88] The authorities which have expressed the process of construction in terms of ‘introducing’ words to an Act or ‘adding’ words have all, so far as I have been able to determine, been concerned to confine the sphere of operation of a statute more narrowly than the full scope of the dictionary definition of the words would suggest. I am

unaware of any authority in which a court has ‘introduced’ words to or ‘deleted’ words from an Act, with the effect of *expanding* the sphere of operation that could be given to the words actually used. ... There are many cases in which words have been *read down*. I know of no case in which words have been *read up*.”⁶⁸

Notwithstanding some observations by Justice McHugh in the Court of Appeal, not repeated in his equivalent High Court judgments, the position in Australia is that identified by Stephen J:

“It is no power of the judicial function to fill gaps disclosed in legislation.”⁶⁹

These observations must be read together with the judgments in *Cooper-Brookes*, *Jones v Wrotham Settled Estates* and *Inco Europe*, to which I have referred. Indeed Justice Stephen subsequently said:

“To read words into any statute is a strong thing and, in the absence of clear necessity, a wrong thing.”⁷⁰

The process must remain one of interpretation so that a reading of the text with additional words must be “reasonably open” , to repeat the

overriding test from Lord Reid in *Jones v Director of Public Prosecutions* and Mason and Wilson JJ in *Cooper-Brookes* quoted above.

Conclusion

I return in conclusion to the century old article by Roscoe Pound which, again, merits extensive quotation because of its contemporary resonance. He said:

“ ... The bad features of spurious interpretation, as applied in a modern state, may be said to be three: (1) That it tends to bring law into disrepute, (2) that it subjects the courts to political pressure, (3) that it reintroduces the personal element into judicial administration. ... In the first place, in a modern state, spurious interpretation of statutes, and especially of constitutions, tends to bring law into disrepute. Law is no longer the mysterious thing it was once. This is an age and a country of publicity. It is no longer possible to impose upon the public by covering legislation with the cloak of interpretation. ... The disguise is transparent and futile, and can only result in creating or confirming a popular belief that courts make and unmake the law at will. Second, in a common-law country where questions of politics and economics are so frequently

referred to the courts, the knowledge that courts exercise, or may exercise, a power of spurious interpretation subjects the courts to political pressure which can not but impair the general administration of justice. ... Finally, spurious interpretation reintroduces the personal element into the administration of justice. The whole aim of law is to get rid of this element. And, however popular arbitrary judicial action and raw equity may be for a time, nothing is more foreign to the public interest, and more certain in the end to engender disrespect if not hatred for the law. The fiction of spurious interpretation can no long deceive any one to-day. The application of the individual standard of the judge instead of the appointed legal standard is quickly perceived, and is, indeed, suspected too often where it has not occurred.”⁷¹

This analysis represents an exposition of a point of view which remains relevant a century later. It is not, of course, the only opinion held on these matters. Clearly the interpretation of legislation cannot be held to be spurious if it occurs pursuant to an express Parliamentary mandate such as the rights compliant interpretation provisions discussed in the second lecture.

Nevertheless, even in this situation there remains a restraint on the judicial role. With respect to the exercise of federal jurisdiction that restraint could raise issues under Chapter 3 of the Constitution. In the case of all Australian courts, the issue is one of what Chief Justice Gleeson calls, judicial legitimacy. As his Honour said:

“Judicial power ... is held on trust. It is an express trust, the conditions of which are stated in the commission of a judge or magistrate, and the terms of the judicial oath.

...

The quality which sustains judicial legitimacy is not bravery, or creativity, it is fidelity. That is the essence of what the law requires of any person in a fiduciary capacity, and it is the essence of what the community is entitled to expect of judges.”⁷²

¹ Reprinted in John M Creed and S B Smith, *Religious Thought in the Eighteenth Century* (1934) Cambridge University Press, Cambridge at 251.

² Quoted by John Gray, *The Nature and Sources of Law* (2nd ed, 1921) Macmillan, New York at 125.

³ See John Austin, *Lectures on Jurisprudence* (4th ed, 1879) John Murray, London, vol 2 at 1029–1030.

⁴ *Ibid* at 596–597.

- 5 For a general discussion of this doctrine, together with references, see W M C Gummow, *Change and Continuity: Statute, Equity, and Federalism* (1999) Oxford University Press, Oxford at, 18–22; see also his Honour’s joint judgment with Justice Deane in *Nelson v Nelson* (1995) 184 CLR 538 at 552–554.
- 6 See P St J Langan, *Maxwell on the Interpretation of Statutes* (12th ed, 1969) Sweet & Maxwell, London, at 237; Francis Bennion, *Statutory Interpretation: A Code* (4th ed, 2002) Butterworths, London, at Section 159.
- 7 T F T Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (1992) Cambridge University Press, Cambridge, at 95.
- 8 See John F Manning, “Textualism and the Equity of the Statute” (2001) 101 *Columbia Law Review* 1. For an earlier but shorter statement of this position see Roscoe Pound, “Spurious Interpretation” (1907) 1 *Columbia Law Review* 379 esp at 383–384.
- 9 See Manning supra esp at 3ff.
- 10 Gummow supra.
- 11 Paul Finn, “Statutes and the Common Law: The Continuing Story” in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (2005) Federation Press, Sydney, 52 at 57–58.
- 12 Pound supra at 381–382.
- 13 William N Eskridge Jr, *Dynamic Statutory Interpretation* (1994) Harvard University Press, Cambridge Mass, at 48–49.
- 14 See Suzanne Corcoran, “Theories of Statutory Interpretation” in Corcoran and Bottomley supra 8 at 21–25 and Suzanne Corcoran “The Architecture of Interpretation: Dynamic Practice and Constitutional Principles” passim in Corcoran and Bottomley supra 31.
- 15 Mary Arden, “The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament”, Annual Lecture to the Constitutional and Administrative Law Bar Association, London, 26 November 2007.
- 16 *Re S (children: care plan); Re W (children: care plan)* [2002] 2 AC 291.
- 17 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (‘*Ghaidan*’) at [32] per Lord Steyn and at [67]–[68] per Lord Millett.
- 18 *Ibid* at [33] per Lord Steyn.
- 19 *Ibid* at [110] per Lord Rodger.
- 20 *Ibid* at [111].
- 21 See Bennion supra at Sections 157 to 159. See also Sections 190 and 306.
- 22 *Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd* [1938] Ch 174 (‘*Sutherland Publishing*’) at 201.
- 23 See *Kingston v Keprose Pty Ltd (No 3)* (1987) 11 NSWLR 404 (‘*Kingston v Keprose*’) esp at 421–423; *Mills v Meeking* (1990) 169 CLR 214 (‘*Mills v Meeking*’) at 242–243; *Saraswati v The Queen* (1991) 172 CLR 1 (‘*Saraswati*’) at 21–23.

- 24 See eg *Cooper-Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 ('Cooper-Brookes') at 321 quoted and applied by McHugh J in *Saraswati* at 22; *Re Lockwood* [1958] Ch 231 at 238 quoted in *Kingston v Keprose* at 422.
- 25 See *Sutherland Publishing* at 201 quoted in *Kingston v Keprose* at 422.
- 26 See *Kamins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 880-882; *Jones v Wrotham Park Settled Estates* [1980] AC 74 ('Jones v Wrotham Park') at 105.
- 27 *Adler v George* [1964] 2 QB 7; *Wiltshire v Barrett* [1966] 1 QB 312 at 332-333 referred to in *Kingston v Keprose* at 422.
- 28 See *State v Zuma* (1995) (4) BCLR 401 at 402; [1995] (2) SA 642; *Matadeen v Pointu* [1999] 1 AC 98 at 108; *R v PLV* (2001) 51 NSWLR 736 at [82]; *La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius* (Unreported, Privy Council, 13 December 1995); *Pinder v The Queen* [2003] 1 AC 620 at [24].
- 29 *R v Bolton*; *Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169; *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 at 953d; [1978] 1 WLR 231 at 236G; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 613G, 645C-V; *R v Young* (1999) 46 NSWLR 681 at [5]; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at [10]; *Donselear v Donselear* (1982) 1 NZLR 97 at 114.
- 30 See *Nominal Defendant v Ravenscroft* [2007] QCA 435 ('Ravenscroft') esp at [54]-[55].
- 31 *Jones v Director of Public Prosecutions* [1962] AC 635 at 662.
- 32 Cf *Kingston v Keprose* at 422-423; *Mills v Meeking*; *Saraswati*; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 ('Newcastle v GIO'). I note further that McHugh JA's criticism of what he said were observations to the same effect by Viscount Symonds in *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189 and have not generally found favour. See, eg, *Footscray City College v Ruzicka* (2007) 16 VR 498 ('Ruzicka') at [67]; *VOAW v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 79 ALD 422 ('VOAW') at [12]; cf *Ravenscroft* at [34]-[36].
- 33 *Cooper-Brookes* at 320 (emphasis added).
- 34 *Maunsell v Olins* [1975] AC 373 at 385-386.
- 35 I have collected the relevant Australian authorities in *R v Young* (1999) 46 NSWLR 681 ('R v Young') at [25]-[31]; J J Spigelman, "Statutory Interpretation: Identifying the Linguistic Register" (1999) 4 *Newcastle Law Review* 1 at 8; J J Spigelman, "The Poet's Rich Resource: Issues in Statutory Interpretation" (2001) 21 *Australian Bar Review* 224 at 227-230, 232-233.
- 36 *Stradling v Morgan* (1560) 1 Plowd 199 at 204; 75 ER 305 at 312.
- 37 *Ibid* at Plowd 205; ER 315. See also *Bowtell v Goldsborough, Mort & Co Ltd* (1905) 3 CLR 444 ('Bowtell') at 457-458; *Ex parte Walsh*; *In re Yates* (1925) 37 CLR 36 ('Ex parte Walsh') at 91-93; *R v Wilson: Ex parte Kisch* (1934) 52 CLR 234 ('Kisch') at 244; *Commercial Union Insurance Co Ltd v Colonial Carrying Co of New Zealand Ltd* [1937] NZLR 1041 at 1047-1049; *Church of the Holy Trinity v United States*, 143 US 457 (1892) ('Holy Trinity Church') at 459; *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 at 283; *Smith v East Elloe Rural District Council* [1956] AC 736 ('Smith v East Elloe') at 764-765; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18 ('Bropho').
- 38 *Cox v Hakes* (1890) 15 App Cas 506 at 517; see also *Hawkins v Gathercole* (1885) 6 GM&G 1 at 21; 43 ER 1129 at 1135-1136.

39 See *McCormick v Grogan* (1869) LR 4 HL 82 at 97.

40 See, eg, *Maddison v Alderson* (1883) 8 App Cas 467 at 474.

41 *Ibid* at 475.

42 See *Last v Rosenfeld* [1972] 2 NSWLR 923 at 927–928.

43 See, eg, *Bowtell* at 456–457; *Ex parte Walsh* at 91–93; *Kisch* at 244; *Smith v East Elloe* at 764–765; *Bropho* at 17–18; *R v Young* at [23]–[32]; *Al-Kateb v Godwin* (2004) 219 CLR 562 esp at [19], [117], [122].

44 *Holy Trinity Church* at 459.

45 *Ibid* at 472.

46 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997) Princeton University Press, Princeton, at 20–21.

47 Oliver Wendell Holmes (ed), *Holmes-Laski Letters: The Correspondence of Mr Justice Holmes and Harold J Laski 1916–1935* (1953) Harvard University Press, Cambridge Mass at 219.

48 See generally Andrew Turek, “Ladies for Life or Who Sits Where?” (1990) 49 *Cambridge Law Journal* 334; Brenda Hale, “The House of Lords and Women’s Rights or Am I Really a Law Lord?” (2005) 25 *Legal Studies* 72.

49 *Nairn v University of St Andrews* [1909] AC 147.

50 *Viscountess Rhondda’s Claim* [1922] 2 AC 339.

51 *Edwards v Attorney General (Can)* [1930] AC 124.

52 See *R v Young* at [5]–[32]; *R v PLV* (2001) 51 NSWLR 73 at [88]–[89]; Spigelman, “The Poet’s Rich Resource” supra at 233–234.

53 *Jones v Wrotham Park* at 105. This passage has been adopted and applied in a number of authorities: see those set out in *R v Young* at [10]; see also *Mills v Meeking* at 243–244; *Newcastle v GIO* at 116.

54 Manning supra at 4.

55 See text at n 28.

56 *Cooper-Brookes*.

57 *Ibid* at 321 (emphasis added).

58 *R v Young* at [17]–[22].

59 See *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 esp at 592 noting the references to how a provision should be “read” in the context of “adding or omitting words” as part of an “interpretative function”.

60 *Ibid* at 592.

61 See *Kingston v Ke prose* at 423; *Mills v Meeking* at 244.

62 See *Mills v Meeking* at 243; *Saraswati* at 22.

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- 63 *R v A (No 2)* [2002] 1 AC 45 at [44].
- 64 *Ghaidan* at [29].
- 65 *Ibid* at [32].
- 66 See, eg, Laurence H Tribe, *American Constitutional Law* (2nd ed, 1988) Foundation Press, New York, at 16ff.
- 67 See *Schacter v The Queen* [1992] 2 SCR 679 at 698; 93 DLR (4th) 1 at 12–13.
- 68 *R v PLV* at [87]–[88].
- 69 *Marshall v Watson* (1972) 124 CLR 640 at 648; See also *Council of the City of Parramatta v Brickworks Ltd* (1971) 128 CLR 1 at 12; *Ruzicka* at [6]; *VOAW* at [12]; *Cornwell v Lavender* (1991) 7 WAR 9 at 23.
- 70 *Western Australia v Commonwealth* (1975) 134 CLR 201 at 251.
- 71 See *ibid* at 384–385.
- 72 Murray Gleeson, “Judicial Legitimacy” (2000) 20 *Australian Bar Review* 4 at 5, 11.

**THE APPLICATION OF QUASI-CONSTITUTIONAL LAWS
SECOND LECTURE IN THE 2008 MCPHERSON LECTURES**

STATUTORY INTERPRETATION & HUMAN RIGHTS

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There is a tendency in Australia to identify constitutional law with the exegesis of a specific text. Such an approach does not take into account our inheritance of a Westminster system of government. As a joint judgment of the High Court once pointed out:

“To say of the United Kingdom that it has an ‘unwritten constitution’ is to identify an amalgam of common law and statute and to contrast it with a written constitution which is rigid rather than fluid. The common law supplies elements of the British constitutional fabric.”¹

The British Constitution, and to a substantial degree our own, has evolved over the course of the centuries through a process of historical accretion and, sometimes, historical accident. To give only one example, George I and George II spoke no, or little, English. For this reason, and also because of their preoccupation with the affairs of the

Electorate of Hanover, they did not, unlike their predecessors, attend Cabinet meetings. By the time George III took the throne, the convention was firmly established, by almost half a century of practice, that the monarch did not attend Cabinet.²

Our constitution, like the British Constitution, is not contained simply in the document called the Constitution of the Commonwealth and the various documents identified as Constitutions of the respective States. There are, as is well-known, critical matters that are the subject only of a constitutional convention. These conventions have developed over long periods of time and continue to adjust to new circumstances in a manner which cannot and does not occur with a written text. Sir Victor Windeyer observed, upon the centenary of responsible government, fifty years ago:

“That the players should be making the rules as the game proceeds may seem strange. Yet this has been the course of much British constitutional history. It may well be inevitable if the organs of government are not to become atrophied; for definition can produce a rigor iuris, only one stage removed from rigor mortis.”³

Constitutional significance should be attributed to a number of common law doctrines and a number of statutes. Both are, of course, theoretically able to be amended by Parliament. Nevertheless, the fundamental nature of some of these laws and principles, and the improbability of modifying legislation, is such as to justify treating such statutes and principles of the common law as part of constitutional law.

Many of the principles of interpretation set out in the first lecture under the heading “The Common Law Bill of Rights”, are of constitutional significance. There are a number of references in the case law to various principles of the common law being described as constitutional rights, for example: the right of access to the courts;⁴ the right to personal liberty by invoking habeas corpus;⁵ the right to a fair trial;⁶ the conclusive effect of a criminal acquittal;⁷ the principle of open justice.⁸ Notwithstanding that legislation can amend these rights, they are of such significance as to justify such characterisation.

Many of the principles characterised under the general rubric of the principle of legality, discussed in my first lecture, are accurately characterised as quasi-constitutional. Each is a rebuttable presumption of Parliamentary intention, but they reflect fundamental assumptions

about the relationship between citizen and state. That is why they will not be rebutted without clear parliamentary intent.

There are many statutes which are also entitled to be characterised as quasi-constitutional, for example, laws creating integrity institutions which, in my opinion, are of a sufficiently wide-ranging and detailed nature to be classified collectively as an “integrity branch of government”.⁹ Where a jurisdiction adopts a statutory form of a bill of rights, that legislation is also entitled to be characterised as “quasi-constitutional”.

Four examples of such legislation are of relevance to Australian discourse: the *Bill of Rights Act* 1990 of New Zealand, the *Human Rights Act* 1998 of the United Kingdom, the *Human Rights Act* 2004 of the Australian Capital Territory and the *Charter of Human Rights and Responsibilities Act* 2006 of Victoria. Adopting such legislation is also under active consideration in other Australian jurisdictions, albeit not my own.

Nature of the Text

One of the most fundamental, and frequently overlooked, principles of interpretation is that it is critical to commence with an understanding of

the nature of the document which falls to be interpreted. As Professor Paul Freund once remarked:

“We ought not read the Constitution like a last will and testament lest it become one.”¹⁰

This is similar to Sir Victor Windeyer’s concept of a “*rigor iuris*”.

There are numerous authorities which emphasise the different approach that is required for the interpretation of a constitution. As O’Connor J put it in the first decade of federation:

“it must always be remembered that we are interpreting a *Constitution* broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.”¹¹

The Privy Council quoted with approval the observation of a Canadian constitutional law scholar:

“The Privy Council, indeed, has laid down that courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction being proper in

the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British colony."¹²

Plainly, a formal constitution, whether or not incorporating an express bill of rights, is entitled to a distinctively different approach than that appropriate to other forms of legislation. As the Privy Council once said with respect to the Constitution of Bermuda, which did incorporate a bill of rights:

"It is ... drafted in a broad and ample style which lays down principles of width and generality ... [and which] calls for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give individuals the full measure of fundamental rights and freedoms referred to."¹³

The difficulties that may be occasioned in the task of interpreting a constitutional bill of rights, is illustrated by the narrow five to four majority of the Privy Council that upheld the validity of the mandatory death penalty in some Caribbean nations.¹⁴

Lord Hoffmann, writing for the majority which upheld the full effect of the statute conferring a mandatory death penalty, noted at [28]:

“Parts of the Constitution, and in particular the fundamental rights provision in Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions ... The text is a ‘living instrument’ when the terms in which it is expressed, in their constitutional context, invite and require periodic examination.”

His Lordship indicated a clear limit to the living instrument approach when he said at [29]: “the Constitution does not confer upon the judges a vague and general power to modernise it”.

He concluded:

“[59] The ‘living instrument’ principle has its reasons, its logic and its limitations. It is not a magic ingredient which can be stirred into a jurisprudential pot together with ‘international obligations’, ‘generous construction’ and other such phrases, sprinkled with a cherished aphorism

or two and brewed into a potion which will make the Constitution mean something which it obviously does not. If that provokes accusations of literalism, originalism and similar heresies, their Lordships must bear them as best they can.”

The dissentients, led by Lord Bingham, were equally forthright, saying that the majority judgment:

“[78] ... puts a narrow and over literal construction on the words used, gives little or not weight to the principles which should guide the approach to interpretation of constitutional provisions, gives little or no weight to the human rights guarantees which the people of Barbados intended to embed in their constitution and puts Barbados in flagrant breach of its international obligations.”¹⁵

The debate as to the proper approach to constitutional interpretation is not directly relevant to the matters I am now considering, namely, the common law principles of statutory interpretation that I have grouped as a “common law bill of rights” and the statutory human rights acts. Nevertheless, some aspects of

constitutional interpretation may have an analogous application for the interpretation of quasi-constitutional laws. There is some similarity in the approaches that have been adopted between constitutional and quasi-constitutional texts.

In this lecture, I wish to focus on the close analogy between the rules for interpretation contained in the common law bill of rights and the special provisions requiring courts to strive to interpret other legislation to be compliant with human rights. The approach to these matters reflects the quasi-constitutional nature of the two lists of rights.

Rights Compliant Interpretation

The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of the law has escaped statutory modification. It is, perhaps, a little ironic that one of the areas of the law to be least affected by statutory modification is, in fact, the law of statutory interpretation. As a matter of appearance, the introduction into interpretation acts of a requirement for purposive interpretation was substantive. However, by the time that legislation was introduced such an approach had been adopted by the judiciary and replaced the former literalist approach.

The most significant statutory change to the law of statutory interpretation is introduction of the special interpretation provisions in human rights acts which impose an obligation upon courts to interpret *other* legislation so as to be consistent with the rights set out in the human rights act. Those rights can be more extensive, or less extensive, than the common law bill of rights which I discussed in my first lecture. There is, however, a substantial overlap. The rights compliant interpretation provisions are potentially of constitutional significance. Their application raises some fundamental issues about the nature of the interpretive process and the relationship between the judiciary and the Parliament.

There are four rights compliant interpretation provisions relevant for our purposes. The first is s 6 of the *New Zealand Bill of Rights Act* 1990 which provides:

“Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”

The second such provision is s 3 of the *Human Rights Act* 1998 of the United Kingdom which provides:

“3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

The first such Act passed in Australia was the *Human Rights Act* 2004 (ACT) which, in its original form, provided:

“30(1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.

(2) Subsection (1) is subject to the *Legislation Act*, section 139.”

Section 139 of the *Legislation Act* is the common provision of Australian interpretation acts requiring the interpretation that would best achieve the purpose of the law to be preferred to any other interpretation.

In Victoria, the *Charter of Human Rights and Responsibilities Act* provides:

“32(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.”

The legislative history of the ACT *Human Rights Act* is pertinent. The ACT Act was based on a report prepared by the ACT Bill of Rights Consultative Committee which recommended wording based on the New Zealand and United Kingdom approaches as follows:

“A court or tribunal must interpret a law of the Territory to be compatible with human rights and must ensure that the law is given effect to in a way that is compatible with human rights, as far as it is possible to do so.”¹⁶

The recommendation was not adopted. By reason of the express provision making s 30 subject to the purposive test, Professor Hillary Charlesworth observed:

“At first sight, then, s 30 appears to make a human rights interpretation of legislation available only when it is clear that the Legislative Assembly did not intend otherwise. In this sense it could be read as a codification of the ‘principle of legality’ by which Parliament is assumed not to intend to impinge on basic rights unless it uses clear

words to do so. This may suggest that s 30 is weaker than both its New Zealand and United Kingdom counterparts in promoting a human rights dialogue.”¹⁷

When the rights compliant interpretation provision is made expressly subject to the purposive requirement, its operation would probably be very similar to the principle of legality. Nevertheless, it can have some additional force when there is doubt about Parliament’s intention in other legislation because it is more likely that the judiciary will apply an express parliamentary authority than a common law principle.

Following a review of the *Human Rights Act* it was recommended that:

“Section 30 should be amended to clarify that a human rights consistent interpretation must prevail unless this would defeat the purpose of the legislation.”¹⁸

Subsequently, a Bill has been passed which, inter alia, amends s 30, so that it is almost identical to the Victorian Act, to provide:

“So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.”

This change will come into effect on 1 January 2009.

The Explanatory Memorandum for the Bill explained:

“It clarifies the interaction between the interpretive rule and the purposive rule such that as far as it is possible a human rights consistent interpretation has to be taken to all provisions in Territory laws. This means that unless the law is intended to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. This is consistent with the Victorian approach contained in subsection 32(1) of the *Charter of Human Rights and Responsibilities Act 2006*. It also draws on jurisprudence from the United Kingdom such as the case of *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 cited recently by the ACT Supreme Court in *Kingsley’s Chicken Pty Limited v Queensland Investment Corporation and Canberra Centre Investments Pty Limited* [2006] ACTCA 9.”

As I will endeavour to show, *Ghaidan* is an inappropriate source of guidance and its citation by the ACT Supreme Court did not suggest its adoption.

The courts that must apply the interpretation provisions of the ACT and Victorian Acts will draw upon the New Zealand and United Kingdom case law. There are, however, differences in the legislative formulations which may be of significance.

The Victorian and ACT Acts, unlike both the New Zealand and United Kingdom provisions, make reference to the purpose of the legislation. In the Victorian and recently amended ACT formulation there is a reference to “consistently with their purpose”, which focuses attention on matters that are not expressly referred to in either the United Kingdom or New Zealand sections.

Furthermore, the Victorian and ACT Acts adopt, albeit with more explicit guidance, s 5 of the New Zealand Act, which refers to subjecting rights and freedoms to “reasonable limits”. This is a consideration which distinguishes New Zealand from English case law on the rights compliant provision.

One of the issues that will arise with respect to the interpretation sections in Victoria and the ACT is what, if any, impact they will have on the interpretation of national uniform legislation. For example, in 2004 and 2005 the Commonwealth and all States and Territories enacted interlocking anti-terrorism legislation.

No doubt on the basis of constitutional law advice, the Commonwealth scheme for preventative detention orders was limited to detention for 48 hours, whereas the NSW scheme extended to 14 days. So fine are the distinctions required by the contemporary Chapter 3 jurisprudence of the High Court.

This integrated national scheme permits detention and questioning warrants, control orders, preventative detention orders, covert search warrants and prohibited contact orders raises important issues affecting personal liberty. Although there are differences amongst the State Acts, litigation could well invoke the special interpretation sections available only in Victoria and the ACT.

Resolution of this issue could turn on the fact that the current ACT provision is expressly made subject to the purposive test and the

Victorian and new ACT provisions refer to “consistency” with purpose. In each case it is arguable that a nationally uniform regime, interconnecting with Commonwealth legislation for constitutional reasons, was part of the “purpose”.

Committing yet again the sin of self-quotation, I once observed:

“The *Commonwealth Places (Administration of Laws) Act* is part of a national collaborative scheme between the Commonwealth and all the States. The proposition that one State has impliedly repealed one of the provisions of this scheme without consultation, lacks even a scintilla of force. There is a strong presumption that a legislature in a federal system would not alter a statute that forms part of a collaborative and uniform national scheme, save in express terms. There is nothing express here.”¹⁹

Such an issue has already arisen, without being resolved, in the ACT.²⁰ Such a situation calls for strong clear statement principle. There is no room for implied repeal.²¹ For analogous reasons, that also appears to be the situation with respect to the binding effect of legislation in the UK adopting the *European Economic Community* treaty

and the *European Convention on Human Rights*. This result is a manifestation of the quasi-constitutional character of such legislation.²²

English Authority

The critical issue that arises in the application of rights compliant interpretation provisions is how far a court can go in modifying the application of the statute and still be undertaking a task that can correctly be identified as one of “interpretation”. The existing state of English authority suggests that the law in England in this, as in many other respects, has gone further than we have gone and, perhaps, further than we will ever go.

When it comes to applying and interpreting the Charter of Rights of the Australian model and determining what, if any, reliance is to be placed on English authority, the quite different constitutional background must be borne in mind. In significant respects the United Kingdom has surrendered aspects of its sovereignty to the institutions of the European Union. Relevantly, this includes the *European Convention on Human Rights*, which is administered in part by a supranational institution.

Prior to the adoption of the *Human Rights Act* in 1998, England was the most frequent defendant in the European Court of Human

Rights at Strasbourg. Indeed, generally, it was an unsuccessful defendant. What happened in such litigation was that the State was sued for failing to comply with its Convention obligations. This extended at one stage even to an action for personal injury which had been unsuccessful in England by reason of a particular rule of the law of tort, which the European Court found constituted a failure to implement Article 6 of the *European Convention on Human Rights* providing for a right to a fair and public hearing. Eventually, the European Court backed off this particular interpretation.²³

Nevertheless, the success of litigants in the European Court meant that it was the government of England that bore the burden of compensation for its failure to implement a remedy in accordance with Convention rights, rather than some English citizen or corporation that had actually done whatever was being complained about. It was the success of a continuing stream of cases in the European Court of Human Rights that served as an important part of the political stimulus to pass legislation implementing the Convention – “bringing rights home” it was said – so that it would be English courts that determined matters of this character.

Significantly, as British judges are well aware, a disappointed litigant in England can still take proceedings in Strasbourg. The House of Lords operates in a system where it can be held to be wrong by higher authority, whose case law it is required by statute to take into account.

Specifically, the formulation of the UK rights compliant interpretation provision was influenced by European Court of Justice judgments on the obligation imposed upon national courts by the European Economic Community treaty.²⁴ For an Australian audience it is necessary to state that the European Court of Justice is a different body to the European Court of Human Rights.

This background is distinctly different from anything that has been operative in the Australian debate about enacting a statutory Charter of Rights.

At first the rights compliant interpretation provision in s 3 of the UK *Human Rights Act* was characterised as an enactment of the common law principle of legality.²⁵ Subsequently, two approaches to the deployment of s 3 emerged, referred to as the cautious approach and the radical approach.²⁶

The differences arose clearly in a case in which a rape shield law, which restricted cross-examination of a rape victim, was said to be incompatible with the Convention right to a fair trial. The radical approach to s 3 concluded that it was permissible, as a form of interpretation, to construe a section which permitted evidence about sexual behaviour by the complainant by leave in precisely identified circumstances, as if it were subject to an overriding requirement to permit cross-examination, if it was “so relevant to the issue of consent that to exclude it would endanger the fairness of the trial”. The cautious approach rejected this as impermissible, on the basis that “[t]he rule is only a rule of interpretation. It does not entitle the judges to act as legislators”.²⁷

Eventually the House of Lords adopted the radical approach in *Ghaidan*, which was explained in *Sheldrake*²⁸ by Lord Bingham as follows:

“[28] ... First, the interpretative obligation under s 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a convention-compliant interpretation under s 3 is the primary remedial measure and a declaration of

incompatibility under s 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a convention-compliant interpretation is not possible ... In explaining why a convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (see *Ghaidan* ... at [33], [49], [110]–[113], [116]). All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: 'So far as it is possible to do so ...'. While the House declined to try to formulate precise rules (at [50]), it was thought that cases in which s 3 could not be used would in practice be fairly easy to identify.”

The first matter to which his Lordship referred is, perhaps, the most striking to an Australian lawyer. The proposition that a court can interpret a particular Act other than in accordance with the intention of Parliament at the time of the enactment of that Act is a fundamental change. This conclusion arose from the interpretation of the meaning of the word “possible” in s 3 in the context of “reading and giving effect to” other legislation in a manner compatible with the Convention rights “so far as it is possible to do so”. As Lord Steyn put it:

“This is the intention of Parliament, expressed in s 3, and the courts must give effect to this intention.”²⁹

In *Ghaidan*, Lord Nicholls said that the word “possible” is itself ambiguous and posed the issue as what is to be the standard or criterion by which “possibility” is to be judged. His Lordship went on to say:

“[30] ... [T]he interpretative obligation decreed by s 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require

the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, s 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting s 3.

[31] ... Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that s 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of s 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of s 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, s 3 would be available to achieve convention-compliance.

If he chose a different form of words, s 3 would be impotent.

[32] ... [T]he intention of Parliament in enacting s 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation."³⁰

The House of Lords purports to accept the traditional judicial role in interpretation, being the implementation of the intention of Parliament. The critical step is, however, that the intention of Parliament expressed in s 3 of the *Human Rights Act* is applied to override the intention of Parliament at the time that the other legislation, including subsequent legislation, is enacted. This is a substantial change in the relationship between Parliament and the judiciary. In substance it constitutionalises the *Human Rights Act*. Such a step had been taken earlier in the course of giving overriding effect to laws of the European Community, which are quite different from the *European Convention on Human Rights* and are adjudicated upon by a different European court.³¹

The degree to which Parliament's intention in the non-compliant legislation can be overridden is manifest in *Sheldrake*. In the context of

the anti-terrorism legislation there under consideration, Parliament had expressly listed provisions which imposed only an evidential burden, rather than a burden of proof. The section in issue was not on that list. The House of Lords held, expressly, that it was *not* the intention of Parliament that only an evidential burden be imposed. However, the court concluded that s 3 enabled the court to so find.³²

More recently, the House of Lords invoked s 3 to qualify the statutory provision for control orders under the *Prevention of Terrorism Act 2005*. Under this scheme the relevant Minister may be permitted by the Court not to disclose material to the subject of an order where the court “considers that the disclosure would be contrary to the public interest”. The House of Lords held that this provision “ ... should be read and given effect ‘except where to do so would be incompatible with the right of the controlled person to a fair trial’”.³³

Lord Bingham expressed doubt about the course taken because of the mandatory language in the Act.³⁴ This kind of implied term, importing the words of Article 6 of the Convention in its entirety, had earlier been described by Lord Hoffmann as “bold” – probably in the “Yes Minister” sense.³⁵

The reading into the Act of a qualification expressed in the terms of the protected right is difficult to distinguish from a legislative amendment. When reading English case law in the future, it will be necessary to bear in mind just how different their approach has become. As the authors of a leading text on the *Human Rights Act* have put it:

“The process of interpretation is no longer dominated by a search for the intention of Parliament. Instead the courts’ first duty is to adopt any possible construction which is compatible with Convention rights.”³⁶

In the third lecture, I will discuss how far the English approach can be said to be consistent with the concept of “interpretation” or, to use the English language the concept of “reading and giving effect”. I am, however, sceptical that Australian judges will go as far as the English judges have gone. The New Zealanders have not.

New Zealand Authority

The New Zealand judiciary has, in some respects, adopted a robust approach with respect to the *Bill of Rights Act* 1990. In *Baigent’s* case, the Court of Appeal created a public law remedy by awarding damages against the Crown for breach of the *Bill of Rights Act*.³⁷ In *Moonen* the Court of Appeal decided that it would, in an appropriate

case, declare that a statute unjustifiably impinges on human rights even though the New Zealand Act, unlike the United Kingdom Act, makes no express provision for any such declaration of incompatibility.³⁸ Chief Justice Elias has indicated that this approach reflects a recognition that there is a hierarchy of statutes and manifests a process of dialogue between Parliament and the courts.³⁹

Notwithstanding this jurisprudence, the New Zealand courts have not adopted the radical approach of the House of Lords to the rights compliant interpretation provision in the New Zealand Act.⁴⁰

An example of the difference in approach is found in cases construing statutory provisions which shift the burden of proof. The House of Lords had no difficulty in deploying s 3 of the United Kingdom Act to that effect.⁴¹ In contrast, the New Zealand Court of Appeal did not apply s 6 of the New Zealand Act in that way.⁴² Even at common law, in my opinion, the clear statement principle would apply and such a section would often be interpreted to shift only an evidential burden, not the burden of proof.⁴³

The same issue came before the recently established Supreme Court of New Zealand, which upheld the approach of the earlier

judgment that interpreted the formulation “until the contrary is proved” as shifting a burden of proof.⁴⁴ The case contained five separate judgments and there are significant differences between them. A majority of three, Justices Blanchard, Tipping and McGrath, with a strong dissent from Chief Justice Elias, affirmed an approach to the New Zealand interpretation clause which is distinctively different from that which has found favour with the English courts.

Before the passage of the United Kingdom *Human Rights Act*, the New Zealand Court of Appeal had interpreted the words “can be given” in s 6 to mean “can reasonably be given”.⁴⁵

In a judgment in the House of Lords, Lord Steyn has said:
“The draftsman of the 1998 Act had before him the slightly weaker model in s 6 of the New Zealand *Bill of Rights Act* 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation.”⁴⁶

His Lordship was referring to Parliament expressly rejecting such a requirement. An amendment requiring any interpretation under the UK

Act to be “a reasonable” interpretation was moved in the UK Parliament and rejected.

The Supreme Court of New Zealand in *Hansen* expressly affirmed the test of “reasonably possible” interpretation.⁴⁷ This may, in part, be explicable by differences in wording, notably the use of the word “possible” in the UK Act, with the emphatic addition of “so far as” and “must be read”, compared to the somewhat weaker formulation in the New Zealand Act of “can be given”. The ACT and Victorian provisions appear to be analogous to the UK provision in this respect. Furthermore, the New Zealand Act also contains in s 4 an express preservation of the doctrine of implied repeal.⁴⁸

An important matter is the interrelationship between s 6, the interpretation provision of the New Zealand Act, and s 5 of that Act, which provides:

“5 Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

The majority in *Hansen*, over Elias CJ's dissent, established that the interpretive provision requires the prior application of s 5. That means that if the Court concludes that the apparent inconsistency was justifiable as a "reasonable limit" under s 5, the requirement for a rights compliant interpretation is not engaged. The process of interpretation required a sequence of steps in which the court should first determine whether any inconsistency with a relevant right or freedom is justified. If so, then Parliament's intended meaning would prevail.⁴⁹

Section 5 of the New Zealand Act has no equivalent in the UK Act. It has, however, been adopted in s 28 of the ACT Act and s 7 of the Victorian Act, albeit with specification of a list of relevant factors. It will be necessary for Australian courts to consider whether to follow the New Zealand case law to the effect that these provisions operate anterior to the rights compliant interpretation provision.

ACT Authority

I am unaware of any application of the interpretive provision in the Victorian Charter, which only came into force on 1 January this year. There have been a number of cases in the Australian Capital Territory.

The current ACT provision is distinctive. As noted above, the rights compliant interpretation provision is expressly made subject to the purposive test. I do not see how it could be suggested that, in the light of this factor, the English approach could be applicable, particularly the reasoning that permits a court to override the actual intention of Parliament when passing other legislation.

The same may well be true of the formulation in the current Victorian Charter, and the amendment in the ACT, arising from the words “consistently with their purpose”. These words do not exist in s 3 of the United Kingdom Act. They are words of limitation which, at least, arguably, would not permit the approach that has been adopted in the United Kingdom.

I note that the ACT Court of Appeal has identified both s 139 of the *Legislation Act* (ie the purposive requirement), and s 30(1) of the *Human Rights Act 2004* (ie the rights compliant requirement), as each having a similar form to s 3 of the UK *Human Rights Act 1998*, as explained by the House of Lords in *Ghaidan*. However, the interrelationship between ss 30(1) and 139 of the ACT legislation was not considered.⁵⁰

Chief Justice Higgins of the Supreme Court of the Australian Capital Territory invoked the interpretation provision of the ACT Act when determining the proper interpretation of a section of the *Domestic Violence and Protection Orders Act 2001* (ACT), which had the effect that an interim personal protection order automatically became a final personal protection order, without a hearing and without the prospect of further review. Invoking s 30 of the ACT *Human Rights Act*, his Honour held that the relevant provision empowered, but did not mandate, the making of the final order and did not preclude a respondent to an ex parte order from applying to set it aside as of right, if irregularly made, and as a matter of discretion, if cause be shown.⁵¹

It may be that the principle of legality would have been deployed to similar effect. However, s 30 was more clearly applicable.

The Clear Statement Principle

The determination that the principle of legality, or that a statutorily adopted human right, applies in a particular case is, regrettably, the easy part of the process. All that we have done at this stage is to identify the two elements – namely the statutory formulation and the right – that may give rise to an incompatibility or tension. The difficult part is determining which must prevail in the particular circumstances. It is at this point that

judicial reasoning often becomes fuzzy when identifying a relevant test and, perhaps more significantly, when applying it. The relevant test is, more often than not, expressed in the conclusion rather than in the reasoning.

The relevant principle of the law of statutory interpretation applicable to each principle in the common law bill of rights is the principle of clear statement. There are a range of verbal formulations, all basically equivalent, as to how the presumption that Parliament does not intend to interfere with rights within the principle of legality has been expressed. I have compiled the following list from the judgments of the High Court of Australia over the years:

“Clear and unambiguous words”, “unambiguously clear”, “irresistible clearness”, “express words of plain intendment”, “clear words or necessary implication”, “unmistakable and unambiguous”, “expressly stated or necessarily to be implied”, “clearly emerges whether by express words or by necessary implication”, “with a clearness which admits of no doubt” and “something unequivocal must be found, either in the context or the circumstances, to overcome the presumption”.⁵²

It is often said that a statute which impinges upon the principle of legality, or any of its constituent interpretive principles, must be construed strictly. However, the idea of “strict” construction does not involve a simple standard. There are degrees of strictness. There is very little discussion in the literature or case law about what is meant by strict construction.

I believe we should stop using the language of “strict construction”. It suggests that courts give a restricted interpretation to the language of Parliament and do so irrespective of the intention of Parliament. That that has been the case, and not only in the distant past, is a good reason for ensuring that the terminology more accurately reflects the true judicial role. In my opinion, this approach is more appropriately called ‘the clear statement principle’. All the formulations I have listed reflect this principle.

Whenever rights, liberties and expectations are affected, if Parliament wishes to interfere with them, it must do so with clarity. The clear statement principle is the critical way that the law of statutory interpretation reflects and implements the principle of legality.

A core difficulty remains. Clarity, like beauty, always involves questions of degree and is affected by the eye of the beholder. Significantly the degree of clarity required may vary from right to right and, with respect to any particular right, may vary from time to time.

This was expressly referred to in the joint judgment of the High Court in *Bropho*, in the context of whether a statute binds the Crown, where their Honours said:

“If such an assumption be shown to be or to have become ill-founded, the foundation upon which the particular presumption rests will necessarily be weakened or removed. Thus, if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption of the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear.”⁵³

It is equally possible that matters that were once regarded as rights, albeit not of a fundamental character, may come to be regarded as more significant than they once were.

When an international human rights instrument is adopted by statute, it may be that a cognate common law right may be given enhanced salience. Indeed, there is a vibrant debate, into which I do not tread, on whether, and if so to what degree, executive ratification of international human rights instruments has such an effect.

The principle of clear statement that has been applied to the common law bill of rights is reflected in American jurisprudence where there is a clear interaction between constitutional and quasi-constitutional principles.⁵⁴ This approach is reflected in the doctrine of “strict scrutiny” developed for applying the Constitutional Bill of Rights. The United States Supreme Court has adopted what are described as three standards of review which, in ascending order of stringency are: the rational relationship test, the intermediate test and the strict scrutiny test.⁵⁵

When determining the constitutional validity of legislation, the court may employ the standard of least stringency, the rational basis test, whereby the court is said to give deference to the legislative decision as to whether or not the legislation falls within a head of power. On the intermediate standard of review, there is less deference and the court will require a substantial relationship to an important government

interest. The strict scrutiny test, which represents the highest level of judicial review, is the one the court applies whenever the legislative scheme involves what the court classifies as fundamental constitutional rights.

On this last standard of review the court independently determines the degree of relationship which the law bears to an objective that is constitutionally sanctioned. It is often applied whenever the exercise of a fundamental right is involved, so that the proponent of the legislation must demonstrate that the statute serves a compelling government interest that could not be served by any less restrictive measure. There is much scope for disputation with respect to the application of these tests.⁵⁶

An American constitutional scholar has recently observed:
“[I]n its insistence that any infringement of fundamental rights must be necessary or narrowly tailored to compelling governmental interests, the strict scrutiny formula possesses important commonalities with (though possibly also some important differences from) the similarly generic ‘proportionality’ tests applied in Germany, Canada, and Israel and by the European Court

of Justice. Each of these proportionality tests encompasses three doctrinal subtests, all of which must be satisfied for legislation to survive judicial review. The first asks whether a legislative measure restricting basic rights is rationally related to a desired end. The second, called 'the principle of necessity' in Germany and 'the least injurious means test' in Israel, requires that the means, 'even if rationally connected to the objective ... should impair "as little as possible" the right or freedom in question.' The third, called the principle of 'proportionality *stricto sensu*' in Germany and the 'proportionate means test' in Israel, invites the court to balance societal interests against individual rights by asking whether an infringement of rights is proportionate to the desired objective.

I should emphasize, however, that although the strict scrutiny and proportionality tests both aspire to find a middle way between treating rights as absolutes and deferring routinely to legislative compromises of civil liberties, there may be important differences between them. By inviting assessments of all-things-considered

reasonableness, proportionality inquiries may tend to deprive rights of any ‘special force as trumps,’ whereas the American approach, on at least some interpretations, preserves a special, trumping aura for preferred rights.”⁵⁷

The status of a Human Rights Charter as a quasi-constitutional text may lead to reliance upon such constitutional analysis in its application. Just as these are “statutes and statutes”, so are there “rights and rights”. The right to life is not the same kind of right as the right to a speedy trial.

When applying s 3 of the UK Act, it is clear that British judges are not constrained by anything like the principle of clear statement. There is, however, a real issue as to how far beyond that principle the Australian rights compliant interpretation provisions can be said to go.

Al-Kateb

The Australian case that perhaps most directly raises the issues of statutory interpretation that I have been discussing was *Al-Kateb*, where the High Court split four to three. There appears to have developed a habit of deploying in the title and in sections of legislation, terminology that bears the characteristics of a press release or political statement. In that vein the relevant legislation classified the appellant in *Al-Kateb* as

“an unlawful non-citizen”. The issue was whether he could be detained for the purpose of deportation when there was no present prospect of deportation,⁵⁸ because he was stateless and no one would take him.

The relevant statutory provisions were in mandatory language:

- An officer “must detain” an unlawful non-citizen.
- An unlawful non-citizen “must be kept in immigration detention until he or she is ... removed from Australia”.
- “An officer must remove, as soon as reasonably practical, an unlawful non-citizen” after a request for removal.

On the facts of the case there was no prospect of Australia receiving international co-operation for the removal of the appellant. By a majority of four to three the High Court held that he could be detained indefinitely. The majority held that there was no room in this context for the application of a “purposive limitation” or of the presumption that Parliament does not intend to interfere with individual rights and freedoms. Detention must continue until deportation, however unlikely that may be. The terminology, the majority concluded, was clear, unambiguous and intractable.⁵⁹

The minority of Gleeson CJ, Gummow and Kirby JJ, a singular and, as far as I am aware, unique concatenation of dissentients, read down the words “must be kept in immigration detention”.

Gleeson CJ applied the principle that, for a statute to justifiably interfere with human rights or freedoms, it must do so in “unambiguous language” which indicates “that the legislature has directed its attention to the rights or freedoms in question and has consciously decided upon abrogation or curtailment”.⁶⁰ The majority made no reference to this particular requirement, which was expressly stated in the joint judgment of the Court in *Coco*.⁶¹ The majority reasoning proceeded on the basis that the mandatory requirement – ‘must keep in detention’ – satisfied any such test.

Gummow J construed the provisions as having the purpose of removal and, accordingly, that the power could be read down once that purpose was no longer pertinent.⁶²

Kirby J agreed with Gummow J, but also invoked a presumption of the common law “in favour of liberty and against indefinite detention”.⁶³

A recent article speculates as to the effect upon the outcome in *Al-Kateb* if a statutory provision equivalent to s 32 of the Victorian Charter had been in place. It is reasonably clear that the author does not regard *Al-Kateb* as the high point of contemporary High Court jurisprudence. She is not alone in this. Subject, perhaps, to the current form of the ACT provision, it appears likely that the author is correct when she concludes that a different result would probably have ensued.⁶⁴

The rights compliant interpretation provisions do go further than the principle of legality. Both the common law bill of rights and the adopted international rights instrument identify personal liberty as a fundamental right, which any system of detention necessarily infringes. The express statutory requirement to interpret the words of other legislation so as to comply with an express statutory right is, in my opinion, more likely to be given effect than a judge-made principle derived only from Parliament's presumed intention. The words of the statute will be assessed by Parliament's express intention.

One does not have to go as far as the English judiciary has gone to give force and effect to an expression of Parliamentary will in a statute entitled to be treated as quasi-constitutional. The inhibition that any judge will feel, albeit to varying degrees, before trespassing into what

may appear to some to be the province of the Parliament, must be allayed to some degree by such an express Parliamentary mandate.

This is particularly so because of the requirement, in the Australian form of the interpretation provision, to have regard to the purpose of the legislation. In *Al-Kateb* it was quite clear that detention for the purpose of deportation could not be attained because, on the facts, deportation could not occur in the foreseeable future. I think it likely that some members of the majority may have found the language less intractable if they had had an express statutory requirement to interpret the statutory language so as to validate the appellant's right to personal liberty.

As the dissentients in *Al-Kateb* show, such a result is well within the permissible scope of interpretation. Whether the English position can be so described will be discussed in the third lecture.

¹ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562.

² See F W Maitland, *The Constitutional History of England* (1908) Cambridge University Press, Cambridge at 395.

³ W J V Windeyer, "Responsible Government – Highlights, Sidelights and Reflections" (1957) 42 *Journal and Proceedings of the Royal Australian Historical Society* 257 at 272.

⁴ See *Bremer Vulkan Schiffbau & Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909 at 977; *R v Secretary of State for the Home Department; Ex parte Leech* [1994] QB 198 at 198–210; *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 at 585.

⁵ *Cox v Hakes* (1890) 15 App Cas 506 at 528; *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36 at 91.

6 *The King v Macfarlane; Ex parte O’Flanagan* (1923) 32 CLR 518 at 541.

7 *Wall v The King; Ex parte King Won (No 1)* (1927) 39 CLR 245 at 250.

8 *Scott v Scott* [1913] AC 417 at 473, 477.

9 See Spigelman, “The integrity Branch of Government” (2004) 78 *Australian Law Journal* 724.

10 See Eugene W Hickok Jr (ed), *The Bill of Rights: Original Meaning and Current Understanding* (1991) University Press of Virginia, Charlottesville at 21.

11 *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309 at 367–368.

12 *British Coal Corporation v The King* [1935] AC 500 at 518–519. See also *Edwards v Attorney-General for Canada* [1930] AC 124 at 136.

13 *Minster of Home Affairs v Fisher* [1980] AC 319 at 328. See also *Attorney-General (Trinidad and Tobago) v Whiteman* [1991] 2 AC 240 at 247.

14 *Boyce v The Queen* [2005] 1 AC 400.

15 See also *Matthew v Trinidad and Tobago* [2005] 1 AC 433 at [42]–[46], [56]–[58].

16 See ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003) at Appendix 4: *Human Rights Bill* 2003 (ACT), cl 3; Hilary Charlesworth, “Human Rights and Statutory Interpretation” in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (2005) Federation Press, Sydney at 114; Hilary Charlesworth, “Australia’s First Bill of Rights: The Australian Capital Territory’s Human Rights Act” in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance & Reform in Australia* (2006) Ashgate, Aldershot at 293–294.

17 See Charlesworth, “Human Rights and Statutory Interpretation” supra at 115; Charlesworth, “Australia’s First Bill of Rights” supra at 295.

18 See ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report* (2006) Recommendation 5 at 33.

19 *R v Porter* (2001) 53 NSWLR 354 at [59].

20 *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority* (2006) 152 LGERA 132 at [23].

21 I doubt if *McCawley v The King* [1920] AC 691; (1920) 28 CLR 106 would be decided the same way today.

22 See, eg, *Thoburn v Sunderland City Council* [2003] QB 151.

23 See J J Spigelman, “Access to Justice and Human Rights Treaties” (2000) 22 *Sydney Law Review* 141.

24 See *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [45] (‘Ghaidan’); *R (IDT Card Services Ireland Ltd) v IDT Customs & Excise Commissioners* [2006] EWCA Civ 29 at [75]; Francis Bennion, *Statutory Interpretation: A Code* (4th ed, 2002) Butterworths, London at Section 410 and Francis Bennion, *Supplement to the Fourth Edition of Statutory Interpretation: A Code* (2005) LexisNexis Butterworths, London at 560. See also Geoffrey Lindell, “The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?” (2006) 17 *Public Law Review* 188.

25 See *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131–132 per Lord Hoffmann.

26 The divergence is reflected in the contrast between Lord Steyn and Lord Hope who, respectively, adopted the radical and cautious approaches in *R v A (No 2)* [2002] 1 AC 45 (*'R v A'*) at [44] and [108]; see also Daniel Greenberg (ed), *Craies on Legislation* (8th ed, 2004) Sweet & Maxwell, London, ch 25; Francesa Klug, “United Kingdom Experience” in Christine Debono and Tanya Colwell (eds), *Comparative Perspectives on Human Rights* (2004) National Institute of Social Science and Law at 5; David Bonner, Helen Fenwick and Sonia Harris-Short, “Judicial Approaches to the Human Rights Act” (2003) 52 *International and Comparative Law Quarterly* 549 at 555–557.

27 *R v A* at [108] per Lord Hope; see also at [44] per Lord Steyn.

28 *Ghaidan; Sheldrake v Director of Public Prosecutions, Attorney-General’s Reference (No 4 of 2002)* [2005] 1 AC 264 (*'Sheldrake'*).

29 *Ghaidan* at [26].

30 *Ghaidan* at [28]–[32].

31 See Lindell *supra* at 24.

32 *Sheldrake* at [5] and [53].

33 *Secretary of State for the Home Department v MB* [2007] 3 WLR 681 at [72].

34 *Ibid* at [44].

35 *R (Hammond) v Secretary of State for the Home Department* [2005] 3 WLR 1229.

36 Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human Rights and Criminal Justice* (2nd ed, 2007) Sweet & Maxwell, London at [3–59].

37 *Simpson v Attorney-General (Baigent’s Case)* [1994] 3 NZLR 667.

38 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

39 See Sian Elias, “Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round” (2003) 14 *Public Law Review* 148 at 157–162.

40 See J F Burrows, *Statute Law in New Zealand* (2003) LexisNexis, Wellington esp at 242–252; J J Spigelman, “Blackstone, Burke, Bentham and the *Human Rights Act 2004*” (2005) 26 *Australian Bar Review* at 8–10.

41 *R v Lambert* [2002] 2 AC 545 at 563, 574–575, 590, 610; see also *R v Keogh* [2007] 1 WLR 1500.

42 *R v Phillips* [1991] 3 NZLR 175 at 176–177.

43 Spigelman, “Blackstone, Burke, Bentham and the *Human Rights Act 2004*” *supra* at 8.

44 See *R v Hansen* [2007] 3 NZLR 1 (*'Hansen'*).

45 See *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 272.

46 *R v A* at [44]. In my article, “Blackstone, Burke, Bentham and the *Human Rights Act 2004*” *supra* at 10, I incorrectly combined the two propositions in Lord Steyn’s statement. I had the

impression that he suggested that the New Zealand Act imposed a requirement of a reasonableness. However, that occurred by reason of judicial interpretation.

47 At 157–158, 289–290.

48 When the *Human Rights Bill* was debated in the House of Lords, Lord Simon of Glaisdale suggested an amendment to refer to the doctrine of implied repeal. This was done to ensure that *prior* inconsistent legislation would in fact be taken as overruled without the need for a declaration of incompatibility. That the *Human Rights Act* itself should be insulated from subsequent implied repeal was not the focus of attention: see Great Britain, Parliamentary Debates (Hansard), House of Lords, 18 November 1997 at 509–510, 518–529; 19 January 1998 at 1289–1295.

49 See *Hansen supra* esp at [92] and [192]. See Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) LexisNexis, Wellington esp at [7.19] and Hanna Wilberg, “The Bill of Rights and Other Enactments” [2007] *New Zealand Law Journal* 112.

50 See *Kingsley’s Chicken Pty Ltd v Queensland Investment Corporation* [2006] ACTCA 9 at [49]–[51].

51 See *SI bhnf CC v KS bhnf IS* (2005) 195 FLR 151 esp at [71]–[72], [98], [112]–[113].

52 See *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340 at [44]–[45].

53 See *Bropho v Western Australia* (1990) 171 CLR 1 at 18.

54 See William N Eskridge Jr and Philip P Frickey, “Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking” (1992) 45 *Vanderbilt Law Review* 593; Cass R Sunstein, “Interpreting Statutes in the Regulatory State” (1989) 103 *Harvard Law Review* 405 at 462 (pt IV).

55 See John E Nowak and Ronald D Rotunda, *Constitutional Law* (4th ed, 1991) West Publishing Co, St Paul at 574–576; Laurence H Tribe, *American Constitutional Law* (2nd ed, 1988) Foundation Press, New York: see esp the index under Rational Relationship Test, Intermediate Scrutiny and Strict Scrutiny.

56 See, eg, Hans A Linde, “The Shell Game of ‘Interest’ Scrutiny: Who Must Know What, When, and How?” (1992) 55 *Albany Law Review* 725 at 734; Peter J Reuben, “Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After *Adarand* and *Shaw*” (2000) 149 *University of Pennsylvania Law Review* 1.

57 Richard H Fallon Jr, “Strict Judicial Scrutiny” (2007) 54 *UCLA Law Review* 1267 at 1295–1296.

58 See *Al-Kateb v Godwin* (2004) 219 CLR 562 (*‘Al-Kateb’*).

59 *Al-Kateb* at [33] per McHugh J; at [241] per Hayne J (with whom Heydon J agreed); and at [298] per Callinan J.

60 *Ibid* at [19].

61 See *Coco* at [437].

62 *Ibid* at [117] and [122].

63 *Ibid* at [15].

⁶⁴

See Alice Rolls, "Avoiding Tragedy: Would the Decision of the High Court in *Al-Kateb* have been any Different if Australia had a Bill of Rights like Victoria?" (2007) 18 *Public Law Review* 119.

THE COMMON LAW BILL OF RIGHTS
FIRST LECTURE IN THE 2008 MCPHERSON LECTURES
STATUTORY INTERPRETATION & HUMAN RIGHTS
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
UNIVERSITY OF QUEENSLAND, BRISBANE
10 MARCH 2008

I am honoured by your invitation to deliver the 2008 McPherson Lectures. Bruce McPherson is one of the outstanding Australian lawyers of my time in the law. I have long admired his legal scholarship and his judgments, particularly as a judge of an intermediate court of appeal. They are always learned, closely reasoned and definitive in their exposition of the area of the law with which his Honour was then concerned. As counsel I always felt that I was lucky to have anything Bruce McPherson said in my favour. As a judge I have invariably found his writing illuminating and instructive. His legal career fully deserved the rare honour of a Festschrift in which the length, depth and quality of his contribution to the law is set forth.¹

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The theme I have chosen for the 2008 McPherson Lectures is “Statutory Interpretation and Human Rights”.² The first lecture will

concentrate on the group of principles of the law of statutory interpretation which constitute, in substance, a common law bill of rights.³ The second lecture will be concerned with the application of quasi-constitutional laws such as a statutory bill of rights and the common law bill of rights. How are the principles of statutory interpretation applied to legislation of this character? The third lecture will consider the limits of interpretation, distinguishing genuine from spurious interpretation.

One of the ways that the multifaceted process referred to as “globalisation” has been manifest in world legal systems is through what has been described as the “human rights revolution” of recent decades. This widespread movement represents the resurgence of the philosophy of natural law in common law systems for the first time in three centuries. In England this resurgence is driven in part by the influence of civil law, by reason of the subjugation of English law to European law.

Australia’s response to this “revolution” has been a modest one. Nevertheless, the greater salience that has been given to human rights issues by lawyers and judges throughout the world has had, and will continue to have, an influence on the Australian legal system, particularly as the current generation of law students carve their path

through that system in the future. Real issues about the proper role of the judiciary in a parliamentary democracy arise in this context. The range of legitimate opinion on this matter is wide and remains the subject of vigorous debate. I do not wish to be understood to take any particular position on the desirability, or otherwise, of a statutory human rights act.

There are now two human rights acts in Australia: in the Australian Capital Territory and Victoria. Such legislation is under consideration in Tasmania and Western Australia, as well as at the Commonwealth level. In New South Wales the introduction of a statutory human rights act was considered and rejected by a Parliamentary Committee, following a rather tentative suggestion by myself.⁴ At the moment I do not detect any movement in this position in the New South Wales political debate.

A brief historical perspective is appropriate by reason of the fact that common lawyers have traditionally been reluctant to embrace the rhetoric of rights. It was not always thus.

Blackstone and Bentham

Human rights talk reflects the longstanding tradition of natural law, with which English common lawyers were once very comfortable. That changed about two centuries ago and a new tradition of legal positivism, adopting a command theory of law and a broadly utilitarian philosophy, became the dominant intellectual tradition of English jurisprudence, under the influence of Jeremy Bentham, John Austin and Albert Venn Dicey. The particular target of Bentham's vitriolic attack upon the common lawyers was Sir William Blackstone who, in 1753, delivered the first lectures on English law ever presented at an English university. Until that time Oxford and Cambridge had taught only Roman and canon law. The Inns of Court was the only university for common lawyers.

Blackstone, the first Vinerian Professor of Law at Oxford, presented the first and most influential systematic conspectus of the common law in his *Commentaries*. He had no difficulty about the language of rights. His references to natural law were little more than a ghostly memory of rhetoric past.⁵ The quadripartite structure of this seminal work reflected the contemporary terminology of common lawyers. Book 1 is on the Rights of Persons; Book 2 on the Rights of Things; Book 3 on Private Wrongs; and Book 4 on Public Wrongs. The

influence of the legal positivists, in substance, redefined the first two Books. For the last two centuries the common law of England and its epigone, such as the Australian common law, has primarily been a law of wrongs, not balanced by a law of rights.

In the first book of Blackstone's *Commentaries*, "Of the Rights of Persons", Chapter 1 is entitled "Of the Absolute Rights of Individuals". His primary focus was on political or civil rights and, particularly, on the right of property. I would not wish to put Blackstone forward as any kind of model for a contemporary human rights scholar.⁶ However, his choice of language must have reflected the practice of the bar at the time.

Of particular significance for the future was the influence of Blackstone's *Commentaries* in the United States of America. In the course of his defence of the American colonists against the conduct of the British executive, Edmund Burke noted that the *Commentaries* had sold as many copies in America as it had in England. Indeed, without any institution such as the Inns of Court, and with a dispersed population, the *Commentaries* became more of a law library than a law book for American legal practice.⁷

Almost a century of American lawyers, from the founding fathers and Chief Justice Marshall down to Abraham Lincoln, learned their law from Blackstone. For that reason, the language of rights, particularly, reflected in the Declaration of Rights of Virginia in 1776 and the Bill of Rights adopted in 1791 in the United States Constitution, came naturally to American lawyers. Because of the American Revolution and the adoption of a written Constitution, the rights terminology of late 18th Century lawyers, when legal discourse was a dominant feature of politics and society,⁸ was frozen in time. In England it gradually disappeared.

Bentham as a young teenager was shocked when he attended Blackstone's lectures and heard him support the complexities of the common law. Bentham rejected the theory of natural law. He was a founder of the command theory of law: that all law was an act of will by a sovereign, rather than conforming to some ideal. The arcane mysteries of the common law offended Bentham's monomaniacal pursuit of the principle of utility – the balance of pleasure and pain – as the sole determinant of all proper societal rules. He was the first economic rationalist.

When the French Declaration of Rights appeared, Bentham launched a ferocious attack, declaring:

“Natural rights is simple nonsense: natural and imprescriptible rights, [by which he meant rights which could not be abrogated by a legislature, was] rhetorical nonsense – nonsense upon stilts.”

His basic proposition, in common with generations of legal positivists to come, was that rights were created by law, rights did not precede government or law. It is not often remembered that the example he used for this proposition, in the ‘nonsense on stilts’ passage, was the Australian Aborigines, whom he called “the savages of New South Wales” and who, he said, had no laws and therefore no rights.⁹

From the time of his original 1753 lectures at Oxford, which became the Introduction to the *Commentaries*, Blackstone proclaimed that the commencing point of his analysis was the proposition that the purpose of English governance was to promote political and civil liberty. In contrast, Bentham always treated liberty as subordinate to utilitarian reform.¹⁰ Blackstone deployed a dialectical mixture of natural law and legal positivism.

By the middle of the nineteenth century, references to natural law had become distinctly embarrassing to British lawyers. The

Commentaries were still the basic text, but required updating in numerous respects. Unlike the United States, where new editions of the *Commentaries* continued to be produced and actively deployed in legal discourse, in England an expurgated and updated version emerged. The task was undertaken by Henry John Stephen, whose book *New Commentaries on the Laws of England (Partly Founded on Blackstone)* first appeared in 1841. Its numerous subsequent editions and student summaries remained a basic text for the best part of a century. The alterations are revealing.

In his Introduction Blackstone had referred to natural rights and said: “No human legislature *has power* to abridge or destroy them”. Stephen’s *New Commentaries* amended this statement to read: “No human legislature can *justifiably* abridge or destroy them”. Similarly, the heading of Blackstone’s Chapter 1 which was: “Of the Absolute Rights of Individuals” had become “Of Personal Rights”. Assertions such as “the principle aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature” had disappeared.¹¹

None of this is to suggest that the idea of rights played no part in the continuing development of the common law. There can, however,

be no doubt that the focus shifted. Rights were no longer regarded as “natural”, in the sense that they had to be treated as existing prior to the creation of a polity and of the laws enacted or developed by custom by the polity. This is what we would today call “human rights”. Furthermore, the focus remained on civil and political rights, although the original emphasis on property rights waned over the course of the 20th century until, perhaps, its very end. There was never a focus on the concern of contemporary rights discourse with economic or social rights or collective rights. Nevertheless, important principles were developed in a manner perfectly consistent with a focus on rights.

Significant areas of the common law, some reinforced by statute, served to protect human rights as they would now be understood. Although the language was somewhat different, the substance was in important respects the same. The central theme of this first lecture is that the protection which the common law affords to the preservation of fundamental rights is, to a very substantial degree, secreted within the law of statutory interpretation.

The law of statutory interpretation has always manifested a dialectic interaction between three approaches, traditionally referred to as the literal rule, the golden rule and the mischief rule. From time to

time one or other is given pre-eminence in accordance with the judicial Zeitgeist. This seems to change every half century or so. The literal rule is now called textualism, the golden rule is now called contextualism and the mischief rule is now called purposive interpretation. In Australia, contextualism and purposivism have come to dominate over recent decades. American jurisprudence, which went through that process long before us, appears to be reverting to textualism. The sources and intensity of threats to fundamental rights are one of the critical elements that may explain these shifts in emphasis.

The Kisch Case

An excellent example of the way in which the law of statutory interpretation protects fundamental rights is a 1934 judgment of the High Court which, by reason of its vintage, and by reason of the identity of some judges in the majority, does not raise the kinds of difficulties associated with contemporary debates about the judicial role in enforcing human rights.

A great cause célèbre of the mid 1930s was the attempt by the Commonwealth Government to prevent Egon Kisch, a Czech journalist, from attending a Communist front Peace Congress. Kisch's celebrity has received a recent, moderate revival, particularly at the hands of

Justice Hasluck of the Supreme Court of Western Australia.¹² The case affords a good illustration of some issues of statutory interpretation.

Kisch had acquired a degree of intellectual notoriety for his prolific, declamatory, investigative journalism. The attempt to prevent the Australian public hearing his subversive opinions caused outrage, particularly on the left. A theme of broader appeal was the fear expressed that such conduct could cause right thinking people overseas to think less of Australian intellectual life. Australians never seem so parochial as when we act in fear of being regarded as parochial. Perhaps it was inevitable that Australia's patron saint of the second rate, Norman Lindsay, proclaimed that he and Kisch were both victims of Australian "suburban complacency".¹³

Kisch, famously, in an obviously futile attempt to evade those who sought to ban his arrival, first landed in Australia by jumping from his ship in Melbourne - he entitled his subsequent memoir "*Australian Landfall*". The leap broke his leg. This, of course, gave him immediate celebrity status. It also enabled him to energise his audiences, as he pursued the Soviet policy of "peace" in the years immediately preceding the Hitler-Stalin pact, with the rallying cry:

“My leg is broken. My English is broken. But my heart is not broken.”¹⁴

The *Immigration Restriction Act* 1901 made provision for a dictation test in a “European language”, of the examiner’s choice. Another delegate who sought to address the Peace Congress came from New Zealand. He was given a dictation test in Dutch, failed it and was excluded.¹⁵ Kisch had a reputation as a linguist. Dutch would not do for him. He was given the test in Scottish Gaelic. The issue for determination in the High Court was whether or not Scottish Gaelic was a “European language”. By majority the High Court held that it was not and, accordingly, the dictation test administered to Kisch was invalid.

Starke J had no doubt about the position. He applied the “golden rule”: give words their grammatical and ordinary meaning, unless the context indicates otherwise. He found no reason to read the words down. Scottish Gaelic was a language used by a large number of people in Scotland. It was a “European” language. All other members of the Court concluded otherwise.

Rich J noted:

“[T]he provision ... is dealing with the practical subject of immigration from abroad, particularly from other nations. It ostensibly provides a test against illiteracy and against ignorance of European speech. I think it would be unreasonable to hold that every distinguishable form of speech which has a home in Europe can be resorted to for the purpose of asking the immigrant to write at dictation a passage of fifty words in length in an European language. The expression ‘an European language’ means a standard form of speech recognized as the received and ordinary means of communication among the inhabitants in an European community for all the purposes of the social body. Scottish Gaelic is not such a language. Census figures show that it is the speech of a rapidly diminishing number of people dwelling in the remoter highlands of Scotland, and the western islands. It is not the recognized speech of a community organized politically, socially or on any other basis.”¹⁶

Dixon J said:

“[T]he substance of the enactment and its subject matter ... show that the language resorted to is to be taken,

ostensibly at least, as a test of fitness of the person to whom the dictation test is administered to take his place in an organized British community.”¹⁷

Dixon J concluded:

“I am very much alive to the difficulty of attaching a definite meaning to these words which will be satisfactory and which will accord with the probable intention of the Legislature. No doubt the Legislature did not itself sufficiently advert to the many uncertainties involved in the expression it used.

...

The rules of interpretation require us to take expressions in their context, and to construe them with proper regard to the subject matter with which the instrument deals and the objects it seeks to achieve, so as to arrive at the meaning attached to them by those who use them. To ascertain this meaning the compound expression must be taken and not its disintegrated parts. I am disposed to think that it means here to convey that a test is provided for immigrants depending upon a proper familiarity with some form of speech which in some politically organized

European community is regarded as the common means of communication for all purposes”¹⁸

Evatt J adopted a more international perspective when he concluded:

“It cannot be denied that, in the *Immigration Act* dictation test, the Australian Parliament represented to the Governments and nationals of all other countries that exclusion from Australia would be the result of an elementary dictation test limited to those languages which the Governments of the world would immediately recognize as an accepted or standard language of modern Europe. Scottish Gaelic is not such a language.”¹⁹

The *Kisch* case occurred before the courts decided to have recourse to a wide range of extrinsic materials, including parliamentary debates. Nevertheless it is difficult to believe that the High Court was unaware of the true origins of the dictation tests. The intention of Parliament when enacting the original *Immigration Restriction Act* 1901 was that the dictation test should be applied for the purpose of excluding

coloured migrants. It was the core provision of what became known as The White Australia Policy.

The use of a dictation test as a camouflage for a policy of racial exclusion was first introduced in Natal and, at the express suggestion of the British Colonial Secretary, Joseph Chamberlain, was adopted by a number of the Australian colonies.²⁰ The purpose of this camouflage was to preserve the illusion of an absence of racial discrimination within the British Empire, a matter especially sensitive in India, the Jewel of the Empire. The sensitivity of the imperial centre to any of the white colonies behaving in this manner was exacerbated by the fact that Great Britain was at that time cultivating the newly emerging power in the Far East, Japan, which had shown itself to be particularly sensitive to expressions of racial discrimination, including by the Australian colonies.

When Edmund Barton introduced the *Immigration Restriction Bill* into the first Commonwealth Parliament he implemented this imperial policy.²¹ Amendments were unsuccessfully moved by the Labour Party to expressly exclude non-European migrants. Indeed, a handful of non-European applicants were allowed into Australia by means of the selection of a language under the dictation test in which they proved proficient. The degree of administrative discretion conferred by

permitting the examiner to select the language invited abuse, which no doubt occurred.

A B Piddington KC, 73 years old but driven by fear of fascism and the emergence of the New Guard, appeared for Kisch in the High Court. He handed up in Court the *Australian Encyclopaedia* (1926) Vol 1, drawing their Honours' attention to pp 653 *et seq.*²² That text made the racist origins of the Act quite clear. It said:

“The first federal parliament ... set itself to give effect to the popular demand for the exclusion of Asiatics, and after much controversy the language test was agreed upon ... *It was understood from the first that European immigrants would not be required to pass the test.*”²³

This little bit of extrinsic material was handed up, without comment, it appears, from either the bar or the bench. Nonetheless, it was powerful as a guide to the eventual result in *Kisch*. It is a technique of advocacy that the late Sir Maurice Byers QC, a barristers' barrister, used to describe as: “putting the ball in the scrum”.

Piddington made no submission to the High Court that the Parliament intended the dictation test to be administered only to

coloured applicants. He made no submission that the Act was never intended to apply to a white Czech, even if he was a Bolshevik. Piddington, did not submit that, rather than reading down the words “European language”, it would better accord with the parliamentary intention to read down the word “person”, in the relevant section, to mean “non-white” person. Perhaps, particularly with a newly aggressive Japan, it was too hard to be frank. More likely, it was the continued sensitivities of the British Empire that prevented anything like that being uttered in public – whether from the bar table or in a judgment.

The first use of the dictation test for a white person, of which I am aware, was in 1914. Miss Ellen Fitzgibbon, a young Irish girl, described as “of rather attractive appearance” was deported after failing a test in Swedish. The only clue we have is that on her voyage the captain of the ship had occasion to have Miss Fitzgibbon examined by a medical officer.²⁴ Preserving the public morals was still a factor in the mid 30s. A year after the Kisch affair, in 1936, the dictation test was used to exclude an English woman, Mrs M Freer, on the ground that her entry might lead to the dissolution of a “perfectly good Australian marriage”.²⁵ The power was also frequently used for political purposes.

In the *Kisch* case reference was made to the importance of context. Indeed, it was context that proved determinative. The context on which reliance was placed extended beyond the Act itself to encompass the scope and purpose of the legislation. Emphasis was placed on the significance of language, in contrast to dialects, in a world-wide system of polities and societies. This was the context adopted by the Court as pertinent to the interpretation of legislation regulating the migration of persons from one polity/society to another polity/society. That is why the word “language” was identified as having been used with reference to a broader grouping than a distinct minority language or dialect. By these orthodox steps of statutory interpretation, a result affirming the right to freedom of movement was attained.

Principles of Interpretation

Statutory interpretation is not merely a collection of maxims or canons. It is a distinct body of law. It is capable of disaggregation, as the basic Australian text does, into categories such as: “extrinsic aids to interpretation”; “intrinsic or grammatical aids to interpretation”; and “legal assumptions”.²⁶ An American analysis refers to this tripartite classification as: “referential canons”; “linguistic canons”; and “substantive canons”.²⁷ Amongst the “substantive canons” the authors refer to legal presumptions and clear statement rules. It is in this respect

that it can be said that the common law developed a bill of rights in recognition of the fact that infringement of rights will often occur by statute or by the exercise of powers under statute.

I use the terminology of “bill of rights” because it has acquired a level of acceptance by wide usage, and is not yet replaced by “charter of rights”, but it may be. Of course, the original “Bill of Rights” amendments to the United States Constitution, reflected in large measure the understanding of what was then referred to as “the rights of Englishmen”, of which the most influential contemporary exposition was Blackstone’s *Commentaries*. Many of the principles then called rights live on in the law of statutory interpretation. It may be more accurate to refer to a “common law bill of principles”, but that would not convey the sense of a systematic protection of human rights which is the result, as a matter of practical reality, of those aspects of the law of statutory interpretation which constitute common law protections of human rights.

It is an inevitable concomitant of statutory interpretation that it is necessary to invoke interpretative principles which reflect values and assumptions that are so widely held as not to require express repetition in every text. Often these principles will play the determinative role in identifying the meaning of the text. The existence of such background

assumptions has been identified in many different circumstances of constitutional and statutory interpretation.²⁸

The basic principle that Parliament did not intend to invade fundamental rights, freedoms and immunities has been well established in Australia at least since 1907, when the High Court adopted a passage from a text on statutory interpretation that said:

“It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.”²⁹

This principle, also applicable to subordinate legislation,³⁰ has been expressed and re-expressed by the High Court on numerous occasions.³¹ An authoritative statement is in a unanimous joint judgment of the High Court in *Coco v The Queen*:

“The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity

must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.”³²

What is to be regarded as a “fundamental right, freedom or immunity” is informed by the history of the common law. One list, not intended to be comprehensive, was identified by McHugh J as entitled to a strong presumption against intrusion, in the following way:

“[A] civil or criminal trial is to be a fair trial, a criminal charge is to be proved beyond reasonable doubt, people are not to be arrested or searched arbitrarily, laws,

especially criminal laws, do not operate retrospectively, superior courts have jurisdiction to prevent unauthorised assumptions of jurisdiction by inferior courts and tribunals

... „33

The general principle is reflected in numerous specific principles of the law of statutory interpretation which can be set out as a common law bill of rights, based on the presumed intention of Parliament which operates in the absence of a clear indication to the contrary in the statute. These include rebuttable presumptions that the Parliament did not intend:

- To retrospectively change rights and obligations;³⁴
- To infringe personal liberty;³⁵
- To interfere with freedom of movement;³⁶
- To interfere with freedom of speech;³⁷
- To alter criminal law practices based on the principle of a fair trial;³⁸
- To restrict access to the courts;³⁹
- To permit an appeal from an acquittal;⁴⁰
- To interfere with the course of justice;⁴¹
- To abrogate legal professional privilege;⁴²
- To exclude the right to claim self-incrimination;⁴³

- To extend the scope of a penal statute;⁴⁴
- To deny procedural fairness to persons affected by the exercise of public power;⁴⁵
- To give executive immunities a wide application;⁴⁶
- To interfere with vested property rights;⁴⁷
- To authorise the commission of a tort.⁴⁸
- To alienate property without compensation;⁴⁹
- To disregard common law protection of personal reputation;⁵⁰ and
- To interfere with equality of religion.⁵¹

This common law bill of rights overlaps with but is not identical to, the list of human rights specified in international human rights instruments, which have been given legislative force in some jurisdictions. That development will have an influence upon the degree of emphasis to be given to these presumptions. It will also influence the articulation of new presumptions. For example, the legislative proscription of discrimination on the internationally recognised list of grounds – gender, race, religion, etc – could well lead to a presumption that Parliament did not intend to legislate with such an effect. I am unaware of any authority which says that, but I can see how this proposition could now be added to the common law bill of rights.

I note, in this context, that a right not to be subject to racial discrimination was recognised at common law in a case which is not well remembered. In 1943 the West Indian cricket captain, Learie Constantine, was refused service at a prominent London hotel. He successfully sued for damages in an action on the case. The authorities referred to in that judgment are replete with references to common law rights. The judge concluded that Constantine's common law right had been violated.⁵² This precedent could have been, but was not, developed into a general right at common law not to be discriminated against on racial grounds. Eventually, legislation established that right.

The right to a fair trial is perhaps the best established example of a presumption that is appropriately characterised as part of a common law bill of rights. Save with respect to the right to a speedy hearing, which has not been acknowledged in Australia, the Australian law is virtually indistinguishable from the case law with respect to a right of fair trial in those jurisdictions which have adopted a human rights instrument all of which contain a provision to that effect.⁵³

It is not feasible to attempt to list exhaustively the attributes of a fair trial. The issue has arisen in a seemingly infinite variety of actual

situations in the course of determining whether something that was done or said either before or at the trial deprived the trial of the quality of fairness to a degree where a miscarriage of justice has occurred. There is probably no aspect of preparation for trial or trial procedure which is not touched, indeed often determined, by fair trial considerations. As Lord Devlin once put it:

“[N]early the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see what was fair and just was done between prosecutors and accused.”⁵⁴

Justice Isaacs said in 1923, with reference to “the elementary right of every accused person to a fair and impartial trial”:

“Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle.”⁵⁵

I will not repeat what I have written elsewhere about the scope and range of circumstances in which the principle of a fair trial falls to be applied.⁵⁶ It is sufficient for present purposes to indicate that this is a fundamental common law right and, accordingly, the principle of statutory interpretation with which I am here concerned will be applied,

and applied with some strictness. Parliament will need to state with clarity that it intends to impinge upon the traditional incidents of the criminal trial which have been developed over the centuries by the application of the principle of a fair trial.

I give one example of this process at work in three separate jurisdictions in Australia over recent years with respect to the interpretation of provisions giving a general right of appeal. The High Court had long before determined that general words in a provision establishing a right of appeal do not extend to modifying the conclusive effect of a verdict of acquittal, to which the court referred as an “ancient and universally recognized constitutional right”.⁵⁷

Similarly Deane J said in *Rohde v Director of Public Prosecutions (Cth)*⁵⁸ in the context of appeals by the Crown against sentence:

“A conferral of such a prosecution right of appeal infringes the essential rationale of the traditional common law rule against double jeopardy in the administration of criminal justice in a manner comparable to a conferral of a prosecution right of appeal against a trial acquittal ... As a matter of established principle, a general statutory provision should not ordinarily be construed as conferring

or extending such a prosecution right of appeal against sentence unless a specific intention to that effect is manifested by very clear language.”

In New South Wales, the Court of Criminal Appeal applied this principle when refusing to allow the Crown to appeal from an interlocutory indication by a trial judge that he intended to direct a verdict of acquittal.⁵⁹ Furthermore, when legislation was introduced granting, in specified circumstances, the Crown a right to appeal from an acquittal, the fundamental nature of the principle of the criminal law involved, combined with the principle against retroactivity, the Court held that the legislation did not apply to proceedings which had been instituted prior to the statute coming into effect.⁶⁰

In Victoria the issue arose with respect to an attempt by the Crown to appeal an allegedly inadequate penalty imposed for a conviction for contempt. The Victorian Court of Appeal concluded that a generally expressed right of appeal should not be construed as extending to the Crown with respect of a sentence imposed following a conviction for contempt.⁶¹

In Queensland, the Court of Appeal also determined that a broadly stated statutory right of appeal did not apply to an order dismissing a contempt proceeding.⁶²

These principles remain of robust utility.

The Principle of Legality

In recent years this range of presumptions, canons or maxims with substantive content has been categorised together under the general concept of the “principle of legality”, which was reintroduced into contemporary discourse as a phrase found in the 4th edition of *Halsbury’s Laws of England*. There it was employed as equivalent to the traditional phrase “the rule of law”, albeit in a narrower sense to many uses of that concept.⁶³ It is, however, a concept with a long history and was expounded at some length in the early 1950s by Glanville Williams.⁶⁴ He was concerned with the application in the English criminal law of the traditional maxim of *nullum crimen sine lege*, *nullum poena sine lege* – no crime or punishment save in accordance with law.⁶⁵ This maxim, was applied in a number of respects: by the principle against retroactivity; by the rule of strict construction of penal statutes; and by the need for certainty in draftsmanship, has a long history as an integrative concept.

In the case which established “the principle of legality” as a unifying principle in English law, Lord Hoffmann said, in a passage subsequently quoted with approval by Gleeson CJ⁶⁶ and by Kirby J⁶⁷ and, in New Zealand, by Elias CJ and Tipping J:⁶⁸

“[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”⁶⁹

As Lord Simon of Glaisdale once said, the canons of construction “are ... constitutionally salutary in helping to ensure that legislators are not left in doubt as to what they are taking responsibility for”.⁷⁰ This idea is the same as that expressed by John Marshall, Chief Justice of the United States, when he said in 1820, with respect to the rule that penal laws are to be construed strictly:

“It is the legislature, not the Court, which is to define the crime and ordain its punishment.”⁷¹

The range of principles of the law of statutory interpretation, to which it is convenient to refer under the unifying concept of the principle of legality, are well known to every parliamentary drafter. They have been so well established for such a long period of time, and have been reaffirmed on so many occasions, that the courts are entitled to approach statutory interpretation on the assumption that, if the principles are not to be applied, the Parliament will say so, or otherwise express its intention so as to identify the results it wishes to achieve in a way that will ensure that the law of statutory interpretation does not interfere with that occurring.

As Gleeson CJ has said with respect to this principle:

“The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.”⁷²

Ambiguity

There is a tendency in some authorities to give a narrow application to the presumption relevant to the case before the court, on the basis that it is first necessary to find an ambiguity in the statutory formulation before the presumption can operate. In both the House of Lords and the New Zealand Court of Appeal, such references appear in judgments which emphasise the restrictive operation of common law presumptions in comparison with statutory provisions for interpretation in a human rights act.⁷³ In my opinion, this reflects an unnecessarily restrictive view of the concept of ambiguity in the law of statutory interpretation. When the relevant common law presumption is understood as a specific application of the principle of legality it is not appropriate to take a narrow approach to what is meant by ambiguity.

I have on more than one occasion had reason to draw on the observations of a master of statutory interpretation, Lord Simon of Glaisdale⁷⁴ – both an officer of the Simplified Spelling Society and a scrabble tragic – including the following:

“Words and phrases of the English language have an extraordinary range of meaning. This has been a rich resource in English poetry (which makes fruitful use of the resonances, overtones and ambiguities), but it has a concomitant disadvantage in English law (which seeks unambiguous precision, with the aim that every citizen shall know as exactly as possible, where he stands under the law).”⁷⁵

Perhaps not without irony, the word “ambiguity” is itself ambiguous. It is not necessarily limited to situations of lexical or verbal ambiguity and grammatical or syntactical ambiguity. The word ambiguity is often used in a more general sense of indicating any situation in which the scope and applicability of a particular statute is, for whatever reason, doubtful.⁷⁶ Save where appearing in some Interpretation Acts, where the narrow conception may be intended, the common law concept of ambiguity should be understood in this broader sense.

Common Law Doctrines

The protection of fundamental rights, freedoms and immunities (to use the authoritative formulation from the joint judgment in *Coco*) has sometimes been expressed in a shorthand way as the protection of common law rights. That terminology can be misleading if it is used in such a way as to equate the position of fundamental rights, freedoms and immunities with the old presumption that Parliament did not intend to change the common law. There is a clear distinction between legislation which invades fundamental rights etc and legislation which alters common law doctrines.

As Lord Simon of Glaisdale put it in 1975:

“It is true that there have been pronouncements favouring a presumption in statutory construction against a change in the common law ... Indeed, the concept has sometimes been put (possibly without advertence) in the form that there is a presumption against change in the law pre-existing the statute which falls for construction. So widely and crudely stated, it is difficult to discern any reason for such a rule – whether constitutional, juridical or pragmatic. We are inclined to think that it may have evolved through a distillation of forensic experience of the

way Parliament proceeded at a time when conservatism alternated with a radicalism which had a strong ideological attachment to the common law. However valid this particular aspect of the forensic experience may have been in the past, its force may be questioned in these days of statutory activism ... Whatever subsisting scope any canon of construction may have, whereby there is a presumption against change of the common law, it is clearly a secondary canon ... – of assistance to resolve any doubt which remains after the application of ‘the first and most elementary rule of construction’, that statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances. Moreover, even at the stage when it may be invoked to resolve a doubt, any canon of a construction against invasion of the common law may have to compete with other secondary canons. English law has not yet fixed any hierarchy amongst the secondary canons: indeed, which is to have paramountcy in any particular case is likely to depend on all the circumstances of the particular case.”⁷⁷

To similar effect, Kirby J has often emphasised the duty to obey legislative texts and the impermissibility of adhering to pre-existing common law doctrine in the face of a statute.⁷⁸

McHugh J, on a number of occasions, stated that the presumption that a statute is not intended to alter or abolish common law rights must now be regarded as weak.⁷⁹ His Honour did not expressly distinguish in this respect between the presumption against altering common law doctrines and the presumption against invading common law rights. His Honour did, however, identify circumstances in which the presumption would operate with some strength, identifying that category as “fundamental legal principles”⁸⁰ or as “a fundamental right of our legal system”.⁸¹ He distinguished “fundamental rights” which are “corollaries of fundamental principles” from “infringements of rights and departures from the general system of law”⁸² and “a fundamental right” from a right “to take or not to take a particular course of action”.⁸³

With respect to common law doctrines, his Honour emphasised the weakness of the presumption. He said:

“Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that

the legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend 'ordinary' common law rights, the 'presumption' of non-interference with those rights is inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced."⁸⁴

If I may be permitted the sin of self-quotation, in a case in which it was the Crown that relied on the so-called presumption that Parliament did not intend to change the common law, I said:

"The principle of statutory interpretation relied on by the Crown is, in my opinion, now of minimal weight. It reflects an earlier era when judges approached legislation as some kind of foreign intrusion. The scope and frequency of legislative amendment of the common law including the common law of criminal procedure, has over many decades been both wide-ranging and fundamental."⁸⁵

This issue has arisen with respect to the manner in which Parliament has, over recent decades, restricted the law of torts. There

is a real issue as to what aspects of tort litigation could ever have invoked the principle that legislation must be interpreted on the assumption that it does not alter the common law. As I have sought to show elsewhere, reliance on the tort of negligence as establishing common law “rights” overlooks the fact that fundamental features of the tort as we know it were established by legislation which overturned common law rules restricting liability in tort. This included *Lord Campbell’s Act*, which overturned the rule against the recovery of damages for the death of another person; the statutory abolition of the doctrine of common employment, by which an injured worker was denied the right to redress whenever injury resulted from the act of a fellow worker; the removal of the immunity of the Crown; the establishment of liability for nervous shock and apportionment of legislation overturning the absolute nature of the defence of contributory negligence.⁸⁶ It may well be that in many of these respects the common law would have developed in the same way. However, that is not what actually happened. In personal injury litigation many so-called “common law rights” were created by statute.

The relevant distinction was emphasised by Justice McHugh, when he said:

“The right to bring an action for psychiatric injury is an ordinary legal right. It is not a fundamental right of our society or legal system similar to the right to have a fair trial or to have a criminal charge proved beyond a reasonable doubt. Nor is the presumption against interfering with ordinary common law rights of the same strength as the presumption that laws do not operate retrospectively.”⁸⁷

I am aware that the Queensland Court of Appeal has applied the case law which refers to fundamental common law rights to statutory restrictions on the ability to seek damages for gratuitous services.⁸⁸ Each statutory scheme must be considered separately when applying these principles.

The Judicial Role

These interpretive principles are of longstanding. The debate about their deployment by common law judges goes back at least as far as Blackstone and Bentham. In many ways Blackstone’s account of statutory interpretation in Book 1 of the *Commentaries*⁸⁹ is quite contemporary.

What attracted Bentham's outrage, in this as in other aspects, with the common law method, was the fluidity that is introduced by the use of interpretive principles, particularly those which emphasise the context and purpose of the statutory text and specific principles, e.g. that Parliament did not intend an absurd result. Bentham found all of this inconsistent with a rational legal order, which required express codification of everything. He made no allowance for ambiguities, gaps, generalities or the scope of language. He found the flexibility that the common law judges retained nothing short of outrageous.⁹⁰

Notwithstanding the assumption in some continental legal systems that complete precision and comprehensiveness of expression is possible, Bentham's obsessiveness has never been accepted in the common law world. His view that every aspect of law could be written down as a complete body of law, which he called a Pannomion, has never been achieved, even in the Continental codes.

Many years ago Rupert Cross described Bentham's approach to Blackstone as "pig headed" and referred to:

"The naïve belief manifested throughout so much of his work that it is possible for the laws of a sophisticated

society to be formulated in terms of indisputable comprehensibility.”⁹¹

Over the centuries, judges in the common law tradition have found that the task of statutory interpretation is never as simple as Bentham thought. There are a range of circumstances in which the application of a statutory formulation is doubtful:

- When the words used are ambiguous or obscure;
- when deciding whether to read down general words;
- when implications are sought to be drawn from a text;
- when considering whether to depart from the natural and ordinary meaning of words, by adopting a strained construction;
- when deciding whether or not a statutory definition or interpretation section does not apply on the basis of an intention to the contrary;
- when giving qualificatory words an ambulatory operation;
- more controversially, whether words and concepts are to be read into a statute by filling gaps.

In the third lecture I will discuss some of these circumstances in detail.

The process of interpretation pursuant to the principle of legality, or any of its sub-principles, may not differ in essence from that to be conducted pursuant to a statutory requirement to interpret any Act or statutory instrument to conform with the list of human rights. I will discuss such provisions in the second lecture.

There are examples in legal history of the judiciary applying interpretive principles as a means of subverting legislative intent. The old rule that penal statutes have to be strictly construed – referred to as the rule of lenity in the United States – was developed to mitigate the harshness of the death penalty then applicable to minor offences and concomitant attempts by Parliament to restrict benefit of clergy.⁹²

The contemporary controversy about judicial activism – particularly in the context of human rights litigation, raises parallel issues. Subject to any constitutional entrenchment of rights, the judiciary must always remember that the interpretive principles are rebuttable.

It is a corollary of the principle of legality, and a manifestation of what Chief Justice Gleeson has felicitously called judicial legitimacy, that the judiciary do not find ambiguity when there is none and recognise clear and unambiguous language when it is presented to them for

interpretation. Of course, from time to time, the results of the application of these interpretative principles will give rise to controversy.

There is a substantive distinction between what can permissibly be called “interpretation” and defiance of the legislative will. The distinction is not as easy to perceive in practice as it is to state in principle. Nevertheless, it is a fundamental distinction which I will address in the third lecture on genuine and spurious interpretation.

* * * * *

You will permit a touch of nostalgia in conclusion. In the 1930s when the *Kisch* case was decided, respect for the courts was unalloyed. No Commonwealth Minister denounced the High Court for letting this rabble rouser pollute the minds of Australian youth or lead Australian women from the path of virtue. There was no electronic lynch mob on talk-back radio.

The Attorney General, Robert Menzies, of Scottish heritage himself and no doubt sensitive to the status of Scottish Gaelic, quietly paid Kisch’s costs and let him go home. When the Sydney Morning Herald published articles and letters denouncing the judgment for its failure to recognise Scottish Gaelic as the glorious language it was – the

most vituperative written under a pseudonym by Sir Mungo MacCallum, Chancellor of the University of Sydney – the newspaper was prosecuted for contempt. I doubt if that would happen today.

Perhaps Egon Kisch left Australia ruminating about the application to his recent experience of the insights into bureaucratic conduct recently published by his old classmate at the Altstadter Gymnasium in Prague - Franz Kafka. We will never know.

¹ Aladin Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice B H McPherson CBE* (2006) Supreme Court of Queensland Library, Brisbane.

² These lectures involve a re-presentation and development of ideas put forward in earlier addresses: see J J Spigelman, "Statutory Interpretation: Identifying the Linguistic Register" (1999) 4 *Newcastle Law Review* 1; J J Spigelman, "The Poet's Rich Resource: Issues in Statutory Interpretation" (2001) 21 *Australian Bar Review* 224; J J Spigelman, "Blackstone, Burke, Bentham and the *Human Rights Act* 2004" (2005) 26 *Australian Bar Review* 1; J J Spigelman, "Principle of Legality and the Clear Statement Principle" (2005) 79 *Australian Law Journal* 769.

³ The terminology common law bill of rights was, so far as I am aware, first deployed by John Willis in "Statute Interpretation in a Nutshell" (1938) 16 *Canadian Bar Review* 17. It has been adopted by others: see, eg, D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) LexisNexis Butterworths, Sydney at [5.2].

⁴ See J J Spigelman, "Rule of Law – Human Rights Protection" (1999) 18 *Australian Bar Review* 29 at 33; J J Spigelman, "Access to Justice and Human Rights Treaties" (2000) 22 *Sydney Law Review* 141 at 149–150; New South Wales, *A New South Wales Bill of Rights: Standing Committee on Law and Justice*, Report No 17 (2001).

⁵ See, eg, David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (1989) Cambridge University Press, Cambridge, ch 1.

⁶ See, eg, Albert S Miles et al, "Blackstone and American Indian Law" (2002) 6 *Newcastle Law Review* 89.

⁷ See Daniel J Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (1941) University of Chicago Press, Chicago; Albert W Alschuler, "Rediscovering Blackstone" (1996) 145 *University of Pennsylvania Law Review* 1; Paul O Carrese, *The Cloaking of Power: Montesquieu, Blackstone and the Rise of Judicial Activism* (2003) University of Chicago Press, Chicago, esp at 111–112; Albert S Miles, David L Dagley and Christina H Lau, "Blackstone and his American Legacy" (2001) 5(2) *Australia and New Zealand Journal of Law and Education* 46.

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- 8 See, eg, Douglas Hay, “Property, Authority and the Criminal Law” in Hay et al, *Albion’s Fatal Tree: Crime and Society in Eighteenth Century England* (1975) Pantheon, New York; ‘Introduction’ in John Brewer and John Styles (eds), *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries* (1980) Hutchinson, London.
- 9 See Jeremy Waldron (ed), *‘Nonsense Upon Stilts’: Bentham, Burke & Marx on the Rights of Man* (1987) Methuen, London, at 53.
- 10 See Carrese supra, ch 5.
- 11 See Henry John Stephen, *New Commentaries on the Laws of England* (2nd ed, 1848) Butterworths, London, vol 1 at 35, 129; cf William Blackstone, *Commentaries on the Laws of England* (1st ed, 1765), Book 1, ch 1 at 120.
- 12 See Nicholas Hasluck, *Our Man K* (1999) Penguin, Melbourne; Nicholas Hasluck, “Waiting for Ulrich: The Kisch and Clinton Cases” (1999) 33 *Quadrant* 28; Nicholas Hasluck, “Reinventing the Kisch Case” (2000) 2 *University of Notre Dame Australia Law Review* 67; Nicholas Hasluck, *The Legal Labyrinth: The Kisch Case and other Reflections on Law and Literature* (2003) Freshwater Bay Press, Perth. See also Heidi Zogbaum, *Kisch in Australia: The Untold Story* (2004) Scribe Publications, Melbourne.
- 13 C M H Clark, “A History of Australia, VI: The Old Dead Tree and the Young Tree Green (1916–1935)” (1987) Melbourne University Press, Melbourne, at 474.
- 14 Ibid at 471.
- 15 Ibid at 463.
- 16 *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234 (‘Kisch’) at 241.
- 17 Ibid at 243.
- 18 Ibid at 244.
- 19 Ibid at 247.
- 20 See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) Angus & Robertson, Sydney, at 626–627.
- 21 See Geoffrey Bolton, *Edmund Barton: The One Man for the Job* (2000) Allen & Unwin, Sydney, at 243–245.
- 22 *Kisch* at 237.
- 23 Arthur Wilberforce Jose and Herbert James Carter (eds), *The Illustrated Australian Encyclopaedia* (1925) Angus & Robertson, Sydney, vol 1 at 653–654 (emphasis added).
- 24 See Gavin Souter, *Lion and Kangaroo : The Rise of a Nation, 1901–1919* (1978) Collins, Sydney, at 90.
- 25 F K Crowley (ed), *A New History of Australia* (1974) Heinemann, Melbourne, at 448.
- 26 See Pearce and Geddes supra, the Chapter headings of chs 3, 4 and 5.
- 27 See William N Eskridge Jr and Philip P Frickey, “Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking” (1992) 45 *Vanderbilt Law Review* 593 at 595.

28 See, eg, John Bell and George Engle, *Cross on Statutory Interpretation* (3rd ed, 1995) Butterworths, London, at 165–166; Cass R Sunstein, “Interpreting Statutes in the Regulatory State” (1989) 103 *Harvard Law Review* 405; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 (the rule of law); *Egan v Chadwick* (1999) 46 NSWLR 563 at [16]–[25] (responsible government).

29 *Potter v Minahan* (1908) 7 CLR 277 (*‘Potter’*) at 304. The text was the 4th edition of *Maxwell on Interpretation of Statutes* ((1905) Sweet & Maxwell, London). Subsequent editions of that text substitute much wider language to this passage and should be treated with care; see *R v Janceski* (2005) 64 NSWLR 10 (*‘Janceski’*) at [67]–[88].

30 See *Hill v Green* (1999) 48 NSWLR 161 at [5]–[10], [143].

31 See, eg, *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 252; *Coco v The Queen* (1994) 179 CLR 427 (*‘Coco’*) at 437; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 (*‘Daniels Corp’*) at [11].

32 *Coco* at 437.

33 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 (*‘Malika Holdings’*) at [28].

34 See *Cox v Hakes* (1890) 15 App Cas 506 esp at 519, 528, 534; *Newell v The King* (1936) 55 CLR 707 at 711; *Maxwell v Murphy* (1957) 96 CLR 261 at 267; *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194; *Rodway v The Queen* (1990) 169 CLR 515 at 518; *Esber v Commonwealth* (1992) 174 CLR 430 at 440–441. The most recent detailed discussion of this principle is Ben Juratowitch, *Retroactivity and the Common Law* (2008) Hart Publishing, Oxford.

35 *R v Bolton*; *Ex parte Beane* (1987) 162 CLR 514 at 520, 523, 532; *Al-Kateb v Godwin* (2004) 219 CLR 562 (*‘Al-Kateb’*) at [149]–[150]; *Uittenbosch v Chief Executive, Department of Corrective Services* [2006] 1 Qd R 565 at [7], [12]–[18].

36 *Commonwealth v Progress Advertising & Press Agency Co Pty Ltd* (1910) 10 CLR 457 at 464; *Potter* at 305–306; *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206.

37 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 31; *R v Secretary of State for the Home Department*; *Ex parte Simms* [2000] 2 AC 115 (*‘Simms’*) at 125–127, 130.

38 See, eg, *Bishop v Chung Bros* (1907) 4 CLR 1262 at 1273–1274; *Tassell v Hayes* (1987) 163 CLR 34 at 41; *R v Fuller* (1994) 34 NSWLR 233 at 237–238; *Thompson v Mastertouch TV Service Pty Ltd (No 3)* (1978) 38 FLR 397 at 408–409, 412–413; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (*‘EPA v Caltex’*) at 516–517; *Malika Holdings* at [28].

39 *Magrath v Goldsborough Mort & Co Ltd* (1932) 47 CLR 121 at 134; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (*‘Plaintiff S157’*) esp at [30]–[32].

40 *Davern v Messel* (1984) 155 CLR 21 (*‘Davern’*) at 30–31, 48, 63, 66.

41 *EPA v Caltex* at 558.

42 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 322, 338, 368–369; *Daniels Corp* at [11]. Note also *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at [7]–[8].

43 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Hamilton v Oades* (1989) 166 CLR 486 at 495; *Rich v Australian Securities and Investment Commission* (2004) 220 CLR 129.

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- 44 *Ex parte Fitzgerald; Re Gordon* (1945) 45 SR (NSW) 182 at 186; *Krakouer v The Queen* (1998) 194 CLR 202 at [62].
- 45 *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395–396; *Annetts v McCann* (1990) 170 CLR 596 at 598; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575–576.
- 46 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 116; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at [33]–[37], [59]–[68], [113].
- 47 *Clissold v Perry* (1904) 1 CLR 363 at 373; *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 682–683; *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 199–200.
- 48 *Coco* at 435–438.
- 49 *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552 at 563; *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343 at 359; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [28]–[31].
- 50 *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635–636.
- 51 *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525 at 544 per McHugh JA.
- 52 *Constantine v Imperial Hotels Ltd* [1944] 1 KB 693 at 708.
- 53 See generally J J Spigelman, “The Truth Can Cost Too Much: The Principle of a Fair Trial” (2004) 78 *Australian Law Journal* 29.
- 54 *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1347.
- 55 See *R v Macfarlane; Ex parte O’Flanagan* (1923) 32 CLR 518 at 541–542.
- 56 Spigelman, “The Truth Can Cost too Much: The Principle of a Fair Trial” supra.
- 57 *Wall v R; Ex parte King Won (No 1)* (1927) 39 CLR 245 at 250; see also *Secretary of State for Home Affairs v O’Brien* [1923] AC 603 at 610.
- 58 (1986) 161 CLR 119 at 128–9.
- 59 See *R v Cheng* (1999) 48 NSWLR 616.
- 60 See *R v JS* [2007] NSWCCA 272 esp at [26]–[48].
- 61 See *Director of Public Prosecutions v Garde-Wilson* (2006) 15 VR 640 esp at [15]–[26].
- 62 See *Henderson v Taylor* [2007] 2 Qd R 269 esp at [13]–[16], [26]–[27], [73]–[78].
- 63 See *Halsbury’s Laws of England* (4th ed, reissued, 1996) vol 8(2) at [6].
- 64 See Glanville Williams, *Criminal Law* (1st ed, 1953) Stevens, London, at 434–465, then ch 12 of this seminal text.
- 65 See also Aly Mokhtar, “Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects” (2005) 26 *Statute Law Review* 41.

66 *Plaintiff S157* at [30]; *Al-Kateb* at [19].

67 *Daniels Corp* at [106]; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at [180].

68 *R v Pora* [2001] 2 NZLR 37 at [53].

69 *Simms* at 131. See also *B v Director of Public Prosecutions* [2000] 2 AC 428 at 470; *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659 at [82]; *R v JS* at [36]-[37]; *Lodhi v R* (2006) 199 FLR 303 at [32]; *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203 at [111]; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at [82]-[85]; *Watkins v Queensland* [2007] QCA 430 at [64].

70 *Ealing London Borough Council v Race Relations Board* [1972] AC 342 at 361.

71 *United States v Wiltberger*, 18 US (5 Wheat) 76 (1820) at 95.

72 *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309 ('*Electrolux*') at [21].

73 See *R v Secretary of State to the Home Department: Ex parte Pierson* [1998] AC 539 at 587; *Quilter v Attorney-General* [1998] 1 NZLR 523, 526, 541-542, 581.

74 The titles of two earlier addresses were drawn from Lord Simon's judgments: "Identifying the Linguistic Register" and "The Poet's Rich Resource": see above n 2. See also his Lordship's series of articles on "English Idioms from the Law" (1960) 76 *Law Quarterly Review* 283 and 429; (1962) 78 *Law Quarterly Review* 245; and (1965) 81 *Law Quarterly Review* 52.

75 *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 236.

76 See the references set out in my earlier addresses in the *Newcastle Law Review* above n 2 at 2; 21 *Australian Bar Review* above n 2 at 231-232; *Repatriation Commission v Vietnam Veterans' Association of New South Wales Branch Inc* (2000) 48 NSWLR 548 at [116].

77 *Maunsell v Olins* [1975] AC 373 at 394-395.

78 See, eg, *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491 at [143]-[147].

79 See *Malika Holdings* at [28]-[30]; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 ('*Gifford*') at [36].

80 *Malika Holdings* at [28].

81 *Gifford* at [36].

82 *Malika Holdings* at [28].

83 *Gifford* at [36].

84 *Ibid.* See also the reference by Gleeson CJ in *Electrolux* at [19] and *Malika Holdings* at [29]-[30].

85 See *Janceski* at [62].

86 See J J Spigelman, "Negligence: The Last Outpost of the Welfare State" (2002) 76 *Australian Law Journal* 432 at 437-438.

87 See *Gifford* at [37].

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- 88 See *Grice v Queensland* (2006) 1 Qd R 222 at [25]-[26]; *Kriz v King* [2007] 1 Qd R 327 at [18].
- 89 Blackstone *supra* at 87–92.
- 90 See the analysis in Cass R Sunstein and Adrian Vermeule, “Interpretation and Institutions” (2003) 101 *Michigan Law Review* 885 esp at 890–897.
- 91 Rupert Cross, “Blackstone v Bentham” (1976) 92 *Law Quarterly Review* 516 at 520–521.
- 92 See Pearce and Geddes *supra* at [9.8]; Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (1948) Stevens & Sons, London, vol 1 at 83–88; Lawrence M Solan, “Law, Language and Lenity” (1998) 40 *William and Mary Law Review* 57; Livingston Hall, “Strict or Liberal Construction of Penal Statutes” (1935) 48 *Harvard Law Review* 748; John Calvin Jeffries Jr, “Legality, Vagueness, and the Construction of Penal Statutes” (1985) 71 *Virginia Law Review* 189; Sarah Newland, “Mercy of Scalia: Statutory Construction and the Rule of Lenity” (1994) 29 *Harvard Civil Rights–Civil Liberties Law Review* 197; Stephen Kloepfer, “The Status of Strict Construction in Canadian Criminal Law” (1983) 15 *Ottawa Law Review* 553.

CONSISTENCY AND SENTENCING
KEYNOTE ADDRESS BY
THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
TO SENTENCING 2008 CONFERENCE
THE NATIONAL JUDICIAL COLLEGE OF AUSTRALIA
CANBERRA, 8 FEBRUARY 2008

Allegations of inconsistency in sentencing are one of the perennials in debate about the criminal justice system. At its core the debate raises a fundamental ethical issue identified by Aristotle in his dictum that justice requires that equals be treated equally and unequals be treated unequally. The problem, of course, is that there is no universally accepted standard as to what kinds of differences constitute a relevant form of inequality, so as to justify different treatment.

This is not a debate about which one can ever expect an ultimate resolution other than, perhaps, in a totalitarian society. Even there, as George Orwell reminded us, the principle is that all persons are equal, but some are more equal than others.

At the core of the sentencing task – and the reason why debate in well informed circles, let alone in the tabloid media – will know no rest is the process of weighing incommensurable and often contradictory objectives: protection of the community, deterrence, retribution and rehabilitation. Such a process of balancing, in the words of Justice Scalia of the United States Supreme Court, is like asking whether a particular line is longer than a particular rock is heavy.¹

As this audience is well aware, working out the divergent objectives of the sentencing task in a particular case necessarily means that, within reasonable bounds, different judges can permissibly reach different conclusions. Variations within those boundaries do not constitute a relevant inconsistency or impermissible disparity. This is simply a manifestation of the wise dictum of Sir Frederick Jordan that in the context of sentencing for criminal offences: “the only golden rule is that there is no golden rule”.²

In this, as in virtually every other context of debate about sentencing, there is a tension between principles that point in different directions, yet which have to be reconciled in the wide variety of specific factual circumstances that arise. The way in which I prefer to express

the issue is as a tension between the principle of individualised justice and the principle of consistency.³

A memorable expression of a similar tension is contained in Ralph Waldo Emerson's essay "Self Reliance" where he emphasises the importance of every person following his or her instincts rather than seeking to conform. In a memorable turn of phrase, he says:

"A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do."

Attractive as the phrase may be, everything that matters is subsumed in the word "foolish". Unfortunately, Emerson did not seek to identify the difference between foolish and wise consistency.

The principle of individualised justice, depends on the elementary proposition that the wide variation of circumstances of both the offence and of the offender must always be taken into account, so that the sentence is appropriate to the individual case. Experience over the centuries has led to the clear conclusion that this task is best undertaken by the exercise of a broad discretion by individual judges. Subject, of course, to any statutory requirements, there is room for judges to bring

to this task different penal philosophies in terms of the emphasis given to one or other of the incommensurable objectives of the sentencing exercise.

In this respect judges will, at least to a certain degree, reflect the wide range of differing views on this very matter that exists in the general community. However, the range of permissible variation amongst judges is narrower than the range of actual variation in the general community. The reason why the range is narrower is the principle of consistency which is sometimes referred to in terms of disparity or uniformity or discrepancy.

The observations of Sir Anthony Mason in *Lowe v The Queen* may be regarded as the origins of contemporary Australian doctrine on the issue of consistency. His Honour said:

“Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice.”⁴

As this quotation makes clear, what is involved is something more than justice for the individual offender. There is also a public interest dimension to ensuring consistency in sentencing. Nothing is more corrosive of public confidence in the administration of justice than a belief that criminal sentencing is primarily determined by which judge happens to hear the case. As Justice Gummow has pointed out, public confidence in the administration of justice is today the meaning of the ancient phrase “the majesty of the law”.⁵ Given the nature of media reporting about the administration of justice, such public confidence is, to a very substantial extent, determined by public understanding of sentencing by criminal courts.

I invoke also the observations of Chief Justice Gleeson in *Wong v The Queen*:

“All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner.

The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.”⁶

The emphasis on fairness in these observations identifies an important public interest. For that reason the principle of inconsistency is sometimes expressed as a separate principle, which may be useful for some purposes. However, inconsistency or disparity also impinges on the central principle of Australian sentencing law, the principle of proportionality, authoritatively established in *Veen No 2*.⁷ Wherever two sentences can be said to be inconsistent or to manifest impermissible disparity, then at least one and perhaps both, must offend the principle of proportionality.

Chief Justice Gleeson’s reference to “unconnected single instances” is reminiscent of the well-known observations of Lord Tennyson in *Aylmer’s Field*, where the poet referred to:

“ ... the lawless science of our law,
that codeless myriad of precedent,
that wilderness of single instances ...”

In the context of sentencing for criminal offences this wilderness is tamed and given shape and form by the principles of sentencing and the emergence, over a period of time, of a pattern of sentences for particular offences. It is these principles and such patterns which play the critical role in reconciling the principle of individualised justice and the principle of consistency.

There are, however, difficulties in identifying sentencing patterns. It is in this context, perhaps more than in the context of identifying relevant sentencing principles, that the imperfections necessarily inherent in any system of human endeavour appear to emerge in this context.

The identification of a sentencing pattern is the core task to be undertaken so that the principle of consistency can be carried into effect. That task involves a level of complexity by reason of the principle of individualised justice. All of the information available about past sentences reflects the implementation of the principle of individualised justice. In every past case, whilst the elements of an offence for purposes of a conviction have been established, the circumstances encompassed a wide range of culpability in both the objective features

of the offence and, perhaps an even wider range, in the subjective circumstances of each offender.

The first and most important component of the process of identifying sentencing patterns is the almost intuitive understanding developed over many years of experience by individual judges who have been long engaged, both as counsel and as judges, in the sentencing exercise. The collegiality of individual courts also ensures that this body of collective experience is transmitted to new judges, who may not have the same background in the administration of criminal justice.

As Chief Justice Street observed:

“The task of the sentencing judge, no less than the task of an appellate court, is to pursue the ideal of evenhandedness in the matter of sentencing. Full weight is to be given to the collective wisdom of other sentencing judges in interpreting and carrying into effect the policy of the legislature. That collective wisdom is manifested in the general pattern of sentences currently being passed in cases which can be recognised judicially as relevant to the case in hand. This is not to suggest that sentences are to be arbitrarily dictated by mathematical application of statistics. There is an

enormous difference between recognising and giving weight to the general pattern as a manifestation of the collective wisdom of sentencing judges on the one hand and, on the other hand, forcing sentencing into a strait-jacket of computerisation.”⁸

Like any other human institution this mechanism for identifying a body of collective knowledge is subject to imperfections and can be improved. Whilst bearing in mind Sir Laurence’s warnings, since then the most important additional element, in the experience of the New South Wales system about which I can speak, has been the development of a sentencing information system which provides statistics about sentences actually imposed and which is readily available to all those involved in the sentencing task. The statistics are capable of disaggregating the data by relevant variables, e.g. identifying cases in which the particular offence was committed while the offender was on conditional liberty or where the offence was a first offence, etc.

Of course such statistics have to be supplemented, as they generally are, by the sentencing judge being informed of particular cases where the full range of facts, that are not capable of being reduced to statistical form, may suggest more precise parallels.

Nevertheless, it is one of the great advantages of statistics, so long as the database is sufficiently broad, that many of the items that lead to variations in the sentence appropriate for an individual case are already reflected in the broad range that past sentences display when reduced to a graph or table.

It is important not to confuse the range of appropriate sentences for an individual case, which is a matter that is frequently the subject of submissions in a court of criminal appeal, on the one hand, from the range that the statistical database shows has been appropriate in the past for *all* the different kinds of cases that have arisen, on the other hand. Nevertheless, statistics are capable of assisting judges in the difficult task of applying the principle of consistency. Such statistics may identify a sentencing pattern which accommodates differences in the individual circumstances of an offence and of an offender upon which the judge has to adjudicate.

I have attempted to identify the utility of statistics on the basis of the case law in which they have been deployed, as follows:

- (i) The sentence to be imposed depends on the facts of each case and for that reason bald statistics are of limited use.

- (ii) Statistics may be less useful than surveys of decided cases, which enable some detail of the specific circumstances to be set out for purposes of comparison.
- (iii) Caution needs to be exercised in using sentencing statistics, but they may be of assistance in ensuring consistency in sentencing.
- (iv) Statistics may provide an indication of general sentencing trends and standards.
- (v) Statistics may indicate an appropriate range, particularly where a significant majority or a small minority fall within a particular range. Similarly when a particular form of sentence such as imprisonment is more or less likely to have been imposed.
- (vi) Statistics may be useful in determining whether a sentence is manifestly excessive or manifestly inadequate.
- (vii) Statistics are least likely to be useful where the circumstances of the individual instances of the offence vary greatly, such as manslaughter.
- (viii) The larger the sample the more likely the statistics will be useful.⁹

Statistics have been shown to be of significant, albeit limited, use in a variety of circumstances.¹⁰ Anyone who has had the benefit of the sentencing database compiled by the Judicial Commission of New South Wales is well aware that the database has proven to be very useful, particularly in order to implement the principle of consistency. The officers of the Commission, of which I should reveal I am the President, have done a magnificent job over the decades, both in compiling the database and maintaining its accessibility and utility. It has been recognised internationally as world's best practice on this matter.

I refer, for example, to the *Auld Report* of 2001, which led to fundamental changes in the administration of the criminal law in England and Wales. His Lordship said:

“The New South Wales system is one of the most sophisticated yet unobtrusive systems of its kind in the world ... It is probably the world leader in this field.”¹¹

The officers of the Commission have assisted the Courts of Queensland in establishing an equivalent in that State. At the launch of the Queensland Sentencing Information System, Chief Justice de Jersey said:

“The people of Queensland have been well served by a current judicial system where judges and magistrates exercise a comprehensively informed and comparatively unfettered sentencing discretion. The introduction of this comprehensive sentencing database is potentially the most significant development in recent years in the streamlining of our criminal justice system. The ideal is increased consistency and predictability in sentencing.”¹²

As you are all aware, tomorrow morning there will be a formal launch of the Commonwealth sentencing database, in which endeavour the expertise of the Judicial Commission was also drawn upon.

The significance of such a database has been expressed by Chief Justice Gleeson who, as Chief Justice of New South Wales, was President of the Judicial Commission for most of the years that the system was being developed. His Honour said:

“Most sentencing of offenders is dealt with as a matter of discretionary judgment. Within whatever tolerance is required by the necessary scope for individual discretion, reasonable consistency in sentencing is a requirement of justice. The *Judicial Officers Act* 1986 (NSW) identifies

sentencing consistency as a legislative objective. That Act established the Judicial Commission of New South Wales to monitor sentences and disseminate information about sentences 'for the purpose of assisting courts to achieve consistency in imposing sentences' (s8). How does collecting and disseminating information about sentences help to fulfil the statutory purpose? The obvious legislative assumption is that knowledge of what is being done by courts generally will promote consistency. That assumption accords with ordinary practice. Day by day, sentencing judges, and appellate courts, are referred to sentences imposed in what are said to be comparable cases. There will often be room for argument about comparability, and about the conclusions that may be drawn from comparison. But sentencing judges seek to bring to their difficult task, not only their personal experience (which may vary in extent), but also the collective experience of the judiciary. Communicating that collective experience is one of the responsibilities of a Court of Criminal Appeal."¹³

Sentencing statistics are of utility for matters other than ensuring consistency. For example, they may reveal the fact that the

parliamentary intention with respect to particular offences is not being carried into effect. Take a case where Parliament's intention with respect to a particular offence has been reflected in a number of increases in the maximum sentence available. It sometimes appears that sentencing judges have not changed the sentencing pattern in response. This has arisen in courts of criminal appeal, for example, with respect to changes in maximum sentence for the offence of dangerous driving causing death or grievous bodily harm.¹⁴

From time to time judges have expressed surprise, with respect to particular offences, that there have been so few cases which have justified more than half the maximum sentence as determined by Parliament.¹⁵ Statistics have also indicated that a legislative provision requiring a particular proportionate relationship between the head sentence and the non-parole period, with a "special circumstances" exception, may not have been implemented in accordance with the parliamentary intention, when the overwhelming majority of cases appear to throw up some "special circumstance" or another.¹⁶

Sometimes there is public controversy about the manner in which judges exercise the broad discretion vested in them with respect to sentences. I have spoken of these matters on other occasions and won't

repeat my observations again. The general thrust of such public debate and, from time to time, parliamentary intervention, focuses on leniency rather than on inconsistency. In this debate the tension between the principle of consistency and the principle of individualised justice becomes manifest. Those who emphasise the significance of the latter object to any step which may be seen to interfere with the discretion of an individual sentencing judge. However, sentencing principles, including proportionality and consistency, must mean that an individual judge cannot impose whatever sentence he or she likes. The issue is how to resolve the tension between the relevant principles, a tension that inevitably arises and which can never be finally resolved to everyone's satisfaction. It is important to recognise that there is no absolute correct answer in all jurisdictions and all situations to the resolution of this tension.

At one extreme there have been examples, and continue to be proponents of, a rigid system which takes away to a substantial degree the discretion of the trial judge. This includes mandatory minimum sentences in some cases or a rigid grid system that requires sentences carefully calibrated by reference to some, but not all, of the circumstances of a case. The degree of rigidity involved in such interventions inevitably leads to injustices arising in individual cases.

Sooner or later those systems collapse under the weight of those injustices. The principle of consistency has been served at the expense of other sentencing principles, especially the principle of individualised justice.

This is not a new phenomenon. For example, the *Criminal Law Amendment Act 1883* (NSW) created a sentencing structure with five distinct steps or categories, and minimum and maximum sentences. The scheme led to such palpable injustices that it was abandoned a year later. As *The Sydney Morning Herald* editorialised on 27 September 1883:

“We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion.”

Other less prescriptive forms of intervention have been undertaken from time to time. They include the creation of sentencing councils, generally of an advisory character. They also include the adoption of guideline judgments which are well established in overseas jurisdictions

but, outside of New South Wales and South Australia, remain somewhat controversial in Australia.

In New South Wales the system of guideline judgments was first established by the Court of Criminal Appeal but was reinforced by supportive legislation. It is a system which has ceased to grow because of the introduction into our sentencing legislation of a scheme of indicative “standard” non-parole periods, providing the same guidance in legislative form. The scheme of the legislation is such as to cover virtually every offence that was capable of being the subject of a guideline judgment.

Such judgments are not prescriptive in character but they do establish a system in which sentencing judges have to take the guideline into account as a check or indicator or guide, with a requirement to address the guideline and to articulate reasons for its applicability or inapplicability to the case in hand. The principal objective of a guideline judgment is to promote consistency.

The Judicial Commission of New South Wales has studied the impact of guideline judgments from a number of points of view, including that of consistency in sentencing. The results of these studies are

generally supportive of the system as a way of implementing the principle of consistency.

The first such study was with respect to the guideline judgment for dangerous driving. The relevant conclusion by the authors of the study of the impact of the guideline was as follows:

“The guidelines have resulted in consistent results or outcomes in the sentencing of offenders convicted of dangerous driving offences under s52A. In addition, after reading the various judgments in the course of this study it became apparent that since *Jurisic* consistency is also evident in the articulation of the purpose underlying the type and quantum of sentences handed down, and in the approach taken by trial judges in sentencing for these offenders.”¹⁷

With respect to the guideline judgment for armed robbery, the study concluded:

“The authors found that the *Henry* guideline judgment has provided consistency in sentencing for robbery offences under s97 of the *Crimes Act* 1900. This consistency was evident in the way in which judges commonly articulated

that deterrence, both general and specific, was the main purpose of sentencing for this offence; assessed the wide variations in the objective and subjective features of the case; and applied the starting range suggested in *Henry* to arrive at an appropriate sentence in the individual case.”¹⁸

Finally, employees of the Judicial Commission have conducted a study of the impact of the guideline for high range PCA offences, particularly directed to the hitherto extensive use of orders under s10 of our *Crimes (Sentencing Procedure) Act 1999* which is our provision for not entering a conviction notwithstanding a finding of guilt. The study relevantly concluded:

“ ... [T]here has been more consistency in the sentences imposed for high range PCA offences with:

- More uniformity in the use of s10 non-conviction orders between the courts ...
- More uniformity in the length of disqualification periods between the courts ...
- A clear distinction in sentencing patterns between first offenders, subsequent offenders and subsequent offenders where the prior offence was high range PCA – although there was a clear distinction prior to the

guideline, after the guideline it was even more accentuated.”¹⁹

A critical mechanism by which consistency is achieved within any jurisdiction is through appeals to the court of criminal appeal. One of the most important of appellate tasks is to balance the principle of individualised justice and the principle of consistency. Indeed, the development in recent years of guidelines by the courts, as in England and New South Wales, or issued by sentencing councils, as in England, is specifically directed to this objective.

It is, however, important to recognise a constraint which operates with respect to the effective operation of the appellate process in this respect.²⁰ Our system of appeals operates differently depending on who the appellant is.

Wherever a trial judge sentences in a manner that can be described as inconsistent in that it is too harsh, a severity appeal to the appellate court will succeed without any constraint. In the case of a Crown appeal, in which the proposition is that the trial judge has been too lenient and in that sense given rise to inconsistency, there are significant restraints. I refer to what is, quite inappropriately, referred to

as the principle of double jeopardy, which requires both a higher level of error before intervention and imposes restraints upon the extent of any variation.

For present purposes it is sufficient to note that this difference of treatment does impede the ability of the appellate process to carry the principle of consistency into effect.

In a federal system such as our own there is an additional difficulty arising from the fact that the Commonwealth has vested its criminal jurisdiction in State courts, each of which has its own court of criminal appeal. Theoretically sentencing appeals could go from one of those courts to the High Court, but that is not a practical proposition. Accordingly, it is necessary to ensure that the principle of consistency is carried into effect between jurisdictions in the absence of a single court of criminal appeal. I refer again to the observations of Gleeson CJ in *Wong v The Queen*, quoted above, that one of the responsibilities of a court of criminal appeal is to communicate the collective experience of the judiciary.

As I have indicated above, judges must know what their colleagues have been doing and to have information available about sentencing

patterns. This is a requirement that must be addressed in all jurisdictions. Clearly, by reason of distances and comparatively lesser opportunities for communication, sentencing in all of the different parts of Australia under Commonwealth legislation involves an added dimension of difficulty in this regard. In my experience, and of those whom I have consulted, judges regularly obtain information about sentences imposed by colleagues in other States and Territories with respect to Commonwealth offences under consideration. To a large extent, of course, this depends, as it does for State offences, upon information being made available by the parties, especially representatives of the prosecution.

As this audience is well aware this is a matter that has been considered in some depth by the Australian Law Reform Commission (ALRC) culminating in its report which, in accordance with contemporary custom, has a media release style title, *Same Crime, Same Time*, with the more appropriately prosaic subtitle *Sentencing of Federal Offenders*. The ALRC has made important recommendations for reform of the Commonwealth regime by the enactment of a new Federal Sentencing Act in substitution for Part 1B of the *Crimes Act* 1914. The recommendations in this respect are comprehensive. If enacted such an Act will assist in ensuring consistency in the exercise of the sentencing

discretion by courts throughout Australia. The proposals have much to commend them.

Everything I have said about sentencing statistics applies, perhaps even with more force, to sentencing under Commonwealth statutes. Accordingly, the launch tomorrow of the new sentencing database will be of considerable significance, as the ALRC report recognised. Until now, sentencing judges have relied on the information available from the Director of Public Prosecutions database. The new system will, I am sure, be a considerable improvement and will go a long way to minimising such inconsistency as has existed.

It is by no means clear to me that the kinds of inconsistency that may exist with respect to the sentencing for Federal offences are of a different order of magnitude to those which have existed, and despite all best endeavours will continue to exist to some degree, within each jurisdiction. This is not a matter about which we will ever be able to declare victory. It is a principle of sentencing which must be continually applied.

It may be correct that there are significant differences between judges of one State jurisdiction and judges of another State jurisdiction

with respect to use of full time imprisonment as a sentencing option and with respect to the severity of sentences imposed. Indeed, there are indications of some differences from State to State even with respect to State offences. However, statutory provisions and the sentencing regimes do vary from State to State and these indications may not indicate inappropriate disparity.²¹

Nevertheless, the Australian Law Reform Commission, not least by the very title of its Report, acted on the assumption that, in some way, its material has established impermissible inconsistency amongst the judges of some States and Territories. It does appear that Commonwealth prosecuting authorities believe that there is such divergence on the basis of evidence which the Australian Law Reform Commission politely refers to as “anecdotal”.²² However, dissatisfaction with sentences is an occupational hazard of being a prosecutor. It may be that such dissatisfaction is held more acutely in some State offices of Commonwealth agencies than in others.

The evidence presented by the ALRC to support its conclusion of inconsistency has been subject to cogent criticism. There is a certain sense of déjà vu about this Report. Similar assertions about the existence of impermissible disparity in sentencing for Commonwealth

offences had been made by the first report of the Australian Law Reform Commission entitled *Sentencing of Federal Offenders* published in 1980.²³ That Report was subject to fundamental criticism of much the same kind as has been directed to the recent Report.²⁴

It is, of course, possible that the anecdotal evidence to which the ALRC referred is correct although, in my view, the report assumes that to be the case and does not establish it in any rigorous manner. It must, however, be accepted that the absence of a single court of criminal appeal does mean that one of the mechanisms for ensuring consistency which operates within each Australian jurisdiction is not at present operative with respect to Commonwealth offences. The sentencing information database will assist, in my opinion significantly assist, in this regard. Nevertheless, harmonisation of practice amongst the respective courts of criminal appeal is a worthy objective.

In a Federal system like our own there are numerous alternative ways to pursue this objective. Unlike some other areas of discourse in which Commonwealth/State relationships are institutionally fraught, the judiciary has an advantage that is quite special. There is a very real sense of collegiality amongst judges throughout Australia. This sense of collegiality has grown apace over recent years. Indeed, the very

establishment of a National Judicial College is a manifestation of that development and its activities, not least through conferences such as this, will reinforce it.

The sense amongst judges that they belong to a single national enterprise is a comparatively recent development and it is increasing every year. Perhaps its most recent manifestation is the renewed attention now being given to exchanges between courts. This is an idea whose time has come.

Some 15 or 16 years ago the Council of Chief Justices of Australia resolved that such exchanges ought be encouraged. The only actual practical consequence of that resolution of all of the Chief Justices of Australia was that there emerged an annual exchange between the Supreme Court of New South Wales and the Supreme Court of the Northern Territory, which continued for some years. There were other ad hoc exchanges.

Necessity brought about a particularly significant exchange when a judge of the Court of Appeal of New South Wales was a litigant before that Court. By agreement a special Court of Appeal was created consisting of the Chief Justice of Western Australia and appeal judges

from Victoria and Queensland. In the case of Western Australia there was an exchange in that the time of the Chief Justice sitting in New South Wales was repaid by a New South Wales appellate judge sitting in Perth. The Victorian Supreme Court did not take up the offer of a return exchange. In the case of Queensland, I was able to inform the Chief Justice that in the 1890s a judge of the Supreme Court of New South Wales had sat on an appeal in his court in a case in which the integrity of the then Chief Justice of Queensland had been called into question. Although it had taken a century for us to call up the debt, it was duly repaid.

Another example of systematic exchange arose when the Supreme Court of Western Australia was provided with funds for acting judges, to replace a judge who conducted a lengthy Royal Commission for the Commonwealth. A number of judges, including judges of the Supreme Court of New South Wales, sat in Perth.

In this and every other case of which I am aware, the judges who participated in the exchanges have found the experience not only fulfilling but stimulating. I have had a similar experience. A number of judges of my Court sit as judges of the Supreme Court of Fiji and I did so on one occasion. When we do, we sit with judges of the Federal

Court and, until recently, with judges from New Zealand. From my own personal experience this kind of interaction is invaluable.

As Justice French, with whom I sat in Fiji, described the result:

“There are many benefits to be derived from exposure to diversity in judicial work. One of them is a sharpened sense of what is essential and what is inessential in the law. This is an understanding which lawyers sometimes find difficult to attain. To the extent that Australian judges can be exposed to diversity within the national judicial system, they have the opportunity to be better judges and to make their courts better courts.”²⁵

The issue of expanding such exchanges on a systematic basis was put back on the agenda by Justice French some 18 months ago in a speech delivered to the Judicial Conference of Australia.²⁶ His Honour traced the history of exchanges and also outlined a range of options. His Honour’s proposal has led to the appointment of a committee, chaired by himself, by the Judicial Conference of Australia. I understand its Report is just about ready. I have no doubt it will prove influential.

In the meantime discussions have occurred between courts to implement such a system and the Attorneys General are considering the matter. One of the matters to which Justice French referred was the suggestion, made over a decade ago in a paper by recently retired Justice Kim Santow and a co-author for the creation of mixed jurisdiction intermediate appeal benches on matters of national significance.²⁷ There are a number of ways in which such a system could emerge: from ad hoc arrangements of the kind that have occurred from time to time; more formally by means of a protocol between two or more heads of jurisdiction and, finally, by parallel legislation of two or more jurisdictions. Recently Chief Justice Gleeson has expressed again his longstanding support for judicial exchanges.²⁸

Justice French appears to be quite confident that there is no inhibition arising from Chapter 3 of the *Commonwealth Constitution* with respect to the involvement of Commonwealth judges in such composite benches, which his Honour described as constituting “a de facto, ad hoc, intermediate National Court of Appeal”.²⁹ I certainly hope he is right, although the authors of the eminently sensible cross-vesting scheme, which operated to universal acclaim for a decade, were no doubt similarly confident.

As the pressures on the High Court inevitably grow, the need for some kind of national intermediate court of appeal arrangement will increase. An appropriate place to start this kind of development is with sentencing for Commonwealth offences. There may also be matters of some significance with respect to the substantive criminal law of the Commonwealth, but which are not of sufficient importance to justify special leave of the High Court. However, it is clear that the problem, if there be one, of consistency in sentencing is of that character.

Speaking on behalf of the Supreme Court of New South Wales I have no difficulty in entering into arrangements with other States to have experienced criminal judges from those States sit as acting judges of the Supreme Court of New South Wales Court of Criminal Appeal, on days when we list criminal appeals with respect to Commonwealth offences, including sentence and Crown appeals. Furthermore, on those occasions, and there have been a number in recent times, when an issue has arisen which is of sufficient significance for us to sit a five judge bench, I would welcome the participation of a judge from another State in such a bench. I have every reason to believe that the Attorney General of New South Wales would be prepared to support such an arrangement by ensuring the appointment of persons that I nominate to him, as acting judges of the Supreme Court for a defined period. I would

expect that, in any such case, there would be an exchange in which a judge of the Supreme Court of New South Wales would reciprocate and sit in the other State for the same period on Commonwealth criminal appeals.

I have no doubt that this system can work and that it would be welcomed by the judiciary throughout Australia. It could be placed on a more formal basis by protocols between heads of jurisdiction. Eventually, if thought desirable, the system could be institutionalised by parallel legislation. It may, however, be best to allow the system to develop before adopting a legislative structure. However, there may be some need for minor technical amendments to facilitate the process, although that has not inhibited past exchanges.

It was in part the recognition of the need for some kind of harmonisation of sentencing practice that led the Australian Law Reform Commission in its Discussion Paper on its reference about Sentencing of Federal Offenders to raise the possibility that the Federal Court of Australia, in addition to obtaining for the first time a significant criminal jurisdiction with respect to certain matters, could also exercise an appellate jurisdiction with respect to all Federal criminal offences. In my opinion, constituting a court with judges, few of whom would have had

any experience in the administration of criminal justice with respect to the range of offences on which they would be asked to sit on an appeal, is institutionally unsound. No doubt for that reason the ALRC did not make any such recommendation in its final report. Of course, there could be no objection if the Commonwealth chose to invest the full range of criminal jurisdiction on the Federal Court.

The issue that was sought to be addressed by this original proposal can be effectively resolved by harnessing the sense of national collegiality of judges throughout Australia in a programme of systematic exchanges, directed particularly to harmonisation of practice with respect to Commonwealth criminal offences. Once the system is established for such a purpose I have every reason to believe that Justice French is right and that it will grow and extend to a range of other matters. For purposes of this paper it is sufficient to note that such exchanges can significantly assist the process of applying the principle of consistency when sentencing for Commonwealth offences.

We are probably far away from a formal institutionalised national intermediate court of criminal appeal. There is one circumstance in which such a body would need to be created. If a policy decision were made that a system of guideline judgments was appropriate, that could

only be established by Commonwealth legislation and the creation of an institution to undertake that task. That institution could be unilateral or collaborative, but it would have to be national.

Let me conclude with a note of caution about sentencing statistics. I do not want to spoil tomorrow's party but, important as such information is, in the end the principle of individualised justice requires the exercise of a broad based judgment. The sentencing task is an art, not a science. It is well to remember the warning given by Socrates about the introduction of literacy in the ancient world. Plato in *The Phaedrus* recalls Socrates words:

“ ... [F]or this discovery of yours will create forgetfulness in the learners' souls, because they will not use their memories; they will trust to the external written characters and not remember of themselves. The specific which you have discovered is an aid not to memory, but to reminiscence, and you give your disciples not truth, but only the semblance of truth; they will be hearers of many things and will have learned nothing; they will appear to be omniscient and will generally know nothing; they will be tiresome company, having the show of wisdom without the reality.”

The sentencing task continues to require the reality of wisdom, not merely the show. It can never be forgotten that wisdom requires sentences to differ. Inconsistency does not exist merely because there is difference.

¹ *Bendix Autolite Corp v Midwesco Enterprises Inc*, 486 US 888 (1988) at 897.

² *R v Geddes* (1936) 36 SR (NSW) 554 at 555.

³ See *R v Whyte* [2002] NSWCCA 343; (2002) 55 NSWLR 252 at 276–282 [147]–[189].

⁴ *Lowe v The Queen* (1984) 154 CLR 606 at 610–611.

⁵ *Mann v O'Neill* (1997) 191 CLR 204 at 245.

⁶ *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at 591 [6].

⁷ *Veen v The Queen (No 2)* (1988) 164 CLR 465.

⁸ *R v Oliver* (1980) 7 A Crim R 174 at 177.

⁹ *R v Bloomfield* (1998) 44 NSWLR 734 at 739.

¹⁰ Judicial Commission of New South Wales, “The Use and Limitation of Sentencing Statistics” (Sentencing Trends and Issues No 30, 2004).

¹¹ See Robin Auld, *Review of the Criminal Courts of England and Wales* (2001) ch 11 at 603, accessible at <<http://www.criminal-courts-review.org.uk/>>.

¹² Paul de Jersey, “Launch of the Queensland Sentencing Information Service” (Speech delivered at the Banco Court, Supreme Court of Queensland, Brisbane, 27 March 2007), accessible at <<http://archive.sclqld.org.au/judgepub/2007/dj270307.pdf>>.

¹³ *Wong* supra at 591 [7].

¹⁴ See *R v Jurisic* (1998) 45 NSWLR 209 at 229.

¹⁵ See e.g. *Maxwell v R* [2007] NSWCCA 304 at [30].

¹⁶ See *R v Fidow* [2004] NSWCCA 172 at [20]; Judicial Commission of New South Wales, “Common Offences and The Use of Imprisonment in the District and Supreme Courts in 2002” (Sentencing Trends and Issues No 30, 2004) at pp 3-4.

¹⁷ Judicial Commission of New South Wales, “Sentencing Dangerous Drivers in New South Wales: Impact of the *Jurisic* Guidelines on Sentencing Practice” (Research Monograph No 21, 2002) at 33.

¹⁸ Judicial Commission of New South Wales, “Sentencing Robbery Offenders since the *Henry* Guideline Judgment” (Research Monograph No 30, 2007) at 149.

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- 19 Judicial Commission of New South Wales, "Impact of the High Range PCA Guideline Judgment on Sentencing Drink Drivers in New South Wales" (Sentencing Trends and Issues No 35, 2005).
- 20 See J J Spigelman, "Sentencing Guideline Judgments" (1999) 73 *Australian Law Journal* 876 at 878–879.
- 21 See Judicial Commission of New South Wales, "Trends in the Use of Fulltime Imprisonment 2006–2007" (Sentencing Trends and Issues No 36, 2007).
- 22 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) at [20.24].
- 23 Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 15 (1980).
- 24 See Guy Greene, "The Concept of Uniformity in Sentencing" (1996) 70 *Australian Law Journal* 112 esp at 114.
- 25 See R S French, "Judicial Exchange: Debalkanising the Courts" (2006) 15 *Journal of Judicial Administration* 142 at 144.
- 26 Ibid.
- 27 See G F K Santow and M Leeming, "Refining Australia's Appellate System and Enhancing its Significance in our Region" (1995) 69 *Australian Law Journal* 348.
- 28 See Michael Pelly, 'Gleeson Calls for Court Time Limits', *The Australian* (Sydney), 1 February 2008.
- 29 French *supra* at 161.

OPENING OF LAW TERM DINNER
LAW SOCIETY OF NEW SOUTH WALES
THE HONOURABLE JAMES SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY, 29 JANUARY 2008

Last week I delivered the annual Australia Day Address. My topic was the Bicentenary of the Coup of 1808 popularly, but inaccurately, known as the “Rum Rebellion”. My central theme was the significance of this event, the only military coup in Australian history, for the establishment of a robust tradition of the rule of law in Australia.

Plainly rebellion against legitimate authority, for whatever reason, was a direct challenge to the rule of law. More significantly the subsequent experience of two years under military government was such that the significance of the rule of law was established on the basis of direct experience in Australia, not simply on the basis of the intellectual heritage of 18th century England.

After the Coup substantial sections of the community lost any sense of security in their person and property, particularly in the first six months. The distortions in the legal system during this period were such

that it could be said that the rule of law was suspended. Magistrates loyal to Bligh were dismissed. Other loyalists were subject to a parody of justice that was no more than malevolent revenge. They were convicted on bogus charges and sent to work in the coalmines at Newcastle. The civil court processes were abused.

For the entire period of two years of illegal government, every appointment, including to judicial office, was clearly invalid. So was every governmental decision, including every exercise of judicial power. Uncertainty was ubiquitous. Personal and property rights were institutionally insecure.

Governor Lachlan Macquarie took over on 1 January 1810 with his own 73rd Regiment to enforce the removal of the New South Wales Corps. He invalidated the appointments and the decisions of the rebel administration, including the appointments to, and the decisions of, the courts. On the basis of necessity, perfected orders were not reopened, as applied most poignantly to a number of invalid death sentences that had been carried into effect. Some redress was, however, available for the past illegal exercise of governmental power. For example, one of those banished to the coalmines sued successfully for false imprisonment.

The rule of law was emphatically restored. It has only been significantly challenged in Australia on one occasion since.

That occurred, perhaps understandably, over an issue that incited the passions of the populace more than any other, the issue of race. The intensity of the hostility to Chinese migration in the mid to late 19th century, particularly virulent on the gold fields, led to a direct confrontation between the Government of New South Wales and the Supreme Court in 1888.

The government ordered its police force to prevent the disembarkation of Chinese passengers on a number of ships that arrived in Sydney Harbour in mid 1888. Two Chinese, one an alien and the other a returning resident with a statutory certificate of exemption from the poll tax, sought habeas corpus from the Supreme Court to prevent police restraining their disembarkation.ⁱ A submission on behalf of the government, to the effect that the police were simply acting upon orders, was summarily rejected. That after all was the purpose of a writ of habeas corpus. “No man’s liberty”, said Chief Justice Darley, who

referred to an identical claim made by Charles I, “would be safe for one moment were it held that this was sufficient ...”.ⁱⁱ

The then Premier, Sir Henry Parkes, no stranger to stirring up popular prejudice for political advantage, dismissed the Supreme Court decision as “technical” and asserted that “the law of preserving the peace and welfare of civil society” must prevail.ⁱⁱⁱ He directed the police to continue implementing the government policy and to ignore the court orders.

Notwithstanding considerable debate in the Parliament and the media, the government maintained its defiance of the law for a considerable period. The Court reiterated the basic principles of the rule of law, and the necessity for the government to comply, in a subsequent unanimous judgment upon the application of another Chinese immigrant.^{iv}

As Chief Justice Darley said with respect to the events that had occurred:

“We are not aware that such a course of conduct as has been pursued in the matter of these Chinese has ever before been adopted at any period of our history. No

sovereign, no matter how tyrannically inclined, no government, however unconstitutional in its acts, has ever ventured to act in open opposition to, and in disregard of the law, when that law was once pronounced by the duly constituted authority. Unfortunately there have been times when by the appointment of venal judges those in authority have sought to twist the law of the land to suit their own purposes, but never has the law, once pronounced, been set at defiance. The danger of the course here pursued is obvious. We say nothing of the evil example set to the weak and thoughtless in the community, pernicious as this is in itself.”^v

The government backed off and the detainees were released although Parkes, as was his want, did so with politically motivated words of defiance.

I should note that some months later, without the same kind of confrontation with its executive government, the Supreme Court of Victoria reached the same conclusion on the interpretation of the relevant legislation, which was virtually uniform amongst the States on the eastern seaboard. It did so, however, without reference to the prior

New South Wales decisions.^{vi} There is now a sense of national collegiality amongst Australian judges, so that this kind of snotty indifference is unlikely to occur today. In any event, the High Court has indicated that it should not.

The fact that matters of racial and ethnic identity were regarded with such passion that they could lead to the only serious challenge to the rule of law in Australian history since the Coup of 1808, is a matter that should give us all pause. There is no reason to believe that the people of this, or of any other, nation are now so enlightened that these kinds of passions cannot be stirred again. There are too many examples in history of such xenophobia leading to catastrophe for us not to remain vigilant in this regard.

As is so often the case, perhaps the best short description of the evils of racial and ethnic intolerance was written by William Shakespeare. He wrote it in a form that was not definitively attributed to him for centuries. Furthermore it is not found in any of his plays or poems and, accordingly, is not contained in anthologies nor taught in literature courses. It is a passage that is very little known.

There is in existence a single manuscript of a play entitled *Sir Thomas More* which was written in at least six different hands in the period 1591-1593. A passage of a few pages, referred to by Shakespearean scholars as Hand D, is attributed to Shakespeare. The play was rejected by the censor of the day, not because any positive depiction of More was impermissible under a Tudor monarch, but because of its reference to the London mob rioting in hatred of foreigners. In the years 1592-1593 there had been a number of riots against foreigners, which the authors of the play were obviously intending to exploit, but the censor feared the play would aggravate the existing tensions. It was banned, never finished and its first recorded performance was in 1994.^{vii}

The occasion depicted in the play, to which the censor objected, was what became known as the “Evil May Day” of 1 May 1517, when the London mob violently attacked foreigners throughout the city in an outburst of what we would today call ethnic cleansing. Thomas More was then the Under Sheriff for the city and played a role in suppressing the riot. It was in this role that he was depicted in that part of the draft play attributed to Shakespeare.

More asks what it is the rioters want and is told that they want the strangers to be removed. More replies in words which ring down the ages:

“Grant them removed, and grant that this your noise
Hath chid down all the majesty of England;
Imagine that you see the wretched strangers
Their babies at their backs, with their poor luggage,
Plodding to th’ ports and coasts for transportation,
And that you sit as kings in your desires,
Authority quite silenced by your brawl,
And you in ruff of your opinions clothed;
What had you got? I’ll tell you. You had taught
How insolence and strong hand should prevail,
How order should be quelled – and by this pattern
Not one of you should live an aged man;
For other ruffians, as their fancies wrought,
With selfsame hand, self reasons, and self right
Would shark on you; and men like ravenous fishes
Would feed on one another.”

I know of no passage that more effectively depicts the dangers of ethnic cleansing and the role of the rule of law in controlling the kinds of

passions that give rise to ethnic, religious or racial hatred. The “ravenous fishes” metaphor would resurface in the mouth of Cardinal Wolsey in Shakespeare’s *Henry the Eighth* (I.ii.79). It was to Wolsey that More had appealed for assistance to stop the 1517 riots.^{viii}

The rage associated with ethnic cleansing is well captured in the image of self-devouring humanity. It is an image repeated in *Lear*, *Othello*, *Troilus and Cressida* and the very phrase “Would feed on one another” appears in *Coriolanus* (I.i.184-8). That is the result when mob rule replaces the rule of law.

The passage deserves to be better known.

Sir Thomas More is, of course, one of history’s exemplars of commitment to the rule of law. This is best reflected in the well-known passage from Robert Bolt’s *A Man For All Seasons* in which Sir Thomas More rejects the religious fervour of his future son in law. More asserts that he knew what was legal, but not necessarily what was right, and would not interfere with the Devil himself, until he broke the law. The following exchange then occurred:

“ROPER: So now you give the Devil benefit of law!

MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: Oh? And when the last law was down, and the Devil turned round on you – where would you hide Roper, the laws all being flat? This country's planted thick with laws from coast to coast – man's laws, not God's – and if you cut them down ... d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake."

This imagery of the law as a protection from the forces of evil is an entirely appropriate one. Each society has its own devils, some real, some imagined. The forest of laws that are planted under the rule of law protects us from those devils.

One of the principal reasons why the judicial task is often thankless and prone to controversy is precisely because we are obliged to protect the legal rights of unpopular people. The judicial oath requires no less.

When, as I have shown, it was popular passion, indeed outrage, that gave rise to the only serious challenge to the rule of law in Australia for two centuries, the words of Shakespeare that I have quoted are of particular resonance on the bicentennial of the Coup of 1808. Often it is the law alone that can prevent a situation in which, to repeat:

“... men like ravenous fishes would feed on one another.”

This a task in which judges are all engaged, perhaps less dramatically than on the occasions to which I have referred. Nevertheless, like any safety system it must be well maintained in order to operate when it is needed. I have no doubt that the Australian judiciary satisfies this requirement.

Like so many things of fundamental importance Australians take for granted the strength of our institutions for the administration of justice. The virility of our legal profession and the quality and integrity of the judiciary is of the highest order. This has come to be increasingly recognised throughout the Asia Pacific region.

Over the last seven or eight years, the judges of the Supreme Court together with the judges of other courts, have engaged with the judiciary of Asia in a manner which will prove to be of long term advantage to the profession and also to the nation. Bilateral exchanges have expanded significantly, perhaps most notably with China, but also with most other nations in the Asia/Pacific Region.

Every year two or more judges of the Supreme Court have lectured at the National Judges' College in Beijing. I have initiated national judicial delegations to the Supreme Courts of Japan and India. It is rare for a month to go by without a judicial delegation from China. In a few weeks we will receive delegations from Bangladesh and Nepal.

In discussions I have had with judges from Singapore, Malaysia and Hong Kong, it has been made clear to me that those jurisdictions increasingly refer to Australian authority in preference to English authority, which they believe is now influenced by European law to an extent which makes it inapplicable to their common law traditions.

Most of you will have heard me assert, more than once, the significance of the longevity of our institutions for the administration of

justice. One example of this is in commercial litigation. In 2003 we celebrated the centenary of our commercial list.

In an era when commercial litigation increasingly has an international dimension, judicial exchanges in the region have become essential. A further initiative of the Supreme Court will come to fruition in a few months time, when the first of what I expect will be a regular conference of commercial and corporations judges from throughout the region will be held in Sydney. In a joint venture with the High Court of Hong Kong, the Supreme Court of New South Wales will host the first judicial Seminar on Commercial Litigation. The second seminar will be held in Hong Kong.

In addition to a five judge delegation from Hong Kong, there will be a seven judge delegation from China led by a Vice President of the Supreme People's Court including, at my express suggestion, commercial judges from Guangzhou and Shanghai. Representatives will also be coming from India, Japan, Papua New Guinea, Malaysia and Singapore and I expect further acceptances in the near future.

This will be a hands-on conference designed to exchange information about best practice, with a view to acquiring ideas for

improving our own practices. It is also, however, an important source of information for Australian judges who have to make decisions in commercial contexts which increasingly involve transnational elements and cross-jurisdictional disputes. We are now often called upon to either assume or decline jurisdiction, or to issue anti-suit injunctions. These decisions turn on the practices in, and quality of the judiciary of, other jurisdictions with respect to disputes that, in accordance with the universal long arm jurisdiction rules, could be heard in a number of different nations. The more we know about other practices and procedures and about the judges in these other nations, the better informed our judgments will be.

This kind of engagement is only possible so long as we maintain the vigour of our profession and of our judiciary. It is also necessary to maintain the quality of our human and physical infrastructure so that we can continue to play a critical role in the administration of justice throughout Australia and in the Asian region.

It has become common for the judges and professional bodies from Australian jurisdictions outside New South Wales to complain about the amount of work, particularly commercial work, which could have gone to their firms and been litigated in their courts but which is in fact

attracted to Sydney firms, counsel and courts. That issue was recently described by one of those senior judges from another State at a judges conference as the problem of the “Sydney vortex”. However, as the philosopher put it: “That is not my problem”.

What we have to do in this State is simply to continue to perform our functions with a high level of quality, learning, efficiency and energy which is increasingly recognised, not only throughout Australia but throughout the Asian Pacific region. How that performance affects parties who are in a position to choose where to go, should not concern us as judges or lawyers. However, as citizens we naturally wish to live in a vibrant, progressive and prosperous city.

In a service economy, Sydney has become a global city and a regional financial centre. Commercial legal practice and commercial dispute resolution – whether in courts or by arbitration and mediation – is an essential feature of a commercial city. In this regard Sydney is the only Australian city that can compete with Hong Kong, Singapore and Shanghai. If we try to spread the work around Australia, no one will get anything.

Sydney has always been the most globally minded of Australian cities. For three quarters of a century after federation, Australia lapsed into protectionism. That policy was specifically directed to overcoming the free trade tradition which was then strongest in this city. It is a tradition that has re-emerged with vigour and the legal profession of this State is an important part of it.

The pressures and requirements of commercial litigation continually change. All of us involved, whether as lawyers or judges, must remain able to adapt our practices and procedures to these changes. The experience, energy, expertise and professionalism of all those engaged in commercial dispute resolution in this city – and I include not just lawyers and judges, but arbitrators, expert witnesses and the highly sophisticated clients with whom we deal such as underwriters and investment bankers – represents a centre of excellence which is already economically significant. I am quite confident that we can build on this base.

ⁱ See *Ex parte Lo Pak* (1888) 9 LR (NSWR) L 221; *Ex parte Leong Kum* (1888) 9 LR (NSWR) L 250; J M Bennett *Colonial Law Lords: The Judiciary in the Beginning of Responsible Government in New South Wales*, Federation Press (2006) pp 28-41.

ⁱⁱ *Lo Pak* supra at p 235.

ⁱⁱⁱ Eric Rolls *Sojourned: The Epic Story of China's Centuries Old Relationship with Australia* University of Queensland Brisbane (1992) at p 481 and see 487.

^{iv} See *Ex parte Woo Tim* (1888) 9 LR (NSWR) L 493.

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- v Ibid at 495- 496
- vi See *Toy v Musgrove* (1888) 14 VLR 349.
- vii See Stephen Greenblat *Will in the World: How Shakespeare Became Shakespeare*, W W Norton & Co, New York (2004) at 262-264. See also the Wikipedia entry “Sir Thomas More (play)” [www.wikipedia.org/wiki/Sir_Thomas_More_\(play\)](http://www.wikipedia.org/wiki/Sir_Thomas_More_(play)); Ron Rosenbaum “A Hand for Applause Books: A Hand for ‘Hand D’” 10 May (1999) *The New York Observer* accessible at www.observer.com/node/41447.
- viii Jasper Ridley *The Statesman and the Fanatic: Thomas Wolsey and Thomas More*, Constable, London (1982) pp 78-79.

BICENTENARY OF THE COUP OF 1808

THE ANNUAL AUSTRALIA DAY ADDRESS

BY THE HONOURABLE JAMES SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

SYDNEY 22 JANUARY 2008

Australia Day this year marks the bicentenary of the only military coup in Australian history. Popularly, but inaccurately, known as the “Rum Rebellion”, the Coup of 1808 played a crucial role in establishing a firm foundation for the rule of law in this nation. On an anniversary such as this, it is appropriate to pause and consider how and why it was that our ancestors created the institutions which we take for granted and which explain the long-term stability and prosperity that so few nations have been able to achieve.

Just before sunset on 26 January 1808, the twentieth anniversary of the arrival of the First Fleet, over 300 soldiers of the New South Wales Corps, the 102nd regiment of the British army expressly created to protect the new colony, gathered on the parade ground in front of their barracks, of which the last remnant is now Wynyard Square. The officers of the Corps had reinforced their regimental esprit de corps at a

rare full dress dinner at the barracks two nights before the coup. The next day they decided to arrest and depose Governor William Bligh, fourth Governor of New South Wales, who already had one mutiny on his record.

The soldiers were led in formation from the parade ground by their commander, Major George Johnston, with drawn sword in one hand and the other arm in a sling, an injury caused when he fell out of his carriage on the way home after the regimental dinner. It was one of Sydney's first drink driving accidents.

Guns loaded, bayonets fixed, sweltering in their scarlet woollen coats, with banners flying and the regimental band playing *The British Grenadiers*, the column marched down High Street, since renamed George Street, across the new stone bridge spanning the Tank Stream and up Bridge Street to Government House where the Museum of Sydney is now, at the base of Governor Phillip Tower.

This was all for show, no doubt designed to impress and perhaps to intimidate the general populace. Bligh's personal guard had already been suborned and the two naval vessels under his command were out of port. There was no possibility of resistance nor, as Bligh was taken

by surprise, of escape. He was kept under house arrest for a year and it was another year before Governor Lachlan Macquarie arrived with his own 73rd regiment to enforce the removal of the NSW Corps.

One of the oldest and most debated questions of political philosophy is the identification of the circumstances when resistance to established authority is permissible. Whether or not that was so in Sydney two hundred years ago has divided contemporaries and historians. Personal values and beliefs often influence the interpretation of the past and the role of the NSW Corps has not been immune to such influences.

At the risk of over simplification, the history of the Coup of 1808 has been written in two distinct ways. Each emphasises one or other of two sets of facts, selected from the limited pile of contemporary records as if they were iron filings into which a magnet had been dipped, so that some facts gather at one pole and different facts at the other pole, with little in between. The differences in interpretation are as divergent as the north and south poles of a magnet.

At the north pole the emphasis is on the fact that the rebels had become a kleptocracy, motivated by crass avarice. Bligh's policies threatened their wealth. At this pole, John Macarthur, a former officer of the Corps who had become one of the wealthiest men in the colony, is cast as a conniving puppet master and Bligh's personal defects are played down. This interpretation seems to appeal to those who have faith in Government enterprise and an egalitarian inclination to support, as Bligh did, the small farmers of the hapless settlement on the Hawkesbury flood plain.

However, one person's idea of greed is another's commercial incentive. At the south pole the primary focus is on the fact that the officers of the NSW Corps provided much of the entrepreneurial drive in trade and agriculture that was necessary to enable the colony to succeed. Bligh's policies threatened that success. His was a static vision of a government-dominated society serviced by yeoman farmers, in contrast with the dynamism of Sydney based commerce reaching across the South Pacific to trade in sandalwood, seal skins, whaling and wool. Adherents to this approach emphasise Bligh's character and policy defects and play down the cupidity and cunning of the rebels. This pole appears to appeal to those who have faith in private enterprise and are unsympathetic to government control.

The analysis at the south pole appears to have been the judgement of the only systematic contemporary investigation of the events, the court martial which let Johnston, the commanding officer, off with a mere discharge, expressed to be, and universally regarded as, exceptionally lenient.

Both perspectives are open. This is one of those historical controversies that is not capable of final resolution. The historical record – that pile of factual iron filings – largely consists of assertions by those with a vested interest in the outcome, as is inevitable with an event that polarised a small community. In such circumstances, it is understandable why a particular historian can find a reason not to accept something said by anybody.

Three matters must be borne in mind when assessing the body of writing on this topic.

First, any explanation of why the coup occurred can look like justification or condemnation. The distinction between explanation and judgment has proven difficult to maintain.

Secondly, when assessing the venality and corruption of the officers it is necessary to avoid that imperialism of the present by which today's values are projected back on a different era. What we would regard today as corruption, such as officers exploiting access to regimental finances for personal gain and preference dependent on personal patronage, was then regarded as normal conduct. Eighteenth Century British politics and public administration was, by our standards, profoundly corrupt. There was no reason to expect the early Sydney colony to differ.

Finally, it is necessary to allow for a fundamental cultural difference between that time and our own. That was an age of status and anyone aspiring to the rank of a gentleman behaved in ways quite incomprehensible to those who have become more accustomed to venality as the principal motive for action. Much conduct was then prescribed, as powerfully as by religious rule, by the code of honour, to which all gentlemen had to subscribe. The significance of this code is manifest in the long tradition of duelling where, for centuries, perfectly rational men risked, and often enough lost, their lives over the most trivial of aspersions on their character. Part of the explanation for the Coup of 1808 lies in the operation of this code.

The first thing that needs to be said about the so-called “Rum Rebellion” is that it had nothing to do with rum. The appellation was conferred some fifty years after the event by an activist for a teetotal society. It was popularised by H V Evatt as the title of the series of lectures he delivered at the University of Queensland for the 150th anniversary of the Coup.¹

In the early years of the settlement – particularly during the two years between Governor Phillip’s retirement on health grounds in December 1792 and the arrival of his successor, when the commanding officer of the Corps acted as Governor – alcohol, generically referred to as rum, was a readily tradeable item in the barter-based, rudimentary economy operating beyond the bureaucratic, requisition system at the government store. Rum became a substitute for currency. The shortage of currency in the colony was aggravated by the fact that the agent appointed by the British Government to operate the colony’s accounts from London was in the process of embezzling some 80,000 pounds.² The officers’ early trading success was based on the fact that they were paid in London and could draw bills which would be honoured there. They alone, in the early years, had access to sterling for purposes of trade.

In those years the trading cabal, which operated as an extension of the officers' mess, was able to profitably exploit a monopoly position in rum and other goods. That was no longer the case in 1808. By then, competition ensured that monopoly profits were substantially reduced, although high prices were retained by the penumbra of illegality that surrounded the trade.

Some officers had built up capital during the period of exploitation when mark-ups were high and by preferential access to governmental largesse such as land grants, cheap labour by assignment of convicts and supply of provisions, livestock and equipment delivered for government purposes at the cost of the British taxpayer. In 1808, many officers retained an interest in trade, which had become more diverse and much more competitive, but their principal economic interests now lay in the land, both acres of land for agriculture, granted at no cost and without compensation to the traditional owners, and urban leaseholds in Sydney, where one subdivisible block had changed hands for the extraordinary amount of 900 pounds just before Bligh's arrival.

As I wish to highlight one aspect of the coup – its implications for the rule of law – it is appropriate to focus on the urban leases.

Governor Phillip intended to reserve the land between, roughly, Hunter Street and the water for public purposes. It was the first attempt at town planning in Sydney. Cutting into this reserved area, during Phillip's time, was a track formed by the passage of traffic behind the row of tents that the officers of the First Fleet had pitched on arrival, soon replaced by rudimentary huts, on the western bank of the Tank Stream that flowed into Sydney Cove, now Circular Quay.³ That accidental track became George Street and this fortuitous origin, rather than Phillip's conception, proved to be the model for the grand Sydney tradition of urban planning. The only remnant of Phillip's plan around the original Government House is Macquarie Place.

Phillip's successors gradually abandoned his plan. Leases were granted, at first only for short periods. However, the third Governor, Phillip King, attempted to regularise the haphazard system and to establish clearly defined property rights: creating a register of dealings, quadrupling the rent and granting a large number of leases, many for periods of 14 years.⁴ His successor, William Bligh, wanted to return to critical aspects of Phillip's original plan – clearing grand spaces around Government House and the church – but King's leases stood in the way.

Bligh set out to use all the wide discretionary powers at his disposal as Governor of a penal colony to achieve his objective. He refused to issue any more leases, announced that he would not approve building on existing leases, ordered residents to surrender possession of homes, ordered the demolition of structures built without approval and threatened to demolish others. Intending to revoke the leases, but unsure of his power to do so, he sought instructions from London.⁵

The wife of a commercially successful emancipist wrote complaining:

“From some he took good houses and gave them bad ones. From others he took their houses and turned them into the street and made them no recompense whatever. Some he stopped building. Others he made make improvements against their inclinations and on the whole endeavoured to crush every person as much as possible.”⁶

When one occupant of a leasehold residence in the environs of Government House objected to Bligh’s order to remove it, asserting that he could not be forced to do so by the laws of England, Bligh allegedly exploded:

“Damn your laws of England! Don’t talk to me of your laws of England. I will make laws for this colony, and every wretch of you, son of a bitch, shall be governed by them. Or there (pointing over to the gaol) is your habitation!”⁷

The lease of land next to the gaol was held by Major Johnston, the commanding officer of the Corps. It was one of those Bligh wanted to revoke.

The Coup of 1808 was the result of a range of factors including various aspects of commercial self-interest. The traffic in rum was of little if any significance, except to some of the non-commissioned officers. Much more important, amongst multiple causes, was the conflict between real estate developers and the public interest over the exploitation of prime urban land near the water. Nothing could be more “Sydney” than this.

The tension over urban leases was one of a number of conflicts in which Bligh sought to reverse practices permitted by his less resolute predecessors. He made only three land grants in 18 months and issued no leases; he pardoned only 2 convicts in 18 months; he cracked down on profiteering and enforced import restrictions. His policies undermined

the wealth and the prospects of that part of the local elite with access to capital. On a number of occasions he deployed his authority over the rudimentary judicial system to attack those he opposed and intervened directly in court cases to achieve his ends.

To any self-respecting Englishman, the kind of untrammelled executive power that Bligh exercised was an abomination. At the very core of the national polity was the bundle of procedural and substantive principles known as the rule of law, which required executive authority to be based on, and subject to, pre-existing rules. Government by whim or caprice in the exercise of an absolute discretion, was tyranny, typical of Continental nations and an anathema to the English.

The broad discretionary powers of the Governors of NSW may have been necessary vis-à-vis the convicts. However when applied to free settlers and emancipists, they were reminiscent of the prerogatives claimed by the Stuart kings. The historical inheritance of the civil war and of the Glorious Revolution of 1688 was the dominant ideology of 18th Century Britain and, beyond the penal regime, provided the civic discourse of early Sydney.⁸

Bligh's conduct may have been accepted from the chief warden of an open-air prison or the captain of a ship – the culture of authority in both created an expectation of unquestioning and immediate execution of orders. Bligh, as an accomplished naval commander and a brilliant navigator, brought this expectation to his role as Governor. However, such conduct was unacceptable when applied to free subjects, who constituted the majority of the 7000 persons in the colony. Indeed there were serious doubts, privately expressed by Jeremy Bentham but known to some settlers, about whether, in the absence of express Parliamentary authority, the Governor could lawfully exercise such authority over free men and women at all.⁹

Whatever his formal powers may have been, Bligh undermined what the local elite regarded as property rights, perhaps most clearly with respect to the urban leases. This was fundamentally inconsistent with the universal understanding of the rights of free Englishmen.

Bligh, of course, relied on his formal authority and had the personal strength to exercise powers that his two predecessors, Hunter and King, had compromised. They, Bligh believed, had permitted private men to grow wealthy at the expense of the Crown. He was determined to reassert the public interest as he saw it and to act strictly

in accordance with his instructions. In most respects his approach to governing was disciplined and purposeful. However, even in a small settlement like Sydney of the day, where the petty rivalries, gossip, bickering, slights and vendettas of village life were all manifest, effective government required an understanding of communal expectations. Bligh proved as oblivious to the fears and aspirations of the Sydney elite as he had earlier been to the delights that the crew of *The Bounty* had experienced in Tahiti.

The scene was set for a conflict of institutional cultures between that of the navy, where authority was typically exercised in the confined autocracy of a ship, and that of the army, where the exercise of authority often required interaction with a broader community.

Those adversely affected by Bligh's policies included many with no association with the NSW Corps. However, no coup could have occurred without the united resolve of the current officers. Their commercial interests, which were engaged to varying degrees, cannot fully explain the Coup. The risk of retributive action from London for such gross insubordination must have been regarded as high and any commercial advantage would, at best, be short term.

Bligh had also stirred the acute status anxieties of the officers by challenging their individual and collective reputation. This was a serious affront under the code of honour which they, as members of the caste of gentlemen, regarded as the most important social bond of their lives.¹⁰ Bligh offended members of this caste by his conduct, by his bearing and, perhaps most of all, by his language.

The officers of the NSW Corps, as well as most free settlers, were attracted to the colony precisely because their family background did not enable them to live as a gentleman should at home. Commissions in the army were then bought and those who signed up for the NSW Corps could not afford to buy a commission in one of the more fashionable regiments. Nor were there opportunities for advancement in the peacetime army during the interlude between the American Revolution and the Napoleonic Wars. The economic and, therefore, the social status of the officers was never secure.

In one of the books published in 2005 to mark the bicentenary of the Battle of Trafalgar, the perceptive author describes the social group from which the NSW Corp's officers came:

“Social and financial security, which are deeply connected to the question of honour, had a shaping effect on the officer corps of the British fleet at Trafalgar. They were men on edge, not certain of the place they held in the hierarchy for which they were fighting, with enormous rewards in terms of money and status dangling before their eyes, but the equal and opposite possibility of failure, ignominy and poverty if chance did not favour them or their connections did not steer them into the path of great rewards. The quartet of honour, money, aggression and success formed a tight little knot at the centre of their lives, the source at times of an almost overwhelming anxiety.”¹¹

The author goes on to indicate the vulnerability of such men, in words directly applicable to the officers of the NSW Corps, most of whom had a precarious hold on the status of gentleman:

“A body of officers coming from an uncertain and ill-defined social position needs to rely on the idea of their honour to establish their place in the social hierarchy ... [W]hen, if you defined yourself as a gentleman, you had nothing else, as so many did not, honour was what you had. It was membership of a moral community, which is why the

language used is so critical. Your membership was defined by the respect with which other people treated you.”¹²

Bligh proved viscerally incapable of treating other gentlemen in the language, or with the respect, that the code of honour required. Devoid of tact, quick tempered, infuriated by insubordination or incompetence, incapable of compromise, prone to indulge in mockery and abuse, Bligh failed to respect the boundary between criticism and derision.¹³

Manning Clark described him thus:

“If anyone dared to object or remonstrate with him, he lost his senses and his speech, his features became distorted, he foamed at the mouth, stamped on the ground, shook his fist in the face of the person so presuming, and uttered a torrent of abuse in language disgraceful to him as a governor, an officer and a man”.¹⁴

Bligh did not only attack the commercial interests of the officers of the NSW Corps. He challenged the core of their personal identity.

John Macarthur – often referred to as the creator of the Australian wool industry, although his wife Elizabeth deserves the title more than he – precipitated the crisis. He challenged Bligh to what was, in effect, a political duel in defence of both his honour and his money. Macarthur's wealth was regarded by Bligh as the most egregious example of private profit at public expense. He was determined to confine and reduce it.

Bligh refused to make a major land grant that Macarthur thought he had negotiated in London. His tone was dismissive: "Are you to have such flocks of sheep and such herds of cattle as no man ever had before. No sir!"¹⁵ Bligh refused to intervene when Macarthur's commercial expectations over a promissory note were rejected in favour of a wealthy emancipist, who happened to be Bligh's manager on the property granted to Bligh on his arrival by Governor King. On Bligh's express orders, his officers dismantled a fence that Macarthur erected on one of his urban leases, part of which he had, defiantly and ostentatiously, personally erected in their presence. Two stills that Macarthur sought to import, contrary to the policy of permitting alcohol to be supplied only with the Governor's permission, were declared forfeit and Bligh refused him permission to recycle the copper boilers for other use.

Macarthur was as vituperative, domineering, short-fused and arrogant as Bligh, but had an unscrupulous shrewdness, indeed subtlety, which Bligh both lacked and could not discern in others. He chose the venue for the final confrontation with care.

The criminal court of that era was constituted by six military officers, chaired by the Judge Advocate, Richard Atkins, an educated but legally illiterate drunk, who had, no doubt to the consternation of the bewildered litigant, pronounced a death penalty when intoxicated. The civil disputes in which Macarthur had become involved could come before the criminal, rather than the civil, court if he challenged the Governor's authority. He did so over an attempt to enforce a 900 pound bond upon a ship, in which Macarthur had an interest, which was forfeit when it became known that a convict had stowed away on board. Rather than challenge the legality of the fine in the civil court, Macarthur refused to comply with the subsequent process. This precipitated a warrant for his arrest to which he responded, to use his words, "with scorn and contempt".¹⁶ His defiance required proceedings in the criminal court, where the officers would decide his fate.

When the court convened on 25 January, in a room packed with soldiers, Macarthur challenged the right of Atkins to preside on the

ground of bias, based in part on the fact that he owed Macarthur money – on a promissory note that Macarthur had bought long before and kept for such an occasion. Bligh and Atkins correctly concluded that the court could not sit without him. When the six officers, no doubt by prearrangement, purported to do so,¹⁷ Bligh ordered that they be charged with criminal conduct. He even suggested that it amounted to treason.

There could be no greater slur on their honour. There had been tension between the Governor and the regiment, but this was an attack on its institutional integrity, not least if six of the nine officers of the Corps were put out of action. Nothing was more calculated to ensure that the loyalty of the officers' mess, which had been confirmed the previous night at dinner, would lead the officers to arrest Bligh before he could arrest them.

The commanding officer of the Corps Major George Johnston, although highly critical of Bligh's conduct, had little by way of commercial interest at stake and may not have been part of the coup planning. He was finally convinced that the Corps had no choice but to depose the Governor. And it did.

This is an explanation of the coup but, of course, not a justification. The officers' reaction was, at best, self-indulgent. Their conduct was fundamentally inconsistent with the maintenance of the social order that it was their very purpose to preserve. Even acknowledging the inappropriateness of Bligh's conduct, other means of resolution should, at least, have been attempted, difficult as that may have been when communications to and from England took a year.

The code of honour, with duelling as the principal form of alternative dispute resolution, was incompatible with the rule of law. Rebellion against legitimate authority, whatever the reasons, was the most fundamental challenge to it. As I have said, the rule of law provided the central legitimising discourse of eighteenth century England. It was firmly established in Australia by the experience of the coup itself and, perhaps more significantly, by the experience of government under a military regime.

Bligh had united a number of disparate interests. His removal took away that unity. The absence of a clearly legitimate authority, as could easily have been predicted, enabled anyone with a grievance to seek

vengeance and anyone with access to power to abuse it. The rule of law was compromised and, on many occasions, set aside.

The sense of personal security of citizens, indeed the existence of social order, is determined in large measure by the extent to which people can arrange their personal affairs and their relationships with associates, friends, family and neighbours on the assumption that basic standards of propriety are met and reasonable expectations are satisfied. In all spheres of conduct it is essential that persons know that they can pursue their lives with a reasonable degree of security, both of their person and of their property. All forms of social interaction, including economic interaction, are impeded by the degree to which personal and property rights are subject to unpredictable and arbitrary incursion, so that people live in fear, or act on the basis of suspicion, rather than on the basis that others will act in a predictable way.

After the Coup of 1808 the sense of personal security was lost to a substantial degree. Those who could exercise power were not confined by the effective operation of the rule of law, save insofar as ultimate retribution from London was anticipated.

Until a superior officer to Johnston arrived six months after the coup, John Macarthur was clearly in control. During that period the rudimentary legal system was abused, where not suspended. Atkins was replaced and Macarthur was quickly acquitted of the charges that precipitated the coup at a joke of a trial. Magistrates loyal to Bligh were dismissed. Other loyalists were subject to a parody of justice that was no more than malevolent revenge. They were convicted on bogus charges and sent to work in the coal mines at Newcastle. The civil court processes were abused.¹⁸ Commerce was adversely affected as it was uncertain whether the negotiable bills payable in sterling, that had traditionally been used for transactions with the government, would be honoured in London.¹⁹ No one who lived through this period could have had any doubt that the rule of law was severely compromised.

Later, the courts appeared to operate more normally and fairly. However, throughout the two years between the deposition of Bligh and the arrival of Macquarie, the colony was controlled by an illegal government. Every appointment, including to judicial office, was invalid. So was every governmental decision, including every exercise of judicial power. Uncertainty was ubiquitous. Personal and property rights were institutionally insecure.

The English political nation welcomed the restoration of the Stuarts after the depredations of Cromwell, which experience left an abiding mistrust of a standing army that was forbidden, without express Parliamentary approval, by the Bill of Rights of 1689. For much the same reasons, the residents of New South Wales welcomed the restoration of legitimate authority under our greatest Governor, Lachlan Macquarie.

In accordance with his instructions, he invalidated the appointments and the decisions of the rebel administration, including appointments to and decisions by the courts. Perfected court orders were not reopened on the basis of necessity, perhaps most poignantly applied in the case of the invalid death sentences that had been carried into effect. Nevertheless, some redress was available for the past illegal exercise of governmental power. One of those banished to the coal mines sued successfully for false imprisonment.²⁰

The rule of law was emphatically restored. The bicentenary of Macquarie's installation as Governor on 1 January 1810, is an event worthy of substantive commemoration.

Much of Australian history is written as if it consisted primarily of the achievement of independence from England: constitutional, political, economic, military, cultural, social and legal independence – “a march towards the light” as one historian has put it.²¹ However, many of our most fundamental institutions were created quickly and, whilst drawing on the intellectual toolkit of contemporary Britain, emerged, or were entrenched, in response to local events and conditions and proceeded to change and develop in a distinctive way. The rule of law, the independence of the judiciary, freedom of the press, representative and democratic government are such institutions.

The bicentenary of this most significant event in the establishment of the rule of law, like the commemoration eighteen months ago of the sesquicentenary of responsible government in this State, emphasises the longevity that underpins the robust strength of those institutions. We do well to understand the source of that strength.

¹ H V Evatt *Rum Rebellion: A Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps* Lloyd O’Neil, Sydney (1971). (First published in 1938).

² See Michel E Scorgie, David J Wilkinson and Julie D Rowe “The Rise and Fall of a Treasury Clerk: William Bassett Chinnery” Paper presented to the Conference of the British Accounting Association April 1998; c/f Scorgie, “The Rise and Fall of William Bassett Chinnery” (2007) 43 *Abacus* 76. See also Anne-Maree Whitaker *Joseph Foveaux: Power and Patronage in Early New South Wales* UNSW P, Sydney (2000) at 155-156.

³ Alan Atkinson *The Europeans in Australia; A History – Volume I, The Beginning* Oxford Uni P, Melbourne (1997) at 273.

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- 4 See generally Alan Atkinson "Taking Possession: Sydney's First Householders" in Graeme Aplin *A Difficult Infant: Sydney Before Macquarie* NSW Uni P, Sydney (1988) esp. at 76, 79-82, 83-84.
- 5 Ibid at 84-87; HRA Vol 6 at 155-156,714-715
- 6 Atkinson supra n 3 at 273.
- 7 John Ritchie *A Charge of Mutiny: The Court Martial of Lieutenant Colonel George Johnston for Deposing Governor William Bligh in the Rebellion of 26 January 1808* National Library of Australia, Canberra (1988) at 365.
- 8 See David Neal *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* Cambridge Uni P, Cambridge (1991); John Braithwaite "Crime in a Convict Republic" (2001) 64 *Modern Law Review* 11; John Gascoigne *The Enlightenment and the Origins of European Australia* Cambridge Uni P, Cambridge (2002) at 39-44; Martin Krygier "Subjects, Objects and the Colonial Rule of Law" in Martin Krygier *Civil Passions: Selected Writings* Black Inc, Melbourne (2005); E P Thompson *Whigs and Hunters: The Origin of the Black Act* Pantheon, New York (1975) esp at 265-266; Douglas Hay "Property, Authority and the Criminal Law" in Hay et al *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* Pantheon, New York (1975); John Brewer and John Styles (eds) "Introduction" in *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries* Hutchinson, London (1980); D H Cole " 'An Unqualified Human Good': E P Thompson and the Rule of Law" (2001) 28 *Law and Society Review* 117, accessible at www.ingentaconnect.com .
- 9 Alan Atkinson "Jeremy Bentham and the Rum Rebellion" (1978) 64 *Journal of the Royal Australian Historical Society* 1.
- 10 The emphasis on the code of honour as a critical factor in the coup was first put forward by George Parsons in "The Commercialisation of Honour: Early Australian Capitalism 1788-1809" in Graeme Aplin (ed) supra n 4. The theme was developed by Michael Duffy in his biography *Man of Honour: John Macarthur - Duellist, Rebel, Founding Father* Macmillan, Sydney (2003).
- 11 Adam Nicolson *Men of Honour: Trafalgar and the Making of the English Hero* Harper Perennial, London (2005) at 102-103.
- 12 Ibid at 114.
- 13 There is even a book devoted to Bligh's foul mouth: Greg Denning *Mr Bligh's Bad Language: Passion, Power and Theatre on the Bounty* Cambridge Uni P, Sydney (1992).
- 14 C M H Clark *A History of Australia Volume I* Melbourne Uni P, Melbourne (1962) at 216.
- 15 Duffy supra n 10 at 255.
- 16 Atkinson supra n 3 at 284.
- 17 This tactic had worked before when Governor King backed down after Major Johnston had objected to the presiding officer on behalf of one of the officers on Macarthur's court. See Evatt supra n 7 at 77-81; John McMahon "Not a Rum Rebellion but a Military Insurrection" (2006) 92 *Journal of the Royal Australian Historical Society* 125 at 132-133. .
- 18 Bruce Kercher *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* Federation Press, Sydney (1996) at 41-2.

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- ¹⁹ J E B Currey (ed) *Reflections on the Colony of New South Wales: George Caley Lansdowne*, Melbourne (1966) at 157.
- ²⁰ Kercher *supra* n 17 at 40.
- ²¹ Atkinson *supra* n 3 at xii.

FOUNDATIONS OF THE RULE OF LAW IN AUSTRALIA
OPENING ADDRESS
TO THE SUPREME AND FEDERAL COURT JUDGES’
CONFERENCE 2008
BY THE HONOURABLE JAMES SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY, 21 JANUARY 2008

This Conference of judicial officers from throughout Australia assembles on the eve of a significant anniversary for the establishment of the rule of law in this nation. Australia Day this year marks the bicentenary of the only military coup in our history popularly, but inaccurately, known as the “Rum Rebellion”. Tomorrow evening I will deliver the annual Australia Day Address in which I will develop the theme at greater length than I can do on this occasion. Nevertheless, it is appropriate to highlight some aspects of this anniversary to this audience.

The civic discourse of early Sydney was, understandably, expressed in terms of the intellectual toolkit of 18th century Britain. The core concept of that era, before both political discourse and jurisprudence came to be dominated by Bentham’s utilitarian philosophy,

was the bundle of procedural and substantive principles known as the rule of law, then generally expressed in terms of rights, particularly rights of property and of personal liberty. Later, under the influence of the utilitarians with their impoverished view of human nature, talk of rights ceased for a century and a half, especially talk of inalienable human rights, which Bentham had denounced as “nonsense on stilts”.

Blackstone’s great work, which functioned as a core authority in the nascent Australian legal system, used the language of rights, until watered down in subsequent editions. The edition current in 1808 remained faithful to the original in this respect. That edition, by way of an interesting aside, was edited by the brother of Fletcher Christian, who led the mutiny on *The Bounty*.

Three decades ago, the English Marxist historian, E P Thompson, after close study of 18th century British society, was driven by his intellectual honesty to the unexpected, at least to him, conclusion that the upper class was subject to the law and that the rule of law was a “cultural achievement of universal significance and an unqualified human good”.¹ He was treated as an apostate and attacked by his fellow left wing historians.²

The centrality of the discourse about the law in late 18th century Britain cannot be doubted.³ It was this discourse that accompanied soldiers, convicts and free settlers to Australia and created from the outset a strong legal tradition in the penal colony.⁴

Only a few decades ago emphasis on the rule of law would have been dismissed in many circles as Eurocentric and neo-colonialist. That is no longer the case. The concept has now been adopted as a model and an aspiration for so many different nations of divergent cultural traditions that any approach to this concept based on cultural relativism must be rejected.

Our own achievement in this respect over a period of some two centuries, whilst taken for granted in Australia, is increasingly recognised internationally, not least in the international judicial exchanges in which Australian judges have participated with increasing frequency over recent years.

One of the oldest and most debated questions in political philosophy is the identification of the circumstances in which resistance to legitimate authority is justifiable. The language of the rebels in the Coup of 1808 deployed the then current ideas of John Locke to the

effect that there were such circumstances. Inevitably, whether or not such circumstances exist is a matter on which there will be differences of opinion. There was, in 1808, a general consensus that the Glorious Revolution of 1688 which overthrew James II, the last of the Stuart Kings, was such an occasion. Whether or not the so-called “Rum Rebellion” could be so justified is a matter which was fiercely debated at the time and remains contested.

There are two clearly distinct bodies of writing on this issue. The first, and perhaps best known, is exemplified by H V Evatt whose book entitled *The Rum Rebellion* was originally delivered as a series of lectures to mark the sesquicentenary of the event. This approach emphasises the venality of the officers of the New South Wales Corps, and generally explains the event as a defence by them of their monopolistic practices, particularly with respect to trading rum. On this approach John Macarthur, a former officer of the Corps who had become one of the wealthiest men in the colony, is cast as a conniving puppet master. Bligh’s numerous personal defects are sometimes acknowledged, but played down, and the fact that he already had one mutiny on his record is not regarded as particularly relevant.

A second approach has become increasingly prominent in historical writing over recent decades. It emphasises the role the officers of the New South Wales Corps as providing the entrepreneurial skills essential for a successful economy. This approach emphasises the confrontational nature of Bligh's policies and his significant personal defects. What is rejected as greed, on the first approach, is treated as normal commercial profit motive in the second.

This is one of those historical controversies that is not capable of final resolution. The historical record largely consists of assertions by those with a vested interest in the outcome, as is inevitable when dealing with an event that polarises a small community. Sydney with a population of some 7,000, of whom almost 10 percent were officers and soldiers of the regiment, manifested all the petty rivalries, gossip, bickering, slights and the vendettas of village life. In such a context any historian can always find a reason for doubting one person's version of events. It is understandable that historians remain as polarised as the community that lived through the event.

The rule of law issues involved in the Coup of 1808 commenced with Bligh's own conduct when he challenged what the local elite regarded as property rights. This was particularly acute with respect to

certain urban leases that his predecessor Governor King had issued for periods of up to 14 years. Governor Phillip had reserved much of the land closest to the harbour for public purposes. It was the first attempt at town planning in Sydney. Bligh wanted to return to important aspects of Phillip's original plan, but King's leases stood in the way.

Bligh refused to issue any more leases, announced he would not approve building on any existing leases, ordered residents to surrender possession of their homes, ordered the demolition of structures built without approval and threatened to demolish others. He clearly intended to revoke some of the leases and sought instructions from London, but was removed before he could do so.

Amongst the important causes of the Coup of 1808 was the conflict between real estate developers and the public interest over the exploitation of prime urban land near the water. Nothing could be more "Sydney" than this.

There is now a broad consensus amongst historians that the so-called "Rum Rebellion" had nothing to do with rum. A number of other interests were affected by Bligh's conduct and the traffic in rum was of

little significance to the officers, although it was to some of the non-commissioned officers.

Their exercise of what purported to be absolute discretionary powers caused widespread resentment of Bligh's conduct particularly amongst, but not limited to, those whose wealth or expectations were directly affected. However justifiable these wide powers may have been for the chief warden of an open air prison or for the captain of a ship, they were not regarded as tolerable by free settlers or, emancipists, who regarded themselves as entitled to the rights of free Englishmen. Indeed there were serious doubts as to whether the Governor could exercise such powers over free settlers at all. These doubts were expressed by Bentham in a privately circulated attack on the constitution of the penal colony and were known to some of the Sydney elite.

On the other hand, Bligh relied on his authority and was determined to reassert the public interest as he saw it and to overturn the policies of his predecessors that he believed had permitted private men to grow wealthy at the expense of the Crown. He was determined to pursue his policies, which were in accordance with the instructions he had received.

There could be no coup without the involvement of the officers of the New South Wales Corps. The commercial interests of some of them, and of former officers like John Macarthur, which were challenged by Bligh's policies, would not have been enough. Bligh had alienated the Corps in a number of ways but, in my view, the most significant was his complete failure to respect them as gentlemen acting in accordance with the code of honour. Bligh's foul-mouthed, short-tempered, tactless behaviour frequently degenerated into mockery, abuse and derision. This cut to the core of the personal identity of the officers of the Corps.

The social position of those officers was the same as that described in one of the books published in 2005 to mark the bicentenary of the Battle of Trafalgar, where the perceptive author states:

“Social and financial security, which are deeply connected to the question of honour, had a shaping effect on the officer corps of the British Fleet at Trafalgar. They were men on edge, not certain of the place they held in the hierarchy for which they were fighting, with enormous rewards in terms of money and status dangling before their eyes, but the equal and opposite possibility of failure, ignominy and poverty if chance did not favour them or their connections did not steer them into the path of great rewards. The quartet of honour,

money, aggression and success formed a tight little knot at the centre of their lives, the source at times of an almost overwhelming anxiety ... A body of officers coming from an uncertain and ill-defined social position needs to rely on the idea of their honour to establish their place in the social hierarchy ... [W]hen, if you define yourself as a gentlemen you had nothing else, as so many did not, honour was what you had. It was membership of the moral community, which is why the language used is so critical. Your membership was defined by the respect with which other people treated you.”⁵

Bligh was completely incapable of treating gentlemen with the respect or in the language that they believed they deserved. Bligh ordered that six, out of the total of nine officers of the Corps, be charged with criminal conduct, by reason of their involvement in a trial. He suggested that the conduct amounted to treason. This was clearly an attack on the institutional integrity of the New South Wales Corps. The brotherhood and loyalty of the officer’s mess was called into play.

All of this is an explanation of the Coup but of course not a justification. The officer’s reaction was, at best, self-indulgent. Their

action was fundamentally inconsistent with the maintenance of the social order that it was their very purpose to preserve.

Plainly rebellion against legitimate authority, for whatever reason, was a direct challenge to the rule of law. More significantly the subsequent experience of two years under military government was such that the significance of the rule of law was established on the basis of direct experience in Australia, not simply on the basis of the intellectual heritage of 18th century England.

After the Coup substantial sections of the community lost any sense of security in their person and property, particularly in the first six months. The distortions in the legal system during this period were such that it could be said that the rule of law was suspended. Magistrates loyal to Bligh were dismissed. Other loyalists were subject to a parody of justice that was no more than malevolent revenge. They were convicted on bogus charges and sent to work in the coalmines at Newcastle. The civil court processes were abused.

For the entire period of two years of illegal government, every appointment, including to judicial office, was clearly invalid. So was every governmental decision, including every exercise of judicial power.

Uncertainty was ubiquitous. Personal and property rights were institutionally insecure.

Governor Lachlan Macquarie took over on 1 January 1810 with his own 73rd Regiment to enforce the removal of the New South Wales Corps. He invalidated the appointments and the decisions of the rebel administration, including the appointments to, and the decisions of, the courts. On the basis of necessity, perfected orders were not reopened, as applied most poignantly to a number of invalid death sentences that had been carried into effect. Some redress was, however, available for the past illegal exercise of governmental power. For example, one of those banished to the coalmines sued successfully for false imprisonment.

The rule of law was emphatically restored. It has only been significantly challenged in Australia on one occasion since.

That occurred, perhaps understandably, over an issue that incited the passions of the populace more than any other, the issue of race. The intensity of the hostility to Chinese migration in the mid to late 19th century, particularly virulent on the gold fields, led to a direct

confrontation between the Government of New South Wales and the Supreme Court in 1888.

The government ordered its police force to prevent the disembarkation of Chinese passengers on a number of ships that arrived in Sydney Harbour in mid 1888. Two Chinese, one an alien and the other a returning resident with a statutory certificate of exemption from the poll tax, sought habeas corpus from the Supreme Court to prevent police restraining their disembarkation.⁶ A submission on behalf of the government, to the effect that the police were simply acting upon orders, was summarily rejected. That after all was the purpose of a writ of habeas corpus. “No man’s liberty”, said Chief Justice Darley, who referred to an identical claim made by Charles I, “would be safe for one moment were it held that this was sufficient ...”.⁷

The then Premier, Sir Henry Parkes, no stranger to stirring up popular prejudice for political advantage, dismissed the Supreme Court decision as “technical” and asserted that “the law of preserving the peace and welfare of civil society” must prevail.⁸ He directed the police to continue implementing the government policy and to ignore the court orders.

Notwithstanding considerable debate in the Parliament and the media, the government maintained its defiance of the law for a considerable period. The Court reiterated the basic principles of the rule of law, and the necessity for the government to comply, in a subsequent unanimous judgment upon the application of another Chinese immigrant.⁹

As Chief Justice Darley said with respect to the events that had occurred:

“We are not aware that such a course of conduct as has been pursued in the matter of these Chinese has ever before been adopted at any period of our history. No sovereign, no matter how tyrannically inclined, no government, however unconstitutional in its acts, has ever ventured to act in open opposition to, and in disregard of the law, when that law was once pronounced by the duly constituted authority. Unfortunately there have been times when by the appointment of venal judges those in authority have sought to twist the law of the land to suit their own purposes, but never has the law, once pronounced, been set at defiance. The danger of the course here pursued is obvious. We say nothing of the evil example set to the weak

and thoughtless in the community, pernicious as this is in itself.”¹⁰

The government backed off and the detainees were released although Parkes, as was his want, did so with politically motivated words of defiance.

I should note that some months later, without the same kind of confrontation with its executive government, the Supreme Court of Victoria reached the same conclusion on the interpretation of the relevant legislation, which was virtually uniform amongst the States on the eastern seaboard. It did so, however, without reference to the prior New South Wales decisions.¹¹ Conferences such as this have played an important role in establishing a sense of national collegiality amongst Australian judges so that this kind of snotty indifference is unlikely to occur today. In any event the High Court has indicated that it should not.

The fact that matters of racial and ethnic identity were regarded with such passion that they could lead to the only serious challenge to the rule of law in Australian history since the Coup of 1808, is a matter that should give us all pause. There is no reason to believe that the

people of this, or of any other, nation are now so enlightened that these kinds of passions cannot be stirred again. There are too many examples in history of such xenophobia leading to catastrophe for us not to remain vigilant in this regard.

As is so often the case, perhaps the best short description of the evils of racial and ethnic intolerance was written by William Shakespeare. He wrote it in a form that was not definitively attributed to him for centuries. Furthermore it is not found in one of his plays or poems and, accordingly, is not contained in anthologies nor taught in literature courses. It is a passage that is very little known.

There is in existence a single manuscript of a play entitled *Sir Thomas More* which was written in at least six different hands in the period 1591-1593. A passage of a few pages, referred to by Shakespearean scholars as Hand D, is attributed to Shakespeare. The play was rejected by the censor of the day, not because any positive depiction of More was impermissible under a Tudor monarch, but because of its reference to the London mob rioting in hatred of foreigners. In the years 1592-1593 there had been a number of riots against foreigners, which the authors of the play were obviously intending to exploit, but the censor feared the play would aggravate the

existing tensions. It was banned, never finished and its first recorded performance was in 1994.¹²

The occasion depicted in the play, to which the censor objected, was what became known as the “Evil May Day” of 1 May 1517, when the London mob violently attacked foreigners throughout the city in an outburst of what we would today call ethnic cleansing. Thomas More was then the Under Sheriff for the city and played a role in suppressing the riot. It was in this role that he was depicted in that part of the draft play attributed to Shakespeare.

More asks what it is the rioters want and is told that they want the strangers to be removed. More replies in words which ring down the ages:

“Grant them removed, and grant that this your noise
Hath chid down all the majesty of England;
Imagine that you see the wretched strangers
Their babies at their backs, with their poor luggage,
Plodding to th’ ports and coasts for transportation,
And that you sit as kings in your desires,
Authority quite silenced by your brawl,
And you in ruff of your opinions clothed;

What had you got? I'll tell you. You had taught
How insolence and strong hand should prevail,
How order should be quelled – and by this pattern
Not one of you should live an aged man;
For other ruffians, as their fancies wrought,
With selfsame hand, self reasons, and self right
Would shark on you; and men like ravenous fishes
Would feed on one another.”

I know of no passage that more effectively depicts the dangers of ethnic cleansing and the role of the rule of law in controlling the kinds of passions that give rise to ethnic, religious or racial hatred. The “ravenous fishes” metaphor would resurface in the mouth of Cardinal Wolsey in Shakespeare’s *Henry the Eighth* (I.ii.79). It was to Wolsey that More had appealed for assistance to stop the 1517 riots.¹³

The rage associated with ethnic cleansing is well captured in the image of self-devouring humanity. It is an image repeated in *Lear*, *Othello*, *Troilus and Cressida* and the very phrase “Would feed on one another” appears in *Coriolanus* (I.i.184-8). That is the result when mob rule replaces the rule of law.

The passage deserves to be better known.

Sir Thomas More is, of course, one of history's exemplars of commitment to the rule of law. You have all heard many times the passage from Robert Bolt's *A Man For All Seasons* in which Sir Thomas More rejects the religious fervour of his son in law to argue that the devil himself is entitled to the protection of the law. As Chief Justice Gleeson has observed, the use of the image of the law as a windbreak in this passage is important. "The law restrains and civilises power", he said.¹⁴

One of the principal reasons why the judicial task is often thankless and prone to controversy is precisely because we are obliged to protect the legal rights of unpopular people. The judicial oath requires no less.

When, as I have shown, it was popular passion, indeed outrage, that gave rise to the only serious challenge to the rule of law in Australia for two centuries, the words of Shakespeare that I have quoted are of particular resonance on the bicentennial of the Coup of 1808. Often it is the law alone that can prevent a situation in which, to repeat:

"... men like ravenous fishes would feed on one another."

This a task in which we are all engaged, perhaps less dramatically than on the occasions to which I have referred. Nevertheless, like any safety system it must be well maintained in order to operate when it is needed.

I have no doubt that the Australian judiciary satisfies this requirement.

¹ E P Thompson *Whigs and Hunters: The Origin of the Black Act*, Pantheon, New York (1975) esp at pp 265-266.

² For example M J Horwitz “The Rule of Law: An Unqualified Human Good?” 1977 86 *Yale Law Journal* 561; Adrian Merritt “The Nature of Law: The Criticism of E P Thompson’s *Whigs and Hunters*” 1987 *British Journal of Law and Society* 194; see generally D H Cole “An Unqualified Human Good’: E P Thompson and the Rule of Law” (2001) 28 *Law and Society Review* 117 accessible at www.ingentaconnect.com.

³ See e.g. Douglas Hay “Property, Authority and the Criminal Law” in Hay et al *Albion’s Fatal Tree: Crime and Society in Eighteenth Century England*, Pantheon, New York (1975); “Introduction” in John Brewer and John Styles (eds) *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries*, Hutchinson, London (1980).

⁴ See esp David Neal *The Rule of Law in a Penal Colony* Cambridge Uni P, Cambridge (1991); John Braithwaite “Crime in a Convict Republic” (2001) 64 *Modern Law Review* 11; John Gascoigne *The Enlightenment and the Origins of European Australia*, Cambridge Uni P Cambridge (2002) pp 39-44.

⁵ Adam Nicholson *Men of Honour: Trafalgar and the Making of the English Hero* Harper Perennial, London (2005) pp 102-103, 114.

⁶ See *Ex parte Lo Pak* (1888) 9 NSWLR (L) 221; *Ex parte Leong Kum* (1888) 9 NSWLR (L) 250; J M Bennett *Colonial Law Lords: The Judiciary in the Beginning of Responsible Government in New South Wales*, Federation Press (2006) pp 28-41.

⁷ *Lo Pak* supra at p 235.

⁸ Eric Rolls *Sojourned: The Epic Story of China’s Centuries Old Relationship with Australia* University of Queensland Brisbane (1992) at p 481 and see 487.

⁹ See *Ex parte Woo Tin* (1888) 9 NSWLR (L) 493.

¹⁰ *Ibid* at 495- 496

¹¹ See *Toy v Musgrove* (1888) 14 VLR 349.

¹² See Stephen Greenblat *Will in the World: How Shakespeare Became Shakespeare*, W W Norton & Co, New York (2004) at 262-264. See also the Wikipedia entry “Sir Thomas More

(play)" [www.wikipedia.org/wiki/Sir_Thomas_More_\(play\)](http://www.wikipedia.org/wiki/Sir_Thomas_More_(play)); Ron Rosenbaum "A Hand for Applause Books: A Hand for 'Hand D'" 10 May (1999) *The New York Observer* accessible at www.observer.com/node/41447.

¹³ Jasper Ridley *The Statesman and the Fanatic: Thomas Wolsey and Thomas More*, Constable, London (1982) pp 78-79.

¹⁴ Murray Gleeson *The Rule of Law and The Constitution: The Boyer Lectures 2000* ABC Books, Sydney (2001) p1.

FOREWORD

BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

I am pleased to introduce this special Forum issue of the *UNSW Law Journal* which has as its focus current trends in international commercial arbitration. The multi-faceted process known as globalisation has brought with it a widespread recognition of the benefits potentially available from the reduction of national barriers to mutually advantageous exchange by trade and investment. The rapid expansion of such commercial interaction inevitably brings with it the need for dispute resolution.

One of the non-tariff barriers to international trade and investment, being a barrier which impedes such mutually beneficial exchange to a greater degree than domestic trade and investment, arises from the transaction costs and uncertainties involved in international dispute resolution.

The transaction costs involved in international litigation include:

- Additional layers of complexity;
- Additional costs of enforcement, indeed uncertainty about the ability to enforce contractual rights;
- The risk arising from unfamiliarity with foreign legal process;
- The risk of unknown and unpredictable legal exposure.

Lawyers and other practitioners in this field can make a significant contribution to the reduction of this non-tariff barrier and, thereby, improve the economic welfare of all those who benefit from trade and investment.

The coherent international system for resolving commercial disputes that has been devised in the interlocked provisions of the UNCITRAL Model Law on

International Commercial Arbitration, the New York Convention for Enforcement of Arbitral Awards and the Washington Convention for Investment Disputes, plays an important role in international commerce. These international instruments are so widely adopted that they facilitate such commerce to a substantial degree.

For all of those who are involved as practitioners in the resolution of international commercial disputes, whether as lawyers or arbitrators or judges, the contribution that we can make to the maintenance of the system is twofold. First, to ensure that the public and political decision-makers are aware of the benefits of the system. Secondly, to ensure that the system actually delivers the benefits of which it is capable.

The costs and uncertainties of international commercial dispute resolution are capable of being minimised, and brought into some kind of reasonable relationship with the costs and uncertainties of domestic commercial dispute resolution, only if all of us who are involved in the process are committed to the just, quick and cheap resolution of such disputes.

Business lawyers have been described as “transaction cost engineers” who facilitate commercial intercourse by reducing future transaction costs. Well drafted commercial arrangements avoid conflict with regulatory regimes, anticipate and therefore avoid disputes and create structures for dealing with the unknown or the unanticipated. By such involvement, transaction lawyers add value to commercial transactions. The same is true of the contribution by lawyers to dispute resolution processes.

The international regime for commercial arbitration does have advantages. It avoids the proclivity to engage in venue disputation that has bedevilled such litigation in Australia, England and North America but, not yet, elsewhere. The burgeoning case law on anti-suit injunctions and then anti-anti-suit injunctions and, inevitably, anti-anti-anti-suit injunctions, reflects the simple proposition that when it comes to the procedure of courts and the quality of judiciaries, parties believe that where a case is determined matters. This is so even if disputation about venue involves considerable expenditure that is, on any objective view, completely wasteful.

Avoiding venue disputation is a real cost and time advantage of choosing the international arbitration regime.

Perhaps most significantly, nothing remotely comparable to the international system for enforcement of arbitral awards exists with respect to enforcement of judgments of courts. There have been numerous attempts to develop some kind of system for enforcement of judgments and they have all failed. I cannot see this situation changing. This is a substantial advantage of international commercial arbitration. Facility of enforcement, perhaps more than any other single factor, ensures that the subject of this Forum will remain of critical importance for international trade and investment.

L Pearson, C Harlow and M Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson*, Portland, Hart Publishing, 2008

**THE EQUITABLE ORIGINS OF THE IMPROPER PURPOSE GROUND
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES**

In the third edition of *Judicial Review of Administrative Action* Mark Aronson and his co-authors observe:

The overall ground of judicial review is that the repository of public power has breached the limits placed upon the grant of that power.¹

The authors note that the basic assumption underlying this proposition is that all powers have limits. In this context the authors state:

The powers of public officials are regarded as being held on trust for the public who granted them. They cannot lawfully be exercised for personal gain or motive, or irrationally, or for purposes which exceed the reasons for their conferral. There are obvious parallels with equity's doctrines

governing fiduciaries, although one must not press that analogy too far.²

The first reference given for this passage is an observation by Sir Anthony Mason, writing extra-judicially, that:

In the field of public law, equitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.³

The link between equitable relief and administrative law has also been identified, with regard to *Wednesbury* unreasonableness, by Justice Gummow, who has often referred to this extract by Sir Anthony Mason, both as a judge of the Federal Court⁴ and of the High Court.⁵ The infusion of equitable principles occurred, his Honour suggests, by a process of analogy, applying to a new field principles developed in another.⁶ The result is what Justice French has felicitously called ‘the equitable spirit of administrative justice’.⁷

In the mid nineteenth century, when this process commenced, the caste of mind of a Chancery judge was quite different to that of a

common law judge. The proposition that there existed legal principles that could readily be adapted to new situations, which came naturally to a Chancery judge, permitted more flexibility than did the technicalities of the common law.

The metaphor, sometimes deployed, that public power is held on trust, is generally a political rather than a legal proposition. Some public powers may well be subject to requirements as strict as those applicable to fiduciaries. Not all can be so described. A closer, and often more useful, analogy is with the control exercised by courts of equity over powers, which encompasses, but extends beyond, fiduciary powers.

The Law of Powers

In the law of property a 'power' is a term of art referring to any authority that one person has to deal with property that s/he does not own. This was a natural source of analogy for equity judges when, as I will show below, they were first faced on a systematic basis with statutory powers that impinged upon the property rights of citizens.

The author of *Thomas on Powers* explains the distinction between trust and powers:

A trust imposes an obligation, or creates a duty: a power confers an option. A trust is imperative, whereas a power is discretionary.⁸

Some powers are accurately described as ‘trust’ or ‘fiduciary’ powers, so that the donee is a fiduciary of the authority to deal with another’s property. They are to be distinguished from ‘bare’ or ‘mere’ powers.

To the same effect as the observations of Sir Anthony Mason, quoted above, the author of *Thomas on Powers* states:

there has always been a close interdependence between the traditional principles and doctrines of the law of powers and those of judicial review in public law (a common history which remains largely untold). This has continued over recent decades and, indeed, as both the scope and grounds of judicial review have expanded considerably, the process of cross fertilisation has become more marked. ... [T]hroughout this century, and especially in recent years, there have been substantial changes in many areas of the law in which the principles and doctrines of the law of powers operate and apply, or might be expected to operate

and apply, and that, as a result, those principles and doctrines have themselves had to be developed and adapted to meet new demands and changed circumstances.⁹

Equitable Origins

It cannot be suggested that the principles developed for controlling the exercise of statutory powers, on the one hand, and the exercise of powers over property, on the other hand, have a historically shared doctrinal origin. The linkage did, however, arise, as so often in the development of the common law, in the law of remedies. It is in the pragmatic development of common law principle from the bottom up, by means of decision-making in individual cases, that common themes emerge in the course of determining what is fair and just, leading to the grant of the appropriate remedy, on the basis of analogical reasoning.

The mechanism by which the principles applicable to fraud on a power were adopted for administrative law purposes was litigation brought in the Court of Chancery for equitable relief. At the relevant time, the relief sought was by way of injunction. The jurisprudence on declarations developed later.

The significance of the injunction as a remedy in administrative law is emphasised by its inclusion, in express terms, in s 75(v) of the *Commonwealth Constitution* as one of the constitutional writs. (Although injunctions have been granted by order rather than writ long before that happened for the prerogative writs). This provision is one of the fundamental underpinnings of the rule of law in Australia. Although not directly applicable to the common law basis of review in State jurisdiction, inevitably the High Court's jurisprudence on the constitutional writs will exercise a gravitational pull on the whole of administrative law.

No doubt part of the attraction of litigation in Chancery in the mid nineteenth century was the proclivity of Chancery judges to protect individual property rights against statutory expropriation, particularly by the newfangled institutional form of railway companies. As early as 1839 Lord Chancellor Cottenham said, in one of the earliest cases of compulsory acquisition by a railway company:

it is extremely important to watch over the interests of those whose property is affected by these companies, to take care that the company shall not ... be permitted to exercise powers beyond those which the Act of Parliament gives them, and to keep them most strictly within the powers of

the Act of Parliament. The powers are so large — it may be necessary for the benefit of the public — but they are so large, and so injurious to the interests of individuals, that I think it is the duty of every Court to keep them most strictly within those powers; and if there be any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers; but they will get none from me, by way of construction of their Act of Parliament.¹⁰

The authors of *de Smith, Woolf & Jowell*, the foundational text on British administrative law, identify the origin of contemporary doctrine on extraneous purposes in cases concerning the exercise of powers of compulsory acquisition in the mid nineteenth century by railway companies.¹¹ The key authority to which the authors refer is the 1866 House of Lords judgment, *Galloway v The Mayor of London*.¹² It was preceded by a number of similar cases in Chancery.¹³

Compulsory powers of acquisition by railway companies, and later by public authorities, were the cases in which the basic principles were most frequently applied. However, it was not only railway companies who sought to exercise statutory powers in a manner which led persons affected to seek injunctions from the Court of Chancery. For example,

neighbouring residents objected to a proposal to construct a urinal in Grosvenor Place adjacent to the wall of Buckingham Palace.¹⁴

In *Galloway*, Lord Chancellor Cranworth said:

The case of the Appellant ... rested on a principle well recognized, and founded on the soundest principles of justice. The principle is this, that when persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the Legislature to take compulsorily lands of others, making to the latter proper compensation, the persons so authorized cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the Legislature has invested them with extraordinary powers. The necessity for strictly enforcing this principle became apparent, when it became an ordinary occurrence that associations should be formed of large numbers of persons possessing enormous pecuniary resources, and to whom are given powers of interfering for certain persons with the rights of private property. In such a state of things it was very important that means should be devised, whereby the Courts, consistently with the ordinary

principles on which they act, should be able to keep such associations or companies strictly within their powers, and should prevent them, when the legislature has given them power to interfere with private property for one purpose, from using that power for another. ... It has become a well-settled head of equity, that any company authorized by the Legislature to take compulsorily the land of another for a definite object, will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing.¹⁵

In Australia, the principle emerged from litigation over the proposal by the Council of the City of Sydney to acquire land by compulsion, in order to extend Martin Place from Castlereagh Street to Macquarie Street, *Galloway* was the basic authority cited.¹⁶ The approval of the judgment in Equity in New South Wales by the Privy Council in *Municipal Council of Sydney v Campbell* cited as the foundational Australian authority on improper purpose. The reasoning in the Privy Council's decision however is unremarkable and borders on the glib — quite typical of the Privy Council of the era when determining how much attention was good enough for an appeal from the colonies.¹⁷

The extract from *Galloway* quoted above indicates that the Court was reacting to the emergence of a new form of institution, namely corporations which were given extraordinary powers to interfere with the property of others, particularly railway corporations. Traditionally, there had been other such statutory bodies with similar powers, notably sewer commissions, whose activities had long been regulated by the common law courts through the writ of certiorari or by actions in trespass. The historical origins of judicial review by the common law courts has been traced to this body of case law.¹⁸

The scope of Chancery's jurisdiction, extending beyond proceedings for an injunction, was manifest in the first case in which Lord Cranworth formulated his proposition that a compulsory taking of lands by railway companies must be 'bona fide with the object of using them for the purposes authorized by the legislature, and not for any sinister or collateral purpose.' This principle was first enunciated by his Lordship in 1860 in proceedings in the Court of Chancery in lunacy, because one of the persons whose land was to be acquired was a lunatic.¹⁹

In 1864, two years before the decision in *Galloway*, Lord Cranworth, who had two periods as a Lord Chancellor (1852–1858 and

1865–1866) had agreed with the then Lord Chancellor, Lord Westbury, his reasons in *Duke of Portland v Topham*, in what has become the classic formulation of the test for a fraud on a power. Lord Westbury had said:

inasmuch as your Lordships concur in opinion, I think we must all feel that the settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power.²⁰

The language of these two judgments is in substance the same. It appears that Chancery judges had identified what they regarded as a principle of general application. As quoted above, the judgments in *Galloway* and *Duke of Portland* each state that a high principle of the law has been invoked. From that perspective, common law powers over

property did not differ from powers conferred by statute. Nothing has changed in this respect.

Such analogical reasoning is also reflected in other closely related areas of the law. It was Lord Cranworth in 1854 who delivered the definitive judgment that established the principle that a director of a corporation was subject to the conflict of interest principles established by fiduciary law,²¹ relying on *Keech v Sanford*.²²

Why Chancery?

In the middle decades of the nineteenth century, parties chose to proceed in equity with respect to decisions that may otherwise have been regulated by the common law courts through the exercise of the prerogative writs. It was this choice by litigants that allowed the penetration of equitable principles into the development of administrative law including, relevantly, the emergence of the improper purposes ground.

Chancery judges could draw on a significant body of precedent in the regulation of matters of public interest. Of particular significance was the role of the Crown as *parens patriae*. That role had been exercised by the Attorney-General by instituting proceedings in Chancery with

respect to charitable and ecclesiastical corporations which lacked a visitor. Such a jurisdiction was readily adaptable, by analogy, to other corporations which had no visitors, first municipal corporations and then other statutory corporations.²³ In such proceedings, the Court would, at the suit of the Attorney, directly or on relation, injunct a corporation from imposing a rate for an unauthorised purpose,²⁴ or from expending public funds for an unauthorised purpose, eventually extending beyond trust funds.²⁵

Injunctions came to be issued against water and sewerage instrumentalities²⁶ on matters which had in the past been litigated in the common law courts. This reflected a dramatic improvement in Chancery practice.

In the years immediately preceding the *Duke of Portland* and *Galloway* cases, important reforms were made to procedure, in both common law courts and Chancery, culminating in the 1870s in the broad based reform of the *Judicature Acts*. However, in mid century, litigants had a real choice of jurisdiction and many chose Chancery.

The horrors of Chancery procedure, depicted by Dickens in *Bleak House*, a novel set in about 1827, were addressed by statute. A number

of Acts, especially in 1852, radically reformed Chancery: replacing remuneration of judges and clerks from fees with salaries; abolishing the corrupt sinecures of Masters; simplifying proceedings and facilitating evidence; and formulating a comprehensive set of consolidated orders.²⁷

The ability to bring proceedings in Chancery was extended by the *Chancery Procedure Act 1852*, which empowered the Court to determine rights at law, without prior proceedings in a common law court.²⁸ Furthermore, a new power to make declarations without consequential relief was first conferred in 1850 and affirmed in the 1852 Act. However, for some time there was resistance to making such declarations.²⁹ The similar resistance to exercising the jurisdiction at law led to the *Chancery Regulation Act 1862*, which required the Court to determine any question of law on which the relief sought depended.

Lord Westbury had long been the most prominent advocate of fusion. Indeed, he was called the 'Galileo of fusion' by a journal which had earlier characterised fusion as suicide and Chartist, which in that era carried the connotation of Bolshevik in the twentieth century. Lord Cranworth was regarded as a moderate reformer, but was still a reformer.³⁰

Perhaps the most significant development for present purposes was the 1852 Act which established, for the first time, that procedure in Chancery would be the same whether the Court was asked to restrain breach of a legal, or, equitable right. Although the distinction between the exclusive and the auxiliary jurisdiction of the Court remained, procedural impediments were substantially removed, even before the *Judiciary Acts*.

The Proper Purpose Principle

The relevant principle identified by Chancery judges in the mid nineteenth century can be articulated at different levels of generality. At a comprehensive level it can be expressed as follows: Any kind of authority to affect the rights of others can only be exercised bona fide and for the purposes for which it was conferred. This appears to me to be the principle referred to by both Lord Westbury and Lord Cranworth.

A principle expressed at this level of generality could have the standing of a maxim, applicable to any legal context in which it is relevant. However, so far as I am aware, such a principle was never articulated in Latin and, accordingly, was not included in the various lists

of maxims that have been collated from time to time which, because of the origins of maxims in Roman Law, were always set out in Latin.

The usual formulation is that a power must be exercised 'bona fide for the purposes for which it was conferred'. It is a form of words that has been applied in a number of different legal contexts. The common law cases indicated that there was no distinction between 'bona fides' and 'purposes'. The formulation conveyed one idea, not two. It was only when the principle was incorporated in the comparative rigidity of a statutory formulation — as in the *Administrative Decisions (Judicial Review) Act* and its progeny — that it became appropriate to separate the element of bona fides from the element of purpose.³¹

The usual formulation is a principle of general application in any institutional context in which persons have an authority to act conferred upon them. Accordingly, when interpreting one of the foundational documents of the Church of Scotland, Lord Lindley said:

there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purposes for which they are conferred.³²

In Australia the principle has been applied in numerous statutory contexts.³³ It is the same principle as has emerged in the law of corporations, in which context the overlay of fiduciary powers is frequently referred to. Both lines of authority involve the application in an organisational or institutional context of ideas first articulated in the control by courts of equity of powers in the law of property.³⁴

Cross-Fertilisation

One of the strengths of the common law has been its capacity to adapt to changing circumstances by the cross-fertilisation of principles and doctrine between different areas of the law. The requirements of teaching in discreet subject areas, with concomitant specialisation on the part of academics, can result in spheres of legal discourse being divided into undesirably rigid categories that become self-referential, to the point of being self-absorbed. This tendency has been reinforced by a similar trend towards specialisation in the profession. One purpose of this essay is to indicate the utility of cross-fertilisation between different spheres of legal discourse, by taking as an example the improper purposes basis of judicial review.

Recognition of the common origins of doctrines applicable in different areas of the law is a manifestation of that cross-fertilisation

which has been so important in the capacity of the common law to grow and adapt to changed circumstances. There are a number of common, and some contrasting, features in the disparate fields in which questions of improper purpose arise.

Two examples of common issues indicate the benefits of cross-fertilisation:

- (1) The utility of a two-fold division between fiduciary and mere powers;
- (2) The identification of the nature of a purpose that may be improper.

The distinction between fiduciary and mere powers is well established in the law of powers. A similar categorisation can be discerned in other areas of the law, albeit not always acknowledged in those precise terms.

In one of the early texts on corporations law a distinction was drawn between the powers and privileges of the corporation itself, eg to compulsorily acquire property and powers vested in the directors who have fiduciary duties. The author characterised the former test as:

Powers and other privileges ... [that] must be exercised for the purposes intended.

Whereas:

The powers of directors can be used only strictly for the purposes for which they are created.³⁵

The reference to 'strictness' in the case of powers of directors, as distinct from powers of the corporation itself, suggests that a fiduciary power is involved. Statutory powers may, with advantage, be categorised by means of a similar distinction.

A ubiquitous difficulty with the proper purpose principle is the fact that it is rare for any decision-maker to only have one purpose for the exercise of a power or authority. In the context of administrative law, the authors of *de Smith* identify six different tests that have been applied for determining what impact the presence of an impermissible purpose has upon the validity of the decision.³⁶ Aronson and his co-authors provide a critical assessment of these tests.³⁷ Craig has, for similar reasons, reduced the number of tests to four.³⁸

The various formulations found in the authorities turn on the degree of significance which the impermissible purpose had upon the ultimate result. Similar considerations have arisen in other spheres of

legal discourse such as choosing between a sole purpose, dominant purpose or substantial purpose test with respect to the law of legal professional privilege,³⁹ or choosing between a sole purpose or dominant purpose test in the law of abuse of process.⁴⁰

The case law on common law powers does not suggest that there is a single test applicable in all contexts. Dicta in some cases indicate that the presence of *any* improper purpose invalidates the exercise of the power. However, the wide range of different tests found in this case law appears to be very similar to the range originally set out in *de Smith*.⁴¹

The distinction between fiduciary powers and mere powers may be of assistance in this regard. With respect to a power analogous to a fiduciary power, the mere presence of an improper purpose may vitiate the exercise of the power. A more substantial consequence, however, is required in the case of a mere power.

Such a twofold distinction between different kinds of powers may also be useful when categorising statutory powers. There may be powers which, like a fiduciary power, can only be exercised for a particular purpose, so that any intrusion of another purpose leads to

invalidity. It may well be that many of the difficulties that have attended the proper purpose rule in corporations law arises from a failure to distinguish fiduciary powers from mere powers. Not all conduct of officers of corporations deserves to be subject to the fiduciary standard.⁴² A good faith standing may be all that is required.⁴³

In a statutory context, the issue will be determined on the basis of the interpretation of the particular power to determine what, in the specific context of that statute, Parliament intended a defect of that character to have. The approach of the High Court in *Project Blue Sky* to identifying whether or not Parliament intended a particular defect to lead to invalidity of the decision may explain the various tests which appear in the authorities, which are discussed in the administrative law texts to which I have referred.⁴⁴ It is not a matter of multiple 'tests' but a matter of varying interpretations of Parliamentary intention.

The results will necessarily be more varied than the bifurcation suggested by distinguishing fiduciary from mere powers. The analysis involves a spectrum rather than a bifurcation, but it may be assisted by identifying the two extremities and drawing upon analogous case law.

With respect to the second matter identified above — the nature of an improper purpose — there appears to be a more consistent approach. In each of the legal spheres in which improper purpose is a vitiating factor the test is subjective not objective. The question is whether the impermissible purpose was an actuating purpose in the sense of an intention to bring about a result. Accordingly, in the context of administrative law, as Dixon J put it with reference to a statutory discretionary power conferred without any legislative identification of the grounds on which it is to be exercised:

wherever the legislature has given a discretion of that kind you must look at the scope and purpose of the provision and what is its real object. If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion.⁴⁵

Similarly in the context of corporations law, the focus is on the actuating purpose which caused directors to exercise a power conferred upon them by the articles of association. The question is what was:

the substantial object the accomplishment of which formed the real ground of the board's action.⁴⁶

Or, what was “the moving cause” of the action of the directors’.⁴⁷

In the area of powers, including powers of appointment, the emphasis is similarly on the actual ‘intention or purpose’ of the person exercising the power.⁴⁸ In this context a distinction has sometimes been made between intention and motive which is not always useful and has been criticised.⁴⁹ However, as Brennan J put it, with respect to the issue then before the Court:

Intention relates to the result which the plaintiff desires to obtain by commencing or maintaining the proceeding; motive relates to all the considerations which move that party to commence or maintain the proceeding. The desired result is no doubt an element of the moving considerations, but it does not exhaust those considerations.⁵⁰

The Australian case law appears to have resolved upon a substantial, actuating purpose test for the improper purpose ground in administrative law.⁵¹ The authorities establish that a vitiating purpose must be a substantial purpose, in the sense that but for the unauthorised purpose the power would not have been exercised in the way it was.

In the analysis of the law of powers there is a clear distinction drawn between intervention on the basis of excessive execution of a power, on the one hand, and intervention on the basis of fraud on a power, on the other.⁵² Many of the matters identified as constituting an excessive execution of a power are analogous to aspects of ultra vires in the narrow sense and extend to a number of grounds for judicial review. The improper purpose ground has a close analogy, in terms of the applicable principles, with the law of fraud on a power.

The concept of improper purpose, in the context of fraud on a power, does not involve an idea of dishonest or immoral conduct, and the references to good faith in this case law should be so understood. In a case involving fraud on a power, the Privy Council said that fraud:

merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.⁵³

The same is true of a finding of improper purpose in administrative law. In a recent joint judgment, the High Court expressly adopted the equitable concept of 'fraud', 'bad faith' and 'abuse of power' for purposes of public law.⁵⁴

Conclusion

The proper purpose principle appears in a number of different contexts with regard to the conduct of artificial legal personalities. The central role played by organisations in contemporary society has led to a focus on institutionalism in the social sciences, notably, over recent decades, in economics and political science.⁵⁵

The proper purpose principle is only one of a number of legal principles that arise in much the same way in different institutional contexts, including trade unions, corporations and public administration. In each sphere, there is a requirement that a power be exercised rationally by reference to relevant considerations and without reference to irrelevant considerations which arise in the same contexts. This principle of rationality is similar to the proper purpose principle in this respect.

I have long been of the view that the proper focus is on principles of institutional law, rather than upon the academically defined disciplines of corporations, trade union and administrative law.⁵⁶ In any event, the benefits of cross-fertilisation and the common historical origins of

principles in equity, are such that scholars in one field should be conversant with scholarship in each other field.

¹ Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Sydney, Law Book Co, 3rd ed, 2004) at 85.

² *Ibid* at 86.

³ Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *LQR* 238 at 238.

⁴ *Fares Rural Meat & Livestock Co Pty Ltd v Australian Meat & Livestock Corp* (1990) 96 ALR 153 at 167; *Bienke v Minister for Primary Industries & Energy* (1994) 125 ALR 151 at 163.

⁵ *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257–259 [24]–[29]; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 649.

⁶ See *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 618ff.

⁷ RS French, 'The Equitable Gesit in the Machinery of Administrative Justice' (2003) 39 *AIAL Forum* at 1.

⁸ Geraint Thomas, *Thomas on Powers* (London, Sweet & Maxwell, 1998) at 20–21 [1–40]; see also JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (Sydney, LexisNexis Butterworths, 7th ed, 2006) at 36–37 [246].

⁹ Thomas, above n 8 at vii.

¹⁰ See *Webb v Manchester & Leeds Railway Co* (1839) 4 My & Cr 116 at 120; 41 ER 46 at 47–48.

¹¹ See SA de Smith, Harry Woolf and Jeffrey L Jowell, *Judicial Review of Administrative Action* (London, Sweet & Maxwell, 5th ed, 1995) at 330–331 [6–059].

¹² (1866) LR 1 HL 34.

¹³ See, eg, *Eversfield v Mid-Sussex Railway Co* (1859) 1 Giff 153; 65 ER 865; *Dodd v Salisbury & Yeovil Railway Co* (1859) 1 Giff 158; 65 ER 867. In the latter case the Vice Chancellor, Sir John Stuart, said:

in constructing works under the authority of Acts of Parliament for the purposes of the railway, the company are not at liberty to make use of their compulsory powers to attain a subsidiary object. Those powers, which are great powers, are given to the company solely to enable them to construct their works in a convenient and proper way, and for no other purpose whatsoever.

¹⁴ See *Biddulph v The Vestry of St George, Hanover Square* (1864) 33 LJ Ch 411.

¹⁵ (1866) LR 1 HL 34 at 43.

¹⁶ See *Campbell v Municipal Council of Sydney* (1923) 24 SR (NSW) 179 esp at 187ff; and *Campbell v Municipal Council of Sydney (No2)* (1923) 24 SR (NSW) 193 at 205.

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- 17 See *Municipal Council of Sydney v Campbell* [1925] AC 338 esp at 343.
- 18 See Louis L Jaffe and Edith G Henderson, 'Judicial Review and the Rule of Law' (1956) 72 *LQR* 345.
- 19 See *Stockton & Darlington Railway Co v Brown* (1860) 9 HL Cas 246 at 256; 11 ER 724 at 728.
- 20 *Duke of Portland v Topham* (1864) 11 HL Cas 32 at 54; 11 ER 1242 at 1251.
- 21 See *Aberdeen Railway Co v Blaikie Bros* [1843–60] All ER Rep 249 at 252.
- 22 (1726) Cas temp King 61; 25 ER 223.
- 23 See de Smith et al, above n 11 at 640–641 [14–050]–[14–053].
- 24 *Attorney-General v Corporation of Lichfield* (1848) 11 Beav 120 esp at 128–131; 50 ER 762 at 765–767; *Attorney-General v Andrews* (1850) 2 Mac & G 225 at 229–230; 42 ER 87 at 88–89.
- 25 *Attorney-General v The Mayor of Norwich* (1837) 2 My & Cr 406 at 424–425, 429; 40 ER 695 at 701–703; *Attorney-General v Guardians of the Poor of Southampton* (1849) 17 Sim 6 at 13; 60 ER 1028 at 1031.
- 26 See *Gard v Commissioners of Sewers of the City of London* (1885) 28 Ch D 486; *Lynch v Commissioners of Sewers of the City of London* (1886) 32 Ch D 72.
- 27 See Harold Potter, *An Introduction to the History of Equity and its Courts* (London, Sweet & Maxwell, 1931) esp at 21; Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth Century Court of Chancery' (2004) *Law & History Review* 389 and 565 esp at 579–584.
- 28 See Frederick Jordan, 'Chapters on Equity in New South Wales' in FC Stephen (ed), *Sir Frederick Jordan: Select Legal Papers* (Sydney, Legal Books, 6th ed, 1983) at 5–6.
- 29 See PW Young, *Declaratory Orders* (Sydney, Butterworths, 2nd ed, 1984) at 24–26.
- 30 See Lobban, above n 27 at 584–6.
- 31 See the cases discussed in Aronson et al, above n 1 at 292–294.
- 32 See *General Assembly of Free Church of Scotland v Overtoun* [1904] AC 515 at 695 (per Lord Lindley).
- 33 See, eg, *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37 at 67–68, 82–83; *Municipal Council of Sydney v Campbell* [1925] AC 338 esp at 343; *Brownells Ltd v Ironmongers' Wages Board* (1950) 81 CLR 108 at 119–120; *The Queen v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 186–187.
- 34 In corporations law, see David MJ Bennett, 'The Ascertainment of Purpose when Bona Fides are in Issue — Some Logical Problems' (1989) 12 *Sydney L Rev* 5; RC Nolan, 'The Proper Purpose Doctrine and Company Directors' in Barry AK Rider (ed), *The Realm of Company Law* (London, Kluwer Law International, 1998); Saul Fridman, 'An Analysis of the Proper Purpose Rule' (1998) 10 *Bond L Rev* 164.
- 35 See Seward Brice, *A Treatise on the Doctrine of Ultra Vires* (London, Stevens & Haynes, 2nd ed, 1877) at 511 and 610. See also 3rd ed, 1893 at 408 and 570.
- 36 de Smith et al, above n 11 at 340–343 [6–077].

37 Aronson et al, above n 1 at 298.

38 PP Craig, *Administrative Law* (London, Sweet & Maxwell, 5th ed, 2003) at 559.

39 Compare *Grant v Downs* (1976) 135 CLR 674; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

40 *Williams v Spautz* (1992) 174 CLR 509 at 529.

41 See, eg, DM Maclean, *Trusts and Powers* (Sydney, Law Book Co, 1989) at 118–120; Thomas, above n 8 at 482–483 [9–69]–[9–71].

42 See, eg, Fridman, above n 34 at 164.

43 See PD Finn, ‘The Fiduciary Principle’ in TG Youdan (ed), *Equity Fiduciaries and Trusts* (Toronto, Carswell, 1989) at 3–26; Nolan, above n 34.

44 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; see also *Attorney General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557; HP Lee, ‘Improper Purpose’ in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Melbourne, Cambridge University Press, 2007) at 201–202.

45 *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473.

46 *Mills v Mills* (1938) 60 CLR 150 at 186 (per Dixon J).

47 *Ibid* at 165 (per Latham CJ).

48 See, eg, *In Re Crawshay, Dec.d; Hore-Ruthven v Public Trustee* [1948] 1 Ch 123 at 134–135.

49 See Maclean, above n 41 at 93–96.

50 *Williams v Spautz* (1992) 174 CLR 509 at 535.

51 See *Thompson v Council of the Municipality of Randwick* (1950) 81 CLR 87 at 106; *Samrein Pty Ltd v Metropolitan Water, Sewerage & Drainage Board* (1982) 41 ALR 467 at 468–469.

52 See, eg, *Halsbury’s Laws of England* (4th ed, 1999) vol 36(2) at 194–196 [353–358] on excessive execution and 200–205 [364–371] on fraud on a power; to similar effect are the separate chapters in George Farwell, *A Concise Treatise on Powers* (London, Stephens & Sons, 3rd ed, 1916) compare ch VI and ch X; Thomas, above n 8, compare ch 8 and ch 9.

53 *Vatcher v Paull* [1915] AC 372 at 378.

54 See *SZFDE v Minister for Immigration and Citizenship* (2007) 237 ALR 64 at 67–68 [12]–[13].

55 See, eg, Peter A Hale and Rosemary CR Taylor, ‘Political Science and the Three New Institutionalisms’ (1996) 44 *Political Studies* 936.

56 See, eg, JJ Spigelman, ‘Foundations of Administrative Law: Toward General Principles of Institutional Law’ (1999) 58 *Aus J of Public Administration* 3.