Australia and New Zealand Scrutiny of Legislation Conference

'Adding Value to Law Making'

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An uninformed observer, upon being told of a parliamentary conference on Scrutiny of Legislation, might be forgiven for asking – isn't scrutiny of legislation what parliamentarians are paid to do? It is an interesting commentary on the realities of contemporary parliamentary democracy that scrutiny of legislation and delegated legislation is a term used to describe a special process which stands apart from the mainstream of parliamentary debate about legislation based upon contested policy.

I have called this opening address 'Adding Value to Law Making' because the history and nature of parliamentary scrutiny of bills and delegated legislation does stand apart from adversarial debate. It aspires to bipartisanship in ensuring that legislation is subjected to a degree of parliamentary quality control according to agreed parliamentary criteria.

The functions of law-making and of ensuring the accountability of the executive are core functions of parliament. The law-making function is conferred by constitutional instruments. In our constitutions, Commonwealth and State, there is either by formal prescription or unwritten convention, a distribution and separation of powers between parliament, the executive and the judiciary. Parliament is the lawmaker, the executive administers the laws and the judiciary interprets and applies them to the controversies or disputes which come before it. The brightness of that separation is dimmed to a degree by the immense amount of law-making power delegated by the parliament to the executive and the interstitial case-by-case law-making of the judiciary in areas of developing principle, contested interpretations of statutes and the application of broad statutory standards.

Acknowledging the constitutional and conventional distribution of powers and the forms of responsible government, it would be idle to contend other than that the great bulk of legislative initiatives in the parliament are brought to it by the executive. The volume and complexity of primary legislation submitted to the parliament today would test the credulity of the legislators of 100 years ago. Some numerical examples may serve to make the point.

- The *Immigration Restriction Act* passed in 1901 comprised 19 sections. Its successor, the *Migration Act* 1958 (Cth) has been subject to well over 100 amending Acts since it was passed in 1958. It now comprises over 740 sections, supported by hundreds of regulations set out in two volumes. Many of those regulations prescribe detailed criteria for the grant or refusal of various classes of visa.

- The overall size and volume of legislation has increased.

  In 1935, there were only 340 Acts of the Commonwealth Parliament. They were printed in four volumes covering less than 3,000 pages. Today there are more than 1,300 such Acts. The official reprint of the *Social Security Act* 1991 (Cth) alone occupies more than 2,700 pages. The *Income Tax Assessment Acts* are even longer. Today the official reprints of the Assessment Act of 1936 and the "Plain English" partial rewrite of 1997, which have to be read together, occupy more than 3,700 pages.

Scrutiny of Bills and Regulations by parliamentary committees in Australia dates back to the establishment of the Senate Standing Committee on Regulations and Ordinances in 1932. Its function under Order 23(3) of the Standing Orders of the Senate requires that the Committee scrutinise each instrument referred to it to ensure:

(a) that it is in accordance with the statute;
(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal;

(d) that it does not contain matter more appropriate for parliamentary enactment.

The Committee described its function in its Annual Report in 1996-1997 and I understand that is still an accurate description of its general approach[1]:

> The Committee engages in technical legislative scrutiny. It does not examine the policy merits of delegated legislation. Rather, it applies parliamentary standards to ensure the highest possible quality of delegated legislation, supported by its power to recommend that a particular instrument, or a discrete provision in an instrument, be disallowed. This power, however, is rarely used, as Ministers almost invariably agree to amend delegated legislation or take such other action to meet the Committee's concerns.

The Senate Standing Committee for the Scrutiny of Bills was established in 1982. It has been said that this was intended to restore parliament to its role as legislator[2]. Similar mechanisms have been set up in other States and Territories of Australia.

The criteria for review of legislation by the Senate Standing Committee for the Scrutiny of Bills are set out in Standing Order 24(1). They are similar, but not identical, to the terms of reference of the Senate Standing Committee on Regulations and Ordinances. They require the Committee to review all primary legislation introduced into the parliament and to report on whether or not it contains provisions that[3]:

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[1] Senate Standing Committee on Regulations and Ordinances, *One hundred and fifth Report, Annual Report 1996-97*, June 1998, p 1, cited in Pearce and Argument, *Delegated Legislation in Australia*, 3rd ed (2005) at [2.18].

[2] Representation of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation: Position Paper*, October 1996 at 1.

[3] Cited in Pearce and Argument, op cit, at [2.27].

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make such rights, liberties or obligations unduly dependent on non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

The importance of pre-enactment scrutiny by reference to criteria relevant to the form of legislation, its intelligibility and its impact on rights and liberties cannot be underestimated. It is obviously far better to address problems of unintended legislative overreach, doubtful expression or impact on basic rights and freedoms at the pre-enactment stage, than to rely upon the mitigating effects of judicial interpretation.

This leads me to some observations about the way in which the judiciary examines and interprets legislation. The interpretive role of courts in relation to statutes is a necessary element of the core function of deciding the controversies or disputes which are presented for resolution. These controversies or disputes may arise between governments in the Federation, between governments or public authorities and private corporations or individuals, and between private parties. In each case the court is required to determine the facts of the case and apply the law to those facts. The simple logical model for that kind of decision-making requires:

1. identification of the applicable rules of law;
2. determination, upon the evidence, of the facts of the case;
3. application of the relevant rule of law to the facts of the case to reach a conclusion about the rights and liabilities of the parties.

The interpretation of statutes requires the application of well recognised rules. The starting point must always be the ordinary meaning of the words of the Act. In a representative democracy those who are subject to the law, those who

invoke it and those who apply it are entitled to expect that it means what it says. As Gaudron J said in *Corporate Affairs Commission (NSW) v Yuill*[4]:

> [T]hat rule is dictated by elementary considerations of fairness, for, after all, those who are subject to the law's commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.

Anybody who has read a dictionary knows that most words have more than one definition. Sometimes the correct and applicable definition of a word or words used in a statute is obvious. On other occasions, it may not be. The interpretive process requires that the court refer to the context in which the words are used and the legislative purpose. Sometimes legislative purpose is obvious, on other occasions it may not be so obvious. This is particularly so where the legislation itself reflects a balance of conflicting interests and to that extent a compromise between them. Increasingly, Acts of parliament specify their objectives. Often, however, those statements are at such a level of generality as to be of limited assistance in solving particular problems of interpretation. The court will of course, where appropriate, have regard to material such as the Minister's Second Reading Speech, the Explanatory Memorandum which was tabled in parliament and, perhaps, other extrinsic materials such as Law Reform Commission Reports or other reports which have been behind the enactment of the law.

The proposition that judges construe Acts in accordance with the intention of the parliament acknowledges in a general way the parameters set by parliamentary language and their compliance with rules of interpretation understood by both the courts and those who draft legislation for the parliament. Individual members of parliament may have differing views about the meaning and purpose of the legislation on which they are voting. On some occasions, fortunately fairly rarely, the Minister's Second Reading Speech cannot be reconciled with the words of the

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[4] (1991) 172 CLR 319 at 340.

Act which he or she is explaining. In that case, it is the words of the Act which will prevail over the Minister's intention.

In a sense, the concept of legislative intention is a construct. It has been called a fiction on the basis that neither individual members of parliament nor even the government necessarily mean the same thing when they vote on a Bill or 'in some cases, anything at all', as Dawson J said in *Mills v Meeking*[5]. If 'legislative intention' is meant to describe a collective mental state of the body of individuals who make up the parliament, then it is a fiction which has no useful purpose[6]. The concept of legislative intention is not usefully deployed in statutory construction as describing some antecedent mental state of the parliament. Rather, it describes an attributed intention based on inferences drawn from the statute itself[7]. It operates as a persuasive declaration or an acceptance that the interpretation adopted is legitimate in a representative democracy characterised by parliamentary supremacy and the rule of law.

An important element in the courts' approach to statutory interpretation is the common law. As a former Chief Justice, Sir John Latham wrote in 1960[8]:

> [I]n the interpretation of the Constitution, as of all statutes, common law rules are applied.

So it is that the common law has a pervasive influence upon statutory interpretation. As Justice McHugh observed in *Theophanous*, which was a case applying the implied freedom of political communication to the common law of defamation[9]:

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5 (1990) 169 CLR 214 at 234.

6 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 345-346 per McHugh J; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 612 per Lord Reid.

7 (1990) 169 CLR 214 at 226.

8 Latham, "The Migration of the Common Law: Australia", (1960) 76 *Law Quarterly Review* 54.

> The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture.

The exercise of legislative power in Australia takes place in the constitutional setting of a 'liberal democracy founded on the principles and traditions of the common law'[10]. The importance of those traditions and principles in Australia is reflected in the long established proposition that statute law is to be interpreted consistently with the common law where the words of the statute permit. Historically, that proposition derived from judicial resistance to legislative incursions on judge-made law.

Justice O'Connor of the High Court in the 1908 decision, *Potter v Minahan*[11] quoted from the 4th edition of Maxwell's *On the Interpretation of Statutes*:

> 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. (footnote omitted)

That principle of interpretation has been repeatedly applied by the High Court and has evolved into a protective presumption against the modification or abolition of fundamental rights[12]:

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[9] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 196.

[10] *R v Secretary of State for the Home Department*; *Ex parte Pierson* [1998] AC 539 at 587.

[11] (1908) 7 CLR 277 at 304.

[12] *Coco v The Queen* (1994) 179 CLR 427 at 437.

> 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. (footnote omitted)

The Courts of the United Kingdom have enunciated a related 'principle of legality' which takes the form of a strong presumption that broadly expressed official discretions are to be subject to fundamental human rights recognised by the common law. Lord Hoffman's explanation of that principle was[13]:

> … the 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 existed in countries where the power of the legislature is expressly limited by a constitutional document.

The principle of legality was said by Laws LJ in 2003 to protect what he called 'rights of a constitutional character recognised by the common law'[14]. He said that the abrogation of a 'constitutional' common law right by statute would require a demonstration that the actual intention of the legislature as distinct from its imputed, constructive or presumed intention was to effect the abrogation. This test could only be satisfied by express words or words so specific that the inference of an actual

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[13] *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131. See also *R v Lord Chancellor; Ex parte Witham* [1998] QB 575 and Dyzenhaus, Hunt & Taggart- 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' [2001] 1 *Oxford University Commonwealth Law Journal* 5-34.

[14] *Thoburn v Sunderland City Council* [2003] QB 151 at 186 (the Metric Martyrs case)

determination to effect the result contended for was irresistible. He suggested that this development of the common law, which applied not only to constitutional rights but to what he called 'constitutional statutes', gave 'most of the benefit of a written constitution, in which fundamental rights are accorded special respect' but preserved the sovereignty of the legislature and the flexibility of the uncodified British Constitution[15]. Although Commonwealth statutes in Australia are made under a written Constitution, that Constitution does not guarantee common law rights and freedoms against legislative incursion. While the observations of Laws LJ were strongly stated, they seemed to go no further than a strongly stated interpretive rule. That rule may be less strongly stated in Australia, but can properly be regarded as 'constitutional' in character even if the rights and freedoms which it protects are not.

In *Electrolux Home Products Pty Ltd v Australian Workers' Union*[16] Gleeson CJ said:

> 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.

The common law has always adhered to the proposition that 'everybody is free to do anything, subject only to the provisions of the law'[17]. That may suggest that freedom is what is left over when the law is exhausted. But the principle of

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15 [2003] QB 151 at 187.

16 (2004) 221 CLR 309 at 329.

17 *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283 per Lord Gough; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564.

legality in England and the interpretive principle in Australia suggests it is more than that. TRS Allan wrote in 1996[18]:

> [T]he English Courts no longer view individual liberty (if indeed, strictly speaking, they ever had) as solely residual. Liberty is not merely what remains when the meaning of statutes and the scope of executive powers have been settled authoritatively the court. The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction. The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal.

By way of example, there has long been a particular recognition at common law that freedom of speech and the press serves the public interest. Blackstone said that freedom of the press is 'essential to the nature of a free state'[19]. Lord Coleridge in 1891 said that[20]:

> The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done…

The common law freedoms include freedom of movement and freedom of speech. The common law also provides for interpretation of statutes said to affect property rights so as to minimise their effects upon such rights. Statements to that effect appear in Blackstone's *Commentaries on the Laws of England*. He said that

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[18] Allan TRS, "The Common Law of the Constitution: Fundamental Rights and First Principles", in Saunders (ed), *Courts of Final Jurisdiction – The Mason Court in Australia* (1996) 146 at 148.

[19] Blackstone, *Commentaries on the Laws of England* , (1975) bk IV c II at 151-152.

[20] *Bonnard v Perryman* [1891] 2 Ch 269 at 284 and see *R v Commissioner of Metropolitan Police; Ex parte Blackburn (No 2)* [1968] 2 QB 150 at 155; *Wheeler v Leicester City Council* [1995] AC 105 at 106; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 203.

the common law would not authorise the 'least violation' of private property notwithstanding the public benefit that might follow[21]. He acknowledged that the parliament could compel acquisitions. That common law interpretive approach was accepted by Sir Samuel Griffith in *Clissold v Perry*[22]. In that case Griffith CJ referred to the 'general rule to be followed in the construction of Statutes … that they are not to be construed as interfering with vested interests unless that intention is manifest'[23].

The way in which common law rights and freedoms inform the interpretation of statutes reflects the way in which an interpretive Charter of Rights might operate. Whether or not such a Charter is adopted, it would no doubt be useful to unbundle from the terms of reference of the two Senate Committees the 'personal rights and liberties' against which statutes and delegated legislation are examined.

The interpretive approach required by the 'principle of legality' arises after the event of enactment and necessarily responds to the particular case before the court. Generally speaking, the resolution of the question of interpretation which comes before the court in such cases will go no further than is necessary to resolve the case at hand, although it may have implications for further similar cases. Pre-enactment scrutiny by the parliament with a view to ensuring minimum impact of legislation, primary or delegated, upon fundamental human rights and freedoms is to be preferred. There is also much to be said, as I think has been discussed, for post-enactment scrutiny of legislation in operation.

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[21] Blackstone, *Commentaries on the Laws of England*, (1975) bk I c I at 135.

[22] (1904) 1 CLR 363.

[23] (1904) 1 CLR 363 at 373, Barton and O'Connor JJ concurring at 378. Similar statements can be found in *Greville v Williams* (1906) 4 CLR 694; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 and *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193.

One particular area which offers considerable challenge to the autonomy of individual parliaments and the balance of power between parliament and the executive in connection with the scrutiny of legislation arises out of cooperative federalism. The Position Paper on Scrutiny of National Schemes of Legislation, published in October 1996 by a working party of representatives of Scrutiny of Legislation Committees throughout Australia, identified the problems associated with scrutiny of cooperative scheme legislation. The problems are not diminishing. The agenda of the Council of Australian Governments ("COAG") indicates a wide range of areas in which cooperative legislative approaches may be contemplated. This is illustrated by the seven areas identified for the 2008 COAG work agenda:

- Health and Ageing
- The Productivity Agenda – including education, schools, training and early childhood
- Climate Change and Water
- Infrastructure
- Business Regulation and Competition
- Housing
- Indigenous Reform

It is obvious that pre-enactment scrutiny of legislation to give effect to cooperative schemes becomes more difficult in practical terms when the legislation emerges from an inter-governmental agreement and consultation and exchange of drafts between the executives of the participating governments.

There are many challenges which face parliaments in representative democracies with responsible government. Important issues associated with scrutiny of legislation include avoiding unwarranted incursions into personal rights and freedoms, reducing complexity and engaging in a timely and effective way with complex legislation particularly that which is the product of cooperative schemes. The range and depth of the agenda of your conference suggests that the parliamentarians participating in it are taking a pro-active and energetic approach to what might be called 'preproduction quality control' in relation to legislation. What

you are doing in this respect is of great importance for all of us and I wish you well in your deliberations.