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The decision of the Privy Council in Lesa v Attorney-General of New Zealand has unleashed an avalanche of popular as well as legal writing. In this Journal alone, the judgment has been reproduced (see [1982] NZLJ 274) and, by a bit of investigative journalism, profiles have been offered on Dr. Barton and his colleague (ibid 271, 273). One feature of the decision has been little remarked. In February 1983 Professor Ken Keith called it to the attention of a high powered legal symposium in Canberra. The symposium was summoned to look at that old question - the extent to which courts can have regard to extrinsic material in determining the intention of Parliament. It will be recollected that in Lesa, having reached a firm view on the meaning and effect of the relevant New Zealand legislation, their Lordships permitted themselves a peep, beyond the language of the legislature, to extrinsic material, namely the records of the resolutions of the Council of the League of Nations, resolved in 1923 shortly before the relevant New Zealand legislation there in question was passed.

> 'Despite the fact that the resolutions did not impose on the Government of New Zealand any obligation binding upon it in international law, their Lordships agree with the Court of Appeal that the resolutions would be relevant in resolving any ambiguity in the meaning of the language [of the statutes].'

Comfortably for this opinion, the Privy Council was unable to discern any ambiguity or lack of clarity in the legislative language. So the observations are at best obiter.

They nonetheless reflect important moves that can be seen in a number of common law countries, where judges are going beyond the four corners of the statute and looking for the meaning in relevant extrinsic documents even - terribile dictu - Hansard reports of Parliamentary debates.

Take the following recent examples from Australia:

* In Dugan v Mirror Newspapers (1978) 142 CLR 583, Stephen J. resorted to legislative history and debates, though he found the experience 'unrewarding'.
* More recently Mason J. in F.C.T. v Whitfords Beech Pty. Ltd. (1982) 39 ALR 521, sought access to a Minister's second reading statement to Parliament to provide evidence of the 'mischief' to which the legislation was addressed.
* Encouraged by this, the full Federal Court of Australia in TCN Channel 9 Pty. Ltd. v A.M.P. Society (1982) 42 ALR 496, admitted the Minister's second reading speech and explanatory memorandum to prove the 'mischief'.
* Even in criminal trials, State judges in Australia are now looking to Hansard to see what on earth Parliament meant when it enacted criminal law reforms. For example, this is what Cross J. did in R. v Murray [1982] 1 NSWLR 760.

In England, Lord Denning (like Murphy J. in the High Court of Australia) never hesitated to look to extrinsic documents if he considered them relevant. The adherence of the United Kingdom to the European Communities encouraged Lord Denning to urge that 'Just as in Rome you should do as Rome does. So in the European community, you should do as the European court does'. James Buchanan & Co. Ltd. v Babco [1977] 2 WLR 107, 112. European lawyers find the common law tradition difficult to understand and when understood they normally cannot accept it. Normally they will look at any relevant material outside the statute. But any hints of a softening of English judicial attitudes, to be drawn from Lesa or from Lord Denning, must be weighed against the stern rebuke administered to Denning in a decision of the House of Lords a few weeks before Lesa. This reiterated 'a series of rulings unbroken for a hundred years...that recourse to reports of proceedings in either House of Parliament...is not permissible as an aid to construction'. Hadmor Productions Limited v Hamilton [1982] 1 All ER 1042.

Plainly, the common law is going through a perfectly normal phase of law reforming development - individual judges pushing forward the range of material to which they openly have access and upon which they will rely, with attribution, in the often unrewarding task of divining the legislative intent. We should never forget the the original genius of the common law system lay in its law reforming capacity: judges and practitioners working together to stretch old rules and adapt them for changing circumstances and new attitudes.

The Canberra seminar was interesting both for the fact that it occurred and for the contributions made to it. In advance of the seminar, the Federal Attorney-General's Department in Canberra had distributed a policy discussion document Extrinsic Aids to Statutory Interpretation (October 1982). This set out numerous judicial cris de coeur about the problems of statutory interpretation as well as a goodly sampling of exotic reform legislation (such as the Ghana Interpretation Act 1960 s 19). There was also a specific proposal. The proposal suggested the preparation with a limited number of Bills of an explanatory memorandum which should be approved by Parliament and then available to be used by courts 'as an aid in interpreting an Act'. To start things rolling, it was suggested that the Australian Law Reform Commission should prepare such a memorandum with one of its reports. Indeed, the Commission's latest reference on admiralty jurisdiction, in which Australia is much aided by the report of the New Zealand Special Law Reform Committee on Admiralty Jurisdiction, 1972, specifically instructs the Law Reform Commission to formulate a draft explanatory memorandum 'that could be used as an aid to the interpretation' of legislation giving effect to the Commission's recommendations.

Always seeking to anticipate Parliamentary wishes, the Commission has already acted. In a report on Insurance Contracts (ALRC 20) tabled in the Australian Parliament in December 1982, it proposed a comprehensive reform of insurance contracts law. The report attaches, as usual, a draft Bill to implement the recommendations made. But, as well, for the first time, it also attaches a detailed explanatory memorandum. This provides references to the relevant sections of the text, background information and examples and illustrations of the way in which the insurance reforms are intended to work. If the next Australian Parliament is serious about the explanatory memorandum procedure and wishes to experiment with it, it now has a ready made starting point.

Interestingly enough, several participants at the symposium questioned the notion of explanatory memoranda in aid of construction. One or two urged persistence with the current rules - some for reasons of principle relating to the relative power of Parliament and Executive Government; others for reasons of practicality. It is hard enough, they said, to keep pace with and find the enacted law, let alone adding to that burden resort to extrinsic material which might be less precise, less certain and less available. On the other hand, an unexpected opposition camp was led by Murphy J. With characteristic frankness, he told the participants (as his judgments disclose) that he frequently had access to Parliamentary debates and often found his own contribution, when a member of the Australian Senate, especially valuable, not least during the time when he was a Federal Minister. Murphy J., apparently

confident that his approach was winning the day in the courts, urged that nothing should be done by Parliament and that reform should be left to the processes of the common law. Others, including this writer, urged that any legislative reforms should be permissive only so that the inventive tendencies of the common law should continue to have full rein.

In one of the closing sessions of the symposium (which lasted only one day), an informal vote of participants was taken. Unlike other votes in Australia it was not compulsory. It showed relatively little support for the explanatory memorandum proposal, some support for holding the line. But the strongest support of all (about 70%) favoured a general liberalisation of the rules of statutory interpretation, so that judges and lawyers would look to a much wider range of relevant extrinsic material - including Parliamentary debates, Royal Commission and Law Reform reports and other related material that might throw light on the Parliamentary intent. Summing up the day, Mason J. of the High Court of Australia pointed to the need to keep in mind the costs and benefits of reform. Though sometimes inconvenient and even seemingly irrational, the rule limiting access to material outside the statute had encouraged precision of legislative language and discouraged undue reference to material that is obscure or unreasonably difficult to obtain. Mason J. confessed that he too often looked at Hansard, though he did not confine his attention to speeches of Senator Murphy!

No mention was made in the symposium of the novel provisions of section 5(j) of the New Zealand Acts Interpretation Act 1924.[1] Doubtless this provision and the traditions of courts in New Zealand would provide an interesting counterpoint to the Australian and English debates. But it is certain that central among the concerns of law reform in English speaking countries are the burgeoning size of the statute book, the unavailability of the law to many people and the obscurity of the legal language once it is found. The price of simpler legislation may be new rules of statutory interpretation. The record of the Canberra meeting will for that reason attract the interest of more than a few colleagues across the Tasman.

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1. See D.A.S. Ward 'A Criticism of the Interpretation of Statutes in the New Zealand Court' [1963] NZLJ 293.