

"STATUTORY INTERPRETATION AND THE RULE OF LAW -

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The Hon Justice Michael Kirby, CMJ¹

John Ewens - Doyen of Draftsmen

My professional association with John Ewens dates back to the time when we were both Commissioners of the Australian Law Reform Commission. He was first appointed to the Commission in 1978² initially for a period of two years. He had by that time retired as First Parliamentary Counsel of the Commonwealth. The Commission already had in place a settled policy of attaching to its reports a draft Bill for the implementation of so much of its reform proposals as were thought to require legislation. This technique of institutional law reform had been copied from the Law Commission of England and Wales. It had been justified on a number of bases. It would help to focus precisely the proposal for reform. It would help to place the reform in its context of Federal or Territorial legislation. It would express the reform in a manner that was familiar to legislators, administrators and other relevant persons. It could help to expedite the process of reform, by facilitating enactment. Occasionally, it might provide a Bill which could be slipped into an unexpected gap in the legislative programme.³

Not all of these objects were always secured. But there is no doubt that the discipline imposed by the translation of

reform proposals into draft legislation helped to sharpen the focus of the work of the Law Reform Commission. The searching questions of the trained legislative drafters who assisted the Commission in those early days, set the Commission on a path of precision and attention to detail, which has gradually earned the translation of many of its proposals into law.⁴

None of the interrogators was more searching or more demanding than John Ewens. He came to the Commission with a formidable reputation. This is traced elsewhere in this volume. I will not repeat it. In a career of more than 50 years as an officer of the Commonwealth, he had held, on a permanent and acting basis, most of the highest offices involved in the provision of legal advice to the Commonwealth. I well remember, before his appointment as a Commissioner was suggested by Attorney-General Ellicott, that I was warned of his most demanding ways. It was suggested, ever so delicately, that a person of my (then) comparative youth might find life with Ewens altogether too tempestuous. His reputation for blunt speaking, directness and impatience with humbug was legend. I am not sure whether it was thought appropriate to warn me especially of these characteristics because of suspected relevant defects on my part. Certainly, I welcomed his appointment. It meant that we had amongst us a person most knowledgeable in the legislative and other ways of the Commonwealth. I suspected that the Commission would survive his occasional

irascibility. It did. He doubtless felt, on occasion, that the grand schemes of legislative reform put forward were nonsense. Indeed, often he did not hesitate to say so.

He was appointed a part-time Commissioner. But in the nature of things his redoubtable talent as a drafter was soon to shine forth. The early drafts of legislation for the Commission had been prepared by Mr Jim Munro (of Parliamentary Counsel's office) and Mr Noel Sexton (Director of the Legislative Drafting Institute). Mr Munro's struggles with Mr Gareth Evans (as the Minister then was) were notable for the heat and light which they generated. Noel Sexton was a kindly and most obliging man. He was happy to work with the Commission when the Fraser Government withdrew its support from the Legislative Drafting Institute. With John Ewens's arrival on the scene, the drafts of Noel Sexton - so perfect to our eyes - were subjected to the impatient scrutiny of his former master. Ewens was swift and peremptory in his corrections. I observed how his razor-sharp mind earned the deference of Sexton and the admiration of the distinguished Commissioners who sat at the table with him. The skills of a trained legislative drafter at work were a wonderful thing to behold.

A mark of the admiration which John Ewens earned in the Law Reform Commission was the celebration, in 1979, of his 50-

year membership of the legal profession attended by the then Governor-General, Sir Zelman Cowen. Sir Zelman had been a Commissioner of the Law Reform Commission with John Ewens. There was an entirely appropriate Vice Regal tribute to his service.⁵

Upon the completion of his two-year term as a Law Reform Commissioner, I endeavoured to have John Ewens reappointed, so indispensable had he become by that time. However, the policy against the appointment of persons to statutory office over the age of 70 years frustrated my attempts. This impediment was soon properly circumvented by his reappointment as a consultant. It was in that role that he maintained his links with the Commission right up to the time that I left it in 1984. To the end of that association, John Ewens was energetically filling his days not only with practical work on legislative drafting, but also by contributing to the future of the drafting profession, of which he was in Australia, the *doyen*. For example, in February 1983, he delivered an invited paper to a meeting of Commonwealth Law Ministers held in Sri Lanka. The paper was on the topic of the provision of an effective legislative drafting service: a constant problem in the developing countries of the Commonwealth. Ewens expressed the view that those who did legislative drafting were "born and not made". He was for the apprenticeship method of training. He questioned the notion that legislative drafting could be taught in a body such as the Australian

Legislative Drafting Institute, then recently abandoned. He described his miraculous first encounter with a word processor in language akin to that of Keats, first looking into Chapman's Homer. It was in the Law Reform Commission that this marvellous tool of drafting first became available to him. I remember his delight with it; and his reflection on the way in which it would have saved the tormenting tasks of repeated retyping of drafts in the old days.

His two immediate successors in the office of First Parliamentary Counsel were, in due course, appointed to the rank of Her Majesty's Counsel. Such appointment had never come to Ewens, apparently because of the obstruction in some quarters to the notion that government lawyers should be honoured in this way. Although in every sense Ewens was more truly one of Her Majesty's Counsel than many bearing that title, he was not practising in the daily business of the courts. The Bar, jealous of the title, resisted its conferral outside the ranks of practising barristers.

I intervened, with others, to correct this injustice. Soon after the appointment of Senator Gareth Evans (arisen phoenix-like from his part as a Commissioner of the Law Reform Commission to be Attorney General), Mr Ewens was appointed one of her Majesty's Counsel for the Australian Capital Territory.⁶

A wrong was righted and his professional rank recognised. But he was not the retiring type. Not only did he continue his association with the Law Reform Commission, he took part in the foundation of the Commonwealth Association of Legislative Counsel, and he later became interested in a most unlikely cause. I refer to the "translation" into "plain English" of Federal legislation expressed in the traditional style.⁷ I say this was an "unlikely" interest for him because it represented a kind of Damascus Road conversion, at an advanced age, to a new and somewhat different mode of expressing legislation. It might have been expected that a person heavy with years and celebrated and honoured for a lifetime of distinguished service, would refuse, in the autumn of his life, to question settled ways of doing things. It is a measure of John Ewens's independence and liveliness of mind that he was to disdain such self satisfaction. Instead, with the apparent enthusiasm of a new St Paul, he involved himself directly in one of the three most important developments which are occurring in Australia at this time, affecting the science of legislation to whose cause he had devoted his life. That development is the writing of legislation in so called "plain English". The principal impetus for this movement has been the work of the Victorian Law Reform Commission under the stimulus of the former Attorney-General Mr James Kennan⁸ and the leadership of the Chairperson of that Commission, Professor David St L Kelly. The Report of that

Commission on *Plain English and the Law*, together with its appendixes, represents the foundations of nothing less than a new approach to the expression of the will of Parliament in legislation.⁹ The purposes, problems and successes of this new movement are reviewed elsewhere in this series of articles.¹⁰ I do not propose to canvass that ground at any length.

Instead, I propose to deal with the other two principal developments concerned with legislation in Australia. These also affect the way in which legislation is expressed. I refer to the increasing inclination of the courts to adopt a so-called purposive approach to effect the apparent policy of the legislature, expressed in the language of legislation, and the use of extrinsic material to assist the achievement of that end. All of these developments - plain English expression, purposive construction and use of extrinsic materials - represent a facet of a single diamond. This is modern legislation, more simply and conceptually expressed; more faithfully and wholeheartedly implemented by a judiciary, respectful of the will of the modern Parliament; utilizing to that end the material which was available to Parliament and to the drafter, in order more accurately to secure the apparent objectives of the law-maker.

Limits of "Plain English"

There is a vast literature on the theory and practice of statutory interpretation. It is difficult in a short article to avoid banal generalities. However, it is as well to approach and illustrate the two topics which I have chosen to examine, by offering at the outset a few observations of a general character.

The first is that language is an inescapably imperfect vehicle of communication of ideas. The English language is especially imperfect. One of the reasons for this assertion may be traced to the fact that English represents the confluence of two significantly different linguistic streams. The core language, as spoken in every-day speech, remains the Germanic tongue of the Saxon invaders of Celtic England. But onto that language has been grafted the formal and courtly language of the Norman Conqueror. It is for this reason that English is such a rich language for literature. For many ideas there are two words, competing for acceptance. This competition is particularly reflected in poetry. But also in the law. The phrase "last will and testament" symbolises the marriage of these two linguistic traditions. "Will" is the language of the Saxons. "Testament" is a word brought over with William the Conqueror. It is important to appreciate the high level of ambiguity of our language when tackling the simplification of the expression of ideas in legislation or in any other

legal drafting. Such recognition provides a reason for acknowledging the limitations of so-called "plain English expression" and of the successful attainment of the "legislative purpose" from words, whatever they are. That "purpose" may itself be obscured to some extent in the words chosen to express it. There may be as many opinions about the "meaning" and "purpose" as there are decision-makers to offer them.

An amusing illustration of the ambiguity of language and communication was recently given by one of John Ewens's former colleagues, Ewart Smith. It was Smith who discovered the fatal flaw in the Australia Card legislation by turning his drafting skill onto the fine print of the legislation. In a forthcoming book, Smith - sensitive to the ambiguities of language - instanced the following exchange he once had with former Prime Minister Whitlam. He wrote:

Gough Whitlam was ... a man of great humour, amongst all his enormous pressures and worries. It was always a great pleasure for officers in our Department to have dealings with him directly, as we often did. I recall on a visit to Sydney with him one day I drew his attention to a booklet (issued by some Labor Party organisation) on the front of which, in capital letters, was the caption "Gough's going great!".

But, I said, it had been pointed out in some magazine that the mere inclusion of a comma after "going" changed its meaning dramatically! Whitlam saw the joke and laughed heartily.

Language, the structure of sentences and even emphasis and body language provide great scope for ambiguity in communication. It may be reduced. It cannot be abolished.

Secondly, it must be recognised that, whether in "plain English" or not, legislation can only ever deal with some of the myriad of circumstances which arise in everyday life. Human conduct is so varied, and the variety of instances that may occur so unpredictable, that even the best drafter can only express a proposition in general terms. There will, inescapably, be a law-making function left to the person whose task it is to interpret this generality of language: whether that person is an ordinary citizen governed by the law, an administrator or a judge. The authority of their interpretations will vary. But the need to flesh out the bare bones of skeletal statutory language is inescapable. It derives from the imperfect tools by which legislative purposes must perforce be expressed.

It is traditional for judges to state the task of statutory construction to be that of discerning the legislature's "will" or "intention". These expressions have the value of symbolising deference to the supremacy of Parliament and to the right of the elected representatives of the people in Parliament to embody their "will" and "intention" (however wise or foolish) in binding expressions of enforceable law, collected in the statute book.

To refer to the "will" and "intention" of the collection of elected people of varying backgrounds assembled in Parliament also has the merit of underlining the duty of unelected judges (and others) in our form of polity to bend their respective wills to that expressed by Parliament, whose members enjoy a special legitimacy derived from their popular election. In this sense, the reference to "will" and "intention" is itself an expression of deference to the rights of the people, collectively to choose their representatives. The whole people cannot assemble in Parliament. Therefore, of practical necessity, representatives must act for them. Statutes are, by our legal theory, the reflection of the will of the majority of the people. We check and renew the authenticity of that expression of will by rendering those representatives accountable from time to time in popular elections. Therefore, the authenticity and legitimacy of the expression of the legislative "will" and "intention" is traced back to the people in whose name the legislation is notionally made.

This said, there are many flaws in the translation of this theory into actuality. So much so that Julius Stone expressed the view that the invocation of these words must be regarded as fictional or ritual, concealing the unavoidable creative choices which the interpretation of statutes, at least in a case of any difficulty, must

involve".¹² In some cases, despite the almost inescapable ambiguities of the English language, the meaning to be derived from legislation is fairly clear. But in many cases it is not, and certainly not in the kinds of cases that typically come before appellate courts. Often there is no single, plain, clear construction to be given to the legislative language. In such circumstances, to talk of the legislative "will" or "intention" is not very helpful.

There are also practical reasons why the expression should be avoided. Fictions may sometimes be useful. However, they may also destroy the confidence of those who too naively espouse them and find that the actuality is different. Thus, anyone with even a modest knowledge of the way Parliament works, will question the reference to a "legislative will". On some rare occasions, Parliament may speak on an important topic with a clear voice, expressing its "will" or "intention" with pristine clarity. But in most cases there is neither a clear "will" on the part of Parliament as a whole nor even on the part of those members who command the majority of Parliament in government. Often, the most that can be said is that the members of the government approve generally of the attainment of a broad policy thrashed out in party conferences and caucus rooms in general terms. Beyond that policy, the flesh of statutory language is applied by the departmental officials. The legislative drafter acts with a varying degree of input from the Minister, other members of Cabinet

and the Minister's private office instructing on behalf of the political government. The sheer pressure of life, particularly the intermittent legislative life of a politician in a country such as Australia, forbids any closer involvement of the elected official in the formulation of a "legislative will".

It does not require a close attention to half a century of the operation of Parliament which John Ewens enjoyed to reach this conclusion. Any member of the Australian public who listens even occasionally to parliamentary broadcasts will realise that talk of a simple "legislative intention" about a complex enactment is, as Julius Stone described it, a "fiction". A clear-sighted recognition of this fact will not destroy the respect which is due of a democratically elected legislature. But it will inject into the task of statutory construction a healthy degree of realism about the purpose to be attained in carrying out the task. That purpose is the giving of meaning to language which cannot escape a degree of ambiguity and which expresses in detail, with the authority of the legislature, policies generally approved by the elected government. That approval is forthcoming frequently without specific attention to the detail of the language in which the legislation is expressed.

Thirdly, there is a need to consider the question of the lawmaking power. References to the "legislative will"

cannot remove the creative choices which interpreters, including ultimately judges, have in seeking to apply ambiguous language of generality to the particular fact situations which arise. There is, I am afraid, a great deal of double-talk about simplifying legislation. Many are the debates about the comparative values of the detailed common law style of drafting (which we have tended to follow in Australia) as contrasted with the civil law tradition. The latter is said to be more conceptual and simpler of expression. But there are paradoxes to be noted here. On the one hand, as Sir William Dale has observed, English statutes originated, and continue to exist within the matrix of the common law.

Although they have grown to an immense size,
they are not free of mother's apron strings.
Independence will follow codification¹³.

On the other hand it has been said that

"Englishmen" prefer to be governed (if they must be governed) by fixed rules rather than by official discretion. Mr Bennion prefers common law to civil law drafting because of its "much greater degree of certainty and democratic control".¹⁴

Many judges express a similar preference. This view was more common when, through lack of insight or otherwise, the judicial task was seen as largely mechanical and automatic. Even today, with greater insight, there are those who prefer the notion that the rule to be applied should be found somewhere in the legitimate language approved by

Parliament. Never mind that the elected legislators never gave the slightest attention to the minor clause under the interpreter's microscope. Never mind that the clause was not even noticed by the Minister or the Cabinet. Do not be concerned that even the departmental officials may not have given the slightest consideration to the possibilities of the clause or that it may have been added, as apparently necessary, by a drafter on his or her own authority. The chief paradox is found in the creative function of the common law judge.¹⁵ He or she is not a "knight errant" entitled to roam at will. But, in all truth, there is a high element of creativity in the function of the judge of our tradition. It is not less so because denied. Only lately has that element of creativity been more openly acknowledged.

The blinkers may have been partly removed, from perception of the proper function of the common law judge in the development, by analogous reasoning, of the common law. However, the opportunities for choice which frequently exist in the construction of legislation have not been equally perceived. Wherever there are opportunities for choice it becomes important to provide guidance to the judge (and other interpreters). Only in this way may a measure of certainty in the construction of legislation be achieved together with consistency in the attainment of the overall purpose of the legislation.

Rules of interpretation have been devised by judges. However, these rules often involve the "problem of dichotomous concept".¹⁶ They tend to "hunt in pairs". For almost every one of them, another can be found which, in an appropriate context, will point to a result different from that which the rule indicates.¹⁷ It is the belated recognition of the limited tools which are available to assist in the task of statutory interpretation which has lately encouraged the use, in aid of that task, of extraneous materials - such as second reading speeches, parliamentary debates, law reform reports and other preliminary works. By interaction with the necessarily brief language used in the statute, it is hoped that clearer pointers will be provided to the purpose which the legislation was seeking to attain. But are they?

The Purposive Approach

I have said that the judge-made rules for statutory construction tend to "hunt in pairs". One of those pairs is the so-called "literal" or "golden" rule requiring meaning to be given only to the language used - and the so-called "mischief" rule, which obliges the interpreter to search for the policy or purpose of the legislature that is to be effected beyond that language, but guided by it.

It is, of course, a mistake to present these approaches to legislation as true alternatives. It would take a sociological study, doubtless with the aid of scalograms, to catalogue judges according to whether, by their personality or otherwise, they generally favoured a "literalist" approach to a so-called "purposive" approach to statutory construction. Perhaps a sociologist of the judiciary would, with appropriate examples, categorise as "literalists" those with lesser insight into the opportunities for choice inherent in the function of a common law judge, including in the construction of legislation. Such judges might be portrayed as yearning for the simpler days, when the judicial function was perceived to be nothing more than the ascertainment and declaration of pre-existing rules. The same sociologist might catalogue the judges who are inclined to the "purposive" approach as those who have greater insight into their real function but without a clear identification of the principles by which that function is discharged. Perhaps it would be said that such judges are frustrated law makers who constantly run the risk of exceeding their mandate by usurping the legitimacy that attaches to the law made in Parliament. Observation of the judiciary, at least in Australia, suggests caution in assigning such stereotypes to judges, any more than to parliamentary law makers. Giving meaning to legislation has now become a major aspect of the work of the modern judge - as indeed of the modern lawyer. The enormous quantity of law imposes a

daily burden of construction. That task must be performed, frequently without the availability of a previous interpretation to afford a guide.

The notion of looking for the meaning of the language of legislation, by reference to the policy it is apparently seeking to attain, is hardly novel. This was recalled recently by Mahoney JA when he pointed out:

The fact that policy or purpose may be referred to in the construction of legislation is no new insight. The use of it dates back at least four hundred years to *Heydon's Case* 3 Co Rep 7 and "the mischief", "the remedy" and "the true reason of the remedy" there referred to.¹⁸

In part the greater attraction to judges nowadays of the "purposive" approach when compared to the past, rests upon practical considerations. Sometimes this is expressed in terms of the perceived desirability that judges should play their part in encouraging the simpler expression of legislation. This will only occur if judges avoid the horrors of "Judge Fiendish's" perverse tendency to misread the drafter's mind.¹⁹ The increased tendency to search for, and to implement, the apparent purpose of the legislation has been noticed by many judges,²⁰ including myself.²¹ But I regard these explanations for it as concentrating on matters of detail only.

The real explanation of the swing towards favouring the purposive approach is to be found in the modern self

conception of the judiciary as having a legitimate, but limited, function of lawmaking. That function includes the elaboration of law which has necessarily been expressed in brief and general language that cannot foresee all of the circumstances to which that language will have to apply. In such a case, legislation being meant to operate effectively in the real world, the creative judge of the common law will play a function entirely appropriate to the judiciary of our tradition if he or she fills at least the minor gaps in the statutory language in a way, which achieves, and does not frustrate, the apparent overall policy of the legislation. Doing so appears specially legitimate if the reality of the way in which legislation is created is kept in mind. It is not as if every word has received more than the formal stamp of approval of the parliamentary institution. I will not repeat what I have said about the fiction of "the will" or the "intention" of Parliament. Growing knowledge and recognition of these realities has fostered a growing acceptance of the creative function of the judiciary in statutory interpretation.

There have been numerous attempts in recent years to explain why judges have tended away from the "literalist" approach to the task of statutory construction and towards a "purposive" approach. I offered my own attempt in a dissenting opinion in *Australian Broadcasting Corporation v Redmore Pty Ltd.*²² But one of the most helpful analyses of the shift from a "literalist" tendency to a "purposive"

one is offered by McHugh J A in *Kingston and Anor v Keppose Pty Ltd.*²³

A purposive and not a literal approach is the method of statutory construction which now prevails: cf *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 272-273, 275, 280, 291. In most cases the grammatical meaning of a provision will give effect to the purpose of the legislation. A search for the grammatical meaning still constitutes the starting point. But if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act. The Act's Interpretation Act 1901 (Cth) s15AA and the Interpretation Act 1987. (NSW) s33 both require this approach to statutory construction. The companies legislation has its own direction to this effect ... the function of the court remains one of construction and not legislation.

As Lord Diplock has pointed out.

"The task in 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". *Jones v Wrotham Park Estates Ltd* [1980] AC 74, 105.

Purposive construction often requires a sophisticated analysis to determine the legislative purpose and a discriminating judgement as to where the boundary of construction ends and legislation begins. But it is the technique best calculated to give effect to the legislative intention and to deal with the detailed and diverse factual patterns which the legislature cannot always foresee but must have intended to deal with if the purpose of the legislation was to be achieved. Moreover, it is the technique which may finally induce the draftsmen of statutes to state broad principles rather than to draw the detailed enactments which now emanate from the legislatures. Only then will statute law escape the comment of Sir Carleton Allen that a "statute is probably

the most repellent form of written expression known to man": "The Literature of the Law", in *Aspects of Justice* (1958) (Stevens and Sons Ltd.) at 284.

If the objects and purposes of a statute and the means of their achievement are not declared, they can only be determined by examining the statute as a whole. The ordinary meanings of the individual words together with any statutory definitions will invariably indicate what those objects, purposes and means are. The cumulative weight of their core meanings will indicate the general purpose or purposes of the statute. But when the statute has been read as a whole and its purpose determined, the *prima facie* meaning of a provision must, if necessary, give way to the construction which gives effect to the statutory object or purpose. The meaning of a legislative provision is not necessarily the sum of the meanings of its constituent element... Words may give colour to each other, modifying their primary meaning, and causing the whole provision to have its own unique meaning. Likewise the general objects and purposes of the statute will give colour to the individual words, phrases and provisions sometimes modifying their ordinary meanings.

Once the object or purpose of the legislation is delineated, the duty of the court is to give effect to it so far as, by addition or omission or clarification, the relevant provision is capable of achieving that purpose or object. Where the Court can see the purpose of a provision from an examination of its terms, little difficulty should be met in giving effect to that purpose. The days are gone when judges, having identified the purpose of a particular statutory provision, can legitimately say as Lord Macmillan said in *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 at 641, of the means used to achieve the purpose: "The legislature has plainly misdirected fire". Lord Diplock, in an extra judicial comment on that decision has said that "if the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed". "The Courts as Legislators", *Lawyers and Justice* (Sweet and Maxwell) (1978) at 274.

I agree with these observations. But I would caution against creating a false dichotomy between "purposive" and "literalist" approaches to legislation. There is a tension here, always competing for the persuasion of the judicial mind. It is between the apparent meaning of the words taken in isolation and the meaning of those words, examined in their context, including the context of the particular statute in question or its background of common law, predecessor legislation and subsequent amendments. That is why I prefer to describe the two ends of the spectrum as "tendencies". Nor may judges be conveniently slotted into one or other, as Lord Denning categorised the "timorous souls" and "bold spirits" of the law (himself naturally one of the latter).²⁴ Judges, on different occasions, in different contexts favour a construction described as "literalist" or "purposive". No doubt general tendencies do emerge from many cases. But it is in the nature of the human activity of decision-making that exceptions should exist and deviation from predictability occur.

Immediately following the passage (above) in which he referred to *Heydon's case*, Mahoney JA cautioned against the indiscriminating use of policy as an aid to construction:

Experience has shown that policy and purpose as aids to construction, must be dealt with with care. It is not by accident that judges of eminence have suggested that policy and public policy are to be used with caution: See, eg, *MP Metals Pty Ltd v Federal*

Commissioner of Taxation 117 CLR 631 at 633, per Windeyer J; *ex parte Begovich*: *re Morrow* 43 SR (NSW) 274 at 277-8, per Jordan CJ. There are reasons for it. The views of judges on such matters may differ widely: See the well-known observations on public policy in *Mogul SS Co v McGregor Gow and Co* [1892] AC 25 at 45; *Janson v Driefontein Consolidated Mines* [1902] AC 484 at 500, 507. Even where the policy or purpose of the legislation is clear judges may differ as to what follows from it, and how the policy or purpose operates in the individual case. The danger that a judge may see a policy or purpose behind legislation for reasons which are idiosyncratic has been referred to: See *Halsbury Laws of England*, 4th ed, Vol 44, par 903(4). But to see the key to the meaning of a section in the policy or the purpose of the legislation is, in my opinion, to take a less than sophisticated view of the art of the parliamentary draftsmen. In many cases, the interpretation of a provision is difficult, not because the policy or purpose of the legislation is not clear, but because the section is directed, not simply to effecting that policy or purpose, but to achieving a compromise between it and other considerations.²⁵

Many instances present where an anomalous or apparently unjust, result arises from the meaning which appears to flow from the language of the statute. In such cases, it is the duty of the judge to endeavour to effect the purpose, as it is expressed. In *re Rouse*,²⁶ Cardozo J said that "consequences cannot alter statutes, but may help to fix their meaning". Yet it is a truism to declare that a point will be reached where the court, however anomalous or unfair the result, is bound to give effect to the language in which the statute is expressed. Many such instances have come before me,²⁷ as before every other judge.

A good illustration may be found in a recent case

concerning the meaning of the *Stamp Duties Act 1920 (NSW)*, s74D. That provision related to the duty payable on the hiring of certain goods. The statutory definition excluded from duty an arrangement "relating to" a "motion picture film". The arrangements of the appellant related to the hire of video tape cassettes, some of which (but not all) were copies of earlier celluloid motion picture films. The ultimate question for the Court of Appeal was whether such hiring arrangements were within the definition or the exception to the definition and thus dutiable or free from duty. The Court unanimously held that the transactions entered into by the appellants, when hiring video cassettes to members of the public, fell within the definition of "hiring arrangement" under the Act. They were not exempt from duty as relating to a "motion picture film". Although there was no apparent logic in excluding celluloid films but including for duty the new technology of video tape film cassettes, the legislation had been expressed with a high degree of specificity. In its history and context - including by contrast with other legislation where video tape had been specifically referred to - the exemption from duty of a "motion picture film" was to be seen as an historical anomaly. It was not a reason for distorting the language used by Parliament in order to encompass the new technology of video tape where the statutory language does not comfortably do so.

In the course of my reasons in that case,²⁸ I pointed out

that it is sometimes possible, where words of generality had been used, to adapt those words to apply to a supervening technology.²⁹ However, that was not considered to be possible in that case. There being no objectively right interpretation of statutory language, it is worth commenting that a similar issue in the United States was decided in precisely the opposite way.³⁰

The most that can be said from the recent trend of legal authority, both in Australia and overseas, is that with the growing perception of the legitimately creative function of the common law judge, has come an increased willingness, stimulated by facultative legislation, to try to avoid anomalous and unjust results which can occur from a too literal interpretation of ambiguous and general language of legislation. This has led, in turn, to an increased tendency to search for the meaning of the legislative language by the light of the apparent purpose of the legislation, as that purpose appears to the Judge. I regard this tendency as a reflection of the greater realism of most judges today, in their perceptions of the respective proper functions of Parliament and of the courts in stating, elaborating and applying the law.

Use of Extrinsic Material

There are some theorists who urge the necessity to search for the "meaning" of legislation by examining the precise

background of information and policy against which the legislation was originally drawn. Only if the decision-maker can immerse himself or herself in the entirety of the context in which the Bill was enacted, can he or she hope to ascertain the true "purpose" of the legislature in enacting it as it did. Such an approach may be implicit in the suggestion by Francis Bennion that:

The ideal course would be to relive the history of the text in question, covering not only the entire process of text-creation and text-validation but also historical material such as reports of official inquiries and other background sources. If we soaked ourselves in all this, we would be in the best position to judge the meaning of the text and whether it was clear or doubtful. The assiduous academic commentator can act in this way (subject to the problem of access to confidential official³¹ records). The practical lawyer cannot.

There are numerous reasons why it is sometimes helpful to have regard to background data to help ascertain the meaning of legislation, in the brief way in which it is typically expressed. Those reasons were collected in the Federal Discussion Paper *Extrinsic Aids to Statutory Interpretation*.³² That paper formed the basis of an important symposium on the interpretation of legislation which took place in Canberra in February 1983.³³ The paper proposed facilitating judicial reference to second reading speeches, explanatory memoranda and law reform reports to help judges to elaborate, in an appropriate way, the economical language of the statute. The paper said:

Judges should become bolder in applying both the principles of the Common Law and the guidelines laid down by Parliament. Hopefully, Parliament might be persuaded to give a greater role to judges if it knew that they would accept the change. With a purposive approach and better aids to interpretation, Parliament might be encouraged to reduce the size and complexity of legislation.

Even before the legislature acted to facilitate such a course, steps on the path to the use of this material were taken by the judges themselves. Thus, before Federal legislation (and later State legislation) was enacted to permit the use of extrinsic aids to statutory interpretation, the courts in many jurisdictions had made it plain that material such as second reading speeches could be used to help define the "mischief" to which the legislation was addressed.³⁴ The use of Ministerial speeches in this way became quite common, in advance of the legislative authority, at least in the New South Wales Court of Appeal.³⁵

With the enactment of the wider statutory mandate, it is now not at all uncommon for the courts to have reference pressed upon them to a wider range of background material than was ever considered in the past when attention was usually rivetted only on the statutory language itself. Whilst I am of the view that this is a healthy development - replacing with candid reference to material that can be scrutinized and criticised in open court, private

consultation that might earlier have taken place - there are dangers which must be noted.

One of these I called to attention is a case in which the Court had been taken to a Ministerial speech.³⁶ Upon close checking, it emerged that the form of the Bill, to which the Minister was addressing his remarks, was not the form in which the Bill finally passed into law. Although in the United States it has been not at all uncommon to scrutinize the successive stages of legislation as it passes through Congress, the same has not been true in our processes of judicial construction of statutes. However, once it becomes legitimate, either to ascertain "the mischief" or, more importantly, to assist in ascertaining the meaning of legislation, to have regard to second reading and other parliamentary speeches, it is vital that the Court should satisfy itself that the legislation addressed in the cited remarks was that ultimately enacted. Otherwise, the remarks in Parliament might be entirely irrelevant, or even misleading, because the clauses of the Bill under consideration were in a different form than those enacted.

A second reason for caution emerged in another case that was recently before the Court. This concerned the construction of gaming and wagering laws. Reference to the second reading speeches in that case was quite helpful.³⁷ However, they could not overcome the difficulty of extracting from an ungainly piece of legislation a logic which hundreds of years of legal history denied it.

Thirdly, although legislative history and the use of extraneous materials can quite frequently cast light on the meaning of ambiguities left in the brief language of legislation,³⁸ in the end, the duty of a court is to the words enacted by Parliament. This point was recently emphasised by the High Court of Australia in a case where the statutory warrant to use extrinsic materials had been invoked.³⁹ There are practical considerations which lie behind this warning of the High Court. They include the fact that most lawyers and judges do not have in their libraries, or readily at hand, the extrinsic materials such as Parliamentary debates or Parliamentary and other reports which precede legislation. The advent of information technology may help to overcome or reduce this defect. But the crushing burden of legal data is already oppressive. It is difficult to see how courts could function if they were required in every case - or even every case of ambiguity - to go beyond the already bulky statute book a wide range of background material.

A further difficulty is that legislation, at least, has the formal imprimatur of Parliament. Other material may not. Even second reading speeches by Ministers are nowadays frequently written by their officials and simply incorporated in the Hansard record. In such circumstances, to ascribe to them an authority approaching that of

legislation, may be effectively to shift power from the legislature to the administration which drafts the explanatory memoranda, second reading speeches and background reports upon which the legislation is based. At least in the case of the statute, Parliament gives its formal approval, signified by scrutiny in committee and by votes of the legislators at the three readings.

Interpretation and the Reality of Power

This observation about the power of law-making brings me to my conclusions. It is obvious that each of the innovations in the techniques of statute drafting and interpretation referred to in this paper affects the distribution of the power of law-making in a society such as ours. Until recently, most lawyers (including most judges) were content with unquestioned assumptions, of a somewhat unsophisticated kind, about where the power of law-making lay. To some extent, their notions were derived from the general acceptance of the theory which resulted from the constitutional settlement following the Glorious Revolution in England in 1688.⁴⁰ Three hundred years after the supremacy of Parliament was acknowledged, its true role in law making and the associated role of Ministers, administrators and judges is at last coming for a more realistic and candid analysis.

At first sight it might seem obvious that a shift toward

briefed, "plain English" legislative drafting, together with the adoption by judges of the purposive approach and their use of extrinsic aids, external to the legislative text, all combine to shift power from the legislature to others, particularly the judiciary. If Parliament has spelt its purposes out in detail - even in complex language - the power behind the law so enacted is that of Parliament (and thus - by our democratic theory - the people). By this view, power is transferred to the judiciary, to the extent that large gaps are left by Parliament's use of brief language and choice is assigned to judges, guided only by their perception of the "purpose" and their interpretation of extrinsic material used to assist their search for meaning. It is this analysis which has led, in some quarters, to the defence of the traditional mode of detailed drafting and to criticism of the "plain English" approach, "purposive" construction of statutes and the use of extrinsic aids.⁴¹

However, in modern circumstances, and with greater realism about our political and legal institutions, it is right that the simplistic approach to the power of law-making should now be reviewed. Such power as judges have to interpret legislation, although possibly originally asserted by themselves, must now be taken to be exercised with the acquiescence of Parliament and of the people. If the judges get it wrong (constitutional cases apart) the political process through Parliament can correct them. The

inescapably creative function of judicial decision-making - with its obligation to discriminate between choices - is now generally accepted. Lord Reid denounced the "slot machine" theory of the judicial function as a "fairy tale".⁴² Given the ambiguity of all language and in particular of the English language - there is often unclarity of expression which requires an authoritative decision from someone. In the nature of things, that cannot immediately be Parliament. Therefore, through the practical operation of the legal system, it must often be the judges. An analysis of the way legislation is actually made teaches that the assumption that Parliament, as a disembodied institution, has given approval to each and every word used in a statute is a fiction. It is a convenient fiction. But we should not be deceived by it. The elected representatives may have a theoretical right to alter and disallow specific words in the legislation. But the actuality is far removed from the myth. The modern shift of power from the legislators to Ministers, the Cabinet and the Prime Minister together with the reliance on administrators and legislative drafters to operate the complicated machine of a modern Parliament, represents the reality. In this reality, the suggested shift of power to the judiciary may be nothing more than a marginal adjustment of the respective functions of non parliamentary "law-makers" who contribute to the actual process of law making. It may be an adjustment which we should welcome because of the advantages it brings of clearer

communication in law making and the economic⁴³ and other benefits which come in its train.

John Ewens, whose service for the Commonwealth has spanned more than half of its existence, has watched the emergence, as a recognised discipline, of the study of the science of law-making. It is a mark of his fine intellect, his open-mindedness and his sense of continuing service, that he is still contributing to the debate in many ways. He walks in the footsteps of Robert Garran, from whose early labours our Commonwealth prospered. He is an officer of the Commonwealth worthy of celebration.

If we seek the monuments of this fine Commonwealth lawyer, we can look around to a nation which boasts of adherence to the rule of law and which is sufficiently perceptive, now, at last, to be asking what it is that that boast really means.⁴⁴ Whose Rule? What Law?

FOOTNOTES

1. President of the Court of Appeal of New South Wales, Commissioner of the International Commission of Jurists, Formerly Chairman of the Australian Law Reform Commission and Judge of the Federal Court of Australia
2. See [1978] *Reform* 46.
3. See [1981] *Reform* 92. See also M D Kirby *Reform the Law* OUP 44f.
4. See Law Reform Commission (Cth), *Annual Report 1987* (ALRC 41), 1; cf M D Kirby "The Politics of Achieving Law Reform", (1988) *Adel LR* 315, 319f.
5. See [1983] *Reform* 64.
6. See [1984] *Reform* 45.
7. Noted by D St L Kelly, "The Takeovers Code: A Failure in Communication", (1987) 5 *Companies & Securities LJ* 219 fn4.
8. See "Plain English Welcomed" (1987) 61 *Law Inst J* (Vic) 1229.

9. Law Reform Commission of Victoria, *Plain English and the Law* (VLRC 9, 1987).
10. See the essays by Robert Eagleson, David Kelly and Jim Kennan in this book.
11. Smith, "Caught Stone, Bowled Smith" (Provisional Title, Macmillan, forthcoming).
12. J Stone, *"Legal Systems and Lawyers' Reasoning"*, Maitland, Sydney, 1968. 30.
13. Sir William Dale, *"Legislative Drafting: A New Approach"*, 1987, 335. See also G Nazareth, "Legislative Drafting, Could Our Statutes Be Simpler", [1980] *Statute LR* 81, 83. [1980] *Statute LR* 181.
14. See Lord Cross, "Review of F Bennion *Statute Law*", [1981] *Statute LR* 122.
15. See, eg, M H McHugh, "The Law-Making Function of the Judicial Process", (1988) 62 *ALJ* 15 and M D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *ALJ* 514.
16. R Tomasic, "Towards a Theory of Legislation: Some Conceptual Obstacles", [1985] *Statute LR* 84, 104.

17. N McCormick, *Legal Reasoning and Legal Theory*, 1978, 207, cited Tomasic, 104.

18. Mahoney J A, *Metal Manufacturers Ltd v Lewis* (unreported, CA (NSW) 17 May 1988); [1988] NSW JB 77. See also the remarks of Samuels JA in *The Pambula District Hospital v Herriman*, unreported, CA (NSW), 5 August 1988; referring to *Lincoln College's Case* (1595) 3 Co Rep. 586, 596.

19. R Flesch, *"How To Write Plain English"*, 1979, 36. See Kelly, *op cit Supra* n6, 229.

20. See, eg, in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 280 (Lord Diplock). See also *Kingston and Anor v Keprose Pty Ltd* (1983) 11 NSWLR 404, esp 423ff. (McHugh JA).

21. *Australian Broadcasting Corporation v Redmore Pty Ltd* Kirby P dissenting, unreported, CA (NSW) 24 December 1987; (1988) NSWJB 3.

22. *Id.*

23. (1987) 11 NSWLR 404.

24. In *Candler v Crane Christmas & Co* [1951] 2 KB 164, 178.

25. *Metal Manufacturers Ltd v Lewis* (Mahoney JA, unreported CA (NSW) 17 May 1988; [1988] NSWJB 77.
26. 116 NE 782, 785 (1917).
27. See, eg, *The Proprietors of Strata Plan No. 159 v the Council of the City of Parramatta and Ors.* (1985) 55 LGRA 363. See also discussion in *Gamer's Motor Centre (Newcastle) Pty Ltd v NatWest Wholesale Australia Pty Ltd* (1985) 3 NSWLR 475 (1987) 72 ALR 321; *Thomas Australia Wholesale Vehicle Trading Co Pty Ltd v Marac Finance Australia Ltd* (1985) 3 NSWLR 452.
28. See *Wilson and Anor v Commissioner of Stamp Duties*, unreported, C of A (NSW) 27 April 1988; [1988] NSWJB 56.
29. As occurred in, eg, *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327, 331; See also *Chappell & Co Ltd v the Associated Radio Co of Australia Ltd* [1925] VLR 350, 36.
30. See *Turner Communications Corporation v Chilivis* 236 SE 2d 251; 231 SE 2d 425 (1977).
31. F Bennion, n13, 88-89. see also Tomasic n15, 104.

32. AGPS, 1982.

33. [1983] *Reform* 62.

34. See, eg, *South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd and Ors* (1977) 139 CLR 449, 479-81; *Wacando v the Commonwealth of Australia and State of Queensland* (1981) 37 ALR 317, 335-6; *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 39 ALR 521, 533; *TCN Channel 9 Pty Ltd v AMP Society* (1982) 42 ALR 496.

35. See e.g. *Varley v Attorney-General in and for the State of New South Wales* (1987) 8 NSWLR 30, 45 (Hope JA).

36. See *Regional Director of Education, Metropolitan East, Department of Education NSW and Ors v International Grammar School Sydney Ltd* (1986) 7 NSWLR 302, 308 ff; see also comments in [1983] *Reform* 62f.

37. See *Tahapi Pty Ltd v Avery* (1986) 6 NSWLR 138, 157ff.

38. See, eg, *Holden v Toll Chadwick Transport Ltd* (1987) 8 NSWLR 222, 226; *Kingshott v Goodyear Tyre and Rubber Co Australia Ltd (No2)* (1987) 8 NSWLR 707, 722.

39. *The Queen v Bolton and Anor; ex parte Beane* (1987) 70 ALR 225, 229. See generally discussion P Brazil, 'Reform of Statutory Interpretation - The Australian Experiences of Use of Extrinsic Materials: With a Postscript on Simpler Drafting' (1988) 62 ALJ 503, 505.

40. See E Dreiger, *Manual of Instructions for Legislative Writing*; Vol 6, Department of Justice, Canada, 1982, 544, cited Victorian Law Reform Commission *Plain English and the Law*, 16.

41. See, eg, Lord Hailsham, "Addressing the Statute Law". [1985] *Statute LR*, 47.

42. Lord Reid, "The Judge as Law Maker" (1972) 12 JPTL 22.

43. This point was noted by the Victorian Law Reform Commission in *Plain English and the Law*, para 59.

44. See *Merkur Island Shipping Corp v Laughton* [1983] 1 All ER 334, 351 (Sir John Donaldson MR).