Statutory Interpretation: Identifying the Linguistic Register

The Honourable J J Spigelman AC*

In the second Sir Ninian Stephen Lecture delivered on 10 March 1993, the Honourable Justice McHugh of the High Court of Australia said:

> "Legislation is the cornerstone of the modern legal system."

His Honour's lecture was entitled *"The Growth of Legislation and Litigation"*. His Honour emphasised the centrality of the law of statutory interpretation to the functions of the profession and the judiciary.

The overwhelming majority of cases in the Courts require reference to statutory provisions. Something in the order of half of all cases require the Court to construe a statute. The constitutional significance of statutory interpretation should also be noted. A number of the rules of construction, to which I will refer, make it clear that the common law's protection of fundamental rights and liberties is secreted within the law of statutory interpretation.

I wish to deal with one aspect of statutory interpretation in this lecture: How do we select the meaning of words capable of application at different levels of generality? That is to say, when Parliament uses general words does it intend to encompass everything that is capable of falling within them?

The title that I have chosen for this lecture is "Identifying the Linguistic Register". This is a formulation that I have adopted from Lord Simon of Glaisdale. In a case concerned with the meaning of the word "premises" in the British *Rent Act* 1968, his Lordship said:

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> "Statutory language, like all language, is capable of an almost infinite gradation of 'register' - i.e. it will be used at the semantic level appropriate to the subject matter and to the audience addressed (the man in the street, lawyers, merchants, etc). It is the duty of a court of construction to tune in to such register and so to interpret the statutory language as to give to it the primary meaning which is appropriate in that register (unless it is clear that some other meaning must be given in order to carry out the statutory purpose or to avoid injustice, anomaly, absurdity or contradiction). In other words statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances."[1]

Lord Simon of Glaisdale returned to this issue in a subsequent case where his Lordship said:

> "If a court of construction places itself in the position of the draftsman, acquires his knowledge, recognises his statutory objectives, tunes into his linguistic register, and then ascertains the primary and natural meaning in their context of the words he has used, that will generally be an end of the task of construction. But occasionally something will go wrong. It may become apparent that the primary and natural meaning cannot be what Parliament intended: it produces injustice, absurdity, anomaly or contradiction, or it stultifies or runs counter to the statutory objective."[2]

Ambiguity

The identification of the appropriate "linguistic register" is not the same as resolving an "ambiguity": understood in the sense that a word or phrase may have more than one meaning. This is the sense in which the word "ambiguity" is generally used.

However, the word "ambiguity" itself, perhaps ironically enough, is not without its own difficulty. Frequently, in the context of statutory interpretation, the word "ambiguity" is used in a more general sense. It is applied, not only to situations in which a word has more than one meaning, but to any situation in which the intention of Parliament with respect to the scope of a particular statutory situation is, for whatever reason, doubtful.

As the authors of the third edition of Cross on *Statutory Interpretation* state:

> "In the context of statutory interpretation the word most frequently used to indicate the doubt which a judge must entertain before he can search for, and if possible, apply a secondary meaning is 'ambiguity'. In ordinary language this term is often confined to situations in which the same word is capable of

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1 *Maunsell v Olins* [1975] AC 373 at 391.

2 *Farrell v Alexander* [1977] AC 59 at 84. See also *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 645 per Lord Simon of Glaisdale.

> meaning two different things; but in relation to statutory interpretation, judicial usage sanctions the application of the word 'ambiguity' to describe any kind of doubtful meaning of words, phrases, or longer statutory provisions."[3]

A similar broad approach to the concept of "ambiguity" is reflected in a judgment of Justice O'Connor in 1906, when his Honour said:

> "It has been contended in this case that an ambiguity must appear on the face of a statute before you can apply the rules of interpretation relating to ambiguities. In one sense that is correct, and in another sense it is not. You will frequently find an Act of Parliament perfectly clear on the face of it, and it is only when you apply it to the subject matter that the ambiguity appears. That ambiguity arises frequently from the use of general words. And wherever general words are used in a statute there is always a liability to find a difficulty in applying general words to the particular case. It is often doubtful whether the legislature used the words in the general unrestricted sense, or in a restricted sense with reference to some particular subject matter."[4]

The Contemporary Approach

Justice McHugh has identified the task of the contemporary interpreter, in a judgment which is frequently referred to with approval, in the following way:

> "A rule of law enacted by statute consists of a proposition which gives rise to legal consequences when the act or omission of some person falls within the factual outline delineated by that proposition ... The difficulty is to determine whether Parliament intended a particular set of facts to fall within the factual outline of the proposition. That is, the difficulty is to determine the ambit of the factual outline which Parliament intended to enact."[5]

His Honour has explained the contemporary approach to this process:

> "In many cases, the grammatical or literal meaning of a statutory provision will give effect to the purpose of the legislation. Consequently, it will constitute the 'ordinary meaning' to be applied. If however, the literal or grammatical meaning of a provision does not give effect to that purpose, that meaning cannot be regarded as the 'ordinary meaning' and cannot prevail. It must give way to the construction which will promote the underlying purpose or object of an Act ..."[6]

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3 R. Cross, *Statutory Interpretation* 3rd Ed. London: Butterworths, 1995, at 83-84.

4 *Bowtell v Goldsborough Mort & Co Limited* (1906) 3 CLR 444 at 456-457.

5 *Kingston v Keprose Pty Limited* (1987) 11 NSWLR 404 at 421. His Honour's analysis in this judgment was referred to with approval by a six person joint judgment of the High Court: *Bropho v Western Australia* (1991) 171 CLR 1 at 20.

6 *Saraswati v The Queen* (1990-91) 172 CLR 1 at 21.

His Honour went on to quote from the frequently cited judgment of Mason and Wilson JJ, where their Honours said, inter alia:

> "The propriety of departing from the literal interpretation ... extends to any situation in which for good reason the operation of the statute 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."[7]

The purposive approach to statutory construction is now enshrined in statute.[8] It is not without its difficulties.[9] It must not be forgotten that the task is to identify the meaning of what Parliament said, not to identify what Parliament meant to say.[10]

Context

The contemporary Australian approach to construction is the same as Justice Learned Hand once expressed:

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[11]

A good short hand description of this approach is "literal in total context".[12] Wherever general words must be construed, it is essential for the interpreter to bear in mind that a statute has a context, it has a background and it reflects assumptions as to the circumstances in which it will operate. The words of a statute do not exist in limbo.[13]

Let me give you one example of this principle at work.[14] Parents leave

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7 *Cooper Brookes (Wollongong) Pty Limited v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321.

8 E.g. *Interpretation Act* 1901 (Cth) s15AA; *Interpretation Act* 1987 (NSW) s33 and similar provisions in other States and Territories.

9 *Brennan v Comcare* (1994) 50 FCR 555 at 572-575 per Gummow J.

10 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* above n3, at 613 per Lord Reid, 645 per Lord Simon of Glaisdale; *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; Byrne v Australian Airlines Ltd (1995) 185 CLR 410 at 459.

11 *Cabell v Markham* (1945) 148 F2d 737 at 739.

12 E. Driedger, *Construction of Statutes* 2nd Ed. Scarborough: Butterworths, 1983; Barnes "Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law-Part One" (1994) 22 *Fed LR* 116 at 134.

13 *Morris v Beardmore* [1981] AC 446 at 449 per Lord Edmund-Davies.

14 See Zander, *The Law Making Process*. London: Weidenfeld and Nicholson, 1980, at 57.

their children in the care of a childminder. They suggest that to keep the children amused, the childminder should teach them a game of cards. After the parents leave, the childminder teaches the children to play strip poker.

The natural and ordinary meaning of the words "game of cards" is, merely, a game played with cards. Strip poker falls within that natural and ordinary meaning. However, there seems little doubt that the meaning which the parents intended for the words they chose, did not encompass this particular example of such a game. The reason for that is the context. In accordance with what one would assume to be the generally accepted conception of the proper upbringing of children, parents do not intend the words "game of cards" to extend to a game of this character, at least in relation to their children.

Another example is found in a controversial civil liberties case from Australian history. I refer to the case of Egon Kisch, a radical political figure, to whom the Commonwealth government of the day, in 1934, wished to deny entry into Australia. The relevant legislation entitled a Commonwealth official to administer a dictation test to any prospective entrant. The legislative provision permitted such a test to be "in a European language". Kisch, a national of Czechoslovakia, was asked to submit to a test in Scottish Gaelic. The High Court refused to accept that this was permissible. Sir Owen Dixon said:

> "It appears to me that the objects which the legislature had in view would not be furthered by attaching to that expression (i.e. 'a European language') a meaning which is arrived at by disintegrating the phrase into its component words and asking oneself, first - is it a language? and then is it European? ... 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 organised European community is regarded as the common means of communication ..."[15]

The Court held that Scottish Gaelic was not such a "European language".

Over the long history of the common law there have been fluctuations in the degree of emphasis which the Courts have given to a literal interpretation of words on the one hand, and the context, subject matter and purpose of legislation on the other hand. We are now in an era where the latter is more frequently determinative than may have been the case until a decade or two ago. This is particularly the case with respect to the

[15] *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234 at 244.

construction of general words. Those who would strictly apply a "plain meaning" rule have to recognise that general words do not necessarily have a "plain meaning".[16]

Whilst acknowledging changes in the emphasis over time, there is nothing new in the application of what is now regarded as the contemporary approach to construction.

As long ago as 1660 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."[17]

And added:

> "... 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 sometime 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."[18]

This extract from 1660 highlights the significance for any process of construction, of the whole text and of the subject matter being dealt with, to provide the context within which a particular provision is intended to operate.

In the United States the classic application of this approach is to be found in a decision of the United States Supreme Court in 1892. 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:

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[16] *Maunsell v Olins*, above n1, at 385-386 per Lord Wilberforce.

[17] *Stradling v Morgan* (1660) 75 ER 305 at 312.

[18] Above n17, at 315. See also *Bowtell v Goldsborough Mort & Co Limited*, above n4, at 457-458; *Commercial Union Insurance Co Ltd v Colonial Carrying Co of New Zealand Ltd* [1937] NZLR 1041 at 1047-1049.

> "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".[19]

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."[20]

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."[21]

Justice Scalia has conducted a long battle against laxity in the process of statutory construction, and in particular constitutional construction. His criticisms have been influential in the United States in a movement labelled "the new textualism".[22] In many respects Justice Scalia's approach

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[19] *Church of the Holy Trinity v United States* (1892) 143 US 457 at 459.

[20] Above n19, at 472.

[21] Scalia, *A Matter of Interpretation: Federal Courts and the Law*. New Jersey: Princeton University Press, 1997, at 20-21.

[22] Zeppos "Justice Scalia's Textualism: The 'New' Legal Process" (1991) 12 *Cardozo Law Review* 1597; Karkkainen " 'Plain Meaning': Justice Scalia's Jurisprudence of Strict Statutory Construction" (1994) 17 *Harvard Journal of Law and Public Policy* 401; Schacter "The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation" (1998) 51 *Stanford Law Review* 1.

to statutory construction is bringing the United States approach back to that which applies in Australia and the United Kingdom. His criticism of the *Church of Holy Trinity* line of cases has not prevailed in the United States. Nor would it do so in Australia.

As Mahoney JA has put it:

> "It is part of the ordinary process of legislative construction to qualify the generality of words."[23]

In any such process, little assistance can be gained from previous cases on different statutes. This is because:

> "Everything depends upon the subject matter and the context."[24]

In 1906 Justice O'Connor in the High Court, immediately after his reference to the broader sense of the word "ambiguity" referred to above, quoted with approval the following passage from the third edition of *Maxwell on the Interpretation of Statutes*:

> "General words admit of indefinite extension or restriction, according to the subject to which they relate, and the scope and object in contemplation. They may convey faithfully enough all that was intended, and yet comprise also much that was not; or be so restricted in meaning as not to reach all the cases which fall within the real intention. Even, therefore, where there is no indistinctness or conflict of thought, or carelessness of expression in a statute, there is enough in the vagueness or elasticity inherent in language to account for the difficulty so frequently found in ascertaining the meaning of an enactment, with a degree of accuracy necessary for determining whether a particular case falls within it."[25]

Section 52 of the *Trade Practices Act*

One example of the courts grappling with the application of general words is the delineation of the precise scope of s52 of the *Trade Practices Act* 1974 (Cth), and its replication in s42 of the States' *Fair Trading Acts*. Giving each of the words their fullest literal meaning would open the prospect of s52 superseding vast tracks of the law of tort and of contract. Such could also supersede a large number of specific statutory provisions. It is not likely that Parliament intended any such results. Nevertheless, the delineation of the boundaries of the application of the section has proven a matter of some difficulty.

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[23] *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 at 279.
[24] *Hall v Jones* (1942) 42 SR(NSW) 203 at 208 per Jordan CJ.
[25] *Bowtell v Goldsborough Mort & Co Limited*, above n4, at 457.

In the basic authority in the High Court on this matter, the Court divided four/three. The case involved an employee who had suffered physical injuries.

The Court was unanimous in its conclusion that s52 of the *Trade Practices Act* did not intend to regulate all conduct of a corporation engaged in for the purposes of its trade or commerce. The minority found the relevant restriction in the heading Part V of the Act with its reference to "Consumer Protection". This led to the conclusion, on a textual basis, that Parliament intended to restrict the protection of the Act to consumers in their capacity as such.

The majority took a different view. The reason expressed for not permitting the heading of Part V to determine the scope of the general words of s52 was because the Court identified such a construction to be discriminatory. The joint judgment said:

> "So to constrict the provisions of s52 would be to convert a general prohibition of misleading or deceptive conduct by a corporation, the consumer or supplier, in trade or commerce, into a discriminatory requirement that a corporate supplier of goods or services should observe standards in its dealing with a corporate consumer which the consumer itself is left free to disregard. That being so, the general words of s52 must be construed as applying even handedly to corporations involved in a transaction or dealing with one another 'in trade or commerce'."[26]

The question of discrimination has played a significant role in various aspects of the High Court's recent jurisprudence. What appears to be envisaged in this present context is that the idea of fair dealing lying behind s52 does, as a matter of the presumed intent of Parliament, require some element of mutuality.

The majority identified the source of restriction of the general words in s52 as arising from the use of the word "in", before the words "trade or commerce". Their Honours held:

> "The phrase 'in trade or commerce' in s52 has a restrictive operation. It qualifies the prohibition against engaging in conduct of the specified type. As a matter of language, a prohibition against engaging in conduct 'in trade or commerce' can be construed as encompassing conduct in the course of the myriad of activities which are not, of their nature, of a trading or commercial character but which are undertaken in the course of, or as incidental to, the carrying on of an overall trading or commercial business ... Alternatively the reference to conduct 'in trade or commerce' in s52 can be construed as referring only to conduct which is itself an aspect or element of activities or transactions which of their nature bear a trading or commercial character."[27]

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[26] *Concrete Constructions (NSW) Pty Limited v Nelson* (1990) 169 CLR 594 at 602.
[27] Above n26, at 602-603.

The decision of the Court was that the words bore the latter meaning. Their Honours concluded:

> "Section 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation may engage in the course of, or for the purposes of, its overall trading or commercial business. Put differently the section was not intended to impose, by a side wind, an overlay of Commonwealth law upon every field of legislative control, in which a corporation may stray for the purposes of, or in connection with carrying on its trading or commercial activities. What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character."[28]

The Court drew on the words of Sir Owen Dixon in a different context, to conclude that the words "in trade or commerce" referred to "the central conception" of trade or commerce[29] and not to the whole range of conduct engaged in in the course of, or for the purposes of, carrying on a business. This identifies a boundary, but where that boundary is to be drawn remains a matter of some difficulty.

In *Concrete Constructions* itself the High Court concluded that communications between employees as to the safety of the system of work were not "in trade or commerce" in the relevant sense. It also gave another example in which a driver carrying freight between Sydney and Melbourne who used the indicator lights to suggest the movement of a vehicle in a manner which proved false or misleading, was also not engaging "in trade or commerce" in the relevant sense. Clearly the boundary proposed in the majority judgment is more difficult to draw than that identified in the minority judgments and so it has proved.

The "side wind" metaphor has been applied subsequently.[30] Persons who believed themselves to be depositors in the building societies were not permitted to rely on s52. The form of the alleged "deposits" was non-withdrawable shares. Section 52 was not permitted to supersede the long established procedures for the conduct of a company liquidation. The Court concluded that "the *Trade Practices Act* is not concerned to regulate the position as between members of the company and its creditors". Nor was it intended to eliminate "the detailed provisions established for more than a hundred years to govern the winding up of a company"[31].

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[28] Above n26, at 603-604.

[29] *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 381.

[30] The origins of the metaphor are to be found in the judgment of Brennan J in *Parkdale Custom Build Furniture v Puxu* (1982) 149 CLR 191 at 224. See Gillooly "Limiting Section 52 of the Trade Practices Act: The Side-Wind Argument" (1994) 24 *UWALR* 278; Marshall "Section 52 of the Trade Practices Act an External Legal Order: Lessons from the NRMA Case" (1996) 3 *TPLJ* 126 at 140-143.

[31] *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 36-37.

The determination that s52 must be disregarded as a "side wind", with respect to a particular body of law, is as difficult as the identification of certain conduct as falling within the "central conception" of trade or commerce. The High Court will revisit these issues.

Fundamental Rights

The most important application of the process of statutory construction by which words of general application are read down so as not to apply to particular factual situations, occurs when a statute impinges on fundamental rights recognised by the common law. As I have said, the protection which the common law affords to the preservation of fundamental rights and liberties is secreted within the law of statutory interpretation.

This protection operates by way of rebuttable presumptions that Parliament did not intend:[32]

- to invade common law rights;
- to restrict access to the courts;
- to abrogate the protection of legal professional privilege;
- to exclude the right to claims of self incrimination;
- to interfere with vested property rights;
- to alienate property without compensation;
- to interfere with equality of religion;
- to deny procedural fairness to persons affected by the exercise of public power.

A number of alternative, but equivalent formulations have been propounded to identify the level of strictness appropriate to construe provisions of this character: eg "express words of plain intendment"[33]; or "clear and unambiguous words"[34]; or "unmistakable and unambiguous"[35] or "irresistible clearness"[36] or "clearly emerges, whether by express words or by necessary implication"[37] or "with a clearness which admits of no doubt"[38].

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[32] See Pearce and Geddes, *Statutory Interpretation in Australia* 4th Ed. Sydney: Butterworths, 1996, Chapter 5.

[33] *Commissioner of Police v Tanos* (1957-58) 98 CLR 383 at 396; *R v Lieschke* (1986-87) 162 CLR 447 at 463; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 576.

[34] *Bropho*, above n5, at 17.

[35] *Coco v R* (1994) 179 CLR 427 at 436-438; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 381.

[36] *Potter v Minahan* (1908) 7 CLR 277 at 304.

[37] See eg *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341; *Public Service Association (SA) v Federated Clerks Union* (1991) 173 CLR 132 at 160.

[38] *McGrath v Goldsborough Mort & Co Ltd* (1931-32) 47 CLR 121 at 128.

The basic proposition was well put by Lord Reid:

> "There are many cases where general words in a statute are given a limited meaning. That is, not only when there is something in the statute itself which requires it, but also where to give general words their apparent meaning would lead to conflict with some fundamental principles. Where there is ample scope for the words to operate without any such conflict it may very well be that the draftsman did not have in mind and Parliament did not realise that the words were so wide that in some few cases they could operate to subvert a fundamental principle. In general, of course, the intention of Parliament can only be inferred from the words of the statute, but it appears to me to be well established in certain cases that, without some specific indication of an intention to do so, the mere generality of words used will not be regarded as sufficient to show an intention to depart from fundamental principles."[39]

The High Court has adopted a similar approach in the six person joint judgment in *Bropho*, a case concerned with the appropriate test for determining whether an act is intended to bind the Crown. Their Honours said:

> "One can point to other 'rules of construction' which require clear and unambiguous words before a statutory provision will be construed as displaying a legislative intent to achieve a particular result. Examples of such 'rules' are those relating to the construction of a statute which would abolish or modify fundamental common law principles or rights, which would operate retrospectively, which would deprive a superior court of power to prevent an unauthorised assumption of jurisdiction or which would take away property without compensation. The rationale of all such rules lies in an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear. Thus, the rationale of the presumption against the modification or abolition of fundamental rights or principles is to be found in the assumption that it is 'in the least 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'."[40]

The last quotation in this passage refers to an earlier case in which Justice O'Connor had adopted a passage from the fourth edition of *Maxwell on Statutes*.[41] His Honour also quoted, with approval, the first sentence of the following passage from *Maxwell on Statutes*:

> "There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided. It is not infrequently necessary, therefore, to limit the effect of the words

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[39] *Smith v East Elloe Rural District Council* [1956] AC 736 at 764-765.
[40] *Bropho*, above n5, at 17-18, references omitted.
[41] *Potter v Minahan*, above n36, at 304.

> contained in an enactment (especially general words), and sometimes to depart not only from their primary and literal meaning, but also from the rules of grammatical construction in cases where it seems highly improbable that the words in their wide primary or grammatical meaning actually express the real intention of the legislature. It is regarded as more reasonable to hold that the legislature expressed its intention in a slovenly manner, than that a meaning should be given to them which could not have been intended."[42]

The joint judgment of the High Court in *Bropho*[43] referred with approval to the reasoning of Isaacs J in *Ex parte Walsh & Johnson; In re Yates*, where his Honour said:

> "... the full literal intention will not ordinarily be ascribed to general words where that would conflict with recognised principles that Parliament would be prima facie expected to respect. Something unequivocal must be found; either in the context or the circumstances to overcome the presumption."[44]

His Honour had also said in that judgment:

> "But once concede the tractability of a phrase, then the extent of tractability depends entirely on its surroundings, including extraneous circumstances."[45]

One of the presumptions I have listed is the presumption that Parliament does not intend to restrict access to the Courts. Accordingly where a statute expressly includes such a restriction in an "ouster" or "privative" clause, this presumption operates to require a strict reading of the clause.[46] So a statute which prevented judicial review of decisions "under this Act" would not protect jurisdictional error. The words were not "under or purporting to be under this Act".[47]

The right of individuals to approach the Courts to enforce the law, not least to ensure that the executive arm of government exercises its power in accordance with law, is a fundamental right of constitutional significance. Statutes which purport to oust that right will not only be strictly construed, there is a core content to which the strict construction will be applied with stringency.

Australian law has developed the *Hickman* principle.[48] An ouster clause will not save the exercise of a power which is not a bona fide exercise,

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[42] P. Maxwell, *Maxwell on the Interpretation of Statutes* 12th Ed. London: Sweet & Maxwell, 1969, at 105.

[43] Above n5, at 18.

[44] (1925) 37 CLR 36 at 93.

[45] Above n44, at 91.

[46] See e.g. *McGrath v Goldsborough Mor & Co Ltd*, above n38, at 128, 134.

[47] *Darling Casino Ltd v New South Wales Casino Authority* (1997) 191 CLR 607 at 635; See also *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at 170; De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* 5th Ed. London: Sweet & Maxwell, 1995, at 253.

[48] *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.

which does not relate to the subject matter of the legislation or which exceeds the scope of the power on its face. These represent a core content of jurisdictional error to which a stringent standard is appropriate. I have recently held that the obligation to accord procedural fairness is also such a core category.[49]

There are two general points to make about the circumstances in which a Court will read down general words in order to protect a fundamental principle.

First, the particular principles so protected are well known and are so well established that parliamentary draftsmen cannot be in any doubt that they will be applied. Questions are sometimes raised as to whether such a construction by the courts is consistent with the proper functions of the courts or represents in some way a failure by the courts to reflect the true intention of the legislature. No such criticism is warranted with respect to the application of such long established principles of statutory construction. Parliamentary draftsmen know that this is the approach that will be taken. If they wish to ensure a particular result, they can do so by the use of appropriate language.

Indeed the contrary is true. As Sir Gerard Brennan has said:

> "The authority of the courts to change the common law rules of statutory construction must therefore be extremely limited, for the courts are duty bound to the legislature to give effect to the words of the legislature according to the rules which the courts themselves have prescribed for the communication of the legislature's intentions."[50]

The second point to identify is that the categories, to which this approach to statutory construction apply, are not closed. In this, as in every other respect, the common law is a developing body of principle. The case of *Bropho* itself concerned the modification of a strict construction with respect to a category to which it had hitherto been applied, namely, whether or not a statute bound the Crown.

Immediately after the passage I have quoted above, in which the High Court identified the principle as an "assumption" that in certain contexts the legislature would make its intention "unambiguously clear", the High Court added:

> "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 that 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."[51]

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[49] *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78 at 106-112.
[50] *Corporate Affairs Commission v Yuill* (1991) 172 CLR 319 at 322.
[51] *Bropho*, above n5, at 18.

The High Court went on to say, that there had been such a change with regard to the issue of whether statutes bound the Crown, by reason of the historical development of the position of the Crown. However, in acknowledgment of the prior position on which parliamentary draftsmen may very well have relied, the Court distinguished between statutes passed before and after the publication of the decision in *Bropho* itself. The Court said:

> "... it must be acknowledged that, in the period since the *Province of Bombay Case* the tests of 'manifest from the very terms of the statute' and 'purposes of the statute being otherwise wholly frustrated' came to be established as decisive of the question whether, in the absence of express reference, the general words of a statute bind the Crown. That being so, it may be necessary, in construing a legislative provision enacted before the publication of the decision in the present case, to take account of the fact that those tests were seen as of general application at the time when the particular provision was enacted. If, however, a legislative intent that the Crown be bound is apparent notwithstanding that those tests are not satisfied, that legislative intent must prevail.
>
> In the case of legislative provisions enacted subsequent to this decision, the strength of the presumption that the Crown is not bound by the general words of statutory provisions will depend upon the circumstances, including the content and purpose of the particular provision and the identity of the entity in respect of which the question of the applicability of the provision arises."[52]

The considerations identified in *Bropho* suggest that if a new category of fundamental principle is to be developed, by the usual processes of the common law, then cases involving statutes enacted before the new principle was established may have to be approached differently from those enacted thereafter.

In addition to the traditional common law examples of what constitutes "fundamental principles", there is a new source of authoritative exposition of such principles to be found in the human rights treaties and conventions to which Australia is a party. They may, in the future, prove to be a fertile source of authoritative exposition of principles which are used to read down general words.

Such an approach has long been adopted in the case of private international law. Sir Owen Dixon once said:

> "The rule is that an enactment describing acts, matters or things in general words, so that, if restrained by no consideration lying outside its express meaning, its intended application would be universal, is to be read as confined to what, according to the rules of international law, administered or recognised in our courts, it is within the province of our law to effect or control. The rule is one of construction only, and it may have little or no place where some other restriction is supplied by context or subject matter. But, in the absence of

[52] *Bropho*, above n5, at 23.

> any countervailing consideration, the principle is, I think, that general words should not be understood as extending the cases which, according to the rules of private international law administered in our courts, are governed by foreign law."[53]

A similar presumption applies with respect to established doctrines of public international law. As O'Connor J said in 1908:

> "Every statute is to be interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law."[54]

The basic rule is that Parliament is to be presumed to intend to legislate in conformity, and not in conflict, with international law.[55] The scope of the matters within this field may change with time. This has been the case with subject matter of the kind found in international human rights instruments.

In a case concerning the possible application of human rights conventions, referred to with approval in subsequent cases, three judges of the High Court said:

> "We accept the proposition that the Court should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty."[56]

The word ambiguity in this context bears the broader meaning to which I have referred above, i.e. any case of doubt as to the proper construction of a word or phrase. As Mason CJ and Deane J said in *Teoh*:

> "In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations."[57]

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[53] *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601.

[54] *Jumbunna Coal Mines NL v Victorian Coal Mines Association* (1908) 6 CLR 309 at 363.

[55] See *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Zachariassen v The Commonwealth* (1917) 24 CLR 166 at 181; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42; *Minister for Foreign Affairs v Magno* (1992) 37 FCR 298 at 303-305 per Gummow J; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-66; *Kartinyeri*, above n35, at 745; Sir Anthony Mason "International Law as a Course of Domestic Law" in Opeskin and Rothwell (eds) *International Law and Australian Federalism*. Melbourne: Melbourne Uoiversity Press, 1997, at 220-222.

[56] *Chu Kheng Lim v The Minister for Immigration and Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ.

[57] *Minister for Immigration and Ethnic Affairs v Teoh* (1994-95) 183 CLR 273 at 287-288.

An express statutory provision has recently been adopted in this regard in the British *Human Rights Act* 1998 which incorporated the European Convention on Human Rights into the law of the United Kingdom. Section 3(1) of that Act states:

> "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."

This provision bears some resemblance to the provision in the New Zealand *Bill of Rights Act* 1990 which requires the Courts to construe other legislation consistently with the protected rights "wherever an enactment can be given such a meaning".

No such provision has been introduced into the *Interpretation Acts* of the Commonwealth or the States. There is no reason why, even though human rights treaties have been ratified by the executive of the Commonwealth government, a State legislature could not establish such a presumption for purposes of its own legislation.[58] The reasoning in *Teoh* suggests that a common law principle to this effect may be emerging.

[58] See Spigelman "Rule of Law - Human Rights Protection" (1999) 18 *Australian Bar Review* 29.