interpreting interpretation

Literature is language charged with meaning.
Ezra Pound, *ABC of Reading*, 1934

extrinsic aids . If you were take to Ezra Pound's view as definitive, the prospect of finding a jewel of poetic uncertainty in the dull prose of an Act of Parliament would seem remote. Take also T.S. Eliot's opinion:

> The poet must become more and more comprehensive, more allusive, more indirect in order to force, to dislocate if necessary, language into its meaning.

The search for meaning by the torch of language is not confined to poetry, as any lawyer who has laboured over an obscure statute or an unclear judicial expression will tell you. And whereas in poetry the images are thrilling, in the law the lack of clarity in language can be just plain irritating and extremely expensive. The English language has a special problem in the early marriage of a Germanic based tongue with the phrases -- particularly the legal phrases -- of the Norman conquerors. Given that much of language is uncertain, can we do better in the law, where relative certainty tends to be specially important?

A number of recent developments in Australia have brought the subject of statutory interpretation to the fore.

- Judges of the High Court of Australia (and of other Federal courts) are beginning to admit openly in their judgments that they have defied the 'rules of long standing' as to the interpretation of statutes and have plunged into the pages of *Hansard* to try to discern what on earth it was that Parliament was seeking to do when it enacted the statute in question.
- Judges of the State Supreme Courts have also begun to take up the quest leading to *Hansard.* In his observations on sentencing *Murray* (unreptd., 13 July 1982) Mr Justice Cross, in the Supreme Court of N.S.W. quoted from the *Hansard* what the Minister had said as his intention in amending the Crimes Act to modify the penalty for murder. But his Honour conceded that 'it is nowadays a shade *mal vu*' to do so.
- In 1981 the Acts Interpretation 1901 (Cwlth) was amended by the insertion of s. 15AA. This section confirms that, in interpreting Federal statutes, regard is to be had to the object or purpose underlying the Act in question. ('A construction that would promote the purpose or object underlying the Act . . . shall be preferred to a construction that would not promote that purpose or object'). However, the provision was not to be construed as providing special authority, for 'the consideration of any matter or document not forming part of the Act'. This provision has now been copied by Victoria. Clause 32 of a bill introduced on 1 December 1982 in the Victorian Parliament to completely repeal and replace the Acts Interpretation Act 1958 (Vic.) is in exactly the same terms as the Commonwealth provision.
- In March 1981 a symposium on statutory interpretations was convened in Canberra, with the blessing of Federal Attorney-General Durack and with the participation of the top Federal lawyers in Australia. The proceedings of that seminar have now been published by the Attorney-General's Department, *Another Look At Statutory Interpretation*, (1981). It contains a number of useful papers and discussion on the mischief rule (Mr John Greenwell), objects clauses (Department Secretary, Alan Neaves), the purposive approach (Deputy Secretary, Pat Brazil) and the use of explanatory memoranda (Professor Dennis Pearce).

- Then, at the end of October 1982 came the publication by the Attorney-General's Department of a further policy discussion paper '*Extrinsic* Aids to Statutory Interpretation', 1982. The distribution of a discussion paper, looking for all the world like a law reform document, though mercifully briefer than many, is a happy development in the methodology of Federal lawmaking in Australia.

explanatory statement. The Federal Attorney-General's Department policy discussion paper raises for consideration a possible procedure and a program in the use of extrinsic documents. The procedure, to be adopted 'for selected cases' is the publication of 'an explanatory memorandum to be used as an aid to interpreting an Act'. The memorandum would:

- state the purpose or object of the Act;
- explain particular provisions;
- give guidance for the application of general provision in particular cases.

The discussion paper contemplates high standards of accuracy, impartiality and completeness in the preparation of a memorandum. It suggests that though parliamentary counsel should be aware of it, they should not be responsible for its preparation. As a means of preserving and assuring parliamentary authority, it is proposed that approval of the memorandum should be secured from Parliament. It is conceded that it would be basic to the proposal that it should be freely available with the Act to which it relates. Though not part of the Act, if parliamentary approval were given, it would be appropriate to 'require' that in interpreting the Act regard should be had to it. The alternative would be simply to provide that regard 'may' be had to it.

So far as the program is concerned, this is where the ALRC comes in according to the D.P.:

> Initially, at least, such a procedure should be used only for selected Bills considered by their sponsors to be appropriate for this purpose. The most likely possibilities will be Bills to give effect to a report by the Law Reform Commission or by a similar body. The time and labour involved in preparing a memorandum would be considerably lightened by the existence of the relevant report.

Consideration of amendments to the Acts Interpretation Act is also raised. Speaking to Parliament about the policy discussion paper, Acting Federal Attorney-General Neil Brown QC noted that individual judges of the High Court had already begun to look at *Hansard* 'to identify the problem the Act addresses or even to ascertain directly what was the parliamentary intent'. However, other judges have taken a more restrictive view. One problem about the former view was the inaccessibility of much parliamentary and other material and the danger that the general use of background matter might raise more questions than it solved. Nonetheless, according to Mr Brown, the time had come for innovation. In support of the idea of using a special explanatory statement, he cited Professor C.K. Allen, Lord Scarman and the speech on his retirement by Sir Stanley Burbury, former Chief Justice of Tasmania. Mr Brown foreshadowed a symposium to be held in 1983. This symposium has now been arranged for 5 February 1983. The chief speaker at the symposium will be Lord Wilberforce who will doubtless be able to explain to the Australian audience his efforts -- and so far his failure -- to secure interpretation reform in Britain. See [1980] *Reform* 47; [1981] *Reform* 83. The Shadow Federal Attorney-General, Senator Gareth Evans, on behalf of the Opposition, welcomed the publication of the discussion paper:

> The idea of policy discussion papers to generate debate on complex issues is a sensible one, which deserves a lot more repetition. . . . The proposal for formal explanatory memoranda to be endorsed by Parliament as the same time as the parent legislation is neither new nor radical, but would represent a significant contribution towards more acceptable

> interpretations. Partly as a backlash to the excesses of the Barwick Court, courts around Australia are now more sensitive to the social and economic effects of their decisions, but that process needs all the reinforcement it can get.

But not everyone was happy with the thrust of the discussion paper. David Solomon, legal correspondent for the *Australian Financial Review*, offered his opinion in the issue of that journal of 22 October 1982:

> The Attorney-General, Senator Durack, appears to have rejected any radical change in the methods by which Parliament can make its intentions clearer to the courts which have to interpret the laws approved by Parliament . . . The proposals advanced in the discussion paper [on explanatory memoranda] go no further than the ideas Senator Durack expounded when he introduced changes in the Acts Interpretation Act almost 18 months ago. . . . To some extent the arguments [about the status quo] have been overcome by the wide circulation of *Hansard* reports, . . . On the High Court, Mr Justice Murphy has been a strong advocate of the use of whatever parliamentary material might be helpful to the court. In recent cases, Mr Justice Mason has joined Mr Justice Murphy in accepting it is proper for the court to look at *Hansard* to help determine the purpose for which an Act of Parliament was passed. Whilst Senator Durack's discussion paper notes these views, it does nothing to encourage the courts to accept a more liberal attitude to parliamentary materials.

lord denning again. But as an indication that reform in this area, if it is to be widespread, probably has to come from parliamentary enactment, it is useful to note the decision of the House of Lords in *Hadmor Productions Limited and Ors* v. *Hamilton and Ors,* [1982] 1 All ER 1042. The House of Lords allowed an interlocutory appeal from the English court of Appeal. In the course of his speech Lord Diplock (presiding) took exception to a passage in the judgment of Lord Denning in the Court of Appeal. All other Law Lords agreed with Lord Diplock:

> The Master of the Rolls . . . sought to justify the construction that he placed on s. 17(8) [of the Employment Act 1980] by referring to the report in *Hansard* of a speech made in the House of Lords by a peer, who is a distinguished academic lawyer, Lord Wedderburn, when moving an opposition amendment (which was defeated) to delete the subsection from the Bill. There is a series of rulings by this House unbroken for a hundred years . . . that recourse to reports of proceedings in either House of Parliament during the passing of a Bill that . . . becomes an Act of Parliament that falls to be construed, is not permissible as an aid to its construction.

Lord Denning has long been an advocate for reform of the judicial approach to statutory interpretation. He called this the 'European approach' and sought support for it in the accession by the United Kingdom to the European Community. He used a typically delightful argument in favour:

> In interpeting the Treaty of Rome (which is part of our law) we must certainly adopt the new approach. Just as in Rome, you should do as Rome does. So in the European community, you should do as the European court does. . . . We should interpret in the same spirit and by the same methods as the judges of the other countries so as to obtain a uniform result. Even in interpreting our own legislation, we should do well to throw aside our traditional approach and adopt a more liberal attitude.

James Buchanan and Co Ltd v *Babco* [1977] 2 WLR 107, 112.

law reform ventures. Finally, three law reform moves of relevance should be noted:

- In the ALRC report *Insurance Contracts* (ALRC 20) provision is proposed, in the draft Bill attached, for courts in interpreting the legislation to have regard to the report. This is justified by the statement of 'the intention of the Parliament' that the Act and Regulations 'are to give effect to the recommendations made in the report of the Law Reform Commission'. (cl. 3, ALRC 20, 249.) Only once before has the ALRC ventured such a clause in its report *Alcohol, Drugs and Driving* (ALRC 4). When the legislation based on that report

was enacted, the provision was deleted. However that legislation dealt with criminal offences where strict construction is the rule. Time will tell whether the present clause survives in a rather more congenial climate.

- Secondly, one of the latest references to the ALRC on admiralty law (see next item) contains a novel instruction requiring the Commission 'to formulate a draft Explanatory Memorandum that could be used as an aid to the interpretation of any Bill for an Act to give effect to the Commission's recommendations'.
- Thirdly, on 1 December 1982, the Victorian Premier and Attorney-General, Mr John Cain introduced into the Victorian Parliament an Interpretation Bill 1982. Its purpose is to repeat the Victorian Interpretation Act 1958 to allow shorter, simpler language in Acts of Parliament. Many provisions of the 1958 Act are restated -- some with amendments designed to improve their efficacy. The major reform is the extension of most of the provisions to subordinate legislation.

Steady progress through a thorny thicket.

admiralty afloat

If blood be the price of admiralty
Lord God we ha' paid in full!

Rudyard Kipling,
The Song of the Dead, 1896

of bottomry bonds. Admiralty jurisdiction has a long, troubled and interesting history in the law of English speaking people. Its origins are obscure. But admiralty courts were well established by the reign of King Edward III. The Court of Admiralty asserted a general jurisdiction over things done upon the sea and concerning maritime matters. It developed its own special rules and procedures to deal with such matters as wrecks, droits of admiralty, bottomry bonds (now, perhaps unfortunately, obsolete) maritime liens and actions in *rem.* This admiralty jurisdiction was progressively whittled away by the Westminster Parliament and by the rival common law courts. It reached its nadir in the 18th and early 19th century but with the expansion of Britain's maritime trade and power it began to be revived and even extended by Acts passed in 1840 and 1861. These statutes were part of the process of court reform and rationalisation which led ultimately to the Judicature Acts in England.

In Australia, admiralty jurisdiction was at first not entrusted to the colonial supreme courts. It was given instead to designated colonial judges sitting as judges in Vice Admiralty. This approach by the colonial authorities was replaced by the passage in 1890 of a general Imperial Act, the Colonial Courts of Admiralty Act. It is under that Act that the Supreme Courts of the States of Australia, the High Court of Australia, and possibly, by inadvertence, the Federal Court of Australia exercise admiralty jurisdiction in this country. Interestingly enough, the only inferior court in Australia to have a limited admiralty jurisdiction is the Broome Local Court. Any reader anxious to lose no time exploring further how this exotic development came about is referred to the treatment of admiralty in Dr James Crawford's recent book *Australian Courts of Law*, Chapter 7. In that book, Dr Crawford illustrates a number of problems with the continuing applications to Australia of the colonial courts legislation. He concludes:

> Repeal of the 1890 Act and its replacement by more adequate provision for civil jurisdictions in admiralty, such as exists in New Zealand and the United Kingdom, is long overdue.

Dr Crawford points out that the criminal jurisdiction of admiralty courts was almost as troublesome, a fact illustrated by *R*. v. *Robinson* [1976] WAR 155 and *Oteri* v. *The Queen* [1976] 1 WLR 1272. However these problems have now been largely been overcome by the