COMMON LAW STATUTES AND JUDICIAL LEGISLATION: STATUTORY INTERPRETATION AS A COMMON LAW PROCESS†

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I INTRODUCTION

Most cases in most courts in Australia are cases in which all or most of the substantive and procedural law that is applied by the court to determine the rights of the parties who are in dispute has its source in the text of a statute. In every one of those cases, the attribution of some meaning to that statutory text forms a necessary element in the court's identification of the substantive or procedural law it applies to determine the rights of the parties so as to resolve their dispute. That element of attributing meaning to a statutory text, when isolated, is referred to as 'statutory interpretation' or 'statutory construction'. Statutory interpretation is so much a part of the identification by a court of the applicable substantive or procedural law that it is rarely subjected to separate analysis. Only quite recently has statutory interpretation been singled out as a discrete topic of judicial and academic interest.[1] Overlapping and competing approaches have emerged. The approach now ascendant in Australia has been labelled 'literal in total context':[2] it explains statutory interpretation in terms of the attribution of meaning to the words of a statutory text in the totality of the 'context' in which the statutory text was enacted.

My thesis is that 'literal in total context' is an incomplete explanation of contemporary statutory interpretation in Australia unless 'context' is expanded to include the way the statutory text is applied in the courts *after* the text is enacted. Although the enactment of the text occurs by or under the authority of a legislature at a point in time, that enactment occurs in a broader structural and temporal context where the enacted text becomes part of the law that is to be applied by courts, on and from the time of its enactment, to determine rights and resolve disputes in individual cases. The meaning of a statutory text in that broader structural and temporal context is informed by the experience of the courts in the process of application of the law to the facts in those individual cases. Over time, the meaning of a statutory text is reinformed by the accumulated experience of courts in the application of the law to the facts in a succession of cases. The meaning of a statutory text is also informed, and reinformed, by the need for the

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1 Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, 1997) 14–15.

2 E Driedger, *Construction of Statutes* (LexisNexis Butterworths, 2nd ed, 1983); Jeffrey Barnes, 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law — Part One' (1994) 22 *Federal Law Review* 116, 134, cited in James Spigelman, 'Statutory Interpretation: Identifying the Linguistic Register' (1999) 4 *Newcastle Law Review* 1, 4 n 12.

courts to apply the text each time, not in isolation, but as part of the totality of the common law and statute law as it then exists.

The attribution of meaning by courts to the statutory text in this way resembles the declaration and development by courts of the common law. The common law and statute law as applied by courts are, to a significant degree, products of the same inherently dynamic legal process.

II PRINCIPLES OF INTERPRETATION

Within the integrated Australian legal system, the courts alone have conclusive authority to determine the meaning of a statutory text. Against that fundamental constitutional background, it has been pointed out that the 'preferred construction' by a court of a statutory text 'is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy'.[3]

The non-pedantic, non-semantic and non-mechanical nature of the application by a court of rules of interpretation to arrive at a preferred construction of a statutory text is emphasised by the frequent invocation in Australian courts of the famous statement of Judge Learned Hand. That statement was to the effect that, whilst the words used:

> are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing … it is one of the surest indexes of a mature and 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. [4]

The 'purpose', 'object' or 'mischief' to which a statutory text is directed is itself emphasised to be an important part of the 'context' in which a statutory text is enacted.[5] That purpose, object or mischief is, by definition, concerned with the state of affairs as known to, or foreseen by, the legislature at the time of enactment so as to prompt or explain the enactment. But just how the purpose or object is to be used by courts as a guide to meaning is not necessarily subject to the same temporal limitation.

Experience teaches that the possibilities of meaning rarely emerge divorced from the necessities of application. That this is the experience of courts seeking to attribute meaning to a statutory text was noted by O'Connor J when he said in 1906:

3 *NAAV v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 123 FCR 298, 410–12, cited in *Zheng v Cai* (2009) 239 CLR 446, [28] and *Dickson v The Queen* (2010) 241 CLR 491, [32].

4 *Cabell v Markham*, 148 F 2d 737, 739 (2d Cir, 1945) cited in *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 [27].

5 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

> You 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.[6]

The application of the law to the facts in a succession of cases tends only to magnify the possibilities of meaning.

However widely or narrowly the rules of interpretation applied by courts might potentially be conceived, two features of the institutional setting in which courts attribute meaning to a statutory text are inherent in the nature and operation of courts. For that reason these features must themselves be taken to be part of the rules that are accepted by all arms of government as guiding the process of interpretation. One is that a court is justified and obliged authoritatively to determine the meaning of a statutory text only so far as the attribution of meaning to the text is necessary to enable that court to discern the content of the law that must be applied to determine the rights of the parties who are in dispute in the individual case. The other is that a court is in every case constrained in the meaning it is able to attribute to the text by the place of the court within the hierarchy of courts and by a need to respect and ordinarily to adhere to such meaning as may have been attributed to the text in the past by that court or other courts at the same or higher hierarchical level. The first of those two features is a limitation on jurisdiction that is inherent in the nature of a court. So much is it embedded in the nature of a court within our constitutional system that we have no name for it. Outside our system, it is sometimes called 'judicial economy', which seems as good a name as any.

The second feature is a constraint consciously observed by courts and enforced by higher courts which is critical to the stability and predictability of the legal system as a whole. We call it the doctrine of precedent, or sometimes we give it the Latin tag *stare decisis*.[7] The operation of, and justification for, *stare decisis* was well explained in the Federal Court, in a case concerning statutory interpretation, in the following terms:

> The doctrine of *stare decisis* takes its name from [a] Latin phrase … which translates as 'stand by the thing decided and do not disturb the calm'. It is a doctrine based on policy. The rationale for the doctrine can be grouped into four categories: certainty, equality, efficiency and the appearance of justice. *Stare decisis* promotes certainty because the law is then able to furnish a clear guide for the conduct of individuals. Citizens are able to arrange their affairs with confidence knowing that the law that will be applied to them in future will be the same as is currently applied. The doctrine achieves equality by treating like cases alike. *Stare decisis* promotes efficiency. Once a court has determined an issue, subsequent courts need not expend the time and resources to reconsider it. Finally,

6 *Bowtell v Goldsborough Mort & Co Ltd* (1906) 3 CLR 444, 457.

7 See, eg, *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47 [51].

> *stare decisis* promotes the appearance of justice by creating impartial rules of law not dependent upon the personal views or biases of a particular judge. It achieves this result by impersonal and reasoned judgments.[8]

The combination of those two features — judicial economy and *stare decisis* — creates an impetus for courts to proceed cautiously and incrementally in the attribution of meaning to a statutory text. That is, courts will tend to expound that text no further than is necessary for the application of the law to the facts in the case at hand, conscious that whatever meaning is attributed to the text in that case will have a bearing on the disposition of other cases in the future and draw, in each case, on the accumulated experience of courts in earlier cases in the application of the law to the varied facts of those cases.

The characteristic adoption by courts of a cautious and incremental approach to the attribution of meaning to a statutory text is reflected in a judgment of Brennan CJ in a case in which the High Court, for the first time, considered the meaning and application of a recently enacted provision of a statute. That provision allowed an exception from a prohibition against discrimination in employment in circumstances where the reason for the differential treatment of an employee could be shown to be based on 'the inherent requirements of the particular position'.[9] Brennan CJ stated:

> The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation. In so saying, I should wish to guard against too final a definition of the means by which the inherent nature of a requirement is determined. The experience of the courts of this country in applying anti-discrimination legislation must be built case by case. A firm jurisprudence will be developed over time; its development should not be confined by too early a definition of its principles.[10]

A narrow version of the 'literal in total context' approach would be forced to accept the existence of the two features of the institutional setting identified above, in which courts attribute meaning to a statutory text. It would also be forced to accept the impetus those features create for courts to proceed cautiously and incrementally in the attribution of meaning to a statutory text. However, it would deny the relevance of those features or of that impetus to the meaning that is properly to be attributed to the text. The true meaning of the statutory text, on a narrow approach, would always be inherent in the text at the date of enactment and would therefore be knowable in theory in its entirety at the date

8 *Telstra Corporation Ltd v Treloar* (2000) 102 FCR 595, 602 [23] (Branson and Finkelstein JJ). See generally Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (Butterworths, 7th ed, 2011) [1.9].

9 *Industrial Relations Act 1988* (Cth) s 170DF(1)(f).

10 *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 284 [1].

of enactment. The application of the law to the facts in individual cases might provide the occasion for the exposition of the meaning of the text but could have no effect on the meaning that was fixed in its totality at the time of enactment.

At any particular time after enactment, the meaning in fact attributed to the text by a court at any hierarchical level may or may not in fact accord with the true meaning of the statutory text. If the attributed meaning did not in fact accord with the true meaning of the statutory text, the attributed meaning would, on the narrow version, be in error. The institutional requirement for a court to respect and ordinarily to adhere to whatever meaning may have been attributed to the text in the past by that court or by other courts would, on the narrow version, therefore carry the risk of perpetuation of error. It would nevertheless be pointed out that the risk of perpetuation of error is kept in check by the capacity of higher courts, ultimately the High Court, to correct an error when identified, irrespective of how long that error may have persisted. The characteristic adoption by courts of a cautious and incremental approach to the attribution of meaning would be seen as nothing more than an institutionally endorsed mechanism for the minimisation of error.

Some support for that narrow version of the 'literal in total context' approach might be thought to be drawn from the qualifications that have been made to the standard formulation of the principle of *stare decisis* that applies equally to common law and statute law. Although a lower court has no option but to adhere to the meaning attributed to a statutory text as a necessary step in the reasons for decision of a higher court, the requirement that a court adhere to the meaning attributed to a statutory text as a necessary step in the reasons for decision of that court, or of a court of co-ordinate jurisdiction, is subject to the qualification, unless convinced that the attributed meaning is 'plainly wrong'.[11] To similar effect, while the High Court has developed principles to guide the circumstances in which it will be prepared to reconsider the meaning it has itself attributed to a statutory text in an earlier case, and has emphasised that 'such a course is not lightly undertaken',[12] reconsideration and overruling may occur where the High Court is convinced that its previous attribution of meaning is 'plainly erroneous'.[13]

On analysis, however, any support for the narrow view from the existence of these qualifications is extremely weak. It is undermined by the qualifications to the qualifications ('*clearly* wrong' and '*plainly* erroneous'), restraints that have been repeatedly accepted in intermediate courts of appeal in Australia as capturing the need for the later court, if it is to depart from the judgment of an earlier court, to have a 'strong conviction … that the earlier judgment was erroneous and not merely the choice of an approach which was open'.[14] It is also undermined by

11 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [135].

12 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438 citing *Queensland v The Commonwealth* (1997) 139 CLR 585, 599, 602, 620.

13 Ibid 439–40 citing *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 13.

14 *Gett v Tabet* (2009) 254 ALR 504, 565 [294]–[295]. See also *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 13–14, 32–3.

the requirement for any conclusion that a qualification, as so qualified, should be invoked to depart from a meaning attributed in a previous case only after carefully examining that previously attributed meaning and finding it to be wanting. The principles developed by the High Court to guide the circumstances in which it will be prepared to reconsider the meaning it has itself attributed to a statutory text in earlier cases, include whether or not those decisions 'rest upon a principle carefully worked out in a significant succession of cases' and whether or not there was 'a difference between the reasons of the justices constituting the majority in one of those earlier decisions'.[15] 'No Justice', it has been said, 'is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank'.[16] On the contrary, reconsideration and overruling may occur 'only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances'.[17]

Some support for the narrow version of the 'literal in total context' approach might also be argued to be drawn from language used in a unanimous judgment of the High Court in 2005.[18] The judgment addressed the task of an intermediate appellate court applying the proviso to the common form criminal appeal provision first enacted in England in 1907 and enacted afterwards in each Australian state. The task of an intermediate appellate court applying the proviso had, by 2005, been expounded on countless occasions in judgments of intermediate appellate courts and on a number of occasions in judgments of the High Court. After introducing an altered exposition under the heading '[s]ome fundamental propositions' and identifying the 'root question' as 'one of statutory construction', the High Court stated:

> It is the words of the statute that ultimately govern, not the many subsequent judicial expositions of that meaning which have sought to express the operation of the proviso to the common form criminal appeal provision by using other words.[19]

The strength to be attributed to that statement obviously lies in the weight to be given to the expression 'ultimately govern'. On any view, a court is confined to attributing meaning to the statutory text and the meaning that a court is able to attribute to that text is limited by the range of possible meanings that the text is capable of bearing. In that sense, it must always be the words of the statute that ultimately govern. But equally, the exposition by a court of whatever meaning the court is persuaded to attribute to the text from within that range of possible meanings could not occur unless the court were able to explain the text using words other than those contained in the text. It is the explanation of the text as

15 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438.

16 *Queensland v The Commonwealth* (1977) 139 CLR 585, 599.

17 Ibid.

18 *Weiss v The Queen* (2005) 224 CLR 300.

19 Ibid 305 [9].

given by a court in one case that guides the understanding of that text by a court in a subsequent case.

Ought the High Court be taken to have been propounding a fundamental proposition of statutory construction, the effect of which was to require a court in 2005 to focus on the words of a 1907 statute, to the exclusion of the many judicial expositions of those words over the intervening 98 years? That would not be an option for a lower court and it is inconceivable that the High Court would have been choosing to articulate a fundamental proposition of statutory construction that no court other than the High Court could apply, or that was in opposition to the fundamental systemic requirement that a court ordinarily adhere to a meaning attributed to a statutory text by other courts in the past. The better understanding is that the High Court was expressing not disregard for previous judicial expositions of the statutory text, but profound and considered disagreement with the thrust of most of them. The High Court was emphasising the primacy of the text, not narrowing the 'context'.

A wider version of the 'literal in total context' approach is able to treat the two features of the institutional setting in which courts attribute meaning to a statutory text as legitimately informing the preferred construction of that statutory text.

The need for a court — observing judicial economy — to attribute meaning to a statutory text, in the course of applying the law to the facts to determine the rights of the parties in the individual case before it, informs the attribution of meaning in three cumulative respects: first, by exposing possibilities of meaning; second, by allowing those possibilities of meaning to be tested in a concrete setting against the purpose, object or mischief to which the statutory text is directed; and third, by compelling, in that limited but concrete setting, the making of a choice between possible meanings that achieves the best fit between that purpose, object or mischief and the actual application of the statutory text. Lord Diplock put the point bluntly and provocatively when he said that where the courts can identify the 'target' of legislation, 'their proper function is to see that it is hit: not merely to record that it has been missed'.[20]

The need for a court, adhering to *stare decisis*, to respect and ordinarily to adhere to such meaning as may have been attributed to the text in the past by another court, informs the attribution of meaning in two additional cumulative respects: first, by requiring present choices to be made with a view to the future; and second, by requiring past choices to be considered, retested and if necessary adjusted, in the light of the accumulated experience of courts in the operation of the statute. This was again well put in the Federal Court:

> The problem [addressed by *stare decisis*] is very real when what is at issue is the construction of a statute. For one thing, statutory language is often ambiguous. Courts can struggle to determine the legislative intent. It is often impossible to discover any legislative intent. In many instances the

20 Lord Diplock, 'The Courts as Legislators' (1978) *The Lawyer and Justice* 263, 274. This statement has often been quoted in Australian courts, see, eg, *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 424.

> generality of the statutory language is deliberate and allows the courts to develop a body of law to fill the gaps. This may lead to disagreement among judges about what the statute means. It would be sound policy that once that intent has been discerned by an appellate court then that should be the end of the matter.[21]

As to the effect of present choices on the future, the following explanation given by Lord Diplock has a great deal of force:

> Litigation is concerned with what is past and incidental — with a particular breach already committed by a particular individual of his duty towards his neighbour in circumstances which will never be exactly reproduced. Rarely are the Courts explicitly concerned with future conduct. … Never are the Courts explicitly concerned with what is general. The Court's order normally binds only the parties before it. Even a judgment *in rem* or as to status explicitly affects only a particular *res* or the status of a particular person. Yet implicitly every judgment delivered not under a palm tree but in a Court bound by the rules of precedent speaks to the future and speaks generally. It says not only to the particular party to the action but to all of whom the judgment becomes known: 'If anyone does this kind of thing in the future this kind of consequence will follow'. It is by that implicit content of every judgment that the Courts in performing a judicial function exercise a legislative power.[22]

The force of Lord Diplock's characterisation lies in its resonance with the everyday language of legal discourse. To the extent that it is a necessary element in the reasoning of the court to the resultant determination of the rights of the parties in dispute, any judicial exposition of a statutory text contained in the reasons for decision of a court in an individual case becomes an 'authority' which, if not 'overruled' or 'distinguished', is to be 'followed' in a subsequent case before the same or another court. Of course, Lord Diplock's characterisation would be misleading — and in Australia deeply constitutionally flawed — were it taken to the point of suggesting some assimilation of the judicial function to the legislative power. There are critical distinctions. A court does not initiate legislation, nor does it formulate legislative policy. It is confined to the application of the statutory text, as enacted, to the case at hand and its declaration or exposition of the meaning of the statutory text occurs as an incident of that task. The legislative effect of such exposition of the statutory text as may be involved in the application of that text by a court to the case at hand is derivative and incidental. Because it is bounded by the possibilities of meaning that are textually available and because it is focused on the purpose, object or mischief to which the statutory text is directed, any exposition of a statutory text by a court is inherently interstitial. Because of the possibility of being overruled or distinguished, any exposition of a statutory text by a court is also necessarily provisional.

21 *Telstra Corporation Ltd v Treloar* (2000) 102 FCR 595, 602–3 [27].

22 Lord Diplock, above n 20, 266–7 (emphasis in original).

As to the reconsideration and retesting of past choices in the present, what is significant is that any consideration by a court of the 'authority' of a judicial exposition of a statutory text, contained in the reasons for decision of a court in an earlier case, involves some consideration not only of the way the text was explained, but also of the way the text was applied in that earlier case to determine the rights of the parties. What is seen and evaluated in the concrete setting in any present case is how meaning was translated to result in the concrete settings of all previous cases.

As the cases multiply, a picture, in the form of a mosaic, emerges of the overall practical operation of the statute. The picture that emerges through the accumulation of experience provides scope for the making of refinements and corrections. Problems and potentialities emerge based on an evaluation of the practical operation of the statutory text that might not have been seen, easily or at all, at the time the text was enacted or at the time of its earliest application. As Dixon CJ once intimated, in language recently echoed by French CJ, a past decision may be weakened or strengthened by later decisions and may be made more or less certain in the light of subsequent experience.[23] Indeed, the standard formulations of the principle of *stare decisis* admit that departure from an earlier interpretation more readily occurs when that earlier interpretation can be seen to have 'achieved no useful result' or to have 'led to considerable inconvenience'.[24] Where a meaning once attributed to a statute can be seen to have 'produced unintended and perhaps irrational consequences not foreseen by the court that created the precedent',[25] an authority may be 'overruled'. But overruling tends, in practice, to be rare. More often, particular authorities are explained, categorised and treated as carrying more or less weight in the light of experience. Application of the statutory text in this way informs the meaning of that text. Through the process of repeated application, a contemporary understanding of the meaning of the statutory text develops in tandem with a contemporary understanding of the consequences of that meaning for the practical operation of the statute.

In terms cited with approval in the High Court, Professor Leslie Zines has explained:

> Any standard or criterion will have a penumbra of uncertainty under which the deciding authority will have room to manoeuvre — an area of choice and of discretion; an area where some aspect of policy will inevitably intrude. The degree of vagueness or discretion will be affected by what is conceived to be the object of the law and by judicial techniques and precedents. Given a broad standard, the technique of judicial interpretation is to give it content and more detailed meaning on a case to

23 *A-G (Cth) v Schmidt* (1961) 105 CLR 361, 370, quoted in *Wurridjal v Commonwealth* (2009) 237 CLR 309, 353 [71].

24 *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 57 (Gibbs CJ).

25 *Telstra Corporation Ltd v Treloar* (2000) 102 FCR 595, 603.

> case basis. Rules and principles emerge which guide or direct courts in the application of the standard.[26]

Recalling that statutory interpretation is not an end in itself, but an element in the identification of the content of the substantive and procedural law that is applied by courts to determine the rights of parties who are in dispute, there can be little doubt that the wider version of the 'literal in total context' approach accords more closely with the development of the law as observed in practice than does the narrower version. It would be possible to refer, by way of example, to any area of substantive or procedural law that takes its content in whole or in part from a statutory text: revenue law, intellectual property law, competition and consumer law, environmental protection law, migration law, human rights, civil procedure, to name just a few. It is sufficient to refer to the relatively uncontroversial area of competition and consumer law. No one could realistically suggest that the vast body of law that has developed over the last 35 years concerning the circumstances in which conduct engaged in by a corporation will be characterised as occurring 'in trade and commerce' and as being 'misleading and deceptive', is to be treated as being nascent and discoverable in those words at the time of their original enactment in 1975.[27] Nor could anyone realistically suggest that the complex problems of the existence or non-existence of a causal connection between such misleading and deceptive conduct as might be engaged in by a corporation in trade and commerce and such loss or damage as might be suffered by another person, can be resolved through the contemplation of some fixed meaning inherent in such words as 'by' or 'because'.[28] In each of those examples, the words of the statutory text, read against the background of the purpose, object or mischief to which they were directed, establish no more than an essential orientation. The experience of the courts in applying the law to the facts to determine the rights of the parties in a succession of cases has provided the content and that content continues to evolve and to be refined as the cases multiply. In no area of substantive or procedural law are the words of any statute, read as at the time they were enacted, sufficient to establish with confidence the content of any legal principle. The content of any body of substantive or procedural law that is based to any significant degree on any statutory text, is revealed through the reasoning of courts seeking to apply that text in practice.

The characteristic adoption by courts of a cautious and incremental approach to the attribution of meaning to a statutory text, as reflected in the judgment of Brennan CJ in the anti-discrimination case discussed earlier, is not a defensive mechanism for the avoidance of error. It is, instead, a positive mechanism by which meaning is actively attributed and constantly reassessed, in a manner most likely to ensure that the choice between possible meanings of the statutory text that prevails in the long run is the choice of meaning that, for the majority of cases, achieves the best fit between the actual application of the statutory text and

26 Leslie Zines, *The High Court and the Constitution* (Federation Press, 4th ed, 1997) 195, quoted in *Thomas v Mowbray* (2007) 233 CLR 307, 351 [91].

27 *Trade Practices Act 1974* (Cth) s 52. See now *Competition and Consumer Act 2010* (Cth) sch 2 s 18.

28 *Trade Practices Act 1974* (Cth) s 82. See now *Competition and Consumer Act 2010* (Cth) sch 2 s 236.

the purpose, object or mischief to which the text is directed. Using Lord Diplock's metaphor, if the target can be hit at all, a cautious and incremental approach serves to maximise the likelihood that the target will be hit.

III INTERPRETATION IN CONTEXT

There is, however, another consideration that qualifies Lord Diplock's metaphor. The circumstance that a statutory text, once enacted, becomes part of the law that is to be applied by courts upon the enactment of the text, carries the additional consequence that the text sits, from the beginning, within the whole body of the statute law and common law and that its meaning may be influenced by subsequent developments in other parts of the statute law as well as by subsequent developments in the common law.

The time-honoured explanation is that the text of a statute speaks rarely just for a moment in time and most often speaks continuously in the present. With an eye to history, Lord Steyn once explained it as follows:

> Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that 'An Act of Parliament should be deemed to be always speaking'. In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors has brought about the situation that statutes will generally be found to be of the 'always speaking' variety.[29]

A statutory text that speaks continuously in the present is necessarily influenced in its meaning by the contemporary statutory context in which it continues to speak. So much is that taken for granted that it is almost never suggested that a frequently modified statute should be read other than as a coherent whole. There is not the slightest conceptual difficulty with the notion of subsequent legislative enactments expressly or by implication modifying existing statutory language. Words incorporated into a statute at a particular time are therefore not frozen at the point of incorporation but take (and can change) their meaning so as to best fit the changing statutory landscape.

Changes in common law that occur after a statute is enacted are also capable of affecting the meaning of a statutory text. As Gleeson CJ pointed out in 2001: 'Legislation and the common law are not separate and independent sources of

29 *R v Ireland; R v Burstow* [1997] 4 All ER 225, 233.

law; the one the concern of parliaments, and the other the concern of courts. They exist in a symbiotic relationship'.[30]

Save in so far as interpretation can be and is regulated by statute, the principles governing the interpretation of statutory text by a court in a common law setting are themselves common law principles. As common law principles, they have evolved like other common law principles. As the common law principles evolve, so too do the meanings those evolving principles ascribe to a statutory text. Two examples suffice. One is the modern emergence of the common law principle of natural justice or procedural fairness, now generally conceived as a condition of a grant of statutory power to affect rights or interests. The other is what has come to be known as the 'principle of legality' — the common law principle that a statute will not, in the absence of 'plain words of necessary intendment', be construed to interfere with fundamental rights recognised by the common law[31] — by reference to which legal professional privilege, only recently recognised as a fundamental common law right, has been used to qualify the operation of statutes of long standing.

Natural justice or procedural fairness arguably has its roots in long-standing principles of the common law, but only emerged as a significant constraint on the exercise of statutory power — that is to say, power conferred by the terms of a statutory text — in the second half of the 20th century. In a case decided in 1990 concerning the application of procedural fairness to the exercise of a power to conduct a coronial inquiry conferred by a statute enacted in 1920, three members of the High Court said:

> It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.[32]

They continued:

> In determining whether this Act has excluded the rules of natural justice, two considerations need to be kept in mind. The first is that many interests are now protected by the rules of natural justice which less than 30 years ago would not have fallen within the scope of that doctrine's protection. Thus, it was not until 1969 that the common law rules of natural justice were extended to the protection of legitimate expectations. … It was even later that the common law rules of natural justice were held to apply to public inquiries whose findings of their own force could not affect a person's legal rights or obligations.[33]

30 *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532 [31].

31 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15], 271 [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

32 *Annetts v McCann* (1990) 170 CLR 596, 598.

33 Ibid 599.

Their reasoning continued:

> It simply would not have occurred to anyone in the legal profession in 1920 that the common law rules of natural justice applied to an inquiry whose findings could not alter legal rights or obligations. No doubt the legislature assumed that the rules of natural justice did not apply to coronial inquiries. But that is no ground for concluding that the legislature intended to exclude those rights if they were otherwise held to apply. … [N]othing else in the Act provides any support for the proposition that the Act excludes the rules of natural justice. Accordingly, the rules of natural justice are applicable.[34]

With that straightforward explanation, a statute enacted in 1920 was interpreted in 1990 by reference to principles of natural justice which no one would have perceived as having fallen within the scope of the protection of natural justice even as late as 1969.

What is now labelled the 'principle of legality' is a principle of long standing. Precisely what has been treated as falling within the category of 'fundamental rights recognised by the common law' has, on the other hand, varied considerably over time. The existence of the principle has often been explained in terms of the improbability of a legislative intention to interfere with fundamental common law rights through the enactment of a statutory text expressed in general terms — as a 'common sense guide to what a Parliament in a liberal democracy is likely to have intended'.[35] However, the more modern explanation is that it is 'a working hypothesis, the existence of which is known both to Parliament and the courts, upon which the statutory language will be interpreted'.[36] That more modern explanation can only be treated as a comprehensive explanation of the operation of the principle as applied in practice if the working hypothesis is extended to include the way in which rights recognised by the common law can be developed by courts through time after the enactment of a statute.

Legal professional privilege, for example, was admitted to that category in Australia only in 1983 in the context of construing a statute enacted in 1914.[37] It has since been applied many times in respect of many statutes enacted at a time when legal professional privilege went unrecognised as a common law right. A rare aberration occurred in 1991 when a majority of the High Court held legal professional privilege not to be an exception to a statutory code enacted in 1961. Brennan J in the majority explained:

> We are … concerned with an application of that presumption in a legal matrix which has changed since the Code was enacted. The alteration of the law [in 1983] evokes an application of [the maxim that] the best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up … And so, the answer

34 *Annetts v McCann* (1990) 170 CLR 596, 600.

35 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

36 Ibid.

37 *Baker v Campbell* (1983) 153 CLR 52.

> to our … question is that the Code should be construed in the light of the law as it stood when the Code came into force — that is, the law as it stood before [1983] — unless there be something in the Code which is inconsistent with the operation that would thus be attributed to the Code.[38]

That case, however, was overruled barely a decade later when a majority of the High Court commented that the case in which it was expounded 'would now be decided differently'.[39] With it went any strong application of the maxim that 'the best and surest mode of construing [a statutory text] is to read it in the sense which would have been applied when it was drawn up'.[40] As subsequently explained by Kirby J, '[t]he essential flaw in that maxim derives from the fact that laws, once enacted, operate thenceforth, as from time to time applicable'.[41] The reality is that statutes are read by courts in the light of common law principles of interpretation as those principles exist, not simply at the time of enactment, but also at the time of application.

IV CONCLUSION

Writing in the United Kingdom in 1984, the parliamentary draftsman Francis Bennion painted the picture of a statutory text as taking on 'a life of its own':

> The ongoing act resembles a vessel launched on some one-way voyage from the old world to the new. The vessel is not going to return; nor are its passengers. Having only what they set out with, they cope as best they can. On arrival in the present, they deploy their native endowments under conditions originally unguessed at.[42]

That colourful, allegorical description has found resonance with some writers.[43] I, too, find it alluring. I would modify it only to the extent that it might be read as suggesting that the voyage is unchartered, the cargo unstable, the arrival uncertain, or the behaviour of the passengers unpredictable.

Writing in Australia in 2005, Suzanne Corcoran argued that the interpretation of statutes must be 'dynamic' as well as 'pragmatic'.[44] I agree, provided the word 'pragmatic' is understood not in the popular and sometimes pejorative sense of 'unprincipled', but in the sense of being informed by experience through the evaluation of practical consequences.

38 Ibid 322 (Brennan CJ).

39 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 560 [35].

40 Ibid.

41 *Coleman v Power* (2004) 220 CLR 1, 95 [224].

42 Francis Bennion, *Statutory Interpretation* (Butterworths, 4th ed, 2002) 356, cited in William Eskridge, *Dynamic Statutory Interpretation* (Harvard University Press, 1994) 49.

43 Eskridge, above n 42, 49. See also William Gummow, *Change and Continuity* (Oxford University Press, 1999) 607.

44 Suzanne Corcoran, 'The Architecture of Interpretation: Dynamic Practice and Constitutional Principle' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 31.

What I have sought to do is to explain the systemic influences that serve both to constrain and to guide the temporal journey of a statute. What I have sought to show is how the meaning of a statutory text is informed by the experience of the courts in the process of the application of the law to the facts in a series of individual cases. In that respect, I have sought to show how judicial economy and *stare decisis* operate over time to inform and reinform the meaning of a statutory text by reference to the accumulated experience of courts in the application of the law to the facts in a succession of cases. Finally, I have sought to show how the meaning of a statutory text is also informed, and over time can be reinformed, by the need for the courts, at each time of its application, to apply the text not in isolation but as part of the totality of the statute law and the common law in the state in which it has come to exist.

Recognition of these inherently dynamic and pragmatic aspects of the process of statutory interpretation is in positive terms no more than a description of the actual experience of statutory interpretation within the Australian legal system. In normative terms, that recognition carries with it acknowledgement not only of the authority of courts as the arbiters of statutory meaning but of the responsibility of courts as the arbiters of statutory meaning through time.