CHALLIS TAXATION DISCUSSION GROUP

CONTEXT AND COMPLEXITY: SOME REFLECTIONS BY A NEW JUDGE

By

The Hon Justice Nye Perram

The Australian Club

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1. Mr Williams suggested that I should speak to you of my first year on the Bench and perhaps of some tax cases in which I have had an involvement. There is no shortage of material for such a speech, so to give it a little form I thought I would comment on two recurrent problems I have noticed and relate those problems to the manifestations they take on in tax cases. The first problem I want to touch upon is the problem of statutory construction. The second is the problem of overly complex legislation. These problems are not perhaps as unconnected as at first blush they appear.

2. But first, the problem of interpretation. One of the vexing questions in the study of English literature with which every school pupil is brought into contact sooner or later is that of what it is that a particular work of literature *means*. It is, therefore, something of an annual fixture to hear of large numbers of children clutching a copy of Hamlet under one arm and the most recent crib guide of the Bard's great works under the other, setting off in hot pursuit of what that famous play is about. So we see, by turns, that Shakespeare intended Hamlet to be an heroic figure struck through, however, with the tragic flow of flaw of hesitancy:

> "And thus the native hue of resolution
> is sicklied o'er with the pale cast of thought"

3. But the children do not have to wait long to find out that this is a very traditional view of what Hamlet means. Some will be exposed to teachers of a certain age who will tell them that, in truth, the whole play is a Freudian allegory – that

Hamlet is made hesitant by an unresolved Oedipal complex and that the ghost of his father is no more, and no less, than his own id.

4. Many other interpretations abound. For a long time literary critics put their analyses of such texts on the basis that they were seeking to expose the author's true intentions. But in the 1970's it was becoming generally accepted that this enterprise was unsound. The French literary critic Roland Barthes famously made this point in a 1968 essay entitled "Death of the Author" which, putting the matter briefly, suggested that the author's intentions towards a work of literature were only one of a number of factors influencing what the work meant. A topical example makes the point. No film depicting the World Trade Centre in New York has quite the same meaning that it had prior to 11 September 2001. Every time the towers come into view the audience is affected by the thought of the events of that day and the story being told is irretrievably altered by that reaction in the audience. Seinfeld has never been the same.

5. A similar result may be seen by the smoking of cigarettes in mainstream cinemas or the saying of profanities which are no longer merely rude but now also politically incorrect. Like most people, my reaction to being told Roland Barthes' point of view when I was 20 was one of incredulity. How self-indulgent, indeed, it seemed to suggest that the author's intentions were not determinative of the meaning of a text. How could anyone, for example, think that the true meaning of Joseph Conrad's Heart of Darkness was other than as a commentary on the perils of colonialism in the Congo. How idle it would be to suggest that the book was an allegory for the wickedness that lurks in everyone. Conrad was surely about boats and jungles and knew nothing of Jungian psychology, still less of the aspirations of the proletariat. Thus, fortified by considerations of that kind against the perils of textual relativism we expect the school children of today to toil away extracting the themes and meanings of great works of literature by reference to what the author meant.

6. All of this would be harmless fun except for the fact that it turns out to be rather too close to home. In our federal constitutional arrangements there are two great literary organs. Plumped upon Capital Hill in the form of the Parliament

is the author or as Michel Foucault might call it, "the author function"[1]; a little further down the road and by the lake, in the form of the High Court and the Federal judiciary generally, is the reader. Neither has any choice about its respective role: the Parliament authoritatively speaks, the Courts authoritatively interprets. The writer cannot stop writing and the reader cannot give the author up no matter how inaccessible it finds the prose style.

7. I have spent sometime sketching a version of traditional literary theory to suggest its similarities with modern practices in statutory interpretation. Under both views we adhere to the fiction that the author's intention definitively affects the meaning of a text. I do not know what John Donne intended when he wrote *The Flea* and said that wonderful line:

> "And in this then our two bloods mingled be"

8. Nor have I the foggiest conception of what Chekhov meant when he wrote *The Cherry Orchard*. Yet there are no difficulties in enjoying these or discussing intelligently what they mean. But with a work of literature there is at least an author who is a person. The situation with legislation is very different. There is no single author. We subscribe to the view that the meaning of the text is to be discerned by reference to the intention of the Parliament. But the intention of Parliament is the intention of an abstraction. The only thing which may be said with absolute certainty about a statute is that Parliament intended to pass it in the form in which it was eventually passed. The moment one steps down from that elegantly correct, but surely useless statement, and seeks by examination of the position of individual members of the Parliament to discern the intention of the Parliament itself, the interpretative position becomes quite untenable: some members or senators may not have read the legislation, some may think it means one thing; others something else; some may be against it but vote in favour of it as part of a broader political deal; some may not care. The problems are all too easy to multiply.

9. I mention these problems because their resolution lies very close to the day-to-day work of the Federal Court. In terms of the interpretation of Federal statute

[1] Foucault, M. "What is an Author".

law the Federal Court lies at ground zero and a very substantial part of its work concerns the every day application of the principles of statutory interpretation.

10. I wish to talk about two aspects of that interpretative task which I have observed in the work of the Court and I then want to relate those issues to some particular tax questions with which I am sure this audience is familiar. The first matter which I wish to raise relates to the comment I have just been making about the difficulties in isolating the meaning of a given text. The orthodox approach in statutory interpretation has been described in some quarters as the speakers meaning theory[2]. That theory is that, in attempting to resolve the meaning of any given – ambiguous – statutory provision we seek to identify what the person who said the words on the page meant. We adopt this theory because it has about it an air of legitimacy. The commands of a statute require obedience by reason of the identity of the author. Thus we treat a loss or outgoing which is capital in nature as not being deductible not because we find the terms of s 8-1 of the *Income Tax Assessment Act 1997* particularly persuasive or because we liked the style of the prose or its pithy expression of sentiment. Rather, we obey it because that is what the Parliament has authoritatively said. And this is so even if one subscribes to the late Professor Parsons' view that such losses or outgoings cannot, as a matter of theory, be incurred in the course of earning assessable income[3].

11. So viewed it is easy to see why it is natural to have resort to the meaning intended by the speaker. Because a statute is a command from a person of authority it would generally be, on this view, inappropriate to resolve any ambiguity in the command other than by reference to the intention of the person issuing it. If a policeman tells me to get out of my car it would be silly to ask anyone but him what he meant.

12. But that, as many commentators have pointed out, is a very simplistic view. Where the speaker is not a single person like our policeman but a committee the theory encounters serious practical problems. On this view fidelity to the authority of Parliament as author requires one to ascertain its meaning in

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[2] Ronald Dworkin, Law's Empire p 314
[3] Parsons, R.W., Income Taxation in Australia (Law Book Company, 1985).

enacting a statute. But, like a company, the Parliament is from its beginning to its end an abstraction. No visit to Canberra by even the most assiduous tourist will locate it. We may find its chambers in which its members may be seen but it is not either of those places. Instead it is in truth an arrangement of people: it is a House of Representatives consisting of members, a Senate consisting of Senators and a head of state presently consisting of a Queen. Each of these arrangements of people is not only selected by complex and diverse means; for example, preferential voting, single transferable voting and hereditary monarchy – but each also has its own unique deliberative rules. Thus the Senate and the House of Representatives each have their own standing orders and the Head of State is practically bound by political reality to act in accordance with unwritten conventions.

13. The person seeking the true intention of that very complex structure will have no more luck in finding it than the person seeking to know what colour the Parliament is. At this point those pondering this problem typically fall into one of three camps.

14. The first of these, to which I have already made reference, regards the will of Parliament as an ineffable and unknowable thing, a part of the furniture of the mind. These solipsists say only that Parliament intended to pass the Act in the form that it did. There is much to be said for this view in terms of analytical rigour but although it is unquestionably correct it is also not especially useful to those in the trenches.

15. The second school is diametrically opposed to the first. Not content to leave the unknowable alone, this school seeks to approximate the will of Parliament with the will of parliamentarians or, in some cases, with the will of parliamentarians' advisors. This approach, and variants on it, is recurringly popular in works on statutory interpretation but, as many have pointed out, it is both logically incoherent and wasteful in terms of the litigation it engenders. Jurisprudence is in decline in this country and does not receive quite the attention it once did when Julius Stone held the Chair at the University of Sydney. If it did, we would be much more aware of the fact that in serious circles the view that it is worthwhile to seek to discern the intention of parliament is not held by anyone.

There is a useful sketch of the difficulties, for those who are interested, in Jeremy Waldron's excellent book Law and Disagreement, in Chapter 5.

16. The pursuit of the intention of Parliament is logically incoherent because it makes assumptions about the mental states of members of Parliament which do not bear any relation with reality. It is idle, I think, to suggest that any member of the House of Representatives had a view about the operation of CGT Event L5, that is, the potential capital gains tax event occurring upon the deconsolidation of a subsidiary. And today such a claim is so untenable that the more mainstream variants of this view do not seek to invoke directly the intentions of individual members. Instead, the intention of the members is itself to be discerned indirectly by what it is that the members must have heard in the chamber or otherwise read or perceived. Note if you will the double shoe shuffle which has occurred. We seek the will of Parliament but we know that is not literally possible. Thus we settle for the will of parliamentarians as a kind of proxy. But that is unworkable because we dare not ask them what they actually did think. Thus we fall back even further and we examine the documents they should have read and we work out what they should or would have intended if they had read that which they should have read.

17. It is for that reason that particular reliance is placed upon the words of the Minster responsible for the second reading speech. There is no particular difficulty in extracting from such a speech what it was that the Minister meant but it does not follow at all that each member either read or heard what the Minister said or that they agreed with it or even that they understood it. For many of the more technical areas of the law, and most federal statute law probably falls into that class, the members are unlikely to have paid much attention still less, in most cases, to have grasped its detail. The same theory supports the use of explanatory memoranda, reports of Parliamentary select committees and law reform bodies. Here, so it seems to me, the theory is even more optimistic and operates on the romantic vision that Parliamentarians will read everything pertinent to their task, understand it and when voting in favour of the measure implicitly agree with everything which they have read.

18. Apart from the unrealistic vision this presents we should object to this theory because it also puts at naught significant elements of real political practice. In Parliament deals are done on legislation. A good example of that kind of process can be found in the GST legislation. When the amply entitled *A New Tax System for Australians (Goods and Services Tax) Act 1999* passed through the Parliament the Democrats in the Senate insisted on exemptions for certain supplies with which the government of the day did not agree. Those provisions have given rise, as all of you know, to a thriving species of litigation in the Federal Court concerned with their precise delimitation. Thus recently Justice Sundberg was called to decide whether mini-ciabatte was a biscuit and hence GST-free or something else and hence not: *Lansell House Pty Ltd v Commissioner of Taxation* [2010] FCA 329. As events transpired, it was not a biscuit.

19. To give an example with which I am more familiar, the Court has frequently been called on to consider the meaning of the expression "premises intended to be used for residential purposes" to determine whether certain supplies associated with land are to be input-taxed[4].

20. It is not correct to say that the Senators during the debate had any view about these matters. It is unlikely in 1999 that anyone, even the Democrats, knew what a mini-ciabatte was. We know the government Senators only voted in favour of the provisions in order to get the balance of the legislation through. Where also, it may be asked, does the theory that members of Parliament represent their electorate fit into this view? To suggest an argument that Parliament intended to act in the best interests of the electors in each electorate would be likely, even in the most earnest of circles, to elicit no more than a dry smile. Reading the proceedings of Parliament in such a context will tell you something about what the Parliamentarians were doing but it is not, so it seems to me, logically capable of getting one any closer to the abstraction which is the will of Parliament.

21. The speaker's-meaning view of the will of Parliament is also wasteful in litigation. It is the lot of Federal Court judges to be assailed in many cases by a

welter of secondary materials. Because of the volume of these materials and the level of generality at which the discussion in them frequently takes place, usually every party sees something in them which is of assistance and, even if they do not, the perception of diligence on a practitioner's part is only likely to be enhanced by showing that the requisite secondary materials have, indeed, been marshalled. As Justice Brian Sully once said, in a slightly different context, it is all, need I say, very disheartening.

22. The third school of thought pays homage to the notion of the will of Parliament as a controlling interpretative principle but confines the search for it to the words which the Parliament has itself used. A few fictions are indulged in along the way to assist in that task but these fictions are relatively harmless. For example, we insist that Parliament is rational and that a statute taken as a whole should be internally coherent. We do not indulge the possibility that there might be a loose word here or there and we insist that the Parliament should be taken to have used words throughout the statute in a consistent fashion. We assume harmony of form and purpose. This engaging view of authorial competence is set out in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355. It is in these terms:

> "A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme."

I like to call this the music of the spheres theory of statutory interpretation.

23. Those of a philosophical bent might ask why we assume that Parliament is such a good writer. Democracy is a messy business – Bismarck is once said to have

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[4] See, for example, *Sunchen v Commissioner of Taxation* (2010) 264 ALR 447.

observed that people should not see the manufacture either of sausages or of laws – there is really no logical reason to expect the effusions of the Parliamentary process would be models of clear speaking. Indeed watching the proceedings of Parliament does not leave one with the impression that one is looking into the mind of a Wordsworth or a John Clare. The problem is even worse in a Parliament where the government does not control the Senate. Yet that is the theory we ascribe to and it does, I suppose, provides a convenient tool for a working judge to engage in the task of interpretation.

24. The first theory has few adherents outside schools of jurisprudence. The second and third theory are in constant combat. The high water mark of the second may be found in *CIC Insurance v Bankstown Football Club Ltd* (1998) 187 CLR 384 where the Court said that "the modern approach to statutory interpretation insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise" and, of course, s 15AB of the *Acts Interpretation Act 1901* explicitly permits the use of such material. More recently, however, there are signs that the third theory, which some would call black letter, is growing in influence. In *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204 the High Court rebuked the Full Court of the Federal Court for using an explanatory memorandum and a second reading speech saying "it is erroneous to look at extrinsic material before exhausting the application of the ordinary rules of statutory construction". Heydon J put it a little more fragrantly when he said:

> "In short, as is very common, reading the explanatory memorandum and the Second Reading Speech is much less helpful than reading the legislation itself."

25. So, this was the first point I wanted to make: there is, at least at the moment, a growing – and I think probably wholesome – practice of interpreting federal legislation with less assistance from the caravan of extrinsic aids then has been the case in the past. The position seems to me more theoretically acceptable than peering into the sausage factory. On this view, the will of Parliament remains an abstraction, of course, but if we must have it – and we do need to resolve ambiguity some way – an abstraction deduced from the words on the page is a good place to start. It is more legitimate than seeking to distil if from

the second reading speeches and explanatory memoranda because, unlike those materials, we do know that the text is what Parliament intended. We cannot make the claim for anything else.

26. I describe this as wholesome because the instinctive resort to place before the Court every input into the Parliamentary process has little value from the perspective of principle. The intention of Parliament is a theoretical abstraction and not a political reality. The business of Parliament is the making of laws and not the formation of intentions. To put the matter perhaps a little simplistically: if I am trying to work out whether a cake is chocolate cake or not I am not in any way assisted by being told that the baker put two cups of flour in it and thought that he was making a vanilla tart. The question always remains: is it a chocolate cake?

27. The approach in *Project Blue Sky* – with all its attendant strengths and weaknesses – was on display in one of the first cases to discuss the consolidated group provisions of the *Income Tax Assessment Act 1997*. As many of you will know deconsolidation from a consolidated group can give rise to a capital gains tax event approachably called CGT Event L5. The provisions involved are very complex but basically ask whether the net worth of the group is decreased upon the deconsolidation by the departing of the subsidiary which is ceasing to be 100 per cent owned. The moment of deconsolidation is called, in a phrase reminiscent I think of German romantic poetry, the leaving time. The taxpayer had structured its affairs in such a way that the deconsolidation occurred by means of a debt for equity swap and the question which arose was when did the debt become equity and did that happen at the leaving time or at some other anterior time. The case is *Handbury Holdings Pty Ltd v Commissioner of Taxation* (2009) 179 FCR 569 which was decided by Justices Finn, Sundberg and myself.

28. The essential interpretative challenge was that the provisions simply did not work and could not be made to work. Neither the Commissioner's position nor that of the taxpayer was capable of resolving all of the many logical inconsistencies thrown up by the legislation. The task at hand, therefore, guided by the principle that legislation should be construed as being as coherent as

possible was to discover what the legislation "meant". Had it been a literary work one might well have attributed its authorship to Franz Kafka. But it was not. Armed with the Vision Splendid enunciated in *Project Blue Sky* that what was presented was a harmonious whole the Court strove to find melody in the most cumbersome collection of chords. The solution was to adopt the least disharmonious construction. In that case, so the Court held, this involved embracing the Commissioner's position.

29. The Diophantine provisions governing CGT Event L5 provide a useful avenue for entry upon the second matter I wish to raise for your consideration. It concerns the question of complexity. Commonwealth legislation in general is simply far too complex. I am not the first person to say this by any means and I will not harp on the detail of it with which we are all sadly too familiar. Instead, I thought it might be useful to trace why this complexity is occurring and why, despite widespread dissatisfaction with it, the present form of legislative drafting not only appears to be persisting but to be growing in influence.

30. Part of the problem seems to be a desire to expunge from the law generally, and the tax laws in particular, elements of discretion. In saying that I am using the word discretion in a rather formal sense not to mean the exercise of discretionary powers as lawyers might understand that term but rather the discretion which exists in a judge interpreting vague or unclear terms in legislation. The great H.L.A. Hart in his landmark work *The Concept of Law* referred to these kind of provisions as open textured. More recently, Professor Endicott at Oxford has called such provisions "vague"[5]. I will use the terminology of vagueness which is a convenient one.

31. I will give an example to illustrate what I mean by it. A statute might provide that a person is not to engage in "unconscionable conduct" or that a notice is to be served within a "reasonable time". These are statutory standards but their application unquestionably leaves a margin of discretion in their interpretation. No one suggests that in interpreting such provisions that a judge is engaging in judicial activism. Examples abound in the tax field. In its decision of *St George v Commissioner of Taxation* (2009) 176 FCR 424 the Full Court had to

interpret the meaning of the well-known expression "losses or outgoings of a capital nature". The same problem presents itself and those words leave open multiple interpretative choices.

32. I think that the theoretical position underlying the present practice of seeking to regulate everything is as follows. The existence of such vague provisions increases or at least appears to increase uncertainty. And uncertainty may itself lead to arbitrary exercises of power by unelected judges. Thus, to reduce the exercises of such arbitrary power the Parliament has to extirpate as much vagueness from the law as is possible. It is true that this is likely to augment rather than to diminish the length of legislation but this is a price which has to be paid for certainty and to save us from the blandishments of judicial law making.

33. Every step in this reasoning is, so it seems to me, problematic both from a philosophical and practical perspective. The basic problem has to do with the unavoidable truth that in the real world there are an infinite number of facts but in the legal world the Parliament is confined by reality to the production of a finite number of rules[6]. The gulf between the rules which are prescribed and the situations which those rules seek to regulate is therefore the gap between the finite and knowable and the infinite and unknowable.

34. The immediate consequence of this unfortunate state of affairs is that any rule must of necessity operate in a zone of uncertainty. One can illustrate the point this way. One might pass a law requiring motor vehicles to be registered. But is a motorised wheelchair a motor vehicle? Once can solve that problem in one of two ways. The first is to supplement the definition so that a motor vehicle is now defined to include a motor vehicle but not to include a motorised wheelchair. But this is not really a long term solution for taken to its logical end point it inevitably requires a listing of everything which is not a motor vehicle. The second approach is to try and capture the essence of what a motor vehicle is more precisely. One could for example try something like:

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[5] Endicott, T. Vagueness in Law, Oxford University Press 2000.
[6] A point made by HLA Hart himself in the Concept of Law.

> "A motor vehicle is a vehicle intended for use on the roads whose motion is achieved by means of an engine".

35. Now this sounds much better but it is, I think, actually much worse. All sorts of questions are prompted. Intended for use by whom? Is a person who does not actually intend to use his vehicle on a road exempt from registration? Or is something else intended? And a use for what purpose? Is a steam roller being used on a road or does the rule really only refer to the use of the road as a road? And what is an engine? A horse is probably not operated by means of an engine but what about a solar powered car? Or a person with a mechanical heart on a bicycle?

36. What I hope this example shows is that by increasing the level of prescription you simply increase the number of legal terms in play and, far from reducing uncertainty, you simply exchange one form of it for another. Instead of wondering what a motor vehicle is we now wonder instead about intentions, motions, roads and engines.

37. This example brings me back to the Full Court's decision in *St George v Commissioner of Taxation*. We will probably not see another case like *St George* or its predecessor *Macquarie Finance v Commissioner of Taxation* (2005) 146 FCR 77 because the ambiguity inherent in the expression "capital in nature" in the context, at least, of capital raisings has been replaced by the application of Division 974, that is, the debt/equity provisions. Section 974-1 tells us that "this division tells you whether an interest is a debt interest or an equity interest for tax purposes". Many people might think that debt and equity form a spectrum and that the lofty aim announced by s 974-1 might be the equivalent of telling one where on the rainbow violet stops and mauve starts or, correspondingly, the precise height below which people are short.

38. In my copy of the legislation, Division 974 – which replaces a three word expression "capital in nature" – goes for 31 pages. In place of the phrase "capital in nature" we now have the complex machinery of the debt equity interest tests. I will not set those tests out because you people have to get home at some stage. But I will give you what restaurants in Sydney these days call an

amuse-bouche. The debt test is to be applied to what is called a "scheme" which is, so we are told, the same as an "arrangement". What is an arrangement? It turns out to be "an arrangement, agreement, or understanding, promise or undertaking". What then of the scheme? The scheme, we are told, will be a debt interest if it satisfies the five elements in s 974-20(1). It must be a financing arrangement, under which an entity or a connected entity obtains a benefit. There must a concomitant non-contingent obligation; and so on and so on. Yul Brynner might have said "et cetera, et cetera, et cetera".

39. Far from reducing uncertainty this morass of terms is only likely to increase uncertainty. It is a classical example of a situation where the boundaries of vagueness have not been eliminated at all but instead merely relocated. But worse than that, Division 974 is not just a case of relocation. The original vague question – is the loss or outgoing capital in nature – was indeed difficult to answer as the authorities about it plainly show[7]. But it was, at least, informed by a readily conceptualised metric – namely the difference between outgoings on the revenue and capital accounts which had a theoretically consistent, if difficult, underpinning. Now we have dozen vague terms but no corresponding guiding conceptual metric to resolve what they mean. Instead, the interpreter will be left to flounder around wondering what a non-contingent obligation might be. Inevitably, the process of interpretation will end up resembling the kind of reasoning in *Handbury Holdings*; that is, a dyspeptic attempt simply to make the puzzle box of words fit together. The nub of the matter is that when we abolish general prescriptions we run the risk of exchanging vagueness of a comprehensible kind for vagueness of an incomprehensible kind. Thus it is that the legislative programme of increased prescription is a failure at a practical level and generally exacerbates the very problem it was designed to address.

40. It is a failure at the level of principle too. The concern, if it exists, that vague laws increase judicial discretion and that this is somehow to be seen as lacking in democratic pedigree can only proceed from the most naïve conceptions of the manner in which legal systems operate. As I have endeavoured to show

[7] See, for example, *Sun Newspapers Ltd v Federal Commissioner of Taxation* (1938) 61 CLR 337; *Federal Commissioner of Taxation v South Australian Battery Makers Pty Ltd* (1978) 140 CLR 645; *Steele v Deputy Commissioner of Taxation* (1999) 197 CLR 459.

vagueness is unavoidable. The quest to remove it from the legal system is not dissimilar to Don Quixote's tilting at windmills. The real question is how vagueness is to be addressed and in that circumstance the existence of an independent judiciary operating under clearly defined principles of statutory interpretation and with a proper respect for the doctrine of precedent provides a much more practical approach than attempting the inhuman task of writing down every possible outcome. Amongst those matters, the last, that is, the doctrine of precedent is especially important. It guarantees consistency of outcome and guards against the risk that the power of interpretation might be exercised in an arbitrary fashion. People forget this. The powers of judges to interpret statutes is, no doubt, significant. But unlike the power of legislators and of the executive it cannot be exercised on a whim and it awaits parties with a court case to give it the breathe of life. The discourse of judicial interpretation is one circumscribed by appellate review and by a systemic commitment to consistency of result. It is to that institution that we should look to apply the law to the multitude of potential factual scenarios. The quest to fix every detail is unachievable and the attempt to achieve it dangerous for the polity

41. There are two final footnotes to these observations. The first is to note the link between the question of the use of secondary materials and the question of over complex legislation. It is easy to be critical of the banalities of second reading speeches and explanatory memoranda. But where the legislation being produced by the Office of Legislative Drafting and Publishing is many thousands pages in length how else can members and Senators be expected to proceed? In a sense, the over complexity of legislation is not only rendering the law essentially uninterpretable it is, perhaps even more seriously, depriving the Parliament of an opportunity for proper and informed debate on the terms of that legislation. The problem of over complex legislation is, therefore, to use a popular phrase, a whole of government problem. It is also, for reasons I have just outlined, a constitutional problem. It means that legislation is passing into law largely unreviewed by the organ responsible for its production. It means that that the judicial branch is being burdened by unreadable provisions. It means litigants and those to whom the legislation is directed are left not knowing what their position is. And it means practitioners are left to flounder

around in an endless sea of paper. These are all matters in respect of which we are entitled to expect more from the Parliament. The present form of legislation, viewed from that perspective, is a failure. It is a blot on our legal institutions.

42. A second footnote concerns remedies. It is one thing to identify a symptom – here over complexity – it is altogether another to diagnose the disease or to find a cure. The present problem will not be solved by people railing against the modern form of legislation. It will be solved instead by a close examination of the way in which Australian governments interact on a routine basis with those who draft the legislation. That is a review, I venture to suggest, which would be assisted in its conduct by having a membership consisting of those involved: the Parliament, the Judges, the departments of State and the profession. It is common to think of this problem as a tax problem, and, no doubt, the situation in terms of a tax legislation is particularly bad. But one only needs to look at the bloated form of the *Corporations Act 200,* expanded as it now is to twice its original size by nine successive ways of reform, to see that the problem is on the march. Recourse to the significant bulk of the *Fair Work Act 2009* gives little cause for optimism. But the situation is not hopeless. Largely, this is a Commonwealth problem. The State legislatures are not beset with a fascination for prolixity. Perhaps the draftsmen need to be given page limits.

43. There is a dispute as to whether it was said by Churchill or Blaise Pascal but one of them said “I would have written you a shorter letter but I did not have time”. There is much wisdom in this. Perhaps it will catch on.

Thank you.