AUSTRALIA-NEW ZEALAND SCRUTINY OF LEGISLATION CONFERENCE DINNER

The Boat House by the Lake

7 July 2009

Stephen Gageler
Commonwealth Solicitor-General

Distinguished guests and - on the off-chance that there is anyone here who does not fall within that description - ladies and gentlemen.

Let me start with an old story. I don't know if it is true. If it isn't true, my defence is that I didn't make it up. The story goes something like this. An Englishman and an American are sitting together at a table. The Englishman is Churchill. The American is Roosevelt. They have just signed a treaty. The story does not descend to the detail of what treaty it is. "What are you going to do now?", asks Roosevelt. "Well", says Churchill, "I'm going to take the terms of the treaty; place them before Parliament; Parliament will enact them into law; and then they will be enforced in the courts." "You mean, all you have to do is take the

terms of the treaty; place them before Parliament; Parliament enacts them; and the courts enforce them?" "Yes". "Anybody could run a country like that!"

The only reason for telling that story is to make the point that nobody does run a country or a State like that; not any more; not a constitutional democracy anyhow.

For England, things got complicated when it entered the European Union. They have got more complicated with devolution and with the enactment of the Human Rights Act.

New Zealand was probably the country closest to Churchillian England. But then it changed its electoral system and enacted a Human Rights Act of its own.

Australia and Canada have always had to work within the constraints of federalism and with it a written constitution and a formal separation of powers. In Canada those constraints of federalism have now been overlaid for some time by the Charter of Rights. In Australia, the same sorts of additional constraint have recently come into existence in Victoria and the Australian Capital Territory.

Talking with people holding similar offices to mine in New Zealand and Canada, what is striking is the similarities of the issues that are faced when governments ask “Can we do X?” or “How can we achieve Y?”. The similarity of the issues is all the more striking given the apparent difference in the formal legal framework that exists in each country. Outside Victoria and the Australian Capital Territory, we have in Australia nothing that approaches a bill of rights. But when no spade is available, sometimes a shovel gets used to do the same job. In Australia what we have seen (over much the same period that Canada has had its Charter of Rights and New Zealand has had its Human Rights Act) a number of very similar constraints being found to emerge by implication from the separation of judicial power that is effected by Chapter III of the Australian Constitution. Justice Kirby was a very well known and outspoken member of the High Court of Australia. He has only recently retired. “Other countries have their bills of rights”, Justice Kirby was heard to say, “we have our Chapter III.” Justice Kirby was alone on the High Court in putting it quite so boldly. But he was certainly not alone on the High Court in using the constitutional separation of judicial power to imply some of the limitations on the scope of legislative and executive

power that in Canada would come from the Charter of Rights and that in New Zealand would come from the Human Rights Act.

My purpose tonight is not to talk about constitutional constraints or any other formal legal limits on legislative or executive power. Nor is my purpose to delve very much into the making of legislation.

I still want to talk about legislation. But I want to talk about the product rather than the production: about how legislation is interpreted rather than about how legislation is made. It is an important topic and I think it is really important to recognise that it is a topic that is not entirely or even primarily within the control of any legislature. Within the constitutional systems that we have all inherited one way or another from the English model, the interpretation of legislation is ultimately the role of the courts. In the final analysis - no matter what the intensity of the deliberations that have gone into its production - legislation means not necessarily what it was meant to say, not what it says to you or to me but what it says to a court.

No doubt, every legislature strives to speak with a measure of precision; to minimise ambiguity and, with it, to minimise the scope for interpretative choice. But they have never been able to achieve the goal of eliminating interpretative choice. It would be in vain to think that it would be possible to do so.

If it ever happened, I would be out of a job. Most of what I have been doing professionally over the last quarter of a century has been arguing before courts about the interpretation of legislation.

The modern high level principles governing the interpretation of legislation are pretty much uncontroversial and pretty much universal:

- It is all about giving meaning to the text.
- It is about giving that meaning to the text which the legislature can be inferred to have intended.
- To infer that intended meaning, the text is always to be read in its context.
- Where two or more meanings are equally available, the meaning that best fits the apparent purpose of the legislature should prevail.

But those are all very high level principles. Almost never will they dictate the result. And it is probably impossible to come up with a formulation that ever will dictate the result. The process is an art not a science. The best description of the process that I have heard used an artistic analogy. The description was given at a conference about five years ago by Frank Calloway, then a judge of the Victorian Court of Appeal. What he said was this: statutory interpretation in the hard case is like standing before an impressionist painting and trying to make sense of it. The painting looks different from different angles. Persuading a court to interpret it to have one meaning rather than another meaning, is really all about persuading the court to look at it from one angle rather than another angle.

The truth of the matter is that the choice between competing available interpretations is all about the angle. But how does a court come to be persuaded to look at the legislative text from this angle not that angle? One thing is clear. If you are trying to choose the best angle to look at the text: the choice of the angle can never be just about the text. Very much depends on what in art would be called aesthetics and what in law is called judgment. Whether it is called aesthetics or

whether it is called judgment, it is very much about the values the interpreter brings to the task at hand.

Let me repeat that last point somewhat pointedly:

- any exercise in statutory interpretation will involve an exercise of judgment by a court about how best to look at a statutory text; and
- no exercise of judgment by a court about how best to look at a statutory text can ever be free of values drawn from outside the statutory text.

Where do those values that are external to the text come from? Sometimes they go unarticulated. But almost never are they idiosyncratic. They are values that are informed very much by history and tradition. They are, by and large, values that can be seen by a court to lie at some level within the broader legal framework in which the court operates.

At this point I want to make an observation about a development that is occurring in Australia. It is also a development that is occurring elsewhere but which I suspect that it matters more here and that it is not particularly well appreciated here.

The development is this. More and more values drawn by courts from the broader legal framework in which they operate are being openly fashioned by courts to generate a kind of default position to be used by the courts in the interpretation of legislation. Those values give the court an angle from which it feels comfortable to start. And they give the court the angle to which to the court can comfortably return when none of the other available angles seems particularly compelling.

What I am talking about here is the generation by courts of what are called “presumptions”. A presumption, in essence, is a default position that a court declares it will take unless the court can be persuaded that there is some good reason to take some other position. It is called a presumption because the theory is that the legislature will be presumed to have taken the same position when enacting the statutory text or at least to have been aware when enacting the statutory text that a court would adopt that position when interpreting the text.

There are many presumptions and many have been around for a long time. But there is one very large presumption that has achieved increasing prominence in the last decade or so. The presumption was most clearly

articulated by the High Court about fifteen years ago in a case called Coco v Queen. What was said in that case was pretty much in these terms: a court will not interpret a statute as curtailing a fundamental right unless an intention to do so is clearly manifested by unmistakeable and unambiguous language. Why not? Well for two reasons. One, it was said to be improbable that the legislature would intend to depart from fundamental rights without expressing its intention with irresistible clarity. Two, it was said – and I quote – that "curial insistence on a clear expression of an unmistakeable and unambiguous intention … will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights".

That second reason is a pretty big deal: it amounts to the courts choosing to take an attitude to legislative interpretation that will make the parliamentary process more focussed and more accountable. That is an approach that has been generated entirely by the courts themselves and it is an approach that has come to take on a life of its own. It is now called the "principle of legality". That term was coined in the Judicial Committee of the House of Lords in 1999 and since then has been very much appropriated by Australian courts into Australian law.

The principle of legality, it was said in the House of Lords:

> "… means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

That explanation had been so much assimilated into Australian law that it could be said in the Australian High Court by 2004 to be "a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted" and to be an aspect of the rule of law.

That is all well and good but the question then becomes where do we find these fundamental or basic rights? Without anything approaching a bill of rights, it is said in Australia that they are to be found in the Australian common law. The difficulty is that outside perhaps the field of criminal procedure, the common law has not really formulated itself in terms of fundamental or basic

rights. When it comes to things people have, there are lots of rights that we like to call species of property but it might be hard to say that any of them are really fundamental. When it comes to things people do, the fundamental approach of the common law has always been that anyone has the right to do anything provided it does not injure someone else. But it would, of course, be nonsense to translate that into some fundamental common law right to do everything.

Indeed, I would defy any two Australian lawyers to sit down separately and come up with the same list of ten things that they would describe both (a) as common law rights and (b) as fundamental. The only attempt at such a list that I have ever seen is in Dennis Pearce and Harry Geddes' book on statutory interpretation. In the current edition, it is on pages 189 to 190. What can be seen on those pages is a list of twenty one common law rights that, over the years, have been seen by Australian courts in interpreting legislation as fundamental. First on the list is the right to carry on one's own business. Second is the right to carry on a trade. Third is the right to prepare goods for sale and to sell the. Part way down is the right to navigate a navigable river. Coming in at number fourteen is what is called "personal liberty". Last on the list is "freedom of expression".

Given the hypothesis that Parliament is taken to be aware of fundamental common law rights in enacting legislation, it would be an interesting exercise to compare that list - or any other list that someone might be able to compile of things that might be said to have been recognised as fundamental common law rights in Australia over the last century – with the things that are actually seen by parliamentarians or by the community at large to be important to the scrutiny of modern day legislation. There will obviously be an overlap. But I doubt that there would even be a consistency of terminology.

That brings me to a point where I want to touch just lightly on a matter of current debate in Australia. Should we have a national charter of rights? And if we have a national charter of rights, should we adopt a dialogue model?

My only points are these. We already have a dialogue model: it is called the principle of legality. We already have a set of fundamental or basic rights which legislation will be found to curtail only if it is expressed in unmistakeable and unambiguous language. We are all presumed to know what those rights are.

If we agreed to write them down, then at least we might all be singing from the same hymn-sheet.

Thank you for listening.