RECENT CASES — THEIR PRACTICAL SIGNIFICANCE

B.H.P. Petroleum Pty. Ltd. v. Balfour[1]

By G. J. Moloney*

B.H.P. Petroleum Pty Ltd v. Balfour provides a convenient context in which to consider two issues of interest to those concerned with the laws affecting the exploitation of natural resources. Those issues are:

— the correct approach to the exercise of administrative decision-making powers in revenue-raising legislation; and

— the proper use of industry custom and usage in the interpretation of legislation regulating aspects of the mining and petroleum industry.

A third issue concerning the meaning of 'royalty' in the context of the recovery of offshore petroleum merits a brief mention.

FACTS

The circumstances of this dispute are well-known[2] and need not be described in detail. This case appears to be the first to interpret any aspect of the joint legislative scheme for the regulation of the exploration for, and recovery of, offshore petroleum. B.H.P. Petroleum Pty. Ltd. (BHP), together with its joint venture partner, challenged the decision of the Designated Authority as to the correct location of the well-head of the Cobia No. 2 well in Bass Strait. This determination is central to the calculation of the royalty payable by the joint venturers under the Petroleum (Submerged Lands) (Royalty) Act 1967 (Cth.) (the Royalty Act) on the petroleum recovered from that well. Under section 5(1) of the Royalty Act, licence holders are required to pay, to the Designated Authority, a royalty at the prescribed rate. The prescribed rate is set by the legislation at a fixed percentage of the value at the well-head of the petroleum.[3] Section 8 of the Royalty Act directs that the well-head for these purposes should be either such valve station as is agreed between the licensee and the Designated Authority or, where no agreement is reached within the period determined by the Designated Authority, such valve station as the Designated Authority determines to be the well-head.[4]

The general effect of this part of the Royalty Act is, therefore, that, in the absence of agreement between the parties, the Designated Authority has the power to determine the variable components in the calcu-

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1 (1987) 61 ALJR 345 (H.C.).
2 Casenote, *B.H.P. Petroleum Pty Ltd v. Balfour* (1987) 16 *M.U.L.R.* 436.
3 S.5(2) & (3), Royalty Act.
4 The terms, 'valve station' and 'well' which were also relevant are defined in s.5 of the Petroleum (Submerged Lands) Act 1967 (Cth.).

lation of the required royalty.[5] In this case, when the parties could not agree on the correct location for the well-head, the Designated Authority, purportedly acting under section 8 of the Royalty Act, determined that certain valve stations on the Mackerel A platform itself, which was some 4 kilometres from the well-hole on the seabed, would be the well-head for royalty purposes. The joint venturers had argued that, according to the industry's meaning of 'well-head', the correct location was on the 'Christmas tree' which was directly above the well-hole. The general effect of the Designated Authority's decision was to increase the amount of the royalty payable by the joint venturers.[6]

The Designated Authority's determination was challenged in the Supreme Court of Victoria; the relief sought was a declaration that the determination was void and other consequential relief. Having been successful at first instance, before Marks J. but unsuccessful before the Full Court of the Supreme Court of Victoria,[7] the joint venturers appealed to the High Court. In a unanimous decision, the High Court allowed the appeal and restored the orders made by Marks J.

The joint venturers' argument throughout the dispute was essentially that the term 'well-head' when used in section 5 of the Royalty Act was a technical term and that it was intended to have its customary industry meaning. In the vernacular of the petroleum industry, the well-head was 'the top of the casing and/or Christmas Tree or both.'[8] The Designated Authority's response was that the accepted industry meaning (which he did not dispute) was irrelevant as the Royalty Act provided its own dictionary of the relevant terms to be used in the royalty assessment. Section 8 referred to the well-head, 'for the purposes of the Act' as a valve station and what constituted a valve station was defined in section 5(1) of the Submerged Lands Act. Therefore, provided that the valve chosen by the Designated Authority answered the statutory description that was all that the Act required. On a plain reading of the legislation, no other restrictions were placed upon the valid exercise of this power by the Designated Authority.

THE HIGH COURT'S REASONS

In the reasons of the Full Court of the Supreme Court of Victoria, Nicholson J., who delivered the leading judgment[9] had held that prior to recovery, the petroleum was at the Crown's disposal on account of its 'sovereignty'[10] over the seabed and therefore, the purpose of the relevant provisions of the legislation was 'to provide for the payment of royalties to

5 The Royalty Act provides similar mechanisms to that outlined in the text in relation to the 'well-head' for the determination of the 'value at the well-head of any petroleum' (s.9) and the 'quantity of petroleum recovered' (s.10).

6 The reason for this is explained in the reasons for judgment of Marks J., at first instance, unreported, Supreme Court of Victoria, 8-2-1985, 8 & see R. Cullen 'Natural Resources Law' R. Baxt *Annual Survey of Law* 1987 (1988).

7 Unreported, Supreme Court of Victoria, 8-4-1986.

8 *Per* Marks J. above n.6, 10.

9 Murray J. expressly agreed with Nicholson J. & Brooking J. delivered reasons generally to the same effect.

10 See Full Court decision, 14.

the Crown for the right to extract and take possession'[11] of the petroleum. 'All that the [Royalty] Act does is to enable the Designated Authority to determine the point at which the mineral is to be treated as having been recovered for the purpose of assessing the royalty.'[12] This led his Honour to conclude that it was not 'unreasonable for the Designated Authority as representative of the Crown to be given the final right to determine the point at which the assessment should take place.'[13] It was against this perception of the legislative scheme that the Full Court held that section 8 did invest the Designated Authority with a discretionary power to make the final determination of the location of the well-head. As his decision was not reached capriciously or unreasonably, it was within the power in section 8.[14]

The High Court flatly rejected this approach. According to the Court, a necessary consequence the Designated Authority's construction of section 8 was to 'vest in [him] an arbitrary power of determination, qualified only by the need to identify a particular valve station.'[15] Such a construction inevitably raised the question 'whether a legislative intent to impose such an arbitrary basis for the assessment of tax can be discerned in the legislation.' The Court held that it could not. Given that, under section 5(2) of the Royalty Act , the royalty rate payable was determined by reference to the value at the well-head of the petroleum recovered therefrom and that this was 'consistent' with the general understanding of 'royalty', it was clear that the legislation provided for an objective assessment of the royalty.[16] In consequence, the Royalty Act did not confer any discretion upon the Designated Authority. Section 5 of the Royalty Act was not concerned with the Designated Authority's opinion and sections 8, 9 and 10, on their proper construction, did not confer any discretion upon him in respect of the ascertainment of any aspect of the value of the petroleum at the well-head. The object of these provisions was to permit agreement if it could be reached, but if no agreement was reached, to provide a means whereby the statutory components by which the royalty was to be assessed could be determined without the need to resort to litigation or arbitration.[17]

Thus, the statutory function of the Designated Authority permitted him only to determine a relevant fact, namely the *fixing of a valve station which fairly accorded with the description of well-head.*[18] He had not carried out this statutory function properly by selecting a valve station which *he* thought appropriate to the calculation of the royalty, unless it also fairly answered the description of a well-head. What the Designated Authority had done, in the discharge of his function under section 8, was to ask himself the wrong question, namely which valve station is appropriate for the calculation of the royalty rather than the correct question,

11 *Ibid.* 15.
12 *Ibid.* 14–15.
13 *Ibid.* 15.
14 *Ibid.* 12.
15 (1987) 61 ALJR 345, 347.
16 *Ibid.*
17 *Ibid.*
18 *Ibid.*

which the Court held was which valve could fairly be said to be the well-head at which the petroleum was recovered.

In so performing his task, the Designated Authority had offended against the administrative law principle which was stated by Lord Diplock in *Re Racal Communications Ltd.*[19] as follows:

> [*Anisminic*][20] proceeds upon the presumption that where Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined . . . So if an administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do. . . .

As the valve station selected could not fairly be said to be the well-head at which the petroleum was recovered, the determination of the Designated Authority, arrived at in breach of this principle, was a nullity.[21]

Proper Exercise of Administrative Decision-Making Power in the Context of Revenue-Raising Statutes

Perhaps the most important feature of the High Court's decision in *Balfour* was its complete rejection of the approach to the interpretation of the the Royalty Act which was favoured by the Full Court of the Supreme Court of Victoria. The Supreme Court's approach attempted to interpret section 8 so as to preserve for the Designated Authority some viable field of discretion based upon the proposition that since the petroleum, prior to its recovery, was Crown property, it was reasonable to expect that Parliament intended the Crown's agent to have the final word on this aspect of the royalty assessment.

The High Court, by contrast, began from the perspective that the Royalty Act was a revenue statute which provided the mechanism for the calculation of an impost which must be paid to enable the exploitation of the resource. The 'taxpayer's' liability should, therefore, be ascertainable objectively and not subject to arbitrary manipulation by the Crown.

> The High Court's reasoning suggests that where the administrative power is central to, or directly involved in, the statutory calculation of a person's 'tax' liability, it is only if the legislation is expressed in clear and unambiguous language that the court will construe the power as conferring an arbitrary discretion. To approach the interpretation of a 'taxing' provision which confers such a power upon an administrative official so as to preserve for him a measure of discretion is to stray from the correct path, more particularly where the relevant statutory provision is not cast in discretionary terms.[22]

The High Court has confirmed, therefore, that on its proper interpretation, section 8 confers no discretion upon the Designated Authority. There is no reason to doubt that the same reasoning should be applied to the other related provisions, namely sections 9 and 10 of the Royalty

19 [1981] AC 374, 382–383.
20 *Anisminic v. Foreign Compensation Tribunal* [1969] 2 AC 147.
21 (1987) 61 ALJR 345, 347.
22 Casenote, (1987) 16 *M.U.L.R.* 436, 440.

Act.[23] Moreover, the decision in *Balfour* is not limited to the offshore petroleum legislation. In several of the States and the Northern Territory, there is legislation regulating the exploitation of onshore petroleum, which contains provisions worded similarly to the offshore legislation. The Western Australian Petroleum Act 1967 is, in many respects, a copy of the offshore legislation. Sections 145, 146 and 147 correspond to sections 8, 9, and 10 of the Royalty Act. Queensland has provisions which correspond to sections 9 and 10 of the Royalty Act but has no equivalent of section 8 itself.[24] The Northern Territory's Petroleum Act 1984 defines 'the gross value of the petroleum' in a manner similar to section 9 but has no provisions which resemble sections 8 or 10. The South Australian legislation, while empowering the Minister to 'determine the value at the well-head of petroleum produced'[25] provides a statutory formula which the Minister must apply in making that determination.[26] The *Balfour* reasoning would appear to apply *a fortiori* to these provisions.

Use of Industry Interpretation of Legislative Terms

At first instance, Marks J. had approached the question of the proper interpretation of section 8 on the basis that the term 'well-head' should have its industry meaning unless the arguments advanced by the Designated Authority were accepted, which in the result he held, they were not. Although the High Court did not expressly consider whether the term should have its industry meaning, this can be necessarily implied from the Court's decision. It would appear that the parties argued the case on this footing. Moreover, the Court upheld the decision of Marks J. and restored his order.[27] That order had included a declaration that the Designated Authority in making the required determination under section 8 could 'lawfully select as that well-head, equipment for regulating the flow of petroleum from the well at the said sub sea completion which is equipment installed at the hole in the sea-bed or subsoil which is the head of that well, and may not lawfully select any other equipment as that well-head.'[28] This accords with the industry meaning of 'well-head'. The High Court may, therefore, be taken to have accepted that the term 'well-head' was used in the Royalty Act in this sense.

23 On a more speculative level, the decision in *Balfour* might be argued to support the proposition that the High Court at last has accepted fully the reasoning in *Anisminic*. Although *Balfour* according to the old dichotomy is an *ultra vires* case and not one concerned with jurisdictional error, the Court relied upon a jurisdictional error case to lay down the applicable administrative law principle. This approach may be taken to imply that the Court acknowledges that the old lines of distinction are illusory; the same principles apply in the same way to both classifications. See further Casenote, (1987) 16 *M.U.L.R.* 436, 441. But see Sir A. Mason 'Future Directions in Australian Law' (1987) 13 *Mon ULR* 150, 152 where his Honour stated that the distinction, far from being abandoned, is still part of the common law of Australia.

24 Petroleum Act 1986 (Qld.), ss.40C, 40D.

25 Petroleum Act 1940–1971 (S.A.), s.35(7).

26 *Ibid.* s.35(6).

27 (1987) 61 ALJR 345, 348.

28 *Per* Marks J. above n.6, 17–18.

This aspect of the decision in *Balfour* provides a convenient setting in which to consider some of the principles associated with the use of industry custom and usage in the interpretation of statutory language. It is a topic which has received very little attention in the literature, beyond a few pages in most of the leading texts on statutory interpretation.[29]

Not unexpectedly for this area, the courts have not attempted to provide a coherent or systematic *modus operandi*.[30] The writer will adopt what he considers to be a convenient method of discussing the issues, while conceding that it may not fit all the cases on the subject. That concession, in this field, does not of itself undermine the structure as a convenient manner in which to discuss the topic.[31] It is suggested that a twofold distinction can be made between those words or phrases in a statute which have a technical or scientific meaning and those which have an ordinary and natural meaning. Into which of the two the relevant term falls is a question of law[32] which the court will determine primarily upon a consideration of the expression in its statutory context but using such extrinsic aids to interpretation and presumptions as the law allows.[33]

Where the court determines the relevant expression to be technical, a question of fact as to its proper technical meaning arises. To resolve that question, as with any factual question of this sort, the court must have before it expert evidence: in this case, as to the accepted technical or scientific meaning of the expression.[34] The rules of evidence which control the giving of expert testimony will apply.[35] Where there is a conflict of opinion between experts, it will be for the court to resolve the matter, just as it must do with any conflict of evidence on a factual question.

Where the court holds the expression to be other than a technical or scientific one, the the court must apply the ordinary and natural meaning of the term *in its context*. That context may suggest that Parliament intended the word or phrase to have a special meaning other than its generally accepted meaning. This too will be a question of construction for the court and again the statutory context will play an important part.

That meaning may be one commonly used and accepted by those in a particular industry. Where the court reaches this conclusion, the

29 See, *e.g.*, D.C. Pearce *Statutory Interpretation in Australia* (2nd ed.), 37–38; R. Cross *Statutory Interpretation* (1976), 64–68. Some of the issues have received consideration, in relation to the meaning of the expression 'mining operations' in certain legislation, in R.D. Nicholson 'An Interface of Law and Technology: Defining the Extent of Mining Operations' (1983) 15 *W.A.L.R.* 33.

30 Most of the cases in which these questions have been addressed have involved either income tax or sales tax legislation.

31 This approach would appear to be consistent with that employed by Kitto J. in *N.S.W. Associated Blue Metal Quarries Ltd. v. Federal Commissioner of Taxation* (1956) 94 CLR 509, 511–512 & Gibbs J. in *Commissioner of Taxation (Cth.) v. ICI Australia Limited* (1972) 127 CLR. 529, 578–582.

32 *Markell v. Wollaston* (1906) 4 CLR 141, 150 *per* O'Connor J.

33 *E.g.*, Acts Interpretation Act 1901 (Cth), s.15 AB & Interpretation of Legislation Act 1984 (Vic.), s.35.

34 Above n.32. *Per* O'Connor J.

35 As to which see generally D. Byrne & J.D. Heydon *Cross on Evidence* (3rd Aust. edn), 710–715.

accepted meaning given to the relevant word or expression will be a question of fact. Its determination will require evidence of the industry vernacular not necessarily from experts in the sense of someone scientifically or technically trained but rather from those with special knowledge of the usage accepted within the industry.[36] What distinguishes this category from that of the 'technical terms' category is the type of evidence to which the court will have regard. In the case of technical language, it requires technical experts, whereas in the case of specialist industry usage adopted in legislation, evidence from those familiar with the industry vernacular or 'informed general usage'[37] is what is required.[38]

Where the context suggests that Parliament intended the expression to have its ordinary and natural meaning, then the court will take judicial notice of that meaning as evidenced by its dictionary definition and implied from other related works on the English language.[39] In the context of the interpretation of a patent specification, Lord Denning however, has suggested a broader approach. In *Baldwin & Francis Ltd. v. Patent Appeals Tribunal*[40] he said:

> [W]henever the meaning of words arises, however technical or obscure, then, unless there is some dispute about it, it is common practice for the court to inform itself by any means that is reliable and ready to hand. Counsel will usually give any necessary explanation: or reference may be made to a dictionary, which may be a general dictionary or even a technical one. . . . The one thing a court should not do is to refuse jurisdiction in a case because it does not understand the technical terms employed in it. Scientists and engineers are entitled to have their rights enforced and their wrongs redressed as well as anyone else: and the court must possess itself of whatever information is necessary for the purpose. . . . All that happens is that the court is equipping itself for its task by taking judicial notice of all such things as it ought to know in order to do its work properly.

By what principles, therefore, will a court be guided in determining whether or not statutory language has a technical, rather than a popular meaning? As noted earlier, this is a question of law.[41] The proper general approach to this question was explained by Lord Esher M.R. nearly one hundred years ago as follows:

> If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business or transaction, knows and

36 *Borys v. Canadian Pacific Railway Co.* [1953] AC 217, 218 (the interpretation of a private deed).

37 *North Australian Cement Ltd v. Commissioner of Taxation (Cth.)* (1969) 119 CLR 353, 362 *per* Menzies, J.

38 '. . . where it can be ascertained that a particular vernacular meaning is attributed to words under circumstances similar to those in which the expression to be construed is found, the vernacular meaning must prevail over the scientific.': *Borys v. Canadian Pacific Railway Co.* n.36.

39 *Chapman v. Kirke* [1948] 2 KB 450, 454; *Whitton v. Falkiner* (1915) 20 CLR 118, 127 *per* Isaacs J. This is a question of question of fact not law (see *Federal Commissioner of Taxation v. Broken Hill South Limited* (1941) 65 CLR 150, 154, 155) but evidence as to ordinary meaning is inadmissible (see *Marquis Camden v. Commissioners of Inland Revenue* [1914] 1 KB 641 & *Federal Commissioner of Taxation v. Hamersley Iron Pty. Ltd.* (1980) 48 FLR 134, 157.).

40 [1959] AC 663, 691; see also *Marquis Camden v. Commissioners of Inland Revenue.*

41 *Per* O'Connor J. above n.32.

> understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the ordinary meaning of the words.[42]

As is often the case in the field of statutory interpretation, there are few fixed rules which will automatically determine the issue but rather a range of principles and factors to which it is legitimate to have regard. Some of the more important of these will be briefly outlined.[43]

It would appear that in the context of the interpretation of revenue laws aimed at commerce, courts will more readily construe the relevant terms according to their common commercial or trade usage.[44] When Parliament enacts such a revenue law, it usually levies the tax or charge upon those engaged in the relevant industry, so that it is more likely that the Parliament intended to employ '. . . the descriptions and [adopt] the meanings in use among those who exercise the trade concerned.'[45] For example, in the *Herbert Adams* case,[46] the word 'pastry' in a statutory provision which exempted from sales tax, 'Pastry but not including cakes or biscuits' was construed by Dixon J. to be used in its wider industry meaning rather than its popular meaning. If this proposition is applied to the legislation in *Balfour* it tends to confirm that the industry meaning of 'well-head' was intended.

It has been stated that it is less difficult to establish an industry meaning as the statutory meaning, when it expands rather than limits the ordinary meaning.[47] The reason for this, suggested by Dixon J., is that 'an extension of meaning involves no abandonment of the use in respect of things to which it would in any case apply; but a uniformly restricted application among any class of person is necessary in order to establish that it has among them a narrower meaning and that meaning only.'[48] In the *Balfour* context, this appears to be a neutral factor.

Another important factor, which can be seen as a corollary of the general principle stated above, is whether or not the relevant words or phrases are matters of common parlance.[49] If they are in common use, the courts will be less inclined to attribute to them any technical meaning unless the statutory context otherwise requires it. For example in *Re Western Mining Corporation Ltd. v. Collector of Customs (WA)*,[50] a deci-

42 *Unwin v. Hanson* [1891] 2 QB 115, 119. In that case, it was held that a statutory power to order that trees overhanging a public road be 'pruned or lopped' did not permit them to be 'topped', as the word 'lop' had been used in the statute in its technical sense which everyone conversant with the cutting of trees in the country knows and understands.

43 Limitations of space do not permit any detailed treatment of this rather complex topic. Some of the relevant principles have been collected and discussed in the decision of the Commonwealth Administrative Appeals Tribunal in *Re Pacific Film Laboratories Pty. Ltd. and the Collector of Customs* (1979) 2 ALD 144.

44 *E.g., Whitton v Falkiner* n.39; *Herbert Adams Pty. Ltd. v. Federal Commissioner of Taxation* (1932) 47 CLR 222, 227 *per* Dixon J.; & *Re Pacific Film Laboratories Pty. Ltd. v. the Collector of Customs* (1979) 2 ALD 144, 155.

45 *Herbert Adams Pty. Ltd. v. Federal Commissioner of Taxation* n.44.

46 *Herbert Adams Pty. Ltd. v. Federal Commissioner of Taxation* n.44.

47 *Ibid.* 228–229.

48 *Ibid.* 229.

49 *Max Cooper & Sons Pty. Ltd. v. Sydney City Council* (1980) 54 ALJR 234, 239.

50 (1984) 5 ALN No. 310.

sion of the Commonwealth Administrative Appeals Tribunal (AAT), it was decided that the word 'beneficiation' was not a word in common use; rather it was used in its technical signification. This may be contrasted with *Re B.H.P. Petroleum Pty. Ltd. v. Collector of Customs*,[51] another decision of the AAT concerning the meaning of 'mining operations' in the provisions of the Excise Act 1901 (Cth.)[52] and the Customs Act 1901 (Cth.)[53] allowing rebates on fuel. 'Mining operations' was defined to include 'exploration ... for minerals'. The Tribunal decided that these were words in common parlance and therefore, they should be given their ordinary meaning. The Tribunal's decision is generally consistent with the approach to the same phrase in section 122 of the Income Tax Assessment Act 1936 adopted by the High Court in *Federal Commissioner of Taxation v. ICI Australia Ltd.*[54] Applying the common parlance test to section 8 of the Royalty Act again suggests that decision in *Balfour* was correct.

'If the relevant expression is not uniformly understood in a specialized sense in the trade, it cannot be assumed that Parliament has adopted or recognized that specialized meaning. In that event, the ordinary English meaning of the expression is applied, having regard to the legislative context.'[55] In *Re Pacific Film Laboratories Pty Ltd v. Collector of Customs*, the AAT decided that the evidence introduced by the Collector of Customs had not established that the expression 'bulk rolls' in the Customs Tariff Act 1966 (Cth.)[56] had the trade meaning for which he contended. In *Balfour*, there was no argument that there was an accepted industry designation of 'well-head'.

While the correct interpretation of statutory language is a question of law, the accepted technical meaning remains a question of fact to be proved by reference to expert evidence. This principle has been put felicitously by the Privy Council in *Max Cooper & Sons Pty Ltd. v. Sydney City Council*:

> That the ordinary meaning in which a technical term is used in a particular industry is not a question of construction but a question of fact to be decided upon expert evidence, has been undoubted law since it was laid down by Baron Parke in *Shore v. Wilson* (1842) 9 Cl and Fin 355; 8 ER 450. A question of construction (which is one of law) arises only when it becomes necessary to determine whether in the particular context it was intended to bear its ordinary technical meaning or some more extended or restricted meaning.[57]

In the area of customs duty legislation, it has been held that the expert evidence as to the accepted meaning must relate to that meaning as at the date of the relevant Act or inclusion in the legislation of the relevant expressions which the court must construe.[58] In the *ICI* case, Walsh J., at

51 (1986) 6 AAR 245; *coram*: Nicholson (Deputy Pres.) and Woodard (Member).
52 S.164.
53 S.78A.
54 (1972) 127 CLR 529.
55 *Re Pacific Film Laboratories Pty. Ltd. & the Collector of Customs* n.44, 56 citing *Herbert Adams* case and *D. & R. Henderson (Mfg.) Pty. Ltd. v. Collector of Customs (N.S.W.)* (1974) 48 ALJR 132.
56 Sch. 1, Pt. II, sub-item 37.03.1.
57 (1980) 54 ALJR 234, 239; see also *Markell v. Wollaston* (1906) 4 CLR 141, 150 *per* O'Connor J.
58 *Whitton v. Falkiner* (1915) 20 CLR 118, 127.

first instance, took a different view, holding that, in the circumstances of that case, it would be a mistake to restrict the question to the meaning of the relevant provisions at the time when they were inserted into the legislation. It would be legitimate to consider the usage as at the date when the question of deductibility arose.[59] In most situations of concern to mining lawyers, the contemporary meaning approach adopted by Walsh J. is likely to be preferred.[60]

Where the court decides that the statutory expression has been used in its accepted industry meaning, what evidence will the court admit as to that meaning? As it is the industry vernacular which holds the key to the proper construction of the term, and not the scientific or technical usage, the relevant evidence must come from those with appropriate experience in the relevant industry. Moreover, often what will be needed is evidence of *Australian* industry usage. The decision of McPherson J. in *Australian Energy Limited v. Lennard Oil N.L.*[61] illustrates this point. That case concerned the interpretation of the terms, '6% overriding royalty interest' and '12.5% net profit revenue interest after payout' in a private agreement.[62] In support of the argument that the use of these expressions rendered the agreement void for uncertainty, evidence was received on the one hand, from two lawyers, one an American who was described as 'a leading textwriter and practising attorney in the United States in the field of oil and gas law'[63] and the other an interstate solicitor who was said to have made a study of mining law and published papers in the area but who had not, through any active participation in the industry itself, gained any knowledge of the relevant industry usage. On the other hand, evidence was led from two businessmen, both of whom had extensive knowledge of, and experience in, the Australian petroleum exploration industry. As it was agreed that the question concerned the 'sense in which those words are used and understood in the petroleum exploration industry in Australia', McPherson J. preferred the evidence of the businessmen to that of the 'technical' experts.

This issue was also discussed by Walsh J. in the *ICI* case[64] and by Gobbo J. in the *Hamersley Iron* case,[65] but the two approaches are far from homogeneous. In the *ICI* case, ICI called evidence from local and overseas mining engineers and geologists as to whether or not they would classify the company's salt extraction techniques as mining operations. The court was also referred to technical literature, mostly of overseas origin, including textbooks and handbooks. On the question of what use the court could make of this evidence and of the conclusions based upon it as to the meaning of the particular expression, Walsh J. held:

59 (1971) 127 CLR 529, 548; see also *Lake Macquarie Shire Council v. Aberdare County Council* (1970) 123 CLR 327, 331 *per* Barwick C.J. and Menzies J.
60 See Pearce *op. cit.* 33–36.
61 Unreported, Supreme Court of Queensland, 6-2-1985.
62 McPherson J.'s approach would apply equally in the area of interpretation of similar statutory language.
63 *AEL v. Lennard Oil*, above n.61, 18.
64 (1971) 127 CLR 529.

> I have no doubt that such evidence and conclusions may be taken into account. I think that they may be of much importance, especially in a situation where there has not been in fact any occasion for a widespread adoption or development by the general public of a terminology to describe the particular process under review. At the same time I think that use may properly be made of such knowledge as is available to the Court of more general usage.

Having referred to the various forms of the vernacular test,[66] he continued:

> But those statements do not suggest to me that the Court is restricted to a consideration of the usage 'by mining men'. Indeed it seems plain from his judgment that Menzies J. did not think it was so restricted. In *Waratah Gypsum Pty. Ltd. v. Federal Commissioner of Taxation*[67] McTiernan J. referred to literature which showed how mining profession described the winning of gypsum and then referred also to 'common parlance'. With respect, I am of the opinion that his Honour was right in taking both into account.

As is apparent from the decision on appeal,[68] this was not a case involving the interpretation of a technical term, in the strict sense and, at first instance, the Court held that it was not restricted to receiving this technical evidence (and this may be taken to include the material in the technical literature) as to the accepted industry meaning but could refer to the common understanding of the relevant term. If Walsh J. meant merely that it is necessary to gain some impression of the common understanding of the expression as part of the background to arriving at its special meaning then this is an acceptable approach. If, however, he saw a wider role for resorting to the ordinary meaning then, with respect, he has confused two separate matters.

In the *Hamersley* case, Gobbo J. was required to decide upon the admissibility of certain evidence given as to the meaning and usage of the terms 'treatment' and 'processing' in sales tax legislation. That evidence came from various sources, in particular an academic expert and various textbooks. Gobbo J. rejected the academic's evidence for three reasons: first, he held that the expressions were intended to have their common meaning, so evidence of any special meaning was not relevant, secondly, the expressions to be interpreted were less obviously directed to a particular industry than that in the *ICI* case, and thirdly, the evidence given did not relate sufficiently to the technical meaning of these terms but to the meaning of some other expression.[69] As to the use of textbooks as part of the proof of the accepted industry meaning, Gobbo J. held that they could not be relied upon for the same reasons as the evidence of the expert was rejected. As for the argument that these textbooks themselves could be used as proof of the industry usage, he expressed reservations as to their admissibility. He considered that they were not in the same class as dictionaries; rather they contained expert opinion of an expert who was not called to give evidence.[70]

65 *Federal Commissioner of Taxation v. Hamersley Iron Pty. Ltd.* (1980) 48 FLR 134.
66 *Federal Commissioner of Taxation v. Broken Hill South Limited* (1941) 65 CLR 150, 160 ('the vernacular of mining men') & *North Australian Cement Ltd. v. Federal Commissioner of Taxation* (1969) 119 CLR. 353, 362 ('an informed general usage').
67 (1965) 112 CLR 152, 160.
68 (1972) 127 CLR 529, 579.
69 (1980) 48 FLR 134, 156–158.
70 *Ibid.* 159.

This brief excursion into the field only serves to confirm that it is an area in need of re-evaluation so that a more systematic approach can be introduced. It would be preferable if the courts laid down more clearly the proper role for industry usage and the acceptable manner of its use. *Balfour* adds nothing directly to this re-evaluation but it at least confirms the Court's preparedness to assign the industry meaning to those terms, in the offshore and onshore petroleum legislation, which are used by those involved in the petroleum industry in a specialised sense.

Meaning of 'Royalty' in Petroleum Legislation[71]

In the course of its reasoning in *Balfour*, the High Court confirmed that the Royalty Act provisions were consistent with the general understanding of royalty which the Court accepted was that laid down in *Stanton's* case.[72] It will be recalled that, in *Stanton's* case (which was concerned with the question whether a lump sum paid under an agreement which provided for the sale for standing timber, with a quantity limitation, was income 'as or by way of royalty' for income tax purposes), the High Court held that it is inherent in the concept of 'royalty' that 'the payments should be made in respect of the particular exercise of the right to take the substance and therefore should be calculated either in respect of the quantity or value taken or the occasions upon which the right is exercised.'[73]

71 As to nature of royalties created under private agreement see generally, G. Ryan 'Petroleum Royalties' [1985] *AMPLA Yearbook* 328.
72 *Stanton v. Federal Commissioner of Taxation* (1955) 92 CLR 631.
73 *Ibid.* 642.