AMENDMENTS TO THE COMMONWEALTH *ACTS INTERPRETATION ACT*

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The *Acts Interpretation Act 1901* (Cth) was recently amended by the *Acts Interpretation Amendment Act 2011* (Cth) (the *2011 Amendment Act*), which commenced on 27 December 2011. These amendments are the most substantial made to the Act since its enactment in 1901, and will be of considerable importance in the interpretation of Commonwealth legislation and for Commonwealth government administration. This article discusses the background to the changes, and the purpose and effect of some of the more significant amendments.

Role of the *Acts Interpretation Act* in interpreting legislation

The former Chief Justice of the Supreme Court of NSW, James Spigelman, has written:[1]

> The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of the law has escaped statutory modification. It is, perhaps, a little ironic that one of the areas of the law least affected by statutory modification is, in fact, the law of statutory interpretation.

This comment raises several important preliminary points.

First, statute law has clearly become important in almost all areas of law and pre-eminent in many public law areas; therefore interpreting statutes is a core skill for public lawyers, and a key task for decision-makers, those affected by decisions, tribunal members and judges.

Secondly, it is true that some of the basic principles of statutory interpretation remain subject to the common law, not statute law. The *Acts Interpretation Act* sets out some key principles, such as preferring an interpretation that would best achieve the purpose of the Act (s 15AA), and providing for the use of extrinsic materials in interpretation (s 15AB). But, it does not seek to codify the principles of statutory interpretation. Many decisions of superior courts therefore turn on a sophisticated, perhaps intuitive, application of the common law principles, such as:

- the principle that a statute is to be interpreted in light of established rules of international law,[2] particularly an international agreement which the statute seeks to give effect to;[3]
- the principle of legality, namely the presumption that Parliament does not intend to interfere with common law rights except by clear language.[4] Unlike the position under Victorian and the ACT law,[5] there is no related Commonwealth statutory requirement that legislation needs to be interpreted, so far as possible, consistently with human rights, although s 10 of the *Racial Discrimination Act 1975* affects the operation of legislation;[6] and
- the principle that legislation must be read as a whole.[7]

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But, thirdly, interpretation legislation plays a very significant role in the drafting of legislation, and in much statutory interpretation by lawyers, decision-makers and those affected by decisions, and tribunals and courts. The resort by superior courts to common law principles to resolve some of the most difficult cases should not distract from the pivotal role which this legislation plays in the interpretation of legislation. This legislation also performs a range of other important functions in relation to legislation and the machinery of government.

Background to the reforms

The *Acts Interpretation Act* was the first Commonwealth Bill to be introduced into the new House of Representatives and the second Commonwealth Act to be made. It was based on the then English,[8] New South Wales[9] and Victorian[10] precedents.[11] Since 1901, it has been subject to numerous amendments but it had not (until the recent amendments) been comprehensively restructured and modernised.

In 1993, the House of Representatives Standing Committee on Legal and Constitutional Affairs published a report on the drafting of Commonwealth legislation, entitled *Clearer Commonwealth Law* (the Report). The Report recognised the importance of interpretation legislation in legislative drafting and in promoting clear legislation. However, it noted that the *Acts Interpretation Act* was 'an amalgam of provisions based on the oldest Commonwealth legislation still in force' and that many of its provisions were not expressed in plain English. The Report recommended that the Attorney-General's Department and the Office of Parliamentary Counsel publicly review and rewrite the *Acts Interpretation Act*.[12]

In response, the Attorney-General's Department and the Office of Parliamentary Counsel issued a discussion paper entitled *Review of the Commonwealth Acts Interpretation Act 1901* in 1998 (the Discussion Paper).[13] The Discussion Paper considered some of the key conceptual issues about the *Acts Interpretation Act* and interpretation legislation generally. It discussed whether different users have different, and sometimes competing, needs in relation to legislation; whether users are better served by shorter Acts relying on interpretation legislation, or by self-contained legislation; and whether standard provisions, or tailor-made ones, are more appropriate in meeting various policy objectives.[14] The Paper also noted the range of functions that interpretation legislation performed, namely:

- providing a technical framework to support legislation;
- shortening and simplifying general legislation;
- codifying or changing the rules of statutory interpretation;
- maintaining consistency in law and administration; and
- providing for legislation to be updated or corrected without recourse to Parliament.[15]

In light of these considerations a number of specific issues were raised and suggestions made, about how to amend the Act to promote legislative clarity. Many of these issues have now been addressed in the *2011 Amendment Act*.

Brief outline of the amendments

The *2011 Amendment Act* effected three types of changes to the *Acts Interpretation Act*:

- It made the Act more user-friendly and, in particular, it improved the readability and the structure of the Act. There is now a simplified outline in s 1A, a feature of much modern legislation. Definitions that previously appeared throughout the Act have been co-located. (A number of new definitions have also been inserted, such as a definition of 'Australian citizen', which is a term that appears in many Commonwealth

Acts.) Provisions dealing with similar subject matters have been co-located, to provide a stronger structure, as summarised in s 1A, and to minimise the risk that a relevant provision will be inadvertently overlooked. Further, a number of provisions, including s 36 dealing with calculation of time, have been drafted to make them easier to apply. Section 36 now includes a table setting out a range of time-related expressions and what they mean, along with examples for each expression.

- It modernised various concepts in the Act to allow for advances in technology; for example s 33B dealing with participation in meetings by telephone and other methods of communication has been amended to clarify that people who participate by such means can be considered to form part of any quorum for the meeting and to allow for meetings to be held in two or more places at the same time.
- It made a number of more significant amendments which are the focus of this paper, relating to (1) the application of the *Acts Interpretation Act*, (2) what forms part of an Act, (3) the status of examples in an Act, (4) construing legislation with regard to purpose, (5) references in legislation to Ministers, (6) making, varying and revoking instruments, (7) the effect of things done pursuant to a defective appointment, and (8) the effect of new powers on existing delegations.

The amendments commenced on 27 December 2011 and apply to both existing and new Acts.[16]

The more significant amendments:

1. What the Act applies to

Section 2 of the *Acts Interpretation Act* has been amended to make it clearer what the Act applies to. The *Acts Interpretation Act* continues to apply to all Commonwealth Acts. As indicated in a new note included under s 2(1), it also continues to apply to legislative instruments made under an Act by virtue of s 13(1) of the *Legislative Instruments Act 2003*. It also applies to other instruments mentioned in s 46 of the *Acts Interpretation Act* — namely, instruments made under an Act that are not legislative instruments or rules of court.[17]

New s 2(2) provides that all provisions of the *Acts Interpretation Act* are subject to a contrary intention. Specific references to 'contrary intention' in individual provisions of the *Acts Interpretation Act* have been removed by the amendments.

2. What forms part of an Act

Before the amendments, certain things in Acts were treated as not forming part of an Act. Section 13(3) of the *Acts Interpretation Act* said that marginal notes, footnotes or endnotes to an Act, and section headings, were not to be taken to be part of an Act. Significant difficulties with this provision were identified by the Discussion Paper.[18]

The reason for the elements listed in s 13(3) being excluded from forming part of the Act was that this reflected a common law rule, which was based principally on the fact that historically, in England, these elements were added to the text of a Bill by drafters after its passage through Parliament.[19] However, this is not the modern practice in England[20] or in Australia. In Commonwealth Bills, marginal notes, which became section headings from 1980,[21] have always been included in the text of the Bill presented to and considered by the Parliament. For example, the original Acts Interpretation Bill included marginal notes; for cl 14 about such notes, the marginal note stated: 'Headings, marginal notes and footnotes', and included a reference to s 21 of the *Acts Interpretation Act 1890* (Vic) from which it, in part, derived. The incorporation of the common law rule as a statutory rule in the *Acts*

Interpretation Act was therefore always somewhat anomalous. As noted by Street CJ in *Ombudsman v Moroney*,[22] 'from the public's point of view, it would seem to be bordering on the mischievous to insist that, although the marginal note was there on the clause, although it was there on the section when assented to, and although it appears in the publicly available print of the statute, nevertheless it must be wholly disregarded'.

The effect of former s 13(3) was that the elements mentioned in s 13(3), notwithstanding that they were placed before the Parliament, had to be treated as extrinsic material to the Act. Regard could be had to them in interpreting the legislation in accordance with s 15AB of the *Acts Interpretation Act* to confirm that the meaning of the provision was the ordinary meaning conveyed by the text or to determine the meaning of the provision if it was ambiguous or led to an unreasonable result.[23] Section 15AB(2)(a) provided, and still provides, that 'all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer' can be taken into account as relevant extrinsic material.

However while the old s 13(3) stated that section headings were not to be taken to be part of the Act, the headings for parts, divisions and subdivisions were part of the Act (s 13(1)), and chapter or subsection headings were not referred to, leaving their position unclear. It was uncertain how these provisions flowed through to legislative instruments, where generally all elements of the instrument are before the maker.

The changes to s 13 remove these anomalies. All headings and notes are treated in the same way, as part of the Act. The changes recognise that all these elements are in fact included in the text of Bills presented to Parliament and enacted by Parliament, and that it is therefore not appropriate to treat them as extrinsic material.

Section 13 now says that all material from and including the first section of an Act to the end of the last section of the Act, or the last Schedule to the Act if there are Schedules, is part of the Act. Long titles, preambles, enacting words and headings appearing before the first section of the Act are also part of the Act.

This makes it clear that section headings (and all other headings) and explanatory notes within an Act are part of the Act and can be given appropriate weight in interpreting a provision. It is no longer necessary to rely on s 15AB of the *Acts Interpretation Act* in order to use section headings and relevant notes as aids to the interpretation of an Act. However, this should not mean that headings are given the same weight as the substantive provision. As Street CJ noted in *Ombudsman v Moroney*, such matter 'cannot control the meaning of the section'.[24] Francis Bennion has suggested this statement of principle: 'the significance attached to each type of component of the Act containing the enactment must be assessed in conformity with its legislative function as a component of that type'.[25] Headings are only very brief summaries of the content of parts, divisions, sections and subsections of an Act; they are used to structure the Act and assist the reader to find the substantive provisions. Their use in interpreting the substantive provision should recognise this limited role.

As mentioned above, the amendments introduced by the *2011 Amendment Act*, including the amendments to s 13, apply to existing Acts as well as new Acts. As such, section headings and notes which were not previously treated as part of the Act in which they appear came to form part of the Act from 27 December 2011.

There is some variation in the provisions of the State and Territory Interpretation Acts regarding what forms part of an Act and what does not. In some jurisdictions, it continues to be the case that elements such as section headings and footnotes or explanatory notes do not form part of an Act.[26] In other jurisdictions, section headings (at least those enacted after

a certain date) and explanatory notes are expressed to form part of an Act.[27] In the ACT, section headings enacted after a specified date are part of an Act but footnotes are not.[28]

3. Examples in an Act

Prior to the commencement of the amendments, s 15AD of the *Acts Interpretation Act* provided that examples of the operation of a provision in an Act were not to be taken to be exhaustive and that, where the example was inconsistent with the operative provision, the provision prevailed. Examples were therefore legitimate aids to the interpretation of a provision but had to give way where they were inconsistent with the provision itself. The Discussion Paper noted the concern of the Report that the fact that a provision prevailed over an example 'undermined the value of examples in legislation', but noted that inconsistencies were likely to occur only rarely, and neither supported change.[29]

Section 15AD as amended now similarly provides that examples are not exhaustive. However, it also now provides that examples may extend the operation of the operative provision. This means that examples that are inconsistent with the operative provision or that otherwise do not fall within the terms of the operative provision can have effect, rather than the example giving way to the provision as was previously required. The policy behind this change is stated in the Explanatory Memorandum to the Amendment Bill:[30] by enacting an example in an Act, the Parliament has demonstrated an intention that the example should be covered whether or not it strictly falls within the scope of the provision. That is, a specific example is likely to reflect the policy intention behind the legislation more precisely than a general statement.

Section 15AD as amended does not simply say that the example has effect, even if it is inconsistent with the provision. It says that the example may extend the operation of the provision itself. This means that an example may expand the principal provision so that the provision includes the example and possibly other similar examples. The use of the word 'may' in 'the example may extend the operation of the provision' is intended to ensure that a court can assess whether it is in fact appropriate for an example to extend the operation of the provision in a particular case.[31] Of course, s 15AD, like all other provisions of the *Acts Interpretation Act*, is also subject to a contrary intention by virtue of new s 2(2) of the Act.

Section 15AD as amended is similar to the equivalent provisions of the ACT, South Australian and Victorian Interpretation Acts.[32] The Northern Territory and Queensland Interpretation Acts have provisions similar to the previous version of s 15AD, which specify that the substantive provision prevails where the example is inconsistent.[33] The NSW, Western Australian and Tasmanian Interpretation Acts do not contain provisions dealing with the effect of examples.

4. Purpose

Section 15AA of the *Acts Interpretation Act* previously provided that, in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act was to be preferred to a construction that would not promote that purpose or object.

Former s 15AA did not address the situation where there was a choice between two or more constructions that would promote the purpose or object underlying the Act. It just required a construction that would promote the purpose of the Act to be preferred to one that would not. This limitation had been mentioned in a number of cases.[34]

The amendments to 15AA address this limitation. Section 15AA now provides that the interpretation that would best achieve the purpose or object of the Act is to be preferred to

each other interpretation. This makes it clear that a court can weigh up alternative constructions that would all promote the purpose of the Act, and prefer the construction that would best achieve that purpose.

Apart from making this change to address the situation where there are multiple constructions available that would promote the purpose of the Act, s 15AA should continue to operate in the same way. Judicial consideration of the former s 15AA, and the related common law principle, will continue to be relevant in applying s 15AA as amended. In particular, the purpose of legislation is to be ascertained by regard to the text and context of the provision, its history and extrinsic materials.[35] Section 15AA establishes the importance of this purpose, so ascertained, in determining the meaning of a provision. But, regard must also be had to the text, context, history, extrinsic materials and other relevant common law and statutory principles in determining that meaning, or the range of possible meanings upon which new s 15AA operates.

Section 15AA is now similar to the equivalent provisions in the ACT and Queensland Interpretation Acts, which also refer to interpretations that best achieve the Act's purpose.[36] The other jurisdictions have provisions similar to s 15AA as it was before it was amended.[37]

5. References to Ministers

It has been the policy for some time for Commonwealth legislation to refer simply to 'the Minister', rather than to a specific Minister.[38] This modern practice makes it necessary to determine which Minister is being referred to. Section 19A of the *Acts Interpretation Act* sets out how to do so.

Ministers are appointed under s 64 of the Constitution, to administer departments of State. Their appointment is generally as Minister for a particular subject matter and to administer a particular Department. More detailed provision is set out in the Administrative Arrangements Order (AAO), which is made and amended from time to time by the Governor-General.[39] This Order is organised on a departmental basis and lists matters dealt with by each Department and the legislation administered by the Minister for the Department. So, for example, the AAO provides that the *Acts Interpretation Act* is administered by the Minister administering the Attorney-General's Department.

Section 19A uses this concept of a Minister who 'administers' an Act. In the simplest case, where there is only one Minister administering a Department, s 19A(1) provides that references to a Minister in a provision of an Act are references to the Minister who is administering that provision (s 19A(1)(c)). Many Departments are however now administered by more than one Minister.[40] Where there are 2 or more Ministers administering a provision, a reference to 'the Minister' means any one of those Ministers (s 19A(1)(b)).[41] The section also deals with more complicated arrangements. These provisions also operate where the relevant reference is to a Minister who administers a specific Act or enactment (s 19A(2)).

Historically there have been and, occasionally, even today there need to be, provisions which identify a particular Minister in legislation, for example 'the Treasurer'. Clearly, the presumption is that these functions will be exercised by the person who is appointed as the specified Minister, that is, the Treasurer. Section 19A of the *Acts Interpretation Act* enables even these references to be read as references to the Minister, or any one of the Ministers, responsible for administering the provision or Act at the relevant time (s 19A(1)(ab)). By an amendment made by the *2011 Amendment Act*, this was extended to cover expressly the situation of a specific reference to a Minister even where there is no longer any such Minister

(s 19A(1)(ab)). This provides a mechanism for updating specific historical references in accordance with the AAO.

Most of the State and Territory Interpretation Acts contain similar provisions, although not all of these deal with the situation where legislation refers to a particular Minister where there is no longer any such Minister.[42]

Section 19A(3) makes similar provision in relation to references to Departments. This subsection has been amended to bring it into line with s 19A(1) relating to Ministers.

However, administrative changes cannot always be addressed by these mechanisms. *The Acts Interpretation Act* therefore provides for orders to be made dealing with the position where:

- there is a reference in legislation to a specific Minister or Department or Secretary; and
- there is no longer any such Minister or Department or Secretary — in this situation, s 19B orders can substitute a new reference; or
- the reference is inconsistent with changed administrative arrangements — in this situation, s 19BA orders can substitute a new reference.

Such orders are often made after an election and at other times when there is a change in Ministerial responsibility. They provide clarity about the meaning of specific, but in view of administrative changes now inappropriate, references. They currently take the form of consolidated Orders for s 19B and s 19BA which are amended from time to time: see the *Acts Interpretation (Substituted References — Section 19B) Order 1997* and the *Acts Interpretation (Substituted References — Section 19BA) Order 2004*, which are registered on the Federal Register of Legislative Instruments.

The 2011 amendments now allow these s 19B and s 19BA orders to be made with retrospective effect. This will usefully enable gaps in past orders, or lack of clarity in the operation of past orders, to be remedied.

Section 19A, and orders made under ss 19B and 19BA, do not formally change the relevant references to Ministers in legislation, that is, they do not authorise the reprinting of affected Acts with the references updated. As noted in the Discussion Paper, this can be misleading or confusing for readers. Some Australian jurisdictions provide for Acts to be formally amended to deal with such matters without parliamentary consideration. While such an approach was considered in the Discussion Paper,[43] it has not been adopted.

New s 19BD has been added to provide a safety net against the complexities and challenges of modern government administration. It states that if a Minister purports to exercise a power or perform a function that is actually conferred by an Act on another Minister, the exercise of that power or the performance of that function is not invalid merely because the power or function was conferred on the other Minister.

The provision draws on the distinction discussed in *Project Blue Sky Inc v Australian Broadcasting Authority*,[44] between those statutory requirements which go to the validity of an action and those which do not. In that case the Court rejected the traditional formulation of mandatory or directory statutory requirements and the related concept of 'substantial compliance' and stated:[45]

> A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. ... In determining the question of

purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'.

Noting the centrality of interpretation principles, the *Acts Interpretation Act* expresses a general purpose or legislative rule that where the wrong Minister exercises a power, for example due to a misunderstanding about the allocation of responsibilities under the AAO, this does not result in the invalidity of that exercise.

The policy behind this provision is that invalidity is not an appropriate result for a failure to comply with internal government administrative arrangements.[46] These can be matters of some complexity, relying in some cases on s 19B or s 19BA orders going back many years, and invalidity flowing from a wrong identification of the relevant Minister could cause very significant public inconvenience.[47]

Of course, this is only a presumption, and it remains important that the correct Minister (having regard to the AAO and provisions discussed above) exercises a statutory power.[48] Section 19BD simply seeks to make clear the legal effect if a Minister exercises powers technically conferred on another Minister by an Act. It of course does not relieve whoever makes the decision of compliance with relevant administrative law principles.

There is no equivalent of s 19BD in State or Territory Interpretation Acts.

6. Power to revoke and vary instruments

Section 33(3) establishes a presumption that, where an Act confers a power to make, grant or issue an instrument, the power includes a power to revoke or vary the instrument (among other things). It is a very relevant provision for much government administration, and assists greatly in providing for simplified drafting.

However its operation has been clouded by a view expressed in some cases that it only operates in relation to legislative instruments.[49] This has not been the majority view in recent case law,[50] and s 33(3) has been amended to confirm that the provision can apply to an instrument of a legislative or administrative character.

The section provides for any such power to revoke or vary to be exercised 'in the like manner and subject to the like conditions' as the power to make the instrument. Another issue which has affected the utility of this provision is that there are some requirements for making an instrument, such as the requirement that a permission be given to a person of good character, where that requirement can cease to exist, and where it would be appropriate to revoke the instrument for this very reason. New s 33(3AA) has been inserted to make it clear that the 'like conditions' requirement does not operate to prevent this, but rather the instrument can be revoked on this basis.

Most of the State and Territory Interpretation Acts have an equivalent to s 33(3) (although they do not have an equivalent to new s 33(3AA)). Some of these apply to instruments whether or not they are legislative in nature,[51] while others apply only in relation to a more limited category of instruments such as regulations and by-laws.[52]

7. Things done under a defective appointment

The *2011 Amendment Act* inserted new s 33AB, which provides that things done by a person purporting to act under an appointment — whether an acting appointment or otherwise — are not invalid merely on the basis that there was a defect or irregularity in connection with the appointment,[53] the occasion for the appointment or the occasion to act

had not arisen, or the appointment had ceased to have effect. The section also applies to things done *in relation to* a person purporting to act under a defective appointment. As explained in the Explanatory Memorandum to the Amendment Bill,[54] this is intended to ensure that, for example, payments for services rendered by such an appointee are not invalid.

This section seeks to confirm the availability of the common law de facto officers doctrine, which states that in certain circumstances, even though an officer's appointment is defective, his/her actions can be operative.[55] In *Cassell v The Queen*,[56] the joint judgment referred to the 'the principle of the common law that where an office exists but the title to it of a particular person is defective the "acts of a de facto public officer done in apparent execution of [their] office cannot be challenged on the ground that [they have] no title to the office."'

Enid Campbell has summarised the requirements for the operation of the de facto officer's doctrine,[57] which we have reformulated as follows:

- the office must exist in law;
- the acts of the person must have been within the scope of the authority of that office; and
- the person must have the reputation of being in that office, or the defect in his/her title must be unknown to members of the public.

So for example in *Jamieson v McKenna*[58] the Supreme Court of Western Australia held that the decisions of a magistrate who had passed the statutory age of retirement were nonetheless valid.

The doctrine has however been questioned or given a limited operation in other cases. Most recently, in *Kutlu v Director of Professional Services Review*,[59] the Full Court of the Federal Court held that, in the context where a legislative requirement for consultation before an appointment had not been met, the doctrine did not operate to cure decisions of the appointee. Flick J held that the doctrine should only be applied with caution and that, as a common law doctrine, it must yield to either the terms of an express legislative provision or a sufficiently clear legislative intention precluding its operation.[60] Section 33AB of the *Acts Interpretation Act* now bolsters the doctrine by giving it express legislative form.

The Queensland and ACT Interpretation Acts contain similar provisions, although unlike s 33AB they are expressed to validate the appointment itself, whether an acting appointment or otherwise.[61] The New South Wales and Western Australian Interpretation Acts also contain similar provisions that apply in more limited circumstances, eg in relation only to defects in the appointment of members of statutory bodies.[62]

8. Effect of new or altered powers on existing delegations

One of the key things the *Acts Interpretation Act* does is to deal with a number of substantive issues concerning delegations (see ss 34AA, 34AB and 34A). New s 34AB(2) and (3) have been inserted by the *2011 Amendment Act*. These provisions seek to clarify that references to powers and functions in delegations can be read as in force 'from time to time'.

Section 34AB(2) provides that, where a delegator has delegated *all* of his/her functions (or duties or powers) to a person under an Act, and the Act is amended to give the delegator additional functions, the delegation is taken to include those additional functions. Section 34AB(3) provides that, where a delegator has delegated one or more functions under an Act, and the Act is amended to alter the scope of one or more of those functions, the delegation is taken to include those functions as altered.

The State and Territory Interpretation Acts all contain rules relating to delegation, however they do not include provisions along the lines of new s 34AB(2) and (3) of the *Acts Interpretation Act*.

Conclusion

The *Acts Interpretation Act* is a key tool in statutory interpretation. The Act does not codify the principles of statutory interpretation; many of these remain as common law principles. Nevertheless, consideration of the *Acts Interpretation Act* should be part of all statutory interpretation. The Act also performs a range of other functions: providing a technical framework to support legislation; shortening, simplifying and promoting the consistency of general legislation; and facilitating the machinery of government. Given these key roles, the recent amendments to the *Acts Interpretation Act* seek to ensure that it remains relevant, by making important substantive changes, and accessible, through a significant restructuring of the Act.

Endnotes

1 James Spigelman, *Statutory Interpretation and Human Rights: The McPherson Lecture Series, Volume 3* (2008) University of Queensland Press, 62.
2 *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (*Malaysian Declaration case*), 234 [247] (Kiefel J); *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J).
3 *Malaysian Declaration case* (2011) 244 CLR 144, 189 [90] (Gummow, Hayne, Crennan and Bell JJ).
4 *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013), [42]-[43] (French CJ); *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43] (French CJ); *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).
5 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1); *Human Rights Act 2004* (ACT) s 30; see also *New Zealand Bill of Rights Act 1990* (NZ) s 6; *Human Rights Act 1998* (UK) s 3.
6 See generally 'Human Rights in Commonwealth Policy Development and Decision-making' *AGS Legal Briefing*, forthcoming, 2013.
7 *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372, 1410 [162], 1413 [173] (Hayne J).
8 *Interpretation Act 1889*, 52 & 53 Vict, c 63.
9 *Interpretation Act 1897* (NSW).
10 *Acts Interpretation Act 1890* (Vic).
11 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 6 June 1901, 789-791, Mr Deakin, Attorney-General.
12 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Clearer Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth* (1993), 123.
13 Attorney-General's Department and Office of Parliamentary Counsel *Review of the Commonwealth Acts Interpretation Act 1901* (1998).
14 Ibid 1.4-1.47.
15 Ibid 2.1-2.42.
16 2011 Amendment Act, sch 3 item 1.
17 There are specific provisions, in the legislation providing for rules of court to be made, for these rules to be treated as legislative instruments for the purposes of the majority of provisions of the *Legislative Instruments Act 2003* (Cth) (including s 13 about the application of the *Acts Interpretation Act*), subject to modifications or adaptations provided for in the regulations: see the *Judiciary Act 1903* (Cth) s 86(2); *Federal Court of Australia Act 1976* (Cth) s 59(4); *Family Law Act 1975* (Cth) ss 26E, 37A(14), 123(2); *Federal Circuit Court of Australia Act 1999* (Cth) s 81(3). The *Acts Interpretation Act* therefore also applies to these rules (subject to any modifications specified in regulations).
18 Discussion Paper at 3.36-3.38.
19 This understanding was reflected in *R v Hare* [1934] 1 KB 354, 355, where Avory J said that headings and marginal notes are not to be looked at because they 'are inserted after the Bill has become law'; and *Re Woking UDC* [1914] 1 Ch 300, 322 where Phillimore LJ stated that marginal notes 'are inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons'. See Francis Bennion, *Statutory Interpretation* (LexisNexis, 5th ed, 2008) 715 as to the incorrectness of these statements.
Another possible reason for, or more likely an effect of, excluding elements such as marginal notes from forming part of the Act was that they could be amended by a parliamentary clerk, where necessary or desirable by reason of amendments made to the Bill, and were not otherwise subject to amendment by Parliament. But Bennion at 715 states of parliamentary clerks that, '[far] from being irresponsible, they are subject to the authority of Parliament' and that '[t]o suppose that the components of a Bill which are subject to printing corrections cannot be looked at in interpretation of the ensuing Act is to treat them as being in

some way 'unreliable'. No other ground could possibly justify their being ignored. Yet this goes against another principle of law, ...- all things are presumed to be rightly and duly performed unless the contrary is proved.' Commonwealth legislation can also be subject to such corrections by the authority of Parliament: see *House of Representatives Standing Orders*, standing order 156; *Senate Standing Orders*, standing order 124.

20 Francis Bennion, *Statutory Interpretation* (LexisNexis, 5th ed, 2008) 748-9: 'with occasional trifling exceptions, the marginal notes in an Act [now section headings] ... are contained either in the Bill as introduced or in new clauses added by amendment' . At 714, Bennion states that '[a]ny suggestion that certain components of an Act are to be treated, for reasons connected with their parliamentary history, as not being part of the Act is unsound and contrary to principle'. See also DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) 1.37 and 4.54.

21 Discussion Paper at 3.36-3.38.

22 [1983] 1 NSWLR 317, 325.

23 See, eg, *Shuster v Minister for Immigration and Citizenship* (2008) 167 FCR 186, 188-9 [10]-[14] (Bennett J); *Clement v Comcare* (2011) 194 FCR 24, 29-30 [35]-[38] (Cowdroy J).

24 [1983] 1 NSWLR 317, 325.

25 Francis Bennion, *Statutory Interpretation* (LexisNexis, 5th ed, 2008) 713, s 238.

26 *Interpretation Act 1987* (NSW) s 35; *Acts Interpretation Act 1915* (SA) s 19; *Interpretation Act 1984* (WA) s 32; *Acts Interpretation Act 1931* (Tas) s 6.

27 *Interpretation Act* (NT) s 55; *Interpretation of Legislation Act 1984* (Vic) s 36; *Acts Interpretation Act 1954* (Qld) s 14.

28 *Legislation Act 2001* (ACT) ss 126, 127.

29 Discussion Paper at 3.47-3.48.

30 Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) 19.

31 Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) 19.

32 *Legislation Act 2001* (ACT) s 132; *Acts Interpretation Act 1915* (SA) s 19A; *Interpretation of Legislation Act 1984* (Vic) s 36A.

33 *Interpretation Act* (NT) s 62D; *Acts Interpretation Act 1954* (Qld) s 14D.

34 See, eg, *Chugg v Pacific Dunlop Pty Ltd* (1990) 170 CLR 249, 262 (Dawson, Toohey and Gaudron JJ), discussing the equivalent Victorian provision.

35 *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, 649 [5] and 651 [9] (French CJ and Bell J), 661-3 [38]-[45] (Crennan and Kiefel JJ).

36 *Legislation Act 2001* (ACT) s 139; *Acts Interpretation Act 1954* (Qld) s 14A.

37 *Interpretation Act 1987* (NSW) s 33; *Interpretation Act* (NT) s 62A; *Acts Interpretation Act 1915* (SA) s 22; *Interpretation Act 1984* (WA) s 18; *Interpretation of Legislation Act 1984* (Vic) s 35; *Acts Interpretation Act 1931* (Tas) s 8A.

38 Department of the Prime Minister and Cabinet, *Legislation Handbook* (1999) 6.36.

39 The current AAO, available on ComLaw (www.comlaw.gov.au), was made on 9 February 2012, and incorporates amendments made on 25 March 2013.

40 For example, 8 Ministers have been appointed to administer the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, including 2 designated as parliamentary secretaries. There are multiple Ministers responsible for particular subject matters dealt with by the Department. For example, the Hon Greg Combet AM MP is Minister for Climate Change, Industry and Innovation, Senator the Hon Kate Lundy is Minister Assisting on Industry and Innovation, and The Hon Yvette D'Ath MP is Parliamentary Secretary for Climate Change, Industry and Innovation. The High Court upheld the practice of appointing multiple Ministers for a Department in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

41 This is subject to s 19A(1)(a) applying. That paragraph deals with the situation where different Ministers administer the same provision in respect of different matters.

42 *Interpretation Act 1987* (NSW) s 15; *Legislation Act 2001* (ACT) s 162; *Interpretation Act* (NT) s 19; *Acts Interpretation Act 1915* (SA) s 4; *Interpretation Act 1984* (WA) s 12; *Interpretation of Legislation Act 1984* (Vic) s 38; *Acts Interpretation Act 1954* (Qld) s 33.

43 Discussion Paper, 2.28-2.38 and 3.65-3.69.

44 (1998) 194 CLR 355.

45 (1998) 194 CLR 355, 390-1 [93] (McHugh, Gummow, Kirby and Hayne JJ), footnotes omitted.

46 Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) 24.

47 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 392-3 [97]-[100] (McHugh, Gummow, Kirby and Hayne JJ).

48 The Minister referred to in the Act (having regard to the AAO and relevant provisions of the *Acts Interpretation Act* discussed above) may authorise another Minister to exercise the function or power, in which case that power could properly be exercised by that other Minister (see s 34AAB of the *Acts Interpretation Act*).

49 See *Australian Capital Equity v Beale* (1993) 41 FCR 242.

50 See *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167; *Heslehurst v Government of New Zealand* (2002) 117 FCR 104 (Emmett J); *X v Australian Crime Commission* (2004) 139 FCR 413 (Finn J); *Laurence v Chief of Navy* (2004) 139 FCR 555 (Wilcox J); *Nicholson-Brown v Jennings* (2007) 162 FCR 337 (Middleton J); *R v Ng* (2002) 5 VR 257.

51 See the *Legislation Act 2001* (ACT) s 46; *Interpretation Act* (NT) s 43 (and the definitions of 'statutory instrument' in those Acts); *Acts Interpretation Act 1954* (Qld) s 24AA; *Interpretation of Legislation Act 1984* (Vic) ss 27, 41A.

52 *Acts Interpretation Act 1915* (SA) s 39; *Interpretation Act 1984* (WA) s 43(4); *Acts Interpretation Act 1931* (Tas) s 22.

53 As set out in the Explanatory Memorandum to the Acts Interpretation Amendment Bill 2011 at page 31, there are a range of circumstances in which such a defect may arise, including where the appointer failed to observe a statutory procedure in making the appointment.

54 Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) 31.

55 Enid Campbell, 'De Facto Officers' (1994) 2 *Australian Journal of Administrative Law* 5; Owen Dixon, 'De Facto Officers' (1938) 1 *Res Judicatae* 285.

56 (2000) 201 CLR 189, 193 [19] (Gleeson CJ, Gaudron, McHugh and Gummow JJ), quoting from *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503, 525 (McHugh JA).

57 Enid Campbell, 'De Facto Officers' (1994) 2 *Australian Journal of Administrative Law* 5, 7-13.

58 (2002) 136 A Crim R 82.

59 (2011) 197 FCR 177. Special leave to appeal to the High Court was granted (Transcript of Proceedings, *Commonwealth v Kutlu* [2012] HCATrans 35 (10 February 2012)), but the proceedings were discontinued.

60 (2011) 197 FCR 177, 215-216 [119]-[121]. See also at 193 [47] (Rares and Katzmann JJ). Both of the judgments drew on comments by Spigelman CJ in *R v Janceski* (2005) 64 NSWLR 10, [132], who in turn referred back to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

61 See the *Legislation Act 2001* (ACT) ss 212 and 225 (see also s 242 dealing with defective delegations); *Acts Interpretation Act 1954* (Qld) s 26.

62 See the *Interpretation Act 1987* (NSW) s 52; *Interpretation Act 1984* (WA) ss 57 and 52(3).