

ARTICLES

PURPOSE AND CONTEXT IN STATUTORY INTERPRETATION

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INTRODUCTION

In Australia, the twenty-five year period from 1980 has been a significant one for the development of general principles of statutory interpretation. A notable feature of this period has been the parliaments' contributions to the development of interpretive processes. Legislative provisions now direct courts, tribunals and others as to how to go about interpreting statutes and delegated legislation. Another feature of the period has been that when interpreting legislation, courts and tribunals have become increasingly willing to articulate the general interpretive principles on which their reasoning is based. Senior members of the judiciary have also spoken and written about statutory interpretation to a greater extent than previously. The contributions of the courts, tribunals and judges have been prompted in part by the activities of the legislatures, but they also exemplify a greater preparedness to discuss their decision-making methods.

A feature of common law systems is the interplay between the courts and parliament in the laying down of legal rules and principles.¹ This may be accentuated in federal systems, in which

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¹ A little has been written about this, particularly with reference to substantive legal rules. See, for example, Roscoe Pound, 'Common Law

statutory changes are made in some jurisdictions but not in others. The development of the general interpretive principles that are applied to legislation in Australia illustrates that relationship. In parallel with the formal changes enacted by the legislatures, the courts, led by the High Court, have brought about changes at common law that in some respects have gone further than those made by the legislatures. Another feature of this period has been the refinement by the courts of the principles of interpretation laid down by statute. Recently, sharp differences of opinion have been expressed in the High Court as to the role of international agreements in the interpretive process.

The core interpretive concepts on which principles of legislative interpretation are based are not, of course, unique.² Nor are they limited to the interpretation of legal documents. They are not even limited to the interpretation of documents. However, in this article I have concentrated on the form in which these concepts are used in the interpretation of legislation. It is acknowledged at

and Legislation' (1908) 21 *Harvard Law Review* 383, especially at 385, where Pound described four ways in which courts in a legal system like that in the United States might deal with a legislative innovation. Pound's four categories are examined in a modern Australian context by Paul Finn, 'Statutes and the Common Law' (1992) 22 *University of Western Australia Law Review* 7, 18-30. At 19 Finn commented that 'while a significant contemporary issue in our law relates to Pound's second category (the analogical use of statutes in the development of the common law) ... it seems very much the case that judicial treatment of statutes in this country falls into Pound's third and fourth categories (liberal interpretation but without analogical use, and strict and narrow interpretation)'. At 23-4 Finn made the general observation that in Australia the analogical use of statutes by the courts in the development of common law principles depended on whether the statute (or statutory provision) was consistent with or built upon a fundamental theme of the common law. Also see Patrick Atiyah, 'Common Law and Statute Law' (1985) 48 *Modern Law Review* 1; William Gummow, 'Lecture 1 – The Common Law and Statute' in *Change and Continuity: Statute, Equity and Federalism* (1999) 1, 11; Jack Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 *Law Quarterly Review* 247; Paul Finn, 'Statutes and their Relationship to the Common Law' in Suzanne Corcoran and Stephen Bottomley (eds), *Thinking About Statutes: Essays on Statutory Interpretation* (2005). The relationship between a statute and the common law may of course be dealt with in the statute itself. See, for example, the *Trade Practices Act 1974* (Cth) s 4M.

² See The Honourable Michael Kirby, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (2003) 24 *Statute Law Review* 95.

the outset that there is little that is new in the interpretive principles that have developed over the last quarter of a century. The changes relate mostly to the relationship of the principles to one another and to matters of definition. The principles themselves, which are defined by the use of modern terms such as ‘purpose’ and ‘context’, have been in use for centuries.

Electronic research tools make writing about statutory interpretation both exciting and a little daunting.³ If most cases decided by Australian courts in recent years have involved the application of legislation,⁴ all of those cases are worthy of investigation. The process of selecting cases on which to concentrate is therefore not without risk. But the task is worthwhile. Spigelman CJ of the Supreme Court of New South Wales has commented that:

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.⁵

In this article I have attempted to chronicle the process of development of general principles of legislative interpretation and to make a few comments on some of their features.

³ For example, at the time of writing a search of the AustLII database using the term ‘legislative purpose’ produced over 1200 references and ‘literal meaning’ produced over 1100 references. An AustLII search for references to the *Cooper Brookes Case* (below n 34) produced over 600 references.

⁴ See James Spigelman, ‘Statutory Interpretation: Identifying the Linguistic Register’ (1999) 4 *Newcastle Law Review* 1; Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) 1. There have also been substantial increases in the numbers of reported cases, both in print and in electronic form, over recent years. In addition to decisions of courts, the reporting of decisions of tribunals has also increased. A high proportion of cases decided by tribunals involve the interpretation of legislation.

⁵ James Spigelman, ‘The Poet’s Rich Resource: Issues in Statutory Interpretation’ (2001) 21 *Australian Bar Review* 224.

1. LEGISLATIVE CHANGES TO INTERPRETIVE PRINCIPLES⁶

One day in March 1981 Mr Patrick Brazil, Deputy Secretary, Commonwealth Attorney-General's Department, welcomed members of the Department and other invited guests to a symposium on the interpretation of legislation. It was, he explained, the first symposium in the Department's Legal Professional Development Program. Papers were given on the mischief rule, objects clauses in Acts, the purposive versus the literal approach and on the use of explanatory memoranda in interpretation. In his own paper, Mr Brazil reminded those present that Lord Scarman, in the Ninth Wilfred Fullagar Memorial Lecture, delivered at Monash University on 9 September of the previous year, had said:

... when I, an English judge, read some of the decisions of the High Court of Australia, I think they are more English than the English. In London no-one would now dare to choose the literal rather than a purposive construction of a statute: and 'legalism' is currently a term of abuse.⁷

Some of those present at the symposium appear to have thought that Australia had some catching up to do. In his closing remarks the Commonwealth Attorney-General, Senator Peter Durack QC, welcomed the discussion that had occurred that day, much of which focussed on the desirability of encouraging Australian courts to be more open to purposive approaches to legislative

⁶ For a more detailed discussion of the changes, in a historical and theoretical setting, see Jeffrey W Barnes, 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law – Part One' (1994) 22 *Federal Law Review* 116; Jeffrey W Barnes, 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law – Part Two' (1995) 23 *Federal Law Review* 77.

⁷ 'The Common Law Judge and the Twentieth Century - Happy Marriage or Irretrievable Breakdown?' (1980) 7 *Monash Law Review* 1, 6. Lord Scarman also compared Australian interpretive techniques unfavourably with the more free-ranging interpretive practices of United States courts. Exactly eleven years after Lord Scarman's lecture, in an Address to the 27th Australian Legal Convention on 9 September 1991, Mason CJ was able to observe: 'No one would suggest nowadays that statutory interpretation is merely an exercise in ascertaining the literal meaning of words. Statutory interpretation calls for reference not only to the context, scope and purpose of the statute but also to antecedent history and policy as well as community values': see Sir Anthony Mason, 'Changing the Law in a Changing Society' (1993) 67 *Australian Law Journal* 568, 569.

interpretation. He added: ‘I think we have reached the stage where the courts would welcome further directions by Parliament as to how they are to go about their task’.⁸ A few months later, the Commonwealth Parliament enacted s 15AA of the *Acts Interpretation Act 1901*,⁹ which provides:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

One of the reasons for the introduction of s 15AA was a concern that in some cases the time-honoured strict approach to the interpretation of taxation legislation had been undermining the purpose of the legislation.¹⁰ A Current Topic devoted to s 15AA, in the *Australian Law Journal* of April 1981,¹¹ referred to an observation made by Murphy J in the High Court the year before in *Commissioner of Taxation (Cth) v Westrad Pty Ltd*:

In my opinion, strict literal interpretation of a tax Act is an open invitation to artificial and contrived tax avoidance. Progress towards a free society will not be advanced by attributing to Parliament meanings which no one believes it intended so that income tax becomes optional for the rich while remaining compulsory for most income earners. If strict literalism continues to prevail, the legislature may have no practical alternative but to vest tax officials with more and more discretion. This may well lead to tax laws capable, if unchecked, of great oppression.¹²

A second Current Topic devoted to s 15AA, in the October 1981 *Australian Law Journal*, contained the comment that there had been ‘a noticeable lack of enthusiasm by way of reaction for the new s 15AA, particularly among many members of the judiciary’.¹³ It was suggested that one of the reasons for this was

⁸ Another Look at Statutory Interpretation (1982) 31.

⁹ Inserted into the principal Act by the *Statute Law Revision Act 1981*, s 115.

¹⁰ See Richard Krever, ‘Murphy on Taxation’ in Jocelyne A Scutt (ed), *Lionel Murphy: A Radical Judge* (1987) 128.

¹¹ ‘The “purposive” versus the “literal” construction of statutes’ (1981) 55 *Australian Law Journal* 175.

¹² (1980) 54 ALJR 460, 469.

¹³ ‘Statutory guidelines for interpreting Commonwealth statutes’ (1981) 55 *Australian Law Journal* 711, 712.

the belief, held by some of the sceptics, that s 15AA was unnecessary because it stated nothing new. However such a belief would be mistaken. It had been generally accepted that the common law purposive approach, which had its origins in the ‘mischief rule’,¹⁴ should only be brought into play if there was an ambiguity or doubt as to meaning.¹⁵ In the absence of uncertainty of that kind, the literal meaning should be adopted.¹⁶ Section 15AA was different from the purposive approach, however, because it required the interpreter to take account of the purpose or object underlying the Act initially, not just at some later stage

¹⁴ See *Heydon’s Case* (1584) 3 Co Rep 7a, 7b; 76 ER 637, 638: ‘In this case all the judges met.

And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:-

1st What was the common law before the making of the Act.

2nd What was the mischief and defect for which the common law did not provide.

3rd What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And,

4th The true reason of the remedy; and then the office of all the Judges is to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.’

¹⁵ See, for example, *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503, 513 (Stephen J); *Wacando v Commonwealth* (1981) 148 CLR 1, 17 (Gibbs CJ).

¹⁶ The literal approach was based on the literal rule, the most widely used version of which is contained in the judgment of Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (the *Engineers’ Case*) (1920) 28 CLR 129, 161–2: ‘The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.’ Even when stated in this uncompromising form, excluding any other approach to interpretation, the rule incorporated the proposition that the meaning of a provision was to be ascertained by considering it in the context of the rest of the Act.

of the interpretive process at which an ambiguity or doubt as to meaning became apparent.¹⁷

Undeterred by the lukewarm reception accorded the introduction of s 15AA of the *Acts Interpretation Act 1901* two years previously, early in 1983 the Commonwealth Attorney-General's Department sponsored a second symposium on the interpretation of legislation.¹⁸ This symposium focussed on the use which should be made of extrinsic materials, such as Hansard, explanatory memoranda and international agreements, in the interpretation of legislation.¹⁹ The proceedings at this more representative gathering are described in detail in a Current Topic in the *Australian Law Journal* of April 1983.²⁰ The following year s 15AB was enacted.²¹ It provides:

- (1) Subject to sub-section (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material —

¹⁷ *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J); *R v Boucher* [1995] 1 VR 110, 123–4; *Thompson v Byrne* (1999) 161 ALR 632, 646 (Gaudron J). There is a summary of the early views of several academic writers on the meaning and effect of s 15AA in Jeffrey W Barnes (1994), above n 6, 162–3. Although s 15AA adds to the burden of legislative interpreters, in some instances it is only when the legislative drafter has fallen short of his or her ideal that the dominance of the purposive approach assumes significance. If the drafter has achieved what he or she set out to do, applications of the literal and the purposive approaches will ordinarily produce the same result. In the words of McHugh J in *Saraswati v R* (1991) 172 CLR 1, 21: ‘In many cases, the grammatical or literal meaning of a statutory provision will give effect to the purpose of the legislation. Consequently, it will constitute the “ordinary meaning” to be applied’.

¹⁸ *Symposium on Statutory Interpretation* (1983).

¹⁹ A policy discussion paper prepared by the Attorney-General's Department, *Extrinsic Aids to Statutory Interpretation* (1982) was considered.

²⁰ ‘Canberra Symposium on Extrinsic Aids to Statutory Interpretation, February 1983’ (1983) 57 *Australian Law Journal* 191. It is recorded that participants included Lord Wilberforce, who had recently retired from the House of Lords, the Chief Justice of the High Court, Sir Harry Gibbs, four justices of the High Court (Mason, Murphy, Brennan and Dawson JJ), members of state and territory judiciaries, senior counsel and academic scholars.

²¹ Inserted into the *Acts Interpretation Act 1901* by the *Acts Interpretation Amendment Act 1984*, s 7.

- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
 - (b) to determine the meaning of the provision when —
 - (i) the provision is ambiguous or obscure; or
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.
- (2) Without limiting the generality of sub-section (1), the material that may be considered in accordance with that sub-section in the interpretation of a provision of an Act includes —
- (a) 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;
 - (b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;
 - (c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;
 - (d) any treaty or other international agreement that is referred to in the Act;
 - (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;
 - (f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

- (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and
 - (h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.
- (3) In determining whether consideration should be given to any material in accordance with sub-section (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to —
- (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
 - (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

In its underlying philosophy and in its drafting, this section owes something to Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, 1969.²²

Although greeted with misgivings in some quarters,²³ the introduction of s 15AB did at least clarify the principles that were to be applied in this area. Before s 15AB was enacted there had been uncertainty both as to the extent to which, and as to the purposes for which, various forms of international, parliamentary and executive material could be used in the interpretation of legislation. For example, in *Commissioner for Prices and Consumer Affairs (SA) v Charles Moore (Aust) Ltd*,²⁴ the High Court stated that courts should not refer to reports of parliamentary debates for any purpose to aid the construction of a

²² [1974] Australian Treaty Series 2.

²³ Most of the contemporary arguments for and against the introduction of a provision along the lines of s 15AB and similar provisions are canvassed in detail in Jocelyne A Scutt, 'Statutory Interpretation and Recourse to Extrinsic Aids' (1984) 58 *Australian Law Journal* 483, 488-94.

²⁴ (1977) 139 CLR 449, 457 (Barwick CJ), 462 (Gibbs J), 470 (Stephen J), 476-7 (Mason J). Cf 479-81 (Murphy J).

statute. However, in *Wacando v Commonwealth*²⁵ in the High Court Mason J said that an exception could be allowed if the bill had been introduced to remedy a mischief. Mason J repeated that view in *Commissioner of Taxation (Cth) v Whitfords Beach Pty Ltd*.²⁶ Following the *Whitfords Beach* decision, starting with *TCN Channel Nine Pty Ltd v Australian Mutual Provident Society*,²⁷ the Federal Court admitted reports of parliamentary debates and explanatory memoranda on several occasions.²⁸

Under s 15AB(1)(a) and its equivalents in other jurisdictions, any material outside the Act (including the various kinds of material listed in sub-s (2)) may be used to confirm that the ordinary meaning conveyed by the text of a provision was intended, taking account of its context in the Act and the Act's underlying purpose or object. This has been described as meaning that extrinsic material may be taken into account where the provision is 'clear on its face'.²⁹ It would appear that such material cannot be used in those circumstances to alter the interpretation that the court would place upon the provision without reference to that material.³⁰ For a reference to extrinsic material to have the potential to change an interpretation of legislation which would otherwise have been arrived at, it is necessary for a court to conclude that one of the conditions in s 15AB(1)(b)(i) or (ii) has been met. That means the interpreter must conclude, without taking account of any material not forming part of the Act, that

²⁵ (1981) 148 CLR 1, 25-6.

²⁶ (1982) 150 CLR 355, 373-5.

²⁷ (1982) 42 ALR 496.

²⁸ For example, see *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236, 244; *Trade Practices Commission v Orlane Australia Pty Ltd* (1984) 1 FCR 157, 165-6; *Westwood v Lightly* (1984) 2 FCR 41, 43 (Sheppard J), 52 (Kirby J); *Kavvadias v Commonwealth Ombudsman* (1984) 2 FCR 64, 77.

²⁹ *Commissioner of Australian Federal Police v Curran* (1984) 3 FCR 240, 249-50 (Wilcox J, quoting Stephen J in *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, 599-600). Also see *Gardner Smith Pty Ltd v Collector of Customs (Vic)* (1986) 66 ALR 377, 383-4; *NAQF v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 781 [69].

³⁰ See *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416, 420; *The Ombudsman v Commissioner of Police* (1987) 11 NSWLR 386, 396; *ICI Australia Operations Pty Ltd v Fraser* (1992) 34 FCR 564, 568-70. Cf *Parrett v Secretary, Department of Family and Community Services* (2002) 124 FCR 299, 310.

the provision in question is ‘ambiguous’³¹ or ‘obscure’ or that, taking account of its context and underlying purpose or object, the ordinary meaning leads to a result that is ‘manifestly absurd’ or ‘unreasonable’.³² A difference between s 15AA and s 15AB is that while s 15AA gives the interpreter no choice as to whether to apply it, s 15AB allows a choice as to whether extrinsic materials are to be considered (s 15AB(1)) although it also indicates two relevant matters that must be considered, amongst others, in the exercise of that choice (s 15AB(3)).

In the first few years following its introduction, s 15AA was infrequently applied, or even referred to in judgments.³³ Given its non-discretionary nature, this is surprising. There were indications, however, that s 15AA was having some effect on judicial reasoning. Courts became more prepared to articulate the basis on which they had arrived at a particular interpretation of the legislative provisions they were considering. There were more frequent references to the purpose of the Act or provision under scrutiny. In many instances, reference was made to *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*,³⁴ handed down following the enactment of the amending Act, one week before s 15AA came into operation. That case represented an important change in the attitude of the

³¹ See James Spigelman, ‘Statutory Interpretation: Identifying the Linguistic Register’ (1999) 4 *Newcastle Law Review* 1, 2–3, where Spigelman CJ concluded that in the context of statutory interpretation in addition to its ordinary meaning the word ‘ambiguity’ applied to ‘any situation in which the intention of Parliament with respect to the scope of a particular statutory situation is, for whatever reason, doubtful’. See also *Repatriation Commission v Vietnam Veterans’ Association* (2000) 48 NSWLR 548, 577–8 (Spigelman CJ).

³² *NAQF v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 781, [70]–[72].

³³ See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988) [2.14]–[2.15]. One of the reasons for the lack of reference to s 15AA and later on, its equivalents, may have been that some judges assumed they were merely a statutory recognition of the common law purposive approach. For example, Bryson J said of s 15AA and the *Interpretation Act 1987* (NSW) s 33: ‘These have not signalled any new large turn in the construction of statutes. The response to these provisions thus far appears to be appropriate to treating them as declaratory, and in my suggestion that is what they are’: Mr Justice John Bryson, ‘Statutory Interpretation’ (1991–2) 8 *Australian Bar Review* 185, 187.

³⁴ (1981) 147 CLR 297.

High Court to the interpretation of legislation, particularly income tax legislation. By a majority of four to one it construed s 80C(3) of the *Income Tax Assessment Act 1936* (Cth), in a way that avoided a drafting oversight and achieved a result which was consistent with what the court perceived to be the parliament's manifest intentions.³⁵ The reasoning in that case is still regularly referred to in judgments today.³⁶

Section 15AB, like s 15AA, was infrequently referred to by the High Court, the Federal Court and the Commonwealth Administrative Appeals Tribunal, much less relied on, in the first few years of its operation.³⁷ That continued into the 1990s, although references to the section and reliance on it in the judgments of the Commonwealth Administrative Appeals Tribunal³⁸ and some other tribunals increased in frequency sooner than in the case of the courts.

Following the enactment of ss 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth), whatever the reasons for the initial lack of reliance on them, one by one the States and the Territories considered them important enough to enact their own versions, from 1984 into the early 1990s. The provisions which are currently in force in New South Wales,³⁹ Tasmania,⁴⁰ Victoria,⁴¹ Western Australia⁴² and the Northern Territory⁴³ are in substantially the same terms as ss 15AA and 15AB. Like ss 15AA and 15AB, they are in their original unamended form. So are the Queensland⁴⁴ and South Australian⁴⁵ provisions, both of

³⁵ For a detailed discussion of *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* see Barnes (1994), above n 6, 163–8.

³⁶ See above n 3.

³⁷ See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988) [3.19].

³⁸ See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (4th ed, 1996) [3.8]–[3.9].

³⁹ *Interpretation Act 1987*, ss 33, 34.

⁴⁰ *Acts Interpretation Act 1931*, ss 8A, 8B.

⁴¹ *Interpretation of Legislation Act 1984*, s 35. As to whether s 35(b) has a different effect from s 15AB, see Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) [3.21]–[3.23].

⁴² *Interpretation Act 1984*, ss 18, 19.

⁴³ *Interpretation Act*, ss 62A, 62B.

⁴⁴ *Acts Interpretation Act 1954*, s 14A.

⁴⁵ *Acts Interpretation Act 1915*, s 22.

which are worded slightly differently in the case of the s 15AA equivalents.⁴⁶ As there is no equivalent of s 15AB in South Australia, the admissibility of extrinsic materials to assist in the interpretation of legislation is governed by the common law in that state.⁴⁷ The original Australian Capital Territory provisions were closely based on the Commonwealth provisions.⁴⁸ Those provisions were repealed and replaced with new provisions in 2001.⁴⁹

2. CO-EXISTING COMMON LAW INTERPRETIVE PRINCIPLES

Although we live in an age of legislation, we are seldom surprised at the resilience of common law principles. Sections 15AA and 15AB of the *Acts Interpretation Act 1901* and the state and territory provisions based on them were introduced to override certain common law principles of interpretation, but they did not completely sweep them aside. The staggered introduction of the state and territory equivalents of ss 15AA and 15AB, together with the absence of an equivalent of s 15AB in South Australia, combined to make inevitable the survival of those principles, although in a modified form. In those federal systems where statutory principles exist in some jurisdictions while other jurisdictions are governed by the common law, the development of the common law principles may be informed by the statutory principles.⁵⁰ This can be a sensitive issue; judicial

⁴⁶ As to the South Australian provision, whether the difference produces a different meaning is discussed in Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) [2.13].

⁴⁷ In *Owen v South Australia* (1996) 66 SASR 251, the Full Court of the Supreme Court of South Australia held that reference may be made to reports of parliamentary debates both to ascertain the mischief and to discern the underlying purpose of the legislation in question: see the judgment of Cox J at 255–6, with whose conclusions Prior J concurred at 257. In that case Cox J treated ‘mischief’ and ‘purpose’ as interchangeable concepts. Also see *Byrnes v The Queen* (1999) 199 CLR 1, 18 (Gaudron, McHugh, Gummow and Callinan JJ); *MSP Nominees Pty Ltd v Commissioner of Stamps* (1999) 198 CLR 494, 506–7 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

⁴⁸ *Interpretation Act 1967*, ss 11A, 11B.

⁴⁹ *Legislation Act 2001*, ss 138, 139, 141-3.

⁵⁰ See above n 1.

activism can attract the criticism that the courts are exceeding their responsibilities and breaching fundamental constitutional principles.⁵¹ Perhaps such criticisms are less likely to be made when judicial technique, rather than substantive law, is involved. But the results produced can be just as profound.

(a) Context to be considered initially

Another reason for the survival of the general common law principles of interpretation is that it was sometimes possible to find common law principles that were incompatible with other, less favoured, common law principles. Some of the more favoured principles came remarkably close to being consistent with the new statutory principles. Here are some examples.

There is a statement of general interpretive principle whose origins lie in the speech of Viscount Simonds LC in *Attorney-General v Prince Ernest Augustus of Hanover*⁵² ('*Prince Ernest Augustus of Hanover*') as quoted and amplified in 1985 by Mason J (dissenting) in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*⁵³ ('*K & S Lake City Freighters*') that appears to capture the spirit of s 15AA and its equivalents. In that case the High Court applied common law principles of interpretation because the case arose under South Australian law and South Australia did not enact its version of s 15AA until the following year. Mason J said:

Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise. In *Prince Ernest Augustus of Hanover* Viscount Simonds said:⁵⁴ '...words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to

⁵¹ See, for example, Dyson Heydon, 'Judicial activism and the death of the rule of law' (2003) 23 *Australian Bar Review* 110, an Address to the Quadrant Dinner, Sydney, 30 October 2002; John Gava, 'The Rise of the Hero Judge' (2001) 24 *University of New South Wales Law Journal* 747.

⁵² [1957] AC 436.

⁵³ (1985) 157 CLR 309.

⁵⁴ [1957] AC 436, 461.

examine every word of a statute in its context, and I use the word ‘context’ in its widest sense ... as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy’.⁵⁵

Mason J’s statement of common law interpretive principle is of particular interest because of its impact on the fundamental principles of interpretation as they are applied in Australia. The passage which Mason J quoted from the speech of Viscount Simonds in *Prince Ernest Augustus of Hanover* is nearly 50 years old.⁵⁶ It harks back to the mischief rule, which dates from 1584. Notwithstanding this, the proposition that the context of a provision should be considered at the initial stage of the interpretive process, together with the inclusion of the mischief the statute was intended to remedy as part of that context, combine to convey essentially the same meaning as s 15AA.⁵⁷ As there are so many more cautiously framed general statements of principle that Mason J could have relied on,⁵⁸ it is significant that he chose the one in *Prince Ernest Augustus of Hanover*. The importance of the statement lies in the fact that it places ‘context’, bracketed with ‘purpose or object’, at the beginning of the interpretive process.

The innovative significance of Mason J’s statement in *K & S Lake City Freighters* that context, interpreted in its widest sense, should be considered at the initial stage of the interpretive process, was not immediately obvious. However, it has now been

⁵⁵ [1957] AC 436, 461.

⁵⁶ The importance of this speech of Viscount Simonds LC in Australian law has long been recognised. An extract from it is contained in Chapter 12 of Francis K H Maher, Louis Waller and David P Derham’s introductory book *Cases and Materials on the Legal Process* (1966).

⁵⁷ See the comments of Wilcox and Finn JJ in *Rieson v SST Consulting Services Pty Ltd* [2005] FCAFC 6, [20]. The relationship between the mischief rule and the purposive approach is discussed in Barnes (1995), above n 6, 84–5.

⁵⁸ For example, see *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503, 513 (Stephen J): ‘The mischief aimed at may provide a useful aid in interpretation where ambiguity arises but to my mind the words of the definition are not themselves ambiguous nor do they lead to any apparent absurdity in the operation of the Act if full effect be given to their literal meaning’.

relied on in many cases.⁵⁹ One of its manifestations is in the joint judgment of Brennan CJ, Dawson, Toohey and Gummow JJ in *CIC Insurance Ltd v Bankstown Football Club Ltd*,⁶⁰ (*'CIC Insurance'*) which was handed down in 1997:⁶¹

... the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as [reference to reports of law reform bodies], one may discern the statute was intended to remedy: *Attorney-General v Prince Ernest Augustus of Hanover*,⁶² cited in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*.⁶³ Instances of general words in a statute being so construed by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*,⁶⁴ if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent: *Cooper Brookes (Wollongong) Pty Ltd v FCT*.⁶⁵

On numerous occasions, the two propositions set out in this statement of principle have been treated by the High Court and other courts as encapsulating their fundamental responsibilities in

⁵⁹ For example, see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 (McHugh, Gummow, Kirby and Hayne JJ); *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc* (2000) 48 NSWLR 548, 576 (Spigelman CJ); *Australian Industry Group v Automotive, Food, Metals, Printing & Kindred Industries Union* (2003) 130 FCR 524, 534 (French and von Doussa JJ), 540–1 (Marshall J).

⁶⁰ (1997) 187 CLR 384.

⁶¹ *Ibid* 408.

⁶² [1957] AC 436, 461.

⁶³ (1985) 157 CLR 309, 312, 315.

⁶⁴ (1986) 6 NSWLR 363, 388.

⁶⁵ (1981) 147 CLR 297, 320–1.

relation to the interpretation of legislation.⁶⁶ It is a more comprehensive statement than that of Mason J in *K & S Lake City Freighters* in that it expressly extends context to extrinsic materials such as reports of law reform bodies and makes it clear that they are also to be taken into account at the initial stage of the interpretive process, rather than at a later stage when ambiguity or doubt as to meaning become apparent. It is also clear from the examples given in the previous footnote that textual ambiguity is not a precondition for reference to these extrinsic materials for the purpose described. Quotation of, or reference to, the passage from *CIC Insurance* is often accompanied by mention of *Newcastle City Council v GIO General Ltd*,⁶⁷ (*'Newcastle City Council'*) in which an explanatory memorandum was consulted to disclose the particular mischief the legislation was enacted to remedy.⁶⁸ This suggests that the principle applies generally to parliamentary and executive materials.

In addition to *CIC Insurance* and *Newcastle City Council*, *Project Blue Sky Inc v Australian Broadcasting Authority*⁶⁹ is worthy of particular mention. In that case McHugh, Gummow, Kirby and Hayne JJ affirmed the comprehensive application of

⁶⁶ See, for example, *Burch v SA* (1998) 71 SASR 12, 17–18 (Cox J), 26–7 (Lander J), 38–9 (Bleby J); *Police v Kennedy* (1998) 71 SASR 175, 184–5; *Fox v Commissioner for Superannuation (No 2)* (1999) 88 FCR 416, 420 (Black CJ); *MLC Ltd v Deputy Commissioner of Taxation* (2002) 126 FCR 37, 47–8; *Gerah Imports Pty Ltd v Duke Group Pty Ltd (in liq)* (2004) 88 SASR 419, 428–29 (Anderson J), with whom Mullighan and Nyland JJ agreed at 421. Also see *Attorney-General (Cth) v Oates* (1999) 198 CLR 162, 175 (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* (2001) 117 FCR 23, 77; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 205 ALR 1, 4 (McHugh ACJ, Gummow and Hayne JJ); *Solution 6 Holdings Ltd v Industrial Relations Commission of NSW* (2004) 60 NSWLR 558, 579–80 (Spigelman CJ), with whom Mason P and Handley JA agreed at 597; *Mount Beauty Gliding Club Inc v Jacob* [2004] VSCA 151, [16]; *Almario v Allianz Australia Workers Compensation (NSW) Insurance Ltd* [2005] NSWCA 19, [45] (Ipp JA), with whom Hodgson JA agreed at [1] and Hunt AJA agreed at [48]; *Rieson v SST Consulting Services Pty Ltd* [2005] FCAFC 6, [14]–[20] (Wilcox and Finn JJ).

⁶⁷ (1997) 191 CLR 85.

⁶⁸ Ibid 99 (Toohey, Gaudron and Gummow JJ), 112 (McHugh J).

⁶⁹ (1997) 194 CLR 355.

the modern approach to interpretation,⁷⁰ applying it to the difficult question whether breach of a provision that imposed an obligation produced invalidity.⁷¹

Do the common law principles governing the use of extrinsic material in interpretation co-exist with the statutory provisions, where s 15AB or a provision based on it could be applied? This question can be addressed in different ways. It might have been concluded that the effect of the doctrine of parliamentary supremacy was that s 15AB overrode inconsistent common law interpretive principles. This would have meant that extrinsic material could only be considered if s 15AB(1) was satisfied. However, courts and tribunals have assumed, in several cases besides those already referred to, that the two sets of principles do co-exist.⁷² In these cases it was assumed that the mischief rule was extant, together with the principle that it was permissible to refer to certain kinds of extrinsic material to discover the mischief.

It has been pointed out elsewhere⁷³ that although the language of s 15AB and its equivalents is broad enough to apply to the use of dictionaries, other legislation and reports of cases, there is no need to apply these provisions to those forms of extrinsic material because such material was already admissible under principles that predate the introduction of those provisions. Courts and tribunals have never assumed that s 15AB and equivalents apply to those forms of extrinsic material.⁷⁴ To apply

⁷⁰ At 381 they said that ‘the process of construction must always begin by examining the context of the provision that is being construed’.

⁷¹ At the time of writing a search of the AustLII database a search for references to the *Project Blue Sky v Australian Broadcasting Authority* produced over 450 references.

⁷² See, for example, *Alexandra Private Geriatric Hospital Pty Ltd v Blewett* (1984) 2 FCR 368, 375–6; *Re Tasmanian Ferry Services Ltd and Secretary, Department of Transport and Communications* (1992) 29 ALD 395, 408; *Lemair (Australia) Pty Ltd v Cahill* (1993) 30 NSWLR 167, 171 (Kirby P); *Australia & New Zealand Banking Group Ltd v Federal Commissioner of Taxation* (1994) 119 ALR 727, 752 (Hill J), with whom Northrop and Lockhart JJ agreed at 730.

⁷³ See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) [3.26].

⁷⁴ Some of them may have been influenced by the consideration that s 15AB(2) refers to extrinsic material that could be described generically as international agreements and parliamentary and executive material.

those provisions would impose new limitations on the use of that material. That being so, it seems reasonable to assume that just as the common law principles governing the use of that material have survived the introduction of s 15AB and equivalent provisions, so have the common law principles concerning the use of materials covered by those provisions. A troublesome aspect of this reasoning is that s 15AB and its equivalents are open-ended as to the kinds of extrinsic materials covered. For example, although s 15AB(2) specifies some of the kinds of extrinsic material that may be considered under sub-s (1) the only limitation, imposed by sub-s (1), is that the material must be ‘capable of assisting in the ascertainment of the meaning of the provision’.

Perhaps a more realistic approach to the question posed above is to conclude that the common law interpretive principles set out in *CIC Insurance* are so firmly entrenched that another question should be considered. What are the consequences of those principles co-existing with s 15AB or a provision based on it? It is difficult to avoid the conclusion that those principles are available to undermine s 15AB(1), which limits the circumstances in which reference can be made to extrinsic material. If that is so, s 15AB and its equivalents should be amended, to remove that limitation, bringing those provisions into line with *CIC Insurance* principles. That appears to be the position in relation to the Victorian equivalent of s 15AB, s 35(b) of the *Interpretation of Legislation Act 1984*.⁷⁵ It is also the case with the Australian Capital Territory provision, s 141 of the *Legislation Act 2001*. Section 141 simply provides: ‘In working out the meaning of an Act, material not forming part of the Act may be considered’.⁷⁶

This proposal to amend s 15AB and its equivalents along the lines suggested would bring those provisions more closely into line with s 15AA and the provisions based on it, in that it would remove the threshold test for consideration of extrinsic material that is currently contained in the sub-s (1)(b) and equivalent provisions. It would also have the advantage of simplicity,

⁷⁵ This is discussed in Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) [3.21]–[3.23].

⁷⁶ See the definition of ‘working out the meaning of the Act’ in s 138 of the Act.

dispensing with a stage in the interpretive process that has always been accompanied by uncertainty: the need to determine whether, using a literal approach, the meaning of a provision is ambiguous⁷⁷ or obscure, or, taking account of its context and underlying purpose or object, the ordinary meaning leads to a result that is manifestly absurd or unreasonable. A reading of some cases, particularly tribunal decisions, suggests that when s 15AB or a provision based on it is applied this threshold issue is not always considered before reference is made to extrinsic materials. Of course, that in itself is not an argument for changing the law.

Another feature of the principles stated in *CIC Insurance* is that they sweep away several lingering older statements of interpretive principle which suggest that other parts of an Act, such as the long title or the preamble, are to be brought into account only if it has been established, without reference to those provisions, that the provision under scrutiny is ambiguous.⁷⁸ In the Australian Capital Territory, such a change was made by s 140 of the *Legislation Act 2001*, which provides: 'In working out the meaning of an Act, the provisions of the Act must be read in the context of the Act as a whole'.⁷⁹ As previously indicated, the concept of context extends beyond the rest of the Act and extrinsic material as instanced by s 15AB(2) and equivalent provisions, to such aids as Interpretation Acts,⁸⁰ dictionaries,⁸¹ other legislation⁸² and prior or other existing common law.⁸³

It might be argued that a change of the kind suggested could have negative consequences. Whilst the threshold test in s 15AB(1)(b) and equivalent provisions does not prevent parties from referring to extrinsic material for their own research purposes, it does operate as a limitation on the cost of litigation. Indeed, as it

⁷⁷ See above n 31.

⁷⁸ See, for example, some of the authorities referred to in Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) [4.36]–[4.48].

⁷⁹ See above n 76.

⁸⁰ Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) Ch 6.

⁸¹ *Ibid* [3.27].

⁸² *Ibid* [[3.28]–[3.38].

⁸³ See Paul Finn, 'Statutes and the Common Law' (1992) 22 *University of Western Australia Law Review* 7, 18–30.

seems to be a common experience that extrinsic material does not usually assist in interpretation,⁸⁴ some practitioners would wish that the authority conferred by s 15AB(3) might be exercised more rigorously. Ultimately, however, a decision as to whether to investigate the wider context is just another decision that has to be made as part of the process of dealing with legislation.

(b) Implying words into the text

There is a long-standing controversy as to whether it can be legitimate to imply words into the text of legislation and, if so, as to the circumstances in which that can occur. Although the interpretive concepts of context and underlying purpose or object inform this debate, s 15AA and equivalent provisions do not offer any explicit solutions. As a consequence, interpretive principles that predate those provisions continue to be relied on. In these cases although the surface intention of the parliament appears to have been fulfilled, it is clear that the text does not give effect to the underlying purpose or object of the legislation. In *Bermingham v Corrective Services Commission of New South Wales*,⁸⁵ ('*Birmingham*') after suggesting that it could be legitimate to give words used inadvertently a 'strained construction' to produce an interpretation that was consistent with the purpose of the legislation, McHugh JA commented that:

[I]t is not only when Parliament has used words inadvertently that a court is entitled to give legislation a strained construction. To give effect to the purpose of the legislation, a court may read words into a legislative provision if by inadvertence Parliament has failed to deal with an eventuality

⁸⁴ See, for example, *Monier Ltd v Szabo* (1992) 28 NSWLR 53 in which, at 67, Meagher JA drew attention to a problem 'of ever increasing importance': 'One section of an Act ... contains an ambiguity. This propels counsel to flood the Court with various Second Reading Speeches. These speeches, needless to say, do not in any way resolve the ambiguity in the Act. They do, however, raise many fresh ambiguities, hitherto unperceived. Moreover, they leave the Court in the position where there are no documents to clarify the ministerial ambiguities. The habit should cease.' See also *Lembecke v SAS Trustee Corporation* (2003) 56 NSWLR 736, 738 where Meagher JA observed: 'Second reading speeches have almost never any value in elucidating a legal problem' and Winneke P's comments in *Masters v McCubbery* [1996] 1 VR 635, 646.

⁸⁵ (1988) 15 NSWLR 292. For a more detailed discussion of this case, together with references to other relevant cases, see Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) [2.28].

required to be dealt with if the purpose of the Act is to be achieved.⁸⁶

McHugh JA suggested that only if certain conditions were adhered to could the ‘reading in’ of missing words be a legitimate use of the purposive approach. Repeating what he had said in his dissenting judgment in *Kingston v Ke prose Pty Ltd*,⁸⁷ in which he had paraphrased some remarks of Lord Diplock in *Wentworth Securities Ltd v Jones*,⁸⁸ McHugh JA identified the conditions:

First, the court must know the mischief with which the Act was dealing. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.⁸⁹

As those conditions were fulfilled in *Bermingham*, the Court of Appeal was able to conclude that s 28(6)(b) of the *Prisoners (Interstate Transfer) Act 1982* (NSW) should be interpreted as if the words ‘minimum term’ preceded the phrase ‘sentence of imprisonment’ in that paragraph. This interpretation was adopted even though the phrase ‘sentence of imprisonment’ was used elsewhere in the Act to denote a head sentence. It achieved the purpose of the legislation, which was to facilitate the interstate transfer of prisoners on terms that neither advantaged nor disadvantaged them. Also see *Tokyo Mart Pty Ltd v Campbell*⁹⁰ per Mahoney JA,⁹¹ with whom Clarke and McHugh JJA agreed; *Saraswati v The Queen*⁹² per McHugh J,⁹³ with whose judgment Toohey J agreed;⁹⁴ *Clarke v Bailey*⁹⁵ per Kirby P,⁹⁶ with whose

⁸⁶ (1988) 15 NSWLR 292, 302.

⁸⁷ (1987) 11 NSWLR 404, 423.

⁸⁸ [1980] AC 74, 105–6.

⁸⁹ (1988) 15 NSWLR 292, 302.

⁹⁰ (1988) 15 NSWLR 275.

⁹¹ *Ibid* 283.

⁹² (1991) 172 CLR 1.

⁹³ *Ibid* 22.

⁹⁴ *Ibid* 16.

⁹⁵ (1993) 30 NSWLR 556.

⁹⁶ *Ibid* 567.

judgment Sheller JA agreed; *R v Di Maria*⁹⁷ per Doyle CJ,⁹⁸ with whom Prior and Nyland JJ agreed. In the last-mentioned case the Court of Criminal Appeal of South Australia interpreted s 32(5)B(b)(ii) of the *Controlled Substances Act 1984* (SA) as if it contained the words ‘in any other case’. It was decided that those words, which were present elsewhere in s 32, had been inadvertently omitted in amendments to that section. Ten years after the decision in *Bermingham’s Case*, McHugh J repeated the conditions and applied them in the High Court decision in *Newcastle City Council v GIO General Ltd.*⁹⁹

A couple of years after the *Newcastle City Council* decision, in the New South Wales Court of Criminal Appeal in *R v Young*¹⁰⁰ Spigelman CJ suggested that it was misleading to characterise the judicial conduct that had been described in previous cases as the ‘reading in’ of extra words. He said:¹⁰¹

The three conditions set out by Lord Diplock [in *Wentworth Securities Ltd v Jones*, paraphrased by McHugh JA in *Bermingham*] should not be misunderstood. His Lordship did not say, nor do I take any of their Honours who have adopted the passage to suggest, that whenever the three conditions are satisfied, a court is at liberty to supply the omission of the legislature. Rather, his Lordship was saying that in the absence of any one of the three conditions, the court cannot construe a statute with the effect that certain words appear in the statute.

... The court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based.

⁹⁷ (1996) 67 SASR 466.

⁹⁸ Ibid 474.

⁹⁹ (1997) 191 CLR 85, 113. The other members of the High Court reached the same conclusion without referring to the test applied by McHugh J. See also *R v Hill* [1996] SASC 5975; *Wang v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 386, 395–6; *Fox v Commissioner for Superannuation (No 2)* (1999) 88 FCR 416, 421 (Black CJ).

¹⁰⁰ (1999) 46 NSWLR 681.

¹⁰¹ Ibid 687–8. The process of reading down general words is also discussed in James Spigelman, ‘The Poet’s Rich Resource: Issues in Statutory Interpretation’ (2001) 21 *Australian Bar Review* 224, 232–3.

... If a court can construe the words actually used by the parliament to carry into effect the parliamentary intention, it will do so notwithstanding that the specific construction is not the literal construction and even if it is a strained construction. The process of construction will, for example, sometimes cause the court to read down general words, or to give the words used an ambulatory operation. So long as the court confines itself to the range of possible meanings or of operation of the text — using consequences to determine which meaning should be selected — then the process remains one of construction.

The construction reached in this way will often be more clearly expressed by way of the addition of words to the words actually used in the legislation. The references in the authorities to the court ‘supplying omitted words’ should be understood as a means of expressing the court’s conclusion with clarity, rather than as a description of the actual reasoning process which the court has conducted.

As to the other judges in *R v Young*, James J¹⁰² discussed in detail the cases in which McHugh JA and other judges had ‘read in’ extra words. In contrast to Spigelman CJ, he did not take exception to the use of the term ‘reading in’ to describe the interpretive process outlined in those cases.¹⁰³ Beazley JA¹⁰⁴ agreed with the judgment of James J except on a matter that is not presently relevant. The other judges, Abadee and Barr JJ, generally agreed with both Spigelman CJ and James J and did not express an independent view on the issues considered here. Counsel’s submission, which involved the redrafting of four sections of an Act by adding several words to each of the sections,¹⁰⁵ was not accepted.

The approach described by Spigelman CJ in *R v Young* requires any implied meanings derived from a statute to be closely based on the text of the statute. ‘Reading down’ refers to the process of giving general words a more specific meaning, as suggested having regard to the underlying purpose or object of the

¹⁰² (1999) 46 NSWLR 681, 733–6.

¹⁰³ However, in *Director of Public Prosecutions (Cth) v Chan* (2001) 183 ALR 575, 588–9 James J endorsed and applied the observations of Spigelman CJ in *R v Young*. This decision was affirmed by the Court of Appeal: (2001) 52 NSWLR 56.

¹⁰⁴ (1999) 46 NSWLR 681, 704.

¹⁰⁵ *Ibid* 739, 749.

provision in question. Spigelman CJ¹⁰⁶ identified *Tokyo Mart Pty Ltd v Campbell*¹⁰⁷ as another example of the ‘reading down’ approach, and *Berminham*¹⁰⁸ as an example of the ‘ambulatory’ approach. The latter term describes the process of attributing to a word or phrase a different meaning from that given to it elsewhere, to give effect to the underlying purpose or object of the provision.

How have the courts responded to the approaches of McHugh JA in *Berminham* and of Spigelman CJ in *R v Young*? In *Handa v Minister for Immigration and Multicultural Affairs*¹⁰⁹ (‘*Handa*’) Finkelstein J treated s 475 of the *Migration Act 1958* (Cth), which clearly should have been amended as part of changes to review procedures, as if it had been amended, so that an MRT-reviewable decision was not reviewable by the Federal Court.¹¹⁰ The conditions referred to by McHugh JA in *Berminham* were considered to have been fulfilled. *R v Young* was not cited in the judgment.

In *Parrett v Secretary, Department of Family and Community Services*¹¹¹ (‘*Parrett*’) Madgwick J referred to in *R v Young* and *Berminham*, but appeared to go beyond the tests set out in both cases, to give effect to what was perceived to be the underlying purpose of the *Farm Household Support Act 1992* (Cth). The issue was whether the applicant, who, due to illness, adverse weather conditions and lack of working capital, was unable to earn any income from his farm, was a ‘farmer’ within s 3(2) of the Act, which relevantly defined ‘farmer’ as ‘a person who: ... (c) derives a significant part of his or her income from the farm enterprise’. Although he concluded that the conditions articulated by McHugh JA in *Berminham* had been satisfied, Madgwick J acknowledged the difficulty of stating ‘with certainty’ what words parliament would have used to overcome the omission if it had been made aware of the problem. He offered the following formulation: ‘(c) derives *or attempts to derive* a significant part of his or her income from the farm enterprise *but is prevented*

¹⁰⁶ Ibid 689–90.

¹⁰⁷ (1988) 15 NSWLR 275.

¹⁰⁸ (1988) 15 NSWLR 292.

¹⁰⁹ (2000) 106 FCR 95.

¹¹⁰ Ibid 100.

¹¹¹ (2002) 124 FCR 299.

from so doing by the vicissitudes of ill-health, seasonal factors or lack of means to continue farming’ (Emphasis added).¹¹² Madgwick J speculated that parliament might have recast the provision more widely than this if its members had been aware of the problem. In any event, he considered it was quite clear that parliament would have gone as far as suggested. Although that is a clever point, the fact that this and other speculations as to what parliament would have done are possible suggests that the degree of certainty required to satisfy the third condition in *Birmingham* was lacking.

Two cases in which the Court of Appeal of the Northern Territory corrected what it took to be drafting oversights are: *Thompson v Groote Eylandt Mining Co Ltd*¹¹³ and *Minister for Lands, Planning & Environment v Griffiths*¹¹⁴ In the first case the Court of Appeal concluded that the words ‘employer makes deductions’ in the definition of ‘PAYE taxpayer’ in s 3(1) of the *Work Health Act* (NT) included an employer who was required by law to make such deductions and who failed to do so without the worker’s knowledge or authority. Martin CJ indicated¹¹⁵ that this was an example of giving words an ambulatory operation in the manner described by Spigelman CJ in *R v Young*. The same interpretive technique was identified by Mildren J and applied in the second case.¹¹⁶ There, ‘land’ in s 33(1)(b) and (3)(b) of the *Lands Acquisition Act 2001* (NT) was interpreted as meaning ‘land or an interest in land’.

In *Victorian Workcover Authority v Wilson*,¹¹⁷ a majority of the members of the Court of Appeal held that McHugh JA’s three conditions had been satisfied, so that the words ‘or the entitlement to compensation’ should be ‘read in’ after the words ‘either of the assessments’, in s 104B(9) of the *Accident Compensation Act 1985* (Vic).¹¹⁸ Referring to the conditions and to the comments of Spigelman CJ and James J in *R v Young*,

¹¹² Ibid 314.

¹¹³ [2003] NTCA 5.

¹¹⁴ [2004] NTCA 5.

¹¹⁵ [2003] NTCA 5 [4].

¹¹⁶ [2004] NTCA 5 [66].

¹¹⁷ [2004] VSCA 161.

¹¹⁸ Ibid [27]–[30] (Callaway JA), with whose interpretation Winneke P agreed at [3].

Callaway JA observed: ‘Those conditions are satisfied in the present case. It is unnecessary to decide whether they are necessary or necessary and sufficient or usually necessary and sufficient’.¹¹⁹

The two decisions of the Court of Appeal of the Northern Territory are useful illustrations of the process of giving words an ambulatory operation to give effect to underlying purpose or object. As to the two earlier decisions, in *Handa* although the conditions in *Birmingham* were fulfilled, it would seem that the more stringent conditions set out by Spigelman CJ in *R v Young* were not met and in *Parrett* neither of the sets of conditions appears to have been fulfilled. It is therefore too early to say that the stricter approach to implying words into legislation is both accepted and applied.

(c) Presumptions of interpretation

In his Sir Ninian Stephen Lecture¹²⁰ Spigelman CJ of the Supreme Court of New South Wales observed that: ‘A number of the rules of construction ... make it clear that the common law’s protection of fundamental rights and liberties is secreted within the law of statutory interpretation’.¹²¹ He added:¹²²

This protection operates by way of rebuttable presumptions that parliament did not intend:¹²³

- to invade common law rights;
- to restrict access to the courts;
- to abrogate the protection of legal professional privilege;
- to exclude the right to claims of self incrimination;
- to interfere with vested property rights;
- to alienate property without compensation;
- to interfere with equality of religion;

¹¹⁹ Ibid [27].

¹²⁰ ‘Statutory Interpretation: Identifying the Linguistic Register’ (1999) 4 *Newcastle Law Review* 1.

¹²¹ Ibid.

¹²² Ibid 11.

¹²³ See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (4th ed, 1996) Ch 5.

- to deny procedural fairness to persons affected by the exercise of public power.¹²⁴

Given Australia's lack of a bill of rights, it makes sense to ground these presumptions in the need to protect fundamental rights and liberties. In this context it is worth noting the *Human Rights Act 2004* (ACT) s 30(1), which provides: 'In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred'. This provision is declared to be subject to the *Legislation Act 2001*, s 139, the Territory's equivalent of s 15AA: s 30(2). Also see s 31 as to the sources relevant to a human right that may be considered in interpreting that right.

The first-mentioned presumption in the list above was a factor in the reasoning of the members of the High Court in *Al-Kateb v Godwin*.¹²⁵ The case involved an unlawful non-citizen, as defined by s 14 of the *Migration Act 1958* (Cth), who had been subjected to mandatory administrative detention. Although he had asked to be removed from Australia, his visa application having been unsuccessful, no other country was prepared to accept him and it was believed unlikely that this would change in the reasonably foreseeable future. The High Court considered whether the appellant was entitled to an order directing his release from detention or whether he could be detained indefinitely. It decided, by a majority of four to three¹²⁶ that the appellant was not entitled to be released.

The reasons for the decision in *Al-Kateb v Godwin* are too complex to be discussed in detail here, but the case essentially turned on the interpretation of ss 189, 196 and 198 of the *Migration Act 1958*. One of the factors that influenced the

¹²⁴ To this list might be added the presumption that statutes do not operate retrospectively and the presumption (or rule) that penal provisions are strictly construed, as to which see Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) Ch 10 and [9.8]–[9.15] respectively. There are other presumptions of interpretation the existence of which is attributable to considerations other than the protection of fundamental rights and liberties. See, for example, the presumption that legislation does not bind the Crown: Dennis Pearce and Robert Geddes [5.8]–[5.10], and the presumption that legislation does not have extra-territorial effect: Dennis Pearce and Robert Geddes [5.3]–[5.5].

¹²⁵ (2004) 208 ALR 124.

¹²⁶ *Ibid* McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow and Kirby JJ dissenting.

justices in the majority was that the words of the statute were too clear to permit the presumption that parliament does not interfere with fundamental rights to influence the outcome (notwithstanding the characterisation of the appellant's position as 'tragic' by one of the majority, McHugh J).¹²⁷ Gleeson CJ, one of the dissenting justices, observed:¹²⁸

Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle ... is not new. In 1908, in this Court, O'Connor J referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that '[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness': *Potter v Minehan*.¹²⁹

Gleeson CJ added:

A statement concerning the improbability that parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by parliament.¹³⁰

Like the analysis of Spigelman CJ in his Sir Ninian Stephen Lecture,¹³¹ Gleeson CJ's comment illustrates the willingness of many members of the judiciary to address the philosophical basis of some principles of interpretation. In suggesting that any intention to limit human rights or freedoms must be clearly and unambiguously expressed, it is apparent that Gleeson CJ is not referring to any actual ascertainable intention on the part of the

¹²⁷ (2004) 208 ALR 124, 133.

¹²⁸ Ibid 130. See also *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 209 ALR 116, 123–4 (Gleeson CJ).

¹²⁹ (1908) 7 CLR 277, 304.

¹³⁰ (2004) 208 ALR 124, 130.

¹³¹ See n 120.

legislature or of its members. It is an objective intention,¹³² based on values that are shared by parliament and the courts in a society under the rule of law.¹³³

Over the years the courts have used various phrases as tests of rebuttal of these presumptions, such as ‘clearly emerges, whether by clear words or necessary implication’¹³⁴ and ‘clearly

¹³² See also the comments of Gleeson CJ in *Singh v Commonwealth* (2004) 209 ALR 355, 362–3. Kirby J has commented extrajudicially: ‘So far as Acts of Parliament are concerned, it is unfortunately still common to see reference in judicial reasons and scholarly texts to the “intention of parliament”. I never use that expression now. It is potentially misleading: *Wik Peoples v Queensland* (1996) 187 CLR 1, 168-9; *Commonwealth v Yarmirr* (2001) 208 CLR 1, 117–8; cf *Black-Clauson International Ltd v Papierwerke AG* [1975] AC 591, 629–30. In Australia, many other judges also regard the fiction as unhelpful: *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 633 [325] per Hayne J, referring to *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 458-9. It is difficult to attribute the “intention” of a document such as a statute, prepared by so many hands and submitted to a decision-maker of so many different opinions, as having a single “intention”: S van Schalkwyk ‘Subsequent Conduct as an Aid to Interpretation’ (2000) 7 *Canterbury Law Review* 541, 552. Clearly, it cannot be a reference to a subjective “intention”. Being objective, and therefore the meaning which the decision-maker ascribes to the words, the abandonment of the fiction is long overdue’: The Honourable Michael Kirby, ‘Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts’ (2003) 24 *Statute Law Review* 95, 98. Kirby J’s preferred term is ‘purpose’. See, for example, *Director-General of the Department of Corrective Services v Mitchelson* (1992) 26 NSWLR 648, 653; *Commonwealth v Yarmirr* above at 117–8; *Al-Kateb v Godwin* (2004) 208 ALR 124, 167. The passage from the joint judgment in *CIC Insurance* which is quoted above (see the text above at n 61) refers to ‘legislative intent’. The term ‘legislative purpose’ could just as easily have been used.

¹³³ United States courts have applied various rules or presumptions of interpretation, including the rule of lenity (that penal provisions are to be strictly construed) and the rule that remedial statutes should be broadly construed. Scalia J of the United States Supreme Court and Corrigan CJ of the Michigan Supreme Court have attacked the use of such rules or presumptions, describing them as ‘dice loading’ rules. See Antonin Scalia, ‘Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws’ in *The Tanner Lectures on Human Values*, delivered at Princeton University in 1995, 1997, 77, 102–3 and Maura D Corrigan and J Michael Thomas, “‘Dice Loading’ Rules of Statutory Interpretation” (2003) 59 *NYU Annual Survey of American Law* 231.

¹³⁴ *Pyneboard Pty Ltd v Trade Practices Commission* (1982) 152 CLR 328, 341 (Mason ACJ, Wilson and Dawson JJ).

manifested by unmistakable and unambiguous language'.¹³⁵ Spigelman CJ, with whom Handley and Giles JJA agreed, collected many of these phrases in *Durham Holdings Pty Ltd v New South Wales*.¹³⁶ It ought to be possible to gauge the strength of each presumption from the language used to describe the circumstances in which it is rebutted, but in practice this is not always easily done.

What is the status of these presumptions in the light of s 15AA of the *Acts Interpretation Act 1901* (Cth) and the provisions based on it? Only in South Australia and the Australian Capital Territory have the legislatures supplied any answers to this question. In South Australia, it is expressly provided that its equivalent of s 15AA, s 22 of the *Acts Interpretation Act 1915*, does not operate to create or extend criminal liability. In the ACT, s 170 of the *Legislation Act 2001* (ACT), provides:

- (1) An Act or statutory instrument must be interpreted to preserve the common law privileges against selfincrimination and exposure to the imposition of a civil penalty.
- (2) However, this section does not affect the operation of the *Evidence Act 1995* (Cth).

As to how this provision may be displaced, see s 170(3) and s 6(2). Legal professional privilege is similarly protected in the Australian Capital Territory: s 171 and s 6(2). Also see the *Human Rights Act 2004* (ACT) ss 30, 31 which are referred to above.

What is the relationship of the presumptions of interpretation to the interpretive principles described by the terms 'context' and 'purpose' where no answer to this question is supplied by the legislature? The presumptions that have been identified by Spigelman CJ could be considered part of a broad 'context', based on shared liberal values. However, it must be said that this appears to be a broader use of the term than that identified by Brennan CJ, Dawson, Toohey and Gummow JJ in their joint judgment in *CIC Insurance Ltd v Bankstown Football Club*

¹³⁵ *Coco v R* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

¹³⁶ (1999) 47 NSWLR 340, 353–4.

Ltd.¹³⁷ A more orthodox approach is to relate the presumptions of interpretation to the concept of ‘purpose’ by assuming that any purpose would be likely to have been consistent with the values that are reinforced by those presumptions. Of course, such an assumption could be displaced. In *Newcastle City Council v GIO General Ltd*¹³⁸ McHugh J, relying in part on *Waugh v Kippen*,¹³⁹ suggested that the presumption that penal provisions should be interpreted strictly must give way to the purposive approach, especially where the provision in question was a remedial one. Toohey, Gaudron and Gummow JJ¹⁴⁰ were content to comment that in that context the presumption was ‘one of last resort’.

(d) Referring to international agreements

There is a long-standing common law principle that if an Act purports to give effect to an international agreement, the court is at liberty to look at that agreement in an endeavour to resolve any uncertainty or ambiguity in the Act itself.¹⁴¹

More recently, the courts have also taken international agreements into consideration in the process of interpreting legislation with which those agreements have no explicit connection. International obligations may arise under agreements that Australia has signed, but which have not been enacted into Australian domestic law.¹⁴² In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,¹⁴³ citing English authority, Brennan, Deane and Dawson JJ said:

We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a Commonwealth statute

¹³⁷ See the text above at n 61.

¹³⁸ (1997) 191 CLR 85, 109–10.

¹³⁹ (1986) 160 CLR 156, 164–5 (Gibbs CJ, Mason, Wilson and Dawson JJ).

¹⁴⁰ (1997) 191 CLR 85, 102–3.

¹⁴¹ *Yager v The Queen* (1977) 139 CLR 28, 43–4 (Mason J); *Enzed Holdings Ltd v Wynthea Pty Ltd* (1984) 4 FCR 450, 458. Also see, for example, *Acts Interpretation Act 1901* (Cth), s 15AB(1)(b), (2)(d). The variously-defined roles of both international agreements and international customary law in the interpretation of legislation are discussed in Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *Sydney Law Review* 423, 457–61.

¹⁴² *Dietrich v The Queen* (1993) 177 CLR 292, 305 (Mason CJ and McHugh J), 360 (Toohey J).

¹⁴³ (1992) 176 CLR 1, 38.

which accords with the obligations of Australia under an international treaty.

Mason CJ and Deane J referred to this comment when, in *Minister for Immigration and Ethnic Affairs v Teoh*, they said:¹⁴⁴

Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party: *Chu Kheng Lim v Minister for Immigration*¹⁴⁵, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.

It is accepted that a statute is to be interpreted and applied, so far as its language permits, so that it is in conformity and not in conflict with the established rules of international law: *Polites v Commonwealth*.¹⁴⁶ The form in which this principle has been expressed might be thought to lend support to the view that the proposition enunciated in the previous paragraph should be stated so as to require the courts to favour a construction, as far as the language of the statute permits, that is in conformity and not in conflict with Australia's international obligations. That indeed is how we would regard the proposition as stated in the preceding paragraph. In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.

This important principle of interpretation has been accepted in many cases.¹⁴⁷ The *Teoh* principle of interpretation was also

¹⁴⁴ (1995) 183 CLR 273, 287.

¹⁴⁵ (1992) 176 CLR 1 at 38.

¹⁴⁶ (1945) 70 CLR 60, 68–9, 77, 80–1.

¹⁴⁷ See, for example, *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 (Gummow and Hayne JJ); *Luu v Minister for Immigration & Multicultural Affairs* (2002) 127 FCR 24, 48; *Pilkington (Australia) Ltd v Minister for Justice & Customs* (2002) 127 FCR 92, 99–100; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); *Minister for Immigration & Multicultural & Indigenous Affairs v VFAD* (2003) 125 FCR 249, 269; *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2002) 197 ALR 242, 273–7; *Le v Minister for Immigration & Indigenous Affairs* [2004] FCA 875 [59]; *Coleman v Power* (2004) 209 ALR 182, 189–90 (Gleeson CJ). Also see The Honourable

given extra-judicial support by the Chief Justice of New South Wales.¹⁴⁸ Spigelman CJ there suggested that the concept of ambiguity in this context applied ‘to any case of doubt as to the proper construction of a word or phrase’.¹⁴⁹ He added: ‘There is no reason why this principle of statutory construction should not now be reflected in Interpretation Acts, whether at Commonwealth or state level’.

In the decision of the High Court in *Al-Kateb v Godwin*,¹⁵⁰ an aspect of which has already been discussed,¹⁵¹ McHugh J expressed serious reservations about the *Teoh* principle of interpretation. He said:¹⁵²

Given the widespread nature of the sources of international law under modern conditions, it is impossible to believe that, when parliament now legislates, it has in mind or is even aware of all the rules of international law. Legislators intend their enactments to be given effect according to their natural and ordinary meaning. Most of them would be surprised to find that an enactment had a meaning inconsistent with the meaning they thought it had because of a rule of international law which they did not know and could not find without the assistance of a lawyer specialising in international law or, in the case of a treaty, by reference to the Joint Standing Committee on Treaties. In *Minister for Immigration and Ethnic Affairs v Teoh*, counsel for the minister told this court that Australia was ‘a party to about 900 treaties’.¹⁵³

Michael Kirby, ‘The Role of the Judge in Advancing Human Rights Norms by Reference to International Human Rights Norms’ (1988) 62 *Australian Law Journal* 514; The Honourable Michael Kirby, ‘The Australian Use of International Human Rights Norms: From Bangaloro to Balliol — A View from the Antipodes’ (1993) 16 *University of New South Wales Law Journal* 363.

¹⁴⁸ See James Spigelman, ‘Access to Justice and Human Rights Treaties’ (2000) 22 *Sydney Law Review* 141.

¹⁴⁹ *Ibid* 149.

¹⁵⁰ (2004) 208 ALR 124. See James Allan, “‘Do the Right Thing’ Judging? The High Court of Australia in *Al-Kateb*” (2005) 24 *University of Queensland Law Journal* 1, 18–26.

¹⁵¹ See the text above at n 125.

¹⁵² (2004) 208 ALR 124, 141.

¹⁵³ (1995) 183 CLR 273, 316 (emphasis in original).

McHugh J added, however, that the *Teoh* principle of interpretation ‘is too well established to be repealed now by judicial decision’.¹⁵⁴

Kirby J countered:¹⁵⁵

McHugh J appears to adopt an interpretation of detention legislation that implies that the subjective views of legislators must prevail (for example their knowledge and views at the time of enactment about international law). I would reject such an approach. Today, legislation is construed by this court to give effect, so far as its language permits, to its purpose: *Bropho v Western Australia*,¹⁵⁶ *Project Blue Sky Inc v Australian Broadcasting Authority*.¹⁵⁷ This is an objective construct. The meaning is declared by the courts after the application of relevant interpretive principles. It is an approach that has been greatly influenced by McHugh J’s own decisions: see *Kingston v Keprose Pty Ltd*.¹⁵⁸

The purposive approach accommodates itself readily to an interpretive principle upholding compliance with international law, specifically the international law of human rights. This is because, as Professor Ian Brownlie has explained, municipal or domestic courts when deciding cases to which international law is relevant, are exercising a form of international jurisdiction.¹⁵⁹ ... In exercising international

¹⁵⁴ Ibid.

¹⁵⁵ (2004) 208 ALR 124, 167. Kirby J agreed with McHugh J on aspects of the relevance of international agreements as aids to the interpretation of domestic legislation in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. At 391-2 McHugh, Gummow, Kirby and Hayne JJ observed that: ‘while the obligations of Australia under some international conventions and agreements are relatively clear, many international conventions and agreements are expressed in indeterminate language: Bennion, *Statutory Interpretation* (2nd ed, 1992) 461 as the result of compromises made between the contracting State parties’: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 255-6. Often their provisions are more aptly described as goals to be achieved rather than rules to be obeyed. The problems that might arise if the performance of any function of the ABA carried out in breach of Australia’s international obligations was invalid are compounded by Australia being a party to about 900 treaties: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 316’.

¹⁵⁶ (1990) 171 CLR 1, 20.

¹⁵⁷ (1998) 194 CLR 355, 381-2.

¹⁵⁸ (1987) 11 NSWLR 404, 421-4 (McHugh JA dissenting).

¹⁵⁹ Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 584.

jurisdiction, they ... give effect to interpretive principles defensive of basic rights upheld by international law.

There appear to be difficulties with the opinions of both justices. Kirby J is surely on stronger ground in suggesting that the question does not concern the subjective views of legislators. Although Mason CJ and Deane J referred to parliamentary intention in *Teoh*, it would seem that they were speaking of an objective intention, attributed by the court to the parliament as a whole.¹⁶⁰ With respect to the comments of Kirby J, Professor Brownlie did not refer to ‘municipal or domestic courts ... deciding cases to which international law is relevant’. He said:

any national tribunal which is given jurisdiction by municipal law over questions of international law, for example responsibility for war crimes, or genocide, and which exercises that jurisdiction in accordance with international law, may ... be considered to be exercising an ‘international jurisdiction’.¹⁶¹

This is a narrower proposition than that attributed to Professor Brownlie. That said, the principle in *Teoh* stands, independently of the principle ascribed to Professor Brownlie.

There is another issue arising from *Teoh* that needs to be addressed. Does the concept of ambiguity function as a threshold test, so that it must be concluded that a provision is ambiguous before a treaty can be taken into account to produce a conclusion, or is ambiguity an ex post facto conclusion, reached after consideration of the treaty? Given what is at stake here and taking account of the approach to context set out in the *CIC Insurance Case*, the second principle is to be preferred. If that is correct, the principle of interpretation outlined in *Teoh* should be treated as another presumption of interpretation and added to the list above.¹⁶² Like other presumptions of interpretation, the assumption which supports it will be overridden by an interpretation that has been properly reached by reference to underlying purpose or object and context.

A few days after the *Al-Kateb* decision, in *Coleman v Power*¹⁶³ Gleeson CJ and Kirby J considered the relevance of the

¹⁶⁰ As to this, see the comments of Kirby J, quoted above at n 132.

¹⁶¹ Ian Brownlie above n 159.

¹⁶² See the text above at n 122.

¹⁶³ (2004) 209 ALR 182.

International Covenant on Civil and Political Rights (1966) and the *First Optional Protocol* to the interpretation of s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld). The ICCPR had been signed by Australia in 1972 and ratified in 1980. The Protocol had been acceded to in 1991. Gleeson CJ, who dissented, concluded that the qualification relating to ambiguity referred to in the first paragraph of the extract from the judgment of Mason CJ and Deane J in *Teoh*, above, applied, with the effect that s 7(1)(d) of the Act should not be interpreted by reference to the ICCPR. He observed that:¹⁶⁴

The proposition that the ICCPR can control or influence the meaning of an Act of the Queensland Parliament of 1931 is ... difficult to reconcile with the theory that the reason for construing a statute in the light of Australia's international obligations, as stated in *Teoh*, is that parliament, prima facie, intends to give effect to Australia's obligations under international law.

Kirby J disagreed, saying:¹⁶⁵

The notion that Acts of Parliament in Australia are read in accordance with the subjective intentions of the legislators who voted on them is increasingly seen as doubtful.... It does not represent the purposive approach to legislation now followed by this court. The purpose postulated in that meaning is an objective one, derived from the living language of the law as read today. It is not derived from the subjective intentions of parliamentarians held decades earlier, assuming that such intentions could ever be accurately ascertained.

The other justices did not enter the debate. The approach of Gleeson CJ is to be preferred. He appears to have taken a position that is between McHugh J's view in *Al-Kateb* and the view expressed by Kirby J in this more recent case. Gleeson CJ's approach is consistent with that of Kirby J in *Al-Kateb*, in so far as the intention to which he refers is an objective intention of the parliament as a whole. However in his insistence on a strict interpretation of the language of Mason CJ and Deane J in *Teoh*, he has parted company with Kirby J. Gleeson CJ's parliamentary intention is an imputed intention like that of Kirby J, but it is an

¹⁶⁴ Ibid 190.

¹⁶⁵ Ibid 244.

imputed intention as at the time at which the provision in question is enacted.

3. REFINEMENT OF STATUTORY PRINCIPLES BY THE COURTS

Since the introduction of ss 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth) and the provisions based on them in the states and territories, the courts have had a great deal to say about how they operate. An attempt has been made elsewhere to gather some of these statements together and to evaluate them.¹⁶⁶ Here I have limited myself to some recent cases considering the underlying central question associated with s 15AA and equivalent provisions; the identification of purpose or object.¹⁶⁷

Under s 15AA and its equivalents, in the interpretation of a provision of an Act the interpreter must attempt to discover the purpose or object underlying the Act and, if possible, adopt an interpretation furthering that purpose or object. But how the purpose is to be identified is not spelt out. Some legislation contains a statement of its purpose (or purposes).¹⁶⁸ Apart from that, the legislatures have made little contribution to the question of how to define the purpose or object relevantly. General statements contained in legislation as to its purpose or objects need to be treated with caution. As Brennan CJ and McHugh J observed in *IW v City of Perth*,¹⁶⁹ such statements should be understood by reference to other provisions contained in the legislation. Just as it makes no sense to interpret a provision without regard to the rest of the enactment, it is sometimes apparent that a general statement of purpose must be tempered by the contents of other provisions in the enactment. In other words, like any other provision in legislation, a purpose or objects clause must be interpreted in its context.

¹⁶⁶ Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) Chs 2 and 3.

¹⁶⁷ For an earlier, detailed discussion of this matter Jeffrey W Barnes (1995) above n 6, 91–119.

¹⁶⁸ This has been true of all Victorian statutes since 1985.

¹⁶⁹ (1997) 191 CLR 1, 12.

This last point is illustrated by the decision of the High Court in *Victims Compensation Fund Corporation v Brown*,¹⁷⁰ in which Heydon J delivered a judgment with which McHugh ACJ, Gummow, Kirby and Hayne JJ agreed. That judgment, and the dissenting judgment of Spigelman CJ in the New South Wales Court of Appeal decision¹⁷¹ that was reversed by the High Court, contain valuable insights into the way in which a statement of purpose should be formulated in the interpretive process. The case concerned a claim for compensation under the *Victims Support and Rehabilitation Act 1996* (NSW). Clause 5(a) of Schedule 1 of the Act provided: ‘Compensation is payable only if the symptoms and disability persist for more than 6 weeks’. The result turned on whether the word ‘and’ in cl 5(a) should be given its ordinary conjunctive meaning or whether it should be interpreted disjunctively.

It is useful first to consider the judgments given in the Court of Appeal. Mason P observed¹⁷² that cl 5(a) was ‘part of an enactment that has remedial and beneficial objectives’, adding that as a consequence ‘[t]he principle of a liberal approach to the interpretation of legislation of this kind is engaged’. One of the objectives of the Act was ‘to give effect to a statutory scheme of compensation for victims of crimes of violence’: s 3(a). The other majority judge, McClellan J, noted¹⁷³ that ‘the legislation is remedial, having as its purpose the compensation of victims of crimes of violence’. They drew on this formulation of the purpose of the legislation to support a conclusion that ‘and’ should be interpreted disjunctively, producing a result favourable to the claimant.

Spigelman CJ dissented. He found no basis for any interpretation of cl 5(a) other than a literal one. Observing that the introductory words of cl 5 were words of limitation, he continued:¹⁷⁴

¹⁷⁰ (2003) 77 ALJR 1797.

¹⁷¹ *Victims Compensation Fund Corporation v Brown* (2002) 54 NSWLR 668.

¹⁷² *Ibid* 681.

¹⁷³ *Ibid* 689.

¹⁷⁴ *Ibid* 671–2. Spigelman CJ had previously discussed the comments of the Supreme Court of the United States in *Rodriguez v United States* in the Address referred to in n 5 above, 225.

With respect to a clause intended to be limiting, it is not appropriate to apply the principle of statutory construction that beneficial legislation should be construed liberally. ...

In a passage that has frequently been cited with approval (see *Applicant A v Minister for Immigration and Ethnic Affairs*;¹⁷⁵ *Brennan v Comcare*;¹⁷⁶ *Morrison v Peacock*¹⁷⁷), the Supreme Court of the United States said in *Rodriguez v United States*:¹⁷⁸

... No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.

In the present proceedings, the respondent submitted that the purpose was to compensate victims. Even if I were to accept a legislative purpose stated at that level of generality, that would not entail that any ambiguity must be construed in such a way as to maximise compensation (cf *Favelle Mort Ltd v Murray*¹⁷⁹). In any event, the very specificity of the provisions of the legislation indicate that the legislative purpose is to provide compensation in accordance with the Act and not otherwise.¹⁸⁰

¹⁷⁵ (1997) 190 CLR 225, 248.

¹⁷⁶ (1994) 50 FCR 555, 574.

¹⁷⁷ (2000) 50 NSWLR 178, 187.

¹⁷⁸ 480 US 522 (1987) 525–6.

¹⁷⁹ (1976) 133 CLR 580.

¹⁸⁰ A similar point to that made in *Rodriguez v United States* was made locally, by Mahoney JA in *Metal Manufacturers Pty Ltd v Lewis* (1988) 13 NSWLR 315, 326: ‘[T]o see the key to the meaning of a section in the policy or purpose of the legislation is, in my opinion, to take a less than sophisticated view of the art of the parliamentary draftsmen. In many cases, the interpretation of a provision is difficult, not because the policy or purpose of the legislation is not clear, but because the section is directed, not simply to effecting that policy or purpose, but to achieving a compromise between it and other considerations. In the present case, the evil and the remedy are clear. The draftsmen sought to prevent the improper incurring of debts and to do so by imposing criminal and civil liability on relevant directors. The difficulty that arises in the interpretation of [the *Companies (New South Wales) Code*] s 556(2) arises because, having the mischief and the remedy clear, the draftsman had to determine the “true reason” of the remedy chosen, that is, how far he should apply it without

When *Brown's Case* was appealed to the High Court, Heydon J endorsed the reasoning of Spigelman CJ and concluded¹⁸¹ that there was 'no convincing textual reason emerging from the rest of the Act for departing from the ordinary meaning' of the word 'and' in cl 5(a). He added that there were indications that the word 'or' had been used in the Act when a disjunctive meaning had been intended. Furthermore, neither the history of this kind of legislation in New South Wales nor the Minister's Second Reading Speech on the bill supported a disjunctive interpretation of 'and' in cl 5(a). The major point of difference between Heydon J and the majority in the New South Wales Court of Appeal was Heydon J's view that 'in dealing with specific limited words like those in cl 5, it is not open to apply much liberality of construction'.¹⁸² He added that it was 'difficult to state the legislative purpose except at such extreme levels of generality that it is not useful in construing particular parts of the legislative language'.¹⁸³

There are a couple of important lessons here. *Brown's Case* is a reminder that the contextual approach applies to the whole Act, including purpose or objects clauses. Although it is tempting to seize upon a statement of purpose in an Act and to strive for an interpretation that furthers the purpose as defined, the task of relevantly defining purpose may be more complex. The second point, illustrated by the judgments of Spigelman CJ and Heydon J, is that the interpretive techniques encapsulated in the words 'context' and 'purpose' are necessarily interconnected and should be employed together. Although, as I have suggested, the statement of Mason J in *Lake City Freighters* appears to capture the spirit of s 15AA and its equivalents,¹⁸⁴ the statement of 'the modern approach to statutory interpretation' set out in the *CIC*

infringing the rights of otherwise innocent directors. I do not think that policy or purpose are of assistance in determining whether a director should be responsible for all debts incurred by his managing director or only for those to which he has given a particular authority or consent.'

¹⁸¹ (2003) 77 ALJR 1797, 1799.

¹⁸² *Ibid* 1804.

¹⁸³ That concept is regularly used in the interpretation of words and phrases contained in legislation. See James Spigelman, 'Statutory Interpretation: Identifying the Linguistic Register' (1999) 4 *Newcastle Law Review* 1.

¹⁸⁴ See the text above at n 55.

Insurance Case,¹⁸⁵ demands attention because it broadens Mason J's definition of context and emphasises that context is part of the initial stage of the interpretive process.

Most statutes do not contain a purpose or objects clause. In these instances the challenge is to deduce the relevant purpose of the provision being interpreted from its context, using that term in its widest sense, and without an explicit starting-point. The reasoning of the Federal Court in *Pileggi v Australian Sports Drug Agency*,¹⁸⁶ which raised an issue not altogether different from that in *Brown's Case*, provides an illustration. Regulation 17(1) of the *Australian Sports Drug Agency Regulations 1990* (Cth) provided that the Agency may ask a competitor 'orally or by written notice' for a urine sample. Sub-regulation (2) provided that such a request must state the place and time for provision of the sample. Duly authorised representatives of the Agency had followed a competitor as she went to her car. One of the representatives shouted words to the effect that the competitor was notified to attend a drug test and the other showed her a completed form which indicated the place and time at which the sample was to be provided, leaving it on the windscreen of the car before it was driven away.

It was argued on behalf of the competitor that as the request for a sample had been made partly in oral form and partly by written notice, it did not comply with reg 17. Kenny J of the Federal Court rejected that interpretation of the regulation. She stated:

... a purposive approach to interpretation would support reading the word 'and' for the word 'or'; and, having regard to ... ss 15AA and 46 of the *Acts Interpretation Act 1901* (Cth), this approach is to be preferred: see *Smith v Papamihail*,¹⁸⁷ followed in *Re Peat Resources of Australia Pty Ltd; ex parte Pollock*.¹⁸⁸ A request under regulation 17 will be made when, viewed objectively and having regard to the attendant circumstances, the words used clearly convey

¹⁸⁵ See the text above at n 61.

¹⁸⁶ (2004) 138 FCR 107.

¹⁸⁷ (1998) 88 FCR 80, 88–89 (Carr J).

¹⁸⁸ [2004] 181 FLR 454 [23] (Malcolm CJ). See also [98] (Steytler J) and [115] (McKechnie J); Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) [2.25].

to the competitor that he or she is being asked to provide a sample at a particular place and time.¹⁸⁹

Noting the ‘general and non-technical language’ of the regulation, Kenny J adopted an interpretation which, rather than being a literal reading, gave effect to what she considered to be its underlying purpose. This was that objectively speaking the competitor must have been informed of a request to provide a sample for a drug test at a specified time and place. The competitor was not required to have subjective knowledge of the time and place for provision of the sample. The less onerous requirement having been fulfilled, it did not matter that the medium used was partly oral and partly notice in writing.

In support of the approach taken, Kenny J employed a reasoning technique that is an aspect of the purposive approach; interpretation by reference to consequences:¹⁹⁰

... I doubt that it was intended that there would be no request under regulation 17 in the circumstance where a duly authorised official informs a competitor that he or she is required for a drug test, whilst handing to him or her a notification form clearly setting out the time and place for the test.¹⁹¹

Then Kenny J added that the result could not be different simply because not one but two representatives of the Agency were involved in making the request.

As well as exemplifying interpretation by reference to consequences, the reasoning of Kenny J in *Pileggi v Australian Sports Drug Agency* illustrates the way in which the relevant purpose may be constructed by the court or tribunal. The presence of the words ‘underlying purpose or object’ [emphasis added] in s 15AA and equivalent provisions supports the proposition that purpose may have to be constructed by the interpreter.

¹⁸⁹ (1998) 138 FCR 107, 118.

¹⁹⁰ See Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) [2.32]-[2.34].

¹⁹¹ (2004) 138 FCR 107, 119.

CONCLUSIONS

This is an attempt to state a few principles for interpreting legislation, based on the statutory and common law contributions that have been discussed.

- (1) Legislation is to be interpreted with reference to its underlying purpose or object and its context, using that term in its broadest sense, including extrinsic material.
- (2) The task is informed by the *Acts Interpretation Act 1901* (Cth), ss 15AA, 15AB and equivalent provisions, together with the statements of principle identified as the ‘modern approach to statutory interpretation’ in *CIC Insurance*.
- (3) This means that both the underlying purpose or object and the context are to be considered initially, rather than after it has been concluded that the provision in question is ambiguous or unclear.
- (4) A statement of purpose or object, as with any other provision contained in legislation, is to be interpreted in its context.
- (5) Presumptions of interpretation are to be used, but they are necessarily overridden by interpretations properly arrived at by reference to underlying purpose or object and context.
- (6) This includes the presumption that legislation accords with Australia’s obligations under a treaty or convention to which Australia is a party, where the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument.

At this stage it is perhaps too early to determine whether a formulation of Spigelman CJ’s ‘text-based’ interpretation in *Young’s Case* or McHugh JA’s ‘reading in’ principle in *Birmingham’s Case* should join the list, or whether a more broadly-based proposition will be applied by some courts and tribunals.