THE SWINGING PENDULUM: JUDICIAL TRENDS IN THE INTERPRETATION OF REVENUE STATUTES

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> "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean - neither more nor less."
>
> Lewis Carroll, *Through the Looking Glass*

I. INTRODUCTION

It has been suggested that the approach to statutory interpretation has changed over the last sixteen years, particularly in relation to the interpretation of revenue statutes.[1] In particular, it has been suggested that the courts have moved from a strict or literal approach (which has a tendency to favour taxpayers), towards a more purposive approach (which often tends to favour the revenue).[2]

Thus, in *Pepper (Inspector of Taxes) v Hart*,[3] Lord Griffiths said in the context of whether the courts could have recourse to Hansard:

> The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. *The days have long*

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1 A Mason, "Taxation Policy and the Courts" (1990) 2 *CCH Journal of Australian Taxation*, (Issue 4) 40 at 42.

2 This is particularly so in relation to anti-avoidance provisions.

3 [1993] AC 593.

> *passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language.* The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.[4] (Emphasis added.)

However, an examination of recent Australian revenue decisions provides no evidence of a significant change in approach. The recent decision of the New South Wales Court of Appeal in *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd*[5] is an interesting case in point. The case concerned the meaning of the technical term "rent reserved". There are two major judgments, that of Kirby P and the other of Brownie AJA (with whom Powell JA agreed). Certainly, both judgments rejected the technical meaning of the term "rent reserved" and, in so doing, both judgments found in favour of the Commissioner of Stamp Duties. However, in neither judgment is there clear evidence that a purposive approach to statutory interpretation was being adopted. Rather, so it seems, both judgments purported to apply a literal approach to find, in this instance, for the Commissioner.

The purpose of this article is to examine some of the changes which have occurred in relation to statutory interpretation and, in particular, to examine the extent, if any, to which there has been a shift from a literal approach to a purposive approach in the context of revenue legislation. As part of this examination, the decision in *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd*[6] is discussed in greater detail below. But first, let us begin at the beginning and examine the various approaches which have been taken in relation to statutory interpretation.

II. APPROACHES TO STATUTORY INTERPRETATION

A. Introduction

It need hardly be said that statutes are comprised of words - words which in isolation may admit of more than one meaning but which, when taken together, are intended by Parliament to have only one meaning. Statutory interpretation is the process by which that meaning is identified. In a remark which has been described as "cryptic",[7] Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*:[8]

> We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.[9]

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4 *Ibid* at 617.
5 (1995) 38 NSWLR 173.
6 *Ibid.*
7 J Bell and G Engle, *Cross, Statutory Interpretation*, Butterworths (3rd ed, 1995) p 26.
8 [1975] AC 591.
9 *Ibid* at 613.

It would appear that Lord Reid was attempting to draw a distinction between the subjective intentions of individuals on the one hand and the objective meaning of the words on the other hand.[10] However, the remark has become far less apt because, in the event of doubt as to the true meaning of a particular provision in a piece of legislation, recourse may now be had to such things as records of parliamentary debates, second reading speeches and explanatory memoranda, the very purpose of which is to ascertain "what Parliament meant".[11] Nevertheless, in all such cases, the ultimate goal is the proper interpretation of the legislation and recourse to such material, although it may be of assistance in the interpretative process, will not necessarily be determinative of the matter.[12]

Of course, statutory interpretation is not limited to ascertaining the meaning of the particular words used in a piece of legislation. Even if the words themselves are clear in their meaning, or their meaning can otherwise be agreed upon, questions will nevertheless arise as to their application to a particular set of facts.[13] Unfortunately, it is just not possible for the legislative drafter to cover all possible factual situations. The more the drafter tries to do so, the more complex and prolix the legislation will become and, almost inevitably, the less clear the meaning of the legislation will become. One need look no further than the current *Income Tax Assessment Act* 1936 (Cth) for proof of this assertion.[14] At times, therefore, the court must decide whether or not to apply a particular provision to a particular set of facts.

Further, to the extent to which the strict approach to the interpretation of revenue statutes ever applied (see below), its demise gives rise to other questions. If a provision appears to apply to a set of facts, should it apply, or are there grounds to decide that it should not apply? Conversely, if a provision appears not to apply, should this be the result or are there grounds to decide that it should

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10 J Bell and G Engle, note 7 *supra* at p 26. See also Dawson J in *Mills v Meeking* (1990) 169 CLR 214 at 234: "...as everyone knows, the intention of Parliament is somewhat of a fiction. Individual members of Parliament, or even of the government, do not necessarily mean the same thing by voting on a Bill or, in some cases, anything at all. The collective will of the legislature must therefore be taken to have been expressed in the language of the enactment itself."

11 See s 15AB of the *Acts Interpretation Act* 1901 (Cth), inserted in 1984, applicable to Commonwealth statutes such as the *Income Tax Assessment Act* 1936 (Cth). An equivalent provision is to be found in s 34 of the *Interpretation Act* 1987 (NSW), applicable to statutes such as the *Stamp Duties Act* 1920 (NSW). In the United Kingdom, the authority for recourse to such material can be found in *Pepper (Inspector of Taxes) v Hart,* note 3 *supra.*

12 See, for example, the words of ss 15AB(Cth) and 34(NSW) (*ibid*):"if any material...is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material". See also Lord Browne-Wilkinson in *Pepper (Inspector of Taxes) v Hart, ibid* at 635: "The court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted?"

13 A point made by J Bell and G Engle, note 7 *supra* p 2. The dual nature of statutory interpretation is expressed by them thus at p 34: "In the light of what has been said, one may say that interpretation is the process by which the courts determine the meaning of a statutory provision for the purposes of applying it to the situation before them."

14 At the time of writing this article, the *Income Tax Assessment Act* 1936 (Cth) is being progressively rewritten by the Tax Law Improvement Project, a project initiated by the former Labor government in 1993. In addition, five States or Territories (including NSW) are currently rewriting their stamp duty legislation to improve the legislation and to create uniformity between them (in matters other than rates).

apply in the particular set of circumstances? In other words, does the application or non-application of a provision give rise to results which are manifestly absurd, are inconsistent with other provisions, or are otherwise unjust or inappropriate in the circumstances?

Over the years, the courts have developed rules or canons of construction to assist in the process of statutory interpretation. However, not surprisingly, these rules have not remained static, and different judges have at different times adopted different approaches. The suggestion that there has been a shift away from a literal approach to statutory interpretation towards a more purposive approach has already been noted.[15] The question which remains, of course, is the extent of that shift.

B. The Strict Approach to the Interpretation of Revenue Statutes

It has been stated that the "traditional doctrine is clear that penal statutes are to be construed strictly [in favour of the subject] while remedial statutes are to be construed liberally".[16] Taxing statutes are analogous with penal statutes and, accordingly, the same strict approach has historically been adopted for their interpretation.[17] Thus, for example, it has been said that "if the provision is reasonably capable of two alternative meanings, the courts will prefer the meaning more favourable to the subject".[18]

This strict approach was no doubt the basis for the often quoted comment of Lord Tomlin in *Duke of Westminster v Inland Revenue Commissioners*:[19] "Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be."[20] In the same case, Lord Russell of Killowen cited with approval a passage from the judgment of Lord Cairns in *Partington v Attorney-General*:

> As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.[21]

Whether this passage truly represents an approach to the statutory interpretation of revenue statutes which was different from the approach taken in respect of other types of statutes is perhaps debatable. It is debatable because, in many ways, it appears merely to describe the literal approach to statutory interpretation, discussed below. In a passage from *The Cape Brandy Syndicate v Inland Revenue*

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15 See text at note 1.

16 D Gifford, *Statutory Interpretation*, Law Book Co Ltd (1990) p 178. But see the somewhat more cautious approach of DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, Butterworths (4th ed, 1996) p 221.

17 A Mason, note 1 *supra* at 41.

18 *Inland Revenue Commissioners v Ross and Coulter* [1948] 1 All ER 616 at 625, per Lord Thankerton.

19 [1936] AC 1

20 *Ibid* at 19.

21 (1869) LR 4 E & I App HL 100 at 122.

Commissioners,[22] only part of which is generally quoted in the texts, Rowlatt J offered this analysis of the position of both the Crown and the taxpayer under a taxing statute:

> Now of course it is said and urged by Sir William Finlay [Counsel for the Crown] that in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give that maxim a wide and fanciful construction. *It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts.* It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment; there is no equity about a tax; there is no presumption as to a tax; you read nothing in; you imply nothing, but you look fairly at what is said and what is said clearly and that is the tax.[23] (Emphasis added.)

Whatever may have been the scope of this strict (as opposed to literal) approach to the interpretation of revenue statutes, it is clear that it has little or no operation today. This can be illustrated by reference to the judgment of Mason and Wilson JJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[24] where their Honours said:

> The fact that the [*Income Tax Assessment*] Act is a taxing statute does not make it immune to the general principles governing the interpretation of statutes. The courts are as much concerned in the interpretation of revenue statutes as in the case of other statutes to ascertain the legislative intention from the terms of the instrument viewed as a whole.[25]

More recently, Kirby P said this in *Deputy Commissioner of Taxation v Chant*:[26]

> Many of the problems which have bedevilled the construction of the *Income Tax Assessment Act* have derived from the adoption of a purely textual approach and from a tendency to treat the labyrinthine complexity of the Act as an excuse for dealing with it in a special way, different from that adopted in the case of other statutes. There is no legitimate basis for adopting such an approach to the interpretation of the Act. So far as I am concerned, it is just another statute of the Federal Parliament. Within any authority binding on me, its words must be given their ordinary meaning, so far as possible to achieve their ostensible purpose.[27]

At this point, therefore, it will be convenient to examine the various approaches to interpretation of statutes generally.

C. The Literal Approach

It has been stated that in "the Australian common law tradition there have been two general approaches to the interpretation of legislation: the literal approach and the purposive approach".[28] Let us first consider the literal approach.

The following passage is often cited as an example of the literal approach:

> 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

22 [1921] 1 KB 64.
23 *Ibid* at 71.
24 (1981) 147 CLR 297.
25 *Ibid* at 323.
26 (1991) 24 NSWLR 352.
27 *Ibid* at 356.
28 DC Pearce and RS Geddes, note 16 *supra* p 22.

> 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.[29] (Emphasis added.)

The literal approach thus looks at the natural or ordinary meaning of the words used in their particular context. However, subject to certain limited exceptions, it admits of no compromise once that meaning has been found.

In relation to the interpretation of revenue statutes, the literal approach achieved a high water mark in *Federal Commissioner of Taxation v Westraders Pty Ltd*[30] but, at the same time, produced a spirited dissent from Murphy J. The case concerned a tax avoidance scheme which exploited the provisions of s 36A of the *Income Tax Assessment Act* 1936 (Cth).

As it then applied, s 36A provided (so far as is relevant) that where, for any reason including the formation of a partnership, a change had occurred in the ownership of trading stock, and the person who owned the trading stock before the change had an interest in the trading stock after the change, the parties could elect that the value of the trading stock acquired by the partnership was the cost of the trading stock to the person who owned it before the relevant change.

A partnership between the taxpayer (Westraders Pty Ltd), Jensen Mining & Investments Ltd ("Jensen") and seventeen others was formed. Jensen then transferred trading stock, being shares in a number of companies, to the partnership at market value ($111 284.20). Jensen had acquired the shares for $6 584 513. However, before the transfer to the partnership, dividends were declared by the companies out of undistributed profits, thereby reducing the market value of the shares to only $111 284.20. The parties made an election under s 36A, with the result that the shares were deemed to have been acquired by the partnership not at their market value but at their cost to Jensen ($6 584 513). The partnership sold the shares the same day at a price slightly higher than their market value ($125 199.60), thus realising a small profit. However, for tax purposes, each partner, including the taxpayer, claimed a share of the loss incurred by the partnership, being the difference between the deemed acquisition cost ($6 584 513) and the disposal price ($125 199.60). The amount of the loss claimed by the taxpayer was $248 844.

The High Court held (Barwick CJ, Mason and Aickin JJ; Wilson and Murphy JJ dissenting) that the taxpayer was entitled to a deduction for the loss. In the course of his judgment, Barwick CJ said:

> Because of the employment of the provisions of the Act to produce a very large diminution of tax, the case affords an occasion to point out the respective functions of the Parliament and of the courts in relation to the imposition of taxation. It is for the Parliament to specify, and to do so, in my opinion, as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax. The function of the court is to interpret and apply the language in which the Parliament has specified those circumstances. The court is to do so by

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29 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161-2, per Higgins J. The accuracy of the last clause of the last sentence has since been doubted: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*, note 24 *supra* at 320, per Mason and Wilson JJ.

30 (1980) 144 CLR 55.

> determining the meaning of the words employed by the Parliament according to the intention of the Parliament which is discoverable from the language used by Parliament. It is not for the court to mould or to attempt to mould the language of the statute so as to produce some result which it might be thought the Parliament may have intended to achieve, though not expressed in the actual language employed.[31]

His Honour then quoted from the judgment of Deane J (of the Federal Court) in the same case, where Deane J had said:

> If there be, in truth, such contrariety or unfairness [in allowing the deduction], the fault lies with the form of the legislation at the relevant time and not with the courts whose duty it is to apply the words which the Parliament has enacted. For a court to arrogate to itself, without legislative warrant, the function of overriding the plain words of the Act in any case where it considers that overall considerations of fairness or some general policy of the Act would be best served by a decision against the taxpayer would be to substitute arbitrary taxation for taxation under the rule of law itself...[32]

Barwick CJ commented: "The principle to which his Honour calls attention is basic to the maintenance of a free society."[33]

In dissent, Murphy J rejected the literal approach to interpretation as an "extreme, which has generally been rejected as unworkable and a less than ideal performance of the judicial function".[34] His Honour continued:

> It is universally accepted that in the general language it is wrong to take a sentence or statement out of context and treat it literally so that it has a meaning not intended by the author. It is just as wrong to take a section of a tax Act out of context, treat it literally and apply it in a way which Parliament could not have intended. The nature of language is such that it is impossible to express without bewildering complexity provisions which preclude the abuse of a strict literalistic approach.
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> It has been suggested, in the present case, that insistence on a strictly literal interpretation is basic to the maintenance of a free society. In tax cases, the prevailing trend in Australia is now so absolutely literalistic that it has become a disquieting phenomenon. Because of it, scorn for tax decisions is being expressed constantly, not only by legislators who consider that their Acts are being mocked, but even by those who benefit. In my opinion, strictly 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.
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> The circumstances envisaged by Parliament for the operation of s 36A do not include a scheme such as this...[35]

Notwithstanding these strong words, Murphy J had earlier decided against the taxpayer on a somewhat more 'literalistic' approach, namely, that a condition necessary for the operation of s 36A had not been satisfied. It was not wholly a literalistic approach, however, because the condition on which his Honour relied

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31 *Ibid* at 59-60.
32 (1979) 38 FLR 306 at 319-320.
33 Note 30 *supra* at 60.
34 *Ibid* at 79.
35 *Ibid* at 80.

was not one which was expressed in s 36A but was rather one which, in his Honour's opinion, was implied in the terms of s 36A.[36]

Nevertheless, in relation to his Honour's comments quoted above, it may be suggested that his conclusion that "it is a mistake to hold that any circumstances (however artificial and contrived) which literally fit the words in s 36A therefore comply with them"[37] represents an approach which is just as extreme as that adopted by Barwick CJ. It is extreme because his Honour provided no real guidance as to the boundaries of such an approach, other than by referring to "artificial and contrived transactions for tax avoidance purposes".[38] Thus, although it may be felt that the particular scheme in the *Westraders* case had no redeeming features to protect it from such an approach, other cases may not be so clear cut. The question which necessarily arises is where is the line to be drawn in such other cases? It is arguable that under such an approach the citizen would be left very much at the mercy of the court in this regard and may be deprived of that certainty in the interpretation of the law which the literal approach seeks to achieve.[39] In other words, to adopt the concern of Gibbs CJ expressed in *Cooper Brookes*, "it may lead judges to put their own ideas of justice or social policy in place of the words of the statute".[40]

Interestingly, Justice Murphy's approach in *Westraders* appears to have anticipated a somewhat similar development in United Kingdom jurisprudence, dubbed "the doctrine of fiscal nullity", the scope of which was first enunciated by the House of Lords in *WT Ramsay Ltd v Inland Revenue Commissioners*.[41] The potential application of this doctrine in Australia is examined below under the sub-heading G.

D. Exceptions to the Literal Approach: The Mischief Rule and the Golden Rule

In his formulation of the literal approach quoted above,[42] Higgins J admitted of no exception, not even where an application of the rule produced a result which was "inconvenient or impolitic or improbable". These words caused Mason and Wilson JJ to comment in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[43] as follows:

> It would have been better had Higgins J omitted the last clause of the last sentence from the passage which we have quoted. The last clause may be taken to suggest that the operation of a statute is not relevant to the ascertainment of its meaning and this is certainly not now the case, if it ever was. Generally speaking, mere inconvenience of

36 In this regard, Murphy J was supported by similar reasoning in the dissenting judgment of Wilson J.

37 Note 30 *supra* at 79.

38 *Ibid.*

39 "[I]n a society living under the rule of law citizens are entitled to regulate their conduct according to what a statute has said, rather than by what it was meant to say or by what it would otherwise have said if a newly considered situation had been envisaged": *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 237, per Lord Simon of Glaisdale.

40 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*, note 24 *supra* at 305.

41 [1982] AC 300.

42 See the text at note 29.

43 Note 24 *supra*.

> result in itself is not a ground for departing from the natural and ordinary sense of the language read in its context. *But there are cases in which inconvenience of result or improbability of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute.*[44] (Emphasis added.)

It is thought that in expressing these views, their Honours were referring to the so-called "mischief rule", a rule long recognised by the courts as an exception to the literal approach. The mischief rule is generally applied where "two or more competing interpretations are available".[45] The rule enables the court to have regard to the mischief which the particular provision was enacted to overcome.[46] Interestingly, however, in the passage quoted their Honours suggest that the rule may be invoked in cases of "improbability of result". Such an improbable result may suggest the need for a competing interpretation; but the mere fact that the result is improbable does not guarantee that there will always be a competing interpretation to which recourse may be had.

In fact, their Honours' formulation of the mischief rule has echoes of the "golden rule", being another recognised exception to the literal approach. This rule allows the court to depart from the ordinary or natural meaning when the words, so applied, "produce an inconsistency, or an absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification".[47] "The usual consequence of applying the golden rule is that words which are in the statute are ignored or words which are not there are read in."[48]

Indeed, immediately after the passage quoted above, Mason and Wilson JJ continued as follows:

> There is a similar problem with the related so-called "golden rule" of construction. There are statements of the rule which would confine the courts to the ordinary grammatical sense of the words used unless that produces an absurdity or inconsistency...For the reason already given in the discussion of the literal rule, departure from the ordinary grammatical sense cannot be restricted to cases of absurdity and inconsistency.[49]

Thus, Mason and Wilson JJ express the view in the *Cooper Brookes* case that departures from the literal approach are justified in situations other than those recognised by either the mischief rule or the golden rule. Clearly, this suggests a shift in the approach to statutory interpretation. Sir Anthony Mason has since said that the *Cooper Brookes* case is a case in which "the courts accepted that a purposive construction should, in appropriate cases, be applied to revenue laws".[50]

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44 *Ibid* at 320.

45 D Gifford, note 16 *supra* p 43. Alternatively, "the mischief or purpose rule required an ambiguity or inconsistency before a court could have regard to purpose": *Mills v Meeking*, note 10 *supra* at 235, per Dawson J. The rule is thus allied to the purposive approach: D Gifford, note 16 *supra* p 49.

46 The rule has its origins in *Heydon's Case* (1584) 3 Co Rep 7a, which required the court (so far as is relevant) to have regard firstly to the common law before the passing of the legislation and secondly to the mischief or defect for which the common law did not provide.

47 *River Wear Commissioners v Adamson* (1877) 2 App Cas 743 at 764, per Lord Blackburn.

48 J Bell and G Engle, note 7 *supra* p 16.

49 Note 24 *supra* at 320.

50 A Mason, note 1 *supra* at 42.

It is now convenient, therefore, to consider the application of the purposive approach and, in particular, the decision of the High Court in the *Cooper Brookes* case.

E. The Purposive Approach

In applying the purposive approach, it is first necessary to determine the purpose of the statute, or a provision of the statute, and secondly to adopt an interpretation which is consistent with that purpose.[51] In this regard, the purposive approach is an alternative means of ascertaining the "intention of Parliament".

It has been suggested that the purposive approach had its origins in the mischief rule described above.[52] However, it now seems clear that the purposive approach is wider in application than either the mischief rule or the golden rule. Thus, in the *Cooper Brookes* case, Mason and Wilson JJ said as follows:

> ...when the judge labels the operation of the statute as "absurd", "extraordinary", "capricious", "irrational" or "obscure" he assigns a ground for concluding that the Legislature could not have intended such an operation and that an alternative interpretation must be preferred. *But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.*[53] (Emphasis added.)

This is also confirmed by the terms of s 15AA of the *Acts Interpretation Act* 1901 (Cth). This section was introduced shortly after the decision in the *Cooper Brookes* case. Section 15AA provides as follows:

> 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 the purpose or object.[54]

Thus, s 15AA requires no ambiguity or inconsistency for its operation. As Dawson J said in *Mills v Meeking*[55] of a section in terms virtually identical to s 15AA:

> The requirement that a court look to the purpose or object of the Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before a court could have regard to purpose...The approach required by [s 15AA] needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction.[56]

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51 DC Pearce and RS Geddes, note 16 *supra* p 24.

52 *Ibid.*

53 Note 24 *supra* at 321. Unfortunately, their Honours do not elaborate on what might constitute "good reason".

54 Section 15AA was inserted in 1981. An equivalent provision is to be found in s 33 of the *Interpretation Act* 1987 (NSW), applicable to statutes such as the *Stamp Duties Act* 1920 (NSW).

55 Note 10 *supra.*

56 *Ibid* at 235. Dawson J was speaking of s 35(a) of the *Interpretation of Legislation Act* 1984 (Vic).

On this basis, a consideration of the purposes of the legislation or a particular provision would seem to be required *in every case*, otherwise, it would not be possible to say whether any alternative construction (based, presumably, on the literal approach) did or did not promote the purpose or object of the legislation or the particular provision.

However, Dawson J then placed a significant limitation on the operation of s 15AA. He said:

> However, if the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes and *it must be consistent with the wording otherwise adopted by the draftsman.* [Section 15AA] *requires a court to construe an Act, not to rewrite it, in the light of its purposes.*[57] (Emphasis added.)

A similar limitation was expressed by Burchett J in *Trevisan v Federal Commissioner of Taxation*[58] as follows:

> Section 15AA requires a court to prefer one construction to another. Such a requirement can only have meaning where two constructions are otherwise open. The section is not a warrant for redrafting legislation nearer to an assumed desire of the legislature. It is not for the courts to legislate; a meaning, though illuminated by the statutory injunction to promote the purpose or object underlying the Act, must be found in the words of Parliament.[59]

The tensions between the literal approach and the purposive approach are immediately apparent. The purposive approach will only be applied where a purposive construction is wholly consistent with the words used. How does one determine whether it is consistent or not? Only, it would seem, by an application, in the first instance, of the literal approach. If it is not consistent with the meaning of the words as interpreted on a literal approach, the purposive approach cannot apply and the literal approach prevails. On this basis, the purposive approach, like the golden rule and the mischief rule, remains very much an exception to the literal rule.

In the light of these judicial limitations, it is perhaps not surprising that s 15AA has had little impact in Australia to date. This is perhaps best illustrated by the only comment made in relation to s 15AA by Sir Anthony Mason in his address given in 1990:

> The High Court has generally relied upon the general rules of statutory interpretation without resorting to s 15AA.[60]

In light of this, it will now be instructive to examine the judgments in the *Cooper Brookes* case to see whether it accords with Sir Anthony Mason's suggestion that it is a case in which the courts accepted (prior to the introduction of s 15AA) that a purposive approach to statutory interpretation may be applied in relation to revenue laws.

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57 *Ibid.*

58 (1991) 29 FCR 157.

59 *Ibid* at 162. The statement that: "Such a requirement can only have *meaning* where two constructions are otherwise open" may be true as a matter of logic but should not be read as a precondition to the operation of s 15AA. Otherwise, it would represent nothing more than a restatement of the mischief rule.

60 A Mason, note 1 *supra* at 43.

F. The *Cooper Brookes* Case

In *Cooper Brookes*, a question arose as to whether a company with prior year tax losses had satisfied the "continuity of beneficial ownership" test contained in ss 80A, 80B and 80C of the *Income Tax Assessment Act* 1936 (Cth). The relevant provisions operated as follows:

- At the time, s 80A(1) denied a company the benefit of its losses unless, at the relevant time, there was not less than forty per cent continuity in the beneficial ownership of its shares carrying voting, dividend and capital rights.
- Section 80C(1) dealt with the situation where a holding company had a controlling interest in a subsidiary company which had incurred losses. In that latter situation, the continuity of beneficial ownership test had to be satisfied in relation to the shares in the holding company.
- Section 80B(5) was an anti-avoidance provision which empowered the Commissioner to have regard to certain arrangements (falling short of a change in beneficial ownership of the shares in the "loss company") which had been entered into for the purpose of enabling the "loss company" to take into account its losses. If applicable, this would result in a failure of the continuity of ownership test under s 80A(1).
- Section 80C(3) deemed references to the loss company in s 80B(5) to be references to the holding company, so as to extend the application of s 80B(5) to s 80C(1).

The facts in *Cooper Brookes* involved a holding company and its subsidiary, the latter being the loss company. Section 80C(1) thus applied. The effect of s 80C(3) was that when s 80B(5) referred to an arrangement which had been entered into for the purpose of enabling "the loss company" to take into account its losses, this was to be read as a reference to the holding company. But, of course, the holding company had incurred no losses, so that, on a literal interpretation of the provision, this condition could never be satisfied and the section could have no application.

The High Court held by majority (Gibbs CJ, Stephen, Mason and Wilson JJ; Aickin J dissenting) that it was appropriate to depart from a literal interpretation of s 80C(3) and to read it as referring, in its application to s 80B(5), to the company which had actually incurred the losses.

It may have been thought that this was an appropriate case for the application of the golden rule. Gibbs CJ described a literal interpretation of the provisions as "incongruous".[61] His Honour traced the legislative history of the provisions and concluded that the drafter had "acted by mistake".[62] Nevertheless, he described the case as "one of some difficulty",[63] and did not mention the golden rule by name as the basis for his decision. Mason and Wilson JJ described the literal interpretation as giving rise to a result which was "capricious and irrational".[64]

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61 Note 24 *supra* at 305.
62 *Ibid* at 307.
63 *Ibid.*
64 *Ibid* at 321.

They referred to the drafter's "oversight".[65] This strongly suggests that they too applied the golden rule although, like Gibbs CJ, they do not do so expressly. Mason and Wilson JJ also said that their preferred construction may also be justified on the basis of the mischief rule.[66] In contrast, Stephen J said that, but for the legislative history (which he concluded indicated an "oversight"),[67] the result of a literal interpretation "may not qualify for the epithet of irrational".[68] Aickin J (in dissent) was of the view that it was not a case of "manifest absurdity".[69]

It is in this context that Mason and Wilson JJ expressed the views which have been quoted above.[70] However, it may be doubted whether their Honours did anything other than apply ordinary principles of statutory construction.[71] A purposive approach, based on the mischief rule may have assisted their conclusion; however, the "capricious and irrational" result of the application of the literal approach was, it is submitted, sufficient for them to invoke the golden rule and depart from a literal approach. The decision may stand as authority that taxing statutes are subject to the general principles of statutory construction;[72] in contrast, it may be doubted whether it truly represents a new or different approach to statutory construction. Sir Anthony Mason's comment in relation to s 15AA, quoted above, is certainly consistent with this analysis,[73] even if his view that *Cooper Brookes* recognises the appropriateness of the purposive approach to the interpretation of revenue statutes is not.

G. Fiscal Nullity

The principle of "fiscal nullity" was developed by the courts in the United Kingdom in a series of cases commencing with *WT Ramsay Ltd v Inland Revenue Commissioners*[74] and including *Inland Revenue Commissioners v Burmah Oil Co Ltd*[75] and *Furniss v Dawson.*[76]

In *Ramsay*, the taxpayer had derived capital gains. For the purpose of sheltering the capital gains from tax, the taxpayer entered into a "capital loss scheme", the effect of which was to reduce substantially the amount of the capital gains on which tax was payable. The scheme was carried out by a series of pre-ordained steps, each of which was interdependent on the others. The scheme had no commercial justification and no real losses were incurred, because corresponding gains (exempt from tax) were derived. It was held by the House of Lords that the court was not bound to look at the scheme on a step-by-step basis but, in contrast,

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65 *Ibid* at 323.
66 *Ibid* at 322.
67 *Ibid* at 312.
68 *Ibid* at 310.
69 *Ibid* at 339.
70 See, in particular, the passage quoted at note 53.
71 A point also made by ICF Spry, "The Cooper Brookes Case and Statutory Construction" 10 *Australian Tax Review* 208 at 212.
72 See the passage from their Honours' judgment quoted above at note 25.
73 See the passage quoted at note 60 *supra.*
74 Note 41 *supra.*
75 (1981) 54 TC 200.
76 [1984] AC 474.

was entitled to look at the scheme as a whole, to ascertain the legal nature of the transaction and the tax consequences which flowed from the transaction. On this basis, it was held that under the scheme there was neither a gain derived nor a loss incurred.[77]

In *Furniss v Dawson*,[78] Lord Brightman stated the principle in these terms:

> First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (ie business) end...Secondly, there must be steps inserted which have no commercial (business) *purpose* apart from the avoidance of a liability to tax - not "no business *effect*". If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look to the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.[79]

The doctrine of fiscal nullity was subsequently applied by Vinelott J in *Ingram v Inland Revenue Commissioners*.[80] The case concerned a stamp duty avoidance scheme. The taxpayer sought to avoid stamp duty on the conveyance of a property worth £145 500 by first granting a 999 year lease of the property for a premium of £145 000 and an annual rental of £25. This reduced the value of the property to £500. The property, subject to the lease, was then conveyed for that amount to an intermediary and, ultimately, to the taxpayer. Although acknowledging that stamp duty is a charge upon instruments and not transactions,[81] his Lordship applied the doctrine of fiscal nullity and disregarded the lease, treating the whole transaction as a composite contract for the sale of the property at its original value.

The High Court of Australia has considered the application of the doctrine of fiscal nullity both in a stamp duty context and an income tax context. In *Comptroller of Stamps (Vic) v Ashwick (Vic) No 4 Pty Ltd*,[82] the High Court considered a stamp duty avoidance arrangement. The taxpayer sought the benefit of an exemption from duty applicable to the conveyance of real property made by a company to a shareholder in the course of any distribution of assets in consequence of a reduction of the company's capital. The taxpayer subscribed for 10 000 $1 redeemable preference shares in a company, paying a premium of $99 on each share. On a redemption of the shares, the taxpayer was entitled to receive both the par value of the shares and the premium in either cash or property or both. The company redeemed the shares by paying $100 443 in cash and by executing in favour of the taxpayer a transfer of land valued at $899 557. An exemption from stamp duty was claimed in respect of the transfer of the land.

The High Court chose not to express a concluded view on "how far, if at all, the *Ramsay* principle is part of the law governing the judicial process in Australia".[83] On the assumption that the doctrine of fiscal nullity was available, the Court

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77 Note 41 *supra* at 328, per Lord Wilberforce. In the course of his judgment, Lord Wilberforce referred to the views of Barwick CJ in the *Westraders* case (note 30 *supra* at 326), but did not consider that they should exclude the approach adopted.

78 Note 76 *supra*.

79 *Ibid* at 527, per Lord Brightman.

80 [1986] Ch 585.

81 *Ibid* at 593.

82 (1987) 163 CLR 640.

83 *Ibid* at 654, per the Court (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

concluded that it had no application in the case before it. The Court did not consider that the conveyance of the property was the result of a pre-ordained series of transactions having no purpose other than the avoidance of stamp duty. The Court took the view that the "intervening steps between the allotment of the shares and the conveyance were distinct and disparate steps which called for the making of discretionary decisions from time to time by the parties involved".[84] It was held that the conveyance was exempt from stamp duty.

The decision thus left open the question of whether, and to what extent, the principle of fiscal nullity applied in Australia. In relation to income tax, the question was decisively answered in *John v Federal Commissioner of Taxation.*[85] It was said:

> If any such or similar principle is to be applied in relation to the [Income Tax Assessment] Act, it is one which must be capable of implication consonant with the general rules of statutory construction. One such general rule, expressed in the maxim *expressum facit cessare tacitum*, is that where there is a specific statutory provision on a topic there is no room for implication of any further matter on that same topic. The Act, in s 260 and now in Part IVA, makes specific provision on the topic of what may be called tax minimisation arrangements and thereby excludes any implication of a further limitation upon that which a taxpayer may or may not do for the purpose of obtaining a tax advantage.[86]

Unfortunately, this decision does not necessarily determine the question so far as stamp duty legislation is concerned. As a broad generalisation, the stamp duty statutes of the Australian States and Territories do not contain general anti-avoidance provisions similar to either the former s 260 or Part IVA of the *Income Tax Assessment Act* 1936 (Cth). However, it is interesting to note that in his 1990 address, Sir Anthony Mason said: "The doctrine of fiscal nullity has not taken root in Australia."[87] It is thought, therefore, given the High Court's obvious reluctance to apply the principle in the *Ashwick* case, that it is unlikely that the doctrine of fiscal nullity will be adopted in Australia as a rule of construction of stamp duty statutes. Whilst perhaps more clearly delineated than the approach of Murphy J in the *Westraders* case, the doctrine of fiscal nullity nevertheless involves an element of discretionary judicial law-making which most Australian judges have, to date, shown no enthusiasm either to assume or exercise.

III. THE *COMMONWEALTH FUNDS MANAGEMENT* CASE

Let us conclude this review of statutory interpretation by examining the decision in *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd.*[88]

The case concerned an agreement for lease of land entered into between the taxpayer, Commonwealth Funds Management Ltd, as lessee, and the Sydney Cove

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84 *Ibid* at 655. This may have been so; nevertheless, the intention of the parties was clear.

85 (1989) 166 CLR 417.

86 *Ibid* at 434, per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

87 A Mason, note 1 *supra* at 42.

88 Note 5 *supra.*

Redevelopment Authority, as lessor. Under the agreement, the taxpayer was to be given possession of land (not all of which was owned by the Authority at the date of the agreement) for the purpose of constructing a large office building upon it. Upon completion of the building, the taxpayer was to be granted a 99-year lease of the land, upon the terms contained in an unexecuted copy of the lease annexed to the agreement.

The agreement (including the annexed lease) provided, firstly, for the payment of specified amounts of "occupation fees" during the construction phase and, secondly, for the payment of specified amounts of rent during the subsequent term of the lease. The agreement also provided for the payment, during the term of the lease, of additional amounts or rent which were to be calculated by reference to the net income which the taxpayer derived from the building which it was to construct. At the date of the agreement, of course, these additional amounts of rent were not capable of being ascertained.

In the first instance, duty was paid on the agreement for lease, calculated by reference to the amounts of rent actually specified in the agreement as payable during the term of the lease. Subsequently, the Commissioner sought further information from the taxpayer regarding any additional rent which had been paid or was payable under the lease, to enable him to impose additional duty in accordance with the terms of s 78D of the *Stamp Duties Act* 1920 (NSW).

Section 78D applied where "the rent reserved by a lease...is subject to reappraisement in any way whatsoever during the term of the lease so that the total rent payable during such term is not ascertainable at the commencement of the lease". The taxpayer argued that the term "rent reserved" had a precise technical meaning well known to the law, namely, something created or reserved out of a present demise of land. On this basis, an agreement for lease, being the relevant document for stamping, could never give rise to "rent reserved", as it was necessarily antecedent to the demise of land under the lease itself. This argument was accepted by Windeyer J at first instance.[89] The Commissioner appealed to the Court of Appeal.

The Court of Appeal upheld the Commissioner's appeal. Both Kirby P and Brownie AJA (with whom Powell JA agreed) rejected the technical meaning of the term "rent reserved" and, instead, adopted the meaning of "rent payable". There was clearly rent payable under the terms of the agreement for lease and, on the basis of this meaning, there was clearly "rent reserved" to which s 78D could apply.

The taxpayer's argument to the Court was described by Kirby P as follows:

> Although the former approach of construing revenue legislation strictly and contrary to the revenue has now been abandoned, the duty of the Court remains to give meaning to the Act according to its terms: see *Cooper Brookes*... It would have been easy for the parliament to have approached the raising of revenue in a different way, and, if persisting with the use of the word "rent", to have used an expression such as "payable" rather than a past participle verb "reserved". The Court is bound to give effect to the purpose of parliament as expressed in its language. If, by that language, the possible objective of the Commissioner misfired, that was simply the consequence of the choice of a technical expression. Revenue legislation is full of technical

89 (1995) 95 ATC 4004.

> expressions. It is not for the Court to cure problems presented by the language chosen. It must be faithful to the purpose of parliament as expressed in the language actually used...

The difficulty which the Court faced in refuting this argument is obvious. Clearly, the purpose of the *Stamp Duties Act* 1920 (NSW) and, in particular, s 78D, was not promoted by the adoption of the technical meaning of the term "rent reserved". Yet a meaning which *would* have promoted the purpose of the Act, namely that the term meant "rent payable", was not, on its face, consistent with the normally accepted, albeit technical, meaning of the words "rent reserved". And if it was not consistent, it could not be substituted for the normal (or literal) meaning. So much had been made clear by Dawson J in *Mills v Meeking*[90] and by Burchett J in *Trevisan*[91] in relation to s 15AA. It is no doubt for this reason that neither Kirby P nor Brownie AJA even refer to s 33 of the *Interpretation Act* 1987 (NSW) which is, of course, the New South Wales equivalent of s 15AA.

Clearly, however, the Court was reluctant to find for the taxpayer. The purpose of s 78D was clear, even if its language was inappropriate. If an alternative meaning of the term "rent reserved" based on the purposive approach was not available, then the only course left for the Court was to find that the term "rent reserved" had a meaning other than its strict technical meaning. And this is exactly what their Honours did. Kirby P held that by the time s 78D was introduced into the *Stamp Duties Act* 1920 (NSW), the term "rent reserved" meant "no more than rent agreed to be paid".[92] Brownie AJA (with whom Powell JA agreed) held that the word "reserved" added nothing to the word "rent" which meant nothing more than "contractual rent" or rent payable.[93]

This, of course, was a neat solution to the problem and avoided any difficulties with a direct application of the purposive approach. To all intents and purposes, the literal approach had been adopted.

In support of his preferred meaning, Kirby P also referred to the Parliamentary debates at the time of introduction of s 78D, in which the Attorney-General referred to "rent payable", rather than "rent reserved". His Honour noted that this was permissible in the event of ambiguity.[94] His Honour then concluded his judgment as follows:

> In the event of ambiguity in the meaning to be assigned to the words "rent reserved", the governing duty of this Court is to give effect to the purpose of parliament expressed in its language. It is not to approach the construction of the Act in a different, narrow or strict way because it is an Act for the raising of revenue. That approach, apt for a time when taxes were imposed upon unrepresented, or inadequately represented, citizens is no longer apt to legislation enacted by a parliament elected by, and accountable to, all citizens. Revenue legislation is no longer treated as special. There is neither a presumption in favour of, nor against, the construction urged by the Commissioner. The court's duty is simply to try to work out what parliament was getting at when it enacted the provisions in dispute. When that question is asked, there can be little doubt what the parliament meant in the instant

90 Note 10 *supra*.
91 Note 58 *supra*.
92 Note 5 *supra* at 176.
93 *Ibid* at 180-183.
94 *Ibid* at 177.

> case. It was not reviving medieval or narrow technical notions by the use of the words "rent reserved". It was simply addressing a new phenomenon of delayed rental calculations and providing a formula for the calculation of duty thereon. This Court must give effect to parliament's purpose.[95]

Kirby P refers to "parliament's purpose"; however, it is by no means clear that his Honour was suggesting that he had adopted a purposive approach. As noted above, no mention is made of s 33 of the *Interpretation Act* 1987 (NSW). Further, in view of his Honour's earlier finding that the term "rent reserved" meant "no more than rent agreed to be paid",[96] there was in fact no competing construction (notwithstanding the taxpayer's argument to the contrary) and no ambiguity. Any suggestion of "ambiguity" is more likely to be a reference to that requirement of s 34 of the *Interpretation Act* 1987 (NSW), the New South Wales equivalent of s 15AB of the *Acts Interpretation Act* 1901 (Cth), which allows recourse to be had to extrinsic material such as Parliamentary debates.

IV. CONCLUSION

There can be little doubt that significant changes have taken place in relation to the interpretation of revenue statutes. It is quite clear now, if not before, that the same rules of construction apply to revenue statutes as to other statutes. The view that revenue statutes are penal in nature seems now to have only historical relevance.

What is not so clear is the extent to which a purposive approach to statutory construction has supplanted the more traditional approach, that is, the literal approach to statutory construction. Notwithstanding the judgment of Mason and Wilson JJ in the *Cooper Brookes* case, and the subsequent introduction of s 15AA into the *Acts Interpretation Act* 1901 (Cth) and its equivalent in s 33 of the *Interpretation Act* 1987 (NSW), the Courts have shown a reluctance to regard the purposive approach as a real alternative to the literal approach. Rather, its use has been expressed to be limited to situations where a purposive construction is consistent with the ordinary (or literal) meaning of the words used. In other words, the purposive approach appears very much to be an exception to the literal approach, rather than an alternative to it.

Of course, if this analysis is correct, courts will face difficulties when they are inclined to favour a purposive construction in circumstances other than where a purposive approach is permitted. Nowhere is this better illustrated than by the decision of the New South Wales Court of Appeal in *Commissioner of Stamp Duties (NSW) v Commonwealth Funds Management Ltd*,[97] discussed above. The Court's conclusion is wholly consistent with a purposive approach. Yet nowhere is it suggested that this was the approach adopted. On the contrary, on the face of the decision, the Court's conclusion was reached by a straightforward application of the literal approach. In so doing, of course, the Court had to reject the

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95 *Ibid* at 177-8.
96 *Ibid* at 176.
97 Note 5 *supra*.

"ordinary" technical meaning of the term "rent reserved", being the meaning which a literal approach might have been expected to support, and find an alternative "ordinary" meaning. This, of course, the Court did. One can only question whether this approach has any more merit than a more robust application of the purposive approach, in which the purposive approach is recognised as a true alternative to the literal approach, rather than a mere exception to it.