eJournal of Tax Research vol. 18, no. 1, pp. 193-301

Fiscal neutrality:
Foreign ghost in our GST machine?[1]

Gordon Brysland[2]

Abstract

This note argues for the orthodox view that EU neutrality is not part of the GST law. It is no foreign ghost in our GST machine, to use the metaphor selected for this note. The reasons for a negative answer on the issue are diverse, over-lapping, consistent, and ultimately mundane. They also go beyond any mere analysis of the respective legislation and cases in each jurisdiction. The stark differences between the two legal systems and, more importantly, their interpretation protocols are vital to explaining why the orthodox view on EU neutrality is not just the better one, but effectively the only viable one.

After a review of the VAT neutrality concept generally, attention turns in this note to the landmark judgment of Hill J in *HP Mercantile,* his later comments on 'underlying philosophy', and the way they have been received by the courts and commentators. This leads to a review of the principles which apply in our system of statutory interpretation, and discussion of the handful of Australian cases which directly consider EU neutrality. That neutrality, like our own, however, is properly to be understood only within its particular legal, economic and political milieu. A review of EU interpretation principles, the impact of EU law in Britain and selected EU neutrality cases then follows.

Observations made on these matters flow into a discussion of *Rio Tinto*, consumption, practical business tax and tie-breaker issues. The central conclusion reached by this note is that our interpretation protocols, and the real differences between the respective legal systems, only serve to confirm that EU neutrality is not part of the GST law. This is a less than surprising outcome. The Div 11 neutrality we do have, however, works to acceptable modern VAT standards of purity and integrity. Final comments are made about the 'life of our GST statute' so far and its future prospects.

Key words: goods and services tax, underlying philosophy and Hill J, *HP Mercantile* decision, VAT concept of fiscal neutrality, input tax credit access, statutory interpretation in Australia, judicial approaches to the GST law, Australian neutrality cases, statutory interpretation in Europe, teleological principles, EU system of law, European law in Britain, EU neutrality cases, *Rompelman* decision, key aspects of EU neutrality, adoption of EU neutrality in Australia rejected, *Rio Tinto Services* decision, impact of foreign cases, policy preconception, relevance of consumption, practical business tax, application of tie-breaker rules.

---

[1] This note revisits themes considered in a paper given at the *Law Council Tax Committee Workshop* on 18 October 2008, and later comments on the issue in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* (at 40-42).

[2] Gordon Brysland, Assistant Commissioner, Tax Counsel Network, Australian Taxation Office, BEc, LLB (Hons), FAAL. All views and any errors are mine alone. Special thanks to Michael Evans and Oliver Hood.

TABLE OF CONTENTS

1.	**INTRODUCTION**	194	**10.**	**EU NEUTRALITY CASES**	266
2.	**VAT AND NEUTRALITY**	198	**11.**	**COMMENTS ON NEUTRALITY**	277
3.	***HP MERCANTILE***	203	**12.**	**FOREIGN GHOST REVISITED**	279
4.	**HILL J'S FINAL COMMUNIQUÉ**	205	**13.**	***RIO TINTO SERVICES***	285
5.	**VIEWS OF COMMENTATORS**	210	**14.**	**CONSUMPTION ISSUES**	289
6.	**INTERPRETATION IN AUSTRALIA**	214	**15.**	**PRACTICAL BUSINESS TAX**	294
7.	**AUSTRALIAN NEUTRALITY CASES**	244	**16.**	**TIE-BREAKER IDEAS**	297
8.	**INTERPRETATION IN EUROPE**	248	**17.**	**SOME CONCLUSIONS**	299
9.	**EUROPEAN LAW IN BRITAIN**	261			

1. INTRODUCTION

1.1 A New Tax System

Twenty years ago, a package of bold tax reforms was implemented in Australia. They included replacing the old sales tax regime with a new GST law[3] substantially modelled on VAT-type legislation in force elsewhere. Political, economic and legal arguments supported passage of the package as a whole.[4] One legal reason was that the High Court had held that State franchising fees were constitutionally invalid.[5]

The *Tax Reform* paper with the draft legislation said the existing system was 'out of date, unfair, internationally uncompetitive, ineffective and unnecessarily complex'.[6] Hill J said that *Tax Reform* (the paper) 'was a political document and did not purport to be otherwise.[7] The *Australian Financial Review* on 3 August 1998 ran an article headed *– MPs see 'monster' tax reform as a winner*. The decision effectively to hand the GST revenue over to the States and Territories was described as a 'game-changer'.[8]

The *A New Tax System* Bills for the original blueprint were introduced into parliament on 2 December 1998. A nineteen month gestation period involving a range of complications followed – 'long and turbulent', as one commentator described it.[9] The new laws finally took effect on 1 July 2000. In the prophetic words of Alfred Deakin, the States were 'financially bound to the chariot wheels of the central Government'.[10]

---

[3] The *A New Tax System (Goods and Services Tax) Act 1999* and the *A New Tax System (Goods and Services Tax) Regulations 1999*.
[4] Stewart *Reforming Tax for Social Justice* (1998) 23 *Alternative Law Journal* 157.
[5] *Ha v New South Wales* (1997) 189 CLR 465, cf Williams *'Come in Spinner': Section 90 of the Constitution and the Future of State Government Finances* (1999) 21 *Sydney Law Review* 627.
[6] Treasury *Tax Reform: not a new tax, a new tax system* (at 5).
[7] Hill J *Tax Reform: A Tower of Babel; Distinguishing Tax Reform from Tax Change* (2005) 1/2 *Journal of the Australasian Tax Teachers Association* 1 (at 17).
[8] Alley, Bentley & James *Politics and tax reform: A comparative analysis of the implementation of a broad-based consumption tax in New Zealand, Australia and the United Kingdom* (2014) 24/1 *Revenue Law Journal* 1 (at 13).
[9] McCarthy *The Australian GST – Why is it the Way it is and Where to from Here?* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* 61 (at 61).
[10] Deakin *Federated Australia: selections from letters to the Morning Post 1900-1910* (at 97).

It had been fully a quarter of a century since the *Asprey Report* recommended a broad-based consumption tax. Essentially, we picked and chose and innovated on GST from laws elsewhere.[11] The full history of this is traced by Kathryn James in a *British Tax Review* article – *We of the 'never ever'*,[12] and by former Tax Commissioner Michael D'Ascenzo in his paper for this conference – *Making the Value Added Tax Happen*.[13]

We generally liked the new drafting style of the GST law,[14] though the terminology jarred for a few. One federal judge said the statute was 'horribly named',[15] while another called it 'spin'.[16] It looked more to principles in some areas, though it descended into familiar rule-based tactics in others. We looked twice at the volume of exemptions, seen as 'anathema' generally to value added taxes,[17] but which temper their regressive tendencies. Overall, we were impressed by the vision of the project.

Downes J said our GST was 'based on a simple idea'.[18] That idea, commented Blow J, was that the 'very nature of the GST, as a species of value added tax, is that burden of all GST payable by the members of a chain of suppliers is passed on to the ultimate consumer'.[19] A tax based on a simple idea is not the same thing as a simple tax, of course, particularly when the simple idea is high-level economic in nature On whether GST is a simple tax, Richard Vann said – 'To put it mildly, simplicity was oversold'.[20]

We came to find that the GST law not as simple as we had hoped for, and that we had in fact not escaped classification cases.[21] Making certain public goods GST-free as a way of addressing inherent regressivity would only add to the complexities of administration and provide fertile ground for costly disputes.[22] And, many of us wondered what influence foreign VAT principles may have in Australia.

---

[11] Acquisition supplies, the RITC regime, our financial supply regulations, and subjection of government to the tax, for example – Brysland *GST and Government in 2010* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* 3.

[12] James *We of the "never ever": The History of the Introduction of a Goods and Services Tax in Australia* [2007] *British Tax Review* 320, cf Alvey & Roan *A Public Policy Case Study of the Introduction of the Goods and Services Tax: tax reform can be successfully achieved* (2015) 10 *Journal of the Australasian Tax Teachers Association* 67.

[13] D'Ascenzo *Making the Value Added Tax Happen* [2019] *ATAX Where Policy Meets Reality Conference paper*.

[14] Richardson & Smith *The Readability of Australia's Goods and Services Tax Legislation: An Empirical Investigation* (2002) 30 *Federal Law Review* 475 (at 485).

[15] Lindgren J *The Curious Case of GST* [2009] *TIA National GST Intensive Conference paper* (at 3).

[16] Logan J *Where are we with GST – black letter or the practical business tax?* [2008] *TIA National GST Intensive Conference paper* (at [2]).

[17] Crawford, Keen & Smith *Value Added Tax and Excises* in Adam (ed) *Dimensions of Tax Design: The Mirrlees Review* 275 (at 305), Ebrill *The Modern VAT* (at 100), James *The Rise of the Value-Added Tax* (at 50-52).

[18] Downes J *Eleven years of the 'practical business tax'* (February 2012) 70 *Law Institute Journal* 70 (at 70).

[19] *Pebruk Nominees Pty Ltd v Woolworths (Victoria) Pty Ltd* [2003] TASSC 94 (at [40]).

[20] Foreword to Chiert GST: Insurance and Financial Services (at v).

[21] *Lansell House Pty Ltd v FCT* [2010] FCA 329 (crackers), *JMB Beverages Pty Ltd v FCT* [2010] FCAFC 68 (de-alcoholised wine).

[22] cf Carmody *Commentary – Preparing For Tax Reform and the New Millennium: Don't Draw a GST Line Around Food* (1999) 2/4 *The Tax Specialist* (at 171).

1.2 Underlying philosophy

Justice Graham Hill of the Federal Court was particularly interested in how the EU concept of fiscal neutrality might influence credit access in Australia. No-one disagrees that strong and robust neutrality is a pre-condition for delivery on the economic policy objectives of the tax. In one influential article, Hill J described this as part of the 'underlying philosophy' of the VAT system.[23] The question I have posed is whether EU neutrality has become some foreign ghost in our GST machine, as the judge hinted at.[24]

My answer to this question is 'no'. The reasons for this are ultimately mundane. To the extent that any principle akin to 'fiscal neutrality' in either of its EU senses is part of Australian law (either substantively or as some rule of construction), it is to be found first and exclusively within our own GST provisions by reference to orthodox principles of interpretation. The fact that the EU trader, in principle and in practice, is to be relieved entirely of input tax borne is an observation about the operation of foreign law in other jurisdictions. This is the case whether we are talking about neutrality as part of the EU treaty principle of equal treatment, or neutrality as a rule of construction derived from the language and experience of VAT directives. My question, however, only opens the door to another (better) question – that being, if EU neutrality is no part of our GST law, do we have a native neutrality of our own and if so what does it look like?

1.3 Our native neutrality

Of course we do, whether or not the GST law or extrinsic materials use that precise term. This is what Div 11 is all about, subject to Div 129. EU statutes and cases decided under them do not impact, control or extend our own neutrality. EU neutrality is not some foreign ghost in our GST machine. Certainly, as Justice Hill hinted, there remains a wider international and historical perspective to our GST law.

That alone, however, provides no obviously coherence basis for reception into our law of EU neutrality. No formal linkage mechanism is present. No multilateral treaty was involved to which Australia is party. We passed no legislation like the *European Communities Act 1972*. No other rule makes good the connection – the language, context and cultures are too different. High-level economic policy (domestic or foreign) or its preconception cannot leverage the GST law. Appeals to broader philosophical notions tend to fall on deaf ears. More fundamentally, the text of Div 11 was enacted in its own terms, chosen with care and presumed deliberation.

These conclusions should come as no surprise.[25] The idea that EU 'fiscal neutrality' produces some presumptive bias in favour of the Australian taxpayer where interpretation is contested is problematic on its face. Rather like the 'private domestic consumption' yardstick of the economic policy analysts, EU neutrality is a distraction from the normal legal task of determining what parliament meant by the words it used in our GST law.[26] Australia did not acquire an EU-style neutrality by some process of

---

[23] Hill J *GST Anti-Avoidance – Division 165* [1999] *Journal of Australian Taxation* 295 (at 306).
[24] cf Evans *Neutrality, like truth, is rarely pure and never simple* (2017) 17 AGSTJ 3, Evans *VAT Principles* [2018] taxsifu materials, Evans *Capital Raising costs – the wrong side of the mirror?* (2007) 10/3 *The Tax Specialist* 120, Evans *The Value Added Tax treatment of real Property – An Antipodean Context* in White & Krever (eds) *GST in Retrospect and Prospect* (at 243-249).
[25] cf Olding *An ATO perspective on the creditable purpose test* (2012) 12 AGSTJ 131.
[26] cf *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (at 613), *Harrison v Melham* [2008] NSWCA 67 (at [160]) for example.

international osmosis. The routine task of resolving constructional choice issues is performed by the 'unqualified statutory instruction' in s 15AA of the *Acts Interpretation Act 1901*. My conclusion is also supported by comments in three decided cases: one directly, the other two by necessary inference. Block DP was right in 2009 to hold that the 'principle of fiscal neutrality is not part of Australian law'.[27]

1.4 Policy and reality

The theme for this conference – *Where Policy Meets Reality* – may suggest an atmosphere of some regret. Has the bright idealism of the GST architects and the economic policy people been forced back to the grim reality of mere legal rules? Perhaps for some, the wake started in 2008 when the High Court decided *Reliance Carpet*.

Certainly, that case said important things which only go to underline that EU neutrality is no foreign ghost in our GST machine. The real reality, however, is that we do have a robust neutrality deriving from the GST law itself. It functions rather like its EU counterpart, and it is reckoned by many to work more efficiently. It may not be the same as the EU one and it may not be pure, but neutrality in the EU is far from pure either. The EU counterpart is acknowledged to be reduced by inconsistencies and is unpredictable in its outworkings. It is subject to judicial whim and manipulation; it is opaque in its evolutions; it is said to create uneven outcomes, and it is constantly besieged by member states acting in their own self-interest.[28]

When it comes to our neutrality, economic policy may have hit the reality of the law 20 years on. This can happen in a 'rule of law' system. The EU system by contrast is said by many to be governed by the 'rule of economics'.[29] John Davison and Roderick Cordara in their capital raising paper say that that the 'economic analysis of transactions which is often made by the European courts is potentially of universal significance'.[30]

In the opinion of some EU commentators – 'If we depart from the economic rules … there will be no coherent system at all and the best thing to do with the Directives is to burn them'.[31] Even if our domestic neutrality is different to the EU, are we really at the point where we should scrap our neutrality and start again? Even those critical of our system concede that the GST law is 'by and large, an efficient tax'.[32] Our neutrality outcome is no great policy failure on any objective measure.[33]

As *Rio Tinto* confirms, the credit access system works to modern standards with acceptable purity and integrity.[34] It also calibrates well to the Vatopian model proposed by law professors Schenk and Oldman.[35] The objective experience supported by

---

[27] *Electrical Goods Importer v FCT* [2009] AATA 854 (at [52]).
[28] cf Cordara *The Sixth VAT Directive and Key Legal Issues under VAT in Europe* (at 4), James & Stacey *The limits of supply* (2002) 2 AGSTJ 41 (at 44).
[29] Watson & Garcia *EU VAT and the Rule of Economics* [2009] *International VAT Monitor* 190.
[30] Davison & Cordara *The raising of capital – a European perspective* (2004) 4 AGSTJ 1 (at 9).
[31] Watson & Garcia *Babylonian Confusion Following ECJ's Decision on Loyalty Rewards* [2011] *International VAT Monitor* 12 (at 12).
[32] Evans *Taxation of goods and services in Australia – commentary* (2009) 9 AGSTJ 30 (at 35) for example.
[33] cf Stitt *GST – History, Experience & Future* [2007] *Federal Court Judges' Taxation Workshop paper* (at 2).
[34] *Rio Tinto Services Ltd v FCT* [2015] FCA 94, *Rio Tinto Services Ltd v FCT* [2015] FCAFC 117.
[35] Schenk & Oldman Value Added Tax – A Comparative Approach (at 463), cf James The Rise of the Value-Added Tax (at 41), McCarthy *The Australian GST – Why is it the Way it is and Where to from Here?* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* 61 (at 66).

external feedback reveals a system which is tolerably coherent and largely functional. Denis McCarthy, for example, said that our GST law 'stacks up well in its design and application'.[36] Kevin O'Rourke wrote that Australia 'has a world-class GST administration both for the nuts and bolts of processing BASs and for the bells and whistles of world-first legislation'.[37] Apparently the Europeans envy it.

In terms of economic performance against wider federal financial goals and benchmarks,[38] however, there are a range of difficult strategic challenges ahead to confront,[39] particularly in the post-COVID-19 world. As a matter of plain fact, the GST system is performing progressively poorly against those goals and benchmarks as time goes by. As a matter of economic notoriety, both the rate and base cry out for re-examination and upgrading. Ten percent is unsustainable into the future. Even if the exemption categories are 'reasonably settled' in their application,[40] calls for rationalisation and expansion of the base are increasingly heard. Part of the problem is that any changes require a political consensus of the jurisdictions. Without irony, Peter Costello recently spoke about the 'lock mechanism' which had underwritten the success of the GST reforms and guaranteed that the system had remained 'remarkably stable'.[41]

2. VAT AND NEUTRALITY

2.1 Emergence and uptake

Indirect consumption taxes have been around since ancient times – it is 'historically the oldest form of taxation'.[42] Jonathan Barrett sets out the political economy VAT background of Thomas Hobbes and John Locke in a 2010 article – *Equity and GST Policy*.[43] He traces emergence of the concept of a consumption tax from a Wilhelm von Siemens essay on the *Veredelte Umsatzsteuer* a century ago, through the primitive French TVA of 1948 (*la taxe de valeur ajoutée*) presided over by Maurice Lauré (refined in 1954), and the Michigan *Business Activity Tax* of 1953.[44] Professor Terra

[36] McCarthy *The Australian GST – Why is it the Way it is and Where to from Here?* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* 61 (at 74).
[37] O'Rourke *GST Administration – a practitioner's perspective* [2019] *ATAX Where Policy Meets Reality Conference paper* (at 15).
[38] Evans *GST: Where to next?* [2019] *Where Policy Meets Reality Conference paper* (at 14), Smith *GST as a secure source of revenue for the States and Territories* [2019] *Where Policy Meets Reality Conference paper* (at 12-13).
[39] Smith *GST as a secure source of revenue for the States and Territories* [2019] *Where Policy Meets Reality Conference paper*, Evans *GST: Where to next?* [2019] *ATAX Where Policy Meets Reality Conference paper* (at 5).
[40] cf Martin *The Case for Specific Exemptions from the Goods and Services Tax: What should we do about Food, Health and Housing?* [2019] *ATAX Where Policy Meets Reality Conference paper* (at 25).
[41] Alcorn *Cabinet papers 1998-99: Coalition's campaign to unleash the GST laid bare* (1 January 2020) *The Guardian*.
[42] Lang *The Case for Taxing Consumption* (1990) 1 *Revenue Law Journal* 186 (at 187), cf James *The Rise of the Value-Added Tax* (at 1-3), Schenk & Oldman *Value Added Tax – A Comparative Approach* (at 2).
[43] Barrett *Equity and GST Policy* [2010] *Journal of Applied Law and Policy* 15.
[44] cf Schenk & Oldman *Value Added Tax – A Comparative Approach* (at 395-400).

provides more detail on this issue,[45] and on early American theory and writings.[46] Regarding the French TVA, Carl Shoup observed[47] –

> The latest innovation is the value-added tax. Its emergence in France illustrates the process by which a sort of continuing ferment of improvisation now and then gives rise to an invention of the first order.

Other commentators have pointed out that VAT 'should be considered the most important event in the evolution of tax structure in the last half of the twentieth century',[48] and that it has become 'one of the most dominant revenue instruments across the world'.[49] Logan J said that our new GST 'is just an Australian exemplar of a value added type of regressive, indirect tax that was known to and described by public finance economists well before the Second World War'.[50] At any rate, rapid international and some intra-national[51] uptake of this model followed its adoption by the *European Economic Community* in 1967. The United States remains the only developed country not to legislate nationally or federally for a value-added tax.

Back in Europe, VAT Directives became subject to progressive evolution and refinement, culminating in Directive 2006/112/EC. The detail of the history in this respect is traced in *SAE Education*.[52] New Zealand is recognised as having the purest VAT system in terms of neutrality.[53] When our GST was introduced, Graeme Cooper and Richard Vann in their *Sydney Law Review* article concluded that our purity 'is midway between the EU and New Zealand versions'.[54] As Michael Evans gently reminds us – *Neutrality, like truth, is rarely pure and never simple*.

Tax laws 'work best when they interfere least with production and consumption decisions in a properly functioning market'.[55] The central idea is that those decisions 'should be made based on their economic merits and not for tax reasons'.[56] As Schenk and Oldman state, VAT 'is intended to tax personal consumption comprehensively, neutrally, and efficiently'.[57] VAT also 'has been the biggest EU success story do far',[58]

---

[45] Terra *Creditable Input Tax and Shares in EU VAT – Attribution, Apportionment and Allocation* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* (at 179-180), cf Brooks *An Overview of the Role of the VAT, Fundamental Tax Reform, and a defence of the Income Tax* in White & Krever (eds) *GST in Retrospect and Prospect* (at 603-609).
[46] Adams *Fundamental Problems of Federal Income Taxation* (1921) 35 *Quarterly Journal of Economics* 553.
[47] Shoup *Taxation in France* (1955) 8 *National Tax Journal* 328.
[48] Cnossen Global Trends and Issues in Value Added Taxation (1998) 5 *International Tax and Public Finances* 399 (at 399).
[49] James *The Rise of the Value-Added Tax* (at 1).
[50] Logan J *Where are we with GST – black letter or the practical business tax?* [2008] *TIA National GST Intensive Conference paper* (at [3]).
[51] *First Nations Goods and Services Tax Act 2003* in Canada, for example.
[52] *SAE Education Ltd v RCC* [2019] UKSC 14 (at [11-20]).
[53] Preface to White & Krever (eds) *GST in Retrospect and Prospect* (at vii-viii), cf *Value-Added Tax Act 1991* (South Africa).
[54] Cooper & Vann *Implementing the Goods and Services Tax* (1999) 21 *Sydney Law Review* 337 (at 344).
[55] James *The Rise of the Value-Added Tax* (at 26).
[56] van Brederode *Systems of General Sales Taxation: Theory, Policy and Practice* (at 45).
[57] Schenk & Oldman *Value Added Tax – A Comparative Approach* (at 33).
[58] Vanistendael *Can Member States Survive EU Taxation? Can the European Union Survive National Taxation?* in Baker & Bobbett (eds) *Tax Polymath* (at 369).

and neutrality 'is the leading principle of VAT'.[59] The House of Lords has described neutrality as a fundamental principle or 'golden rule' of value added tax.[60] Marco Greggi says effective neutrality 'is the European VAT's Holy Grail: a path rather than an achievement'.[61] Michael Ridsdale observes that the ECJ 'has consistently synonymised the purpose of the VAT directives with the principle of fiscal neutrality'.[62]

Neutrality in the EU is used in two distinct senses, as explained by Dr Friederike Grube in her 2017 article.[63] First, it reflects the constitutional principle of 'equal treatment' insofar as equal transactions are to be treated the same way, and taxable persons carrying on the same activities are to be treated the same way for VAT purposes. The VAT position in this regard reflects the wider European principle of equal treatment.[64] Second, neutrality is an interpretive principle derived from successive VAT directives.[65] While this over-simplifies the EU picture,[66] for present purposes it provides a working model.

The classic statement of neutrality, quoted and applied numerous times with something approaching devotional fervour, comes from the 1985 decision in *Rompelman*[67] -

> … the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of the valued added tax therefore ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way.

Neutrality expresses the notion that traders in a VAT system are entitled, as a matter of primary right and systemic imperative, to recoup all the tax they bear on inputs. They are to be, to the greatest extent, fiscally neutral insofar as business inputs are concerned. Fiscal neutrality is the mechanism which prevents cascading – that is, the 'tax-on-a-tax' effect so noxious to proper functioning of any VAT system. One commentator refers to this under the general heading – 'Detestability of double taxation'.[68]

From an economic policy perspective, GST is to be wholly eliminated as a cost component in the price of taxable outputs.[69] Best-practice VAT design requires that

---

[59] Kogels *Making VAT as Neutral as Possible* (2012) 21 *EC Tax Review* 230, Amand *VAT neutrality: a principle of EU law or a principle of the VAT system?* [2013] *World Journal of VAT/GST Law* 163 (at 163).
[60] *CEC v Liverpool Institute for Performing Arts* [2001] 1 WLR 187 (at 1190).
[61] Greggi *Neutrality and Proportionality in VAT: Making Sense of an (Apparent) Conflict* (2020) 48 *INTERTAX* 122 (at 123).
[62] Ridsdale *Abuse of rights, fiscal neutrality and VAT* [2005/2] *EC Tax Review* 82 (at 93).
[63] Grube *Neutrality and input tax deductibility* (2017) 17 AGSTJ 8.
[64] *LuP GmbH v Finanzamt Bochum-Mitte* [2006] ECR I-5123 (at [48]), CRC v Rank Group plc [2011] Joined Cases C259/10 and C-260/10 (at [61]), *Sub One Limited v CRC* [2012] UKUT 34 (at [11]).
[65] cf Evans *VAT Principles* [2018] taxsifu (at 6-11), Terra & Kajus *A guide to the European VAT Directive* (at 79).
[66] cf Amand *VAT neutrality: a principle of EU law or a principle of the VAT system?* [2013] *World Journal of VAT/GST Law* 163.
[67] *Rompelman v Minister van Financiën* [1985] ECR 655 (at 664), most recently – *Mitteldeutsche Hartstein-Industrie AG v Finanzamt Y* [2020] EUECJ C-528/19 (at [24]).
[68] Parisi *Interpreting the A New Tax System (Goods and Services) Tax Act 1999* [2006] unpublished paper (at 15-17).
[69] *HP Mercantile Pty Ltd v FCT* (2005) 60 ATR 106 (at 116 [45]), cf GSTR 2008/1 (at [43]).

taxable persons receive 'a full and immediate deduction (tax credit) of the VAT on inputs (including capital goods) from the VAT on output'.[70]

2.2 Economic angles

Fiscal neutrality is an economic and fiscal purity mechanism of critical importance. No true VAT system can function without a robust, substantial and predictable neutrality. This is fundamental to the point of having the status of Holy Writ. From an economic point of view, however, it is understood that complete neutrality 'would require supply to be perfectly elastic and demand to be perfectly inelastic' – conditions which rarely if ever collide in the real world.[71] In practice, the ultimate tax burden will often fall on those who are least able to shift it onto someone else.[72]

Consumption taxes, however, are said to promote economic growth better than other taxes.[73] Ben Terra and Julie Kajus state that VAT is 'believed to be superior to an income tax in fostering capital formation (and economic growth)'.[74] However, the 'relative burden of the VAT falls most heavily on those with least, thus making [even] the good VAT a regressive tax'.[75] As Edmonds J pointed out, GST is 'an inherently regressive tax by nature and as a stand-alone tax will never qualify on grounds of vertical equity'.[76] And it would be even more regressive in its impacts, but for the food, health and housing exemptions which apply widely.[77]

2.3 Division 11 rules

Our basic rules on fiscal neutrality, even if not called that, are found in Div 11 of the GST law. You are 'entitled to the input tax credit for any *creditable acquisition that you make' - s 11-20. The main condition for there being a creditable acquisition is that 'you acquire anything solely or partly for a creditable purpose' – s 11-5(a). Something is acquired for a creditable purpose 'to the extent that you acquire it in *carrying on your *enterprise' – s 11-15(1). As observed by Ross Stitt, the first limb of s 11-15 has not proved to be particularly controversial.[78] Neutrality, therefore, is legislated directly

---

[70] Cnossen *Global Trends and Issues in Value Added Taxation* (1998) 5 *International Tax and Public Finances* 399 (at 400).
[71] van Brederode *Systems of General Sales Taxation: Theory, Policy and Practice* (at 32).
[72] Cooper *The Discrete Charm of the VAT* [2007] *University of Sydney Law School Legal Studies Research Paper No 07/65* (at 30), cf Cooper *A Few Myths About the GST* (2000) 23 *UNSW Law Journal* 252 (at 252-255).
[73] International Monetary Fund *Fiscal Exit: From strategy to Implementation* [11/2010] *Fiscal Monitor* 80, for example.
[74] Terra & Kajus *A Guide to the European VAT Directives* (at [7.6.1.3]), James *The Rise of the Value-Added Tax* (at 30-31).
[75] James *The Rise of the Value-Added Tax* (at 33), Krever *Designing and Drafting VAT Laws in Africa* in Krever (ed) *VAT in Africa* 9 (at 18).
[76] Edmonds *Judicial Assessment of the Performance of the Goods and Services Tax as an Instrument of Tax Reform* [2011] *TIA National GST Intensive Conference paper* (at [20]).
[77] Martin *The Case for Specific Exemptions from the Goods and Services Tax: What should we do about Food, Health and Housing?* [2019] *ATAX Where Policy Meets Reality Conference paper* (at 6), cf Ghafari *GST design and structure* (2004) 4 AGSTJ 100.
[78] Stitt *Uncertainties Surrounding Input Tax Credit Entitlement in Australia* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* (at 119), Olding *An ATO perspective on the creditable purpose test* (2012) 12 AGSTJ 131 (132).

into our law in tolerably clear terms, and it is comprehensive in its operation. Michael Evans has referred to s 11-15(1) as the 'elegant provision'.[79]

The counterpoint to this open statement of domestic credit access is its legal denial 'to the extent that … the acquisition relates to making supplies that would be *input taxed' – s 11-15(2)(a). This paragraph was described by Lindgren J in *AXA Asia Pacific* as the 'blocking provision', and so it has come to be known.[80]

Edmonds J of the Federal Court made three important points about s 11-15(2)(a) – (A) it is in different terms to normal VAT rules in this regard, (B) it gives rise to the 'greatest difficulties of construction', and (C) it is defectively drafted.[81] The categories of input taxed supplies most corrosive of neutrality in our system, of course, are financial supplies and residential premises. We also have a unique regime of 'reduced credit acquisitions' at the rate of 75% for financial supply providers. This enhances underlying neutrality by reducing competitive disadvantage suffered through outsourcing.[82] Our GST law engineers its own neutrality in the precise and concise terms selected with studied deliberation by the federal parliament.

2.4 Theatres of advantage

In a GST system where input tax credits operate much like virtual cash in the general economy,[83] an ongoing battle is naturally fought by taxpayers against the ATO to extend credit access and neutrality wherever possible. Where the line is to be drawn between utopian neutrality and s 11-15(2)(a) has a profound and enduring impact across the economy. Fiscal neutrality is of greatest importance to financial institutions, life insurers and others making financial supplies as a core business element. They are the ones with potentially the greatest stake in a pure or purer neutrality taking hold in our GST system. In their book, Peter McMahon and Amrit MacIntyre said that where the line is to be drawn on s 11-15(2)(a) issues 'is difficult to say, and early guidance from Australian courts on this issue will be of critical importance'.[84]

The only rational economic position for those entities (indeed, any entities) is to push neutrality as far as the courts or the Commissioner will allow. Sometimes the attempt is to force it into areas of prior controversy – capital raising by share issue for example[85] – at other times, into new and emerging theatres of perceived advantage – minesite housing comes to mind. Of prime concern, therefore, is the relevance of fiscal neutrality in the *Rompelman* sense to Australian law. Does EU neutrality inform the reach of our own provisions (as some foreign ghost in our GST machine perhaps), or could it impose

[79] Evans *Capital Raising costs – the wrong side of the mirror?* (2007) 10/3 *The Tax Specialist* 120 (at 121).
[80] *AXA Asia Pacific Holdings Ltd v FCT* [2008] FCA 1834 (at [38]), cf de Wijn *Input tax relief and financial supplies: Nexus and relevance for apportionment* (2012) 12 AGSTJ 125 (at 125-126).
[81] Edmonds *Interpretation of s 11-15: Significance of the text, context and history* (2012) 12 AGSTJ 79 (at 84-85).
[82] Explanatory Memorandum (at [5.1]), Treasury *Consultation Document* 1999 (at 12), Explanatory Statement to the GST Regulations [Attachment E (at 2-3)], Edmundson *Financial Supplies and Reduced Input Tax Credits* (2003) 6/3 *The Tax Specialist* 113 (at 114), Parisi *Investment management concept eludes principled delineation* (2008) 8 AGSTJ 221 (at 225), GSTR 2004/1 (at [89-101]).
[83] Illustrated indirectly by *Multiflex Pty Ltd v FCT* [2011] FCA 1112, *FCT v Multiflex Pty Ltd* [2011] FCAFC 142.
[84] McMahon & MacIntyre *GST and the financial markets* (at 31).
[85] *Kretztechnik AG v Finanzamt Linz* [2005] 1 WLR 3755.

an insistent and presumptive bias in favour of credit recovery where interpretation of the GST law yields contrary indications of roughly comparable merit?

3. *HP MERCANTILE*

3.1 At the hearing

The appeal from the AAT decision in *Recoveries Trust*[86] was heard by a Full Federal Court bench comprising Hill, Stone and Allsop JJ on 4 May 2005. A range of GST cases had already worked their way to various courts and tribunals - most notably on validity,[87] transitional relief,[88] damages,[89] valuation,[90] residential premises,[91] going concerns,[92] contract law issues,[93] legal costs,[94] gambling,[95] stamp duty,[96] and body corporates.[97] However, this was to be the first appellate level stress-testing of crucial credit denial provisions in Div 11 of the GST law. It was also before a presiding judge widely acknowledged as the preeminent master of the entire tax field – Justice Graham Hill. To say there was an air of anticipation is an understatement. Stephen Gageler SC, now a judge on the High Court, appeared for the taxpayer, with Roderick Cordara SC for the Commissioner. As many may recall, there was standing room only.

3.2 Landmark decision

On 8 July 2005, the Full Federal Court handed its landmark decision in *HP Mercantile Pty Ltd* in favour of the Commissioner.[98] Hill J gave the main judgment of the court (as was expected), the other two judges (Stone & Allsop JJ) each agreeing, but adding comments of their own. Hill J made no mention of 'neutrality' by name in his reasons. However, he drew particular attention to the cascading problem and the 'genius of a

---

[86] *Recoveries Trust v FCT* [2004] AATA 1075, cf Stitt *Creditable Purpose: The Recoveries Trust Case* [2005] *ATAX 17th Annual GST & Indirect Tax Weekend Workshop paper*, Penning *Recovering input tax under the GST Act* (2005) 39 *Taxation in Australia* 380, Wolfers & Evans *Critical Comment: The recoveries Trust – the test case with no credi[ta]ble purpose* (2004) 4 AGSTJ 287.
[87] *McKinnon v Commonwealth* [2000] FCA 936, *Halliday v Commonwealth* [2000] FCA 950, *O'Meara v FCT* [2003] FCA 217, cf *Reference re Goods and Services Tax* [1992] 2 WWR 673 (Canada), Cominos & Dwyer *Constitutional Problems in the Goods & Services Tax* (1999) 28 *Australian Tax Review* 69.
[88] *ACP Publishing Pty Ltd v FCT* [2005] FCAFC 57, *DB Rreef Funds Management Ltd v FCT* [2005] FCA 509, *Coles Supermarkets Pty Ltd v Westley Nominees Pty Ltd* [2005] FCA 839.
[89] *Interchase Corporation Ltd v ACN 010 087 573 Pty Ltd* [2000] QSC 013, *Shaw v Director of Housing (No 2)* [2001] TASSC 2.
[90] *Orti-Tullo v Sadek* [2001] NSWSC 855, *Kurc v Eyecare Pty Ltd* [2004] VCAT 1139, *Stephens v Gerandu Pty Ltd* [2004] VCAT 1350, *CSR Ltd v Hornsby Shire Council* [2004] NSWSC 946, *Derring Lane Pty Ltd v Fitzgibbon* [2005] VCAT 552.
[91] *Marana Holdings Pty Ltd v FCT* [2004] FCAFC 307, *Karmel & Co Pty Ltd v FCT* [2003] AATA 481.
[92] *Midford v FCT* [2005] AATA 623.
[93] *ETO Pty Ltd v Idameneo (No 123) Pty Ltd* [2004] NSWCA 368, *Empire Securities Pty Ltd v Miocevich* [2004] WASC 118, *Eroc Pty Ltd v Amalg Resources NL* [2003] QSC 074, *Cermak v Ruth Consolidated Industries Pty Ltd* [2004] NSWSC 882, *Igloo Homes Pty Ltd v Sammut Constructions Pty Ltd* [2004] NSWSC 1213.
[94] *Treneski v Comcare* [2004] AATA 98, *Fiduciary Ltd v Morningstar Research Pty Ltd* [2004] NSWSC 381, *Thornton v Apollo Nominees Pty Ltd* [2005] TASSC 38.
[95] *TAB Limited v FCT* [2005] NSWSC 552.
[96] *CSR v Royal & Sun Alliance Insurance Australia Ltd* [2003] VSCA 177, *Gould Management Pty Ltd v CCSR* [2004] NSWADT 66.
[97] *Re Banyandah Towers* [2001] QBCCMC 33, *Villa Edgewater v FCT* [2004] AATA 425.
[98] *HP Mercantile Pty Ltd v FCT* [2005] FCAFC 126 (at [45]).

system of value added taxation' – that being, the mechanism of credits.[99] The judge had expressed similar views in his foreword to the book, *GST and the financial markets*.[100]

Robert Olding noted it was not surprising that Hill J made comments about cascading.[101] One commentator, however, thought the facts of the case were inadequate to fully explore this issue.[102] The judge repeated earlier views about the main characteristics of our GST, noted some of its unique features, and pointed to deliberate choices made to depart from foreign models. He also railed against any concentration on 'linguistic analysis' as a proper tool for resolving what s 11-15(2)(a) means,[103] instead applying the standard purposive approach required by the High Court (as he was bound to).[104]

3.3 Legislative scheme

Justice Hill said this approach requires the court to prefer a construction which gives effect to legislative purpose, to be identified 'both by reference to the language of the statute itself and also any extrinsic material which the court is authorised to take into account'. The judge then observed (at [45]) –

> The language of the GST Act, as seen in the context of value added taxation generally, makes it clear that the legislative scheme is that a taxpayer will be entitled to an input tax credit where it is necessary that a credit be given to ensure that output tax payable by the taxpayer is not imposed upon an amount which already includes tax payable at some early stage in the commercial cycle. Where possible, GST is not to be found embedded in the price or consideration on which output tax is calculated when taxable supplies are made.[105]

Several points may be made. The first is that, even if not formally named that way, the statement from *HP Mercantile* describes the core components of the neutrality principle. Second, it is the language of the GST law, seen against the wider context of VAT more generally, which makes it clear what the scheme of the legislation is in this regard. Third, the statement of Hill J is framed by reference to a 'where it is necessary' test regarding credit access. This phraseology may be taken to indicate a systemic bias for credit access generally, or the presence of an exceptional class or classes of situations where access is properly to be denied. Fourth, and importantly, the principle is to apply where it is otherwise available. Hill J concluded (at [66]) that the interpretation of the Commissioner 'is supported by the syntax, the policy and the surrounding legislative context'. Accordingly, the judge dismissed the taxpayer's appeal.

---

[99] *HP Mercantile Pty Ltd v FCT* [2005] FCAFC 126 (at [13]).
[100] McMahon & MacIntyre *GST and the financial markets* (at vii), cf James & Stacey *The limits of supply* (2002) 2 AGSTJ 41 (at 42-43).
[101] Olding *Trends in the Interpretation of GST law* [2007] *ATAX 19th Annual GST and Indirect Tax Weekend Workshop paper* (at [9]).
[102] Penning *Creditable purpose, intention and timing* [2005] *ATAX 20th Annual GST & Indirect Tax weekend Workshop paper* (at 11).
[103] cf *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 (at [34]).
[104] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, s 15AA of the *Acts Interpretation Act 1901,* referred to.
[105] cf *ACP Publishing Pty Ltd v FCT* [2005] FCAFC 57 (at [2-3]), *Sterling Guardian Pty Ltd v FCT* [2006] FCAFC 12 (at [14-15]).

3.4 Stone and Allsop JJ

The other judges both agreed with the reasons given by Hill J, but added comments of their own. Stone J explained why the relationship required by s 11-15(2)(a) raised a question of law.[106] This was necessary given AAT parties may only appeal to the Federal Court on a question of law, rather than a question of fact.[107]

Allsop J (at [88-90]), with disarming frankness it must be said, stated that, were it not for the explanation given by Hill J of the scheme, purpose and context of the GST provisions, he would have inclined to a different outcome from a purely textual (perhaps literal) point of view. Ross Stitt noted that, although the judgment of Allsop J is less than half a page in length, '[y]et it tells us a great deal about the interpretation of GST and the potential pitfalls'.[108] Edmonds J commented that Allsop J's comments 'highlight the importance of the consequences which flow from matters concerning the statutory scheme and the purpose and context of the legislation'. In short, Edmonds J continued, 'they can lead to a totally opposite result'.[109]

4. HILL J'S FINAL COMMUNIQUÉ

4.1 Interpret or translate?

A month after *HP Mercantile* was handed down, and just a few weeks before his death,[110] Justice Hill delivered what was to be his final communiqué on things GST in a paper to the *Taxation Law & Research Policy Institute* at Monash University[111] – *To interpret or translate? The judicial role for GST cases*. The judge began by pointing out that, as Acts of the Commonwealth parliament, our GST law is subject to the ordinary principles of statutory interpretation. It could hardly be otherwise.[112] Hill J described these as being mainly 'rules of common-sense'.[113] This echoed judges in *Cooper Brookes* quoting Professor Dennis Pearce on the point.[114]

One American judge has said statutory interpretation 'ought to be realistic, pragmatic, free of contrary-to-real-world presumptions and fundamentally consistent with common sense'.[115] Appeals to 'common sense' are often no more a rhetorical device under which the speaker assumes the power of fundamental truth to which a univocal community agrees. So stated, it is a notoriously plastic standard. Basten JA said the days have passed

---

[106] cf *FCT v Eskandari* (2004) 54 ATR 695 (at 701-702).
[107] s 44(1) of the *Administrative Appeals Tribunal Act 1975*.
[108] Stitt *GST – History, Experience & Future* [2007] *Federal Court Judges' Taxation Workshop paper* (at 21).
[109] Edmonds J *Five Years of GST* [2005] *TIA National GST Intensive Conference paper* (at [38]).
[110] His last judgment (dissenting in a Falun Gong matter) was handed down on his behalf a few days after the judge died – *NAJT v Minister* [2005] FCAFC 134. A further case on which he sat was decided by the two remaining judges – *SXBB v Minister* [2005] FCAFC 186 (at [1]).
[111] Hill J *To interpret or translate? The judicial role for GST cases* (2005) 5 AGSTJ 225.
[112] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 (at [57]), cf Pearce & Geddes *Statutory Interpretation in Australia* (at [9.41]).
[113] cf Middleton *Statutory Interpretation: Mostly Common Sense* (2016) 40(2) *Melbourne University Law Review* 626, for example.
[114] *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297 (at 320), Gageler J *Legislative Intention* (2015) 41/1 *Monash University Law Review* 1 (at 4), *Department of Family and Community Services v Abraham* [2016] FamCA 847 (at [204-205]).
[115] Keeton *Statutory Analogies in Legal Reasoning* (1993) 52 *Maryland Law Review* 1192 (at 1204).

since interpretation was seen as an 'exercise in common sense'.[116] Common sense is viewed with suspicion, he added, as it is seen as evasive and may conceal political choices.[117] In the context in which Hill J uses the expression, however, in large part it merely expresses a contrast with intensive analysis.[118]

Hill J went on to observe that various parts of the GST legislation draw on income tax principles and experience.[119] Next, the judge said that, given that our law is based to some extent on foreign analogs and concepts, questions inevitably arise as to how much regard should be had to foreign cases in the interpretation of provisions modelled to some degree on other VAT regimes. This was only natural given there was little else to go on in the early days. In a paper two years earlier, Hill J had said that, in many cases, it will only be possible to understand our legislation by reference to case law on problems in the legislation of New Zealand and elsewhere'.[120]

The principle he framed around this observation (at 18) was that courts 'will always have regard to the case law of other jurisdictions in order to determine what the mischief was …' The maturing of our GST jurisprudence, however, and directions set by the High Court have dimmed the light foreign cases might otherwise shine on what our GST law may mean.[121] Lindgren J added his own caution, saying it was important 'to look very closely' at the legislative text under which a foreign case is decided. He went on to say 'it is not only the text that counts: concepts and assumptions underlying the foreign legislation may also have to be taken into account'.[122] By 2004, Paul Stacey as technical editor of the *Australian GST Journal* had detected a divergence in Australian practice away from the 'old world of European VAT', a trend he said was 'set to continue'.[123] Articles with titles like 'VAT lessons from Europe' soon became rare.

4.2 Underlying philosophy

Roderick Cordara was also interested 'to see how far the Australian judiciary feel the need or the ability to take a similar line [to EU fiscal neutrality cases]'.[124] The problem suggested by Hill J (at 225) …

> … will be that, while the Australian GST may not be modelled, in a particular respect, upon the law of any other GST or VAT country, the underlying

---

[116] Basten *Legislative Intention* (2019) 93 *Australian Law Journal* 367 (at 367).
[117] cf Burton *The Rhetoric Of Tax Interpretation - Where Talking The Talk Is Not Walking The Walk* (2005) 1 *Journal of The Australasian Tax Teachers Association* 1.
[118] *Comptroller-General of Customs v Pharm-a-Care Laboratories Pty Ltd* [2018] FCAFC 237 (at [24]) for example.
[119] cf Evans *Creditable purpose – can the relationship be to past activities?* (2004) 4 AGSTJ 131, Brad Miller *Another GST win for the Commissioner!* (2005) 40/3 *Taxation in Australia* 147 (at 153), Walpole *Keeping to the straight and narrow: interpreting the GST and income tax* (2005) 5 AGSTJ 193, de Wijn *Input tax relief and financial supplies: Nexus and relevance for apportionment* (2012) 12 AGSTJ 125 (at 125).
[120] Hill J *Some Thoughts on the Principles Applicable to the Interpretation of the GST* (2003) 6 *Journal of Australian Taxation* 1 (at 14), cf Edmundson *GST and Financial Supplies: A Comparative Analysis of Legislative Structure* (2001) 30 *Australian Tax Review* 132 (at 138).
[121] cf *AXA Asia Pacific Holdings Ltd v FCT* [2008] FCA 1834 (at [96]), Lindgren J *The relevance of overseas case law to Australia's GST* (2009) 13/2 *The Tax Specialist* 58, Edmonds *Recourse to foreign authority in deciding Australian tax cases* (2007) 36 *Australian Tax Review* 5.
[122] Lindgren J *The Curious Case of GST* [2009] *TIA National GST Intensive Conference paper* (at 19-20), cf *Food Supplier v FCT* [2007] AATA 1550 (at [17]).
[123] Stacey *GST as one-eyed ogre or a multi-headed beast?* (2004) 4 AGSTJ 3 (at 20).
[124] Cordara *The Sixth VAT Directive and Key Legal Issues under VAT in Europe* (at 27).

> philosophy to be found in the interpretation of VAT laws in other countries (particularly the European Union) may influence the interpretation of the Australian GST. This, in turn, leads to a consideration of the place which the European Union Directives on harmonisation of the VAT have had, both in that philosophy and in interpretative rules which have been adopted from them.

What exactly did Justice Hill mean by these remarks? There is no denying that VAT generally has a deep and enduring political and economic philosophy which underpins its practical expression. In an earlier paper, the same judge had set out his more general views on the issue – *How is tax to be understood by the courts?*[125] There he said (at 234) that 'judicial decision making should not proceed by reference to judicial conscience or political philosophy but principled decision'. This view is nothing but mainstream.

Later in his paper (at 238), Hill J returned to the putative role of EU neutrality saying that the EU Directives might be used for interpretational purposes insofar as they 'represent the way value added tax is supposed to work in the continent which invented VAT'. This suggests something like the 'vibe' comments that became popular in early discourse about our new tax.[126] Hill J added that the Directives themselves may also be a 'useful source of principle' in interpretation or a 'useful source of law or premise for legal reasoning'. This goes further than mere 'vibe' or economic nuance. To illustrate, the judge quoted *Rompelman* for the idea that system is meant to relieve the trader 'entirely' of the VAT burden on all economic activities. The three ingredients in this regard are purpose, extent and coverage.

4.3 Problems with policy

Hill J also commented on the basic difficulty of ascertaining policy for a new law 'necessarily written in language of great generality'. Characterising policy at the correct level is a real problem in all statutory settings,[127] as is the danger of reader preconception[128] and the arguably greater sin described as some judges treating policy as an empty vessel into which they may 'unrestrainedly pour their own wishes'.[129] On this score more widely, an international trend towards the 'judicialization of public policy' is being actively tracked and evaluated.[130]

---

[125] Hill J *How is Tax to be Understood by Courts?* (2001) 4/5 *The Tax Specialist* 226 (at 226), cf Tretola *The Interpretation of Taxation Legislation by the Courts – A reflection on the Views of Justice Graham Hill* (2006) 16 *Revenue Law Journal* 73 (at 86).

[126] Cooper *Why GST is Not a Consumption Tax ... and Why it Matters* [2003] *TIA GST Intensive Conference paper* (at 1), Howe & Penning *Creditable purpose and cancelled financial supplies – It's all in the timing* [2005] *ATAX 17th Annual GST & Indirect Tax Weekend Workshop paper* (at 1) quoting Denis Denuto in *The Castle* – 'It's Mabo, it's justice, it's law, it's the vibe and – No, that's it. It's the vibe!', cf Lazanas & Thomas *GST and the changing role of policy, purpose and the "vibe" in statutory interpretation* (2011) 12 AGSTJ 30.

[127] *Carr v Western Australia* [2007] HCA 47 (at [5-7]), *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* [2013] HCA 36 (at [40-41]).

[128] *Australian Education Union v Department of Education & Children's Services* [2012] HCA 3 (at [28]), Certain Lloyd's Underwriters v Cross [2012] HCA 56 (at [26]), *Williams v Wreck Bay Aboriginal Community Council* [2019] HCA 4 (at [79]).

[129] *Momcilovic v The Queen* [2011] HCA 34 (at [450]).

[130] South *Are Legislative Intentions Real?* (2014) 40 *Monash University Law Review* 853, Ekins *The Nature of Legislative Intent* (at 887).

Neither is policy a reflection of or to be derived from subjective sources, Hill J pointed out. It is an objective exercise undertaken by reference to objective indicators. Also, there is the notorious fact that extrinsic materials are often of little use in identifying policy or purpose (let alone fixing meaning). Justice Hill recognised in his *To interpret or translate?* article that purposivism has its constitutional and practical limits, and that 'courts cannot act as legislators' to cure defects and fill in gaps where problems are revealed.[131] The Full Federal Court in the *Multiflex* appeal years later referred to this observation as one of 'enduring wisdom'.[132]

4.4 Special leave refused

On 16 June 2006, ten months after Hill J died, a High Court panel comprising Gummow ACJ and Kirby J refused special leave sought by the taxpayer.[133] Following spirited argument, Gummow ACJ summed-up by saying that a 'purely textual analysis' may give some support for the taxpayer position. Despite this, he and Kirby J 'reached a conclusion similar to that of Justice Allsop'. Gummow ACJ continued –

> However, as Justice Hill showed in what was the leading judgment delivered in the Full Court, the statutory scheme and legislative context and purpose carry the day for the respondent Commissioner.

Refusal of special leave is not generally taken to affirm the correctness of the decision below 'unless, of course, the court goes out of its way to say that it does agree with what was said in the court below'.[134] Arguably *HP Mercantile* falls into this category.

Bruce Quigley, in his contribution to the book *GST in Retrospect and Prospect,* described it in terms of the High Court giving its 'tacit approval' to the approach of Hill J in *HP Mercantile*.[135] Whether or not the decision derives some stronger precedential force by reason of the manner in which special leave was refused, however, does not much matter. The case was referred to by the High Court in *Travelex*;[136] it has been approved by the NSW court of appeal;[137] and it is taken as read by the Full Federal Court in almost every GST case it hears.[138] Apart from all that, the reasons of Hill J in *HP Mercantile* have a legal gravity and authority which compel our attention into the future.

---

[131] *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9 (at [65]), cf *CCA19 v Secretary, Department of Home Affairs* [2019] FCA 946 (at [90-91]), *Fremantle Lawyers Pty Ltd v Sarich* [2019] WASCA 48 (at [4]), *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* [2018] VSCA 294 (at [60]).
[132] *FCT v Multiflex Pty Ltd* [2011] FCAFC 142 (at [1]).
[133] *HP Mercantile Pty Ltd v FCT* [2006] HCATrans 320, Brysland *GST and Government in 2010* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* 3 (at 45-47).
[134] *Mihaljevic v Longyear (Australia) Pty Ltd* (1985) 3 NSWLR 1 (at 25), cf *Algama v Minister* (2001) 194 ALR 37 (at [62]), *North Ganalanga Aboriginal Corp v Queensland* (1996) 185 CLR 595 (at 643), *Ex parte Zietsch* (1944) 44 SR (NSW) 360 (at 368), Mason *Where Now?* (1975) 49 *Australian Law Journal* 570 (at 575), Mason *The Use and Abuse of Precedent* (1988) 4 *Australian Bar Review* 93 (at 97), Brysland *Tax cases and the High Court* (1991) 57 *Weekly Tax Bulletin* [982].
[135] Quigley *Interpreting GST Law in Australia* in White & Krever (eds) *GST in Retrospect and Prospect* (at 116).
[136] *Travelex limited v FCT* [2008] HCA 33 (at [25, 68]).
[137] *Shinwani v Anjoul* [2017] NSWCA 74 (at [88]) illustrates.
[138] *FCT v Secretary to the Department of Transport* [2010] FCAFC 84 (at [38]), *FCT v American Express Wholesale Currency Services Pty Ltd* [2010] FCAFC 122 (at [98, 103-105]), *Rio Tinto Services Pty Ltd v FCT* [2015] FCAFC 117 (at [3, 4, 8]) illustrates.

4.5 Interim reflections

Justice Hill leaves a formidable legacy, not just in tax circles, but more widely in the law as well.[139] The Chief Justice of the Federal Court, Michael Black, referred to Hill J's dedication to the rule of law and to the 'richness and diversity of his work and his service to the community: as a lawyer, a scholar, a teacher, a mentor and a member of our court'.[140] Professor Vann rightly called him a 'tax titan'.[141]

We now have the *Justice Graham Hill Memorial Speech* delivered each year in his Honour's honour. In the 2007 speech, Kirby J said that *HP Mercantile* was one of the judge's 'greatest legacies'.[142] Gzell J described the judgment as a 'powerful piece of jurisprudence'.[143] Edmonds J called it a 'template for the future'.[144] Logan J characterised it 'in terms of its masterly exposition of the statutory scheme of taxation'.[145] In the special leave application for *American Express*, Slater QC referred to *HP Mercantile* said[146] – 'Justice Hill knew perhaps more about GST and VAT than anyone in Australia, with due deference to your Honours'. Professor Millar noted that his passing 'left a void in the Australian judicial understanding of GST'.[147]

Justice Hill never got to see how his musings on the interplay between neutrality and interpretation might resolve in the 15 years since he posed his 'interpret or translate' question. It would take a further four years for the first GST case to reach the High Court – *Reliance Carpet*.[148] In matters of statutory interpretation, two things may be said about the way in which Hill J saw the world of legislation. First of all, he was solidly orthodox in his dedication to modern principle,[149] something which is a consensus assessment.

One commentator said he had 'quite strong views' on this, and about the right way and the wrong way to do things.[150] This understates the position, as anyone reading what Hill J wrote or who otherwise knew him will appreciate. The second is that, in a tangible way, his systemic coherence, constructional choice and anti-linguistic positions anticipated later articulation of those elements in the Federal Court and above.[151] His 'scheme of legislation' approach in *HP Mercantile* echoed the *Ellis & Clark* sales tax

---

[139] Edmonds J *The Contributions of Justice Hill to the Development of Tax Law in Australia* (2006) 2 *Journal of the Australasian Tax Teachers Association* 1, Kirby J *Justice Graham Hill Memorial Speech* (2007) 42/4 *Taxation in Australia* 202, for example.
[140] Black CJ *The Hon Justice Graham Hill (1938-2005)* (2005 Summer) *Bar News: Journal of the NSW Bar Association* 91.
[141] Buffini *Tax Titan was no heir but had all the graces,* 26 August 2005 *Australian Financial Review* 29.
[142] Kirby J *Justice Graham Hill Memorial Speech* (2007) 42/4 *Taxation in Australia* 202 (at 204).
[143] Gzell *The Legacy of Justice Graham Hill* [2006] *TIA Annual Convention South Australian Division paper* (at 2).
[144] Edmonds *Tribute to the late Justice Graham Hill* [2005] *Law Council Tax Workshop paper* (at 5).
[145] Logan J *Where are we with GST – black letter or the practical business tax?* [2008] *TIA National GST Intensive Conference paper* (at [20]).
[146] *American Express Wholesale Currency Services Pty Ltd v FCT* [2011] HCATrans 114 (at 57).
[147] Millar *The Destination Principle: Past Developments and Future Challenges* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* 313 (at 313).
[148] *FCT v Reliance Carpet Co Pty Ltd* [2008] HCA 22.
[149] cf Olding *Trends in the Interpretation of GST law* [2007] *ATAX 19th Annual GST and Indirect Tax Weekend Workshop paper* (at [19]), McElwain *How the courts have interpreted GST in Australia* (2007) 41/9 *Taxation in Australia* 539.
[150] Phair *The GST jurisprudence of the late Justice Graham Hill* [2013] UNSW 25th GST Conference paper (at 6).
[151] Edmonds *Interpretation of s 11-15: Significance of the text, context and history* (2012) 12 AGSTJ 79 (at 88) agrees.

decision 60 years earlier.[152] He also said courts should not be expected 'to make up for drafting deficiencies which revel in obscurity'.[153]

As I read again Justice Hill's *To interpret or translate?* article, the judge is essentially posing questions and suggesting possibilities. He draws no conclusions; he makes no findings; and he embeds no doctrines. This assessment aligns with the end-point reached by Robert Olding in 2010 – that there is nothing in the judgment 'that explicitly supports the conclusion some have suggested, that is, that there must be input tax relief in every case to the extent that the cost of the input is embedded in a taxed output'.[154]

Instead, Hill J raises whether underlying VAT philosophy and EU Directives 'may influence' interpretation in Australia or 'might be taken' as a source of interpretational principle or a 'useful source of law or premise for legal reasoning'. Roderick Cordara thought that, 'though not cited', the trend of EU cases had 'played their silent role in the proceedings'.[155] Hill J sounded a 'cautionary note' in this respect, adding the important qualifier that there is 'no legislative impediment' to the possibilities he suggested.

5. VIEWS OF COMMENTATORS

5.1 Ode to Neutrality

Michael Evans has been the central activist in neutrality debates for more than two decades. He has been an untiring influencer for a 'strict and complete' neutrality within our GST system. Nothing he writes, he says, is not about neutrality. In his view, EU neutrality is already an aspect of the GST law, as least as a rule of interpretation inferred from the context and purpose of the legislation when passed.[156] That would make it a 'foreign ghost fully resident in our GST machine' (my words). Who will forget Michael's *Ode to Neutrality* written on the ten year anniversary of the original ANTS Bills being introduced into federal parliament? – that is, about 12 months after the High Court gave judgment in *Reliance Carpet*.

It may come as no surprise that I disagree with both the basic thesis and detail of the *Ode*. My unease with the idea that we have somehow absorbed EU neutrality as an 'underlying philosophy' of legislation the GST law involves a standard application of interpretation principles required by the High Court. Mr Rompelman is no foreign ghost in our GST machine. I have drunk from no 'bitter cup of literal interpretation' (words from the *Ode*), nor have I sacrificed high transnational principle on the 'crucifix of

---

[152] *DCT v Ellis & Clark Ltd* (1934) 52 CLR 85 (at 89), cf *Avon Products Pty Ltd v FCT* [2006] HCA 29 (at [7]), *CCSR v Hayson Group of Companies* [2006] NSWCA 233 (at [36]), *FCT v Multiflex Pty Ltd* [2011] FCAFC 142 (at [15]), Hill J *How is Tax to be Understood by Courts?* (2001) 4/5 *The Tax Specialist* 226 (at 227-228), Phair *The GST jurisprudence of the late Justice Graham Hill* [2013] UNSW 25th GST Conference paper (at 2), Gzell J *The Legacy of Justice Graham Hill* [2006] *TIA Annual Convention South Australian Division paper*.

[153] *Consolidated Press Holdings Ltd v FCT* [1998] FCA 1277.

[154] Olding *Interpretation of the GST Act – Towards a Principled Basis?* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* (at 91).

[155] Cordara *Developments in UK and European Case Law* [2005] *TIA National GST Intensive Conference paper* (at 2).

[156] cf Heydon Miller *Input Taxed: What's in a name – A look at input tax credit entitlements* [2007] *ATAX GST Conference paper*.

mindless textualism' (again from the *Ode*). This language may echo a description of tax officers by Lord Esher MR long ago as 'unpleasant tyrannical monsters'.[157]

However, the idea that merely legislating for a VAT-type model would bring with it an 'underlying philosophy' to which our GST law would bend is perhaps a romantic idea.

Evans also once advocated for a new objects clause to be inserted after the event into the GST law to enshrine EU neutrality and guarantee it application[158] –

> GST is a general tax on consumption exactly proportional to the price paid by the consumer, however many transactions take place in the production and distribution process before the stage at which consumption takes place. The credit for input tax is meant to relieve the entity entirely of the burden of the input tax payable or paid in the course of all its enterprise, provided that the input tax is not a cost component of an input taxed activity.

These themes are revisited by Evans in *Horton's lesson: Australia's struggle with 'truth in drafting'*.[159] Attention is drawn to structural differences between our system and others, including in the design of input tax relief provisions where different terminology is used, and used deliberately. It is observed (at 39) that, in choosing words 'significantly different to the NZ terminology, there is little in the GST Act to support the contention that the legislature meant the Australian law to follow the NZ model'.

The 'difficult question' is posed (at 42) as to whether, in these circumstances, the 'legislature intended that the test be different from the legislative approach in other jurisdictions'.[160] Following the UK approach may well have produced a different outcome in Australia. However, it does not follow that the 'cost component language' of the VAT Directives can somehow now leverage our GST law to that direction.[161]

The ordinary expectation is that legislating for a different mechanism in different words, in each case deliberately, will lead to a different legal outcome. Evans goes on to describe the High Court majority approach in *Travelex* as 'simple and brutal' regarding their reading of item 4 of the s 38-190(1) table. In his view, (A) we don't know if the legislature meant what it said, (B) we do know that it did not say what it meant, (C) the legislature didn't know what it meant, and (D) whatever the legislature meant, the outcome is what the courts say the words mean. Perhaps the best response to these various points is the fundamental one given by the courts – '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'.[162]

---

[157] *Grainger and Son v Gough* (1894) 3 TC 311 (at 318).
[158] Evans *Taxation of goods and services in Australia – commentary* (2009) 9 AGSTJ 30 (at 35).
[159] Evans *Horton's lesson: Australia's struggle with 'truth in drafting'* [2012] 1/1 *World Journal of VAT/GST Law* 21 (at 22, 28).
[160] cf *HP Mercantile Pty Ltd v FCT* [2005] FCAFC 126 (at [23]).
[161] cf *HP Mercantile Pty Ltd v FCT* [2005] FCAFC 126 (at [45]).
[162] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 (at 613), *Harrison v Melham* [2008] NSWCA 67 (at [160]) for example.

5.2 Only time will tell

Early in our GST journey, Professor Millar asked whether Australia needed to or would develop its own version of neutrality – 'only time will tell', she said.[163] Fast-forward 13 years, and the answer now given by her is the simple one that we have our own neutrality derived from Div 11 provisions. This is a conclusion to be drawn from her 2017 paper – *The principle of neutrality in Australian GST*.[164] If I understand all this correctly, there is no reason really to ask if EU neutrality somehow applies in our system.

As Professor Millar points out, no special rules apply to interpretation of the GST law. And nothing in the extrinsic materials provides any likely foundation for the reception of EU neutrality either. She says (at 33, 34) -

> In Australia, the broader principle established in *Rompelman* … is quite conveniently spelled out for us in the text of the law [primarily s 11-15(1)] … Thus, rather than merely being a principle of interpretation, under Australian GST the principle of neutrality is found in a specific legal rule.

Professor Millar looks at a range of Australian cases through the lens of our native neutrality, including three which consider the s 11-15(2)(a) limitation to our neutrality rule.[165] Millar then tests how our neutrality rule would play out on the facts of recent EU cases.[166] The important point, however, is that our native neutrality is a concept which emerges from the text of the GST law and not from foreign sources. As Pier Parisi says, *HP Mercantile* is a 'classic case of the application of the concept of fiscal neutrality … embedded in the statutory framework of the Australian GST'.[167]

5.3 Change the legislation

As editor of the *Australian GST Journal*, after *Reliance Carpet*, Peter Hill wrote[168] –

> Until such time as the Tax Office is told otherwise, by statute, it will abide by the High Court's decision.[169] If fiscal neutrality is to become a cornerstone of the Australian GST system, many things – including much of the legislation and not just the fundamental compliance approach of the Tax Office – will need to substantially change.

The writer notes that the 'alien concept of fiscal neutrality' had been simmering away on the interpretative front; that some are critical of 'any Tax Office interpretation that ignores fiscal neutrality';[170] and that others say fiscal neutrality 'should play no role in

---

[163] Millar *Time is of the Essence: Supplies, Grouping Schemes & Cancelled Transactions* (2004) 7/2 *Journal of Australian Taxation* 132 (at 169).
[164] Millar *The principle of neutrality in Australian GST* (2017) 17 AGSTJ 26.
[165] *AXA Asia Pacific Holdings Ltd v FCT* [2008] FCA 1834, *Rio Tinto Services Ltd v FCT* [2015] FCA 94, *FCT v American Express Wholesale Currency Services Pty Ltd* [2010] FCAFC 122.
[166] *Sveda UAB v Valstybin mokesi inspektcija prie Lietuvos Respublikos Finans ministerijos* [2014] Case C-126/14 (Baltic Mythological Walkway), *Kopalnia Odkrywkowa Polski Trawertyn v Dyrektor* [2012] Case C-280/10 (stone quarry partnership).
[167] Parisi *The Goods and Services Tax as a Tax on Acquisitions* [2007] unpublished paper (at 25).
[168] Hill *Taxation of goods and services in Australia – past, present, and future* (2009) 9 AGSTJ 21 (at 29).
[169] The ATO of course has no discretion in this regard – *FCT v Indooroopilly Children Services (Qld) Pty Ltd* [2007] FCAFC 16 (at [6]).
[170] James & Stacey *The limits of supply – Part 3* (2002) 2 AGSTJ 81 quoted.

interpreting Australia's GST'.[171] Peter Hill then reviews the High Court position that consumption as a matter of economic policy should not drive interpretation.

This is taken to signal that no neutrality principle applies (or is being applied) in our system, either by reference to EU neutrality or via domestic provisions. In other words, change is needed to bring neutrality into the system. Others accept, however, that neutrality is secured by the concept of 'creditable acquisition'.[172]

5.4 Criteria of liability

In a 2012 article,[173] Robert Olding set out what he called – *An ATO perspective on the creditable purpose test*. The article is comprehensive and reaches the same general conclusions as this note. It is framed against the hypothetical 'mineco example' under which look-through credit access on minesite accommodation insurance is tested in a coal export situation. Olding accepted (at 133) that a 'high-level feature' of VAT regimes is to relieve business of the burden and to prevent cascading.[174] Then he said –

> … policy considerations are seldom single-dimensional: an application that may seem to be clearly consistent with perceived policy in one context may seem less so, or offend a different policy consideration, in another … Accordingly, the approach adopted is not to start with a notion of how an ideal GST would operate and see if the Australian GST can be construed to give life to that perspective. Rather the approach is to endeavour to determine how the provision should be properly construed in light of the judicial guidance available from the GST cases handed down to date …

Although it had been accepted in *HP Mercantile* 'where possible' that GST was not be found embedded in the output price, Olding points out (at 137-138) that nowhere in that case or in *AXA Asia Pacific* is the *legal* test stated in these terms. The relationship required is one of objective fact and no 'look-through' approach is endorsed.[175] Attention is then drawn to the dangers of using high-level policy to inform the meaning of provisions and to the related problem of policy preconception in interpretation.[176] In this regard (at 142), Olding concluded, rather uncontroversially it should be noted, that 'we must guard against assuming that whatever construction furthers the high level objects taxing value added or preventing cascading must be the law'.

Olding also drew attention to the fact that 'what lies behind the enactment of a taxing provision as a matter of public policy or economic theory is not the same thing as the elements or criteria of tax liability which Parliament has laid down'.[177] A further point made by him is that parliament rarely pursues a singular general policy.[178] Statutory

---

[171] Cooper *Why GST is Not a Consumption Tax … and Why it Matters* [2003] *TIA GST Intensive Conference paper* cited.
[172] Howe & Penning *Creditable purpose and cancelled financial supplies – It's all in the timing* [2005] *ATAX 17th Annual GST & Indirect Tax Weekend Workshop paper* (at 2) for example.
[173] Olding *An ATO perspective on the creditable purpose test* (2012) 12 AGSTJ 131.
[174] cf Explanatory Memorandum (at [3.24]).
[175] cf Bird & Miller *GST and property apportionment: "The Wisdom of Solomon"* (2012) 12 AGSTJ 39 (at 48-49).
[176] *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCAFC 59 (at [94-99]) quoted.
[177] *WR Carpenter Holdings Pty Ltd v FCT* [2007] FCAFC (at [29]) quoted.
[178] *Carr v Western Australia* [2007] HCA 47 (at [5]) quoted.

provisions more usually involve a compromise of competing policy objectives. That general policy cannot be read as the law must now be regarded as beyond argument.

On the future impact of *HP Mercantile* itself, Olding elsewhere suggests that cascade avoidance as a key feature of the tax 'will continue to inform judicial decision-making', but that *HP Mercantile* 'is unlikely to be accepted as authority for that principle becoming a proxy for the relationship required by s 11-15(2)(a)'.[179]

6. INTERPRETATION IN AUSTRALIA

6.1 Legalism and literalism

Dennis Pearce, the once again sole author of *Statutory Interpretation in Australia*, in his preface to the First Edition quoted Lord Mansfield for the following – 'Most of the disputes in the world arise from words'.[180] This is an axiomatic truth in the land of statutes. 'Nothing is so easy as to pull them to pieces, nothing is so difficult as to construct them properly'.[181] The uncertainty of statutory words, said Lord Wilberforce, was what made statutory interpretation 'so exciting'.[182] Excitement or otherwise, one thing which is more than clear is that the principles applied by courts to interpretation apply equally to the Tax Commissioner and his officers.[183]

As French CJ has noted, the interpretation of statutes 'can be characterised as a small "c" constitutional function'.[184] For most of the twentieth century, Australia endured a generally literalist approach to statutory interpretation.[185] This approach was dominated by a myopic and morbid fixation on the words, driven by dictionary definitions, strict grammar analyses, mechanical rules and a refusal to look beyond the four corners of the statute. Often referred to as 'black letter' interpretation, inflexibility was front and centre[186] but cynicism (it seemed at times) was not far from the surface.[187] What Mason J called the 'dead weight of precedent' also played a role in its maintenance.[188] The general approach was typified, if not perpetuated and encouraged, by the way the Barwick Court decided a suite of tax cases.[189]

---

[179] Olding *Trends in the Interpretation of GST law* [2007] *ATAX 19th Annual GST and Indirect Tax Weekend Workshop paper* (at [74]).
[180] *Morgan v Jones* (1773) Lofft 160 (at 176).
[181] *O'Flaherty v M'Dowell* (1857) 6 HLC 142 (at 179).
[182] *Symposium on Statutory Interpretation* (5 January 1983) Canberra (at 7).
[183] Logan *Statutory Construction* [2016] FedJSchol 5 (at 5) for example, cf Reid *Interpreting the GST law; tax law based on coherent principles* (2005) 5 AGSTJ 239 (at 243).
[184] French CJ *Common Law Constitutionalism* [2014] *Robin Cooke Lecture* (at 3).
[185] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (at 161-162) exemplifies.
[186] cf *Ausdoc Information Management Pty Ltd v Central Document Storage Pty Ltd* [2003] NSWSC 1013 (at [18]), *Lakes Action Group Association Inc v Shire of Northam* (2004) 37 SR (WA) 7 (at 9).
[187] cf *Commonwealth Bank v Spira* (2002) 174 FLR 274 (at 301), *Porter v GIO Australia Limited* [2003] NSWSC 668 (at [1021]), *Overlook v Foxtel* [2002] NSWSC 17 (at [67]), *ACD Tridon Inc v Tridon Australia Pty Ltd* [2003] NSWSC 1014 (at [105]).
[188] Mason *Taxation Policy and the Courts* (1990) 2/4 *CCH Journal of Australian Taxation* 40 (at 42).
[189] Krever *Taming Complexity in Australian Income Tax* (2003) 25 *Sydney Law Review* 467 (at 476-480), Stone *The GST – A Practical Business Tax?* [2006] *TIA National GST Conference paper* (at 4-5), Slater *Tax in Australian society: An 80 year perspective* (2007) 81 Australian Law Journal 681 (at 696), cf Barwick *A Radical Tory* (at 229), *FCT v Westraders Pty Ltd* (1980) 144 CLR 55 (at 59-60).

Kirby J spoke out about the 'misfiring of texts that was the main legacy of the era of literalism'.[190] What came to be called the 'new literalism'[191] led to what was described as a 'notorious era of interpretation of legislation in Australia'.[192] Hill J had accepted this as only generally being correct, and he regarded the issue as being more complex.[193] So did Sir Anthony Mason, as he later explained in his *Fullagar Memorial Lecture*.[194]

Literalism on some occasions was tempered by the 'golden rule' in *Grey v Pearson* in cases of linguistic absurdity or inconsistency.[195] This 'safety net' facility rarely proved an effective foil to literalism in practice, however, given the way it was understood and applied by courts.[196] Hill J was later to point out some of the limitations of the golden rule in his paper – *To interpret or translate?* Essentially, the rule is one of inward focus on the statute itself and one which denies 'an excursus into legislative policy'.[197]

There developed a degree of concern if not embarrassment about our narrow literalism, and a sense that Australia had fallen behind the times. Professor Pearce in the *Oxford Companion to the High Court* spoke of government 'exasperation'.[198] Murphy J in *Westraders* was particularly scathing about our 'predicament'.[199] He said the prevailing trend was 'now so absolutely literalistic that it has become a disquieting phenomenon'. Interviewed in the book *Judging the World*, Murphy J intimated that this involved 'a departure from, virtually a repudiation of, the role of the judiciary'.[200]

Stone J later said there had been 'naïve confidence' that the literal approach in Australia would produce correct results'.[201] The *National Times* aptly described the approach of the High Court as *Backwards into the Future*.[202] The UK had been moving towards a more purposive approach, partly via the influence of EU protocols following passage of the *European Communities Act* of 1972. The history of what is rightly called the 'disorderly rise of the purposive rule' in the UK is traced by Jeffrey Barnes.[203]

One thing literalism did contribute to was a very granular, rule-based style of legislative drafting. Closed language aimed at eliminating all possible permutations and combinations of circumstance became the cultural norm. The unsurprising result was

---

[190] *Palgo Holdings Pty Ltd v Gowans* [2005] HCA 28 (at [112]).
[191] Krever *Murphy on Taxation* in Scutt (ed) *Lionel Murphy: A Radical Judge* (at 130).
[192] Barnes *Statutory Interpretation, Law Reform & Sampford's Theory of the Disorder of Law* (1994) 22 *Federal Law Review* 116 (at 154).
[193] Hill J *How is tax to be understood by courts* (2001) 4/5 *The Tax Specialist* 226 (at 229-230), cf Hill J *Barwick CJ: 'The taxpayer's friend'?* (1997) 1/1 *The Tax Specialist* 9 (at 12).
[194] Mason *Future Directions in Australian Law* (1987) 13/3 *Monash University Law Review* 149 (at 161).
[195] *Grey v Pearson* (1857) 10 ER 1216 (at 1234).
[196] cf *Footscray City College v Ruzicka* [2007] VSCA 136 (at [16]), *JJ Richards & Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53 (at [50]).
[197] Hill J *To interpret or translate? The judicial role for GST cases* (2005) 5 AGSTJ 225 (at 226).
[198] Blackshield *Oxford Companion to the High Court of Australia* (at 642).
[199] *FCT v Westraders Pty Ltd* (1980) 144 CLR 55 (at 80), cf *The 'Purposive' Versus the 'Literal' Construction of Statutes* (1981) 55 *Australian Law Journal* 175.
[200] Sturgess & Chubb *Judging the World; Law and Politics in the World's Leading Courts* (at 361).
[201] Stone *The GST – A Practical Business Tax* [2006] *TIA National GST Conference paper* (at 4).
[202] McGregor *The High Court: Backwards into the Future* (17 February 1980) *National Times* 14.
[203] Barnes *Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law – Part One* (1994) 22 *Federal Law Review* 116 (at 149-154).

legislation 'not sufficiently general or experiential to allow a conception to live within it'.[204] In *Courts as (Living) Institutions and Workplaces*, Allsop CJ said[205] –

> Deconstruction and particularism and the mania for completeness and certainty plague our statutes, especially Commonwealth drafting … The elemental particularism of modern day legislation – its deconstructionist form, sometimes arranged more like a computer program than a narrative in language to be read from beginning to end – reflects this modern cast of mind intent on particularity, definition and taxonomical structure that is scientific only in a mechanical Newtonian sense.

There was desire for change and a more contemporary approach to interpretation, one which took more account of purpose, context and the modern world of legislation. A central agitator in this regard was Patrick Brazil at the Attorney-General's Department in Canberra with whom I had the pleasure of working.

One way the reform agenda was to be progressed was by a series of conferences, to which influential judges and others were invited from Australia and overseas.[206] Lord Scarman from the UK was one of the international visitors. In a lecture at *Monash University* in 1980, he had said – 'In London no-one would dare to choose the literal rather than a purposive construction of a statute: and 'legalism' is currently a term of abuse'.[207] Lord Diplock had observed in the UK a slow movement towards purposivism starting just after WW2.[208] It was possible to say by 1978 that purposive interpretation had already become 'fashionable'.[209] In the same year, David W Williams, writing in the *Modern Law Review,* put it in these terms[210] –

> The judicial orchestra rarely interprets the score to consistent effect, but broadly it is currently more ready to adopt a flexible and sympathetic approach than tradition suggests.

6.2 Parallel revolution

Sir Garfield Barwick retired as Chief Justice of the High Court at the age of 77 years on 11 February 1981. Before he departed, a bench of five other justices heard the prior year losses case, *Cooper Brookes*. Four months after Barwick left the stage, the decision was handed down.[211] It delivered what has come to be regarded as the comprehensive refutation of literalism that many had hoped for, and one that continues to resonate to this day in the courts.[212] In the recent sperm donor case, six members of the High Court

---

[204] cf Allsop CJ *The Foundations of Administrative Law* [2019] FedJSchol 5 (at 9).
[205] Allsop *Courts as (Living) Institutions and Workplaces* [2019] *Joint Federal & Supreme Court Conference Hobart* paper (at 14-15).
[206] Geddes *Purpose and Context in Statutory Interpretation* in Gotsis (ed) *Statutory Interpretation: Principles and Pragmatism for a New Age* 127 (at 129-135) discusses.
[207] Lord Scarman *Ninth Wilfred Fullagar Memorial Lecture* (1980) 7 *Monash University Law Review* 1 (at 6), cf (9 March 1981) 418 House of Lords Official Report Col 65, Hayne & Gordon *Statutes in the 21st Century* (at 6).
[208] *Carter v Bradbeer* [1975] 1 WLR 1204 (at 1206-1207), cf *The Interpretation of Statutes* Law Commissions Report No 21 (1969), *Stenhouse Holdings Ltd v IRC* [1972] AC 661 (at 682).
[209] *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 (at 951).
[210] Williams *Taxing Statutes are Taxing Statutes: The Interpretation of Revenue Legislation* (1978) 41 *Modern Law Review* 404 (at 417).
[211] *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297.
[212] *HFM043 v Republic of Nauru* [2018] HCA 37 (at [24]) illustrates.

explained that, unless the 'text, structure or purpose of the legislation' provides a basis to suppose that some other meaning was intended, the word 'parent' would take its 'natural and ordinary meaning'.[213]

Not everyone saw *Cooper Brookes* in this same light at the time. Barnes, for example, saw the case as resting on 'fictional foundations', and with no majority support for a change to purposivism.[214] Two decades later, however, Hill J described that case as a 'step backwards from literalism'.[215] Mason J said that *Cooper Brookes* was a case where 'the courts accepted that a purposive construction should, in appropriate cases, be applied to revenue laws'.[216] Others saw it as merely applying existing principles.[217] *Cooper Brooks* does not use all the later language of purposivism. It clearly points in that direction, however, something which is borne out by intervening history.

Cooper Brookes was followed the next week by enactment of legislation to entrench purposive interpretation as the prevailing norm in Australia – s 15AA of the *Acts Interpretation Act 1901*. This new provision (amended in 2011) required a 'construction that would promote the purpose or object … shall be preferred to a construction that would not'. A parallel revolution of sorts had taken place,[218] one for which there was bipartisan support. Similar proposals had earlier failed in the UK. Mason J said of the idea that the approach in *Cooper Brookes* was prompted by awareness of the s 15AA proposal was 'something of an exaggeration'.[219]

Events leading to s 15AA are summarised in a note in the *Australian Law Journal*.[220] The note says variously that s 15AA was not 'radical or innovative', and that it merely made 'mandatory that which was previously facultative'. Dawson J saw it this way early on,[221] as did Supreme Court of Victoria,[222] and Hill J too in *Boral Windows*.[223] Harry Geddes said s 15AA 'gives the interpreter no choice as to whether to apply it'.[224] A visiting American academic, Philip Frickey, colourfully put the proposition that s 15AA

---

[213] *Masson v Parsons* [2019] HCA 21 (at [26]) citing *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297 (at 305, 310, 321, 335) among other cases.
[214] Barnes *Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law – Part One* (1994) 22 *Federal Law Review* 116 (at 168).
[215] Hill J *How is Tax to be Understood by Courts?* (2001) 4/5 *The Tax Specialist* 226 (at 230).
[216] Mason *Taxation Policy and the Courts* (1990) 2/4 *CCH Journal of Australian Taxation* 40 (at 42).
[217] Allerdice *The swinging pendulum: Judicial trends in the interpretation of revenue statutes* (1996) 19 UNSWLJ 162 (at 174), cf Street *Judicial Law-Making – Some reflections* (1982) 9 *Sydney Law Review* 535 (at 539).
[218] cf Nettle *Applications for Special Leave in Tax Matters* [2015] *Tax Bar Association Annual Dinner paper* (at 9-12).
[219] Mason *Taxation Policy and the Courts* (1990) 2/4 *CCH Journal of Australian Taxation* 40 (at 42), *FCT v Lutovi Investments Pty Ltd* (1978) 140 CLR 434 (at 445), *FCT v Students World (Australia) Pty Ltd* (1978) 138 CLR 251 (at 265) cited.
[220] Starke *Statutory guidelines for interpreting Commonwealth statutes* (1981) 55 *Australian Law Journal* 711, cf Barnes *Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law – Part One* (1994) 22 *Federal Law Review* 116 (at 156-157).
[221] *Mills v Meeking* (1990) 91 ALR 16 (at 29).
[222] *R v Boucher* (1994) 70 A Crim R 577 (at 590).
[223] *Boral Windows v Indistrial Research and Development Board* (1998) 83 FCR 215 (at 220).
[224] Geddes *Purpose and Context in Statutory Interpretation* in Gotsis (ed) *Statutory Interpretation: Principles and Pragmatism for a New Age* 127 (at 133).

'arguably mandates purposivism *uber alles*'.[225] Stone J also observed that a purposive approach is 'mandated' by s 15AA.[226]

Subjection of 15AA to its own processes should perhaps have been enough to confirm this outcome.[227] The provision also applies to particular provisions and parts of a statute just as much as to an Act as a whole.[228] Professor Julius Stone wrote in the *Sydney Morning Herald* that intelligent lay people would feel no outrage at s 15AA, and Geoff Pryor penned a memorable cartoon depicting literalist and purposive judges (surely a first).[229] One commentator saw s 15AA as merely giving 'legislative respectability' to common law approaches.[230] Another perceived in the new purposive direction a 'greater threat … to basic human rights', with the literal approach would enable taxpayers 'to protect what is rightfully theirs'.[231]

6.3 Modern approach

The idea that purposive methods are some 'modern approach' to statutory interpretation is a popular myth fondly recalled. The historical antecedents of purposivism are generally regarded as 'equity of the statute' principles[232] and the 'mischief rule'.[233] More recent research suggests,[234] however, that the roots in this regard go all the way back to Aristotle[235] and continental Roman law. It might be noted that New Zealand from colonial times has had provisions on the statute book mandating a purposive approach, even if judges studiously ignored them and continued to favour literal approaches until the late 20th century.[236] The experience in Canada was much the same on very similar provisions.[237] That old legal habits die hard is a truism.

The modern march of purposivism into the common law world seems to date from 1958 with publication of the teaching materials of two *Harvard Law School* professors, Henry Hart and Oliver Sacks.[238] For them, 'every statute must be conclusively presumed to be

---

[225] Frickey *Structuring purposive statutory interpretation: An American perspective* (2006) 80 *Australian Law Journal* 849 (at 856).
[226] Stone *The GST – A Practical Business Tax* [2006] *TIA National GST Conference paper* (at 5).
[227] cf Barker *First You See It, The You Don't – Harry Houdini and the Art of Interpreting Statutes* [2012] *JCA Colloquium paper* (at [16]).
[228] *Anglican Care v NSW Nurses and Midwives' Association* [2015] FCAFC 81 (at [49]).
[229] Reproduced in Morris , Cook, Creyke, Geddes & Seymour *Laying Down the Law* (at 151).
[230] Penfold *Legislative Drafting and Statutory Interpretation* in Gotsis (ed) *Statutory Interpretation: Principles and Pragmatism for a New Age* 81 (at 88).
[231] Lonnquist *The Trend Towards Purposive Statutory Interpretation: Human Rights at Stake* [2003] *Revenue Law Journal* 18 (at 27).
[232] *Eyston v Studd* (1574) 75 ER 688 (at 695), Plucknett *Statutes & their Interpretation in the First Half of the Fourteenth Century* (1986).
[233] *Heydon's Case* (1584) 76 ER 637 (at 638), Black *Development of principles of statutory interpretation* [2013] *Francis Forbes Society paper*.
[234] Corcoran *Theories of Statutory Interpretation* in Corcoran & Bottomley (eds) *Interpreting Statutes* (at 11-14).
[235] Aristotle *Ethics* Book 5, Chapter 10 (at 113-114).
[236] White *Appellate interpretation of NZ's GST legislation: an initial survey: 1986-2005* (2005) 5 AGSTJ 205, Ward *A Criticism of the Interpretation of Statutes in the New Zealand Courts* [1963] *New Zealand Law Journal* 293 (at 294-295), cf s 5(j) of the *Acts Interpretation Act 1924* (NZ), s 5(1) of the *Interpretation Act 1999* (NZ).
[237] *Sullivan on the Construction of Statutes* (at §15.20).
[238] Hart & Sacks *The Legal Process: Basic Problems in the Making and Application of Law*.

a purposive act'.[239] In carrying purpose into effect, they said a court should not give words a 'meaning they will not bear',[240] a basic condition which endures to this day. Their basic ideas were quickly embraced, first in academic circles, then more widely.[241]

In an America, stuck in unending dispute over even the basics of interpretation,[242] however, purposivism never became the prevailing norm before the courts. It remains a methodology of explanation, which has marginal influence in US courts compared to the 'new textualism' of Antonin Scalia.[243] Even by 1996, the purposivism of Hart and Sacks was being described as 'largely discredited' in the United States.[244]

The early years of purposivism are analysed in tense detail by Jeffrey Barnes in two *Federal Law Review* articles written in the mid-1990s.[245] His primary thesis is that the 'novel experiment' in legislating s 15AA only produced greater legal disorder and disarray – it made legal outcomes less certain. He said s 15AA and purposivism only added conflict, decanonised the common law, and gave rise to a more pluralistic practice.

Whether these charges now hold or are all pejorative, or Barnes himself would continue to adhere to them 20 years on, a strong chorus of High Court decisions over nearly four decades should be enough to confirm that formalistic black letter approaches are behind us.[246] There is the odd discordant note, of course, something which is only to be expected in a pluralistic judiciary.[247] A degree of anomalous discord, however, does not disturb the essential continuity of purposivism, something which has become more and more evident since the landmark cases of *Project Blue Sky* in 1997 and *CIC Insurance*. The latter case, with its clear direction to consider context at the beginning and in the 'widest sense', remains centrally important.

6.4 Importance of context

HP Mercantile itself illustrates the refined appreciation Hill J had for 'context' as a key driver in contemporary interpretation. 'Context' is a simple, indeed, obvious, concept, as Beazley P has recently observed.[248] In the words of Edelman J – 'No meaningful words, whether in a contract, a statute, a will, a trust or a conversation are ever

---

[239] Frickey *Structuring purposive statutory interpretation: An American perspective* (2006) 80 *Australian Law Journal* 849 (at 859), cf *Ex parte Northern Land Council* (1981) 151 CLR 170 (at 204).
[240] Hart & Sacks *The Legal Process: Basic Problems in the Making and Application of Law* (at 1374).
[241] Frickey *Structuring purposive statutory interpretation: An American perspective* (2006) 80 *Australian Law Journal* 849 (at 849-855), Brooks *The responsibility of judges in interpreting tax legislation* in Cooper (ed) *Tax Avoidance and the Rule of Law* (at 111).
[242] Scalia & Garner *Reading Law* (at xxvii).
[243] For example - Scalia *A Matter of Interpretation: Federal Courts and the Law* (Tanner Lectures), Scalia & Garner *Reading Law* (at 15-28), *Johnson v Transportation Agency, Santa Clara County* 480 US 616 (at 657-677) (1987) Scalia J dissenting, Eskridge *The New Textualism* (1990) 37 *UCLA Law Review* 621, Eskridge, Frickey & Garrett *Legislation And Statutory Interpretation* (at 235-245).
[244] Livingston *Practical Reason, "Purposivism", and the Interpretation of Tax Statutes* (1996) 51 *Tax Law Review* 677 (at 681)
[245] Barnes *Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law – Part One* (1994) 22 *Federal Law Review* 116, Barnes *Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law – Part Two* (1995) 22 *Federal Law Review* 77.
[246] *The Queen v A2* [2019] HCA 35 (at [32]), cf Corcoran *Theories of Statutory Interpretation* in Corcoran & Bottomly (eds) *Interpreting Statutes* (at 29).
[247] Middleton J *Statutory Interpretation: Mostly Common Sense* (2016) 40 *Melbourne University Law Review* 626 (at 639).
[248] Beazley P *Language: The Law's Essential Tool* (2017) 12 *The Newcastle Law Review* 1 (at [15]).

acontextual'.[249] No person ever makes an acontextual statement; there is always some context no matter how meagre.[250] Words 'do not exist in limbo',[251] nor are they 'susceptible to interpretation standing by themselves'.[252] 'It is a matter of constant experience that people can convey their meaning unambiguously although they have used the wrong words', observed Lord Hoffman.[253]

To say that context is a 'major aspect' of interpretation in Australia is an understatement.[254] Accordingly, we are to have regard to context in the 'widest sense' at the beginning of the process, and not merely if difficulty later arises,[255] as Hill J himself noted many times. The judicial precursors to this approach are found in Mason J's judgment in *K & S Lake*[256] and, further back, a 1957 English case.[257]

The American judge, Felix Frankfurter, said that 'nothing that is logically relevant should be excluded'.[258] Perram J once characterised our 'widest sense' language as a 'high watermark',[259] but it remains confirmed as the legal standard. The passage from *CIC Insurance* has 'been cited too many times to be doubted'.[260] Context in its widest sense includes things both internal and external the statute. Francis Bennion in his UK textbook refers to the use of context as 'informed interpretation'.[261] The underlying idea is that better-informed decisions 'are likely to be more correct decisions'.[262]

Jeffrey Barnes has written recently that contextualism is 'the modern approach to statutory construction', and says it has far greater claims in this regard than either textualism or purposivism.[263] The resolution of contextual factors, to the extent that they may legitimately assist in the process, however, is through the 'unqualified statutory instruction' to prefer the meaning that 'would best achieve the purpose or object' of the provisions. That is one reason Suna Rizalar and I described constructional choice as being 'at the epicentre of statutory interpretation'.[264] French CJ wrote that the 'reality is that statutory interpretation is all about choice of available meanings'.[265] Contextualism, without doubt, performs a vital role in this process. As Jacinta Dharmananda observes,

---

[249] *Rinehart v Rinehart* [2019] HCA 13 (at [83]), *Wollongong Coal Pty Ltd v Gujarat NRE India Pty Ltd* [2019] NSWCA 135 (at [50]), .
[250] *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667 (at [64]).
[251] Spigelman *Principle of legality and the clear statement of principle* (2005) 79 *Australian Law Journal* 769 (at 772) citing *Morris v Beardmore* [1981] AC 446 (at 459).
[252] Sunstein *Principles, Not Fictions* (1990) 57 *University of Chicago Law Review* 1247 (at 1247).
[253] *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (at 774).
[254] Fishman *Statutory Misinterpretations: Rash Holding in Brash Holdings* (2017) 45 *Federal Law Review* 199 (at 206).
[255] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 (at 408), cf *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 (at 461), *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Limited* (1985) 157 CLR 309 (at 315).
[256] *K & S Lake City freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 (at 315).
[257] *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 (at 461).
[258] Frankfurter *Some Reflections on the Reading of Statutes* (1947) 47 *Columbia Law Review* 527 (at 541).
[259] Perram *The perils of complexity: Why more law is bad law* (2010) 39 *Australian Taxation Review* 179 (at 183).
[260] *FCT v Jayasinghe* [2016] FCAFC 79 (at [7]), *SZTAL v Minister for Immigration & Border Protection* [2017] HCA 34 (at [37]), *CPB Contractors Pty Ltd v CFMMEU* [2019] FCAFC 70 (at [59]), *Australian Finance Direct Ltd v Director of Consumer Affairs* [2007] HCA 57 (at [40]).
[261] *Bennion on Statutory Interpretation* (at Part XIII).
[262] Burrows *The Changing Approach to the Interpretation of Statutes* (2002) 33 VUWLR 981 (at 986).
[263] Barnes *Contextualism: 'The Modern Approach to Statutory Interpretation* (2018) 41 UNSWLR 1083.
[264] Brysland & Rizalar *Constructional choice* (2018) 92 *Australian Law Journal* 81 (at 84).
[265] French *The Principle of Legality and Legislative Intention* (2019) 40 *Statute Law Review* 40 (at 44).

parliamentary materials 'inform but do not decide'.[266] In a real sense, while it is context which selects the candidates, it is purpose which picks the winner.

The High Court confirmed this in *Thiess* when it said that objective discernment of statutory purpose is 'integral to contextual construction', and that s 15AA involves the 'statutory reflection of a general systemic principle'.[267] *CIC Insurance* confirmed the potential reach of context from within which the constructional choice is to be made. In a way, the requirement to consult context in the widest sense is a necessary but not sufficient condition in determining what parliament meant by the words it used. Relevant context maps the outer reaches of the enquiry from within which meaning is potentially to be ascertained. Statutory purpose, however, is what legally and practically guides the resolution of statutory meaning.

There may be difficulties in identifying purpose, and often this is the case. Gleeson CJ illustrated this pesky reality in *Carr* by reference to income tax statutes, where provisions strike a balance between competing interests. Sometimes the legislature may abstain from stating any clear purpose at all. In rarer cases, the legislative purpose may be 'to express an inarticulate (or at least not publicly disclosed) compromise'.[268] Also, there is 'nothing to suggest that taxing Acts have higher standards of logical and normative consistency than any other class of statute'.[269]

Chief Justice French, with characteristic flair, reminds us that 'law's realm has its policy deserts, devoid of purpose, its badlands where conflicting purposes are tumbled up against each other in an incoherent jumble and the undulating country of policies in tension'.[270] However, once it is accepted that all legislation is purposive by nature, and that modern regulatory legislation inevitably pursues diverse, overlapping or obscure purposes, the s 15AA obligation is met by probing to what extent the respective interests are advanced. Political compromise does not relieve the s 15AA obligation, even if it makes its delineation more difficult. Legislative purpose 'is required to inform all interpretation', as French CJ points out.[271]

6.5 Disciplined and systematic

The exploration of context for interpretation purposes is now mandatory under the 'modern approach.[272] An early NSW chief justice said that '[e]verything depends upon

---

[266] Dharmananda *Outside the Text: Inside the Use of Extrinsic materials in Statutory Interpretation* (2014) 42 *Federal Law Review* 333 (at 354).
[267] *Thiess v Collector of Customs* [2015] HCA 12 (at [23]), *Calidad Pty Ltd v Seiko Epson Corporation* [2020] HCA 41 (at [91]), *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 (at [39]), *FCT v Sharpcan Pty Ltd* [2018] FCAFC 163 (at [208-212]), *Comptroller-General v Pharm-A-Care Laboratories Pty Ltd* [2018] FCAFC 237 (at [26]), *CCA19 v Secretary, Department of Home Affairs* [2019] FCA 946 (at [39]), cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (at 381), *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 (at [47]).
[268] *Stevens v Kabushika Kaisha Sony Computer Entertainment* [2005] HCA 58 (at [34]), *Collins v Northern Territory* [2007] FCAFC 152 (at [59-60]), cf *Country Carbon Pty Ltd v Clean Energy Regulator* [2018] FCA 1636 (at [118-119])
[269] *Woodside Energy Ltd v FCT (No 2)* [2007] FCA 1961 (at [204]).
[270] French CJ *Dolores Umbridge and Policy as Legal Magic* (2008) 82 *Australian Law Journal* 322 (at 326).
[271] French CJ *Dolores Umbridge and Policy as Legal Magic* (2008) 82 *Australian Law Journal* 322 (at 331).
[272] *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 (at [57]), cf *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 (at 423), *Bropho v Western Australia* (1990) 171 CLR 1 (at 20).

the subject matter and the context'.[273] When we refer to context in the 'widest sense', it is to context both within and outside the statute. Rather obviously, statutes are 'limited in the amount of context that they can contain'.[274] References to 'context' are often to matters external to the statute. Edelman J in the High Court, for example, notes that '*con*text is, literally, those matters to be considered (simultaneously) with the text'.[275] Similarly, context is always to be considered in close tandem with the text,[276] and before application of law to the facts.[277]

Kirby J asked rhetorically in *Lavender* – 'If context is important for statutory construction, why is it not always important?'[278] Some years later, the High Court in *Probuild* answered this in the affirmative.[279] The point to make is that context is 'always important',[280] but it can never be 'an end in itself'.[281] Context is 'often messy',[282] different in every case, and subject to change.[283] In some cases, the search for relevant context may prove laborious; in others, more straightforward.[284] However, even if context is random and taken as it is found to be, it must always be approached in a disciplined, systematic and logical way.[285]

Context may have influence at different levels. It usually includes the existing state of the law and the mischief the provisions were enacted to address.[286] It also, naturally, extends to the pre-enactment and enactment history of the provisions.[287] Extrinsic materials are part of the context, but 'statements of meaning' or intended meaning within those materials are usually accorded little weight.[288] Lord Steyn described this as being no more than 'what the government would like the law to be'.[289] The naïve

---

[273] *Hall v Jones* (1942) 42 SR (NSW) 203 (at 208).
[274] Tanner *Confronting the Process of Statute-Making* in Bigwood (ed) *The Statute – Making and Meaning* (at 72).
[275] *SAS Trustee Corporation v Miles* [2018] HCA 55 (at [64]).
[276] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 (at [47]).
[277] *Multiflex Pty Ltd v FCT* [2011] FCA 1112 (at [18]), *FCT v Multiflex Pty Ltd* [2011] FCAFC 142 (at [13]), *Virgin Blue Airlines Pty Ltd v FCT* [2010] FCAFC 137 (at [31]), cf Walshaw *Recent Developments in Statutory and Constitutional Interpretation* (2019) 40 *Statute Law Review* 1 (at 4).
[278] *R v Lavender* [2005] HCA 37 (at [109]).
[279] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 (at [34]).
[280] Spigelman *Principle of legality and the clear statement of principle* (2005) 79 *Australian Law Journal* 769 (at 772).
[281] *FCT v Consolidated Media Holdings Ltd* [2012] HCA 55 (at [39]), *CPB Contractors Pty Ltd v CFMMEU* [2019] FCAFC 70 (at [57-58]), *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 (at [14]), *Alphapharm Pty Ltd v H Lundbeck A-S* [2014] HCA 42 (at [121]).
[282] Barnes *Contextualism: 'The Modern Approach to Statutory Interpretation* (2018) 41 UNSWLR 1083 (at 1088).
[283] Gleeson CJ *Justice Hill Memorial Lecture – statutory interpretation* (2009) 44 *Taxation in Australia* 25 (at 30).
[284] Middleton J *Statutory Interpretation: Mostly Common Sense* (2016) 40 *Melbourne University Law Review* 626 (at 632).
[285] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 illustrates.
[286] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Limited* (1985) 157 CLR 309
[287] Allsop *Statute: context, meaning and pre-enactment history* [2005] *Bar News (Winter)* 19.
[288] *Berenguel v Minister for Immigration & Citizenship* [2010] HCA 8 (at [21]) illustrates, cf *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50 (at [33]), *Ex parte Beane* (1987) 162 CLR 514 (at 518), *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23 (at [31]), *Nominal Defendant v GLG Australia Pty Ltd* [2006] HCA 11 (at [22]), *Hunter Resources Limited v Melville* (1988) 164 CLR 234 (at 241).
[289] Steyn *The Intractable Problem of The Interpretation of Legal Texts* (2003) 25/5 *Sydney Law Review* 5 (at 14).

practice of 'planting' statements of intention in extrinsic materials does not go judicially unnoticed either.[290]

As has also been observed, the worst one to construe provisions is the person responsible for drafting them.[291] The basic reason for this is that determination of statutory meaning 'is an exercise of the judicial power, not of the legislative power'.[292] Context 'comes in many forms',[293] but 'no text can dictate its own interpretation'.[294] Context, of course, in its 'widest sense' may go further than these things, but it is never limitless or unconstrained.[295] Gleeson CJ has suggested the line be drawn at whatever 'could rationally assist understanding of meaning'.[296] Nor is context uniform in extent, value or impact. McHugh J said[297] –

> The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the texts took for granted or understood without conscious advertence by reason of the common language or culture.

6.6 Impact of context

The same language in different contexts may produce radically different outcomes. This is the whole thing about context - its potential to leverage diverse meanings and results.[298] The impact of context on the meaning of words is one reason why consultation of dictionaries is no substitute for interpretation. Words, after all, 'are only pictures of ideas on paper', as Wilmott CJ reflected in a case decided in 1767.[299]

Context is also to be expanded to include 'the way the statutory text is applied in the courts *after* the text is enacted'.[300] Rares J applied this theme directly in the recent case of *Berkeley Challenge*.[301] Statutory context, therefore, can be an evolving and dynamic thing. The weight and cogency of contextual factors is to be judged by the ordinary rules

---

[290] Keith Mason *The intent of legislators: How judges discern it and what they do if they find it* (2006) 27 *Australian Bar Review* 253 (at 259-261) illustrates.
[291] *Hilder v Dexter* [1902] AC 474 (at 477), *Rambaldi v Weeden* [2008] FCA 1597 (at [47]), cf Middleton J *Statutory Interpretation: Mostly Common Sense* (2016) 40 *Melbourne University Law Review* 626 (at 630).
[292] *Harrison v Melhem* [2008] NSWCA 67 (at [15]), *R v Aubrey* [2012] NSWCCA 254 (at [37]).
[293] Basten *Choosing Principles of Interpretation* (2017) 91 *Australian Law Journal* 881 (at 884).
[294] Campbell & Campbell *Why statutory interpretation is done as it is done* (2014) 39 *Australian Bar Review* 1 (at 16, 35), *Harrison v Melham* [2008] NSWCA 67 (at [12]), *Amaca Pty Ltd v Novek* [2009] NSWCA 50 (at [74-78]).
[295] cf *Woodside Energy Ltd v FCT (No 2)* [2007] FCA 1961 (at [201-203]).
[296] Gleeson CJ *The meaning of legislation: Context, purpose and respect for fundamental rights* (2009) 20 *Public Law Review* 26 (at 29).
[297] *Theophanus v Herald & Weekly Times Ltd* (1994) 182 CLR 104 (at 196), cf *Singh v Commonwealth* [2004] HCA 43 (at [54]), *Momcilovic v The Queen* [2011] HCA 34 (at [19]), *Minister for Home Affairs v Zentai* [2012] HCA 28 (at [31]).
[298] *FCT v Multiflex Pty Ltd* [2011] FCAFC 142 (at [29-33]) for example.
[299] *Dodson v Grew* (1767) 96 ER 106 (at 108), cf *Fell v Fell* (1922) 31 CLR 268 (at 276), *House of Peace Pty Ltd v Bankstown City Council* [2000] NSWCA 44 (at [26]).
[300] Gageler *Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process* (2011) 37(2) *Monash Law Review* 1 (at 1), Mason *The interaction of statute law and common law* (2016) 90 *Australian Law Journal* 324 (at 328), *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34 (at [88]), cf *Weiss v R* [2005] HCA 91 (at [9]), *Baiada Poultry Pty Ltd v R* [2012] HCA 14 (at [21]).
[301] *Berkeley Challenge Pty Ltd v United Choice* [2020] FCAFC 113 (at [190-191]).

of interpretation.[302] And, the more remote something is from the act and time of legislating, the higher will be its level of generality or abstraction. This means it will naturally have less (often no) influence on any constructional choice to be made.

A recurring problem is that there is no bright line in the land of context telling us when we have passed from potential legal relevance into alien non-justiciable territory – be it economics, science, philosophy or some other discipline. Although it has been said there is no 'explicit starting point' on the issue,[303] the most intuitive zones to begin exploration of internal context are immediately proximate sections and any cross-referenced or incorporated provisions. Once outside the statute, the natural inclination is first to look at the explanatory memorandum. Beyond that, and consistent with the 'widest sense' language ever-repeated by the courts, the field is relatively open.

What is clearer is that context only has utility 'if, and in so far as, it assists in fixing the meaning of the statutory text'.[304] Nor can it displace that meaning. A further indicator of the potential scope of 'context' in any particular case may be found by reference to the extrinsic materials listed in s 15AB(2) of the *Acts Interpretation Act 1901*.

That list is open-ended, but the utility of any particular document, whatever its source, is conditioned by the gateway requirement that the material in question is 'capable of assisting in the ascertainment of the meaning of the provision'.[305] This imposes an important practical restraint on what extrinsic material may properly be utilised by a court for interpretation purposes. It also provides a rough guide to the kinds of contextual things that might (emphasise 'might') be of value to an interpreter.

6.7 Unqualified statutory instruction

All legislation provokes questions about its practical application, but where does the record stand on s 15AA after 38 years? First of all, not everyone appreciated or agreed that the provision has mandatory effect. In some ways, this mirrored the experience in New Zealand where courts high and low all but ignored similar provisions.[306]

To the extent it is necessary to set the record straight on this point in Australia, the position was put beyond doubt in 2017 with confirmation that s 15AA involves an 'unqualified statutory instruction'.[307] Another view, expressed two decades after its enactment, was that s 15AA 'had virtually no effect on judicial doctrines'.[308] Whatever this means, it is certainly not a correct statement of the position today. Section 15AA has a tangible and enduring impact on how contested interpretation is settled.

---

[302] Kenny J Current Issues in the Interpretation of Federal Legislation [2013] FedJSchol 41 (at 9).
[303] Geddes *Purpose and Context in Statutory Interpretation* in Gotsis (ed) *Statutory Interpretation: Principles and Pragmatism for a New Age* 127 (at 155).
[304] *FCT v Consolidated Media Holdings Ltd* [2012] HCA 55 (at [39]), Gleeson CJ *Justice Hill Memorial Lecture – statutory interpretation* (2009) 44 *Taxation in Australia* 25 (at 29).
[305] *Harrison v Melhem* [2008] NSWCA 67 (at [12]), *Amaca Pty Ltd v Novek* [2009] NSWCA 50 (at [77]), *Allan v R (No 2)* [2011] NSWCCA 27 (at [15]), cf *FCT v Anstis* [2010] HCA 40 (at [40]).
[306] Ward *A Criticism of the Interpretation of Statutes in the New Zealand Courts* [1963] *New Zealand Law Journal* 293 (at 295).
[307] *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 (at [39]), cf *Ellis v Central Land Council* [2019] FCAFC 1 (at [116]), *Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining, and Energy Union* [2018] FCAFC 223 (at [77]), *FCT v Sharpcan Pty Ltd* [2018] FCAFC 163 (at [207-208]).
[308] Krever *Taming Complexity on Australian Income Tax* (2003) 25 *Sydney Law Review* 467 (at 480, n 43).

The record shows that a slow start and possibly disordering tendencies early on have been overtaken by a resiliently purposive ethos and practice. This was much driven by French CJ before and while he sat on the High Court. Having regard to purpose, that same judge reminds us, is not to engage 'in some creative usurpation of the legislative function' as the court is simply 'doing what the legislature itself has commanded'.[309] Purposivism is no longer to be stigmatised as judicial activism, much less some 'false judicial heroism'.[310] Nor is it necessary now to justify taking a purposive approach.[311] This is not to say that derivation of 'purpose' at the correct level (unaffected by subjective elements) may not be problematic, where the legislation is a product of political compromise, or parliament had a number of purposes.[312]

A modern statute 'will rarely be a seamless robe' in the sense that it identifies purpose with precision.[313] This practical fact, however, signals no systemic failure of purposivism or s 15AA, much less that courts are (or we should) retreat back into literalism. That approach is now truly to be regarded as an artefact of the past. Gleeson CJ said that the 'modern insistence on purposive construction is important in that it denies literalism as a sufficient method of expounding the meaning of a statutory text'.[314] The AAT put it correctly, therefore, when it said – 'It is clear that the High Court has determined that the current approach to statutory interpretation must be the purposive approach and not a literal approach'.[315]

6.8 Methodology and outcomes

The reign of purposivism of course does not mean the literal answer may not be the one forced by s 15AA requirements. To suggest otherwise tends to confuse methodology with outcomes. Experience shows that a purposive approach to interpretation rather often produces literal answers.[316] This is only to be expected in practice.

As McHugh J said in *Saraswati* – 'In many cases, the grammatical or literal meaning of a statutory provision will give effect to the purpose of the legislation'.[317] In these circumstances, the construction adopted is both literal and purposive.[318] To this extent, the perceived distinction between the literal and the purposive may involve a false polemic. The key point is that, while we may end up with a literal answer from the process, you cannot pre-confine the interpretive search to looking for one.

---

[309] French CJ *Dolores Umbridge and Policy as Legal Magic* (2008) 82 *Australian Law Journal* 322 (at 332).
[310] cf Gava *The Rise of the Hero Judge* (2001) 24 *University of NSW Law Journal* 747.
[311] Gleeson CJ *The meaning of legislation: Context, purpose and respect for fundamental rights* (2009) 20 *Public Law Review* 26 (at 31).
[312] *Stevens v Kabushika Kaisha Sony Computer Entertainment* [2005] HCA 58 (at [126]), *Esso Australia Resources Pty Ltd v FCT* [2011] FCA 360 (at [124]).
[313] cf Gleeson CJ *Justice Hill Memorial Lecture – statutory interpretation* (2009) 44 *Taxation in Australia* 25 (at 28).
[314] Gleeson CJ *Justice Hill Memorial Lecture – statutory interpretation* (2009) 44 *Taxation in Australia* 25 (at 29).
[315] *Reid v Secretary of Education, Science and Training* [2006] AATA 1051 (at [35]).
[316] *Commissioner of Stamp Duties v Commonwealth Funds Management Ltd* (1995) 38 NSWLR 173 for example, cf Pagone *Tax Uncertainty* [2009] *Melbourne Law School Annual Tax Lecture* (at 16), Pagone *Deciding Tax Cases* [2017] *New Zealand Law Society Tax Conference paper* (at 13).
[317] *Saraswati v The Queen* (1991) 172 CLR 1 (at 21).
[318] *DPP v Leys* [2012] VSCA 304 (at [45]).

What s 15AA does not do is permit a literal *approach* to be taken to interpretation, whatever the context and whatever the answer. To the extent earlier judicial comments may suggest there is an ongoing choice between different *approaches* to interpretation,[319] they are either mistaken or overtaken by later events.[320] It is also inaccurate now to say that purposivism is the 'preferred' or 'dominant' approach; that there is a 'statutory imprimatur' for its invocation;[321] or that the literal approach 'may no longer be in vogue'. Relativism in this regard is a murmur from the past.

Nor is there valid scope for applying some hybrid of *approaches* dependent on personal inclination or the facts. The choices to be made in contested interpretation situations are overwhelmingly constructional, rather than methodological.[322] These choices – Julius Stone called them 'leeways for choice'[323] – are invariably about the application of known and understood principles, not their content. This remains true, not only for first instance judges and intermediate appeal courts, but also in the High Court itself. In making constructional choices, parliament and the High Court in lockstep tell us directly to take a purposive approach.[324]

In 1999, Spigelman CJ published a paper about *Identifying the Linguistic Register* in which he surveyed the 'modern approach'.[325] Referring to *Cooper Brookes* and s 15AA, he said our approach was the same as described by the celebrated American judge, Learned Hand J.[326] The Chief Justice said that a good shorthand description of this approach is 'literal in total context'.[327] That phrase, as he acknowledged, came from a textbook by the Canadian academic, Elmer Driedger QC.[328]

Some observations – first, Driedger based the description 'literal in total context' on pre-1975 English cases. Second, those cases do not fully reflect our 'modern approach'. Third, the phrase 'literal in total context' has always sounded vaguely odd, partly because we had moved decisively away from literalism nearly two decades before.

Despite these factors, 'literal in total context' became a part of the discourse on interpretation.[329] Of interest, however, is that that description did not survive into later

---

[319] *Stevens v Kabushika Kaisha Sony Computer Entertainment* [2005] HCA 58 (at [30]), cf *Valuer-General v Fivex Pty Ltd* [2015] NSWCA 53 (at [26]), *Olefines Pty Ltd v Valuer-General* [2018] NSWCA 265 (at [11]).

[320] cf Quigley *Interpreting GST Law in Australia* in White & Krever (eds) *GST in Retrospect and Prospect* (at 116-119), Stone *The GST – A Practical Business Tax* [2006] *TIA National GST Conference paper*.

[321] cf Fisher *Judicial dissent in taxation cases: The incidence of dissent and factors contributing to dissent* (2015) 13 *eJournal of Tax Research* 470 (at 487).

[322] Hill J *How is Tax to be Understood by Courts?* (2001) 4/5 *The Tax Specialist* 226 (at 233).

[323] Stone *Legal System and Lawyers' Reasonings* (at 304).

[324] cf MacIntyre *Financial Supplies after 20 years* [2019] *ATAX Where Policy Meets Reality Conference paper* (at 12), Sridaran *Reliance Carpet Co Pty Ltd: Was the Full Federal Court right?* (2008) 3 *Journal of the Australasian Tax Teachers Association* 269 (at 278).

[325] Spigelman CJ *Statutory Interpretation: Identifying the Linguistic Register* (1999) 4/1 *Newcastle Law Review* 1.

[326] *Cabell v Markham* (1945) 148 F 2d 737 (at 739), cf *Re Energex Ltd (No 4)* [2011] ACompT 4 (at [10]).

[327] cf Spigelman CJ *The poet's rich resource: Issues in statutory interpretation* (2001) 21 *Australian Bar Review* 224 (at 230).

[328] Driedger *Construction of Statutes* (at 2).

[329] *R v Young* (1999) NSWCA 166 (at [13-18]), *NSW Crime Commission v Murchie* [2000] NSWSC 591 (at [30]), *Lange v Lange* [2006] NTSC 74 (at [35]), *Taylor v Centennial Newstan Pty Ltd* [2009] NSWCA 276 (at [50]), *Griffiths v Trustees of Parliamentary Superannuation Fund* [2011] NSWSC 983 (at [13]), *Haureliuk v Furler* [2012] ACTCA 11 (at [26]) for example.

editions of the Driedger text.[330] Ruth Sullivan in the sixth edition emphasises the entire or total context requirement of 'Driedger's Modern Principle', but gone are references to it being the 'literal' meaning we are looking for in that setting.[331]

Gageler J, before he became a judge, discussed the concept of 'literal in total context' in a manner that gave a certain acceptance to the phrase as an accurate descriptor of what it stood for.[332] Some years later, in the inaugural *Spigelman Public Law Oration*, he said it was Spigelman CJ 'who first clearly articulated the now dominant text-in-context approach to statutory interpretation'.[333] Since *Taylor*, however, the phrase 'literal in total context' has been little heard, while the cases continue to emphasise the width of context together with the strengthening reign of purposivism. If we are to adopt a description like that from Driedger, in my view, it should be 'purposive in total context'. The phrase 'literal in total context' was never quite right, never achieved widespread approval, and was never actively embraced in the High Court.

6.9 Reversion and stability

Some commentators saw some reversion to textualism (aka literalism) by the High Court following *Alcan* in 2009 due to perceived inconsistency with *CIC Insurance*.[334] They described this as the 'new modern', but history is against a thesis in these terms. *Alcan* merely reminds us to start with the text of the law, surely a constitutional constant in our system.[335] In his *Orgy of Statutes* paper, Lord Steyn said primacy of the text 'is the first principle of interpretation'.[336] Wigney SC has regarded this as 'not a particularly startling or radical proposition'.[337] It is a baseline position involving no back-tracking from purposivism. In their teaching materials at *Melbourne University*, Kenneth Hayne and Michelle Gordon say – 'always, always, always one begins with the words that have been used and ends with the words that have been used'.[338]

This requirement is merely another way of reflecting earlier phraseology used in the High Court, like 'primacy of enacted law'[339] and 'text-based activity'.[340] In Canada, they

---

[330] Spigelman CJ *The poet's rich resource: Issues in statutory interpretation* (2001) 21 *Australian Bar Review* 224 (at 230).
[331] *Sullivan on the Construction of Statutes* (at §2.1), *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)* [2006] 1 SCR 140 (at [48]), Beaulac & Côté *Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimation* (2006) 40 Thémis 131.
[332] Gageler *Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process* (2011) 37(2) *Monash Law Review* 1.
[333] Gageler J *Deference* in Williams (ed) *Key Issues in Public Law* 1 (at 1).
[334] Williams, Burnett & Palaniappan *Statutory Construction: A Method* in Williams (ed) *Key Issues in Public Law* 79 (at 92), cf Pearce & Geddes *Statutory Interpretation in Australia* (at [3.8-3.9]), cf *FCT v BHP Billiton Limited* [2011] HCA 17 (at [47]).
[335] *Dossett v TKJ Nominees Pty Ltd* [2003] HCA 69 (at [57]) explains, cf *Leichhardt Municipal Council v Montgomery* [2007] HCA 6 (at [54]).
[336] Steyn *Dynamic Interpretation Amidst an Orgy of Statutes* (2004) 35 *Ottawa Law Review* 163 (at 165).
[337] Wigney *Text, context and the interpretation of a 'practical business tax'* (2011) 40 *Australian Tax Review* 94 (at 95).
[338] Hayne & Gordon *Statutes in the 21st Century* (at 1), *Mondelez Australia Pty Ltd v AMWU* [2020] HCA 29 (at [14]),
[339] *Nominal Defendant v GLG Australia Pty Ltd* [2006] HCA 11 (at [82]), *Harrison v Melhem* [2008] NSWCA 67 (at [170]), cf Gleeson CJ The Meaning of Legislation: Context, Purpose and respect for Fundamental Rights [2008] *Victorian Law Foundation paper* (at 6), Steyn *Dynamic Interpretation Amidst an Orgy of Statutes* (2003) 35 *Ottawa Law Review* 163 (at 165).
[340] *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14 (at [87]) for example.

express the latter idea by describing legislation as a 'literary genre'.[341] The instruction to start with the text is merely adjectival and carries no hidden stigma. As Kirby J noted about the 'text, context, purpose' mantra, the 'greatest of these is text'.[342] Courts observe that *CIC Insurance* has 'been cited too many times to be doubted'.[343]

If anything, purposivism is an increasingly secure norm and value in our system, something *Alcan* did nothing to undermine. It is easy to make that judgment a decade on with the benefit of hindsight of course. The record does tend to show, however, a degree of jumping at legal shadows in the aftermath to that case. Some commentators returned to notions of statutory interpretation in Australia being a 'fashion industry'[344] or representing a swinging pendulum.[345] These metaphors are largely overworked, however, insofar as they suggest a position now hostage to judicial whim or subject to inevitable and imminent reversal.

Our interpretational history shows long periods of relative stability, something undoubtedly now made all the more enduring by enactment of s 15AA and what Dan Meagher calls the 'twin pillars' of our modern approach – *CIC Insurance* and *Project Blue Sky*.[346] The ongoing coherence and rule of purposivism is not to be derailed by occasional judicial hiccups,[347] failure to appreciate what the new regime requires, or the odd outlier decision uncorrected by appeal processes.[348] Like any revolution, it has taken time for the complete outworkings of what took place in 1981 to be fully realised in any kind of consensus practice, let alone in legal theory.

The year after *Alcan* was decided, there was further concern that comments in *Saeed*[349] heralded regression to more literalistic methods.[350] This turned out not to be so, as some

---

[341] *Sullivan on the Construction of Statutes* (at §8.1).
[342] Kirby J *Statutory Interpretation: The Meaning of Meaning* (2011) 35 *Melbourne University Law Review* 113 (at 134), cf *Commissioner of the AFP v Courtenay Investments Ltd (No 2)* [2014] WASCA 55 (at [14]).
[343] *FCT v Jayasinghe* [2016] FCAFC 79 (at [7]), cf *SZTAL v Minister for Immigration & Border Protection* [2017] HCA 34 (at [37]), *CPB Contractors Pty Ltd v CFMMEU* [2019] FCAFC 70 (at [59]).
[344] cf Brooks *The responsibility of judges in interpreting tax legislation* in Cooper (ed) *Tax Avoidance and the Rule of Law* (at 172).
[345] Allerdice *The swinging pendulum: Judicial trends in the interpretation of revenue statutes* (1996) 19 UNSWLJ 162, cf Olding *Interpretation of the GST Act – Towards a Principled Basis?* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* (at 79), Hill J *How is Tax to be Understood by Courts?* (2001) 4/5 *The Tax Specialist* 226 (at 227, 234), Livingston *Practical Reason, "Purposivism", and the Interpretation of Tax Statutes* (1996) 51 *Tax Law Review* 677 (at 680).
[346] Meagher *The Modern Approach to Statutory Interpretation and the Principle of Legality: An Issue of Coherence* (2018) 46 *Federal Law Review* 397 (at 402).
[347] *Northern Territory v Collins* [2008] HCA 49 (at [99]) for example.
[348] cf Slater *The Income Tax Assessment Acts: Statutes in Senescence?* [2015] *TIA 30th National Tax Convention paper* (at 11).
[349] *Saeed v Minister of Immigration and Citizenship* (2010) 241 CLR 252 (at 264).
[350] *Wentworth District Capital Ltd v FCT* [2010] FCA 862 (at [35]), Perram *The perils of complexity: Why more law is bad law* (2010) 39 *Australian Taxation Review* 179 (at 183), Downes J *Eleven years of the 'practical business tax'* (February 2012) 70 *Law Institute Journal* 70 (at 73), Wheelahan *Contemporary Issues in Construing Statutes: When will the Courts Rewrite or Modify the Words of a Tax Act?* [2016] *TIA Barossa Convention paper* (at 3), cf Kirby J *The Never-Ending Challenge of Drafting and Interpreting Statutes* (2012) 36 *Melbourne University Law Review* 140 (at 173).

predicted[351] and later decisions confirmed.[352] One judge took a pessimistic view only to later adjust his position.[353] The idea that the emphasis 'shifted somewhat'[354] is a verdict against the evidence. Wigney SC rightly said it would be wrong to read too much into cases like *Saeed* and *Travelex*.[355] In my view, *Saeed* is no more than a judicial caution to be careful with extrinsic materials, something which cases in the interim bear out.[356]

The fact is that the High Court has not returned 'to the dark days of literalism'. Any even survey of the court's work over the past two decades should allay any anxiety (if not the nostalgia of some[357]) that we are merely awaiting some return to interpretational styles which ruled the 1960s. To the extent it was strictly necessary, the High Court confirmed this is 2019 when it said that a literal approach to construction 'has long been eschewed by this Court', and that none of the intervening cases (including *Saeed*) 'suggest a return to a literal approach to construction'.[358] It needs always to be kept in mind that cases reaching the High Court 'rarely involve a choice between clearly right and wrong meanings'.[359] Special leave ensures that those cases are often concerned with nuances at the edge of words. It is only natural that application of the same purposive principles by different judges may legitimately yield different answers.[360]

6.10 Revolution and evolution

The stability of our new protocols, however, is not something to be frozen in time.[361] There was a parallel revolution in 1981 as to the approach to be adopted. In the meantime, that approach, hand-in-hand with common law principles of interpretation, continues to evolve in line with 'structural principles or systemic values'.[362] Flexibility, coherence and 'rejection of the adoption of rigid rules' is at the heart of the modern approach.[363] This is crucial to understanding purposivism. Common law 'rules of

---

[351] Spigelman CJ *The intolerable wrestle: Developments in statutory interpretation* (2010) 84 ALJ 822 (at 831), *Re Energex Ltd (No 4)* [2011] ACompT 4 (at [18-21]), cf Brysland *GST and Government in 2010* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* 3 (at 42-43).

[352] *Mondelez Australia Pty Ltd v AMWU* [2020] HCA 29 (at [66]), *CPB Contractors Pty Ltd v CFMMEU* [2019] FCAFC 70 (at [54-57]), cf *CFMMEU v BHP Billiton Nickel West Pty Ltd* [2018] FCAFC 107 (at [25-26]).

[353] *Skyy Spirits LLC v Lodestar Anstalt* [2015] FCA 509 (at [45-47]).

[354] *S M v The Queen* [2013] VSCA 342 (at [55]), cf *Reardon v Magistrates' Court of Victoria* [2018] VSCA 76 (at [82]).

[355] Wigney *Text, context and the interpretation of a 'practical business tax'* (2011) 40 *Australian Tax Review* 94 (at 97).

[356] *The Queen v A2* [2019] HCA 35 (at [35-37]), cf Dharmananda *Outside the Text: Inside the Use of Extrinsic materials in Statutory Interpretation* (2014) 42 *Federal Law Review* 333 (at 335, 346).

[357] *Australian Finance Direct Ltd v Director of Consumer Affairs* [2007] HCA 57 (at [40]) citing *Batagol v FCT* (1963) 109 CLR 243 (at 251).

[358] *The Queen v A2* [2019] HCA 35 (at [32, 37]), *Coeur de Lion Investments Pty Ltd v Lewis* [2020] QCA 111 (at [13]).

[359] *Pfeiffer v Stevens* [2001] HCA 71 (at [88]), *Ellavale Engineering Pty Ltd v Pilgrim* [2005] NSWCA 272 (at [53]), French CJ *The courts and the Parliament* (2013) 87 *Australian Law Journal* 820 (at 824).

[360] Hill J *How is Tax to be Understood by Courts?* (2001) 4/5 *The Tax Specialist* 226 (at 232), *FCT v Sharpcan Pty Ltd* [2018] FCAFC 163 for example, cf *Heather v PE Consulting Group Ltd* [1973] Ch 189 (at 216).

[361] Cf Blaker *The High Court's Minimalism in Statutory Interpretation* (2019) 40 *Adelaide Law Review* 539.

[362] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4 (at [58]), cf *Corporate Affairs Commission v Yuill* (1991) 172 CLR 319 (at 322).

[363] *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9 (at [37]), *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 (at 401), *BMK18 v Minister for Home Affairs* [2019] FCA 189 (at [22]), *Department of Health and Aging v Li* [2018] SASCFC 52 (at [96]).

interpretation' (canons and maxims) are only 'rules' in softly facultative way.[364] They are driven by force of circumstance and perception, rather than force of law. Lord Reid characterised them as 'our servants, not our masters'.[365] French CJ said they were 'but frail guidelines to which recourse is had as a last rather than as a first resort'.[366] Like proverbs, they are 'appropriate only in some circumstances and not in all'.[367]

What judges say about interpretation is also not to be read as having statutory effect.[368] Statutory interpretation involves the application of legal method, not scientific method.[369] Nor is it susceptible to empirical analysis using tools like 'corpus linguistics'.[370] Despite a degree of overlap between legal and scientific techniques (including syllogistic reasoning and induction techniques), interpretational problems 'are not solved as one can solve a simple linear equation which has only one solution'.[371]

Self-evidently, 'prediction of the likely results of a purposive construction is not a precise science'.[372] In this regard, commentators have spoken of 'chaos' in the field and creation of a 'judicial jungle'.[373] 'Being a pragmatic business', said John Burrows, statutory interpretation 'is not susceptible of a coherent philosophy'.[374]

Lord Steyn has said famously that interpretation is an art rather than a science, and 'too elusive to be encapsulated in a theory'.[375] This is correct but it may tend to over-mystify the position. Judgments are not works of art, of course, nor is the judge some kind of artist. As Hill J himself pointed out, 'an item created without the intention of making an artistic statement would not be a work of art no matter how artistic it might appear to

[364] Basten *Choosing Principles of Interpretation* (2017) 91 *Australian Law Journal* 881 (at 881), cf *Baker v Campbell* (1983) 153 CLR 52 (at 104), Raymond *Saving the Literal* in Gotsis (ed) *Statutory Interpretation: Principles and Pragmatism for a New Age* 177 (at 195).
[365] *Maunsell v Olins* [1975] AC 373 (at 382), cf *Corporate Affairs Commission v Yuill* (1991) 172 CLR 319 (at 347), *CB Cold Storage Pty Ltd v IMCC Group (Australia) Pty Ltd* [2017] VSC 23 (at [60]), Spigelman CJ *Statutory Interpretation: Identifying the Linguistic Register* (1999) 4/1 *Newcastle Law Review* 1 (at 14).
[366] French CJ *Statutory Interpretation in Australia: Launch of the 8th Edition* [2014] *University House ANU address* (at 4).
[367] Barwick CJ *Foreword* to Pearce *Statutory Interpretation in Australia* (First Edition).
[368] *Comcare v PVYW* [2013] HCA 41 (at [15-16]), *Stewart v Atco Controls Pty Ltd* [2014] HCA 15 (at [32]).
[369] Gordon J *The Interaction between Science and Law – Legal Science or a Science of Law* [2016] *UWA French CJ Colloquium paper*.
[370] Slocum *Ordinary Meaning and Empiricism* (2019) 40 *Statute Law Review* 13, cf De Mulder, van Noortwijk & Combrink-Kuiters *Jurimetrics Please!* (2010) 1 *European Journal of Law and Technology* (at [3.1]).
[371] French CJ *Science and Judicial Proceedings – Seventy-six years on* (2009) 17 *Journal of Law and Medicine* 206 (at 211), cf French CJ *Judging Science* [2011] *13th Greek/Australian International Legal and Medical Conference paper*, French CJ *The Principle of Legality and Legislative Intention* (2019) 40 *Statute Law Review* 40 (at 44).
[372] *Craies on Legislation* (at 304) quoted by Gummow *Statutes* in Gotsis (ed) *Statutory Interpretation: Principles and Pragmatism for a New Age* 1 (at 3).
[373] Ward *A Criticism of the Interpretation of Statutes in the New Zealand Courts* [1963] *New Zealand Law Journal* 293 (at 296).
[374] Burrows *The Changing Approach to the Interpretation of Statutes* (2002) 33 VUWLR 981 (at 981).
[375] Steyn *The Intractable Problem of The Interpretation of Legal Texts* (2003) 25/5 *Sydney Law Review* 5 (at 6, 8), cf Kirby J *Statutory Interpretation: The Meaning of Meaning* (2011) 35 Melbourne University Law Review 113 (at 133).

be'.[376] Statutory interpretation might be an 'art' in the sense that it requires a special skill, but that skill is always to be applied by reference to standards external to the judge.

As an AAT senior member put it, interpretation 'must involve the conscientious application of methodology'.[377] Creative elements no doubt are present to a limited degree, as Hill J himself freely acknowledged, but they are carefully confined by the judicial function and should not be overstated. French CJ said that interpretation involves law-making to the extent it involves constructional choice.[378] We might agree then that interpretation is a tightly disciplined craft within which correct methods are to be applied. Section 15AA and constructional choice principles play a central role in the practice of this technical craft.[379]

6.11 Purpose, policy and compromise

The discussion of text, context and purpose leads naturally to the vexed place of policy in statutory analysis. Purpose and policy are related concepts often used interchangeably or without deliberation. As Jacinta Dharmananda observes, their use 'in one breath' by the High Court illustrates the judicial vernacular in this respect.[380] Purpose is arguably narrower than policy, but for present purposes the precise boundary is not crucial. Purpose is conceived as the intended practical operation of the law or what it is designed to achieve.[381] The influence of legislative policy and its practical outworking may be subtle and sometimes complicated, but it is never irrelevant.

The following key principles, however, guide the way in most situations –

- *statutes always have some objective purpose to accomplish – parliament is never purposeless*[382]
- *modern statutes are often the product of political compromise and rarely pursue a singular purpose*[383]
- *framing the relevant purpose or policy at too high a level is likely to lead to interpretive error*[384]

---

[376] *FCT v Murray* 90 ATC 4182 (at 4197), citing *Cuisenaire v Reed* [1963] VLR 719 (at 730), *George Hensher Ltd v Restawhile Upholstery (Lancs) Ltd* [1976] AC 64 (at 95),cf *Burge v Swarbrick* [2007] HCA 17 (at [54-62]).
[377] O'Donovan SM *oral remarks* [2019] *Cotter – Uriarra Conference*.
[378] French *The Principle of Legality and Legislative Intention* (2019) 40 *Statute Law Review* 40 (at 45).
[379] cf Williams, Burnett & Palaniappan *Statutory Construction: A Method* in Williams (ed) *Key Issues in Public Law* 79 (at 96).
[380] Dharmananda *Outside the Text: Inside the Use of Extrinsic materials in Statutory Interpretation* (2014) 42 *Federal Law Review* 333 (at 350), citing *Certain Lloyd's Underwriters v Cross* [2012] HCA 56 (at [24-26]).
[381] *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2 (at [72]) citing *APLA Ltd v Legal Services Commissioner* [2005] HCA 44 (at [178]), *McCloy v New South Wales* [2015] HCA 34 (at [132]).
[382] *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2 (at [76]) citing *Residual Assco Group Ltd v Spalvins* [2000] HCA 33 (at [27]), *Thiess v Collector of Customs* [2014] HCA 12 (at [23]) for example.
[383] *McGlade v Native Title Registrar* [2017] FCAFC 10 (at [351]) describes the problem.
[384] *Carr v Western Australia* [2007] HCA 47 (at [5-7]), *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 (at [51]), *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58 (at [95]), *MyEnvironment Inc v VicForests* [2013] VSCA 356 (at [148-150]).

- *the relevant question is usually how far the legislation goes in pursuit of identified purpose or policy*[385]
- *purpose and policy are surer guides to meaning than the logic with which provisions are constructed*[386]
- *do not construct your own idea of desirable policy then characterise that as the statutory purpose*[387]
- *purpose resides in the text and structure of the Act, even when derived from external sources*.[388]

A full treatment of these factors is beyond the scope of this note. Comment might be made about 'political compromise', however, given the complications it may produce in practice. The story starts with *Rodriguez*, an American case, stating that a modern statute rarely pursues some singular purpose at all costs. Deciding what competing values will be promoted or sacrificed is the 'very essence of legislative choice'.[389]

As Gleeson CJ explained by example in *Carr v Western Australia*, assuming that whatever advances the primary object stated in the statute 'is unlikely to solve the problem' and may involve 'a purported exercise of judicial power for a legislative purpose'.[390] Sometimes parliament may deliberately refrain 'from forming or expressing a purpose', as indeed this may be the very thing which enables passage of the law.[391] Edmonds J once spoke about 'political infection' of the tax law in this regard.[392] Eugene Wheelahan SC makes the sound point that often it is 'necessary to examine very closely what function the particular provisions play in the logic and structure of the enactment' in order to ascertain the purpose.[393]

6.12 Legislative intention

In the old case of *Saloman v Saloman*, legislative intention is described as a 'very slippery phrase'.[394] Traditionally, Australian judges have used 'legislative intention' in

---

[385] *Rodriguez v United States* (1987) 480 US 522 (at 525-526), *CFMEU v Mammoet* [2013] HCA 36 (at [40-41]), *Carr v Western Australia* [2007] HCA 47 (at [6]), *Attorney-General v Marquet* [2003] HCA 67 (at [145]), *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50 (at [93]), *Tjungarrayi v Western Australia* [2019] HCA 12 (at [46]).
[386] *Commissioner for Railways v Agalianos* (1955) 92 CLR 390 (at 397), *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 (at [47]), *AB v Western Australia* [2011] HCA 42 (at [10]), *Certain Lloyd's Underwriters v Cross* [2012] HCA 56 (at [24-26]).
[387] *Williams v Wreck Bay Aboriginal Community Council* [2019] HCA 4 (at [79]) most recently for example,
[388] *Lacey v Attorney-General* [2011] HCA 10 (at [44]), *Momcilovic v The Queen* [2011] HCA 34 (at [111]), *Lee v NSW Crime Commission* [2013] HCA 39 (at [45]), *Cole v Minister for Immigration & Border Protection* [2018] FCAFC 66 (at [42]), *FCT v Sharpcan Pty Ltd* [2018] FCAFC 163 (at [213]).
[389] *Rodriguez v United States* 480 US 522 (1987) (at 525-526), *Woodside Energy Ltd v FCT* [2009] FCAFC 12 (at [51]) for example.
[390] *Carr v Western Australia* [2007] HCA 47 (at [5]).
[391] Gleeson CJ *The meaning of legislation: Context, purpose and respect for fundamental rights* (2009) 20 *Public Law Review* 26 (at 33).
[392] Edmonds J *Structural Tax Reform: What Should be Brought to the Table?* (2015) 30 *Australian Tax Forum* 393 (at 398).
[393] Wheelahan *Contemporary Issues in Construing Statutes: When will the Courts Rewrite or Modify the Words of a Tax Act?* [2016] *TIA Barossa Convention paper* (at 11).
[394] *Saloman v Saloman & Co* [1897] AC 22 (at 38).

vague and non-deliberative ways[395] despite what has been referred to as an 'inherited understanding' of the concept.[396] Rules of construction are framed around the absence of contrary intention, a position which is mirrored in interpretation legislation generally[397] or to be implied.[398] Section 2(2) of the *Acts Interpretation Act 1901*, for example, says that the 'application of this Act or a provision of this Act to an Act or provision of an Act is subject to a contrary intention'. It is also pointed out that intention and purpose are 'not logically congruent' (although they may coincide),[399] and that it is possible to determine purpose without exploring intention.[400]

In Australia, legislative intention is now seen as the objective output of the interpretation process, rather than an input into the determination of what the text means.[401] Intention is what parliament is *taken* to mean by the words it used. Political motivations and exigencies are wholly neutral factors.[402] Parliament manifests its constructive intention through the medium of the language it adopts. Hayne J said that intention is a 'conclusion reached about the proper construction of the law in question and nothing more'.[403] It is a fiction or a metaphor,[404] and a 'constitutional courtesy' for us.[405]

Kirby J said he never uses the expression anymore,[406] French CJ called it a 'phantom',[407] and one writer went even further to describe it as an 'oxymoron'.[408] Legislatures do not have intents, 'only outcomes', an American judge noted.[409] Gleeson CJ emphasised the need to avoid the temptation to engage in 'psychoanalysis of individuals'.[410] A Canadian academic said intent was at most 'a harmless, if bombastic, way of referring to the social policy behind the Act'.[411]

The High Court in *Cross* makes it clear that intention is a 'product' of interpretation processes.[412] One textbook said this was a 'rather radical development'[413] and in some

---

[395] Blaker *Is Intentionalist Theory Indispensable to Statutory Interpretation?* (2017) 43 *Monash University Law Review* 238 (at 247).
[396] Gageler J *Legislative Intention* (2015) 41/1 *Monash University Law Review* 1 (at 2-7).
[397] Pearce *Interpretation Acts in Australia* (at 7-11).
[398] *Buresti v Beveridge* (1998) 88 FCR 399 (at 401).
[399] *Lee v NSW Crime Commission* [2013] HCA 39 (at [45]).
[400] French CJ *The courts and the Parliament* (2013) 87 *Australian Law Journal* 820 (at 826).
[401] Mason *The interaction of statute law and common law* (2016) 90 *Australian Law Journal* 324 (at 328) for example.
[402] *Australian Rice Holdings Pty Ltd v CSR* [2004] VSCA 17 (at [16]).
[403] *Momcilovic v The Queen* [2011] HCA 34 (at [341]), cf *ASIC v Rent 2 Own Cars Australia Pty Ltd* [2020] FCA 1312 (at [60-61]).
[404] *Fothergill v Monarch Airlines Ltd* [1981] AC 251 (at 279), cf *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429 (at 443).
[405] *Zheng v Cai* [2009] HCA 52 (at [28]), *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 228 (at [430]), *Dickson v The Queen* [2010] HCA 30 (at [32]), Spigelman *Principle of legality and the clear statement of principle* (2005) 79 *Australian Law Journal* 769 (at 769).
[406] Kirby J *Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts* [2002] *Cambridge University Clarity and Statute Law Society Joint Conference paper* (at 2).
[407] *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429 (at 443).
[408] Shepsle *Congress as a 'They', not an 'It': Legislative Intent as an Oxymoron* (1992) 12 *International Review of Law and Economics* 239.
[409] Easterbrook *Statutes' Domain* (1983) 50 *University of Chicago Law Review* 533 (at 547).
[410] *Singh v Commonwealth* [2004] HCA 43 (at [19]).
[411] Willis *Statute Interpretation in a Nutshell* (1938) 16 *Canadian Bar Review* 1 (at 3).
[412] *Certain Lloyd's Underwriters v Cross* [2012] HCA 56 (at [25]).
[413] Crawford, Boughey, Castan & O'Sullivan *Public Law and Statutory Interpretation* (at 225).

quarters it is. Despite academic debate,[414] a 'growing band of defenders',[415] nuanced views elsewhere,[416] and a degree of judicial provocateurism,[417] however, the High Court has been concerned to stress that intention in this context has nothing to do with the legislative motivations of parliamentarians considered individually or as a collective.[418] Some of the criticism levelled at the court over its stance also has a fretting tone.

In his *Dolores Umbridge* paper, French CJ suggested that what others took as real intention was never more than attributed.[419] In 2019, he wrote – 'Although it has long been integral to the rhetoric of statutory construction, it does not denote a state of anybody's mind', and that 'once meaning is determined the legislative intention can be announced'.[420] Although the threads of this stretch back to early days of the High Court,[421] it was Dawson J in 1990 who first stated directly for us that intention is a 'fiction'.[422] Only a few years before, Mason J had said in *Babaniaris* that the 'fundamental responsibility of a court when it interprets a statute is to give effect to the legislative intention as it is expressed in the statute'.[423]

Not long afterwards, in *Project Blue Sky*, 'intention as imputation' was confirmed for the modern era in Australia.[424] In contract law, the equivalent position had been settled by the mid-19th century.[425] What was called the 'redefinition of legislative intent' in Australia has an impact insofar as imputed intention is arrived at by reference to rules of construction and their underlying assumptions.[426] Sir Anthony Mason made similar points concerning the 'moderation of statutory intention'.[427] Campbell and Campbell

---

[414] Ekins & Goldsworthy *The Reality and Indispensability of Legislative Intentions* (2014) 36 *Sydney Law Review* 39, Feldman *Statutory Interpretation and Constitutional Legislation* (2014) 130 *Law Quarterly Review* 473, Blaker *Is Intentionalist Theory Indispensable to Statutory Interpretation?* (2017) 43 *Monash University Law Review* 238, South *Are Legislative Intentions Real?* (2014) 40 *Monash University Law Review* 853, Ekins *The Nature of Legislative Intent*, Goldsworthy *Is Legislative Supremacy Threatened?* (20 December 2016) *Quadrant online*, Hayne *Statutes, Intentions and the Courts: What Place does the Notion of Intention (Legislative or Parliamentary) have in Statutory Construction?* (2013) 13 *Oxford University Commonwealth Law Journal* 271, Smith *Is the High Court Mistaken about the Aim of Statutory Interpretation?* (2016) 44 *Federal Law Review* 227, for example.

[415] Goldsworthy *Legislative Intention Vindicated?* (2013) 33 *Oxford Journal of Legal Studies* 821 (at 842).

[416] Duxbury *Elements of Legislation* (at 92-119) illustrates, cf Radin *Statutory Interpretation* (1930) 43 *Harvard Law Review* 863 (at 881), *Bennion on Statutory Interpretation* (at 472-474), Sales *Legislative Intention, Interpretation, and the Principle of Legality* (2019) 40 *Statute Law Review* 53 (at 58-61).

[417] Gageler *Legislative Intention* (2015) 41/1 *Monash University Law Review* 1, Basten *Legislative Intention* (2019) 93 *Australian Law Journal* 367 (at 367) for example.

[418] *Byrnes v Kendle* [2011] HCA 26 (at [97]), cf *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2 (at [74-77]), Gageler Legislative Intention (2015) 41 *Monash University Law Review* 1.

[419] French CJ *Dolores Umbridge and Policy as Legal Magic* (2008) 82 *Australian Law Journal* 322 (at 331-332).

[420] French CJ *The Principle of Legality and Legislative Intention* (2019) 40 *Statute Law Review* 40 (at 40, 50), cf French CJ *Interpreting the Constitution – Words, History and Change* (2014) 40 *Monash University Law Review* 29 (at 35-37), *Momcilovic v The Queen* [2011] HCA 34 (at [327]).

[421] *Tasmania v Commonwealth* (1904) 1 CLR 329 (at 358-359) for example, cf *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 (at 405).

[422] *Mills v Meeking* (1990) 91 ALR 16 (at 29).

[423] *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 (at 13).

[424] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (at 384).

[425] *Monypenny v Monypenny* (1861) 11 ER 671 (at 684), cf *Life Insurance Co of Australia v Phillips* (1925) 36 CLR 60 (at 76).

[426] Kenny J *Current Issues in the Interpretation of Federal Legislation* [2013] FedJSchol 41.

[427] Mason *The Interaction of statute law and common law* (2016) 90 *Australian Law Journal* 324 (at 328).

characterised this development as a 'radical revision',[428] and another writer called it a 'sea-change'.[429] In *Lacey*, the High Court said[430] –

> The legislative intention there referred to is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.

While recognising the fact of ongoing academic debate on the issue, Campbell and Campbell point to the unlikelihood the High Court will change its mind on this in the foreseeable future. They suggest that the High Court 'is right as a matter of principle, not merely as a matter of authority'.[431] With this I agree, but a measure of balkanisation on the issue remains. Even among those who accept the current position, there are some who maintain that intention may sometimes be real and may sometimes be important.

Denial of the reality of intention, says Jim South, is dangerous and 'has serious implications for the functioning of democracy and the rule of law'.[432] Later comments by Gageler J in *Outback Ballooning* may suggest similar concern.[433] What is to be observed, however, is ongoing indiscriminate reference to 'legislative intention' in courts high and low without regard to the 'radical revision' mentioned. Perhaps the intellectual influence of French CJ on the issue generally is waning within the judiciary.

Two final comments may be made. The first is that, even if it now 'settled' that intention is an attributed output of the interpretation process, more guidance is desirable on the precise relationship between three of the core concepts – intention, purpose and policy.[434] The second is that, if the High Court was to U-turn from its 'output' characterisation of intention, the change would likely have more to do with symbolism and the habits of language than any radical re-engineering of our 'modern approach'.

6.13 Flexibility and harmony

As noted, flexibility is at the heart of the modern approach to interpretation in Australia. In *Taylor*, three judges spoke about 'rejection of the adoption of rigid rules of statutory construction'[435] citing unanimous comments in *Agfa-Gevaert*. That case in turn said

---

[428] Campbell & Campbell *Why statutory interpretation is done as it is done* (2014) 39 *Australian Bar Review* 1 (at 20).
[429] Walshaw *Concurrent Legal Interpretation versus Moderate Intentionalism* (2014) 35 *Statute Law Review* 244 (at 253).
[430] *Lacey v Attorney-General* [2011] HCA 10 (at [43]), *Akiba v Commonwealth* [2013] HCA 33 (at [30]), *Certain Lloyd's Underwriters v Cross* [2012] HCA 56 (at [25]), *Momcilovic v The Queen* [2011] HCA 34 (at [111]), *Queensland v Congoo* [2015] HCA 17 (at [36]).
[431] Campbell & Campbell *Why statutory interpretation is done as it is done* (2014) 39 *Australian Bar Review* 1 (at 24, n 59).
[432] South *Are Legislative Intentions Real?* (2014) 40 *Monash University Law Review* 853 (at 889).
[433] *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2 (at [77]), cf *Mondelez Australia Pty Ltd v AMWU* [2020] HCA 29 (at [95]), *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (at 566), *Corliss v R* [2020] NSWCCA 65 (at [84]).
[434] cf *Lee v NSW Crime Commission* [2013] HCA 39 (at [45]).
[435] *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9 (at [37]), *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 (at 401), *BMK18 v Minister for Home Affairs* [2019] FCA 189 (at [22]), *Department of Health and Aging v Li* [2018] SASCFC 52 (at [96]).

that, in the 'area of statutory interpretation and construction, courts must be wary of propounding rigid rules. Even the use of general rules carries dangers in this area because of the tendency for such rules to be given an inflexible application'.[436]

The flexibility of purposivism, it was said in *Taylor* (at [37]), may sometimes allow a provision to be read 'as if it contained additional words (or omitted words)'. Strict conditions derived from English cases regulate this sensitive facility.[437] Courts in our system are cautioned against filling gaps in legislation, or making an insertion which is 'too big' or 'too far-reaching' as may violate the separation of powers.

A key point is that the ability to add words (or omit them) arises only on 'rare occasions' in practice, usually for simple drafting errors. Where this is permitted, what results is an explanation of the text rather than its repair.[438] There is an important difference between a gap and a mistake even if the dividing line between the two may be less than clear. Two commentators put the prospect of adding words as 'only if it is plain beyond doubt that Homer, in the person of the parliamentary drafter, has nodded'.[439]

By insisting on the preservation of flexibility, however, the High Court is not sanctioning some kind of 'anything goes' idea in the sense that courts are free to pick and choose which basic approach or methodology they might apply. A purposive approach is mandatory but, within that framework, the soft common law 'rules' as they evolve to meet contemporary conditions are to be applied with flexibility. Rejection of rigid rules as an interpretational baseline requires the careful application of principle.

The 1998 decision of the High Court in *Project Blue Sky* is one of the monuments of statutory interpretation in this country. Legislation is to be construed on the basis that it is intended to give effect to 'harmonious goals' or an 'overall harmonious interpretation'.[440] Perram J called this the 'music of the spheres' theory of interpretation.[441] Conflict is to be resolved by 'adjusting the meaning of competing provisions' to best give effect to the purpose and language while maintaining an overall unity. This may (and often will) involve determining the hierarchy of provisions under which one 'must give way to the other'.

In the recent sperm donor case, for example, the High Court again pointed to the need to adjust competing provisions.[442] The comments from *Project Blue Sky*, like those in *CIC Insurance*, have also been endorsed too many times now to be doubted.[443] *Channel Pastoral* is a tax example of how they are applied in practice by courts.[444]

---

[436] *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 (at 401), citing *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297 (at 320).
[437] *Inco Europe Limited v First Choice Distribution* [2000] 1 WLR 586 (at 592), *Wentworth Securities Limited v Jones* [1980] AC 74 (at 105-106).
[438] *CCA19 v Secretary, Department of Home Affairs* [2019] FCA 946 (at [90-91]).
[439] Lumb & Christensen *Reading words into statutes: When Homer nods* (2014) 88 *Australian Law Journal* 661 (at 677).
[440] *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 (at [31]), *ASIC v Westpac Securities Administration Ltd* [2018] FCA 2078 (at [80]).
[441] Perram *The perils of complexity: Why more law is bad law* (2010) 39 *Australian Taxation Review* 179 (at 182).
[442] *Masson v Parsons* [2019] HCA 21 (at [42]).
[443] cf *FCT v Jayasinghe* [2016] FCAFC 79 (at [7]), *SZTAL v Minister for Immigration & Border Protection* [2017] HCA 34 (at [37]).
[444] *Channel Pastoral Holdings Pty Ltd v FCT* [2015] FCAFC 57 (at [4-5]).

6.14 Emphasis on coherence

The modern emphasis on 'coherence' in statutory interpretation mirrors its impact in other legal areas and is a natural progression from themes in *Project Blue Sky*.[445] A recently published book of essays traces the learning in this regard – *The Coherence of Statutory Interpretation*, edited by Jeffrey Barnes.[446] This book is one of the most important contributions to scholarship on statutory interpretation since *Project Blue Sky*. It was the systemic coherence themes of Hill J in *HP Mercantile*, which persuaded first Allsop J, then the special leave panel, that his approach in that case was to be preferred both as to outcome and in principle.

Sir Anthony Mason said that 'coherence has its place as a relevant consideration in statutory interpretation, in some cases where it is necessary to choose between competing interpretations'.[447] Gageler J has pointed out that, while legislation is sometimes harsh, it is 'rarely incoherent' and 'should not be reduced to incoherence by judicial construction'.[448] In *SAS Trustee*, a plurality of the High Court said[449] -

> Where the text read in context permits of more than one potential meaning, the choice between those meanings may ultimately turn on an evaluation of the relative coherence of each within the scheme of the statute and its identified objects or policies.

These comments come from Gageler and Keane JJ dissenting in *Taylor*,[450] repeated in *SZTAL* by Gageler J (again dissenting).[451] Later in the year *Taylor* was decided, a unanimous bench stated more generally that statutory construction 'should favour coherence in the law'.[452] In a similar vein, a bench of six said that the material provisions of the statute 'must be understood, if possible, as parts of a coherent whole'.[453]

Taken together, these comments echo older, more open, remarks about 'coherence' being an important legal value in our system,[454] indeed a 'meta-principle'.[455] As constructional choice theory evolves, the appearance of some sort of 'coherence'

---

[445] *Andrews v Thomson* [2018] ACTCA 53 (at [38-39]) illustrates.
[446] It is beyond the scope of this note to digest and comment on the themes presented this book.
[447] Mason *The Interaction of statute law and common law* (2016) 90 *Australian Law Journal* 324 (at 338).
[448] *R v Independent Broad-Based Anti-Corruption Commissioner* [2016] HCA 8 (at [76]).
[449] *SAS Trustee Corporation v Miles* [2018] HCA 55 (at [20]), applied since - *Stamford Property Services Pty Ltd v Mulpha Australia Ltd* [2019] NSWCA 141 (at [120]), *Port Macquarie-Hastings Council v Mansfield* [2019] NSWCCA 7 (at [77]), *R v Green (No 3)* [2019] ACTSC 96 (at [12, 47]), *Wheatley v New South Wales* [2018] NSWCA 315 (at [86]).
[450] *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9 (at [66]).
[451] *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 (at [38]), reviewed McIntyre *Adrift: The High Court of Australian decides SZTAL v Minister for Immigration and Border Protection* (2018) 19 *Melbourne Journal of International Law* 389.
[452] *Plaintiff S4-2014 v Minister for Immigration and Border Protection* [2014] HCA 34 (at [42]), cf *CPFC v Minister for Immigration and Border Protection* [2015] HCA 1 (at [41, 214]), *Commissioner of the AFP v Halac* [2015] NSWSC 520 (at [9]).
[453] *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association* [2017] HCA 53 (at [16]), citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (at 381-382).
[454] *Sullivan v Moody* (2001) 207 CLR 562 (at 576 [55]), cf *Miller v Miller* [2011] HCA 6 (at [15-16]), Fell *The Concept of Coherence in Australian Private Law* (2018) 41 *Melbourne University Law Review* 1160.
[455] Grantham & Jensen *Coherence in the Age of Statutes* (2016) 42/2 *Monash University Law Review* 360 (at 361), cf Perram *Constitutional Principles and Coherence in Statutory Interpretation* [2016] *La Trobe Law School Symposium on the Coherence of Statutory Interpretation paper*, Bant *Statute and Common Law: Interaction and Influence in Light of the Principle of Coherence* (2015) 38 *UNSW Law Journal* 367.

principle was never far from the surface. It is also consistent with earlier learning, and hardly controversial. *SAS Trustee* is the first time, however, a High Court majority has formally endorsed them. *Onody* illustrates the practical impact of coherence.[456]

As others have noted, legal coherence 'has been a topic of sustained and deep thought',[457] though never well-articulated by the High Court.[458] As a general concept, it carries with it a sense of consistency and the corresponding absence of contradiction. Dictionaries talk about cohesion, sticking together, congruity, logical connection and integrity. It is self-evidently a protean concept, and one having no immunity from subjective impression. Coherence is resistant both to strict definition and empirical demonstration. Under the heading, 'interpretation and coherence in legal reasoning', the *Stanford Encyclopaedia of Philosophy* talks about the 'frequent influence of the general philosophical climate upon the intellectual weather systems of jurisprudential theorising'. Legal coherence, as a 'special virtue', is seen as 'something more' than logical consistency, but there is much debate about what that 'something more' is.

Within a statute, coherence involves the systemic working together of provisions in a way greater than mere consistency or neutral non-interference. The 'something more' element suggested by the concept of 'coherence' is a kind of synergistic effect or a 'greater than the sum of its parts' characteristic. In any case, that is the theory.

The same idea is also reflected by other well-known metaphors – 'single eye of the law',[459] and parliament having 'one voice', a 'single imperious voice',[460] and speaking with no 'forked tongue'.[461] No matter now 'starry-eyed or astigmatic' the policy makers may be (words of Keith Mason),[462] courts are expected to strive for statutory coherence.[463] Basten JA in *Universal Property* called this the 'search for harmonious operation'.[464] In Canada, where the presumption of coherence is 'virtually irrebuttable',[465] it is explained in the following way[466] –

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework: and because the framework has a purpose, the parts are also

[456] *Onody v Return to Work Corporation* [2019] SASCFC 56 (at [73]).
[457] Grantham & Jensen *Coherence in the Age of Statutes* (2016) 42/2 *Monash University Law Review* 361 (at 363), Fell *The Concept of Coherence in Australian Private Law* (2018) 41 *Melbourne University Law Review* 1160 (at 1161).
[458] French CJ *Harold Ford Memorial Lecture: Trusts and Statutes* [2015] *Centre for Corporate Law and Securities Regulation paper* (at 2).
[459] *R v MJR* [2002] NSWCCA 129 (at [45]) for example.
[460] Keith Mason *The intent of legislators: How judges discern it and what they do if they find it* (2006) 27 *Australian Bar Review* 253 (at 256).
[461] *Waugh v Kippen* (1986) 160 CLR 156 (at 164), *Slivak v Lurgi (Australia) Pty Ltd* [2001] HCA 6 (at [96]), *Attorney-General v World Best Holdings Ltd* [2005] NSWCA 261 (at [171]).
[462] Keith Mason *The intent of legislators: How judges discern it and what they do if they find it* (2006) 27 *Australian Bar Review* 253 (at 254), quoting *R v Firns* [2001] NSWCCA 191 (at [53]), cf *Kizon v R* [2012] HCATrans 331.
[463] cf Ohlendorf *Against Coherence in Statutory Interpretation* (2014) 90 *Notre Dame Law Review* 735 (at 781-782).
[464] *Universal Property Group Pty Ltd v Blacktown City Council* [2020] NSWCA 106 (at [12]).
[465] *Sullivan on the Construction of Statutes* (at §11.4),
[466] *R v LTH* [2008] 2 SCR 739 (at [47]).

> presumed to work together dynamically, each contributing something toward accomplishing the intended goal.

At the bottom of it all, as Pat Lanigan told the *Australian Legal Convention* in 1975, is perhaps the most basic of observations – 'The law needs to be made to work',[467] a task to which a 'constructive loyalty' should be brought.[468] We also need to recognise that 'coherence' in the world of statutes is inevitably a utopian concept. Sometimes, the law cannot be made to work, as the degree of remediation sought to be imposed crosses into legislative territory. In other situations, *DPP v Walters* for example, the statute is simply, persistently and irremediably incoherent.[469]

As a New Zealand jurist put it – 'It is obviously fallacious to assume that revenue legislation has a totally coherent scheme, that it follows a completely consistent pattern, and that all its objectives are readily discernible'.[470] In spite of this reminder, a previous Tax Commissioner, Michael D'Ascenzo, always looked for systemic coherence in statutory interpretation 'to make the law work in a constructive and positively directed fashion, tempered by a thoughtful awareness of its intrinsic limits'.[471] Bruce Quigley made similar comments as follows – 'To achieve a coherent fabric of law it is critical to take an approach that strikes a balance between the syntax, the legislative policy and context in interpreting the law'.[472]

6.15 Process mapping interpretation

The cases and practice make it clear that text and context are considered at the same time with the whole process starting and finishing with the text of the law.[473] Reduced to basics, the approach is 'text > context > text', a protocol Professor Pearce has described as the 'best that one can make of the varying dicta and … in any case, good sense'.[474] Context in this setting – context in the 'widest sense' – refers to everything else appropriate to be considered in the particular case. The phrase 'text, context, purpose' is another way of expressing the same basic idea.

What these approaches reflect is an essentially symbiotic relationship between each of their core elements.[475] They are also part of and consistent with the ordinary two-step syllogistic approach traditionally applied by courts in resolution of disputes. The law as it is determined to be (major premise) is applied to the facts as found (minor premise) to produce the legal answer.[476] Determining what the statutory law requires is a 'multi-

---

[467] Hill J *How is tax to be understood by courts?* (2001) 4 *The Tax Specialist* 226 (at 229).
[468] Cooke *The Crimes Bill 1989: A Judge's Response* [1989] *New Zealand Law Journal* 235.
[469] *DPP v Walters* [2015] VSCA 303.
[470] *Challenger Corporation Ltd v CIR* [1986] 2 NZLR 513 (at 549).
[471] D'Ascenzo *Along the Road to Damascus: A framework for interpreting the tax law* [2000] *Journal of Australian Taxation* 384 (at 235).
[472] Quigley *Interpreting GST Law in Australia* in White & Krever (eds) *GST in Retrospect and Prospect* (at 118).
[473] *FCS17 v Minister for Home Affairs* [2020] FCAFC 68 (at [57]) for example.
[474] Episode 7 of *interpretation NOW!*
[475] Duffy & O'Brien *When Interpretation Acts Require Interpretation: Purposive Statutory Interpretation and Criminal Liability in Queensland* (2017) 40 *UNSW Law Journal* 952 (at 975).
[476] cf *Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 (at 374-375), Brennan J *Limits on the Use of Judges* (1978) 9 *Federal Law Review* 1 (at 3), *South Australia v Totani* [2010] HCA 39 (at [227]), *Re Nolan* (1991) 172 CLR 460 (at 496), *Fardon v Attorney-General* [2004] HCA 46 (at [92]), Hill J *The Judiciary and its Role in the Tax Reform Process* (1999) 2 *Journal of Australian Taxation* 66 (at 70-71), Hill J *How is Tax to be Understood by Courts?* (2001) 4 *The Tax Specialist* 226 (at 229).

factorial and contextual' exercise.[477] This does not mean, however, that key elements in the wider discipline are irreducible to practical steps in a logical process which obeys legal requirements.[478]

Not everyone sees these approaches are providing much real guidance in practice. One commentator views the 'text, context, purpose' mantra as lacking explanatory force.[479] Although interpretation may never be reduced to the mechanics of an equation, however, the cases do show the practical guidance which 'text, context, purpose' brings to the exercise. Hinting at a more systematic approach, others describe 'reiterative circular processes' for understanding statutory texts, in turn called 'hermeneutic circles'.[480] This involves more than simply taking a variety of factors into account. It imposes a more structured discipline, requiring repeated reconsideration of the text in light of what wider context reveals. Think of this loosely as an ongoing feedback loop.

The best analysis of modelling attempts so far comes from Jeffrey Barnes in Chapter 8 of the book *The Coherence of Statutory Interpretation – Is there an Overall Method to Interpreting Legislation?*[481] One approach he favours, originally proposed by Glazebrook J in New Zealand,[482] involves spiralling outwards from the provision in question into the statute as a whole and then beyond into the 'wider legal context'.

Justice Kirby gives a worked example of how 'text, context, purpose' works in practice in a post-judicial analysis of his dissenting judgment in *Carr v Western Australia*.[483] A variant of this approach – called 'concurrent interpretation' – involves considering facts as part of the process for determining what the text means. The rationale is that 'meaning is realised in application to a real-life situation'.[484] What results is that the ordinary two-step syllogistic approach becomes 'one composite process'.[485]

Under the heading '*Construction – method*', the High Court in *The Queen v A2* elaborates generally on the 'text, purpose, text' formulation.[486] Designation of this formulation as a 'method' or process to be followed constitutes what must be the core module for any process mapping of the field. Any number of cases show how this

---

[477] Barnes *How statutory interpretation sustains administrative law* (2015) 22 *Australian Journal of Administrative Law* 163 (at 176).
[478] The ATO is looking at ways to process map interpretation protocols as part of the *interpretation NOW!* initiative.
[479] Gardner *What Probuild Says about Statutory Interpretation* (2018) 25 *Australian Journal of Administrative Law* 234 (at 252), cf Basten *Choosing Principles of Interpretation* (2017) 91 *Australian Law Journal* 881 (at 881).
[480] Campbell & Campbell *Why statutory interpretation is done as it is done* (2014) 39 *Australian Bar Review* 1 (at 42-45), *Thomas v NSW* [2008] NSWCA 316 (at [22]), *Waugh Hotel Management Pty Ltd v Marrickville Council* [2009] NSWCA 390 (at [33]), *AVS Group of Companies Pty Ltd v Commissioner of Police* [2010] NSWCA 81 (at [133]), *Nau v Kemp & Associates* [2010] NSWCA 164 (at [33]).
[481] Barnes in Barnes (ed) *The Coherence of Statutory Interpretation* (at 78-94).
[482] Glazebrook *Filling the Gaps* in Bigwood (ed) *The Statute: Making and Meaning* (at 169-176).
[483] Kirby *Statutory Interpretation: The Meaning of Meaning* (2011) 35 *Melbourne University Law Review* 113.
[484] Walshaw *Concurrent Legal Interpretation versus Moderate Intentionalism* (2014) 35 *Statute Law Review* 244 (at 259), Walshaw *Where are we with statutory interpretation?* [2014] *New Zealand Law Journal* 254, Walshaw *Interpretation is Understanding and Application: The Case for Concurrent Legal interpretation* (2012) 34 *Statute Law Review* 101.
[485] Burrows *Some Reflections on Cozens v Brutus* (1975) 4 *Anglo-American Law Review* 366 (at 366).
[486] *The Queen v A2* [2019] HCA 35 (at [31-37])

module is to be applied in practice.[487] They naturally traverse, however, only that part of the field relevant to the particular provisions being investigated.

My first attempt at illustrating the core module in a diagram – called the Circle of Meaning – appears in Episode 66 of interpretation NOW! It follows the familiar path directed by the High Court – text > context > purpose > text. After considering the relationships between 'text and context' and 'context and purpose' respectively, it emphasises two key principles – objectivity and coherence.

An important point then made is that, in every situation, interpretation requires anchoring your answer, finally and decisively, in the text of the statute. We do this at least to ensure the meaning chosen is open on the words, for broad constitutional reasons, and as a legal reality check. This follows from unambiguous statements in the High Court – first in *Consolidated Media Holdings* then in *Thiess* – that we are to start and finish with the text of the law.

What is desirable is a more comprehensive mapping of the entire field which may be applied to all circumstances – perhaps a three-dimensional matrix incorporating algorithm-driven suggestions. The expectation is not that hard answers will emerge in some mechanical way, or that this model would supplant the human evaluative element. The rather more modest aim would be that, by its orderly navigation of the field consistent with prevailing authorities, the model would direct the reader to factors relevant to determining what their provision means.

6.16 Judges and the GST law

In the GST sphere, Professor Millar has noted what she sees as the struggle of courts to come to grips with the new GST law. Referring to the High Court decisions in *Reliance Carpet* and *Travelex*, she said[488] –

> The default response to that struggle seems to involve, at least in the High Court, a reversion to the approaches of times past, in which strict, literal interpretation of tax law were the norm. Quite apart from this apparent retreat from the modern, purposive approach to statutory interpretation, the judgments also highlight flaws in the drafting of Australia's GST law.

Michael Evans made similar points in his *Horton's lesson* article, referring to the 'frustration of the courts' and the confusion 'at least in the minds of some administrators and members of the judiciary'.[489] Others have made like comments. Reflecting on *International All Sports*,[490] Gina Lazanas and Robyn Thomas referred to a 'shift' in approach where 'courts refused to deviate beyond the ordinary meaning of the relevant statute in order to achieve the Commissioner's desired outcome, even in circumstances

---

[487] *ASIC v King* [2020] HCA 4, *Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union* [2019] FCAFC 84 (at [33-45]) for example.
[488] Millar *The Destination Principle: Past Developments and Future Challenges* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* 313 (at 314), Pelly *Taxman hit hard as focus narrows* (8 October 2010) *The Australian*, cf Millar *The principle of neutrality in Australian GST* (2017) 17 AGSTJ 26 (at 40).
[489] Evans *Horton's lesson: Australia's struggle with 'truth in drafting'* [2012] 1/1 *World Journal of VAT/GST Law* 21 (at 22, 28).
[490] *International All Sports Ltd v FCT* [2011] FCA 824.

where policy objectives and extrinsic materials may have supported that outcome'.[491] *Saeed* was cited and Logan J quoted for it being 'the duty of the courts to construe enactments, not to make them'.[492]

Justice Kirby once observed a certain tendency of judges to treat complexity as an excuse for taking a 'purely textual approach' to revenue statutes.[493] Tony Slater QC spoke of their 'lack of enthusiasm for an expansive construction'.[494] Richard Krever said it was 'possible to excuse many, if not all, exercises in strict literalism as a rational reaction to legislative ambiguity or choice'.[495] The anomalistic nature of tax legislation was once called the 'last refuge of judicial hesitation'.[496]

Whether these observations remain true today is an open question. Several counter-points can be made. First, the temptation to demonise variance is often a strong one, especially (it appears) among non-judicial experts in the field. Two, the idea that judges are raising the white flag of complexity obscures the analysis and introduces a certain tone of condescension. Three, the so-called 'literal' answer may be the only one available on the terms of the law. As has been noted, literal and purposive answers often coincide, precisely as parliament expects or hopes.

The proposition that judges in GST cases, consciously or otherwise, are ducking responsibility by taking refuge in some strict literalism is most unlikely.[497] So is the idea that they are confused or frustrated actors in a play beyond their understanding. The idea that a federal judge like Edmonds J, for example, was intimidated by the complexity of the GST law is laughable. It is also difficult to accept Professor Millar's comments even if you disagree with the two High Court decisions themselves.[498]

It is not as if both decisions were uniformly condemned. Pier Parisi thought the High Court in *Travelex* had restored 'reality',[499] while Richard Krever and Jonathan Teoh regarded *Reliance Carpet* (along with *Qantas* and *MBI Properties*) as situations where the High Court had acted to protect the integrity of the GST law.[500] Wigney SC said in relation to *Travelex* – 'it does not seem to me that it is correct to characterise the decision as a return to literalism and a rejection of matters of context and policy when it comes to statutory construction'.[501] An important point is that our system, including its constitutional architecture, provides only limited scope for judicial fixing of legislative flaws, something Hill J stressed and *Multiflex* underlines.

---

[491] Lazanas & Thomas *GST and the changing role of policy, purpose and the "vibe" in statutory interpretation* (2011) 12 AGSTJ 30 (at 33).
[492] *FCT v PM Developments Pty Ltd* [2008] FCA 1886 (at [47]).
[493] *FCT v Chant* (1991) 24 NSWLR 352 (at 356),
[494] Slater *The Income Tax Assessment Acts: Statutes in Senescence?* [2015] *TIA 30th National Tax Convention paper* (at 10).
[495] Krever *Taming Complexity on Australian Income Tax* (2003) 25 *Sydney Law Review* 467 (at 480).
[496] Williams *Taxing Statutes are Taxing Statutes: The Interpretation of Revenue Legislation* (1978) 41 *Modern Law Review* 404 (at 415) citing *Ayrshire Employers Mutual Insurance v IRC* (1944) 27 TC 331 (at 344).
[497] cf Krever *Taming Complexity on Australian Income Tax* (2003) 25 *Sydney Law Review* 467 (at 470).
[498] cf Datt *The conflict between deposits and security deposits* (2005) 5 AGSTJ 89.
[499] Parisi *Supply Characterisation Brought Back to Reality* (2010) 10 AGSTJ 73.
[500] Krever & Teoh *Justice Edmonds and interpretation of Australia's GST legislation* (2016) 45 *Australian Tax Review* 121 (at 122, 130).
[501] Wigney *Text, context and the interpretation of a 'practical business tax'* (2011) 40 *Australian Tax Review* 94 (at 105).

It ought to be clear that simply requiring that we start with the text signals no regression to past literalism.[502] As stated in *Taylor* – 'The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair'.[503] Neither does an 'ordinary meaning' answer automatically show regression. Wigney SC in an *Australian Tax Review* article playfully drew to attention the 'immense disappointment' that some practitioners must feel when judges[504] –

> …appear to sweep aside all this background and context and arrive at an interpretation of a particular provision of the GST Act by focusing on – dare I say it – the text of the Act. That is, the words actually used in the legislation! Don't they know anything about the VAT experience and that the GST is, after all, a value-added tax?

Driven by separation of powers, the requirement to start with the text merely states the constitutional obvious.[505] It is neither something new nor a litmus test for some 'new textualism', much less the 'mindless textualism' the Tax Commissioner is accused of in the *Ode to Neutrality*. An answer merely to be characterised as 'literal' is also a false positive for determining whether or not a literalistic *approach* has been adopted.[506] This is a common misunderstanding, as is the idea that every failure to provide the policy answer to a legal problem must evidence judicial recidivism or timidness.

Criticising Jessup J in *International All Sports* for refusing to read words into gambling provisions,[507] for example, appears to betray a misunderstanding of basic interpretation principles.[508] It may also suggest a (misplaced) attraction to ancient 'equity of the statute' notions (long discredited),[509] and EU-style teleological methods under which judges are expected or required to fill legal gaps with policy content.[510]

---

[502] cf Olding *Interpretation of the GST Act – Towards a Principled Basis?* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* (at 80-81).
[503] *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9 (at [65]), cf *CCA19 v Secretary, Department of Home Affairs* [2019] FCA 946 (at [90-91]), *Fremantle Lawyers Pty Ltd v Sarich* [2019] WASCA 48 (at [4]), *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* [2018] VSCA 294 (at [60]), *Hall v The Queen* [2020] SASCFC 84 (at [24-31]).
[504] Wigney *Text, context and the interpretation of a 'practical business tax'* (2011) 40 *Australian Tax Review* 94 (at 94).
[505] *Treasurer of Victoria v Tabcorp Holdings Ltd* [2014] VSCA 143 (at [101]) illustrates.
[506] cf *Travelex Limited v FCT* [2018] FCA 1051 (at [93-94, 105]).
[507] *International All Sports Ltd v FCT* [2011] FCA 824 (at [49]) quoting *IRC v Wolfson* [1949] 1 All ER 865 (at 870).
[508] cf *National Rugby League Pty Ltd v Singtel Optus Pty Ltd* [2012] FCAFC 59 (at [97]), *Woodside Energy Ltd v FCT* [2009] FCAFC 12 (at [51]).
[509] *Nelson v Nelson* (1995) 184 CLR 538 (at 552-554), *Burragubba v Queensland* [2015] FCA 1163 (at [17]), *Pipikos v Trayans* [2018] HCA 39 (at [155]), cf *Comcare v Thompson* [2000] FCA 790 (at [43]), *Esso Australia Resources Ltd v FCT* (1998) 159 ALR 664 (at 693).
[510] *Bennion on Statutory Interpretation* (at 465), cf *Sanum Investments Ltd v ST Group Co Ltd (No 2)* [2019] FCA 1047 (at [86]).

7. AUSTRALIAN NEUTRALITY CASES

7.1 *TAB Limited* - 2005

7.1.1 Disunity and neutrality

Several GST cases have directly probed in one way or another if EU-style neutrality applies in Australia. The first gambling supply case is one of them - *TAB Limited*.[511] One focus was the meaning of 'liable' within the 'global GST amount' formula contained in s 126-10(1). Consistent with analogous authority, ordinary understanding of the word, structural aspects of the GST law, symmetry within the formula and extrinsic materials, the taxpayer argued for a legal obligation accruals meaning of 'liable'. This was accepted and declaratory relief granted.

The effect was to maximise 'total monetary prizes' within the formula, and therefore to reduce the overall GST exposure of the taxpayer. Dealing with the Commissioner's argument that the word 'liable' in s 126-10(1) was instead limited to race dividends actually paid, Gzell J said (at [83]) –

> It would be an odd result if total amounts wagered were to be determined on an accruals basis, while total monetary prizes were to be determined on a cash basis. That would create a disunity or, would offend what has been called the principle of neutrality in jurisdictions that have a developed value added tax jurisprudence[512]

The passage in *Elida Gibbs* to which Gzell J referred mentions neutrality 'in the sense that within each country similar goods should bear the same tax burden whatever the length of the production and distribution chain'. While neutrality is referred to in the reasons given by the judge, it is by no means certain that Gzell J was making any authoritative finding about the status of EU neutrality in our law. Two things can be said. The first is that the neutrality remarks of Gzell J are in the nature of an afterthought to a conclusion reached on other grounds. Second, despite the disunity and asymmetry of mixing cash and accruals concepts within the s 126-10(1) formula that the contrary view would produce, it is not clear what offence this gives to the wide 'same tax burden' comments in *Elida Gibbs* to which the judge referred.

Pier Parisi has argued that the 'formulation of elements in the statutory scheme, such as the words "in the form of" in the enterprise concept, suggest that the Act recognises, implicitly, an idea corresponding to the "neutrality' principle in European VAT law'.[513] He then refers to the 'disunity' comments in *TAB Limited* and points out that neutrality 'lies at the heart of VAT law'. We may easily agree with the latter observation, but the argument for an implication so large from indicators so small seems more an exercise in hope than analysis. Cordara and Parisi otherwise question the correctness of *TAB Limited* more generally and query the basic characterisation of gambling activities for

[511] *TAB Limited v FCT* [2005] NSWSC 552, noted Brysland *Igloo Homes to Atkinson – The GST cases just keep coming!* (2005) 5 AGSTJ 137 (at 151).
[512] *Elida Gibbs Ltd v CEC* [1997] QB 499 (at 560 [20]) cited.
[513] Parisi *Interpreting the A New Tax System (Goods and Services Tax) Act 1999* (at 15).

GST purposes.[514] In their view, the European position that the principal objective of gambling is entertainment (and not financial gain) is the better view.[515]

7.2 *TSC 2000 Pty Ltd* - 2007

7.2.1 Economic equivalence

In *TSC 2000*, the taxpayer (a gambling syndicate organiser) argued for an application of the GST law by reference to the concept of 'fiscal neutrality'.[516] The argument made was essentially one of economic equivalence. In other words, that the GST effectively to be borne by all members of one syndicate should be the same, whether they placed their lotto bets directly or via the taxpayer acting as their agent. The taxpayer relied on a passage from a VAT car trade-in case, *Lex Services*[517] –

> Its central core meaning [of fiscal neutrality, that is] … is that whether goods purchased by the final consumer have been through the hands of a dozen different traders at successive stages of their manufacture, distribution and marketing or are the product of a single manufacturer who is also a retailer the VAT system should (through its mechanisms of input tax and output tax) produce the same end result …

Hack DP dealt with this under the heading – *The approach to construction*. The first issue was whether the assessment 'offends the principle of fiscal neutrality'. Responding to the *Lex Services* statement, Hack DP drew attention to the comments by Hill J in *HP Mercantile* regarding credit access 'where possible'.

The deputy president observed (at [54]) that the idea of neutrality had 'limited application' to the case before him. He said, however, that neutrality 'is an aid to construction where it is necessary to determine which of competing constructions is to be preferred', that it cannot operate to modify the plain operation of the statute, and that, if there is a supply from a practical and business point of view, 'then recourse to the principle of fiscal neutrality is unnecessary and unwarranted'. Echoing earlier judicial comments, Hack DP said that what lies behind the enactment of a taxing provision as a matter of public policy or economic theory is not the same thing as the elements or criteria of tax liability parliament has laid down.[518]

Later, the deputy president returned to fiscal neutrality and the argument that the ATO position was 'very odd … a good clue to its being wrong'. Any oddity, said Hack DP, 'arises as a consequence of the particular statutory provisions that apply to this case'. In his view, s 126-30 'operates to prevent the principle of fiscal neutrality operating'.

The approach of Hack DP in this case very much reflects suggestions made by Hill J in two respects. One, EU neutrality might function as an aid to construction but, two, it

---

[514] Cordara & Parisi *Australian Goods and Services Tax Cases – Decisions and Commentary* (at [13.5.2]), cf *Crown Melbourne Ltd v FCT* [2020] FCA 1295.
[515] *RAL (Channel Islands) Ltd v CEC* [2005] EUECJ C-452/03 (at [31]) quoted.
[516] *TSC 2000 Pty Ltd v FCT* [2007] AATA 1629 (at [50-51]), noted Brysland *GST cases to the end of 2007 – Part 2* (2008) 7 AGSTJ 129 (at 141).
[517] *Lex Services plc v CEC* [2004] 1 All ER 434 (at 443 [26]).
[518] *WR Carpenter Holdings Pty Ltd v FCT* [2007] FCAFC 103 (at [29]), cf *WR Carpenter Holdings Pty Ltd v FCT* [2007] HCA 33, *Sterling Guardian Pty Ltd v FCT* [2006] FCAFC 12 (at [15]), *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd* [2006] FCAFC 115 (at [59]), *Reliance Carpet Co Pty Ltd v FCT* [2008] HCA 22 (at [3]).

may equally be excluded by particular provisions – in this case, the special rules of Div 126. So far as the first is concerned, the comments of Hack DP are incidental and without analysis or reflection. Nothing in Div 11 suggests any default rule in favour of credit access, and choices between interpretational alternatives are to be resolved as generally directed by s 15AA of the *Acts Interpretation Act 1901*.

The result in *TSC 2000* also stands against consumption being the measure of the tax. It rejects economic equivalence in the GST sphere, just as that concept is rejected for income tax purposes.[519] Roderick Cordara and Pier Parisi commented on *TSC 2000* that Div 126 is nothing other than a provision aimed at securing the gambling outcome established by the CJEU – the fundamental point being that 'the taxable amount is the consideration actually received'.[520] My point, however, is that Hack DP was stretching things too far to accept that fiscal neutrality, either in its EU guise or as legislated for in Div 11, has any legitimate tie-breaker role to play.

7.3 *AXA Asia Pacific* - 2008

7.3.1 Foreign decisions

The taxpayer in this matter argued for credits before Lindgren J in a life insurance group situation by reference to fiscal neutrality – *AXA Asia Pacific*.[521] The case raised (A) whether independent consideration from a financial supplier is necessary to support an acquisition supply by the acquirer,[522] (B) whether trust grouping extends to unit trustees not GST registered in that capacity,[523] and (C) the correct basis on which to apportion credits.[524] Cordara SC, who appeared for the taxpayer, had said that input taxation –

> … is an exception to the overarching concept underlying GST [that is, fiscal neutrality], which is that no 'sticking' tax will stay in the chain of suppliers: instead they should all be able to recover the input tax that they have had to incur (built into the price of their acquisitions) to make supplies that are either taxable or GST-free, with the burden only being borne by the final private consumer.

Counsel explained it is of the essence in a VAT-based system that entities get all their input tax back so they remain neutral in a fiscal sense. Cordara SC was merely reflecting the orthodox European position that neutrality is 'inherent in the common system of

---

[519] *IRC v Europa Oil (NZ) Ltd* [1971] AC 760, *Europa Oil (NZ) Ltd v CIR* [1976] 1 WLR 464, *Otto Australia Pty Ltd v FCT* 90 ATC 4604 (at 4609), *City Link Melbourne Ltd v FCT* [2004] FCAFC 272 (at [43]), *St George Bank Ltd v FCT* [2008] FCA 453 (at [63]), Walpole & Sommer *A sub-equatorial love affair – flirting with economic equivalence* [2007] *ATAX 19th GST and Indirect Tax Conference paper*.

[520] Cordara & Parisi *Australian Goods and Services Tax Cases – Decisions and Commentary* (at [13.10.2]), *HJ Glawe Spiel-und Unterhaltungsgerate v Finanzamt Hamburg-Barmbek-Uhlenhorst* [1994] Case C38/93 (at [8]) quoted.

[521] *AXA Asia Pacific Holdings Ltd v FCT* [2008] FCA 1834.

[522] cf GSTR 2002/2 (at [35]), *Finanzamt Groß-Gerau v MKG-Kraftfahrzeuge-Factory GmbH* [2003] EUECJ C-305/01, *Hagemeyer Ireland Ltd plc v Revenue Commissioners* [2007] IEHC 49.

[523] ss 48-10(1)(c) and 184-1, cf *Toyama Pty Ltd v Landmark Building Developments Pty Ltd* [2006] NSWSC 83 (at [66]), *Di Lorenzo Ceramics Pty Ltd v FCT* [2007] FCA 1006 (at [87]).

[524] GSTR 2006/4 (at [32-35]), *Ronpibon Tin NL v FCT* (1949) 78 CLR 47 (at 55-56), *HP Mercantile Pty Ltd v FCT* [2005] FCAFC 126 (at [37]).

VAT'.[525] Lindgren J (at [62]) quoted the 'legislative scheme' comments in *HP Mercantile*, but he did not mention neutrality by name. He did say (at [96]), however, that he saw 'no reason to import as authorities on the construction of the GST Act approaches that were taken in cases concerning different statutory texts and contexts'.

This became an ever-stronger theme in the development of our GST jurisprudence. It also provides a cogent basis almost on its own for rejecting EU-style neutrality in Australia. In the year following *AXA Asia Pacific*, Lindgren J expanded on the 'different legislation, different context' theme in an article published in *The Tax Specialist*.[526] In *AXA Asia Pacific* itself, the judge also held (at [122]) that a 'look through' approach to Div 11 was inconsistent with the GST law.[527] This position was also to prove important in later cases also. While *AXA Asia Pacific* raises neutrality, Lindgren J did not buy into the issue and stuck to the provisions.

7.4 *Electrical Goods Importer* - 2009

7.4.1 Economic policy and consumption

This tribunal case, decided shortly after *Reliance Carpet* was handed down in the High Court, is the most targeted analysis of the status of EU-style neutrality in Australia to date.[528] Fiscal neutrality was argued by the taxpayer to reduce consideration by reference to cash-back amounts paid directly by the importer to consumers purchasing from interposed retailers. Block DP (at [41]) first drew attention to the fact that neutrality was an implication drawn from the description of VAT as a 'general tax on consumption'. Next, he observed (at [43]) that the passing reference in *TAB Limited* could not be taken as a pronouncement 'that the principle is part of Australian law'. After noting remarks of Hill J in *HP Mercantile*, the deputy president returned to consider the CJEU case referred to in *TAB Limited* by Gzell J – *Elida Gibbs*.

Elida Gibbs had involved a similar discount scheme under which the manufacturer redeemed consumer coupons direct. It was held in that case that the 'nominal value of redeemed coupons must be deducted from the original purchase price'. Block DP (at [47]) observed that there was no equivalent of the EU directive in the GST law. He referred to *TSC 2000* for the principle that what lies behind a taxing provision 'as a matter of public policy or economic theory' is not the same thing as the criteria of liability which parliament has laid down.[529] He quoted a commentator (me) on the point,[530] then referred to remarks in *Reliance Carpet* (at [3-5]) which contrast the respective systems operating in Europe and Australia.

In *Reliance Carpet*, the High Court stressed (A) that, as a matter of legal analysis, what generates the tax liability is 'not consumption, but a particular form of transaction,

---

[525] *Finanzamt Oschatz v Zweckerband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbien* [2008] EUECJ C-442/05 (at [42]), *Canterbury Hockey Club v CRC* [2008] EUECJ C-253/07 (at [30]), *Commission v Italian Republic* [2008] EUECJ C-132/06 (at [39]).
[526] Lindgren J *The relevance of overseas case law to Australia's GST* (2009) 13/2 *The Tax Specialist* 58.
[527] cf Cordara & Parisi *Australian Goods and Services Tax Cases – Decisions and Commentary* (at [7.10.3]), Macintyre *AXA case: principles for claiming ITCs* (2008) 12 GST News ¶92.
[528] *Electrical Goods Importer v FCT* [2009] AATA 854.
[529] *WR Carpenter Holdings Pty Ltd v FCT* [2007] FCAFC 103 (at [29]).
[530] Brysland *GST cases to the end of 2007 – Part 2* (2007) 7 AGSTJ 129 (at 134), cf Brysland *GST and Government in 2010* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* (at 40-42).

namely supply …',[531] (B) that, by contrast to the Australian system, VAT is a 'general tax on the consumption of goods and services',[532] and (C) that the composite expression 'taxable supply' is of critical importance for the imposition of liability.

Block DP concluded (at [51-52]) that there were no 'competing interpretation' in this case, that neutrality 'cannot modify the plain operation of the statute, and that the 'principle of fiscal neutrality is not part of Australian law'. These findings are expressed in categorical and direct terms. The last finding is consistent with a conclusion expressed in a later *Australian Tax Review* article – 'fiscal neutrality [in the European sense] has no function in the interpretation of the Australian GST'.[533]

As Roderick Cordara and Pier Parisi point out, Block DP did not discuss *Elida Gibbs* in detail, nor did he 'attempt to articulate precisely the principle of fiscal neutrality'.[534] The authors say there was broad reference to the principle 'without acknowledging that while it has specific aspects … which can assist in understanding the basics of a VAT, such as the GST, it is essentially, a core principle of European law'.[535]

Cordara and Parisi quote from EU treaty provisions on equal treatment, observing that these goals 'obviously do not form part of the objectives of the GST Act'. They suggest that, had *Electrical Goods Importer* been better argued for the taxpayer, there may have been scope to appeal more tactfully to underlying policy. Although the authors suggest that reliance on foreign cases for general principles may produce more success, as the years pass, that prediction has not been borne out in practice.

8. INTERPRETATION IN EUROPE

In his article – *Methods of interpretation in European VAT* –Professor Ben Terra said that European VAT 'requires that a tax specialist – whether judge, lawyer or practitioner – be an expert in European law, a polyglot and a bit of an historian'.[536] It goes without saying that I am none of the above. In attempting to trace out the main themes of EU interpretation, therefore, I will rely to some degree on the observations and experience of others mainly from within the European systems of law and taxation.

8.1 Purposive approach

To understand EU neutrality, some appreciation of the legal system including interpretation protocols which produced it is desirable. It is a universal truth that legal texts (like other texts) are only to be understood from their proper context. This is important when looking at legal principles from a different legal system.

A judge once said that the difference between civil law and common law judges was that, when faced with a new case, the former ask – 'what should we do this time?' – while the latter enquire – 'what did we do last time?'[537] Another commentator had put it in terms of the CJEU stating the principle then working down to the facts of the case,

---

[531] *Sterling Guardian Pty Ltd v FCT* [2006] FCA FCAFC 12 (at [15]) quoted.
[532] Article 2(1) of the First Directive referred to.
[533] Spadijer *Is the GST unconstitutional? Some s 55 problems revisited* (2014) 43 *Australian Tax Review* 204 (at 225).
[534] Cordara & Parisi *Australian Goods and Services Tax Cases – Decisions and Commentary* (at [2.10.2]).
[535] *NCC Construction Danmark A/S v Skatteministeriet* [2009] Case C-174/08 (at [41]) quoted.
[536] Terra *Methods of interpretation in European VAT* (2005) 5 AGSTJ 170.
[537] Cooper *The Common and the Civil Law – a Scots View* [1950] *Harvard Law Review* 468 (at 471).

while UK courts do precisely the reverse.[538] In *Merck v Haupzollant Hamburg-Jonas*, the CJEU summarised its general approach to interpretation[539] –

> … in interpreting a provision of the … law it is necessary to consider not only its wording, but also the context in which it occurs and the objects of the rules of which it is part.

This statement conceals more than it reveals about the CJEU. If I read it correctly, the *Merck* statement is largely an understatement. In a 1963 case, the court said that 'it is necessary to consider the spirit, the general scheme and the wording' of provisions.[540] This theme traces back to the very earliest CJEU caselaw.[541]

Gunnar Beck states that the work of the CJEU (in treaty interpretation at least) 'must be placed at the extreme *activist* end of the judicial spectrum'. Another commentator put in terms of the CJEU being 'potentially a dangerous court – the danger being that inherent in uncontrollable judicial power'.[542] There is an enormous and growing literature in this area, however, including a range of textbooks,[543] numerous journal articles (many of which are in English), and personal debates (some rather hard-edged).

Beck's conclusion in the *Epilogue* to his book – 'Law, for the CJEU, is essentially the continuation of politics by other means'.[544] Not everyone agrees with this extreme view. Michal Bobek challenges it on the evidence in the book as a whole, and describes what Beck said as 'bitter and condemning'.[545] Beck doubled-down on his earlier views in a later article – *Law as the Continuation of Politics by Other Means*.[546] His conclusion in that regard is that the judgment in *Pringle* is 'not a model for legal reasoning, but an illustration of the sad, brute fact that the rule of law is, in the end, no more than a fair-weather phenomenon'. These are strong words indeed.

Defending his 'politics by other means' conclusion in a *University of Queensland* article, Beck spoke about 'Political Realpolitik' and that the CJEU would 'break the law to save the euro'[547] – a dramatic accusation. However, it is not as if CJEU judges themselves wholly deny a political dimension in their work. Koopmans J described this as the court in some cases having 'the courage to step into the vacuum'.[548] The point to make, however, is that, while the EU approach may be self-described as 'purposive', it

---

[538] Tiley *The law of taxation in a European environment* (1992) 51 *Cambridge Law Journal* 451 (at 469).
[539] *Merck v Hauptzollant Hamburg-Jonas* [1983] Case C-292/82 (at [12]), *Alfred Lamb International Ltd v CRC* [2009] UKFTT 220 (at [29-30]), cf *Bosphorus v Minister for Transport* [1983] ECR I-3781 (at [12]).
[540] *van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 (at 12).
[541] Fennelly *Legal Interpretation at the European Court of Justice* (1997) 20 *Fordham International Law Journal* 656 (at 660).
[542] Neill *The European Court of Justice - Case Study in Judicial Activism* (at 58).
[543] Rasmussen *On Law and Policy in the European Court of Justice*, Bengoetxea *The Legal Reasoning of the European Court of Justice,* Sankari *European Court of Justice Legal Reasoning in Context*, for example.
[544] Beck *Judicial Activism in the Court of Justice of the EU* (2017) 36 *University of Queensland Law Journal* 333 (at 353).
[545] Bobek *The Legal Reasoning of the Court of Justice in the EU* (2014) 39 *European Law Review* 418.
[546] Beck *The Court of Justice, Legal Reasoning, and the Pringle Case - Law as the Continuation of Politics by Other Means* (2014) 39 *European Law Review* 234.
[547] Beck *The Legal Reasoning of the Court of Justice: Response to Michal Bobek* (2014) 39 *European Law Review* 579 (at 581), *Pringle v Government of Ireland* [2013] 2 CMLR 2, cf *Thesing and Bloomberg Finance LP v European Central Bank* [2013] 2 CMLR 8, *B VerfG 2 BvR* [2012] Case I-1390.
[548] Sturgess & Chubb *Judging the World; Law and Politics in the World's Leading Courts* (at 497).

is not purposive in the sense we know it. EU purposivism roams far beyond even what we would regard as 'exorbitantly purposive'.[549]

All courts are criticised at one time or another for their judicial activism or perceived political motivations. A retired Hawaiian judge recently wrote to John Roberts, Chief Justice of the US Supreme Court, complaining about 'radical legal activism' and how the court had 'become little more than a result-orientated extension of the right wing of the Republican Party'. The ex-judge said that 'even routine rules of statutory construction get subverted or ignored to achieve transparent political goals'.[550]

Leaving aside any merit in these charges, there are differences between the two situations. The constitutional and judicial norms between Europe and America are starkly divergent. There is an expectation the CJEU will bridge gaps between law on the one hand and Realpolitik on the other where necessary. With expectation comes some legitimacy in its wake. We may recoil at EU judicial practices, but they are also a product of their peculiar environment.

8.2 Teleological interpretation

The predominating style of European interpretation tends to be 'teleological' in nature.[551] One text writer describes this as 'emblematic' of the approach of the CJEU. An Advocate General observes that there is 'an increased focus on systematic and teleological reasoning – more contextual and normatively thick'.[552] This methodology resonates with the French teleological approach of Francois Gény in his *Methode d'Interpretation et Sources en Droit Prive Postif* of 1919. Central to this was the need to adapt the law to changing social and economic conditions, liberally, humanely and to the demands of modern life.[553]

The first Advocate General, Maurice Lagrange (a Frenchman) was instrumental in promoting teleological methods to the CJEU.[554] Advocate General Maduro explains that EU statutes are interpreted 'in the light of the broader context provided by the EU legal order and its constitutional *telos*'.[555] Treaties are 'living' documents and read as such.[556] Beck also mentions that 'political fashion' is a factor in interpretation at the treaty level.[557] Professor Leslie Zines at the *Australian National University* described the CJEU in 1973 as being impatient with the treaty provisions 'and determined not to let

---

[549] *Commissioner of Rating and Valuation v CLP Power Hong Kong Ltd* [2017] HKCFA 18 (at [34]), citing *China Field Ltd v Appeal Tribunal (Buildings) No 2* [2009] HKCFA 95 (at [36]), cf *Shanning International Ltd v Lloyds TSB* [2001] 1 WLR 1462 (at [24]).

[550] Lithwick *Former Judge Resigns From the Supreme Court Bar in a Letter to John Roberts* (18 March 2020) *slate.com*.

[551] *Henn and Darby v DPP* [1981] AC 850 (at 905), *Coloroll Pension Trustees Ltd v Russell* [1995] All ER (EC) 23 (at 42), *CCE v Federation of Technology Industries* [2004] EWCA Civ 1020 (at [67]), *Proctor & Gamble Company v Svenska Cellulosa Aktiebolaget SCA* [2012] EWHC 1257 (at [40-42]), *Healthspan Limited v CRC* [2018] UKFTT 241 (at [257]).

[552] Sankari *European Court of Justice Legal Reasoning in Context* (at 67, 69).

[553] Carney *Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions* (2015) 36 *Statute Law Review* 46 (at 52), quoting Troper, Grzegorczyk & Gardies *Statutory Interpretation in France* in MacCormick & Summers (eds) *Interpreting Statutes: A Comparative Study* 171 (at 180).

[554] Burrows & Greaves *The Advocate General and EC Law* (at 59-88).

[555] Maduro *Interpreting European Law* (2007) 1/2 *European Journal of Legal Studies* 1 (at 2).

[556] *Cilfit v Ministry of Health* [1982] ECR I-3415 (at [20]).

[557] Beck *The Legal Reasoning of the Court of Justice of the EU* (at 390-404).

them stand in the way of the fulfilment of what the judges consider to be desirable political or economic ends'.[558] Beck explains further[559] –

> This ultra-flexible interpretative approach minimises methodological constraint and affords the CJEU almost complete freedom of interpretation. This methodological flexibility leaves the CJEU free to give the greatest weight to whatever arguments, usually teleological criteria, support its preferred conclusion.

Scalia and Garner give their understanding of 'teleological interpretation'[560] –

> An interpretation arrived at through imaginative reconstruction, whereby the judge attempts to read the text as he believes the drafter would have wished to phrase it in order to achieve the drafter's desired end.

The concept of 'imaginative reconstruction' is explained as being where the judge 'seeks to resolve a *casus omissus* (an omitted case) by putting himself in the place of the enacting legislature and trying to divine what the collective body would have wanted done'. Scalia and Garner discuss this further under the 'false notion' that, where a statute does not quite cover something, the court 'should reconstruct what the legislature would have done had it confronted the issue'.[561] Central to this view of teleological interpretation is that judicial predictions in this regard 'are bound to be little more than wild guesses'.[562] In Australia also, the term 'teleological' is sometimes used in a pejorative way, though usually with less venom or animus.[563]

It should not be thought, though, that there is any universal distaste for teleological interpretation in the common law world. As Lord Steyn once stated with approval – '*Cross* points out that of the four methods of interpretation – literal, historical, schematic and teleological – the first is the least important and the last the most important'.[564] This accords with how Lord Slynn saw things in his *They Call It 'Teleological'* article.[565]

8.3 The European way

The teleological approach transcends literal, historical and contextual approaches 'because it is not restricted by the wording, background or context of the provisions in issue'.[566] It is purposeful, but in the sense of being dynamic in its drive to give effect to the spirit and scheme of legislation (as the judges see it). It is also seen as unavoidable.[567]

---

[558] Zines *The European Court* (1973) 5 *Federal Law Review* 171 (at 199).
[559] Beck *Judicial Activism in the Court of Justice of the EU* (2017) 36 *University of Queensland Law Journal* 333 (at 353).
[560] Scalia & Garner *Reading Law* (at 430-431).
[561] cf *Argentina v Weltover Inc* 504 US 607 (at 618) (1992), Millett *Construing Statutes* (1999) 20 *Statute Law Review* 107 (at 110).
[562] Scalia & Garner *Reading Law* (at 350), Easterbrook *Statutes' Domains* (1983) 50 *University of Chicago Law Review* 533 (at 547-548).
[563] *Taylor v Attorney-General* [2019] HCA 30 (at [148]), *LM Investment Management Ltd v Drake* [2019] QSC 281 (at [146]) for example.
[564] *Shanning International Ltd v Lloyds TSB* [2001] 1 WLR 1462 (at [24]) referring to Cross *Statutory Interpretation* (at 105-112), cf *Certain Underwriters at Lloyds London v Treasury* [2020] EWHC 2189 (at [33]).
[565] Slynn *They Call It Teleological* (1992) 7 *Denning Law Journal* 225 (at 226, 230).
[566] Moens & Tzovaras *Judicial Law-making in Europe* (1992) 17 *University of Queensland Law Journal* 76 (at 79), *Secretary of State for Work and Pensions v Lassal* [2010] ECR 1-09217 (at [49]).
[567] Sankari *European Court of Justice Legal Reasoning in Context* (at 19).

Judges take a 'panoramic view' and see solutions from a perspective of raw pragmatism. The result is not unlike 'web of beliefs', 'all things considered' and 'funnel of abstraction' ideas of legal pragmatists elsewhere.[568] Continental judges are expected to 'fill in the gaps' by reference to background values, often opaquely expressed.[569]

'It is the European way', Lord Denning once wrote.[570] This was not some veiled criticism. Denning defended the 'schematic and teleological method' of the Europeans saying it was 'really not so alarming as it sounds'.[571] The same law lord in another case observed that the CJEU interprets legislation 'so as to produce the desired effect' – 'This means that they fill in the gaps, quite unashamedly, without hesitation'.[572] The more principles-based style of legislative drafting in the EU presupposes and supports this. There is no formal doctrine of *stare decisis* in the EU, nor any coherent theory of *ratio decidendi*.[573] The CJEU is not bound by its own decisions, but will treat them in a kind of 'precedential' way when that is seen to be desirable.

In a system where 'all authority is persuasive, relative weight becomes crucial'.[574] Gunnar Beck says that the appeal to precedent 'lends later decisions only an *aura* of legal objectivity', an 'impression of continuity and consistency'.[575] Ruth Bader Ginsburg once described judges on the continent as having a civil service character.[576] This appears to be even more so when it comes to CJEU judges.

More creativity and judicial policy-making is ceded to (and demanded from) the EU judge.[577] Bingham J described this as 'supplying flesh to a spare and loosely constructed skeleton'.[578] European legislation 'must be understood in connexion with the economic and social situation in which it is to take effect'.[579] Much weight is placed on the practical consequences of each construction.[580] Reverse-engineering is an open fact of EU judicial life – that is, selecting an agreeable answer then finding whatever reasons

---

[568] Blackshield *Pragmatism and Valid Law* [1965] *Sydney Law Review* 492, Eskridge, Frickey & Garrett *Legislation and Statutory Interpretation* (at 241), Estridge & Frickey *Statutory Interpretation as Practical Reasoning* (1990) 42 *Stanford Law Review* 321, *Flavell v Deputy Minister of National Revenue* (1996) 137 DLR (4th) 45 (at 56), Brooks *The responsibility of judges in interpreting tax legislation* in Cooper (ed) *Tax Avoidance and the Rule of Law,* Dworkin *Law's Empire* (at 159-163) variously provide background.

[569] Filling gaps by judges is usually referred to by its French name *effet utile* – the doctrine of effectiveness.

[570] *Bulmer Ltd v Bollinger SA* [1974] Ch 401 (at 425), cf *Nothman v London Borough of Barnet* [1978] 1 All ER 1243 (at 1246), Sturgess & Chubb *The Incoming Tide* in *Judging the World; Law and Politics in the World's Leading Courts* (at 80-121).

[571] *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1977] 2 WLR 107 (at 112).

[572] *Saarland v Minister for Industry* [1988] ECR 5013 (at [19]).

[573] Beck *The Legal Reasoning of the Court of Justice of the EU* (at 290).

[574] Dashwood *The Advocate General in the Court of Justice of the European Communities* (1982) 2 *Fiscal Studies* 202 (at 214).

[575] Beck *Judicial Activism in the Court of Justice of the EU* (2017) 36 *University of Queensland Law Journal* 333 (at 340, 353).

[576] Ruth Bader Ginsburg *Remarks on Writing Separately* (1990) 65 *Washington Law Review* 133 (at 136).

[577] Neill *The European Court of Justice: a case study in judicial activism*.

[578] *CEC v ApS Samex* [1983] 1 All ER 1042 (at 1056), *R v Food Standards Agency* [2013] EWHC 1966 (at [66]), *Lahyani v Minister for Justice* [2013] IEHC 176 (at [27-28]), *Re Civil Aviation (Investigation of Air Accidents and Incidents) Regulations* 1996 [2015] ScotCS 80 (at [4]).

[579] *Shanning International Ltd v Lloyds TSB Bank plc* [2001] UKHL 31 (at [24]), Cross *Statutory Interpretation* (at 107).

[580] *Enderby v Frenchay Health Authority* [1994] 1 All ER 495 (at 513).

may support it.[581] Legal realism prevails and ends justify means.[582] This is in stark contrast to the traditional 'bottom-up' methods which dominate judicial decision-making in common law countries.

Bennion colourfully summed up the position by saying that the 'continental version of purposive construction enables the legislative animal to be skinned alive'.[583] In similar vein, it has been said that the CJEU 'deliberately and systematically ignores fundamental principles of the western interpretation of law'.[584] Another commentator calls broadly for interpretative restraint by the CJEU, which (in his view) should be based on principles of democracy, rule of law, and the separation of powers.[585]

8.4 Legislative drafting

Interpretation protocols in Europe partly reflect the style of legislative drafting. This is no more than a cultural and systemic observation of general application. The open style of EU drafting facilitates and encourages, if not demands, that judges fill in the spaces between the lines and between the words. We call this interstitial law-making[586] and, in Europe, it happens without apparent anxiety. By contrast, UK legislation is far more complex. John Avery Jones described it as a 'plague of tax rule madness'.[587]

Cordara describes VAT legislation as 'tersely drafted'.[588] The VAT Directives, he says, 'represent a series of political deals interspersed among broad applications of principle'. The general style derives from Continental law systems, which rely on techniques 'not highly dependent on the precise use of language'. Beck explains this is terms of EU law being drafted 'in the less exhaustive and more abstract style of the civil law tradition'.

It is written very differently to the national legislation of member states, for example. As would be expected, the less precise and more open the EU law is, the more amenable it is to the intrusion of 'extra-legal' factors.[589] In many ways, the drafting style of EU law is more strategic, more optimistic, less tactical, less granular and far less absolutist that what we are used to in Australia.

EU legislation is drafted in all 23 official languages, none of which is privileged as original and all of them authentic. Maintaining this corpus – sometimes referred to as the 'Babel of Europe' – is a daunting and resource-intensive task with many obvious risks including legal and reputational ones. As has been observed in another context –

---

[581] cf Hill J *A Judicial Perspective of Tax Law Reform* (1998) 72 *Australian Law Journal* 685 (at 686).
[582] cf Schulyok *The ECJ's Interpretation of VAT Exemptions* (2010) 07/08 *International VAT Monitor* (at 268).
[583] *Bennion on Statutory Interpretation* (at 966).
[584] Herzog & Gerken quoted in Sankari *European Court of Justice Legal Reasoning in Context* (at 61).
[585] Conway *The Limits of Legal Reasoning and the European Court of Justice*, cf Bobek *The Legal Reasoning of the Court of Justice in the EU* (2014) 39 *European Law Review* 418 (at 427).
[586] cf French *Competition law – covering a multitude of sins* [2004] Fed J Schol 5 (at [27]), French *Bending Words: The Fine Art of Interpretation* [2014] *University of Western Australia paper* (at 9), Blaker *Is Intentionalist Theory Indispensible to Statutory Interpretation?* (2017) 43 *Monash University Law Review* 238 (at 269).
[587] John Avery Jones *Tax Law: Rules or Principles?* (1996) 17 *Fiscal Studies* 63 (at 89).
[588] Cordara *The Sixth VAT Directive and Key Legal Issues under VAT in Europe* (at 5).
[589] Beck *The Legal Reasoning of the Court of Justice of the EU* (at 314, 345).

'Different languages are different worlds'.[590] Professor Terra has written that the multilingual nature of EU legislation 'can make any tax practitioner desperate'.[591]

The problem may be little different in principle from that arising in the reading of international treaties written in various language versions.[592] The European situation, however, generates more intensity in a smaller microcosm.

Lawrence Solan argues that multilinguality assists rather than frustrates the processes of interpretation.[593] It is the 'comparison of different language versions'[594] as an additional step which adds value to linguistic analysis, he says.[595] This appears also to be borne out at the practical level. One example is the opinion of Advocate General Slynn in *Rompelman* where no less than six language versions are consulted.[596]

Solan calls this the *Augustinian Approach* to interpretation, given it replicates closely the methodology applied by Augustine in *On Christian Doctrine* to resolve the meaning of scriptural texts in different languages. Capturing the essence of various versions by triangulation techniques assists the interpreter.[597]

In his view, 'Babel is not a punishment, it is a gift'. Solan's conclusion is that 'Augustine had it right when he observed that the careful study of different translations of the same text is likely to lead to a deeper understanding of the text's essential meaning'. The CJEU agrees saying interpretation of Community law 'thus involves a comparison of the different language versions'.[598] As the caselaw shows, however, multilinguistic analysis in this regard has become a dark art of sorts.[599] Having its own terminology, EU legal concepts do not necessarily match-up with those of member states.[600] Terra says this problem 'often results in mental gymnastics' in certain VAT situations.[601]

8.5 CJEU judgments

It is often difficult to identify a path of reasoning leading to the answer provided by the CJEU in its judgments. Three interrelated factors produce this state of affairs – (A)

---

[590] Dixon, Hogan & Wierzbicka *Interpreters: Some basic problems* (1980) 5 *Legal Service Bulletin* 162 (at 163) quoted in French CJ *One Justice – Many Voices* [2015] *Language and the Law Conference paper* (at 3).
[591] Terra *Methods of interpretation in European VAT* (2005) 5 AGSTJ 170.
[592] cf *Comptroller-General of Customs v Pharm-a-Care Laboratories Pty Ltd* [2020] HCA 2 (at [36]), *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157 (at [137]).
[593] Solan *The Interpretation of Multilingual Statutes by the European Court of Justice* (2009) 34 *Brooklyn Journal of International Law* 277.
[594] *Simutenkov v Ministerio de Educatión y Cultura* [2005] ECR I-2579 (at [14]), *CILFIT v Ministry of Health* [1982] ECR 3415 (at [18-20]).
[595] *Commission of the European Communities v United Kingdom* [2006] ECR I-7471, *Irmtraud Junk v Kuhnel* [2005] ECR I-885 (at [33]) for example.
[596] Opinion of Advocate General Sir Gordon Slynn dated 15 November 1984 in Case 268/83, cf Slynn *They Call It Teleological* (1992) 7 *Denning Law Journal* 225 (at 228), *Orange România SA v Autoritatea Naţională de Supraveghere* [2020] EUECJ C-61/19 (at [42]).
[597] Van Calster *The EU's Tower of Babel – The Interpretation by the European Court of Justice of Equally Authentic Texts drafted in More Than One Official Language* (1998) 17 *Year Book of European Law* 363 cited.
[598] *Srl CILFIT v Ministry of Health* [1982] ECR 03415 (at [18]), *Alfred Lamb International Ltd v CRC* [2009] UKFTT 220 (at [28]).
[599] *Ex parte EMU Tabac SARL* [1998] ECR I-01605 (at [28-36]) illustrates.
[600] *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 00113 (at [9-11]), *Apple & Pear Development Council v CCE* [1988] ECR 01443 (at [8, 17]) illustrate.
[601] Terra *Methods of interpretation in European VAT* (2005) 5 AGSTJ 170.

multilingualism of judgments, (B) protocols of interpretation, and (C) manner and style of judgments. Regarding (A), French being the common language of deliberation, all other judgment versions (including in English) are translations produced by a cadre of 'lawyer linguists'. One judge notes generally that court French is a 'rigorous and terse language which puts a penalty on the florid and the twisted'.[602]

It is observed that, for decades, CJEU judgments 'looked like a carbon copy of the judgments of the great French courts'.[603] The function of courts in France is to authoritatively communicate a decision, rather than explain why it has been reached. The French linguistic domination also 'spills over into intellectual domination'.[604] The potential for unwitting and subtle changes in meaning is high, especially when what has been called the 'minefield of Eurish' is added as a wildcard.[605] And, while all language versions of legislation have equal authority, judgments and their interpretation centre on the language of the case.[606]

In this respect, the court will have regard to different language versions 'as a smorgasbord of sources, to be consulted as need and convenience dictate'.[607] Reform moves have been made to change the working language of the court to English,[608] given the latter has become 'the *de facto lingua franca* of the EU legislative bodies'.[609] If this happens, it will be an ironic and Pyrrhic outcome in the wake of Brexit.

Regarding (B) and (C), comments from Matyas Bencze summarise the issue.[610] The CJEU 'engages in meta-teleology by assertion, rather than by justification through argumentation'.[611] While a teleological approach reflects the *telos* of provisions, a meta-teleological one approaches the interpretive task by reference to the *telos* of the wider context.[612] The CJEU also 'often adopts a magisterial or declaratory style of judgment' where a 'lack of substantive or dialogical or dialectical reasoning is apparent'. A key feature, says Bencze, is a 'tendency to under-articulate its methods of reasoning'.

It is this approach which 'helps conceal discretion and real choice, and it means justification is under-developed'.[613] Judgments involve a 'typically continental

---

[602] Mancini *Crosscurrents and the Tide at the European Court of Justice* (1995) 4 *Irish Journal of European Law* 120 (at 121).
[603] Mancini & Keeling *Language, Culture and Politics in the Life of the European Court of Justice* (1995) 1 *Columbia Journal of European Law* 397 (at 399).
[604] Bobek *Epilogue* in Bobek (ed) *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (at 309).
[605] cf Potter *The use of 'Eurish' in Brussels confuses many* (28 May 2004) www.graydon.co.uk/blog/use-eurish-brussels-confuses-many
[606] In *Rompelman*, for example, the language of the case was Dutch.
[607] Derlén *Multilingual Interpretation of CJEU Case Law: Rule and Reality* (2014) 39 *European Law Review* 295 (at 315), cf Sankari *European Court of Justice Legal Reasoning in Context* (at 57).
[608] Arnull *The Working Language of the CJEU: Time for a Change?* (2018) 43 *European Law Review* 904 (at 911-914).
[609] Baaij *Legal Integration and Language Diversity* (at 65-66).
[610] Bencze *How to Measure the Quality of Judicial Reasoning* (at 231-232, 247).
[611] cf *CEC v Thorn Materials Supply Ltd* [1998] 3 All ER 342 (at 355).
[612] Sankari *European Court of Justice Legal Reasoning in Context* (at 62, 67).
[613] *Plaumann v Commission* [1964] CMLR 29 exemplifies.

preference for vague allusions'.[614] It is considered all but indecent to overrule an earlier decision,[615] and proper analysis of caselaw is avoided.

Other factors may contribute to this, including rotating chambers, lack of expertise and the growing complexity of references.[616] The overall result is often heuristically murky reasons. The fact that CJEU judgments traditionally involve short conclusory statements that go unlinked by reasons or analysis, also leads to the building of a certain existentialist atmosphere around what the court does and how it does it.

In the early days, the 'style was so gnomic that judgments could be impenetrable when read alone'.[617] Lewison J thought that 'discerning shifts in emphasis in successive decisions of the ECJ sometimes resembles the finer points of Kremlinology at the height of the Cold War'.[618] Mattias Derlén collects the various descriptions of others – 'famously opaque', 'superficial', 'cryptic', 'succinct', 'sibylline', 'laconic' 'magisterial', 'impersonal', 'stilted and awkward', 'Cartesian style'.[619]

Suvi Sankari observes that reading CJEU judgments 'is an act of interpretation in itself'.[620] The law is expressed as an inexorable declaration by anonymised judges. Neither dissent[621] nor appeal is permitted – the CJEU is a court of first and last resort.

A subtle and complex jurisprudence derived from treaty provisions regulates access to the CJEU.[622] To entertain the idea that a decision might be overturned, 'would look like a defect in the judicial process'.[623] Caselaw is read as if it was the text of the law itself. All this is in line with longer continental traditions. J Gillis Wetter said of the German style – 'Standing always unopposed by differing opinions of equal rank, a German judgment is a solid, conclusive and solemn *Staatsakt*'.[624] Judgments of Australian judges, by contrast, involve the opposite of almost all the above observations. Sir Anthony Mason, for example, has referred to the 'dense, grinding judicial style which is characteristic of typical High Court judgments'.[625]

---

[614] Mancini & Keeling *Language, Culture and Politics in the Life of the European Court of Justice* (1995) 1 *Columbia Journal of European Law* 397 (at 402).
[615] *CNL Sucal v HAG GF* [1990] 3 CMLR 571 was the first occasion albeit obliquely.
[616] Sankari *European Court of Justice Legal Reasoning in Context* (at 31).
[617] Wright *The Language of the Law in Multilingual contexts – Unpicking the English of the EU Courts' Judgments* (2016) 37 *Statute Law Review* 156 (at 158).
[618] *CRC v Livewire Telecom Ltd* [2009] EWHC 15 (at [40]).
[619] Derlén *Multilingual Interpretation of CJEU Case Law: Rule and Reality* (2014) 39 *European Law Review* 295 (at 297-298).
[620] Sankari *European Court of Justice Legal Reasoning in Context* (at 33).
[621] Ruth Bader Ginsburg *Remarks on Writing Separately* (1990) 65 *Washington Law Review* 133 (at 146), Heydon *Threats to Judicial Independence: the Enemy Within* (2013) 129 *Law Quarterly Review* 205 (at 206).
[622] Terra *Methods of interpretation in European VAT* (2005) 5 AGSTJ 170 discusses, cf *Srl CILFIT v Ministry of Health* [1982] ECR 03415.
[623] Dashwood *The Advocate General in the Court of Justice of the European Communities* (1982) 2 *Fiscal Studies* 202 (at 213).
[624] Wetter *The Styles of Appellate Judicial Opinions* (at 26).
[625] Mason *Justice of the High Court* in McCormick & Saunders (eds) *Sir Ninian Stephen: A Tribute* 3 (at 5).

8.6 Role of Advocate General

Advocates General play an integral part in the work of the CJEU, and have done so since its inception as the Court of the European Coal and Steel Community.[626] Sometimes called the 'other voice in Luxembourg',[627] Advocates General are full members of the court,[628] but they are completely independent of and impartial to the judges. An Advocate General 'speaks for no one but himself'.[629]

Their task is threefold – to propose a solution to the case in question, to relate that solution to the general pattern of existing caselaw, and (where possible) to outline possible future development of that caselaw.[630] The office resembles the *commissaire du gouvernement* of the French courts in important respects, but their role is truly unique. Though their opinions may resemble a first instance decision which is subject to compulsory appeal,[631] the office of Advocate General 'cannot be compared to any judicial or legal being in the common law world'.[632]

The Advocate General is said to act as a 'legal representative of the public interest',[633] or as spokesman for the law and justice.[634] One writer referred to a dialectic between judgment and opinion, and between collegiality and individualism.[635] Another said there was an 'organic and functional link' between Advocates General and the CJEU.[636]

As law generalists, they were originally involved in all cases coming before the court. Now they sit in around 47% of CJEU cases, with their views being 'followed' about 70% of the time. Their opinions are not negotiated in any way and are published with the CJEU judgment in the case. These opinions form an integral part of the *acquis jurisprudentiel* and have authority in their own right.[637]

Appointed in 1953, Maurice Lagrange and Karl Roemer were the first two Advocates General, the former being regarded as the founder of the office. In his very first opinion, Lagrange pressed for a teleological approach to interpretation of EU law, a move which has proved enduring.[638] When later Advocates General Jacobs and Warner took a stricter approach to regulations, for example, the CJEU disagreed and applied the teleology of

---

[626] Coincidentally, this was around the same time that France imposed its upgraded TVA – 1954.
[627] Derlén *Multilingual Interpretation of CJEU Case Law: Rule and Reality* (2014) 39 *European Law Review* 295 (at 305).
[628] *Vermeulen v Belgium* (2001) 32 EHRR 15 (at [31]), Craig & De Búrca *EU Law: Text, Cases, and Materials* (at 62).
[629] Dashwood *The Advocate General in the Court of Justice of the European Communities* (1982) 2 *Fiscal Studies* 202 (at 207).
[630] Lasok & Bridge *An Introduction to the Law and Institutions of the European Communities* (at 159).
[631] Borgsmidt *The Advocate General at the European Court of Justice: A Comparative Study* (1988) 13 *European Law Review* 106 (at 107).
[632] Burrows & Greaves *The Advocate General and EC Law* (at 3), citing Fennelly *Reflections of an Irish Advocate General* [1996] *Irish Journal of European Law* 5.
[633] Chalmers, Hadjiemmanuil, Monti & Tomkins *European Union Law* (at 123).
[634] Lasok & Bridge *An Introduction to the Law and Institutions of the European Communities* (at 159).
[635] Dashwood *The Advocate General in the Court of Justice of the European Communities* (1982) 2 *Fiscal Studies* 202 (at 216).
[636] Ryland *The Advocate General; Adversarial Procedure; Accession to the ECHR* [2016] *European Human Rights Law Review* 169 (at 174)
[637] Tridimas *The Role of the AG in the Development of Community Law: Some Reflections* [1997] *Common Market Law Review* 1349 (at 1385).
[638] *France v High Authority* [1954-1956] ECR 1 (at [26]).

Legrange.[639] His solutions to problems were invariably systemic, coherent and principles-based.[640] This is illustrated by Legrange's framing the pivotal rule that community law must prevail over national law,[641] with its requirement that a 'unity of interpretation' should be applied within each system.

In their 2007 book – *The Advocate General and EC Law* – Professors Burrows and Greaves trace the origins of the office, consider the careers and influence of selected Advocates General, and look at the role they have played in important areas of EU law. There is a substantial literature aimed at testing in various ways (including by econometric analysis) just how effective Advocates General have been in meeting their treaty obligation to assist the CJEU.[642] One study concludes that Advocates General are not 'cause lawyers', display no 'crusader zeal', and have no wider agenda. Activism is said to be 'not endemic' among them.[643]

8.7 Activism and coherence

Some views mentioned above may reflect a particularly Anglo-centric conception of EU judicial method, and it would be misleading not to acknowledge that other views are held. David Edward, himself a former CJEU judge, says that the court's role 'cannot be confined to that of providing a technocratic literal interpretation of texts produced by others', and that the judge must proceed 'to make the legal system consistent, coherent, workable and effective'.[644] Sturgis and Chubb in *Judging the World* describe this as the court 'having to take up the social slack and making the law march with the times'.[645]

The legal pluralism of the European Union, for one thing, appears to push things in this direction. Judge Edward vigorously defends the CJEU against charges of activism and wondered if he was 'on the same planet as some of the commentators'. By contrast, Edward J sees 'only a group of judges from different countries seeking to find acceptable legal solutions to practical legal problems'.[646] Having 'recently returned from a spell in Luxembourg' as Advocate General, Sir Gordon Slynn made similar points in his *They Call It 'Teleological'* article.[647] For him, teleological methods presented no alien threat, and the creativity of the Europeans was 'exaggerated'.

Leonor Soriano, writing in the journal *Ratio Regis*, defends European judicial method on the basis of coherence theory.[648] The CJEU, in her view, 'rightly refers to authority reasons and substantive reasons; values and principles'. Indeed, she says (at 298) that

---

[639] *Davidoff & Cie SA v Gofkid Ltd* [2003] ECR I-389 (at [24]), *Camera Care Ltd v Commission* [1980] ECR 119.
[640] Burrows & Greaves *The Advocate General and EC Law* (at 59-88).
[641] *Costa v ENEL* [1964] ECR 585.
[642] Arrebola, Mauricio & Portilla *An Economic Analysis of the Influence of the Advocate General on the Court of Justice of the European Union* (2016) 5 *Cambridge Journal of International & Comparative Law* 82 illustrates.
[643] Solanke *'Stop the ECJ'?: An Empirical Analysis of Activism at the Court* (2011) 17 *European Law Journal* 764 (at 783).
[644] Edward *Judicial Activism; Myth or Reality?* in Campbell & Voyatzi (eds) *Legal Reasoning and Judicial Interpretation in European Law* (at 66).
[645] Sturgess & Chubb *Judging the World; Law and Politics in the World's Leading Courts* (at 112).
[646] Quoted in Sankari *European Court of Justice Legal Reasoning in Context* (at 54).
[647] Slynn *They Call It Teleological* (1992) 7 *Denning Law Journal* 225 (at 231), cf Brittain *Justifying the Teleological Methodology of the European Court of Justice: A Rebuttal* (2016) 55 *The Irish Jurist* 134.
[648] Soriano *A Modest Notion of Coherence in Legal Reasoning – A Model for the European Court of Justice* (2003) 16 *Ratio Juris* 296.

'many of the accusations of judicial activism addressed to the court are founded on a poor understanding of the content of legal reasoning and, in particular, of the role of coherence in the legal system and legal reasoning'.

It is the coherence between different kinds of reasons within a judgment which are important for Soriano, rather than the objective content of the reasons themselves. Internal coherence of judgments, therefore, is valued above external consistency. We might call this the 'good story' approach to the evaluation of judicial outputs. A similar viewpoint is that the CJEU is not really activist in its behaviour, but rather the court acts in an 'entrepreneurial' manner.[649]

A further appraisal of EU interpretation comes from Giulio Itzcovich in the *German Law Journal*.[650] The author categorises the criteria applied as linguistic, systemic and dynamic. So far as the first is concerned, ordinary meaning is seldom conclusive, never binding and often overridden. Plain meaning may also be something of an illusion when EU legislation is drafted in several languages,[651] especially where the different versions are to be treated as 'equally authentic'.[652] Literalism in a sense gets lost in translation.

One reason advanced for a teleological approach is elimination any misunderstandings that may arise between different EU languages.[653] This was one rationale given for the decision - *Skatteverket v Hedqvist* - that bitcoin is 'currency' for VAT purposes.[654] Where there are linguistic differences, it is explained, the answer cannot be determined on a basis that is 'exclusively textual'. Regard must always be had, says Itzcovich, to the aims and scheme of VAT.[655]

8.8 Technical regulation and VAT

There are mixed observations about whether the extreme kind of teleological approach described above is applied with full vigour in VAT situations. Some suggest that this is indeed what happens in practice.[656] Roderick Cordara, for example, has commented that 'European judges have made great use of the scope for creativity afforded to them by the open texture of the Directives'.[657] The imposition of *de facto* sanctions in *Halifax* is seen by Bobek as an example of 'sweeping purposive reasoning', for example.[658]

---

[649] Solanke *'Stop the ECJ'?: An Empirical Analysis of Activism at the Court* (2011) 17 *European Law Journal* 764 (at 784).
[650] Itzcovich *The Interpretation of Community Law by the European Court of Justice* (2009) 10 *German Law Journal* 537.
[651] *CILFIT Srl v Ministero della Sanita* [1983] 1 CMLR 472 (at [18-19]), Duxbury *Elements of Legislation* (at 208).
[652] *National Smokeless Fuels Limited v IRC* [1986] STC 300 (at 308), cf Davis *Notes of Cases* [1986] *British Tax Review* 228 (at 232).
[653] Harasic *More About Teleological Argumentation in Law* (2015) 31 *Pravni Vjesnik* 23 (at 43).
[654] *Skatteverket v Hedqvist* [2014] Case C-264/14 (at [45]), cf Koulu *Blockchains & Online Dispute Resolution* (2016) 13 scripted 40 (at 51), Isakov *Australia's tumultuous road towards taxation of digital currencies* (2017) 17 AGSTJ 145.
[655] *Velvet & Steel Immobilien v Finanzamt Hamburg-Eimshuttel* [2007] Case C-455/05 (at [20]), *Commission v Spain* [2013] Case C-189/11 (at [56]).
[656] Farmer & Lyal *EC Tax Law* (at 89), James *VAT/GST: the UK Experience Revisited* (2000) 10 *Revenue Law Journal* 72 (at 84).
[657] Cordara *The Sixth VAT Directive and Key Legal Issues under VAT in Europe* (at 27).
[658] Bobek *The Legal Reasoning of the Court of Justice in the EU* (2014) 39 *European Law Review* 418 (at 425) citing *Halifax plc v CEC* [2006] ECR I-1609 (at [86]).

This was 'embraced with a passion', it might be added, Advocate General Bobek recently saying that it constitutes a notable exception to the rule that tax authorities 'do not fall in love easily'.[659] From early times, however, the CJEU has sanctioned a widely contextual approach to VAT law, applying the 'general system of value added tax as laid down in the Directive' to the meaning of particular provisions.[660] Professor Terra has pointed out that the 'teleological interpretation method is applied by the CJEU in many cases, often referring to the preamble of the Sixth VAT Directive'.[661] Other factors considered by the judges in this respect include the 'state of evolution of EU law' and the degree of VAT harmonisation.

Gunnar Beck, however, says it is rare in VAT situations for the CJEU to reach a conclusion 'based solely or primarily on teleological criteria at odds with a literal reading'.[662] VAT exemptions, certainly, are expected to be construed in a strict manner[663] though not always.[664] Neither are they to be approached acontextually or without reference to 'systematic and teleological criteria'. The rationale for strictness in this regard is that exemptions are exceptions to the fundamental principle that VAT is to be levied 'on all services supplied for consideration by a taxable person'.[665]

As Advocate General Jacobs explained in *Abbey National*, exemptions form a 'potentially serious departure from the principle on which VAT is levied in that a chain of supplies may be broken in this matter at more than one point, with a concomitant repetition of cumulative taxation'[666] (also called 'cascading'). Some of the CJEU neutrality cases discussed below certainly do suggest application of a broad teleological approach, though not always. The point to make is that, while teleological methods dominate treaty interpretation, they also intrude into regulatory areas like VAT.

8.9 Economics over law

In their 2009 article – *EU VAT and the Rule of Economics* – John Watson & Kate Garcia stake out their view that the 'jurisprudence relating to the VAT system contrasts starkly with the traditions of British tax law'.[667] In their estimation, the CJEU follows a more economic approach even ignoring the legal provisions while UK courts 'closely follow the provisions of the VAT Act'. EU methods extend well beyond the kind of purposivism available in Britain. As the authors explain, the economic principles on which the VAT system are based 'take precedence over the legal provisions', the Sixth Directive being 'merely the mechanism through which the economic structure of VAT

---

[659] *Cussens, Jennings, Kingston v Brosnan* [2017] Case C-251/16 (at [1]).
[660] *Staatssecretaris van Financiën v Hong-Kong Trade Development Council* [1982] ECR 01277 (at [6-7]).
[661] Terra *Methods of interpretation in European VAT* (2005) 5 AGSTJ 170.
[662] Beck *Judicial Activism in the Court of Justice of the EU* (2017) 36 *University of Queensland Law Journal* 333 (at 341, 352)
[663] *Bakati Plus v Nemzeti Adó-és Vámhivatal Fellebbviteli Igazgatósága* [2020] EUECJ C-656/19 (at [23]), *SAE Education Ltd v RCC* [2019] UKSC 14 (at [42]), *Bulthuis-Griffioen v Inspecteur der Omzetbelasting* [1995] EUECJ C-453/93 (at [19]), *Blasi v Finanzamt München* [1998] EUECJ C-346/95 (at [18]), *Försäkringsaktiebolaget Skandia* [2001] EUECJ C-240/99 (at [32]), cf Tervoort *Interpretation methods of the CJEU and the meaning of the principle of fiscal neutrality* [2015] *World Journal of VAT/GST Law* 110.
[664] *Canterbury Hockey Club v CRC* [2008] EUECJ C-253/07 (at [41]) illustrates, cf *Wiener* [1997] ECR I-6495 (at [65]), *United Biscuits (Pensions Trustees) Ltd v CRC* [2020] EUECJ C-235/19 (at [36-38]).
[665] *Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën* [1989] EUECJ C-348/87 (at [13]).
[666] *Abbey National plc v CEC* [2001] 1 WLR 769 (at [32]).
[667] Watson & Garcia *EU VAT and the Rule of Economics* [2009] *International VAT Monitor* 190 (at 190).

is delivered'. Directives are not some 'sacred text', and neutrality examples are given where economics is seen most clearly to rule over the law.[668] One Advocate General appears to have accepted that the CJEU had become a 'one-sided economic court'.[669]

The CJEU, Watson & Garcia go on, 'clearly recognises that the legal provisions of the VAT Directives are subservient to the conceptual structure of the tax'. Referring to *Elida Gibbs*, they say that the CJEU 'rode roughshod over the arguments that the detailed provisions of the Sixth Directive could not deliver them'. Further (at 191), Watson & Garcia say – 'Where the detailed provisions of the directives do not deliver the economics or do not follow the principles of the First Directive, they are ruthlessly corrected by the [CJEU]'.[670] In their later article – *Babylonian Confusion* – the same authors say that 'it would be nothing new for the ECJ to override the exact wording of the Directive in order to achieve a rational result'.[671]

These comments continue a steady theme about interpretation of euro-law by the CJEU. In a sense, that court 'translates' background economic values into legal outcomes, and is expected to. Perhaps this was the idea Hill J was getting at all along in his final communiqué on GST matters – *To interpret or translate?*

9. EUROPEAN LAW IN BRITAIN

9.1 EU law prevails

Britain legislated for a value-added tax in 1973 after repeal of the *Purchase Tax* and the ill-fated *Selective Employment Tax*. Professor Neil Warren, in an early *Revenue Law Journal* article, sets out the historical background to these developments.[672] UK courts in their application of European law, including VAT law, came 'under a duty to follow the practice of the European Court'.[673] This is a direct outcome of the *European Communities Act 1972*, a statute which is to be repealed when Brexit happens.[674]

In his *Lord Fletcher Lecture* given in 1979, Lord Denning said that the 'flowing tide of Community law is coming in fast', adding that it 'has submerged the surrounding land, so much so that we have to learn to be amphibious if we wish to keep our heads above water'.[675] Later, Denning re-expressed this notion in more judicial terms[676] –

---

[668] *Intercommunale voor Zeewaterontzilting v Belgische Staat* [1996] Case C-110/94, *Securenta Göttinger Immobilienanlagen* [2008] EUECJ C-437/06.
[669] Bobek *The Legal Reasoning of the Court of Justice in the EU* (2014) 39 *European Law Review* 418 (at 427).
[670] cf Craig & Búrca *EU Law Text, Cases, and Materials* (at 74).
[671] Watson & Garcia *Babylonian Confusion Following ECJ's Decision on Loyalty Rewards* [2011] *International VAT Monitor* 12 (at 15).
[672] Warren *The UK Experience with VAT* (1993) 3 *Revenue Law Journal* 75 (at 76), cf Reddaway *Effects of the Selective Employment Tax*.
[673] *Lister v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 (at 558).
[674] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, Jones *Brexit and the Future of British Law* (2018) 49 *Victoria University of Wellington Law Review* 1, Basten *Statute, the Common Law and 'Brexit'* (2017) 91 *Australian Law Journal* 414.
[675] Quoted in Slynn *They Call It Teleological* (1992) 7 *Denning Law Journal* 225 (at 243), cf Lord Wilberforce interviewed in Sturgess & Chubb *Judging the World; Law and Politics in the World's Leading Courts* (at 276).
[676] *Macarthys Ltd v Smith* [1981] QB 180 (at 200), cf *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 (at [80]).

> Community law is now part of our law; and whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it …

The law on VAT in the UK is now found in the *Value Added Tax Act 1994* which is 'intended to reflect the provisions of certain EC Directives'.[677] As *Halsbury's Laws of England* explains, 'there is a need to have constant reference to the Sixth Directive and to the various decisions of the ECJ in relation to VAT and allied topics in order properly to interpret and apply the domestic legislation'.[678] If EU law applies directly, national legislation in conflict must give way and be 'disapplied' under supremacy principles.[679] As a result, lower courts must defy domestic precedent 'where this is necessary to apply European law correctly'.[680] They must overlook their own 'black letter law' and give effect to the policy outcomes of EU Directives.[681]

'No longer do the hallowed principles of UK construction apply', as one writer put it.[682] Courts are also 'not to be bound by any strict or literal interpretation' it was said.[683] One difficult issue which also arises is whether, on disapplying inconsistent domestic UK law, a national court can or must act to fill a 'gap in the legislation'[684] in circumstances wider than otherwise permitted under the common law principles.[685] UK courts 'are obliged to take judicial notice not only of decisions of the ECJ or any court attached to it, but also any expression of opinion by such a court on any question of the meaning or effect of any Community instrument'.[686]

9.2 Europeanization

In the early case of *Haydon-Baillie*, the VAT Tribunal took the view that, where the wording of the UK statute 'echoes the intent of the Sixth Directive', there is no further room for reliance on the directive because the 'statute supersedes it'.[687] The tribunal quoted Nolan J in *Yoga for Health* as follows[688] –

> I accept that I must do my best to adopt a European as distinct from a traditionally English approach to the question of construction, but by that I

---

[677] *Airtours Holidays Transport Limited v CRC* [2016] UKSC 21 (at [11]).
[678] *Halsbury's Laws of England* 49(1) Fourth Edition Reissue (at [2-3]), cf Duxbury *Elements of Legislation* (at 231-232).
[679] *Ex parte Factortame Ltd (No 2)* [1991] 1 AC 603 (at 659), *Ex parte Equal Opportunities Commission* [1995] 1 AC 1 (at 27).
[680] *Sub One Limited v CRC* [2012] UKUT 34 (at [16]), citing *Åklagaren v Åkerberg Fransson* [2012] Case C-617/10 (at [112]).
[681] James, Jeffrey & Miller *Apportionment Principles – Part I* (2004) 4 AGSTJ 10 (at 12).
[682] *R v V* [2011] EWCA Crim 2342 (at [19]), *R (Highbury Poultry Farm Produce Ltd) v Crown Prosecution Service* [2020] UKSC 39 (at [25-27]), Davis *Notes of Cases* [1986] *British Tax Review* 228 (at 230), cf *Garland v British Rail Engineering Limited* [1983] 2 AC 751 (at 771).
[683] *Institute of Chartered Accountants in England and Wales v CEC* [1998] 4 All ER 115 (at 123), cf *Healthspan Ltd v CRC* [2018] UKFTT 241 (at [257]), *R v Henn* [1980] 2 All ER 166 (at 196).
[684] *Fleming v RCC* [2008] 1 All ER 1061 illustrates.
[685] *Inco Europe Limited v First Choice Distribution* [2000] 1 WLR 586 (at 592), *Wentworth Securities Limited v Jones* [1980] AC 74 (at 105-106).
[686] cf *Marleasing SA v La Comercial Internacional de Alimentación SA* [1993] BCC 421 (at [8]).
[687] *Haydon-Baillie v CCE* [1986] CMLR 74 (at 79), cf *Pfeiffer v Deutsches Rotes Kreuz Kreiverband Waldshut eV* [2004] ECR I-8835 (at [16]).
[688] *Yoga for Health Foundation v CEC* [1984] STC 630 (at 634).

> think little more is meant than that I should adopt what is often called a purposive or sometimes a teleological method of construction …

Yoga for Health is also quoted for the proposition that, whatever was the EU norm, the filling of 'a gap in an exempting provision of a fiscal measure' was a matter for the legislature and not judges.[689] In other words, UK courts are to continue to apply basic domestic principle in this regard. Another case puts it in terms of applying directives 'if that can be done without distorting the meaning of the domestic legislation.[690] John Tiley wrote that 'we have two sharply different traditions of interpretation operating side by side in one tax system'.[691]

The ground was shifting, however, towards greater acceptance of Euro-style methods. In 1993, it was said in *Pepper v Hart* that courts 'now adopt a purposive approach' to interpretation.[692] Speaking on interactions between legislative style and interpretation techniques, Malcolm Gammie QC perceptively said[693] –

> This chicken-and-egg situation may yet be resolved by the European cuckoo: as the influence of the European Union on our legislation grows, the different traditions of European law may force us to change our ways, to accept a greater use of statements of principle and to adopt a different interpretative approach.

By and large, this appears to have happened in practice. By 1999, there was 'clear evidence' that UK courts were applying a different approach.[694] Lord Bingham spoke about the obligation to give effect to the purpose of parliament and to avoid 'undue concentration on the minutiae'.[695] In the *Assange* case, Lord Mance said domestic courts had gone far beyond their conventional rules of interpretation.[696] In this regard, he later remarked that 'UK courts may have been more catholic than the Pope'.[697]

Martin Brenncke explains that national courts in practice apply a 'hybrid methodology' to EU legislation resulting in 'Europeanization from the inside'.[698] EU techniques converge with and modify domestic principles, something which often results in a 'spill over' of interpretive tools into the domestic system.[699] The outcome is what Brenncke calls 'interlegality' – the blending of elements from different legal orders. Describing the same idea, John Tiley spoke of an 'approximation of methods'.[700]

---

[689] *Expert Witness Institute v CEC* [2001] 1 WLR 1658 (at 1662).
[690] *Webb v EMO Air Cargo (UK) Ltd* [1992] 4 All ER 929 (at 939).
[691] Tiley *The Law of Taxation in a European Environment* (1992) 51/3 *Cambridge Law Journal* 451.
[692] *Pepper v Hart* [1993] AC 593 (at 617).
[693] Gammie *Legislation for business: is it fit for public consumption?* (1994) 3 *Fiscal Studies* 129 (at 138).
[694] Lee *A Purposive Approach to the Interpretation of Tax Statutes?* (1999) 20 *Statute Law Review* 124 (at 132).
[695] *R (Quintaville) v Secretary of State for Health* [2003] UKHL 13 (at [8]).
[696] *Assange v Swedish Prosecution Authority* [2012] UKSC 22 (at [203]).
[697] Mance *The interface between national and European law* (2013) 38 *European Law Review* 437 (at 450).
[698] Brenncke *Hybrid Methodology for the EU Principle of Consistent Interpretation* (2018) 39 *Statute Law Review* 134.
[699] Jacobs *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice* (2003) 38 *Texas International Law Journal* 547 (at 549-550).
[700] Tiley *The Law of Taxation in a European Environment* (1992) 51 *Cambridge Law Journal* 451 (at 466).

9.3 Fiscal theme park

The English judge Sedley LJ once commented (colourfully) that, 'beyond the everyday world', lies the world of VAT, a 'kind of fiscal theme park in which factual and legal realities are suspended or inverted'.[701] This description, made nearly two decades ago, is still being repeated in the First Tier Tribunal.[702] Sedley LJ (at [58]) described going through a 'hermeneutic turnstile' into 'this complex parallel universe' where 'relatively uncomplicated solutions are a snare and a delusion'. Another judge referred to the 'mystic twilight of VAT legislation'.[703] Lord Hope in *Svenska* called-out the 'make-believe world of VAT' where the statutory scheme does not always follow the real world and the guiding principle is neutrality'.[704]

As Roderick Cordara has explained, these various comments are no accident. They express, he says, genuine difficulties 'in coming to terms with a tax that is based on an unfamiliar system of economic policies and has its genesis in civil law thinking and analysis'.[705] In his view, VAT 'is a more political tax than most' and a 'mechanism with an avowedly economic and political agenda'.[706] National courts and the CJEU have been described as being in an 'unenviable position' in this regard.[707]

While technical laws like VAT may not attract the same degree of teleology as do treaty matters, the comments above do suggest the kind of alien legal landscape that teleological interpretation is apt to create. Others may see things in a different light. John Avery Jones, for example, provides a somewhat more sympathetic assessment.[708]

9.4 Brexit and the law

It is not in dispute that the influence of the EU on legal thinking within the UK, and development of the law there, has been profound by any measure. The interaction and exposure to new ways (including teleological interpretation) 'has resulted in a mutual exchange of ideas which has been described as a kind of osmosis between legal systems or the downloading and uploading of legal principles'.[709]

Subjugation of UK law to the European teleos, however, has been an important driver from the start in the Brexit debate under the populist catchcry 'take back control'. The Lord Chancellor even called the CJEU a 'rogue court' in a Brexit rally at Stratford-on-Avon in 2016.[710] Courts in Europe and Britain agree, however, that UK sovereignty has

---

[701] *Royal & Sun Alliance Insurance Group plc v CEC* [2001] STC 1476 (at [54]), cf *ACN 154 520 199 Pty Ltd v FCT* [2019] AATA 5981 (at [1]) 'fiscal alchemy'.
[702] *Virgin Media Ltd v CRC* [2018] UKFTT 556 (at [113]) for example.
[703] *Card Protection Plan v CEC* [1994] STC 199 (at 209), cf *Talacre Beach Caravan Sales Ltd v CCE* [2004] EWHC 165 (at [11]), *Byrom, Kane & Kane v CRC* [2006] EWHC 111 (at [22]), *McCarthy & Stones (Developments) Ltd v CRC* [2013] UKFTT 727 (at [38]).
[704] *CCE v Svenska International plc* [1999] STC 406 (at 416).
[705] Cordara *GST – History, Experience and Future* [2007] *Federal Court Judges Workshop* paper (at [5-7]).
[706] Cordara *The Sixth VAT Directive and Key Legal Issues under VAT in Europe* (at 3).
[707] Joseph *The Vexed Question of Deductibility* [2006] *International VAT Monitor* 191 (at 191).
[708] John Avery Jones *Tax Law: Rules or Principles?* (1996) 17 *Fiscal Studies* 63 (at 81-88).
[709] Jones *Brexit and the Future of British Law* (2018) 49 *Victoria University of Wellington Law Review* 1 (at 20).
[710] Arnull *The Working Language of the CJEU: Time for a Change?* (2018) 43 *European Law Review* 904 (at 909).

been compromised by EU membership.[711] A 'sovereignty clause' was once suggested 'to put the matter beyond speculation'.[712] It is the Brexit case – the so-called 'constitutional case of the century' – however, which settles these issues and explains the true legal impact of EU laws in Britain.

The majority in the Brexit case said (at [65]) that, although the *European Communities Act 1972* gives effect to EU law, it is not the source of that law. It is the 'conduit pipe' by which EU law is introduced into UK domestic law, and 'its effect is to constitute EU law an independent and overriding source of domestic law'. Crucially, the Supreme Court then held (at [67]) that, while EU prevails over inconsistent UK law, the constitutional status of EU law can be changed by the UK parliament.[713] One commentator called this a 'flat contradiction' of the CJEU position that national courts cannot disapply or invalidate EU law.[714] In other words, held the Supreme Court, the UK must disapply domestic law inconsistent with EU law, but it may nevertheless legislate to remove the enhanced constitutional status that EU law now enjoys in Britain.

Under the *European Union (Withdrawal) Act 2018*, the *acquis* of EU legislation applying in the UK (including VAT Directives), called 'retained EU law', will form part of domestic UK law on 'exit day'.[715] This vast legislative corpus will then be subject to progressive rationalisation via formal amendment and repeal.[716]

As was pointed out in the Brexit case (at [80]) '… those legal rules derived from EU law and transposed into UK law by domestic legislation … will no longer be paramount, but will be open to domestic repeal or amendment in ways that may be inconsistent with EU law'. Lord Lloyd-Jones read the original Bill as preserving the authority of EU interpretation principles in relation to the domestic *acquis*.[717]

This appears now to be made secure by s 6 of the withdrawal legislation. This means Brexit itself may not make much difference to the VAT regime now operating in the UK – deal or no deal. EU neutrality, together with the EU cases and the way it is to be understood, is extended indefinitely. So much for 'take back control'. The Supreme Court later struck down the prorogation of parliament by Boris Johnson in a somewhat surprising decision which may yet come back to haunt the UK judiciary.[718]

---

[711] *NV Algemene Transport v Nederlandse Tarief Commissie* [1963] ECR 1 (at 11), *Re a Draft Treaty on a European Economic Area* [1991] ECR I-6079 (at [21]), *Costa v ENEL* [1964] ECR 585, *Trent-on-Stoke City Council v B & Q plc* [1991] Ch 48 (at 56).

[712] Glancey *A 'sovereignty' clause for the UK – essential Act, empty words or hidden agenda?* [2011] 1 *Web Journal of Current Legal Issues* 1, cf *Jackson v Attorney-General* [2005] UKHL 56 (at [104]).

[713] Discussed – Gummow *The 2017 Winterton Lecture: Sir Owen Dixon Today* (2018) 43 *University of Western Australia Law Review* 30 (at 37).

[714] Phillipson *EU Law as an Agent of National Constitutional Change: Miller v Secretary of State for Exiting the European Union* (2017) 36 *Yearbook of European Law* 46 (at 75), Phillipson *Brexit, Prerogative and the Courts: Why did Political Constitutionalists support the Government side in Miller?* (2017) 36 *University of Queensland Law Journal* 31 (at 328), cf *Costa v ENEL* [1964] ECR 585 (at 593).

[715] s 3(1) of the *European Union (Withdrawal) Act 2018*.

[716] It has been estimated that around 186 statutes and 7900 statutory instruments currently implement EU law in England alone.

[717] Jones *Brexit and the Future of British Law* (2018) 49 *Victoria University of Wellington Law Review* 1 (at 19).

[718] *R (Miller) v Prime Minister* [2019] UKSC 41, cf Lindsay *The Exercise of Prerogative Powers and their Political Outcome* (2019) 4 *Perth International Law Journal* 63 (at 78-79).

Finally, in a VAT case decided early in 2020, it was common ground of the parties before the Supreme Court that, at that stage in the UK's withdrawal from the EU, cases involving unclear issues of European law must be referred to the CJEU for resolution.[719] That referral was duly made by the Supreme Court.[720]

10. EU NEUTRALITY CASES

There is a seemingly endless matrix of cases about EU neutrality in the *Rompelman* sense and its derivatives. Any attempt at a comprehensive survey of the field can only end in a book. For present purposes, it is enough to understand where the principle comes from, to get some appreciation about its evolution, the manner in which it is interpreted, the role it plays within the EU legal structure, and how it is applied in practice by the CJEU within the EU. Some feeling for these matters is desirable when seeking to evaluate whether EU neutrality might have already become a 'foreign ghost in our GST machine'. With this in mind, ten EU neutrality cases are reviewed, some of which are also dealt with by Dr Grube in her 2017 paper.[721] They may not always be the most important decisions, but they draw out many of the major themes.

10.1 *Rompelman* - 1985

Key VAT principle

The classic statement of neutrality, applied verbatim too many times to mention and the one which this note adopts as authoritative, comes from the ECJ judgment in a preparatory activities case, *Rompelman v Minister van Financiën*.[722] The Rompelmans bought two units in premises under construction in Amsterdam. They were marked as 'showrooms' on the plan, and the intention was to later lease them to traders.

In a short opinion, Advocate General Slynn did not mention 'neutrality' by name, nor did he derive any concept of that kind in order to resolve the issues.[723] For him the question was simply whether the Rompelmans were taxable persons in circumstances where they were seeking to deduct input tax on a *future* taxable transaction.

Slynn reasoned that acquisition of the means of carrying out an economic activity is the first act in performing that activity, and that this made the Rompelmans taxable persons. He accepted, however, that there must be evidence to establish the intended use asserted. The Advocate General referred to no decided cases, nor is there any wider analysis for his conclusion. In this regard, he is obedient to prevailing style.

The CJEU comprising three judges saw the key issues as being timing and credit access. Before addressing the technical questions, the court recalled the 'elements and characteristics of the VAT system'. The earlier case of *Schul v Inspecteur* was cited (at [16]) for a basic proposition that there is to be charging of tax 'only after the deduction of the amount of the VAT borne directly by the cost of the various components of the price of the goods and services and that the deduction procedure is so designed that only taxable persons may deduct the VAT already charged on the goods and services from

[719] *Overseas Decisions Bulletin* [2002] 17:2.
[720] *Zipvit Ltd v CRC* [2020] UKSC 15 (at [42]).
[721] Grube *Neutrality and input tax deductibility* (2017) 17 AGSTJ 8.
[722] *Rompelman v Minister van Financiën* [1985] ECR 655.
[723] Opinion of Advocate General Sir Gordon Slynn dated 15 November 1984 in Case 268/83.

the VAT for which they are liable'.[724] Article 17(1) of the *Sixth Directive* said that the 'right to deduct shall arise at the time when the deductible tax becomes chargeable'. From these sources, the CJEU (at [19]) stated as follows –

> … the deduction system is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of the valued added tax therefore ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way.

A number of features emerge from this short statement. First, it is a positive purpose of the provisions involved to produce the effect it describes. Second, it is the trader as the taxable person who is the focus of the measure. Third, it is that person who is to be relieved of a tax burden that would otherwise apply. Fourth, the burden in question is to be relieved entirely – not partly and not provisionally, but 'entirely'. Fifth, the relief is to apply universally across all economic activities, provided only that the purpose or results of those activities are themselves subject to the tax. Later cases have added myriad nuances of emphasis to these elements, but the original *Rompelman* formulation still captures the essence and impact of the neutrality principle.

Failure to honour *Rompelman* would burden the trader with the cost of VAT in the course of the economic activity carried on, and would create an 'arbitrary distinction' between preparatory and later costs.[725] This principle is well-illustrated by *Ryanair Ltd*, where input tax deduction was allowed on preparatory acts of a company forming part of a proposed acquisition of shares with the intention of pursuing an economic activity consisting in management of the second company by providing services to that company.[726] Where the purpose of an acquisition changes from non-taxable to taxable, neutrality demands deduction.[727]

What can be said about the style of interpretation applied in *Rompelman* by the court? The first thing is that it reflects the teleological approach of the CJEU generally, and of Maurice Lagrange in particular. The second is that the manner and substance of its derivation of the answer very much illustrates the economic aspects of its influence. That said, the classic statement from *Rompelman* itself is not to be characterised as the brute domination of economics over law. It might rather be seen more as a pragmatic partnership of economics and law.

However, in its later wider application and in its diverse leverage over the VAT system, *Rompelman* neutrality at times exhibits both high teleology and apparent rule of economics over law. Although the CJEU says that neutrality is a principle of interpretation and 'not a rule of primary law', and that it cannot 'be extended in the face of an unambiguous provision of the Sixth Directive',[728] the practical and historical record of its application suggests at times a rather different and more qualified story.

---

[724] *Schull v Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409.
[725] *Intercommunale voor Zeewaterontzilting v Belgische Staat* [1996] Case C-110/94.
[726] *Ryanair Ltd v Revenue Commissioners* [2018] EUECJ C-249/17.
[727] *Szef Krajowej Administracji Skarbowey v Gmina Ryjewo* [2018] EUECJ C-140/17 illustrates, cf *Sonaecom SGPS SA v Autoridade Tributária e Aduaneira* [2020] EUECJ C-42/19.
[728] *Finanzamt Saarlouis v Malburg* [2014] Case C-204/13 (at [43]) for example, cf Grube *Neutrality and input tax deductibility* (2017) 17 AGSTJ 8 (at 20).

10.2 *Elida Gibbs Ltd* - 1997

Dominance of neutrality

In this 'money-off coupon' case, *Elida Gibbs*, the CJEU explained that the 'basic principle of the VAT system is that it is intended to tax only the final consumer', so that the VAT collected 'cannot exceed the consideration actually paid by the final consumer'.[729] The outcome of the case has been controversial, has led to various problems, and is criticised.[730] On the issue of neutrality, the CJEU said –

> … that it was apparent from the First Council Directive … of 11 April 1967 on the harmonisation of the legislation of the member states concerning turnover tax that one of the principles on which the VAT system was based was neutrality, in the sense that within each country similar goods should bear the same tax burden whatever the length of the production and distribution chain.

These are the comments to which Gzell J cross-referred in *TAB Limited*. The CJEU went on to say that, '[i]n order to guarantee complete neutrality of the machinery as far as taxable persons are concerned, the Sixth Directive provides, in Title XI, for a system of deductions designed to ensure that the taxable person is not improperly charged VAT'.[731] These comments emphasise elements derived in *Rompelman,* but that is not the end of the story. Watson and Garcia sum up *Elida Gibbs* by saying[732] –

> The lesson from *Elida Gibbs* is not that retailers can be left aside but that the ECJ will do everything it can to ensure neutrality at the cost of considerable violence to the mechanisms of the VAT Directive.

What these comments point to is precisely the kind of teleology and disregard of provisions that others assert. Whether or not they are accurate or it matters, as Cordara and Parisi point out, *Elida Gibbs* 'has withstood subsequent and sustained attacks, and was confirmed repeatedly in later cases under the Sixth Directive'.[733]

In *Zipvit Limited*, for example, *Elida Gibbs* was relied on for the proposition that 'it is only the final consumer at the end of a chain of supply who bears the burden of the tax, which is designed to operate with complete neutrality at each intermediate stage in the chain'.[734] This is no disagreement that this statement properly expresses in general terms what the neutrality principle requires in theory.

The point of contention, however, is with wider application of the principle in a situation where the detail of VAT provisions is all but disregarded. This is a common theme from various European commentators. What *Elida Gibbs* and its aftermath decisions tend to illustrate is the point made over and over again, both as criticism and as passive

---

[729] *Elida Gibbs Ltd v CEC* [1997] QB 499 (at 560-561 [18-24]).
[730] Watson & Garcia *EU VAT and the Rule of Economics* [2009] *International VAT Monitor* 190 for example.
[731] *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409 (at 1426 [10]).
[732] Watson & Garcia *EU VAT and the Rule of Economics* [2009] *International VAT Monitor* 190 (at 193).
[733] Cordara & Parisi *Australian Goods and Services Tax Cases – Decisions and Commentary* (at [2.10.2]), *European Commission v Germany* [2002] Case C-427/98 (at [30]) quoted.
[734] *Zipvit Limited v CRC* [2018] EWCA Civ 1515 (at [46]), cf *Marcandi Limited v CRC* [2018] Case C-544/16 (at [93]).

statements of fact, that fiscal neutrality in practice confirms the rule of economic policy over the terms of the legislated law. That this continues is illustrated by the recent affirmation of *Elida Gibbs* by the CJEU in 2017 in the case of *Boehringer Ingelheim*.[735] In all these circumstances, the uncritical and unexplained quotation from *Elida Gibbs* by Gzell J in *TAB Limited* raises a series of questions.

10.3 *Kretztechnik AG* - 2005

Not to be limited

In this case, the CJEU held that credit access was available on certain capital raising costs of an Austrian manufacturer of medical equipment – *Kretztechnik AG v Finanzamt Linz*.[736] Issuing new shares was held by the court not to be an 'economic activity',[737] and hence there was no supply for consideration under applicable VAT provisions. However, share issue costs, because they were incurred for the benefit of the company's general economic activity, were to be considered as part of company overheads. Capital raising costs accordingly were held to be creditable by the CJEU to the extent that the company made taxable supplies.[738]

The CJEU in *Kretztechnik* stressed (at 3771) that the right of deduction 'is an integral part of the VAT scheme and in principle may not be limited'.[739] It must be exercised immediately in respect of all the taxes charged on transactions relating to inputs'.[740]

The court emphasised the theme from *Rompelman* about relieving the trader in question 'entirely' of the VAT burden. It made a further point of saying that the 'common system of VAT consequently ensures complete neutrality of taxation overall economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT'. A later case goes even further and says that the VAT system 'rests above all on the principle of fiscal neutrality'.[741]

Kretztechnik itself reversed earlier member state positions on the issue of capital raising, including *Mirror Group* in the UK.[742] In the latter case, it is ironic that a reference to the CJEU had been refused, 'the point being too obvious to trouble the [CJEU] with'.[743] In Australia, the ATO took the view that credits on capital raising costs are blocked.[744] Peter McMahon and Amrit MacIntyre said that it 'seems reasonably clear' that credits

---

[735] *Finanzamt Bingen-Alzey v Boehringer Ingelheim Pharma GmbH & Co KG* [2017] Case C-317/94.
[736] *Kretztechnik AG v Finanzamt Linz* [2005] 1 WLR 3755.
[737] *Harnas & Helm CV v Staatssecretaris van Financiïn* [1997] ECR I-745 (at [15]), *KapHag Renditefonds 35 Spreecenter Berlin-Hellersdorf 3 Tranche GbR v Finanzamt Charlottenburg* [2003] ECR I-6851 (at [38, 40]), *Welcome Trust Ltd v CEC* [1996] ECR I-3013 (at 3041 [33]).
[738] *BLP Group plc v CEC* [1996] 1 WLR 174 (at 199 [25]), *Midland Bank plc v CEC* [2000] 1 WLR 2080 (at 2099-2100 [30]), *Abbey National plc v CEC* [2001] 1 WLR 769 (at 787 [35-36]), *Cibo Participations SA v Directeur régional des impôts du Nord-Pas-de-Calais* [2001] ECR I-6663 (at 6692-6693 [31]), cf Cordara [2005] TIA National GST Intensive Conference paper (at 16-18).
[739] *Ecotrade SpA v Agenzia delle Entrate Ufficio di Genova 3* [2008] EUECJ C-95/07 (at [39]).
[740] *BP Supergas Anonimos Etairia Estatal Emporiki-Viomichaniki kai Antiprossopeion v Greek State* [1995] ECR I-1883 (at 1914 [18]), *Gabalfrisa SL v Agencia Estatal de Administración Tributaria* [2000] ECR I-1577 (at [43]).
[741] *CRC v Isle of Wight Council* [2008] EUECJ C-288/07 (at [16]).
[742] *Mirror Group Newspaper Ltd v CEC* [2000] STC 156, Esajas *The Issue of Shares* (1999) 10 *VAT Monitor* 159 (at 161-163).
[743] Cordara *Developments in UK and European Case Law* [2005] *TIA National GST Intensive Conference paper* (at 16).
[744] GSTR 2008/1 (at [184-187]).

would be denied.[745] Andrew Sommer and Jeffrey Lum concluded it was unlikely the precise outcome in *Kretztechnik* would be replicated in Australia.[746] This was because the costs in question were so clearly related to something which was an input taxed supply. So much appeared to follow from the words of Div 11.

Michael Evans, however, argued that the ATO was wrong in this regard and that a properly contextual approach to Div 11 confirms the correctness of *Kretztechnik* in Australia.[747] This case and others in the same area are discussed by Professor Terra in Chapter 8 of the *GST in Australia* book.[748] As the professor notes, it was the *Rompelman* principle which drove the ECJ decision. As the share issue costs were 'component parts of the price of its products', there was an entitlement to deduct. No part of the wider *Kretztechnik* history, however, permits the issue to be re-opened under the present terms of Div 11, in my view, at least. *Kretztechnik* and *Rompelman* were applied recently by the UK Supreme Court in *Frank A Smart*, a case about input tax deduction incurred in purchasing entitlements to an EU farm subsidy.[749] The court said (at [65]) –

> As VAT is a tax on the value added by the taxable person, the VAT system relieves the taxable person of the burden of VAT payable or paid in the course of that person's economic activity and thus avoids double taxation. This is the principle of deduction set out in article 1(2) and operated in article 168 of the Principal VAT Directive.

10.4 *Empowerment Enterprises* - 2006

Not always the answer

That fiscal neutrality has its limits, even in the EU, is illustrated by a 2006 Court of Session decision – *CRC v Empowerment Enterprises Ltd*.[750] The issue was whether tuition to students by the taxpayer was exempt as 'tuition given privately by teachers and covering school or university education'.[751] The court accepted that in VAT, being a turnover tax, the focus was on the nature of the transaction, rather than necessarily the identity of the supplier.[752] However, neutrality 'cannot provide the answer to every question of interpretation … [and] … it is not always the deciding factor'.[753]

Lord Macfadyen then said (at [27]) –

> The relevance of the principle of fiscal neutrality in construing an exemption comes therefore to be that if the language used admits of two constructions, one which treats the identity of the supplier as relevant and one which does not, the latter is to be preferred. The principle of fiscal neutrality cannot,

---

[745] McMahon & MacIntyre *GST and the financial markets* (at 29).
[746] Sommer & Lum *Case Update* (2005) 5 AGSTJ 132.
[747] Evans *Capital Raising costs – the wrong side of the mirror?* (2007) 10/3 *The Tax Specialist* 120, cf Davison & Cordara *The raising of capital – a European perspective* (2004) 4 AGSTJ 1.
[748] Terra *Creditable Input Tax and Shares in EU VAT – Attribution, Apportionment and Allocation* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* (at 186-187).
[749] *CRC v Frank A Smart & Son Ltd* [2019] UKSC 39 (at [37, 65, 67]).
[750] *CRC v Empowerment Enterprises Ltd* [2006] ScotCS CSIH 46.
[751] Article 13A.1(j) of the Sixth Directive.
[752] *Gregg v CCE* [1999] STC 934 (at [20]), *Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I in Berlin* [2002] ECR I-6833 (at [30]).
[753] *Hoffmann v CRC* [2004] STC 740 (at [60]).

> however, constitute the basis for a construction which is contrary to the clear language of the provision in question.

These comments resonate with the tie-breaker comments of Hack DP in *TSC 2000*. Importantly, EU neutrality may function as a default mechanism where conflicting positions are properly available. In another case, it had been said that neutrality 'can in no circumstances constitute the basis for an interpretation *contra legem* of the provisions in question'.[754] In *Empowerment Enterprises*, however, it was held that this was not a case of competing interpretations. Neutrality simply had no impact on the exemption item in question. Neutrality may be powerful but it is not all-powerful.

In a different context involving third party consideration, Lord Neuberger in *Airtours* had said that 'fiscal neutrality cannot be invoked to invent a supply where there was none'.[755] *Empowerment Enterprises* functions as a reminder that EU neutrality, in the context of clear domestic provisions, may have no impact (as Hill J suggested and *Electrical Goods Importer* confirms in our system).

Associated British Ports is a UK decision also illustrating some boundaries applicable to EU neutrality.[756] The taxpayer, assessed to import VAT on timber unlawfully removed from a warehouse, argued access to an 'equal and opposite right of deduction'. Cordara QC, on the back of *Rompelman*, characterised this as a simple case of principle regarding 'first investment expenditure'. Berner J (at [24]) said –

> The Eighth Directive is founded on a balance between tax collection and prevention of evasion on the one hand and the principle of fiscal neutrality which provides the right of taxable persons to deduct input tax on the other. The principle of proportionality ensures that the balance is not tipped too far in one direction.

The judge traced the wide scope and influence of neutrality. Cordara QC drew attention to the problem of 'cascading', and argued (at [33]) that 'a way must be found to get the VAT lawfully borne by a fully taxable business, including on its overheads, back into the hands of the paying party, so that it is VAT neutral'.[757]

Berner J (at [35]) held, however, that 'none of this case law, whether of the Court of Justice or domestic, provides support for Mr Cordara's argument'. It was 'not applying an over-literal approach', continued the judge, to have regard to the clear requirement of the Directive that the goods 'must be used for the purpose of the relevant economic activity and it is that which provides the necessary direct and immediate link between the input and output transactions'. The taxpayer could establish no such link.

The judge said the 'link which Mr Cordara seeks to establish has no basis in EU law', and that 'a deduction is available only in so far as goods and services are used for the purpose of an applicable economic activity and not simply to the extent any import VAT is incurred absent the use of the related goods'. There is 'no absolute right' to deduct

---

[754] *Gregg v CCE* [1999] STC 934 (at [29]).
[755] *Airtours Holidays Transport Ltd v HMRC* [2016] UKSC 21 (at [53]), noted McGowan *Airtours Holidays Transport Ltd v HMRC: to whom has a supply been made for VAT purposes?* [2016] 4 *British Tax Review* 449.
[756] *Associated British Ports v CRC* [2016] UKFTT 491.
[757] *St Helen's School Northwood Ltd v RCC* [2007] STC 633, *CEC v Redrow Group plc* [1999] STC 161, *RCC v Loyalty Management UK Ltd* [2013] STC 784 relied on.

import VAT simply because the liability arises from the economic activity carried on. Berner J said the position was clear and refused to refer the matter to the CJEU.

10.5 *Marks & Spencer plc* - 2007

Economic analysis & equal treatment

The opinion of Advocate General Kokott in the celebrated 'teacake case', *Marks & Spencer plc*,[758] sets out further basic propositions deriving from the principle of neutrality. Similar goods within each country must bear the same tax burden whatever the length of the production or distribution chain. This is guaranteed by the right to deduct input tax, under which 'all intermediate stages are relieved entirely of the VAT burden'. Similar and competing goods, therefore, must be treated in the same way, and economic operators carrying out the same transactions may not be treated differently for those transactions.[759] As a result, neutrality aims to eliminate distortion in competition as a result of differing VAT treatment.[760]

The taxpayer in *Marks & Spencer* argued for a right under general EU principles (including fiscal neutrality) to recover VAT overpaid on teacake sales, which were subject to concessional treatment.[761] The commissioners said that recovery was always subject to denial under UK law for unjust enrichment reasons.[762] The CJEU agreed that community law does not prevent limitations of the unjust enrichment type,[763] provided they are administered on an 'equal treatment' basis.[764] Discrimination could not be allowed, therefore, between VAT debtors [subject to the unjust enrichment rule] and VAT creditors [not subject to that rule at the relevant time], unless it could be 'objectively justified'.[765] This outcome applied even though the economic traders concerned may not be in direct competition with one another.

However, it was for the national court to determine if in fact there was discrimination of the type described. If discrimination was absent, the national court would have to find unjust enrichment would occur if overpaid VAT was refunded to the taxpayer. This was to be determined 'following an economic analysis' of all the relevant circumstances.[766] The CJEU emphasised again that fiscal neutrality 'is a fundamental principle of the

[758] *Marks & Spencer plc v CCE* [2007] EUECJ C-309/06 (at [56-63]).
[759] *Finanzamt Oschatz v Zweckverband zur Trinkwasserversorgung und Abwasserbeseitigung Torgau-Westelbein* [2008] EUECJ C-442/05 (at [42]), *Ampliscientifica Srl v Ministerop dell'Economica e delle Finanze* [2008] EUECJ C-162/07 (at [25]).
[760] cf Parisi [2006] unpublished paper (at 15-17), Parisi [2007] unpublished paper (at 3, 16-18).
[761] Article 28(2) of the Sixth Directive.
[762] s 80(3) of the *Value Added Tax Act 1994*, cf *Midland Co-Operative Society Ltd v CRC* [2008] EWCA Civ 305.
[763] *Marks & Spencer plc v CCE* [2008] EUECJ C-309/06 (at [47]), *EC Commission v Italy* [1988] ECR 1799 (at [6]), *Dilexport Srl v Amministrazione delle Finanze dello Stato* [1999] ECR I-579 (at [47]).
[764] cf *LA Leisure Ltd v CRC* [2008] UKVAT V20648.
[765] *Klensch v Secrétaire d'État à l'Agriculture* [1986] ECR 3477 (at [9]), *Idéal Tourisme SA v Belgium* [2001] STC 1386 (at [35]).
[766] *Weber's Wine World Handels-GmbH v Abgabenberufungskommission Wien* [2003] ECR I-11365 (at [94-100]).

common system of VAT'[767] which 'precludes treating similar goods, which are thus in competition with each other, differently for VAT purposes'.[768]

The Guardian commented that the decision brought to an end 'an epic dispute after 12 years and two trips to the ECJ'.[769] That said, what drove the legal outcome was high-level economic analysis built on inconvenient facts and a degree of unreality. Cordara & Parisi reflected on complications which the food exemption in *Marks & Spencer* had visited on the VAT system.[770] Referring to *Lansell House*, they hoped Australian judges might take a simpler approach.[771] This sentiment is shared by many.

10.6 *Polski Trawertyn* – 2012

Subvention of national law

This preparatory activities decision[772] is also considered by Dr Grube in her article.[773] Two individuals acquired a quarry then formed a partnership and claimed input tax on acquisition and notary costs. The tax authority rejected both claims, the first because it was the individuals not the partnership who bought the quarry, and the second because the notary work predated formal registration of the partnership.

Despite the textual impediments of Polish law, the CJEU on a very loud application of *Rompelman* had little difficulty in allowing the first claim. After observing that preparatory acts were economic activities, input tax on 'first investment expenditure' had to be recoupable. The court said (at [29]), that 'any other interpretation' would burden the trader and create an arbitrary distinction between expenditure made before and after exploitation. It followed that anyone who carries on investment activities 'closely connected with and necessary for the future exploitation of immovable property' must be regarded as a taxable person. It did not matter that transfer of the quarry to the partnership was VAT exempt.[774]

Although Advocate General Cruz Villalón had drawn attention to Polish law complications in this regard,[775] the CJEU held (at [35]) that the partnership 'must in order to ensure the neutrality of taxation, be entitled to take account of those investment transactions when deducting VAT'. In a line later to echo eerily in our own *Multiflex* proceedings,[776] the CJEU said that, if there was fraud or abuse by the taxpayer on deducting input tax, local authorities could seek recover the amounts over-claimed 'with retrospective effect'. Given the national court found that those who paid the tax and comprised the partnership 'are one and the same legal entity', the CJEU said (at [45])

---

[767] *Schmeink & Cofreth AG & Co KG v Finanzamt Borken* [2000] ECR I-6973 (at [59]).
[768] *Fischer v Finanzamt Donauexchingen* [1998] STC 708 (at [21, 27]), *EC Commission v France* [2001] ECR I-3369 (at [22]), *J P Morgan Fleming Claverhouse Investment Trust plc v CRC* [2007] EUECJ C-363/05 (at [46]), *Banks v CRC* [2008] UKVAT V20695 (at [47-48]), cf *MyTravel plc v CEC* [2005] STC 1617 (at [32-33]), *Advocate General v K E Entertainments Ltd* [2020] UKSC 28 (at [33]).
[769] www.guardian.co.uk/business/2008/apr/10/marksandspencer.teacake (10 April 2008).
[770] Cordara & Parisi *Australian Goods and Services Tax Cases – Decisions and Commentary* (at [8.15.3]),
[771] *Lansell House Pty Ltd v FCT* [2010] FCA 329.
[772] *Kopalnia Odkrywkowa Polski Tavertyn v Direktor w Poznaniu* [2012] Case C-280/10.
[773] Grube *Neutrality and input tax deductibility* (2017) 17 AGSTJ 8 (at 13-17).
[774] *Finanzamt Offenbach v Faxworld Vorgrűndungsgesellschaft* [2004] Case C-137/02 (at [41-42]) cited.
[775] *Kopalnia Odkrywkowa Polski Tavertyn v Direktor w Poznaniu* [2011] Case C-280/10 (at [46-49]) (French text).
[776] *Multiflex Pty Ltd v FCT* [2011] FCA 1112, *FCT v Multiflex Pty Ltd* [2011] FCAFC 142.

that any inability to deduct resulted from a 'purely formal obligation'. Compliance with such an obligation cannot be required where it would make deduction rights ineffective.

Regarding notary costs, the court stated that the right to deduct was an 'integral part of the VAT scheme and in principle may not be limited'. Although Article 273 of the Directive enabled member states to impose obligations necessary to ensure correct collection and prevent evasion, that did not mean they could impose invoicing requirements additional to those in Article 178 and which burdened the ability to deduct input tax. VAT neutrality requires an ability to deduct if substantive requirements are satisfied (at [43]) 'even if the taxable person has failed to comply with some of the formal requirements'. Importantly, if the taxing authority has information sufficient to show that the person is the recipient of supplies subject to VAT, it cannot impose additional conditions which may operate to make the right to deduct ineffective.[777]

Dr Grube makes no comment on *Polski Trawertyn* beyond quoting what the CJEU says in its judgment. To similar effect is the note about the case prepared by Ben Terra and Julie Kajus.[778] If anything, *Polski Trawertyn* confirms in rather emphatic terms that EU-style neutrality is an economic steamroller in the administration of VAT laws. It does this by supporting the right to deduct in the face of otherwise reasonable national safeguards aimed at securing proper VAT compliance and preventing abusive practices.

Professor Millar notes that that the arguments for the partnership being able to deduct on the quarry acquisition were 'somewhat tortured', then deals with how this issue might play out in Australia.[779] Millar also draws attention to the 'agility' with which the CJEU dealt with the partnership question. This appears to be code for precisely the kind of teleological jump to be expected from the CJEU in its judgments.

What is surer, however, is the substantive impact which *Polski Trawertyn* has had in practice. As the First Tier Tribunal recently put it, that decision is clear authority that invoicing requirements like those in Article 226(6) and (7) 'must be dispensed with if the tax authorities are supplied with the information necessary to establish that the substantive requirements of the right to deduct are satisfied'.[780] Measures for the prevention of fraud and evasion must go no further than is necessary and must not undermine neutrality. This is consistent with the conclusion that the VAT aspects of economic activities 'must be dependent on the actual economic situation and the rationality of their result, rather than their formal characteristics'.[781]

---

[777] *Nidera Handelscompagnie BV v Valstybin mokesi inspekcija* [2010] Case C-385/09 (at [42]) cited.
[778] Terra & Kajus *Kopalnia Odkrywkowa Polski* https://research.ibfd.org
[779] Millar *The principle of neutrality in Australian GST* (2017) 17 AGSTJ 26 (at 40).
[780] *Tower Bridge GP Ltd v CRC* [2019] UKFTT 176 (at [126]), cf *Barlis 06 – Investimentos Imobiliários e Turísticos SA v Autoridade Tributária e Aduaneira* [2016] Case C-516/14 (at [42-43]).
[781] Swinkels *Halifax Day: Abuse of Law in European VAT* [2006] *International VAT Monitor* 173 (at 181), cf Walpole *Tackling VAT Fraud* [2014] *International VAT Monitor* 258, Gunacker-Slawitsch *The Knowing Participation in VAT Fraud: Reflections on the Content and the Limits of a Reasonable Duty of Due Diligence* [2017] *British Tax Review* 649, cf *Butt v CRC* [2019] EWCA Civ 554.

10.7 *Macikowski* - 2015

Compulsory sales

This case raised if and how the principle of neutrality should affect compulsory sale situations.[782] Marian Macikowski was a court enforcement officer who, at the request of a creditor, seized immovable property belonging to a taxable person – *Royal sp z o.o*. The officer subsequently auctioned the property to Mr and Mrs Babinski who paid the price in full into court. The last of three questions before the CJEU involved the ability of national law to deny Macikowski the ability to offset input tax deductions otherwise available to the taxable person, where the enforcement officer (as paying agent) was made liable for VAT by Polish law. Did the principle of neutrality operate to transfer or re-vest the right to deduct in officer Macikowski?

The CJEU answered this question 'no'. The court said the right to deduct is an 'integral part' of the system which in principle may not be limited, and that the right is exercisable 'immediately' for all input tax.[783] It was the owner (not the paying agent) as the taxable person who was liable to submit a VAT return and who had the right to deduct input tax. Articles 193 and 199(1)(g) read together allowed 'another person' to be made liable for the tax under national laws where the person liable is the taxable person to whom 'the supply of immovable property sold by a judgment debtor in a compulsory sale procedure'. A national law requiring the enforcement officer to pay the tax was also justified as an 'interim payment' for Article 206 purposes.

The CJEU held that the neutrality principle did not preclude making Macikowski liable, despite the fact that he had no practical ability to deduct input tax. This case appears to create an asymmetrical and counter-intuitive outcome, insofar as the debtor retains deduction rights but the court enforcement officer must pay the tax.

Gunnar Beck has made the point that, generally, in VAT situations the CJEU 'pays very close regard to, and bases its decision on, the wording of the provision in question'.[784] Others disagree with this position as a matter of evidence, sometimes strongly. *Macikowski* is a case supporting the dissenters. The judgment of the CJEU involves a series of short conclusory statements casually unlinked by reasons or analysis, much less any step-by-step progression of logic or argument. The language of the articles in question is difficult from any angle, and we are left to guess about how they inform the conclusion reached. Teleological factors appear have driven the outcome, but we may only conjecture about this also. A patchwork neutrality is achieved it seems, but the steps involved are heuristically murky. In *Macikowski,* the CJEU again forces economic neutrality on provisions, rather than building that outcome on due regard for the words.

10.8 *Volkswagen AG* - 2018

Disregard of formalities

The way in which neutrality may apply when national laws place time limits on input tax recovery was the focus of this case.[785] Hella companies in Slovakia supplied VW in

[782] *Macikowski v Dyrektor w Gdańsku* [2015] Case C-400/13.
[783] *Gabalfrisa SL v Agencia Estatal de Administración Tributaria* [2000] ECR I-1577 (at [43]), *Gran Via Moineşti SRL v Agenţia Naţională de Administrare Fiscală* [2012] EUECJ C-257/11 (at [21]) cited.
[784] Beck *The Legal Reasoning of the Court of Justice of the EU* (at 296).
[785] *Volkswagen AG v Finančné riaditel'stvo Slovenskej republiky* [2018] Case C-533/16.

Germany with moulds for the manufacture of lights. Over a long period no VAT was charged until Hella detected the mistake. After Hella paid the back-tax, VW sought to deduct input tax on the supplies, but that right had expired under national laws in force.

The CJEU (at [38-39]) made familiar remarks about neutrality and its operative effect,[786] but noted that the right to deduct is 'subject to compliance with both substantive and formal requirements or conditions'.[787] The court had already held also that national laws may validly take away the right to deduct where time limits were exceeded and the taxable person 'had not been sufficiently diligent'.[788]

There was no hint or risk of evasion here, however, and it was objectively impossible for VW to exercise the right of deduction before Hella made the adjustment. There was no lack of diligence by VW, nor was there any abuse or 'fraudulent collusion' with the Hella companies. Subsequently, said the court (at [51]), fiscal neutrality precluded a member state from depriving VW of their right to deduct. The court had little difficulty distinguished its earlier decision on forfeiture of deduction rights. The underlying drivers for the decision are the big principles which govern the EU – equal treatment, proportionality and certainty. The case illustrates the more minor role played by precedent in the CJEU.[789] *Volkswagen* is another neutrality decision where it is difficult to properly evaluate the path of reasoning leading to the answer provided.[790]

10.9 *Vadan* - 2018

System jeopardy

My final case on EU neutrality continues a theme discussed by Dr Grube in her paper, that being the right to deduct even where formal documentary requirements are not satisfied by the taxable person.[791] In this case, Advocate General Tanchev held (at [85]) that 'neutrality cannot be legitimately invoked by a taxable person who purports to jeopardise the operation of the common system of VAT through failure to keep the records required under the VAT Directive for a sustained period of time'.

Earlier cases had dealt with the impact of various invoicing defects on the ability to deduct.[792] This one involved a Romanian property developer with a bad compliance history who kept no invoices or other records for several years, and who sought to rely merely on whatever a court appointed expert might glean from wider circumstances.

It was common ground that neutrality derived from Article 168 in the *Rompelman* form was not to be abridged simply by failure to comply with formal invoicing requirements. The CJEU re-stated that the right of deduction is a fundamental principle of the VAT

---

[786] *Senatex GmbH v Finanzamt Hannover-Nord* [2016] EUECJ C-518/14 (at [27]), *SMS group GmbH v Direcţia Generală Regională a Finanţelor Publice Bucureşti* [2017] EUECJ C-441/16 (at [40]) cited.
[787] *SC Paper Consult SRL v Direcţia Regională a Finanţelor Publice Cluj-Napoca* [2017] EUECJ C-101/16 (at [38]) cited.
[788] *Criminal proceedings against Giuseppe Astone* [2016] EUECJ C-332/15 (at [34-35])
[789] Beck *The Legal Reasoning of the Court of Justice of the EU* (at 274-277).
[790] cf de Boer *Commentary on Case C-533/16* [2018] IBFD Bulletin.
[791] *Vadan v Agenţia Naţionala de Administrare Fiscala* [2018] EUECJ C-664/16, cf *Kardi Vehicles Ltd v CRC* [2020] UKFTT 254 (at [80]).
[792] *Uszodaépítő kft v APEH Központi Hivatal Hatósági Főosztály* [2010] EUECJ C-392/09, *Kopalnia Odkrywkowa Polski Trawertyn v Dyrektor Izby Skarbowej w Poznaniu* [2012] EUECJ C-280/10, *Idexx Laboratories Italia Srl v Agenzia delle Entrate* [2014] EUECJ C-590/13, *Senatex GmbH v Finanzamt Hannover-Nord* [2016] EUECJ C-518/14.

system and exercisable immediately to remove the burden of tax on all inputs.[793] Although invoices are a 'ticket of admission' for deduction purposes,[794] toleration of minor errors is required to ensure that neutrality is not undermined.

Luc Vadan went a step too far this time. His infringement was 'so great that it makes it impossible or overly difficult to ascertain whether the substantive conditions for entitlement to a deduction had been met'. The transactions being over 10 years old meant that Vadan's non-compliance was itself a barrier to the production of conclusive evidence supporting any right to deduct.[795] This case stands as a further illustration that EU neutrality is not unlimited. The more recent trend in many 'invoicing formality' cases, however, is for the court to side with the taxpayer and against the national taxing authority.[796] *Rompelman* routinely prevails over member state laws,[797] the bitcoin case being another example of this in practice.[798]

11. COMMENTS ON NEUTRALITY

11.1 Derived from legislation

It is important to notice the precise source of EU neutrality in its second sense. Dr Grube says that it is 'directly connected with the right of taxable persons to deduct input VAT', with that right now finding expression in Article 168 of the VAT Directive.[799] The judge further explains this, saying that the right to deduct input tax 'is essential to relieve taxable persons from the burden of the VAT payable or paid in the course of all their economic activities'.

This phraseology is very much like how the CJEU in *Rompelman* expressed the basic concept, and how it is habitually described in the decisions and the literature. It is not spelt out in so many words by Article 168, of course, but the inference and derivation are clear enough. Does EU neutrality have a statutory source then? I certainly thought so when I first looked at the issue back in 2008.[800]

In *TSC 2000 Pty Ltd*, Hack DP (at [51]) referred to neutrality in slightly different terms to Dr Grube, quoting Lord Walker in *Lex Services plc*.[801] The quotation, however, omits some key words. The full text of what the Law Lord said begins as follows – 'Its central core meaning (spelled out in art 2 of the First directive) …' The part in brackets also

---

[793] *PPUH Stehcemp v Dyrektor Izby Skarbowej w Łodzi* [2015] EUECJ C-277/14 (at [26]), *Biosafe–Industria de Reciclagens SA v Flexipiso-Pavimentos SA* [2018] Case C-8/17 (at [27-29]) cited.
[794] *Jeunehomme and EGI v Belgian State* [1998] EUECJ C-123/87 (at 4534).
[795] cf *Criminal proceedings against Giuseppe Astone* [2016] EUECJ C-332/15 (at [46]), *Marius v Ministerul Finanţelor Publice* [2018] EUECJ C-159/17 (at [35]).
[796] Mikula *Consistency of ECJ Case Law: Formal Requirements in VAT Matters* (2019) 47 INTERTAX 121.
[797] *Siemens Gamesa Renewable Energy Rumânia v Agenţia Nationalã de Administrare Fiscalã* [2018] Case C-69/17, *TGE Gas Engineering GmbH v Autoridade Tributária e Aduaneira* [2018] Case C-16/17, *UAB 'Enteco Baltic' v Muitinės departamentas prie Lietuvos respublikos* [2018] Case C-108/17.
[798] *Skatteverket v Hedqvist* [2014] EUECJ C-264/14, cf *Don Bosco Onroerend Goed BV v Staatssecretaris van Financiën* [2009] EUECJ C-461/08 (at [25]), *DTZ Zadelhoff vof v Staatssecretaris van Financiën* [2012] EUECJ C-259/11 (at [21]), *JJ Komen en Zonen Beheer Heerhugowaard BV v Staatssecretaris van Financiën* [2012] EUECJ C-326/11 (at [20]).
[799] Grube *Neutrality and input tax deductibility* (2017) 17 AGSTJ 8 (at 9).
[800] Brysland *Fiscal neutrality – foreign aid to GST construction?* [2008] *Law Council Tax Committee Workshop paper* (at 8), cf Cordara *The Sixth VAT Directive and Key Legal Issues under VAT in Europe* (at 24).
[801] *Lex Services plc v CEC* [2004] I All ER 434 (at [26]).

suggests an understanding that EU neutrality has a statutory source. In *Kraft Foods Polska*, the CJEU observed that 'VAT neutrality … is a fundamental principle of the common system of VAT established by the relevant European Union legislation'.[802]

Christian Amand took this as a clear indication that *Rompelman* neutrality is a principle sourced, not in the treaties as primary law and not as a mere general principle of secondary law, but rather as a concept sourced in EU legislation itself.[803] So much seems uncontroversial, and it is the conclusion Dr Grube expresses without qualification.[804]

11.2 Fundamental right

Writing in INTERTAX, Marton Varju points to three key features of EO neutrality.[805] First, the right to deduct input tax is a fundamental,[806] imperative, immediate,[807] comprehensive,[808] objective[809] and binding[810] entitlement of all economic operators in comparable situations,[811] to be given without significant limitations,[812] without regard to 'purpose or results' of taxable transactions, independent of VAT payment[813] and even where some formalities are ignored.[814] These aspects of neutrality largely reflect and amplify the classic formulation in *Rompelman*. Despite the superlatives, however, neutrality has a series of legal and practical limitations. For example, it 'cannot be invoked to invent a supply where there is none'.[815] Nor is it immune from legislative adjustment where action of that kind is considered necessary.

The 2007 proposal to limit deduction rights on immovable property, in combination with two CJEU cases,[816] was met with the response that neutrality 'seems to be sacrificed on the altar of fiscal interests'.[817] Sometimes, but only sometimes, neutrality will bow to clear words in the Directives, though almost never to the terms of national laws. Second, Varju says that deduction rights are interfered with only on objective evidence of bad behaviour, like abuse of law or carousel fraud.[818]

---

[802] *Minister Finansów v Kraft Food Polska* [2012] EUECJ C-588/10 (at [28]).
[803] Amand *VAT neutrality: a principle of EU law or a principle of the VAT system?* [2013] *World Journal of VAT/GST Law* 163 (at 168]), Varju *The Right to VAT Deduction and the ECJ: Towards Neutral and Efficient Taxation in the Single Market* (2019) 47 INTERTAX 324 (at 327).
[804] Grube *Neutrality and input tax deductibility* (2017) 17 AGSTJ 8 (at 24).
[805] Varju *The Right to VAT Deduction and the ECJ: Towards Neutral and Efficient Taxation in the Single Market* (2019) 47 INTERTAX 324.
[806] *Rusedespred 00D v Direktor na Direktsia* [2015] Case C-138/12 (at [29]) cited.
[807] *Royal and Sun Alliance Insurance Group plc v CEC* [2003] 2 All ER 1073 (at 1084) for example.
[808] *Kittel v Belgian State* [2006] Case C-C-439/04 (at [48]) cited.
[809] *BLP Group v CEC* [1995] Case C-4/94 (at [26]) cited.
[810] *Halifax plc v CCE* [2006] Case C-255/02 (at [57]), *Vámos v Nemzeti Adó* [2018] Case C-566/16 cited.
[811] *Vámos v Nemzeti Adó* [2018] Case C-566/16 (at [58]), *FinanČné riaditel'stvo v BB construct sro* [2017] Case C-534/16 (at [29]) cited.
[812] *Belgische Staat v Ghent Coal Terminal NV* [1998] Case C-37/95 (at [17]), *Intercommunale voor Zeewaterontzilting v Belgische Staat* [1996] Case C-110/94 (at [20-21]) cited.
[813] *Kittel v Belgian State* [2006] Case C-C-439/04 (at [49]) cited.
[814] *Salomie and Oltean* [2015] Case C-183/14 (at [58-61]), *Polski Tavertyn v Direktor w Poznaniu* [2012] Case C-280/10 (at [44-49]) cited.
[815] *Airtours Holidays Transport Limited v CRC* [2016] UKSC 21 (at [53]).
[816] *Investrand BV v Staatssecretaris van Financiën* [2005] EUECJ C-435/05, *Securenta Göttinger Immobilienanlagen v Finanzamt Göttingen* [2008] EUECJ C-437/06.
[817] Henkow *Neutrality of VAT for taxable persons: a new approach in European VAT?* [2008] *EC Tax Review* 233 (at 233).
[818] cf Amand & Boucquez *A New Defence for Victims of EU Missing-Trader Fraud* [2011] *International VAT Monitor* 234, Terra *The European Court of Justice and the Principle of Prohibiting Abusive Practices*

This controversial though cautious CJEU response has been subject to ongoing criticism which Varju sees as 'overly harsh'. Professor Terra summed up by saying that community law 'cannot be relied on for fraudulent ends'.[819] It may also be recalled that *Rompelman* itself explicitly recognises an exception to neutrality for fraudulent conduct.[820]

Third, although the caselaw has been 'overall balanced', it has produced an 'often highly factual jurisprudence'. Varju says the CJEU treads a fine line between giving full force to deduction rights and addressing the collection concerns of member states. Formality, though, is often sacrificed to neutrality.

Christian Amand provides deeper thoughts in this regard.[821] He emphasises that neutrality is 'only a principle of interpretation'.[822] His concern is how it inter-relates with equal treatment, and what precise status neutrality has as a 'principle of the VAT system' – 'the principle' or 'a fundamental principle'? Various inconsistences are identified in the way the CJEU has dealt with these issues.

Amand refers to cases echoing the *Rompelman* 'right to deduct' statement and tries to reconcile them with 'only a principle of interpretation' comments. He traces neutrality back to the *Treaty of Rome* in 1957, concluding that it reflects the principle of equal treatment. This only complicates any clear understanding of the precise role that neutrality plays. His conclusion is to suggest that the CJEU approach 'creates major confusion in the daily expectations of businesses operating in Europe and seriously damages the European economy'.

12. FOREIGN GHOST REVISITED

12.1 Mr Rompelman

It is one thing to think grandly about the 'underlying philosophy' to which Hill J referred and how the foreign ghost of EU neutrality might guide the resolution of GST disputes in Australia. It is quite another to think through how the logistics of this might play out. The classic statement in *Rompelman* was derived in 1985 from language and principles set out in the First Directive. By the time we legislated for GST, the EU framework had changed and a formidable corpus of neutrality jurisprudence was already building.

Even if it was 'highly factual', that jurisprudence added to and explained the underlying philosophy. When we legislated, did we take on the *Rompelman* principle as a stand-alone thing shorn of all interim learning,[823] or did our foreign ghost, Mr Rompelman, arrive here in 1999 with all his new clothes and possessions intact?

---

in VAT in White & Krever (eds) *GST in Retrospect and Prospect* (at 495), Wolf *Mecsek-Gabona: The Final Step of the ECJ's Doctrine on Reliance on EU Law for Abusive or Fraudulent Ends in the Context of Intra-Community Transactions* [2013] *International VAT Monitor* 280, *Kittel v Belgium* [2008] STC 1537 (at [54-61]), *Peterborough Plant Sales Limited v CRC* [2020] UKFTT 338 (at [21]), *Crow Metals Ltd v CRC* [2020] UKFTT 423 (at [21]).

[819] Terra *VAT lessons from Europe – Part 2* (2007) 7 AGSTJ 73 (at 79).

[820] *Butt v CRC* [2019] EWCA Civ 554 discusses.

[821] Amand *VAT neutrality: a principle of EU law or a principle of the VAT system?* [2013] *World Journal of VAT/GST Law* 163

[822] *Finanzamt Frankfurt am Main V-Höchst v Deutsche Bank AG* [2012] EUECJ C-44/11 (at [45]), *Finanzamt Steglitz v Zimmermann* [2012] EUECJ C-174/11 (at [49-50]) cited.

[823] cf *Vallance v The Queen* (1961) 108 CLR 56 (at 76).

If it is the former, we should apply the principle as read through our eyes exclusively, and ignore everything which has happened in the EU neutrality space since 1985. If the latter, do we take Mr Rompelman as we found him in the arrivals hall at Mascot in 1999 with all his new clothes and possessions intact? Or do we treat him as an 'always speaking' Mr Rompelman in the sense that all the EU neutrality jurisprudence laid down from 1999 informs the principle as we are to apply it year-on-year?

There is no precedent for this and no ready analogy for untangling the practical issues. If we go with static Mr Rompelman, we should ignore all EU cases decided since, including ones like *Kretztechnik* and others discussed in this note. If it is dynamic Mr Rompelman we have welcomed, however, each time his uncles at the CJEU decide a neutrality case, there is a potential impact on how our GST law might operate in comparable situations. None of these speculations is attractive.

12.2 Law and economics

The drivers for EU neutrality being part of our GST law are seen to stem from a standard application of purposive principles. In this regard, the 'context in the widest sense' phraseology of *CIC Insurance* is taken as some open licence to read the words of Div 11 as if they contained concepts derived from foreign legislation different terms and in a different manner. The mandate for preferring an outcome consistent with EU neutrality, however, is suggested to be the 'unqualified statutory instruction' in s 15AA of the *Acts Interpretation Act 1901.* Seeming support for this approach is to be found in the judgment of Hill J in *HP Mercantile*, and comments from the same judge in his later article - *To interpret or translate?* The CJEU decision in *Kretztechnik* is seen as emblematic of how things should work out neutrality-wise in Australia. The arguments for this are best put by Michael Evans in his 2007 paper – *wrong side of the mirror?*[824]

Justice Pagone took up a similar theme in a paper about the 'problems in legislating for economic concepts'.[825] The judge said (at 46) that purposive construction requires judges 'to give effect to underlying objectives which the legislation seeks to achieve', and that 'legislation drafted to give effect to economic concepts is no exception'.

The problem, as Pagone J saw it, it was not lack of legislative direction, 'but that judges do not have the training, background or resources to implement legislation as an economist, accountant, or person of commerce would require'. The judge went on to say, however, that the idea that a judge should apply 'some personally held view of economics, accounting or commerce may be inconsistent with the judge's role as independent (non-partisan) interpreter of legal text'.

This last statement is no doubt correct, as the cases on policy preconception confirm. The deeper problem lies in giving effect to economic policy objectives where the legislative text is *not* open to a construction as would facilitate them. We may lament that judges in this country do not have the same freedom enjoyed by EU judges to openly calibrate their decisions to economic objectives with less regard (sometimes disregard) for the text of the law itself. Reduced to basics, this seems more a plea for different

[824] Evans *Capital Raising costs – the wrong side of the mirror?* (2007) 10/3 *The Tax Specialist* 120.
[825] Pagone *Some problems in legislating for economics concepts – a judicial perspective* [2010] *Treasury Revenue Group paper* 39, cf Pagone *Brambles, hedgehogs and foxes* [2018] FedJSchol 1 (at 3-5), Benedict *The Australian GST regime and financial services: How did we get here and where are we going?* (2011) 9 *eJournal of Tax Research* 174 (at 184-185).

interpretation protocols, a different judicial method and a different legal system. Economic training may assist our judges, but submissions can address economic issues, and expert evidence may be given where appropriate.[826]

Mason J gave his views on the general issue some time ago when he said – 'Understanding rational and sensible tax policy and its associated detail does not call for a sacred band of intellectual colossi'.[827] Gordon J also wrote about the 'myopic culture and specialisation that exists in the tax profession'.[828] Wigney SC made comments in a similar vein in an *Australian Tax Review* article on interpretation.[829]

The more inconvenient truth is that, for better or worse, we have a system which focuses on enacted text – first, and last, as the High Court says. Economic context may compel a different answer only where that answer is otherwise available on the terms of the law and the requirements of s 15AA can be made out.

12.3 Dimensions of difference

The key question posed, though, is whether it is enough that, simply because our system is a VAT system deliberately created with a weather eye to other VAT systems, EU neutrality has embedded itself fully formed into our system. Although neutrality is often described as being 'inherent' in the EU system, the case for any implied absorption into our domestic law is immediately more unlikely once it is seen that the principle derives from a supranational statute requiring fiscal harmony in Europe. Case after case in the EU links neutrality to express provisions within the VAT directive. Neutrality in the *Rompelman* sense has a legislative basis within the European Union, a conclusion confirmed by Dr Grube and others.[830]

To pose the question - how can a foreign statutory concept, unlegislated for in our system, and derived under different protocols, operate as a proxy for the words chosen by our federal parliament? Statutes as 'closed categories' are rarely sources of legal principle[831] – all the more so with foreign statutes. The fact is that our GST law does not contain any *Rompelman*-type formulation or words suggesting it. Our s 11-15(2)(a) language could have legislated for the EU concept (or might be amended to achieve that), but to date it has not done so or shown any inclination.

In the absence of a formal reception device – perhaps a multilateral treaty or a statute like the *European Communities Act 1972* – how can a principle derived from a foreign statute become part of an Australian law framed differently? It is the different terms of Div 11 which define our native neutrality, not what a foreign statute says, much less notions of 'underlying philosophy'. EU neutrality with all of its nuances is derived from

---

[826] *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2006] FCA 1764 (at [172]), Middleton J *Expert economic evidence* [2007] FedJSchol 17 generally.
[827] Mason *Taxation Policy and the Courts* (1990) 2/4 *CCH Journal of Australian Taxation* 40 (at 40), cf Livingston *Practical Reason, "Purposivism", and the Interpretation of Tax Statutes* (1996) 51 *Tax Law Review* 677 (at 683).
[828] Gordon J *The interrelationship between tax law and other areas of law, and the consequences on teaching, drafting and interpreting tax laws* [2011] FedJSchol 1 (at 2).
[829] Wigney *Text, context and the interpretation of a 'practical business tax'* (2011) 40 *Australian Tax Review* 94 (at 95).
[830] Amand *VAT neutrality: a principle of EU law or a principle of the VAT system?* [2013] *World Journal of VAT/GST Law* 163 (at 168).
[831] Farrar *Reasoning by Analogy in the Law* (1997) 9 *Bond Law Review* 149 (at 158, n 37).

VAT Directives in different terms and in a manner alien to the principles of interpretation we apply. Others take the view that these differences do not matter.

John Davison and Roderick Cordara observed[832] -

> The differing legislation, legal tradition and structures, all mean the cases, circumstances and decisions need to be carefully considered to see if they are applicable, but as the base of all VAT and GST systems is the same, the analogies are too strong to ignore. However, overall, there are more similarities than differences in the 2 systems.

12.4 Context and its limits

Justice Hill was right to point to our 'modern approach' to interpretation as requiring consultation of context in the 'widest sense' up-front in the process. Context has a wide meaning and a narrower meaning, but it is the wide one which applies here.[833] Context, however, is never unlimited, and the further you get from the textual centre the more remote is the possibility that what you might find can have any proper influence on the meaning of the provisions being examined.[834] There comes a time, and rather quickly in many cases, when the boundaries of both relevance and utility are passed.

Foreign statutes, principles derived from them, and 'underlying philosophy' are invariably on the other side of the line. *Reliance Carpet* stands as the obvious and cardinal illustration of this. *CIC Insurance* is no open-ended invitation simply to apply whatever may be in the VAT policy background as if it were hard-wired into the GST law. Sometimes, as Edmonds J noted, the identified policy 'is incapable of manifestation through the text of the statute'.[835]

As the discussion of European interpretation shows, courts in the EU give far more prominence to economic policy as an interpretation tool than is permitted in Australia. This is one of the major themes which emerges from a text in the area – *The Legal Reasoning of the Court of Justice of the EU* – by Gunnar Beck. In Australia, the courts have set barricades against economic policy having any automatic influence over the law. We operate in a purposive system, perhaps an increasingly purposive one.

It is not 'teleological' in the EU sense or practice, however. We are no longer free to take literalistic approaches, yet statutory interpretation in Australia remains a 'text-based activity' under which we are to start and finish with what the provisions say. The EU in many ways is a dramatic reverse of this position.

Bruce Quigley, in a speech about general powers of administration, put it more directly in saying that the Commissioner's role 'is to apply the law not the policy'.[836] This language later found its way into an ATO practice statement. In another paper, Quigley said that, while it is erroneous to focus on syntax to the exclusion of policy and context,

---

[832] Davison & Cordara *The raising of capital – a European perspective* (2004) 4 AGSTJ 1 (at 9).
[833] cf *Chaudhri v FCT* [2001] FCA 554 (at [6]), *Sterling Guardian Pty Ltd v FCT* [2005] FCA 1166 (at [33]).
[834] Williams, Burnett & Palaniappan *Statutory Construction: A Method* in Williams (ed) *Key Issues in Public Law* 79 (at 87) illustrates.
[835] *Hastie Group Ltd v FCT* [2008] FCA 444 (at [30]).
[836] Quigley *The Commissioner's powers of general administration: How far can he go?* [2009] *TIA National Convention paper* (at 5).

'it is equally erroneous for perceived policy to drive the interpretation without due regard for the words chosen by Parliament and their context within the Act'.[837]

In his article about the *Indirect Taxes Rulings Panel*, he said that the ATO and the panel 'attempts to the extent possible to take a purposive interpretation having regard to the policy behind the provision'.[838] Practitioners from time to time acknowledge that the Commissioner can and must apply purposive principles as the law demands.[839] He is criticised, however, by some for being too bound to the literal words, and by others for going too far and applying what is called a 'political approach' to interpretation.[840]

It is true that 'constructional choice' theory has opened the interpretive lens in Australia over the last decade, and that greater attention is now given to things like systemic coherence and anti-lingualism. The manner in which these notions play out in practice, however, remains governed by principle and a strong tradition of restraint. A recent example is the dissenting judgment of Gageler J in *SZTAL*.[841]

While the CJEU is expected to make legal decisions based on non-legal factors, in our system, matters of deeper economic policy and philosophy only rarely intrude into the interpretation process and but intangibly. However much we want GST to operate in some particular economic way or think it should operate, it is the words of the legislation which have the final say. This is not a case of reverting to some hard literalism of the past. Nor is it a situation to be solved by providing training in economics to judges. It is simply the way that purposive principles of interpretation operate in Australia – in other words, our system of law.

12.5 *Reliance Carpet*

The case which makes this point most loudly in the GST context is *Reliance Carpet*, decided by the High Court in 2008.[842] It was held that a deposit forfeited in a land sale context was consideration for a taxable supply – that supply being the obligations assumed by the vendor on exchange of contracts. Concerned to distance our GST law from the influence of Article 2 of the First Directive, the High Court referred to an 'important point respecting the nature of GST' made earlier in *Sterling Guardian*[843] –

> In economic terms it may be correct to call the GST a consumption tax, because the effective burden falls on the ultimate consumer. But as a matter of legal analysis what is taxed, that is to say what generates the tax liability (and the obligations of recording and reporting), is not consumption but a particular form of transaction, namely supply …

---

[837] Quigley *Interpreting GST Law in Australia* in White & Krever (eds) *GST in Retrospect and Prospect* (at 118).
[838] Quigley & Tredoux *Inside the Indirect Taxes Rulings Panel* (2004) 4 AGSTJ 89 (at [6.13]).
[839] Timmers *Division 135 – legislative defects: practical problems* (2004) 4 AGSTJ 213 for example.
[840] Robertson *The dangers of the ATO's 'policy intent' approach to the construction of Tax Acts* (2014) 43 *Australian Tax Review* 22, citing *Intoll Management Pty Ltd v FCT* [2012] FCAFC 179 (at [42]), *International All Sports Pty Ltd v FCT* [2011] FCA 824 (at [49]).
[841] *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34.
[842] *FCT v Reliance Carpet Co Pty Ltd* [2008] HCA 22.
[843] *Sterling Guardian Pty Ltd v FCT* [2006] FCAFC 12 (at [15]), cf GSTR 2006/9 (at [10]).

At the end of this passage, the Full Federal Court directed attention to what Hill J said in paragraphs [10-15] in *HP Mercantile*.[844] These passages describe the statutory scheme, point out the cascading problem, explain the 'genius' of the system, and quote earlier Hill J remarks from *ACP Publishing*. They do not, however, make reference to the divide between economic policy and legal analysis.

The point made in *Sterling Guardian,* repeated in the High Court, is neither isolated nor new. The same bench of the Full Federal Court had said in *WR Carpenter* that 'what lies behind the enactment of a taxing provision as a matter of public policy or economic theory is not the same thing as the elements or criteria of tax liability which Parliament has laid down'.[845] In *Universal Music*, the Full Federal Court made a similar point[846] –

> The primary task of the Court, however, is to apply the words of the Act to the facts found on the evidence before it. These words involve some economic concepts and the application of the Act to the facts of a particular case may be informed by economic evidence or argument. But it is the language of the Act which defines the task that the legislature has set for the Court. To the extent that the statutory language conflicts with economic theory, the Court is bound to apply the Act.

French J has also cautioned that an assumption that legislation using economic concepts therefore implements in full the theory or model from which the concepts arise 'requires close scrutiny'.[847] Speaking about *Reliance Carpet*, Logan J said that 'rhetoric is no substitute for regard to the language of a taxing statute',[848] and that the legal question is not answered by policy unless it is reflected in the law.[849] French CJ explained this further in his *Dolores Umbridge* paper, summing up by saying that policy 'divorced from law has no voice in the courts'.[850] The Full Federal Court recently also drew attention to the dangers of decontextualising policy.[851]

These various comments are nothing if not orthodox in our system. In the EU, as explained, the position is rather different for a variety of reasons. Despite the fact that GST is a value added tax, it was the difference between the respective legal systems which *Reliance Carpet* is concerned to stress. After quoting *Sterling Guardian*, the High Court (at [3]) made the following observations –

> By way of contrast to the Australian system, counsel for the Commissioner referred to Art 2(1) of the first Council directive … on the harmonisation of legislation of member states of the European Community concerning turnover

---

[844] cf *Reliance Carpet Co Pty Ltd v FCT* [2007] FCAFC 99 (at [32]), *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd* [2006] FCAFC 115 (at [59]).
[845] *WR Carpenter Holdings Pty Ltd v FCT* [2007] FCAFC (at [29]), cf *SNF (Australia) Pty Ltd v FCT* [2010] FCA 635 (at [118]), *FCT v PM Developments Pty Ltd* [2008] FCA 1886 (at [33]), *FCT v Gloxinia Investments Ltd* [2010] FCAFC 46 (at [28]).
[846] *Universal Music Australia Pty Ltd v FCT* [2003] FCAFC 193 (at [163]).
[847] *Woodside Energy Ltd v FCT (No 2)* [2007] FCA 1961 (at [203]), *Esso Australia Resources Pty Ltd v FCT* [2011] FCA 360 (at [125]).
[848] Logan J *Where are we with GST – black letter or the practical business tax?* [2008] *TIA National GST Intensive Conference paper* (at [14]).
[849] *FCT v Ryan* [2000] HCA 4 (at [19]) quoted.
[850] French CJ *Dolores Umbridge and Policy as Legal Magic* (2008) 82 *Australian Law Journal* 322 (at 323).
[851] *Klemweb Nominees Pty Ltd v BHP Group Limited* [2019] FCAFC 107 (at [138]).

taxes; this indicates that VAT is a general tax on the consumption of goods and services.

13. *RIO TINTO SERVICES*

13.1 No enquiry into purpose

In *Rio Tinto*, Davies J held that credit access on a range of acquisitions into remote area housing was blocked by s 11-15(2)(a) despite the fact that the mining group used the housing for the broader purpose of making taxable and GST-free supplies of iron-ore.[852] Apart from explaining important things about Div 11 and wider policy considerations, this case is interesting for the observation by Dr Grube that the *Bundesfinanzhof* in Germany 'probably would have decided the case the same way'.[853]

The taxpayer argued that, for s 11-15(2)(a) to be engaged, the making of s 40-35 residential rent supplies had to be the 'moving cause' or purpose of the refurbishment and other acquisitions. Providing the accommodation was 'merely an intermediate step' in this respect. The 'moving cause', according to the taxpayer, was the carrying on of the enterprise of mining and selling iron-ore.[854] Davies J said both s 11-15 tests involved matters of objective fact and that there was no requirement to look into ultimate purpose.

The judge rejected Rio's contention that the statements of general policy found in *HP Mercantile* could be relied on as an aid to construing s 11-15(2)(a). Rio had argued that there would be 'double taxation on taxable supplies and unrecoverable GST would be embedded in the GST-free supplies because Hamersley's leasing activities operate at a loss'. The judge said (at [30]) that interpretation 'does not seek to identify or assume the underlying policy of a provision and then to construe that policy'.[855]

Observations by Hill J in *HP Mercantile* on general policy could be accepted, said Davies J, 'but those observations do not provide the answer to the proper construction of s 11-15'. The judge concluded (at [33]) that all acquisitions had a 'direct and immediate connection' to residential rent and that input tax credits were not available.

13.2 Appeal dismissed

In a short judgment delivered promptly, the Full Federal Court comprising Middleton, Logan & Pagone JJ dismissed the taxpayer appeal unanimously and jointly.[856] The judges pointed out (at [6]) that the s 11-15(2)(a) enquiry was not whether something had been acquired in carrying on an enterprise but, and irrespective of that, to what extent the acquisition related to making supplies that would be input taxed.

The relationship which needs to be focused on is 'between the antecedent acquisitions for which credit is claimed and the subsequent supply for which the credit is, in effect, lost'. This, said the Full Federal Court, is a factual enquiry. It does not depend on the 'broader commercial objective of the supplier'. As the court went on to explain (at [8]), the enquiry in question called for by s 11-15(2)(a) –

---

[852] *Rio Tinto Services Ltd v FCT* [2015] FCA 94.
[853] Grube *Neutrality and input tax deductibility* (2017) 17 AGSTJ 8 (at 25).
[854] *CIR v BNZ Investment Advisory Services Ltd* [1994] BCL 466 referred to.
[855] *Certain Lloyd's Underwriters v Cross* [2012] HCA 56 (at [24]) quoted.
[856] *Rio Tinto Services Ltd v FCT* [2015] FCAFC 117.

> … is not into the relationship between the acquisition and the enterprise more broadly … The terms of s 11-15(2)(a) do not depend upon the reason or purpose of the enterprise making the supply or making the anterior acquisition. The provision does not turn upon a characterisation of the purpose, or the occasion of the purpose, of the supplier but upon a characterisation of the extent to which the acquisition relates to the subsequent supply.

Before dismissing the appeal, the Full Federal Court noted (at [8]) that the extent of the relationship between the acquisitions and the residential rent in this case 'is not to be reduced by the fact that the acquisitions may also have related to another purpose where the other purpose is only related to the acquisition wholly by and through the otherwise input taxed supply'. The message from the court is unambiguously to address the words of the statute rather than remotely sourced ideas of policy.

13.3 Views of commentators

Much of the public comment following *Rio Tinto Services* has been directed at the ability to look through input taxed supplies to taxable ones as a means to establishing credit access. That door has been closed in this regard in Australia where the factual enquiry exposes sufficient nexus with an input taxed supply. In an early article, Peter McMahon and Amrit MacIntyre had reviewed a similar 'underlying purpose' argument in a VAT borrowing context.[857] Their conclusion was that the 'same outcome would not necessarily result under the Australian GST legislation because of the different concepts and language employed'.

Professor Millar[858] compares *Rio Tinto Services* with *UAB Sveda*, a CJEU case decided about the same time.[859] Both cases look at the right to deduct on the basis of some ultimate or underlying non-blocked commercial purpose. In *UAB Sveda*, however, the intermediate supply was 'for no consideration' – a key difference – and deduction of input tax was allowed.[860] In the EU, a primary use/secondary use analysis is applied, something which has no resonance in our GST law. Professor Millar concludes (at 47) by saying that, in both jurisdictions, 'once you establish an objective, relevant connection between an acquisition and an exempt/input taxed supply, the right to deduct/credit the input tax is blocked'.

In relation to the first instance decision in *Rio Tinto Services*, Gina Lazanas & Robyn Thomas note that it is an objective relationship between an acquisition and supplies which is required, 'not the moving cause or principal purpose behind the acquisition'.[861] The authors go on to say (at 46) that 'how the GST is intended to apply at a high level and mechanisms to avoid the cascading of tax, will not prevent s 11-15 from being construed on its terms'.

Although the case 'preserves the status quo', it is said (at 47) that the decision may give rise to 'unexpected outcomes' where s 11-15(2)(a) is 'more uncertain and complex in

---

[857] McMahon & MacIntyre *GST and Financial Supplies* (2000) 3 *Journal of Australian Taxation* 167 (at 178-179) citing *Edgemont Group Ltd* [1995] BVC 627 (at 629).
[858] Millar *Limitations on the right to credit input tax* (2016) 5/1 *World Journal of VAT/GST Law* 42.
[859] *UAB 'Sveda' v Valstybin mokesi inspektcija* [2015] Case C-126/14.
[860] cf *BLP Group plc v CCE* [1995] ECR 1-983.
[861] Lazanas & Thomas *Rio Tinto Services Limited: No input tax credit relief* (2015) 15 AGSTJ 40.

its operation'.[862] Examples given include acquisitions into mergers and acquisitions, and acquisitions serving a dual purpose. Jeremy Geale said the decision 'creates significant uncertainty going forward' and that[863] –

> Such an outcome is entirely inconsistent with the primary objects of the Act, which seeks to avoid double taxation and cascading of tax, even in the context of an enterprise which primarily makes taxable or GST-free supplies.

Geale then drew attention (at 1) to a view that the language of Div 11 'may be illusory' insofar as the term 'creditable purpose' has been found to mean 'something other than purpose'. He also said (at 12) that some public rulings were not fully consistent with a submission that the 'creditable purpose' definition 'does not necessarily mandate an inquiry into the purpose of expenditure, notwithstanding its label'.

The ordinary position in Australia is that neither the label for a statutory definition nor the ordinary meaning of terms appearing in that label may be used as an interpretive aid when determining what the definition means.[864] To do otherwise would introduce circuity, as courts have consistently ruled.[865] Other views have been expressed from time-to-time on this issue,[866] but they are yet to be accepted in the High Court. GST commentators have raised that actual 'purpose' continues or should continue to play a role in the s 11-15(2)(a) context.[867] Michael Evans also argues that the focus of credit access 'should be the identification of the extent to which the acquisition relates to the consideration received for the input taxed supply'.[868]

Dr Grube and Professor Millar agree that *Rio Tinto* would be decided in the same way in Europe as it was in Australia. There is no reason to doubt that this is correct, but we ask what significance does this outcome have? My answer is 'probably not very much'. That different legislation in different jurisdictions interpreted differently may produce the same outcome on the same facts may give comfort on wider economic policy or neutrality grounds may be interesting.

However, this tells us little about the legal efficacy of the decisions themselves, whether *Rio Tinto* is good law or not, and much less whether either case confirms the legal correctness of the other. If we test the respective outcomes against some 'strict and complete' neutrality in an economic sense, both are undoubtedly sub-optimal. That neutrality would not deliver credit access in Europe on *Rio Tinto* facts is economically interesting but without wider legal significance.

---

[862] cf Strauch *Sticking to the facts: creditable purpose after Rio Tinto* (2015) 50 *Taxation in Australia* 259.
[863] Geale *The assessment of creditable purpose in light of the decision in Rio Tinto* [2015] *unpublished paper* (at 15).
[864] *SZTVU v Minister of Home Affairs* [2019] FCAFC 30 (at [71]) illustrates.
[865] *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 (at 507), *Owners of Shin Kobe Maru v Empire Shipping Co Ltd* (1994) 181 CLR 404 (at 419), *ASIC v King* [2020] HCA 4 (at [18]).
[866] *Singh bhnf Kanwar v Lynch* [2020] NSWCA 152 (at [98-131]), *SZTVU v Minister of Home Affairs* [2019] FCAFC 30 (at [71]), *Minister for Immigration and Multicultural Affairs v Hu* (1997) 79 FCR 309 (at 324), *Manly Council v Malouf* (2004) 61 NSWLR 394 (at [8-9]), cf *MacDonald v Dextra Accessories Ltd* [2005] 4 All ER 107 (at [18]), *Birmingham City Council v Walker* [2007] 2 AC 262 (at [11]).
[867] Lavery & Patane *Financial transactions: Some Current Issues Arising from Recent Cases and Interpretations* [2017] *TIA National GST Intensive Conference paper* (at 4-8]).
[868] Evans *GST: Where to next?* [2019] *ATAX Where Policy Meets Reality Conference paper* (at 80).

Perhaps it is simply validation of the prediction made by Cordara that there 'is likely to be a convergence of experience on the input tax front given the basically universal problems which input tax generates'.[869] That may be so, but it is not the international experience which is driving the Australian outcomes. It is the form of our legislation.

13.4 Policy preconception

One important point made by Davies J was that interpretation 'does not seek to identify or assume the underlying policy of a provision and then to construe that policy'.[870] This is a practice which the High Court has been concerned to call out more and more often in recent years. It is also precisely what the taxpayer sought to do in *Rio Tinto*.[871] Edmonds J, in his paper *Five Years of GST,* put the issue this way[872] –

> Accepting that the search for legislative policy involves inference, there is a danger that the judge may, in making that inference, apply, perhaps unconsciously, subjective views as to that policy. There may, indeed, be a potential danger that the judge will be mistaken in drawing that inference. Minds may differ as to precisely what the policy is, even if, as Mason CJ once remarked extra-judicially, taxation policy is not 'rocket science'.

The same judge was quoted the following year in the *Australian Financial Review* for saying – 'Perhaps all that may be said is that one person's policy will be the antithesis of another's'.[873] As John Burrows remarked, the art of interpretation 'lies in abandoning one's own prejudices and preconceptions and fully appreciating the direction of the legislature's thinking'.[874] Another writer described the basic problem in more fatalistic terms, saying that 'judges will, under the guise or even the delusion of pursuing unexpressed legislative intents, pursue their own objectives and desires'.[875]

There is perhaps also the human nature comment that 'each of us is very tempted to see his own first interpretation as much more strongly and clearly what the words say than any other view'.[876] As these remarks illustrate, policy preconception is a danger for interpreters generally. It is also a barrier to reception of EU neutrality ideas in particular. Scalia and Garner refer to it in the context of suppression of personal preferences.[877]

Most recently, the High Court warned against 'a judicially constructed policy at the expense of the requisite consideration of the statutory text and its relatively clear purpose'.[878] What we might describe as 'simplistic conception', however, is just as much a problem as preconception. Seeking to apply a policy derived by whatever means which is in terms too general or too abstract may equally lead to error. Modern

---

[869] Cordara *The Sixth VAT Directive and Key Legal Issues under VAT in Europe* (at 33).
[870] *Certain Lloyd's Underwriters v Cross* [2012] HCA 56 (at [24]) quoted.
[871] cf Evans *The Value Added Tax treatment of Real Property – An Antipodean Context* in White & Krever (eds) *GST in Retrospect and Prospect* (at 244).
[872] Edmonds J *Five Years of GST* [2005] *TIA National GST Intensive Conference paper* (at [42]).
[873] Kazi *Judge lays down law to government* (20 October 2006) *Australian Financial Review*.
[874] Burrows *The Changing Approach to the Interpretation of Statutes* (2002) 33 VUWLR 981 (at 985).
[875] Lonnquist *The Trend Towards Purposive Statutory Interpretation: Human Rights at Stake* [2003] *Revenue Law Journal* 18 (at 25).
[876] Bryson *Statutory Interpretation: An Australian Judicial Perspective* (1992) 13 *Statute Law Review* 187 (at 194-195).
[877] Scalia & Garner *Reading Law* (at 31).
[878] *Williams v Wreck Bay Aboriginal Community Council* [2019] HCA 4 (at [79]), cf *Commissioner of Police v Ferguson* [2019] WASCA 14 (at [72]).

legislation and particular provisions are more usually the product of political compromise. The correct enquiry here is not into the policy itself, but how far the provisions go in its implementation.

Mention might be made of a certain hubris which sometimes emerges in this regard. What is being referred to is the confidence of specialists (wherever they are to be found) that they just know what the law was intended to achieve and therefore what it means. Perhaps they were there at the time. In any event, they invariably seem to know from the start and without analysis what the 'right answer' is or should be.

This kind of policy preconception is at the more serious end of the practice courts are increasingly concerned to call out. As Kirby J has directed attention to, and others have repeated, it is sometimes necessary to 'haul experts back to the text of the statute'.[879]

Others describe the isolationist tendencies of 'tax cognoscenti'[880] and the 'myth of tax essentialism'.[881] Gummow J has written on similar themes with special mention for tax officers.[882] Edmonds J, in an article about interpretation of s 11-15, put it best when he said that high level tax policy considerations, 'while they may be relevant to context, are of limited assistance in the task of statutory construction because they do not inform that context in the sense of addressing the elements or criteria of tax liability by which the statute implements that policy.[883]

14. CONSUMPTION ISSUES

14.1 One subject of taxation

For constitutional validity purposes, the subject matter of GST as a tax on consumption is an important consideration. The requirement that the GST law deal with one subject of taxation only, however, is concerned with political relations rather than analytical or logical classifications. It is also for the legislature to choose its own subjects of taxation 'unfettered by existing nomenclature or by categories adopted for other purposes'.

The test is whether, looking at the subject of taxation selected by parliament, 'it can fairly be regarded as a unit rather than a collection of matters necessarily distinct and separate'.[884] Against this constitutional backdrop, it had been held by Hely J in *O'Meara v FCT* that[885] –

> … Parliament has according to 'common understanding and general conceptions' imposed a tax on a single subject of taxation, namely on final

---

[879] Kirby J *Hubris contained: why a separate Australian tax court should be rejected* [2007] *Challis Taxation Discussion Group paper* (at 16).
[880] Livingston *Practical Reason, "Purposivism", and the Interpretation of Tax Statutes* (1996) 51 *Tax Law Review* 677 (at 709).
[881] Caron *Tax Myopia, Or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers* (1994) 13 *Virginia Tax Review* 517 (at 518).
[882] Gummow *The Law of Contracts, Trusts and Corporations as Criteria of Tax Liability* (2014) 37 *Melbourne University Law Review* 834 (at 835).
[883] Edmonds *Interpretation of s 11-15: Significance of the text, context and history* (2012) 12 AGSTJ 79 (at 81).
[884] *Austin v Commonwealth* [2003] HCA 3 (at [190]).
[885] *O'Meara v FCT* [2003] FCA 217 (at [24]), cf Brysland *Interchase to Kurc – the Australian GST cases so far* (2004) 4 AGSTJ 149 (at 151-152), Stone *The GST – A Practical Business Tax* [2006] *TIA National GST Conference paper* (at 6).

private consumption in Australia. That is one subject of taxation for the purposes of s 55 of the *Constitution*.

Steven Spadijer, in an *Australian Tax Review* article, argues the decision of Hely J in *O'Meara* is wrong with the result that the GST law is unconstitutional.[886] In his view, the GST is not a tax on consumption at all, nor can 'supplies' be a singular subject of taxation for s 55 purposes. He says (at 224) that the 'imposition of GST operates completely independently from the act of private consumption, or from private consumption expenditure'. Consumption 'is not even a necessary precondition needed to generate a GST tax liability' – *Reliance Carpet*.

The author's view is that GST involves an 'agglomeration of indirect taxes imposed across a range of heterogeneous and disparate subject matters' – an 'omnibus supertax' he calls it. Steven Spadijer concludes that the GST is in 'violent conflict' with the manifest tenor of s 55'. The article ends with the following statement – 'Political inconvenience is simply not a sufficient reason to continue to allow the *Constitution* to be held hostage to the demands of tax collectors'.

14.2 Economics and law

As Michael Evans pointed out, the 'preference for a tax on consumption is that it enables a secure and reliable source without distorting the behaviour of firms and households'.[887] What the High Court is saying in *Reliance Carpet* is that, although in economic terms GST may be a 'consumption tax',[888] that is not the legal yardstick by which its fiscal reach is to be measured. That GST is a tax on consumption is a truism for most of us,[889] though the kind of 'consumption' involved and the elements which define it may provide scope for analysis and debate.[890]

The High Court was at pains to emphasise this when it said that the 'composite expression "a taxable supply" is of critical importance to the creation of liability to GST'. Matthew Bambrick has observed that, 'while consumption is an economic driver *for* our GST, it is not a legal principle *of* our GST'.[891] The reason 'consumption' is important in the EU is that the Directives incorporate that concept into the statutory infrastructure for taxing purposes.[892] In Australia, parliament took a different approach.

---

[886] Spadijer *Is the GST unconstitutional? Some s 55 problems revisited* (2014) 43 *Australian Tax Review* 204, cf Brysland *GST and Government in 2010* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* 3 (at 6-10).
[887] Evans *GST: Where to next?* [2019] *ATAX Where Policy Meets Reality Conference paper* (at 5).
[888] GSTR 2000/11 (at [27-29]), cf *Westley Nominees Pty Ltd v Coles Supermarkets Australia Pty Ltd* (2006) 62 ATR 682 (at 696 [59]), *DB Rreef Funds Management Ltd v FCT* (2005) 59 ATR 388 (at 389 [2]), *Reliance Carpet Co Pty Ltd v FCT* (2007) 66 ATR 117 (at 132 [31-32]), *O'Meara v FCT* 2003 ATC 4406 (at 4410 [22-24]), *TSC 2000 Pty Ltd v FCT* (2007) 66 ATR 945 (at 957 [55]).
[889] Millar *Time is of the Essence: Supplies, Grouping Schemes & Cancelled Transactions* (2004) 7/2 *Journal of Australian Taxation* 132 (at 137), Parisi *The Goods and Services Tax as a Tax on Acquisitions* [2007] unpublished paper (at 14-16) illustrate.
[890] Cnossen *VAT Treatment of Immovable Property* in Thurongi (ed) *Tax Law Design and Drafting* 231 (at 232-234).
[891] Discussion with Matthew Bambrick of the ATO on 20 March 2019, cf England *When contracts go astray – GST implications* [2009] *ATAX GST & Indirect Tax Weekend Workshop paper* (at 11).
[892] Lazanas *Current Hot Topics in GST* [2006] *TIA 22nd National Convention paper* (at 13-15).

Various passages in *Redrow Group* illustrate the legal focus on the concept of consumption in the EU which is absent in Australia.[893] One commentator said of neutrality that the 'root of the principle is that VAT is a tax on consumption'.[894] Advocate General Kokott has pointed out that neutrality represents a fundamental principle of VAT 'inherent in its nature as a tax on consumption'.[895]

It is the VAT Directive consumption context which makes cases like *Mohr*[896] of ongoing significance in the EU.[897] In that case (at [27]), it was stated that the scope of VAT is 'limited by its character as a tax on consumption'. Roderick Cordara and Pier Parisi observe, however, that the underlying consumption notion in Europe has done little to limit the supply concept.[898] They point to comments that there is 'no jurisprudence on the meaning of consumption',[899] and that the consumption tax principle 'needs clarification on a Community-wide basis, as the present situation is unsatisfactory'.[900]

One reason for this may be that expenditure on consumption is used as a proxy for consumption. Terra and Kajus say that this 'generally avoids the difficulties of defining consumption'.[901] The consumption at which the tax is directed, therefore, is not co-extensive with the economic concept.[902] Professor Millar agrees, and has noted that consumption discussions 'rarely give more than lip service to economists' concepts'.[903]

14.3 Not a consumption tax

A consumption analysis is legally unnecessary in Australia, due to the absence of comparable EU statutory language, and the firm rejection of economic policy more generally as some proxy for the text contained in the legislation. Graeme Cooper dealt with this in a 2003 paper[904] – *Why GST is not a consumption tax ... and why it matters*. In his view, the idea that GST is a consumption tax in economic terms 'should play no role' in GST interpretation. Three points can be made. The first is that Cooper was correct, in my view. The second is that the opposing position is no longer legally tenable.

---

[893] *CEC v Redrow Group plc* [1999] 1 WLR 408 (at 415).
[894] Henkow *Neutrality of VAT for taxable persons: a new approach in European VAT?* [2008] *EC Tax Review* 233 (at 234).
[895] *Biosafe – Indústria de Reciclagens SA v Flexipiso – Pavimentos SA* [2017] Case C-8/17 (at [42]).
[896] *Mohr v Finanzamt Bad Segeberg* [1996] STC 328, *Landboden-Agrardienste GmbH v Finanzamt* [1998] STC 171, cf *CRC v Frank A Smart & Son Ltd* [2019] UKSC 39 (at [25]).
[897] *Trinity Mirror plc v CCE* [2001] STC 192 (at [17-18], *Stewart & Hammond v CCE* [2002] STC 255 (at [32-40]), *South Liverpool Housing Ltd v CCE* [2004] UKVAT V18750 (at [47-48]), *Parker Hale Ltd v CCE* [2000] STC 388, cf *NZ Refining Co Ltd v CIR* (1995) 17 NZTC 12307.
[898] Cordara & Parisi *Australian Goods and Services Tax Cases – Decisions and Commentary* (at [1.15.2]), cf Parisi *Attention diverted from need to focus on consumption* (2010) 10 AGSTJ 103.
[899] *Royal & Sun Alliance Insurance Group plc v CEC* [2001] EWCA Civ 1476 (at [48]).
[900] Butler *VAT as a Tax on Consumption* (2000) 5 *British Tax Review* 545 (at 552).
[901] Terra & Kajus *A Guide to the European VAT Directives* (at [7.2.2]), James *The Rise of the Value-Added Tax* (at 41).
[902] cf Millar *Time is of the Essence: Supplies, Grouping Schemes & Cancelled Transactions* (2004) 7/2 *Journal of Australian Taxation* 132 (at 137-138) quoting Cnossen *VAT Treatment of Immovable Property* in Thuronyi (ed) *Tax Law Design and Drafting* (at 232).
[903] Millar *GST issues for international services transactions* (2004) 4 AGSTJ 285.
[904] Cooper *Why GST is Not a Consumption Tax ... and Why it Matters* [2003] *TIA GST Intensive Conference paper*, cf Ture in McLure (ed) *The Value Added Tax: Key to Deficit Reduction* (at 79-80), Williams in Thuronyi (ed) *Tax Law Design and Drafting* (at 169), Cooper & Vann (1999) 21 *Sydney Law Review* 337 (at 357-359).

The third is that, just as consumption plays no role in determining liability, so it necessarily plays no role in Div 11 credit access questions either.

In his *Journal of Australian Taxation* article, Hill J also surveyed the possible impact of 'consumption' theory on GST interpretation.[905] The judge observed that there was no doubt that parliament had intended that GST 'would operate as a tax on consumption', given comments in the *explanatory memorandum*. Hill J pointed to the wide definition of 'supply', and to the fact that any obligation on a farmer to cease production (as was the case in *Mohr*) would involve a 'supply' for our purposes. He said (at 27) –

> … it is obvious that it will be unsafe to assume the same result will follow in Australia. And it will always be unsafe to assume the same result in Australia as is reached in overseas decisions where the legislation is different. Any attempt to interpret the Australian legislation by adopting a policy driven consumption tax analogy must yield to the terms of the legislation if contradictory to the approach. Conversely, however, if the relevant statutory provision is Australia is substantially similar to the overseas provision, overseas cases will clearly be treated with respect.

Hill J's point about it being 'unsafe' to assume our GST will produce the same results where the overseas legislation is different is an understatement. Of course, our results will yield to our legislation. If *Reliance Carpet* shows anything, it is the flaw of arguing by reference to offshore consumption theories. Commenting on the 'big picture' perspective that our GST is a consumption tax, Michael Walpole said 'it would appear that the purposive approach to interpretation required in our law a different outcome'.[906]

After an early trend towards engagement with foreign caselaw on GST questions, partly driven by Hill J himself,[907] the track record as well as messages from other judges suggests that foreign cases are not of much utility when interpreting our GST law.[908] Three reasons may be advanced for this. The first is that our statutory provisions are different. Second, the interpretation protocols which apply in the EU (including the UK in VAT matters) diverge, and radically so, from those in Australia. Third, there is now an extensive and maturing jurisprudence on the tax at various levels (including five High Court cases) even if there are less cases these days that in the past.[909]

In *Avon Products*, the High Court in a sales tax context said that foreign cases dealing with different statutory regimes need to be treated with 'considerable caution'.[910] This is a long-rehearsed theme of the Australian judiciary. It was said in *Avon Products* that international authorities cited 'tend to muddy the waters rather than to illuminate them'. The Full Federal Court in *Saga Holidays* said this warning 'is particularly apt in the

---

[905] cf Hill J [2002] TIA Australian GST Symposium paper (at 26-27).
[906] Walpole *Keeping to the straight and narrow: interpreting the GST and income tax* (2005) 5 AGSTJ 193.
[907] *ACP Publishing Pty Ltd v FCT* [2005] FCAFC 57 (at [2-3]) quoting *Dansk Denkavit ApS v Skatteministeriet* [1994] 2 CMLR 377 (at 394-395) for example.
[908] cf Edmonds *Recourse to foreign authority in deciding Australian tax cases* (2007) 36 *Australian Tax Review* 5, Lindgren *The Courts' role in statutory interpretation: the relevance of overseas case law to Australia's GST* [2009] *National GST Intensive Conference paper*.
[909] cf Cordara *Value Added Tax/Goods and Services Tax* [2004] *TIA World Tax Conference paper* (at 2), Frost *The developing jurisprudence of the GST* [2013] *UNSW 25th GST Conference paper*.
[910] *Avon Products Pty Ltd v FCT* [2006] HCA 29 (at [28]).

present circumstances since the details of the GST Act are significantly different from those of the equivalent legislation in the UK and other countries'.[911]

Edmonds J made similar points.[912] It was also the absence of comparable statutory provisions which led the High Court in *Reliance Carpet* (at [30]) to reject the relevance of a VAT case – *Société Thermale*.[913] Others pointed out that to argue by reference to CJEU decisions in the future was 'now fraught with danger'.[914] Robert Olding predicted that 'reference to overseas cases and legislation will decline'.[915] So it has proved to be, not only in the courts and the AAT, but also in the journals and commentary.

A swathe of diverse provisions across the GST law, however, adopt some idea of consumption for one purpose or another. In addition to customs law[916] and food senses,[917] the GST law uses 'consumption' and cognate expressions as part of the legal gateway in a variety of situations. These include health exemptions,[918] exported goods,[919] exported services,[920] joint ventures,[921] margin scheme,[922] creditable purpose,[923] deceased estates,[924] and some definitions.[925] The most enigmatic of these is s 38-190(1), where the words 'consumption outside Australia' appear in the heading though not in the provision itself.

Mansfield J, dissenting in *Travelex Limited*, had regard to 'consumption',[926] but none of the majority judges in the High Court factored this into their reasons.[927] Amendments in 2016 introduced the notion of an 'Australian consumer' into s 9-25(5) for when certain supplies are connected with the 'indirect tax zone'. The definition of 'Australian consumer' in 9-25(7) involves a statutory construct, however, rather than an economic one. Choice of the word 'consumer' within the construct plays no role in its meaning.[928]

---

[911] *Saga Holidays Ltd v FCT* [2006] FCAFC 191 (at [43]).
[912] Edmonds *Recourse to foreign authority in deciding Australian tax cases* (2007) 36 *Australian Tax Review* 5 (at 16), cf *Avon Products Pty Ltd v FCT* 2006 ATC 4296 (at 4301-4302 [28]), *Saga Holidays Ltd v FCT* [2006] FCAFC 191 [at 43]).
[913] *Société Thermale d'Eugénie-les-Bains v Ministère* [2007] 3 CMLR 1003.
[914] Batrouney & Geale *The decision of the High Court in Reliance Carpet and what it means for GST* [2008] *Victorian Bar Association Conference paper* (at 10).
[915] Olding *Interpretation of the GST Act – Towards a Principled Basis?* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* (at 92).
[916] ss 13-5(1)(b), 13-99 (item 3), 15-99 (item 2AA), 33-99 (item 4A), 37-1 (item 17), 108(1), 108(5)(1)(b), 114(1), 114-5 (various items), 114-10(a), 114-20(1)(a), 114-25(1), 141-5(1)(c), 141-10(1)(b) of the GST law.
[917] ss 38-3(1)(a), 38-4(1), cf *Cascade Brewery Co Pty Ltd v FCT* [2006] FCA 821, *P&N Beverages Australia Pty Ltd v FCT* [2007] NSWSC 338.
[918] ss 38-10(4)(b), 38-50(2), 38-50(7)(a).
[919] heading to Div 38-E, item 5 in the s 38-185(1) table.
[920] heading to s 38-190.
[921] s 51-30(2)(a).
[922] ss 75-11(2A)(b), 75-1(2B)(b).
[923] s 129-55 definition of 'apply'.
[924] s 139-1.
[925] s 195-1 definitions – 'course materials', 'retailer'.
[926] *Travelex Ltd v FCT* [2009] FCAFC 133 (at [23]).
[927] *Travelex Ltd v FCT* [2010] HCA 33.
[928] *SZTVU v Minister for Home Affairs* [2019] FCAFC 30 (at [66-71]), *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 (at 507), cf *MacDonald v Dextra Accessories Ltd* [2005] UKHL 47 (at [18]), *Manly Council v Malouf* [2004] NSWCA 299 (at [8-9]).

15. PRACTICAL BUSINESS TAX

15.1 A contextual thing

GST has been described in various cases as a 'practical business tax'.[929] As a result, there has been much debate about what impact this might have on interpretation of the GST law.[930] At its highest, there was a half-suggestion that this fact it constituted a special rule of construction for GST purposes.[931] Peter Green, speaking to his 2008 ATAX Noosa paper rejected this idea, calling it 'the refuge of the desperate man'.[932] Michael Wigney was also against any 'special rule' suggestion,[933] a position with which Downes J readily agreed.[934] When *Travelex* reached the Full Federal Court, Stone J called PBT a cliché because like most clichés 'it has achieved that status because it encapsulates a truth so well accepted that it hardly requires articulation'.[935]

In the High Court, no judges referred to the concept, but equally none rejected it either.[936] It is now settled that description of GST as a 'practical business tax' is merely part of the wider context.[937] It would follow then that regard should be had to PBT up-front when applying the 'modern approach'.

The forensic impact of this factor in any particular case, however, even after 20 years of the tax, remains conjectural and illusive.[938] Could it, for present purposes, strengthen the case for EU neutrality being absorbed into our law perhaps?

As Logan J has observed, a value added tax, through the elimination of cascading, is in this economic sense, a 'practical business tax'.[939] The same judge went on to suggest that reference to GST as a practical business tax may be more likely to mask than illuminate the task of interpretation. Many would agree, something which has been borne out to a large extent in practice. Focus on the PBT-status of the tax has worked mainly as a distraction from the words of the legislation.

---

[929] *Sterling Guardian Pty Ltd v FCT* [2005] FCA 1166 (at [39]), *Saga Holidays Ltd v FCT* [2005] FCA 1892 (at [62]), *Saga Holidays Ltd v FCT* [2006] FCAFC 191 (at [29]), *TSC 2000 Pty Ltd v FCT* [2007] AATA 1629 (at [54]), *AGR Joint Venture v FCT* [2007] AATA 1870 (at [32]), *Reliance Carpet Co Pty Ltd v FCT* [2007] FCAFC 99 (at [13]), *Brady King Pty Ltd v FCT* [2008] FCA 81 (at [38, 48]), *Brady King Pty Ltd v FCT* [2008] FCAFC 118 (at [25]).

[930] cf Green [2008] *ATAX Noosa Conference paper* (at 14-20), Stone J [2006] *TIA National GST Conference paper*, Logan J *Where are we with GST – black letter or the practical business tax?* [2008] *TIA National GST Intensive Conference paper*, Olding [2008] *Law Council Tax Committee Workshop paper*, Hmelnitsky *The Truth about Supply – Lessons from Reliance, Qantas and MBI* [2015] *TIA GST Intensive Conference paper* (at [7-13]), Stitt *GST – History, Experience & Future* [2007] *Federal Court Judges' Taxation Workshop paper* (at 24-26).

[931] cf *Saga Holidays Ltd v FCT* [2005] FCA 1892 (at [29, 62]).

[932] Green [2008] ATAX Noosa paper (at 14-20).

[933] Wigney *Text, context and the interpretation of a 'practical business tax'* (2011) 40 *Australian Tax Review* 94 (at 95).

[934] Downes J *Eleven years of the 'practical business tax'* (February 2012) 70 *Law Institute Journal* 70 (at 72).

[935] *Travelex Limited v FCT* [2009] FCAFC 133 (at [46]).

[936] *FCT v Multiflex Pty Ltd* [2011] FCAFC 142 (at [37]).

[937] *Saga Holidays Ltd v FCT* [2006] FCAFC 191 (at [29-30]).

[938] Olding [2008] Law Council Tax Committee Workshop paper.

[939] Logan J *Where are we with GST – black letter or the practical business tax?* [2008] *TIA National GST Intensive Conference paper* (at 1-2 [3]).

This is something which *Reliance Carpet* appears to emphasise by omission. PBT cannot sanction the disregard of legal analysis, something already pointed out in the income tax sphere.[940] PBT just begs the question. Despite some high-powered analytical investment in the concept by commentators and litigation teams, there is not much to show for GST being a 'practical business tax'. Certainly, there is no case I am aware of in which the concept has been decisive in the final result. In one AAT decision, for example, the result reached on common law grounds was simply seen as being consistent with GST being a practical business tax.[941]

Wigney SC has said that characterisation 'is really what the practical business tax concept is all about'. In his expectation, the 'range of cases where significant weight is given to this consideration will be fairly narrow, and the cases where it will be the decisive consideration will be few and far between'.[942] After considering two Full Federal Court decisions – *Brady King* and *South Steyne* – Robert Olding said[943] –

> If practical business tax considerations are considered to be relevant in a particular case, it is important to understand which particular aspect of that context is considered relevant in the circumstances and why. If practical business tax aspects are not relevant, it is important to understand why that contextual consideration should be dismissed or given little weight in the particular case.

15.2 Character of the concept

In *Uber BV*, Griffiths J took a practical, common-sense and always-speaking approach to the meaning of 'taxi' in the GST law.[944] Although the judge referred to the 'practical business tax' context generally, his approach when analysed further merely applied the anti-linguistic orthodoxy within the 'modern approach'.[945] This is reflected in the much-quoted passage from *Agalianos* to the effect that the 'context, the general purpose and policy of a provision and its consistency are surer guides to its meaning than the logic with which it is constructed'.

In a special leave application, Ellicott QC described this as 'one of the most telling statements of principle in relation to the interpretation of statutes'.[946] This is not so far from what Hill J had himself proposed in his *Journal of Australian Taxation* article when he suggested a rule which 'requires GST legislation to be interpreted in a practical

---

[940] *City Link Melbourne Ltd v FCT* [2004] FCAFC 272 (at [42]).
[941] *Trustee for the Whitby Trust v FCT* [2017] AATA 343 (at [69]).
[942] Wigney *Text, context and the interpretation of a 'practical business tax'* (2011) 40 *Australian Tax Review* 94 (at 101, 107).
[943] Olding *Interpretation of the GST Act – Towards a Principled Basis?* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* (at 86).
[944] *Uber BV v FCT* [2017] FCA 110 (at [127-130]), Ng *GST and Uber: an application of the duck test?* [2015] *Australian Tax Law Bulletin* 178.
[945] *Commissioner for Railways v Agalianos* (1955) 92 CLR 390 (at 397), *FCT v Unit Trend Services Pty Ltd* [2013] HCA 16 (at [47]), *AB v Western Australia* [2011] HCA 42 (at [10]), *Certain Lloyd's Underwriters v Cross* [2012] HCA 56 (at [24-26]), *Lansell House Pty Ltd v FCT* [2010] FCA 329 (at [57]), *Comptroller-General v Pharm-A-Care Laboratories Pty Ltd* [2018] FCAFC 237 (at [24]) for example.
[946] *Macoun v FCT* [2015] HCATrans 257.

or business-oriented way … that is not overly technical'.[947] As the years go by, however, the shiny lustre and early promise of 'practical business tax' has dulled somewhat.

This has been the indirect result of directions taken by the High Court in the five GST cases so far to have come before it. Practical business tax is also an inherently impressionistic and plastic concept, and one which is too often worn as a cloak for self-interest. Similar to the 'businesslike interpretation' principle which applies in contract law,[948] PBT is an idea very much in the eye of the beholder. PBT may be a core article of GST faith, but everyone has their own version of what it means. Both sides may rely on 'practical business tax' in litigation contexts, but they invariably seek to leverage it for starkly different outcomes.[949]

Justice Downes has stated that PBT should not have 'more than a peripheral effect on the interpretation of the GST Act', but goes on to say that a construction which advances the role of GST as a PBT 'will generally be preferred to one that does not'.[950] We may agree generally with the first comment. However, the idea that PBT might act as an informal default rule in contested situations is an unlikely position.

Professor Millar also includes an 'aside' on practical business tax, starting from an earlier flippant comment that 'it should be considered dead'.[951] After considering how the concept has played out before the courts, Millar walked this back a little to say that it now 'remains alive'. In the context of her paper, however, the professor said that PBT is a side issue to our search for the principle of neutrality. I agree, but would characterise the first more as a quietly sleeping kind of aliveness.

Professor Millar makes another point which is potentially interesting. This is that a possible reason for PBT remaining relevant 'is because it is a GST-specific reflection' of the 'modern approach' to interpretation. This may flow from PBT being simply part of the background context. That does not mean PBT may ever be decisive in a forensic situation. Its remoteness from the words of the text tells against that.

Other aspects of the 'modern approach', however, may push things in the same general direction – like dissuasion of intense linguistic analysis – as *Uber BV* shows.[952] This is generally consistent with the rejection of expert evidence about the meaning of words.[953] In a *Melbourne University Law Review* article, Middleton J said that 'we should not be blinded by too many rules or over-analysis, or mechanical or scientific analysis'.[954]

---

[947] Hill J *Some Thoughts on the Principles Applicable to the Interpretation of the GST* (2003) 6 *Journal of Australian Taxation* 1 (at 18).
[948] *Electricity Generation Corp v Woodside Energy Ltd* [2014] HCA 7 (at [35]), *Simic v NSW Land & Housing Corporation* [2016] HCA 47 (at [78]), *Daswan Australia Pty Ltd v Linacre Developments Pty Ltd* [2018] VSCA 350 (at [50]).
[949] *Travelex Limited v FCT* [2009] FCAFC 133 (at [47]) for example.
[950] Downes J *Eleven years of the 'practical business tax'* (February 2012) 70 *Law Institute Journal* 70 (at 73).
[951] Millar *The principle of neutrality in Australian GST* (2017) 17 AGSTJ 26 (at 29-31).
[952] *SZTAL v Minister for Immigration & Border Protection* [2017] HCA 34 (at [34]), cf Brysland & Rizalar *Constructional choice* (2018) 92 *Australian Law Journal* 81 (at 84).
[953] *Dyson v Pharmacy Board of NSW* [2000] NSWSC 981 (at [23-28]), for example.
[954] Middleton J *Statutory Interpretation: Mostly Common Sense* (2016) 40 *Melbourne University Law Review* 626 (at 632).

It was once suggested that 'practical business tax' might open the door to 'economic equivalence' arguments in GST analysis.[955] *Reliance Carpet*, however, appears firmly to slam the door against that idea. As Andrew Sommer concluded at the ten year point, the 'concept of taxation by economic equivalence has been too long rejected by the Australian Courts for it to be revived now in the context of GST'.[956]

16. TIE-BREAKER IDEAS

16.1 Common law and statute

It was suggested both in *TSC 2000* and by Hill J himself that EU neutrality might act as some sort of resolving principle where arguments of roughly even weight point for and against credit access. The idea of having unlegislated tie-breaker rules for tax statutes, however, is already behind us. Two judicial protagonists, Kirby and Hill JJ, fought a semi-private battle of sorts over many years about whether tax legislation is still subject to two well-known canons of construction. The first one is that tax laws are to be read strictly or literally. The second one is that ambiguity is to be resolved against the revenue.[957] '[L]et 'not individuals suffer … the benefit of the doubt should be given to the subject' was the ethos.[958] The competing views of Kirby J and Hill J are set out by the former in his *Justice Graham Hill Memorial Speech*.[959]

Both canons, with all their pomp and subtlety, are discussed in an article by Douglas Brown.[960] Very much, they reflected a judicial philosophy that was 'highly suspicious of taxation'.[961] Professor Walpole described their operation as the 'venerable *contra fiscum* rule'.[962] Kirby J regarded them as obsolete by reference to purposive principles[963] and 'a much less hostile judicial attitude' these days. A tax statute is 'just another statute', he famously observed.[964] The change in attitude reflected wider recognition that revenue collection is no longer the sole object of modern tax laws, as Gleeson CJ illustrated in *Carr*. Lord Halsbury had said in 1891 that 'in a taxing Act it is impossible, I believe, to assume any intention, in governing purpose in the Act, to do more than take such tax as the statute imposes'.[965] Things have changed in this regard.

---

[955] Walpole & Sommer *A sub-equatorial love affair – flirting with economic equivalence* [2007] *ATAX 19th GST and Indirect Tax Conference paper* (at 14-15), cf GSTR 2006/9 (at [112-113]).
[956] Sommer *The Application of the GST Law to Complex Transactions* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* 97 (at 112).
[957] *Scott v Cawsey* (1907) 5 CLR 132 (at 154-155), *Anderson v Commissioner for Taxes* (1937) 57 CLR 233 (at 243), Pearce & Geddes *Statutory Interpretation in Australia* (at [9.35-9.36]), cf *Royal Bank of Canada v Saskatchewan Power Corp* [1990] 73 DLR (4th) 257 (at [18]).
[958] *R v Winstanley* (1833) 148 ER 1492 (at 1496).
[959] Kirby J *Justice Graham Hill Memorial Speech* (2007) 42/4 *Taxation in Australia* 202 (at 205-206).
[960] Brown *The Canons of Construction of Taxation and Revenue Legislation* [1976] *Australian Tax Review* 81.
[961] Gleeson CJ *Justice Hill Memorial Lecture – statutory interpretation* (2009) 44 *Taxation in Australia* 25 (at 26) quoting Devlin *Judges and Lawmakers* (1976) 39 *Modern Law Review* 1 (at 13-14).
[962] Walpole *GST Interpretation – The New Age of Uncertainty* (2011) *23rd Annual GST Conference paper*.
[963] *Austin v Commonwealth* [2003] HCA 3 (at [251]), *CSD v Commonwealth Funds Management Ltd* 95 ATC 4756 (at 4759), *CCSD v Buckle* 96 ATC 4098 (at 4101).
[964] *FCT v Chant* (1991) 103 ALR 387 (at 391), cf Livingston *Practical Reason, "Purposivism", and the Interpretation of Tax Statutes* (1996) 51 *Tax Law Review* 677 (at 683).
[965] *Tennant v Smith* [1892] AC 150 (at 154), cf *Hood Barrs v IRC* (1946) 27 TC 385 (at 400), cf *Campbell v The King* (1916) 22 *Argus Law Reports* 428 (at 430), *Trustees of the Wheat Pool of Western Australia v FCT* (1931) 34 WALR 53 (at 58).

Hill J, perhaps a little out of character, took the view that to abandon the rule 'is an encouragement to sloppy drafting'.[966] This comment, offensive to the professionalism of parliamentary counsel everywhere, has a deep and tangled history. The anomalies of tax legislation as a species have been called 'virtually endemic, and, like the spots of the leopard "of the nature of the brute"'.[967]

Charles Dickens in *Bleak House* likened all legal language to 'street mud which is made of nobody knows what'. Lord Reid once pointed to the 'prolixity and obscurity' of taxing provisions, saying that they 'strongly indicate hasty preparation and inadequate revisal'.[968] Anomaly, however, need not always be the result of any drafter negligence.

We should accept that legislative drafting is an inherently difficult exercise, and get over the idea that imperfection, any imperfection, must result from careless or casual drafting. As Hilary Penfold points out, 'Australian statutes are the deliberate and conscious products of fairly well functioning intelligences'.[969] French CJ, for one, has called for a 'degree of empathy in the hardest heart' for the plight of drafters.[970]

In his *Along the Road to Damascus* paper, Michael D'Ascenzo agreed with Kirby J on the issue, adding 'that it is unlikely that Parliament intended "free riders" in relation to taxable activities "to the detriment of the general body of taxpayers"'.[971] Years later, the High Court appeared to put the matter to rest in *Alcan* when it said that 'tax statutes do not form a class of their own'.[972] As in other jurisdictions, however, this has not deterred a lingering nostalgia and fondness for the old canons. In Australia, it is more often in the State sphere that the remnants of literalism in this regard are to be found.[973] When parliament legislated for s 15AA, ordinary wisdom would seem to dictate a shut-down of the old canons to the extent of inconsistency.[974]

In practice, s 15AA has not generally been seen as displacing older non-statutory rules of interpretation. Instead, an unanalysed co-existence of sorts has formed, under which the learning on each category has continued to evolve.[975] It is probably correct to

---

[966] Hill J *A Judicial Perspective of Tax Law Reform* (1998) 72 *Australian Law Journal* 685 (at 689), cf Hill J *How is Tax to be Understood by Courts?* (2001) 4/5 *The Tax Specialist* 226 (at 228-229), Hill J *Some Thoughts on the Principles Applicable to the Interpretation of the GST* (2003) 6 *Journal of Australian Taxation* 1 (at 7-9), *WA Trustee Executor & Agency Co Ltd v FCT* 80 ATC 4565 (at 4571).
[967] *Macpherson v Hall* (1972) 48 TC 382 (at 390).
[968] *Stenhouse Holdings v IRC* [1972] AC 661 (at 682).
[969] Penfold *Legislative Drafting and Statutory Interpretation* in Gotsis (ed) *Statutory Interpretation: Principles and Pragmatism for a New Age* 81 (at 97).
[970] French CJ *Statutory Interpretation in Australia: Launch of the 8th Edition* [2014] *University House ANU address* (at 1).
[971] D'Ascenzo *Along the Road to Damascus: A framework for interpreting the tax law* [2000] *Journal of Australian Taxation* 384 (at 386-387), cf *IRC v McGuckian* [1997] 3 All ER 817 (at 824).
[972] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 (at [57]), cf Vinelott *Interpretation of Fiscal Statutes* [1982] *Statute Law Review* 78, *Stubart Investments Ltd v Canada* (1984) 84 DTC 6305 (at 6323), *R v Golden* [1986] 1 SCR 209 (at 494).
[973] *BSH Holdings Pty Ltd v CSR* [2000] VSC 320 (at [19]), cf *Charles Lloyd Property Group Pty Ltd v CSR* (2011) 84 ATR 775 (at 781), *Intercorp Pty Ltd v CSR* [2018] WASAT 90 (at [53]), *Eames v CSR* [2018] WASAT 14 (at [66]).
[974] *Plaintiff S10 v Minister for Immigration and Citizenship* [2012] HCA 31 (at [97]), cf *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 (at [41]), Pearce & Geddes *Statutory Interpretation in Australia* (at [2.23]).
[975] Geddes *Purpose and Context in Statutory Interpretation* in Gotsis (ed) *Statutory Interpretation: Principles and Pragmatism for a New Age* 127 (at 135-139).

describe the relationship as symbiotic, insofar as each side may inform development of the other in situations where either may prevail.[976]

When it comes to those 'special rules for tax laws', however, two things are reasonably clear. The first is that, by reason of caselaw at least, no special status rule now applies to tax laws in Australia and no systemic presumption favours revenue or taxpayer. Second, despite this, the taxation character of the legislation in question will form part of context in the 'widest sense' to be considered. Kirby J has been vindicated in saying that tax legislation is to be construed 'like any other federal statute'.[977] Tax law 'is still law; it's just that there's so much more of it', so the old joke goes.

16.2 Unqualified statutory instruction

As already discussed, the tie-breaker rule which applies to all federal statutes, including the GST law, is s 15AA of the *Acts Interpretation Act 1901*. Where a constructional choice is available on the words of a provision, this 'unqualified statutory instruction'[978] now requires that choice to be made by reference to the interpretation 'which would best achieve the purpose or object' of the provision derived by legitimate means. It is true parliament could legislate for a Div 11 tie-breaker rule, but it is yet to do so. No-one has sought to promote such a course, and it is an issue for which policy support may well be difficult to secure in practice.

It was Hack DP in *TSC 2000* who said fiscal neutrality 'is an aid to construction where it is necessary to determine which of competing constructions is to be preferred'.[979] A position of this kind creates a presumptive bias in favour of credit access. This is immediately inconsistent with the GST law being construed just 'like any other federal statute'. It is also excluded by the terms of s 15AA which leave no room for its operation.

While fiscal neutrality is a principle of interpretation in Europe – as confirmed by commentators and cases - that outcome is complicated by derivation and status issues. With respect, it was not legally open to the deputy president in *TSC 2000* to adopt EU neutrality as a new tie-breaker rule for GST. There is no presumption in Australia in favour of credit access where arguments are otherwise balanced.

17. SOME CONCLUSIONS

This note has argued for the orthodox view that EU neutrality is <u>not</u> part of the GST law. It is no foreign ghost in our GST machine, to pursue the metaphor, something which may disappoint ghostbusters and ghost-chasers alike. What drives the negative answer suggested is a range of diverse and over-lapping, but ultimately mundane, reasons.

What does seem important, however, is the consistency of the indicators against EU neutrality being part of our GST law, perhaps all the more remarkable in light of Hill

---

[976] cf French CJ *Harold Ford Memorial Lecture: Trusts and Statutes* [2015] *Centre for Corporate Law and Securities Regulation paper* (at 2), *Brodie v Singleton Shire Council* (2001) 206 CLR 512 (at 532).
[977] *FCT v Ryan* [2000] HCA 4 (at [84]) dissenting, cf *Transport for London Ltd v Spirerose Ltd* [2009] UKHL 44 (at [25]), *Commissioner of Rating and Valuation v CLP Power Hong Kong Ltd* [2017] HKCFA 18 (at [35]).
[978] *SZTAL v Minister for Immigration & Border Protection* [2017] HCA 34 (at [39]), cf Brysland & Rizalar *Constructional choice* (2018) 92 *Australian Law Journal* 81.
[979] *TSC 2000 Pty Ltd v FCT* [2007] AATA 1629 (at [54]).

J's comments on 'underlying philosophy'. Key differences between the respective legal systems, their legislation and the interpretation protocols point against EU neutrality being absorbed into the GST law.

To coin a phrase used recently in the High Court, the European position is of 'marginal analogical assistance'[980] in determining the quality and extent of our domestic neutrality. What nails the case shut, however, is basic legal principle. Fundamentally, it is the character of legislated law in Australia and its domination over unlegislated economic policy (from wherever it comes) which locks out Mr Rompelman. Misconceptions about our statutes, their interpretation, and 'what judges do' have only added to the problem. In the end, the question posed is not a difficult one, as *Reliance Carpet* tends to show.

From the perspective of two decades, it is timely to comment on what may be described as the 'life of the statute' – the life of the GST law. It has been observed that context, for interpretational purposes, expands dynamically to include judicial decisions about the GST law as they are made.[981] As Stephen Frost has said, the progress of GST litigation 'has not been a linear journey but a multi-directional, multi-faceted one'.[982]

By year 2020, however, we have the beginnings of a mature GST jurisprudence in this country. A range of foundational issues have been settled by the superior courts, and there is measurably less litigation these days than a decade ago. Australian judges have interpreted our law in our way and in our context, as they are bound to do. In performing this role, they have progressively forsaken foreign decisions and foreign policies, one of which is the EU concept of neutrality derived in *Rompelman*.

To the extent there is lament about the native neutrality achieved, the argument is more with our system and with parliament. What Roderick Cordara referred to as the 'leisurely caravan' of the law,[983] however, has delivered a degree of GST certainty that compares favourably with prevailing European conditions.

Not everyone sees it this way. Edmonds J, for example, was most concerned about complexity of the GST law and the difficulties this produces in 'resolving disputations'.[984] Another commentator described GST interpretation as being 'shrouded in a swirling mist of doubt.[985] The *Australia's Future Tax System* report to government noted that the 'design is complex'.[986] Certainly the legislation is no exercise in perfection, and opportunities for improvement have been lost.

---

[980] cf *Comcare v Banerji* [2019] HCA 23 (at [99]).
[981] Gageler *Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process* (2011) 37(2) *Monash Law Review* 1 (at 1), cf Kirby J *The Never-Ending Challenge of Drafting and Interpreting Statutes* (2012) 36 *Melbourne University Law Review* 140 (at 160), Leeming *Theories and Principles Underlying the Development of the Common Law – The Statutory Elephant in the Room* (2013) 36 *UNSW Law Journal* 1002 (at 1024), *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34 (at [88]), Brysland & Rizalar *Constructional choice* (2018) 92 *Australian Law Journal* 81 (at 82).
[982] Frost *The developing jurisprudence of the GST* [2013] *UNSW 25th GST Conference paper* (at 1).
[983] Cordara *Value Added Tax/Goods and Services Tax* [2004] *TIA World Tax Conference paper* (at 2).
[984] Edmonds *Judicial Assessment of the Performance of the Goods and Services Tax as an Instrument of Tax Reform* [2011] *TIA National GST Intensive Conference paper* (at [36]).
[985] Peter Hill *Taxation of goods and services in Australia – past, present, and future* (2009) 9 AGSTJ 21 (at 26), cf Richardson & Smith *The Readability of Australia's Goods and Services Tax Legislation: An Empirical Investigation* (2002) 30 *Federal Law Review* 475.
[986] *Australia's Future Tax System* Report (at 273).

But is our GST law really much different from any other modern regulatory statute, like the *Migration Act 1958* for example? Again the argument here is with the system and the style of our legislative drafting, rather than with how judges have approached it.

What emerges in 2019 is a picture, in mosaic form, of the overall practical operation of the GST statute set against the backdrop of the general law. Kevin O'Rourke describes a 'legislative framework for GST administration which now resembles a patchwork quilt loosely knitted together by administrative fiat and litigation'.[987] Some 'immutable principles' of the kind flagged at the ten year mark are forming.[988]

As the years pass, the wider mosaic should come into better focus with the 'accumulation of experience' provided by decided cases, administration and academic testing. This will be driven by protocols of interpretation which are purposive and dynamic,[989] though not in the same way as in the EU, and not in a way as would invite Mr Rompelman to our shores. We and he are past that now.

While the idea of a fully harmonised international regime in this respect may be a 'theoretically desirable objective', there is little or no likelihood that Australia would now legislate to adopt EU-style neutrality, whether by substantive amendment or an after-the-event objects clause. To do so would also be misinformed.

Much of this note is about statutory interpretation, and the respective protocols which apply here and in the European Union. Given the question posed at the beginning, and the central importance of statutory interpretation as a driver of legal outcomes, this is less than surprising. It is those protocols, as products of different systems and different legal mosaics which suggest the answer about Mr Rompelman.

It is also those protocols in our legal system which suggest the one sustainable answer to the question posed by Justice Hill in his final communiqué on GST issues – *To interpret or translate?* While the European judge must translate and interpolate in line with community expectations, the Australian counterpart may only interpret.

---

[987] O'Rourke *GST Administration – a practitioner's perspective* [2019] *ATAX Where Policy Meets Reality Conference paper* (at 16).
[988] cf Olding *Interpretation of the GST Act – Towards a Principled Basis?* in Peacock (ed) *GST in Australia: Looking Forward from the First Decade* (at 78).
[989] cf *Brown v Tasmania* [2017] HCA 43 (at [506]).