

MODERN STATUTORY INTERPRETATION

FRAMEWORK, PRINCIPLES AND PRACTICE



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THE NATURE OF STATUTORY INTERPRETATION

1

Overview

Statutory interpretation is a many-faceted thing. It is a substantive body of law and a process involving a set of skills. It is distinct from (but overlapping with) the application of the law. It is not wholly different from the interpretation of ordinary speech. But it is dissimilar in major respects from formulating the ratio decidendi or the rule of a case. Functionally, statutory interpretation resolves a question of law between parties to a dispute. It also contributes to law-making in the sense that the text of the statute, read with the interpretation, constitutes a new understanding of the law. [1.1]

Basic composition

Statutory interpretation is a substantive body of law [1.2]

According to Chief Justice Spigelman, writing extracurially, 'Statutory interpretation is not merely a collection of maxims. It is a distinct body of law.'¹ Several reasons may be given in support. First, sources. The sources of interpretative rules and presumptions are common law and statute law:

[T]he judiciary is strictly involved in interpreting and applying principles of law, the source of which is either legislation or the common law. It is axiomatic, but critical, that in performing that role, no judge acts according to his or her own values or individual views.²

A court has no authority to legislate by using a 'judicially-constructed policy' – 'its own idea of a desirable policy'³ – or personal values.⁴

Second, the rules and presumptions that are relevant to the statutory context and the circumstances of the case are binding. A judge has a duty to consider 'all available indications',⁵

1 Chief Justice JJ Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 769.

2 *WBM v Chief Commissioner of Police* (2010) 27 VR 469, 481 [46] (Kaye J).

3 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, 14 [28] (French CJ, Hayne, Kiefel and Bell JJ).

4 See further [33.4].

5 *Commissioner of Police for New South Wales v Eaton* (2013) 252 CLR 1, 19 [46] (Crennan, Kiefel and Bell JJ), quoting *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1975] AC 538, 553–4 (Lord Wilberforce).

'the full range of relevant factors'⁶ and 'the whole range of circumstances relevant upon question of statutory interpretation'.⁷

It is true that most considerations are presumptions or aids to construction. As Lord Bingham said:

[R]ules of construction are relied on. They are not rules in the ordinary sense of having some binding force. They are our servants, not our masters. They are aids to construction, presumptions or pointers. Not infrequently one 'rule' points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular 'rule'.⁸

But that fact does not deprive the considerations of a legal quality.⁹ It is an outdated conception of law to equate it with hard-and-fast rules.¹⁰ The fact that the canons of statutory interpretation (the bulk of the interpretative criteria) are not hard-and-fast rules does not mean they are not binding and does not mean they are not 'law'. The following observation is endorsed:

Seen from the perspective of the ordinary judge, the rules and principles of statutory interpretation are legally binding statements of the approach he [sic] should adopt, even if their content is more general and vaguer than other rules and principles of the legal system. They are more than mere counsels of good practice.¹¹

Example 1.1 *Dolheguy v Becker*¹²

The plaintiff challenged the failure of the Court below to suspend the defendant's driver licence. At issue were two apparently conflicting provisions of the *Road Safety Act 1986* (Vic).¹³ Under the main heading 'Principles of statutory interpretation without reference to extrinsic material', Honour considered certain principles under the following headings:

'Purposive approach to statutory interpretation'¹⁴

'Principle that all the words of a statutory provision must be given effect'¹⁵

'Principle that general provisions are subject to specific provisions'¹⁶

'Principle of implied repeal of legislation'¹⁷

6 *A-G (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 571 [53] (Spigelman CJ).

7 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405 (Kitto J, Owen J agreeing at 417), *affd Singh v Commonwealth* (2004) 222 CLR 322, 335-6 [19] (Gleeson CJ); *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393, 407 [51] (the Court).

8 *Maunsell v Olins* [1975] AC 373, 382 (Lord Reid).

9 Ruth Sullivan, 'Statutory Interpretation in a New Nutshell' (2003) 82(1) *Canadian Bar Review* 51, 53-5.

10 *Ibid*, criticising the realist John Willis.

11 John Bell and Sir George Engle, *Cross on Statutory Interpretation* (Oxford University Press, 3rd ed, 2005) 462.

12 Sections 28(6) and 66(6).

13 *Dolheguy v Becker* (2009) 52 MVR 462, 469 [37] (Kyrou J).

14 *Ibid* 470 [42].

15 *Ibid* 470 [44].

16 *Ibid* 470 [45].

'Principle that most recent statutory provision prevails'¹⁸

'Principle that ambiguity in a penal statute should be resolved in favour of an accused'.¹⁹

The Court separately considered the principle, set out in s 35(b) of the *Interpretation of Legislation Act 1984* (Vic), that 'permits the Court to have regard to extrinsic material, such as explanatory memoranda and parliamentary debates, as an aid to statutory interpretation'.²⁰

Statutory interpretation is a process involving a set of skills

[1.3]

Statutory interpretation is more than a body of substantive law. Bennion once described statutory interpretation as a 'collection of legal skills'.²¹ From an advisor's standpoint, those skills include, in outline: finding the relevant law; closely reading the relevant provision or provisions, examining the context, formulating constructions, assembling the arguments for each construction, exercising judgement as to which is the preferable construction, and applying the law as interpreted to the facts.²²

Example 1.2 *ABC Developmental Learning Centres Pty Ltd v Secretary, Department of Human Services*²³

The plaintiff company objected to two letters sent to its head office seeking answers to specific questions and the provision of certain documents. The requests arose from two alleged incidents at its child care centres. In outline, the Court found the relevant law was the *Children's Services Act 1996* (Vic). It determined the relevant provision in issue, purportedly supporting the request, was s 36(1)(f). Examining the provision closely, while it authorised an authorised officer to 'require a person ... to answer a question to the best of that person's knowledge, information and belief', the provision did not state that the power was to be exercised at the child care premises.²⁴ The rival constructions as formulated by the parties were set out. The plaintiff construed the provision as limited to a person who 'is actually on the licensed premises at the time of the request'. The respondent department construed the provision as encompassing any person.²⁵ After considering the submissions of the parties and examining the provision and its context, the Court assembled the arguments for each construction. For the respondent, they comprised the literal reading of the provision²⁶ and a general purpose of the Act.²⁷ For the plaintiff, the Court

18 *Ibid* 471 [49].

19 *Ibid* 471 [50].

20 *Ibid* 472 [52]. The Court resolved the apparent conflict by holding that s 28(6) was an exception to s 66(6): at 472 [55].

21 FAR Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, 2009) 1.

22 Chapter 9 provides more detail on the skills.

23 (2007) 15 VR 489.

24 *Ibid* 493 [20] (Hollingworth J).

25 *Ibid* 493 [18].

26 *Ibid*.

27 *Ibid* 493 [19].

a constitutional compass⁴⁵ and 'a message for judges about judging'.⁴⁶ It is a device that reminds the interpreter that they operate under institutional and legal constraints.

Distinct from 'purpose'

[4.7] Legislative intent is distinguishable from the concept of purpose

Legislative intent is distinguishable from another key concept in statutory interpretation – purpose. Briefly, purpose is the object of the statute, or what it is designed to achieve (see chapter 8).

Determining legislative intent involves the application of the principles of statutory construction. A central principle is that we must endeavour to identify the purpose of the Act and adopt a construction that best achieves or is consistent with that purpose. The purpose or purposes of a statute, therefore, is just one of the factors (albeit a mandated consideration) that contribute to the task of determining the legislative intent (whatever view is taken of intent) and therefore the meaning.⁴⁷ Identification of statutory purpose is 'not logically congruent' with that of legislative intention, although sometimes the two may coincide.⁴⁸ To paraphrase Bennion, purpose relates to the object or policy to which the enactment is directed, while legislative intent is the imputed intent of Parliament represented by the legal meaning of the enactment.⁴⁹ The purpose is not what the law *means* – that is, the imputed intent – but what the law is *designed to achieve*.⁵⁰ Purpose can encompass a multitude of different objects or policies within a single statute; that itself is inconsistent with the ultimate aim of interpretation being the determination of the (single) legislative intent.

It has been suggested in the academic literature that the distinction between purpose and legislative intent may be difficult to maintain.⁵¹ If purpose is articulated as being, for example, the 'intended aim' or 'goal' of the legislature⁵² it is easy to see how the two concepts may overlap.

45 Susan Kenny, 'Constitutional Role of the Judge: Statutory Interpretation' (2014) 1 *Judicial College of Victoria Online Journal* 4, 13.

46 Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1, 14, citing Victoria F Nurse, 'A Decision Theory of Statutory Interpretation: Legislative History by the Rules' (2012) 122(1) *Tulane Law Journal* 70, 85.

47 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

48 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 226 [45] (French CJ). See also *Tullamore Bowling & Citizens Club Ltd v Lander* [1984] 2 NSWLR 32, 52–3 (Mahoney JA).

49 Oliver Jones, *Bennion on Statutory Interpretation* (LexisNexis, 6th ed, 2013) 455.

50 See Jeffrey Barnes, 'Contextualism: "The Modern Approach to Statutory Interpretation"' (2018) 41(4) *University of New South Wales Law Journal* 1083, 1109.

51 See, eg, Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1, 10–11; Dale Smith, 'What is Statutory Purpose' in Lisa Burton Crawford, Patrick Emerton, Dale Smith (eds), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, 2019) 13, 16–19; Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018) 19–20.

52 *Unions NSW v New South Wales* (2019) 264 CLR 595, 656 [168], 657 [171] (Edelman J). See also *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 459 [72] (Gageler J). See chapter 8.

or be confused. Sometimes the two phrases are loosely used interchangeably, particularly in the context of describing the general purpose of a statute. But this is more a matter of indiscriminate expression rather than an intended equation of the two concepts.

Statements of intent in legislation

Statements of legislative intent in legislation inform but do not define construction [4.8]

The question sometimes arises as to the relevance of a statement in the statute itself about the legislative intent of that statute. For example, it is not uncommon to find statements in statutes about how an Act is intended to operate with the law of other Australian jurisdictions. Although there has been little attention given to such statements as a component of statutory interpretation, it is likely that they would be treated like provisions that state the purpose or object of an Act.⁵³ That is, such statements will be one of the intrinsic textual factors to be weighed and balanced in the interpretative process and so will inform, but not decide, the legislative intent. They are merely one of the provisions of a statute that must be considered in the context of the whole statute and other legitimate aids.

Example 4.1 *John Holland Pty Ltd v Victorian Workcover Authority*⁵⁴

The plaintiff was charged with various offences relating to health and safety risks under the *Occupational Health and Safety Act 2004* (Vic) ('the Victorian Act'). After the alleged offences were committed, but before charges were laid, new licensing provisions came into force under the *Occupational Health and Safety Act 1991* (Cth) ('the Commonwealth Act'). The plaintiff became subject to the Commonwealth Act.

Section 4(1) of the Commonwealth Act relevantly provided:

[T]his Act is intended to apply to the exclusion of any law of a State or Territory . . . to the extent that the law of the State or Territory relates to occupational health or safety and would otherwise apply in relation to employers, employees or the employment of employees.

An issue before the High Court was the proper construction of s 4 and the extent to which the Commonwealth Act, by virtue of s 109 of the *Constitution*, excluded the operation of the Victorian Act.

A unanimous judgment of the Court referred to s 4 as an 'express statement of legislative intent' in terms of the field that the law was intended to cover. The Court then said:

But such a statement is only a statement of intention which informs the construction of the Act as a whole. It must be an intention which the substantive provisions of the Act are capable of supporting.⁵⁵

53 Robert French, 'The Principle of Legality and Legislative Intention' (2019) 40(1) *Statute Law Review* 40, 50.

54 (2009) 239 CLR 518.

55 *Ibid* [20] 527. Cited with approval in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 601 [282] (Kiefel J, dissenting).

The intention of a statute must be revealed by the application of the principles of statutory construction of which an express statement of intent in the legislation is just one indicator. In *John Holland* the Court concluded that the substantive provisions of the Act did support the statement of intention.⁵⁶

Statement of intent in extrinsic materials

[4.9] The intent expressed in parliamentary or other extrinsic materials does not equate to legislative intent

As discussed above, 'legislative intent' does not refer to the aggregated subjective intentions of the individuals involved in the drafting and enactment of a statute, such as members of Parliament (including Ministers), legislative drafters, or departmental public servants. As a corollary to that proposition, the mental state or subjective intent of any one individual participant as revealed in extrinsic materials should not be conflated with the intent of Parliament. Extrinsic materials are materials that are extraneous to the Act in question.⁵⁷

This is particularly important to bear in mind when referring to parliamentary and executive materials such as the Minister's second reading speech or explanatory memoranda.⁵⁸ The interpreter must avoid the danger of conflating the intention expressed by an individual involved in the making of the statute with the intent of the legislature.⁵⁹ The intent of the statute as expressed by any participant in extrinsic materials does not, of itself, equate to the intent of Parliament. So, to the extent that an individual, even the Minister introducing a Bill for an Act, expresses the intent of a Bill, that intent must not be considered as the final determination of meaning of the language of the statute, or the 'parliamentary intent'. As Allsop P has cautioned:

I am mindful that any initial engagement with enactment history and context might be misunderstood as part of any enquiry as to the subjective intent of legislators or policy advisers so that such divined intent can be transferred to the words used by Parliament. Such an enquiry would be misdirected. It is the language of Parliament that must be interpreted and construed ...⁶⁰

This does not mean that those statements are irrelevant. As discussed in chapter 24, the second reading speech and other extrinsic materials can be of considerable probative value in the interpretative process. (Indeed, some advocates of the 'group theory' of intent consider the 'subjective' expressions about the statute by individuals involved in the making of the statute as important evidence for constructing the group intent.⁶¹) But evidence from such materials is only a factor in

⁵⁶ *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518, 528 [22].

⁵⁷ See Part V.

⁵⁸ See chapter 24.

⁵⁹ For practical difficulties with this conflation, see Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) 95–6, 108. For an anecdote highlighting the danger of the conflation, see Keith Mason, 'The Intent of Legislators' in Tom Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age* (Education Monograph 4, Judicial Commission of New South Wales, 2007) 33, 37.

⁶⁰ *Wilson v State Rail Authority of New South Wales* (2010) 78 NSWLR 704, 707 [12] (Allsop P, Giles, Hodgson, Tobias and Macfarlan JJA agreeing).

⁶¹ Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39, 48.

the weighing and assessing of what are typically numerous factors when it comes to interpreting a statute. Further, to start from a presumption that any intent expressed by an individual is synonymous with the intent of Parliament is to work backwards. The interpretative task must start with the language and, as Allsop P states above, the ultimate meaning must be determined as a result of the weighing and balancing of interpretative factors, whether extrinsic materials, purpose, or intrinsic components, and ultimately must be reconciled with the text of the statute.

Example 4.2 *Nominal Defendant v GLG Australia Pty Ltd*⁶²

The plaintiff, Mr Tleyji, was an employee of a labour hire company. That company supplied Mr Tleyji's services to another company, GLG Australia Pty Ltd ('GLG'). GLG occupied and operated a warehouse where the unloading of containers of goods took place. The usual method of operation for the unloading was for containers to be unloaded in the yard of the warehouse. A pallet was placed on a landing in front of the open container. The labourers would then place the boxes from the container onto the pallet. A forklift truck would go up the ramp to the landing. It would pick up the pallet and then reverse down the ramp. When the forklift truck went up the ramp it caused vibrations. These vibrations could be felt through the ramp, the landing and the container.

One day, Mr Tleyji was standing about a metre inside the container. The vibration caused by a forklift truck led to the boxes stacked in the container to fall and strike him. Mr Tleyji successfully sued the labour hire company and GLG, with the judge apportioning liability between them. GLG's insurer had gone into liquidation so its liabilities were taken over by the Nominal Defendant. The Nominal Defendant argued that it had no obligation under the third-party policy arrangements established by the *Motor Accidents Act 1988* (NSW) ('the Act') to indemnify GLG as Mr Tleyji's claim was outside the Act. GLG contended that Mr Tleyji's claim was a motor accident claim within the scope of the Act.

Section 69 of the Act provided for the award of damages in relation to injury to a person caused by the fault of the owner or driver of the vehicle. Injury was relevantly defined in s 3 of the Act as follows:

[I]njury:

- (a) means personal or bodily injury caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle if, and only if, the injury is a result of and is caused during:
 - (i) the driving of the vehicle, or
 - (ii) a collision, or action taken to avoid a collision, with the vehicle, or
 - (iii) the vehicle's running out of control, or
 - (iv) such use or operation by a defect in the vehicle, ...

The interpretative issue was whether Mr Tleyji's injury fell within the definition of 'injury' in s 3(1) of the Act.

The definition of 'injury' had been inserted by amendment in 1995.⁶³ One of the interpretative aids relied on by the Nominal Defendant to argue a narrow construction of 'injury' was the second reading speech of the Minister introducing the amendment Bill. In his speech the Minister

⁶² (2006) 228 CLR 529.

⁶³ *Motor Accidents Amendment Act 1995* (NSW).

The Court's preferred construction was not as wide as the Crown's nor as narrow as each applicant's. But when applied to the facts, it resulted in a verdict for each applicant. The Court held that the evidence did not reveal the existence of a group, and nor therefore an association under the Act.²⁷

[5.4] In interpreting legislation, judges must reason independently – that is, they must base their decisions on sources of law and not on a personal desire to attain a particular outcome²⁸

As in other areas of law, interpretation requires decisions to be based on legal sources:

[T]he judiciary is strictly involved in interpreting and applying principles of law, the source of which is either legislation or the common law. It is axiomatic, but critical, that in performing that role, no judge acts according to his or her own values or individual views. Some of the functions of the judiciary – such as sentencing – do involve discretionary judgments, but those judgments are made according to established legal principles. They are not decided according to the judge's own set of values or individual idiosyncratic views of life.²⁹

Thus, it is not acceptable for the court to presume a purpose for the legislation if there is no legislative basis for doing so:

This approach, with respect, emphasised a judicially constructed policy at the expense of the requisite consideration of the statutory text and its relatively clear purpose. In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.³⁰

And it is not acceptable for a judge to base their interpretation on a personal desire to attain a particular outcome:

[Statutory interpretation] is, however, a species of law-making necessarily constrained by the requirement that the judges confine themselves to interpretation within the range of meanings which the words can bear and not engage in rewriting laws to attain desired outcomes.³¹

²⁷ Ibid 571 [56], 572 [62].

²⁸ See further [33.4].

²⁹ *WBM v Chief Commissioner of Police* (2010) 27 VR 469, 481 [46] (Kaye J).

³⁰ *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, 14 [28] (French CJ, Hayne, Kiefel and Bell JJ). See also, to similar effect, *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 395 [41] (French CJ and Hayne J).

³¹ Chief Justice Robert French, 'The Judicial Function in an Age of Statutes' (Speech, 2011 Goldring Memorial Lecture, 18 November 2011) 8 (emphasis added).

Example 5.3 Minister for Immigration and Citizenship v Yucesan³²

The facts and legislation the subject of *Yucesan* were introduced above (Example 5.1). The Federal Magistrate's reasons included the following:

In my view, it can be argued that meeting by internet or video telephony is at least as effective [a] way for parties to meet and form an opinion about each other's compatibility as a future marriage partner as the current phenomenon of 'speed dating'. The face-to-face meeting for five or so minutes in speed dating would meet the definition of 'met' argued by counsel for the Minister, but a lengthy series of conversations over 'Skype' would not.³³

On appeal, the Full Court rejected the relevance of this argument: 'Whether or not the federal magistrate is correct that "meeting by internet or video telephony is at least as effective a way for parties to meet and form an opinion about each other's compatibility as a future marriage partner" is not to the point.³⁴ In other words, the Magistrate had to this extent unwittingly based his decision on his opinion of what the law ought to be rather than on cl 300.214 of the *Migration Regulations*, properly interpreted.'

The judicial duty to be independent nevertheless permits individual judgement within the limits of legal method [5.5]

If the adjudication of the law was mechanical, the role of individual judgement would not arise. But the judicial process is not a 'slot machine';³⁵ 'the law is not a complete and coherent system, with fixed boundaries'.³⁶

Judges, curially and extracurially, acknowledge the effect of individual judgement and impression. Kirby P has written that the task of 'classifying a provision on one side of the line or the other' is 'in part one of impression'.³⁷ A former Chief Justice of the High Court of Australia, Sir Anthony Mason, said that '[e]very judge brings to his or her office or, as I think is more often the case, develops while in office, a judicial philosophy'. He elaborated on the philosophy in this way: 'That philosophy may extend over a very wide range of matters related to the law, its place in society, the role of the courts and their relationship with other arms of government'.³⁸

³² (2008) 169 FCR 202.

³³ *Minister for Immigration v Yucesan* (2008) 216 FLR 252 [49], quoted in *ibid* 205 [7] (the Court).

³⁴ (2008) 169 FCR 202, 209 [28] (the Court).

³⁵ Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1968) 235 n 5. But cf the rise of artificial intelligence: Tania Sourdin, 'Judge v Robot? Artificial Intelligence and Judicial Decision-Making' (2018) 41(5) *University of New South Wales Law Journal* 1114.

³⁶ Justice John Basten, 'Constitutional Dimensions of Statutory Interpretation' (Speech, Constitutional Law Conference, Centre for Comparative Constitutional Studies, Melbourne Law School, 24 July 2015) 1.

³⁷ *Hickling v Laneyrie* (1991) 21 NSWLR 730, 738. See also the similar statement by Lord Nolan in *R v Secretary of State for the Environment; Ex parte Camden London Borough Council* [1998] 1 WLR 615, 622.

³⁸ Sir Anthony Mason, 'Rights, Values and Legal Institutions: Reshaping Australian Institutions' in Geoffrey Lindell (ed), *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason AC, KBE* (Federation Press, 2007) 80, 82. For a case study of a judge's judicial philosophy, see Jeffrey Barnes, 'Statutory Interpretation' in Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Lawbook Co, 2009) 721.

which rival contention as to meaning ('construction') is preferable,³⁵ a court attributes the text's meaning to the legislature.³⁶ As was propounded in *Project Blue Sky Inc v Australian Broadcasting Authority*,³⁷ 'the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have'.³⁸

Hence, meaning ultimately 'resides' in the text. The metaphor of 'residing' is taken from a judgment of the High Court in relation to legislative purpose:

The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.³⁹

If the legislative purpose resides in the text, then, all the more so, the meaning must too. This consequence is obvious in the case where the text carries its ordinary or literal meaning. But it also applies in the case of non-literal meanings, such as where an implication is made. As Mason CJ pointed out in a constitutional context:

It is essential to keep steadily in mind the critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution. The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument.⁴⁰

Example 6.1 *Collett v Repatriation Commission*⁴¹

The appellant spent approximately two hours near a beach in Greece after his unit surrendered to the German forces during World War II. The advance elements of the enemy forces bypassed the appellant's unit during this time. After that period, the appellant, with two others, bravely escaped the surrender area, eventually finding safety. After the passing of the *Social Security and Veterans' Affairs Legislation Amendment (One-off Payments and Other 2007 Budget Measures) Act 2007* (Cth) the appellant (now nearing 100 years of age) applied for compensation under the Act. To be entitled, a person had to be relevantly 'interned by the military forces of an enemy State at any time during the designated war period': sch 5 item 2(1)(b).

The meaning of 'interned' was the issue. That word was defined in item 1 of sch 5 as meaning 'confined in a camp, building, prison, cave or other place (including a vehicle)' (emphasis added). The appeal to the Federal Court from a decision of the Administrative Appeals Tribunal turned on the meaning of 'other place'. The respondent Commission argued that 'other place' must fit the

³⁵ This process is examined in chapter 9.

³⁶ *Zheng v Cai* (2009) 239 CLR 446, 445 [28] (the Court).

³⁷ (1998) 194 CLR 355.

³⁸ Ibid 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (emphasis added). See, to similar effect, *R v Secretary of State for the Environment, Transport and the Regions; Ex parte Spath Holme Ltd* [2001] 2 AC 349, 396 (Lord Nicholls).

³⁹ *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁴⁰ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (emphasis added) (citation omitted). The distinction made by Mason CJ was applied to interpretation of ordinary Acts (statutory interpretation) in *Carr v Western Australia* (2007) 232 CLR 138, 145–6 [11]–[16] (Gleeson CJ).

⁴¹ (2009) 178 FCR 39.

genus of the specific places mentioned.⁴² The veteran argued that it was not necessary for a person to have been physically confined.⁴³ After a thorough examination of the provision at issue and its context, the Court found that 'other place' connoted 'a place of confinement of definite, restrictive physical limits'.⁴⁴ Of interest is the way the Court commented on where the meaning lay. The Court concluded: 'There is no need for the qualifying adjective "physically". The latter sense is already present reading the definition of "interned" as a whole and in context.'⁴⁵

An interpreter is not limited by the grammatical or semantic possibilities of a text (read in isolation); the paramount object is to give effect to the intention of Parliament [6.9]

Although the text is considered at the start and end of the interpretative process, it is clear law that a court is not limited to its grammatical or semantic possibilities, read in isolation. In the oft-cited case of *Project Blue Sky*, it was held: 'Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning . . . But not always.'⁴⁶ In *Taylor v The Owners – Strata Plan No 11564*,⁴⁷ Gageler and Keane JJ explained how consideration of the context could result in the legal meaning being 'ungrammatical':

Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation.⁴⁸

And, even more plainly, Edelman J has similarly held:

Context can give words an interpretation that is the opposite of their ordinary meaning and grammatical sense. Context can also permit a construction of words that excludes their application to matters that would have fallen within the application of their literal meaning.⁴⁹

If there is a tension between the text and the context, then the tension is resolved through the umbrella concept of the intention of Parliament:

[T]here are cases in which inconvenience of result or improbability of result assists the court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely conforms to the legislative intent discernible from other provisions in the statute.⁵⁰

⁴² Ibid 49 [36] (Logan J).

⁴³ Ibid 43 [12].

⁴⁴ Ibid 47 [29].

⁴⁵ Ibid 48 [33] (emphasis added).

⁴⁶ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

⁴⁷ (2014) 253 CLR 531.

⁴⁸ Ibid 556 [65] (dissenting as to outcome).

⁴⁹ *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 162–3 [64].

⁵⁰ *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297, 320 (Mason and Wilson JJ) (emphasis added). See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

Statutory interpretation is both a distinct body of law governing the determination of the meaning of legislation and a task that requires a set of skills. It is thus an essential area of legal practice, education and research. *Modern Statutory Interpretation: Framework, Principles and Practice* is an original, clear, coherent and research-based account of contemporary Australian statutory interpretation.

Written by experts in the field, the book provides a comprehensive coverage of statutory interpretation law as well as examining related areas such as legislative drafting, the parliamentary process, the modern history of interpretation, sources of doubt, and interpretation techniques. The content is structured in eight parts. Parts I-III introduce foundational matters, Parts IV-VII deal with the general principles of interpretation, and Part VIII examines special interpretative issues. A fully cross-referenced glossary is included.

With each chapter built around clear statements of principle and with numerous illustrations of the operation of the law, the work presents statutory interpretation in an accessible way. *Modern Statutory Interpretation* is an essential resource for legal professionals, legal researchers and students undertaking advanced courses in statutory interpretation in Australia.

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