STATEMENTS OF MEANING IN PARLIAMENTARY DEBATES: REVISITING *HARRISON V MELHEM*

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I INTRODUCTION

In classical mythology, sirens were fabulous monsters. Part woman, part bird, they lured sailors to destruction by their enchanting singing.[1]

In statutory interpretation, it is not hard to see how parliamentary speeches are siren-like.[2] They are written in a persuasive, highly readable style. They underlie a statute. Since the statutory reforms beginning in the 1980s[3] they are permissible aids to interpretation. They may contain a ministerial statement setting out the meaning of words in a Bill under consideration. And as these statements are made in the Parliament, superficially, they may be seen to attract the legitimating principle of the intention of Parliament.

In *Pepper v Hart*[4] the House of Lords appears to have succumbed to the siren song of parliamentary speeches. The majority held that a statement of meaning by a Minister was not only admissible, it was determinative. However, in the later Australian case of *Harrison v Melhem*[5] a majority of the Court of Appeal of New South Wales rejected *Pepper v Hart* on both points. Mason P[6] expressed the view that a 'statement of meaning'[7] or 'a statement directly addressing the intended meaning of the provision that is in the course of being enacted'[8] would 'seldom be available to elucidate the meaning of the later-enacted text',[9] let alone be determinative. After agreeing with Mason P, Spigelman CJ expressed a very similar view.[10] The majority agreed (subject to the above-mentioned reservations) that the only

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1 John Simpson and Edmund Weiner (eds), *Oxford English Dictionary* (Oxford University Press, 2nd ed, 1989) (definition of 'siren').

2 For this insight, I am indebted to Justice John Logan, 'Statutory Construction – Panel Discussion Presentation' (2016) *Federal Judicial Scholarship* 6 <http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/FedJSchol/2016/6.html>.

3 *Acts Interpretation Act 1901* (Cth) s 15AB, as inserted by *Acts Interpretation Amendment Act 1984* (Cth) s 7. As discussed by Pearce and Geddes, the Commonwealth legislation is replicated in New South Wales, Northern Territory, Queensland, Tasmania and Western Australia. The Australian Capital Territory and Victoria have comparable but somewhat different provisions: D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 107 [3.16].

4 [1993] AC 593.

5 (2008) 72 NSWLR 380.

6 With whom Giles JA agreed: *Harrison v Melhem* (2008) 72 NSWLR 380, 403 [192], and Spigelman CJ: at 382 [1] and Beazley JA: at 403 [191] generally agreed.

7 Ibid 399 [162]. Giles JA agreed: at 403 [192], and Spigelman CJ: at 382 [1] and Beazley JA: at 403 [191] generally agreed.

8 Ibid 401 [172].

9 Ibid 399 [162].

10 Ibid 384 [12]. Although Spigelman CJ agreed with Mason P's reasons '[s]ubject to the following observations': 382 [1], the Chief Justice agreed with Mason P on the issue of the status of ministerial statements: 384 [12]. The disagreement concerned the status of the presumption against the infringement of rights and departures from the general system of law.

parliamentary statements that were admissible were statements identifying the mischief and purpose. This requirement extended to all recourse, whether under the common law or the *Interpretation Act 1987* (NSW). Mason P said:

> Identification of mischief and purpose is one thing, statement of meaning is another … I do not consider the *Interpretation Act* or the common law of statutory interpretation in Australia to permit resort to a minister's speech to guide the meaning of legislation beyond identifying its purpose …[11]

This expression of views in *Harrison v Melhem* was dicta.[12] However, the views were seriously considered and emphatically put,[13] and have been widely endorsed. The views have been approved by the New South Wales Court of Appeal.[14] The dicta in *Harrison v Melhem* has been applied by the Full Federal Court and the Court of Appeal of the Australian Capital Territory to Commonwealth and Australian Capital Territory legislation.[15] Text writers have taken the views to be authoritative.[16] And a leading practitioner has described the observations in *Harrison v Melhem* as 'strong statements' made by the Chief Justice and the President of the Court of Appeal[17] that constitute 'important principles' coming from the case.[18]

Yet the 'ruling' has been queried judicially[19] and contrary views have been expressed extra-curially.[20] Leaving aside the technical nature of the views as dicta, this article addresses the question of whether the views about the use of parliamentary debates in *Harrison v Melhem* fully and convincingly resolved issues with respect to their use. By way of background, Parts

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11 Ibid 399 [162], 401 [172]. Spigelman CJ similarly allowed statements of purpose and mischief to be considered: 384 [13].

12 See ibid 398 [157] (viii) (Mason P) for the indication that they were dicta. This is also the view of Campbell JA in *Amaca Pty Ltd v Novek* (2009) 9 DDCR 199, 214 [73], with whom Giles JA: at 201 [1] and Tobias JA: at 202 [2] agreed; as did Basten JA in *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211, 217 [24].

13 The discussion by Mason P was extensive: *Harrison v Melhem* (2008) 72 NSWLR 380, 398–401 [157]–[173].

14 *Amaca Pty Ltd v Novek* (2009) 9 DDCR 199, 214 [73] (Campbell JA), with whom Giles JA: 201 [1] and Tobias JA: 202 [2] agreed; *New South Wales v Chapman-Davis* [2016] NSWCA 237 [83] (Gleeson JA), with whom McColl JA: at [1] and Sackville AJA: at [100] agreed.

15 For the *Legislation Act 2001* (ACT) ss 141, 142, see *Haureliuk v Furler* (2012) 259 FLR 28, 38 [30]. For the *Acts Interpretation Act 1901* (Cth) s 15AB, see *BGM16 v Minister for Immigration and Border Protection* (2017) 252 FCR 97, 119 [103] (Mortimer and Wigney JJ). For s 15AB, see also the approval in *R v Van Loi Nguyen* (2010) 204 A Crim R 246, 250 [19]–[20] (Barr AJ), with whom Beazley JA: at 248 [1] and Buddin J: at 248 [2] agreed.

16 Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles* (Lawbook Co, 2014) 224 [6.125]. While less emphatic, Pearce and Geddes cite the views in a manner that suggests the views are respected if not authoritative: above n 3, 116–7 [3.26].

17 C T Barry 'Interpreting Statutes' (2008) 46(8) *Law Society Journal* 70, 71. C T Barry QC appeared in the Court of Appeal for the appellant (plaintiff).

18 Ibid 70.

19 Basten JA in *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211, 216–7 [21]–[27]. His queries are discussed below.

20 Justice Stephen Gageler, 'Legislative Intention' (2015) 41 *Monash University Law Review* 1, 10–11. His argument is discussed in Part V(A). See also J D Heydon, 'The "Objective" Approach to Statutory Construction' (Speech delivered at the Current Legal Issues Seminar Series, Supreme Court of Queensland, Brisbane, 8 May 2014) 18–19 <https://law.uq.edu.au/files/23488/CLI-8May2014-J-D-Heydon_The-Objective-Approach-To-Statutory-Construction.pdf>. But the former Justice of the High Court did not elaborate his opinion (not strongly put) that 'knowledge of what was intended by the Minister and the experts might assist in determining the meaning of a particular provision': at 18.

II and III of this article examine the *Pepper v Hart* case and the reasoning in *Harrison v Melhem*. The next three Parts examine unresolved issues with *Harrison v Melhem*: the adequacy of the reasoning, conceptual difficulties with the statement, and consistency with High Court of Australia authority.

II *PEPPER V HART* BACKGROUND

A The Holdings in *Pepper v Hart*

A Minister in the United Kingdom government (Financial Secretary) answered in the Parliament the very question which subsequently arose in *Pepper v Hart*.[21] It was a question concerning the effect of what became section 63 of the *Finance Act 1976* (UK). At the time of the ministerial statement, the 'exclusionary rule' had not permitted recourse to parliamentary debates as an aid to interpretation.[22] In *Pepper v Hart* that rule was relaxed and recourse was had, and determinative weight was given, to statements by the Financial Secretary.

Although the House placed restrictions on the use of parliamentary materials,[23] what was remarkable was the extent to which the Court diverged from previous understandings of the law. First, recourse went beyond ascertaining the mischief; it included the 'legislative intention lying behind the ambiguous or obscure words'.[24] Second, it is true that Lord Browne-Wilkinson at one point suggested that the parliamentary material was nevertheless only an aid.[25] But when it came to the interpretation in the case his Lordship did not engage in a balancing process (which to that point ordinary principles of statutory interpretation required).[26] Rather, he determined the issue as follows:

> … the Parliamentary history shows that Parliament passed the legislation on the basis that the effect of sections 61 and 63 of the Act was to assess in-house benefits, and particularly concessionary education for teachers' children, on the marginal cost to the employer and not on the average cost. *Since the words of [section] 63 are perfectly capable of bearing that meaning, in my judgment that is the meaning they should be given.*[27]

His Lordship pointed out that without the parliamentary material he would have determined the legal meaning of the disputed provision differently.[28] Therefore, the inference is open that the parliamentary material was more than a tie breaker or an additional merely persuasive resource. I would agree with Kavanagh, writing in the *Law Quarterly Review*, that his Lordship gave ministerial statements the status of de facto law.[29]

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21 [1993] AC 593, 629–30 (Lord Browne-Wilkinson).
22 Ibid 630 (Lord Browne-Wilkinson).
23 Ibid 640 (Lord Browne-Wilkinson).
24 Ibid 634 (Lord Browne-Wilkinson).
25 Ibid 639–40 (Lord Browne-Wilkinson).
26 Oliver Jones (ed), *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6th ed, 2013) 504. For Australian law, see *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405 (Kitto J), with whom Owen J agreed: at 417. This was cited and approved of by Gleeson CJ in *Singh v The Commonwealth* (2004) 222 CLR 322, 335–6 [19].
27 *Pepper v Hart* [1993] AC 593, 642 (Lord Browne-Wilkinson) (emphasis added).
28 Ibid 643–4 (Lord Browne-Wilkinson).
29 Aileen Kavanagh, '*Pepper v Hart* and Matters of Constitutional Principle' (2005) 121 *Law Quarterly Review* 98, 104.

B Subsequent English Developments

In time, commentators trenchantly criticised the ruling in *Pepper v Hart* on practical grounds, on constitutional grounds, and for negative impacts on executive practice.[30] By the time of *Harrison v Melhem*, some English re-thinking of *Pepper v Hart* had occurred, most notably in *Wilson v First County Trust Ltd [No 2]* ('*Wilson*').[31] In dicta,[32] Lord Nicholls[33] said:

> A clear and unambiguous ministerial statement is part of the background to the legislation. In the words of Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, 635, such statements 'are as much background to the enactment of legislation as white papers and Parliamentary reports'. But they are no more than part of the background. … [H]owever such statements are made and however explicit they may be, they cannot control the meaning of an Act of Parliament.[34]

Wilson did not overrule *Pepper v Hart*.[35] But the most extreme part of *Pepper v Hart* – that the true intention of Parliament can be found in a ministerial statement – did not find favour in *Wilson*.[36] Nevertheless, in dicta, *Wilson* affirmed the relevance of such statements.

III THE RESOLUTION IN *HARRISON V MELHEM*

Harrison v Melhem concerned the interpretation of section 15(3) of the *Civil Liability Act 2002* (NSW). The provision set out a rule concerning the award of damages for gratuitous attendant care services:

> (3) Further, no damages may be awarded to a claimant for gratuitous attendant care services if the services are provided, or are to be provided:
>
> (a) for less than 6 hours per week, and
>
> (b) for less than 6 months.

The interpretative question was whether 'and' at the end of paragraph (a) was conjunctive or disjunctive. If it was conjunctive, the preclusion only applied if both paragraphs (a) and (b) were satisfied. This construction was submitted by the plaintiff (appellant).[37] But if the paragraphs were disjunctive (free standing), the award was precluded if either was satisfied.

Section 15(3) was relevantly indistinguishable from section 72(2) of the *Motor Accidents Act 1988* (NSW), as amended by the *Motor Accidents (Amendment) Act 1993* (NSW) schedule 1

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[30] J H Baker, 'Statutory Interpretation and Parliamentary Intention' (1993) 52 *Cambridge Law Journal* 353; Dawn Oliver, '*Pepper v Hart*: A Suitable Case for Reference to Hansard?' [1993] *Public Law* 5; Johan Steyn, '*Pepper v Hart*; A Re-examination' (2001) 21 *Oxford Journal of Legal Studies* 59.

[31] [2004] 1 AC 816.

[32] Ibid 833 [27].

[33] With whom Lord Scott agreed: ibid 873 [173] and Lord Hobhouse generally agreed: at 867 [145].

[34] Ibid 841 [58].

[35] Kavanagh, above n 29, 114.

[36] See also ibid 114–5. That dicta is now regarded as the current English law: David Lowe and Charlie Potter, *Understanding Legislation: A Practical Guide to Statutory Interpretation* (Hart, 2018) 140 [7.14].

[37] *Harrison v Melhem* (2008) 72 NSWLR 380, 386 [102] (Mason P).

(13).[38] For reasons that will become clear, it is necessary to refer to the pre-1993 form of section 72. Before 1993 that section had set out the preclusions in separate subsections (subsections (2) and (4)), making it clear that in that form the preclusions operated disjunctively (one only satisfied):

> **Maximum amount of damages for provision of certain home care services**
>
> **72. …**
>
> (2) No compensation shall be awarded unless the services are provided, or are to be provided, for not less than 6 months and may be awarded only for services provided or to be provided after the 6-month period.
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> …
>
> (4) No compensation shall be awarded unless the services provided or to be provided are not less than 6 hours per week and may be awarded only for services provided or to be provided after the first 6 hours.

The 1993 Bill at first did not make provision for these preclusions.[39] In the May 1993 parliamentary consideration of the 1993 amendment to section 72, the Minister observed that that section currently required both thresholds to be crossed before compensation could be *awarded*; in other words, the Minister's understanding of the existing law equated to the preclusions operating disjunctively (one only needed for preclusion).[40]

Later in 1993 the Bill to amend the *Motor Accidents Act 1988* (NSW) was altered (so it was said) to *restore* the position to the existing law (ie, the pre-1993 form of section 72). Significantly, the Minister said (this is the statement of meaning): 'it is proposed to restore the six-hour six-month threshold in relation to the availability of compensation for home care services'.[41]

As mentioned above, the majority (Spigelman CJ, Mason P, Beazley JA and Giles JA) determined the appeal without regard to the Minister's statement of intention.[42] Recourse was not possible under section 34(1)(b) of the *Interpretation Act 1987* (NSW) (the provision permitting recourse to extrinsic materials) because 'the provision is not ambiguous or obscure and because the ordinary meaning conveyed by the text does not lead to a result that is manifestly absurd or unreasonable'.[43] But Mason P went on to hold that if, contrary to that holding, it was permissible to consider ministerial statements made in Parliament in 1993 about the meaning of what became section 15(3), '… those statements do not permissibly assist in the present issue. Nor do common law principles stemming (in the United Kingdom at least) from the decision in *Pepper v Hart* [1993] AC 593'.[44]

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38 Ibid 393 [130] (Mason P).

39 Ibid 390 [118] (Mason P).

40 Ibid, citing New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 May 1993, 2334 (Chris Hartcher). Mason P regarded this understanding of the law as correct: at 390 [118].

41 *Harrison v Melhem* (2008) 72 NSWLR 380, 391 [118] (Mason P), citing New South Wales, *Parliamentary Debates*, Legislative Council, 27 October 1993, 4501 (John Hannaford, Attorney-General).

42 Ibid 398 [157] (viii) (Mason P).

43 Ibid (Mason P).

44 Ibid 398 [157] (Mason P).

Spigelman CJ referred to the condition in section 34(1) of the *Interpretation Act 1987* (NSW) regulating recourse to extrinsic materials. It requires that the extrinsic material be 'capable of assisting in the ascertainment of the meaning of the provision'.[45] He concluded that statements of intention as to the meaning of words in parliamentary speeches were 'rarely, if ever' able to satisfy the condition.[46]

Both Spigelman CJ and Mason P considered the wider context of the *Interpretation Act 1987* (NSW). That context included fundamental principles of the law of interpretation. Mason P and Spigelman CJ emphasised 'the primacy of the enacted law' and construing legislation through what Parliament has said through enactment of legislation.[47] A similar point made by Spigelman CJ was the distinction between objective intention of Parliament (which was sought) and its subjective intention (which was not relevant).[48]

A related justification drew on the constitutional principle of the separation of powers. The Chief Justice observed that '[t]he authoritative determination of the meaning of a statutory provision is an exercise of the judicial power, not of the legislative power, let alone of the executive power'.[49]

A further justification was the 'practical as well as the constitutional problems of using *Pepper v Hart*'.[50] These included Bills being passed without debate[51] and the troublesome assumption that members of Parliament necessarily agree with a Minister's reasoning and conclusions.[52]

IV THE ADEQUACY OF THE REASONING

The reasoning the majority gave in *Harrison v Melhem* in relation to the use of extrinsic materials was not complete. For one thing, the opposing constructions of section 34 of the *Interpretation Act 1987* (NSW) were not expressly articulated. Further, certain arguments from the section, the Act's legislative history, and the wider context,[53] were not referred to.

Section 34(1) of the *Interpretation Act 1987* (NSW) stated in part:[54]

> **34 Use of extrinsic material in the interpretation of Acts and statutory rules**
>
> (1) In the interpretation of a provision of an Act or statutory rule, if any *material not forming part of the Act or statutory rule is capable of assisting in the*

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45 Ibid 384 [12].

46 Ibid.

47 Ibid 384–5 [16] (Spigelman CJ), 398–9 [159]–[160], 400 [170] (Mason P). The phrase, 'the primacy of the enacted law', is one by Kirby J in *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529, 555 [82]. It was quoted and approved of by Mason P: *Harrison v Melhem* (2008) 72 NSWLR 380, 400 [170].

48 *Harrison v Melhem* (2008) 72 NSWLR 380, 384 [14].

49 Ibid 384 [15] (Spigelman CJ). See also 402 [182] (Mason P).

50 Ibid 400 [166] (Mason P).

51 Ibid 400 [165] (Mason P).

52 Ibid 402 [183]–[184] (Mason P), citing and approving *Pennsylvania v Union Gas Co* 491 US 1, 30 (Scalia J) (1989); *Wilson v First County Trust Ltd [No 2]* [2004] 1 AC 816, 843 [66] (Lord Nicholls), with whom Lord Scott agreed: 873 [173] and with whom Lord Hobhouse generally agreed: 867 [145].

53 This division comes from Susan Glazebrook, 'Filling the Gaps' in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 153, 169–76.

54 Emphasis added.

> *ascertainment of the meaning of the provision*, consideration may be given to that material:
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule …
>
> …

A wide construction of section 34(1) would be: material that is 'capable of assisting in the ascertainment of the meaning of a provision' includes a statement of meaning in parliamentary debates. This construction would be consistent with *Pepper v Hart* as read down in *Wilson*. An opposing (narrow) construction would be: material that is 'capable of assisting in the ascertainment of the meaning of a provision' includes only material going to the mischief the Parliament intended to cure and the purpose sought to be achieved by the provision concerned. This construction is the construction which found favour with the majority in *Harrison v Melhem*.

A The Provision

It has been argued that the majority view in *Harrison v Melhem* 'finds no basis in the statutory language of the *Interpretation Act*'.[55] Is the majority's reasoning deficient in this respect?

The text of section 34(1) of the *Interpretation Act 1987* (NSW) permits recourse to 'any material not forming part of the Act'. However, the text of the provision immediately goes on to require that such material be 'capable of assisting in the ascertainment of the meaning of the provision'. This condition was emphasised by Spigelman CJ.[56] It is noteworthy that the drafter did not expressly allow 'the intended meaning of the provision' to be taken into account. The wording is purposive. The question therefore is: can a statement of meaning be so capable? In *Pepper v Hart* it was assumed that such statements could express 'Parliament's true intention'.[57] This claim leads one into difficult waters about the extent to which, if at all, a statement by a Minister can be attributed to the Parliament as a whole. The better view is that it cannot.[58]

But there is a more fundamental problem confronting statements of meaning. Is a statement of meaning relevant at all to the 'ascertainment of the meaning of the provision'?[59] An advocate of ministerial statements, recognising the obvious difficulties in seeing a ministerial statement as a reflection of *the Parliament's* intention, might argue that a court could nevertheless take those difficulties into account in weighing the statement. In other words, although the statement ought not be determinative, it could be taken into account. But, if a court were to weigh a ministerial statement of intention, it would have to be on the basis that

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55 *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211, 217 [27] (Basten JA).

56 *Harrison v Melhem* (2008) 72 NSWLR 380, 384 [12].

57 *Pepper v Hart* [1993] AC 595, 635 (Lord Browne-Wilkinson).

58 See Baker, above n 30, 356–7; Steyn, above n 30, 65–6; Kavanagh, above n 29, 104–6.

59 Ascertainment of meaning is different from a court referring to a statement of meaning *after* it has reached its view of the legal meaning. A court might refer to such a statement to show that its judgment coincides with the political view: see, eg, *Scott-Mackenzie v Bail* [2017] VSCA 108 [50] (The Court).

the material is 'capable' of assisting in the ascertainment of meaning. Or, as Gleeson CJ put it, the material would have to be able to 'rationally assist' the interpretative process.[60] A statement could possibly do so *if* the object of interpretation[61] – the intention of Parliament – referred to ascertaining and giving effect to the Parliament's *subjective* intention. But the High Court has (rightly) emphatically and repeatedly pointed out that this is not the case.[62] Rather, the court infers the legislative intention,[63] or attributes an 'intention' to the Parliament,[64] using 'objective criteria of construction'.[65] Therefore, the fundamental problem with giving weight to a Minister's statement lies in the nature of the interpretative process – the 'ascertainment of the meaning of the provision' as section 34(1) puts it. Being independent of the other branches of government, and consistent with the rule of law, a court is only interested in aids to interpretation by which it can reach a conclusion of its own. A statement of meaning is a statement of *conclusion* concerning the question in issue. It is incommensurate with the aids to interpretation, which assist the court in reaching its conclusion. As a statement of intention cannot be weighed, it is not relevant to the 'ascertainment of the meaning'.[66]

An advocate of ministerial statements might point in the alternative to section 34(1)(a), which was quoted above. The advocate might argue that the paragraph assumes, and furthermore will not work unless, the material to which the section relates includes statements of meaning. But the section does *not* say 'confirm that the meaning of the provision *as set out in material not forming part of the Act* is the ordinary meaning …'. The reference to 'confirm … the meaning of the provision' is merely a condition of use. As so construed, the provision has utility on the *Harrison v Melhem* view. Material not forming part of the Act – material evidencing the mischief or purpose – may be used (in conjunction with other aids) to confirm that the meaning of the provision is the ordinary meaning.

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[60] Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 29, approving a statement of F A R Bennion, *Bennion on Statutory Interpretation: A Code* (LexisNexis Butterworths, 5th ed, 2008) 588–90, 919.

[61] *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 411 [88] (Kiefel J). The United Kingdom Supreme Court has expressed a similar view: *R (Black) v Secretary of State for Justice* [2018] AC 215, 231 [36] (Baroness Hale), with whom Lord Mance, Lord Kerr, Lord Hughes and Lord Lloyd-Jones agreed: at 222.

[62] *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); repeated in *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[63] *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405 (Kitto J), with whom Owen J agreed: at 417, cited with approval by Gleeson CJ in *Singh v The Commonwealth* (2004) 222 CLR 322, 335–6 [19].

[64] *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

[65] *Momcilovic v The Queen* (2011) 245 CLR 1, 85 [146] (Gummow J), with whom Hayne J generally agreed: at 123 [280]. Earlier, Dickerson had argued that, in inferring what is presumed to be the particular legislative intent respecting the issue before it, the court is limited to 'objective manifestations of intent', namely the statute and appropriate extrinsic materials: Reed Dickerson, 'Statutory Interpretation: A Peek into the Mind and Will of a Legislature' (1975) 50 *Indiana Law Journal* 206, 217, 219.

[66] In *R (Public Law Project) v Lord Chancellor* [2016] AC 1531, 1541 [20] (CA) Laws LJ opined: '[t]he opinions of members of either House as to the import or merits of provisions contained in LASPO (or the Order) are, with great respect, not relevant to the fulfilment of this court's duty to construe the statute'. Another judge who has expressed this view (extra-curially) is Justice Kenny in 'Current Issues in the Interpretation of Federal Legislation' (Speech delivered at the National Commercial Law Seminar Series, Federal Court of Australia, Melbourne, 3 September 2013), 7: <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-kenny/kenny-j-20130903>. Her Honour made clear this view extended to recourse under the *Acts Interpretation Act 1901* (Cth): at 7.

Finally, the advocate might point out that, by section 34(1)(a) assuming that the ordinary meaning is found after taking account of the purpose underlying the Act, this suggests the purpose is found *before* recourse to extrinsic materials.[67] However, if this is the case, there is no reason why the extrinsic material cannot also relate to the purpose. Even if the ordinary meaning is to be found before recourse is made to extrinsic materials, the purpose that is considered at this earlier point is from *intrinsic* sources.

None of the arguments from the provision that purport to support the wider construction of section 34(1) carry much force. I conclude that the view of the majority in *Harrison v Melhem* does find a basis in the language of the *Interpretation Act 1987* (NSW).

B Legislative History

In his second reading speech to the Interpretation Bill 1986 (NSW), the Minister had this to say about the object of the proposed section 34:

> The object of this clause is to ensure that courts do have access to any necessary or relevant material. In cases where extrinsic materials have been used there has been some attempt to draw a distinction between their use to discover the mischief which is intended to be remedied by the legislation concerned and their use to discover the remedy itself. The distinction has been rejected as artificial and the clause is drafted so that the use of extrinsic materials is directed to 'ascertainment of the meaning of the provision'.[68]

The object set out in the first sentence does not support either construction. However, the remainder of the extract supports the wider construction as it shows that the object was to go beyond discovering the mischief and the purpose.[69] However, the precise object is unclear, as the Minister unhelpfully restated the words of the provision.

C The Wider Context

Certain aspects of the wider context were not considered by the majority in *Harrison v Melhem*. First, the Australian common law concerning recourse to extrinsic materials. By the time of *Harrison v Melhem*, the High Court had clarified that the common law on recourse to extrinsic materials had survived the amendments to the Acts Interpretation Acts. Beginning with *CIC Insurance Ltd v Bankstown Football Club*,[70] the High Court held that the common law continued to permit recourse to law reform reports for the purpose of ascertaining the mischief the statute was intended to cure.[71] This was shortly followed by applications of the common law to an explanatory memorandum[72] and to the second reading speech of a Minister.[73] It is true that, at the earlier time the Interpretation Bill was considered, the only parliamentary material by which the common law permitted the mischief to be ascertained

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67 Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles* (Lawbook, 2014) 220 [6.105].

68 New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 December 1986, 7922–3 (Terry Sheahan, Attorney-General).

69 This reasoning is discussed in Pt V(A) below.

70 (1997) 187 CLR 384.

71 Ibid 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

72 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 99–100 (Toohey, Gaudron and Gummow JJ), 110, 112 (McHugh J).

73 *A-G (Cth) v Oates* (1999) 198 CLR 162, 175 [28], 176–7 [30]–[31] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

was a law reform report tabled in the Parliament. However, if the background common law changes after an Act is passed, an interpreter is to take account of the revised common law unless it is inconsistent with the Act.[74]

Second, the consequences of each of the constructions were not fully tested. If the wide construction of section 34(1) were accepted, a court would be required to weigh the subjective intention of a statement uttered in Parliament. As argued above,[75] such a statement would pervert the weighing process as it would introduce factors that are not relevant and cannot be weighed. The narrow construction would also face some practical problems. The narrow construction assumes a statement of meaning is distinguishable from a statement of purpose, but this is not always the case. Nevertheless, as elaborated below,[76] this conceptual difficulty is surmountable.

D Conclusion

Overall, arguments for the wider construction of section 34 of the *Interpretation Act 1987* (NSW) – material that is 'capable of assisting in the ascertainment of the meaning of a provision' includes a statement of meaning in parliamentary debates – can be made. Ironically, for legislation concerning extrinsic materials, the strongest argument is from extrinsic materials. But the arguments from the text and the wider context for the narrow construction – material that is 'capable of assisting in the ascertainment of the meaning of a provision' includes only the mischief the Parliament intended to cure and the purpose sought to be achieved by the provision concerned – are much stronger.

V CONCEPTUAL DIFFICULTIES

In *Harrison v Melhem* the majority of the Court purported to make a distinction between a 'statement of meaning' (which is not a permissible interpretative aid) and a statement of mischief or purpose (which is a permissible aid). But are there conceptual difficulties in maintaining such a distinction?[77]

A Mischief and Remedy

The distinction between 'mischief' and 'remedy' for the purpose of regulating recourse to extrinsic material was criticised by Lord Wilberforce in 1983. He said:

> The dividing line between mischief and effect is illogical, and hard to trace in practice. Acts of Parliament are passed with one indivisible objective, to cure an evil and to create new rights and duties. Mischief and remedy, as Lord Diplock said, are the obverse and reverse of a single coin …[78]

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74 *Bropho v Western Australia* (1990) 171 CLR 1, 22 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Re Greenpeace of New Zealand Inc* [2015] 1 NZLR 169, 181 [17] (Elias CJ, McGrath and Glazebrook JJ).

75 Pt IV(A).

76 Pt V(B).

77 Cf *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211, 217 [27] (Basten JA), who queried the distinction between 'legislative purpose' and 'linguistic meaning'.

78 Lord Wilberforce, 'A Judicial Viewpoint' in Attorney-General's Department, *Symposium on Statutory Interpretation* (Australian Government Publishing Service, 1983) 8.

Lord Wilberforce's comments have been influential. It will be recalled that the same point featured in the Minister's second reading speech to the Interpretation Bill.[79] More recently, they have been taken up by Justice Gageler.[80] After citing Lord Wilberforce, his Honour argued:

> It is difficult to maintain that recourse to the record of the legislative process might sometimes help to understand the mischief which a statute or part of a statute is designed to remedy but might never help to understand the sense in which words in the statute have been used to remedy that mischief. Experience teaches that the record can reveal the sense in which a particular statutory word or phrase has been used with at least as much precision as the record reveals the aim to be achieved by its inclusion.[81]

With respect, the arguments of Justice Gageler and Lord Wilberforce before him encounter difficulties. First, Lord Wilberforce's comments were made in the specific and narrow context of law reform reports.[82] Second, Lord Wilberforce's assumption that mischief and remedy are two sides of a single coin only holds good in a simple model of rule making.[83] In reality, they are often not co-extensive.[84] Third, as discussed above,[85] a conclusory statement of meaning is incommensurate with aids to interpretation.

B Purpose and Intention

It is sometimes thought that the legislative purpose equates to the intention of Parliament. If the two concepts were completely co-extensive, the *Harrison v Melhem* view would be fatally flawed. The dicta depends on making a distinction between the two. But (with an important qualification to be discussed shortly) the two concepts are not the same. Put simply, intention goes to the scope of a rule. As Heydon J said, '[o]rdinary statutory interpretation does not depend on the "*purpose*" of the statute, but its "*scope*"'.[86] On the other hand, purpose refers to the object of a law: '[t]he term "purpose" identifies the object for the advancement or attainment of which [the] law was enacted'.[87] Consistent with these definitions, the High Court of Australia, in the leading case of *Project Blue Sky Inc v Australian Broadcasting Authority*,[88] held that the purpose was but one factor in working out the meaning that the legislature is taken to have intended the provision in question to have.[89]

However, there is a sense in which the concepts of legislative purpose and intention of Parliament do overlap. It comes about because the statutory purpose can be stated at varying

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79 Pt IV(B).

80 Gageler, above n 20.

81 Ibid 11.

82 Wilberforce, above n 78, 8.

83 William Twining and David Miers, *How to Do Things with Rules* (Cambridge University Press, 5th ed, 2010) 160–1.

84 Ibid 158–62. On the disjunction between purpose and remedy, see Ruth Sullivan, *Sullivan on the Construction of Statutes* (LexisNexis, 6th ed, 2014) 303–5 [9.96]–[9.100].

85 Part IV(A).

86 *Momcilovic v The Queen* (2011) 245 CLR 1, 182 [450] (dissenting in other respects) (emphases in original).

87 *Al-Kateb v Godwin* (2004) 219 CLR 562, 608 [121] (Gummow J), citing *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

88 (1998) 194 CLR 355.

89 Ibid 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

'levels of generality'.[90] At a specific level the purpose may be defined by reference to its 'immediate function'.[91] *Monis v the Queen*[92] is an example. In that case the interpretation of the *Criminal Code* (Cth) was at issue. Section 471.12 stated that:

> A person is guilty of an offence if:
>
> (a) the person uses a postal or similar service; and
>
> (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

French CJ extracted a purpose directly from the text of this provision which (he later said extra-curially) equated to its 'immediate function'.[93] But his Honour dismissed that 'purpose', contrasting it with a potential 'larger statutory purpose' which, if available, *would* be meaningful:

> It is sufficient to observe that a relevant statutory purpose of s 471.12 is the prevention of offensive uses of postal and similar services. That purpose does not aid in the construction of s 471.12 as it is a purpose derived from the text itself. … A useful definition of any larger statutory purpose based upon common attributes of or significance to be attached to 'postal or similar services' is elusive.[94]

His Honour's analysis is consistent with Dickerson's earlier commentary. The latter explained that when a legislature took particular action, one could say it had 'the specific purpose of taking that action'. But, he said, 'lawyers tend to identify the immediate legislative purpose with "legislative intent" and to reserve the term "legislative purpose" for any broader or remote ("ulterior") legislative purpose'.[95] In more definite terms, Gageler J has helpfully articulated what that broader purpose is. He explains that '[t]he purpose of a law is the "public interest sought to be protected and enhanced" by the law. The purpose is not what the law does in its terms but what the law is designed to achieve in fact.'[96]

It can be inferred that the majority in *Harrison v Melhem* would have intended the use of parliamentary debates to be for the larger/broader sense of purpose, and not for the purpose in the sense of immediate function. This is for two reasons. First, Mason P went to pains to delineate the purpose from a statement of meaning. Secondly, if parliamentary statements of

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[90] *Victims Compensation Fund Corporation v Brown* (2003) 201 ALR 260, 269 [33] (Heydon J), with whom McHugh ACJ: at 261 [1], Gummow J: at 261 [2], Kirby J: at 261 [3] and Hayne J: at 261 [4] agreed; Jones, above n 26, 848–9.

[91] Chief Justice Robert French, 'Bending Words: The Fine Art of Interpretation' (Speech delivered at the Guest Lecture Series, University of Western Australia, 20 March 2014) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20Mar14.pdf> 14.

[92] (2013) 249 CLR 92.

[93] French, above n 91, 14.

[94] *Monis v the Queen* (2013) 249 CLR 92, 112–13 [20].

[95] Dickerson, above n 65, 224.

[96] *Brown v Tasmania* (2017) 349 ALR 398, 444 [209] (footnote omitted).

meaning could be used as statements of 'purpose', that would effectively defeat the argument that the Court was making against the use of statements of meaning.[97]

In short, a conceptual difficulty with the *Harrison v Melhem* dicta lies in the ambiguity of the concept of 'purpose'. The difficulty is a real one. In a number of cases judges have been referred to statements of meaning *but have relied on them for the specific sense of purpose.* The first example comes from *Harrison v Melhem* itself. Basten JA, who dissented on the interpretative issue, stated:

> To the extent that reliance upon the extrinsic material is of assistance in seeking to identify the specific purpose underlying the relevant amendments in 1993, it supports the view, as much by omission as express statement, that the dual prohibition contained in [section] 72(2) and [section] 72(4) prior to the amendments was not intended to be varied.[98]

His Honour derived a 'purpose' which effectively restated the statement of meaning. This circumvents the intentions of the majority view in *Harrison v Melhem*.[99]

The approach of Basten JA is not an isolated one. In *Bail v Scott-Mackenzie*[100] the question was whether the respondent was an 'eligible person' under section 90 of the *Administration and Probate Act 1958* (Vic). The effect of the provision was that 'a stepchild of the deceased' was eligible for a family provision order. The respondent was a child of the deceased's former domestic partner. It was argued by the executor of the estate that a person cannot be a stepchild of the deceased if the child's parent never married the deceased.

Section 90 was inserted by the *Justice Legislation Amendment (Succession and Surrogacy) Act 2014* (Vic). Clause 3 of the explanatory memorandum to the Bill, which became that Act, stated:

> Subclause (2) also inserts a definition of ***eligible person*** into s 90, so that ***eligible person*** means–
>
> …
>
> (c) a stepchild of the deceased who, at the time of the deceased's death was under the age of 18 years, or was a full-time student between 18 and 25 years, or was a stepchild with a ***disability*** (*noting that a stepchild is not limited to a deceased's spouse but also includes a child of the deceased's domestic partner*);[101]

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97 Unusually, a court might draw a purpose from a statement of meaning which is not the specific purpose or immediate function. This occurred in *Berenguel v Minister for Immigration and Citizenship* (2010) 264 ALR 417. I have discussed this case elsewhere: Jeffrey Barnes, 'Contextualism: "The Modern Approach to Statutory Interpretation"' (2018) 41(4) *University of New South Wales Law Journal* 1083, 1097–9.

98 *Harrison v Melhem* (2008) 72 NSWLR 380, 406 [208].

99 In fairness to his Honour, in the later case of *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211, 217 [27] his Honour saw (rightly) how purpose and meaning can co-exist.

100 [2016] VSC 563.

101 *Bail v Scott-Mackenzie* [2016] VSC 563 [66], quoting *Justice Legislation Amendment (Succession and Surrogacy) Act 2014* (Vic) pt 2 cl 3(2)(c), amending *Administration and Probate Act 1958* (Vic) s 90 (emphasis added by the Court).

The Court thought the extract was 'important'.[102] It resolved the doubt or ambiguity.[103] His Honour referred to the statement as a statement of purpose:

> The indications to which I have referred in the text point to the wider meaning. The Explanatory Memorandum clearly shows that *the purpose of including stepchild is to expand the width of the ordinary meaning to encompass the wider meaning*.[104]

Thus, the Court relied on the statement of meaning for the specific 'purpose'.[105] Again, this circumvented the majority view in *Harrison v Melhem*.

VI CONSISTENCY WITH HIGH COURT AUTHORITY

It has been queried whether, at the time the decision was handed down, *Harrison v Melhem* was supported by High Court authority.[106] In the case Mason P relied on *Nominal Defendant v GLG Australia Pty Ltd*[107] for the proposition that neither 'the *Interpretation Act* [n]or the common law of statutory interpretation in Australia … permit resort to a minister's speech to guide the meaning of legislation beyond identifying its purpose'.[108] It is doubtful whether the *Nominal Defendant* case gives much support, for the High Court did not propound a general principle. The Court merely stated that a particular second reading speech should not be employed beyond demonstrating that 'a purpose of the Act was to narrow the law as laid down in pre-1995 cases'.[109]

Prior to *Harrison v Melhem*, Australian judges *had* from time to time used statements of meaning as aids to interpretation.[110] A High Court example is *Re Bolton; Ex parte Beane*.[111] Mr Beane was alleged to be a deserter or absentee without leave from the armed forces of the United States of America. It was alleged that the desertion or absenting without leave occurred in Vietnam in 1970. The ultimate question was whether he could be arrested under section 19(1) of *Defence (Visiting Forces) Act 1963* (Cth). It referred to 'a deserter or an absentee without leave from those forces [of a country to which this section applies]'. The interpretative question was whether the provision ought to be interpreted narrowly (must be a deserter or absentee from a visiting force) or widely (need not be a deserter or absentee from a visiting force). In the second reading speech by the Attorney-General and Minister for External Affairs, Sir Garfield Barwick, it was stated:

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102 *Bail v Scott-Mackenzie* [2016] VSC 563, [31].

103 Ibid [5], [108].

104 Ibid [79] (emphasis added).

105 On appeal, the Court of Appeal took a different approach: *Scott-Mackenzie v Bail* [2017] VSCA 108. That Court determined the meaning without regard to the explanatory memorandum's statement of meaning: at [50]. The Court referred to it merely to fortify their conclusion: at [50].

106 *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211, 217 [27] (Basten JA).

107 (2006) 228 CLR 529, 538 [22] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

108 *Harrison v Melhem* (2008) 72 NSWLR 380, 401 [172].

109 *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529, 538 [22] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

110 See also *Re Warumungu Land Claim; Ex parte Attorney-General* (1987) 77 ALR 27, 35–6 (Beaumont J), with whom Burchett J agreed: at 41. This case is cited with approval in the 2006 edition of Pearce and Geddes' text: D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, 2006) 86 [3.19]. Other pre-*Harrison v Melhem* cases that use statements of meaning include *Re BWV; Ex parte Gardner* (2003) 7 VR 487, 498–503 [45]–[71], 506–7 [86] (Morris J) and *ABC Developmental Learning Centres Pty Ltd v Secretary, Department of Human Services* (2007) 15 VR 489, 494 [27] (Hollingworth J).

111 (1987) 162 CLR 514.

> Mr. Deputy Speaker, Part III of the Bill relates to deserters and absentees without leave from the forces of countries within the Commonwealth of Nations, and other countries to which the part may be applied by regulation. They need not be deserters or absentees from a visiting force.[112]

It is clear that members of the Court gave weight to this statement of meaning. Toohey J (dissenting) held that '[a]ny doubt about the matter, is, I think resolved by a consideration of the second reading speeches in the House of Representatives …'.[113] He then quoted the above statement of Sir Garfield.[114] The other members of the Court formed the majority. Three of those members, Mason CJ, Wilson and Dawson JJ, held that:

> Furthermore, given that s 19 is ambiguous, consideration may be given in ascertaining the meaning of the provision to the second reading speech of the Minister when introducing the Bill for the Act into the House of Representatives in 1963: *Acts Interpretation Act* 1901 (Cth), as amended, s 15AB. That speech quite unambiguously asserts that Pt III relates to deserters and absentees whether or not they are from a visiting force. But this of itself, *while deserving serious consideration*, cannot be determinative; it is available as an aid to interpretation.[115]

In short, one member of the High Court used a statement of meaning to resolve 'any doubt' in favour of the government. Three other members of the Court gave the statement weight but ultimately decided that the arguments for the opposing construction favouring Mr Beane were weightier.[116]

However, *Re Bolton; Ex parte Beane* is, at least now, a weak authority for Interpretation Acts, such as the Commonwealth and New South Wales Acts, authorising the weighing of statements of intention. First, Mason CJ, Wilson and Dawson JJ did not give any reasons as to why the ministerial statements were 'deserving of serious consideration'. Second, their Honours failed to propound a general principle regarding the use of ministerial statements. And third, recent High Court cases are consistent with the restrictions expressed in *Harrison v Melhem*. They include cases stating that legislative intention is not a collective mental state,[117] *Berenguel v Minister for Immigration and Citizenship*[118] and this statement by Kiefel J (as her Honour then was) in *Certain Lloyd's Underwriters v Cross*:[119]

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112 Ibid 541 (Toohey J), quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 24 October 1963, 2263.

113 Ibid 540–1.

114 Ibid 541.

115 Ibid 517–8 (emphasis added).

116 At the 1983 Symposium on Statutory Interpretation, Mason J (as he then was) argued that what the Minister says about 'mischief *and interpretation*' should be taken into account: Sir Anthony Mason, 'Summing Up' in Attorney-General's Department, *Symposium on Statutory Interpretation* (Australian Government Publishing Service, 1983) 81, 82 (emphasis added).

117 *Zheng v Cai* (2009) 239 CLR 446, 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Lacey v A-G (Qld)* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

118 (2010) 264 ALR 417. I have discussed this case elsewhere: see Barnes, above n 97. In this case the High Court, presented with a statement of intention, did not give the statement any weight as a statement of intention.

119 (2012) 248 CLR 378, 412 [89]. It is true that her Honour referred to 'the policy of the statute' but this can be taken to be a global reference to the mischief and the purpose.

> It is legitimate to resort to materials outside the statute, but it is necessary to bear in mind the purpose of doing so and the process of construction to which it is directed. That purpose is, generally speaking, to identify the policy of the statute in order to better understand the language and intended operation of the statute.

VII CONCLUSION

Harrison v Melhem is an important case in the law of statutory interpretation in Australia. In strongly worded dicta, the majority rejected 'statements of meaning' made in parliamentary debates as aids to interpretation. This article has considered the adequacy of the reasoning, conceptual difficulties, and consistency with High Court authority.

Although the reasoning given by the majority in the case is not complete, a consideration of further arguments serves to confirm the views of the majority. Some conceptual difficulties are apparent with the *Harrison v Melhem* view. A statement of meaning should not be taken into consideration under the guise of the specific purpose or immediate function of the rule. The dicta should be taken to apply only to consideration of larger purposes. Finally, the dicta is otherwise consistent with recent High Court authority.