

## CONTEXTUALISM: 'THE MODERN APPROACH TO STATUTORY INTERPRETATION'

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*The widespread realisation that '[l]egislation is the cornerstone of the modern legal system' (Justice McHugh) has brought increased judicial and scholarly attention to legislation's partner, statutory interpretation. In *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 the High Court of Australia referred to the 'modern approach to statutory interpretation'. That modern approach has subsequently been called 'contextualism'. The central questions addressed in this article are: what is contextualism? Is it principled? And is it a coherent general approach? After stating and illustrating key principles from six High Court cases, the author considers challenges to contextualism, including textualism and purposivism. Like the statutes it monitors, statutory interpretation may be 'broad and deep and variegated', as Lord Wilberforce once observed. But, at the same time, it is concluded that statutory interpretation does not lack a general approach that lends coherence to the interpretative enterprise – for contextualism performs this function.*

### I INTRODUCTION

In recent times the realisation that '[l]egislation is the cornerstone of the modern legal system'<sup>1</sup> has brought increased judicial and scholarly attention to its partner, statutory interpretation. As Pearce and Geddes observe, there has been a 'greater willingness on the part of Australian courts and tribunals to articulate the principles of legislative interpretation upon which they rely'.<sup>2</sup> Most

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1 Justice M H McHugh, 'The Growth of Legislation and Litigation' (1995) 69 *Australian Law Journal* 37, 37.

2 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2014) 94 [3.8]. To give the authors their due, they cite that trend as commencing with the case that is the focus of this article, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384.

notably, in *CIC Insurance Ltd v Bankstown Football Club Ltd*,<sup>3</sup> the High Court of Australia famously referred to the ‘modern approach to statutory interpretation’:

[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.<sup>4</sup>

Two introductory comments may be made about this passage. First, the High Court described the context of statutory interpretation in terms of the ‘legitimate means’ of interpretation, that is, the permissible materials and other aids to interpretation.<sup>5</sup> As the text of the law being interpreted is typically a particular statutory provision, the context in this sense extends to the immediate context of any critical word or phrase in the provision concerned, other internal context within the Act as a whole, and finally to the wider context beyond the Act in question.<sup>6</sup> The permissible general interpretative criteria (the so-called rules of interpretation) are sourced in common law and statute law. In the context of a particular case the interpretative factors that are relevant are judicially determined. A factor ‘derives from the way a general interpretative criterion applies to the text of the enactment and the facts of the instant case’.<sup>7</sup> Only factors that are capable of assisting in the process of ascertaining meaning may be considered.

Second, and more interestingly, as signified by the label ‘the modern approach’, the Court indicated that it was enunciating a general *approach* to statutory interpretation by that name. By way of illustration, it was pointed out that a court could not determine the meaning of a statutory provision – even one that was not ambiguous on its face – without having regard to context in the sense described immediately above. Further, the insistence on regard to context at the same time as the enunciation of a modern approach suggests the Court was propounding a general approach to statutory interpretation, with regard to context at its heart; in short, an approach based around ‘contextualism’. This is not a

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3 (1997) 187 CLR 384 (*CIC Insurance*).

4 Ibid 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (citations omitted). In propounding the ‘modern approach to statutory interpretation’, the Court appears to have borrowed some of the language from the dissenting reasons for judgment of Mason J in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315. In that case his Honour had said: ‘The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise’. However, their Honours in *CIC Insurance* did not reference Mason J directly. They referenced *A-G (UK) v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461, cited in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, 315: *CIC Insurance* (1997) 187 CLR 384, 408 n 47. However, in *Independent Commission Against Corruption v Cunneen* the High Court returned to Mason J’s judgment for support, this time referencing his Honour’s judgment: (2015) 256 CLR 1, 28 [57] (French CJ, Hayne, Kiefel and Nettle JJ).

5 It did so at paragraph (b) in the extract.

6 See the reference below n 49, to the spiral approach of Justice Susan Glazebrook.

7 Oliver Jones, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6<sup>th</sup> ed, 2013) 484.

novel proposition. In 2007 the Chief Justice of the Supreme Court of New South Wales, James Spigelman, said:

Law is a fashion industry. Over the last two or three decades the fashion in interpretation has changed from textualism to contextualism. Literal interpretation – a focus on the plain or ordinary meaning of particular words – is no longer in vogue. Purposive interpretation is what we do now ... In constitutional, statutory and contractual interpretation there does appear to have been a paradigm shift from text to context.<sup>8</sup>

If, as it would appear, *CIC Insurance* indicated that the modern approach is contextual, the question which needs to be asked is: what is this modern approach, which has been called contextualism? *CIC Insurance* continues to be endorsed by the High Court.<sup>9</sup> If we examine High Court cases decided since the *CIC Insurance* case, can we elaborate contextualism? Is it principled? These questions are important. The idea that statutory interpretation lacks overall coherence persists in various commentaries since the *CIC Insurance* decision.<sup>10</sup>

This article argues that contextualism is a distinct general approach and that it can be defined in a principled way.

The remainder of the article may be outlined. In Part II, I take up the task of analysing the modern approach. Six High Court cases are the focus of the analysis. They are: *Berenguel v Minister for Immigration and Citizenship*,<sup>11</sup> *Mansfield v The Queen*,<sup>12</sup> *Minister for Immigration and Border Protection v WZAPN*,<sup>13</sup> *Project Blue Sky Inc v Australian Broadcasting Authority*,<sup>14</sup> *Taylor v The Owners – Strata Plan No 11564*,<sup>15</sup> and *Victims Compensation Fund*

8 Chief Justice J J Spigelman, 'From Text to Context: Contemporary Contractual Interpretation' (Speech delivered at the Risky Business Conference, Sydney, 21 March 2007) 1

<[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman\\_speeches\\_2007.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_2007.pdf)>.

9 *SZTAL v Minister for Immigration and Border Protection* (2017) 347 ALR 405, 410 [14] n 14 (Kiefel CJ, Nettle and Gordon JJ); *AB v Western Australia* (2011) 244 CLR 390, 398 [10] n 29 (The Court). Contextualism is also the approach propounded by other apex courts. For the United Kingdom Supreme Court, see *R (Black) v Secretary of State for Justice* [2018] AC 215, 231 [36] (Baroness Hale). For the Supreme Court of the United States, see *Sturgeon v Frost*, 136 Sct 1061 (2016), 1070 (The Court). For the Supreme Court of New Zealand, see *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2015] 1 NZLR 1, 14 [33] (The Court). For the Court of Final Appeal of the Hong Kong Special Administrative Region, see *HKSAR v Tse Man Fei* [2016] FACC 1, [35] (Fok PJ), with whom Ma CJ at [1], Ribeiro J at [2] and Gleeson NPJ at [60] agreed.

10 Tom Campbell, 'Grounding Theories of Legal Interpretation' in Jeffrey Goldsworthy and Tom Campbell (eds), *Legal Interpretation in Democratic States* (Dartmouth Publishing, 2002) 29, 41–2; John Burrows, 'The Changing Approach to the Interpretation of Statutes' (2002) 33 *Victoria University of Wellington Law Review* 561, 561; Suzanne Corcoran, 'Theories of Statutory Interpretation' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 8, 8, 25; Mark Adler, *Clarity for Lawyers: Effective Legal Writing* (Law Society, 2<sup>nd</sup> ed, 2007) 144; Justice John Basten, 'Constitutional Dimensions of Statutory Interpretation' (Paper presented at the Constitutional Law Conference, Centre for Comparative Constitutional Studies, Melbourne Law School, 24 July 2015) 11. For American commentaries, see Morell E Mullins, 'Tools, Not Rules: The Heuristic Nature of Statutory Interpretation' (2003) 30 *Journal of Legislation* 1, 3–4.

11 (2010) 264 ALR 417.

12 (2012) 247 CLR 86.

13 (2015) 254 CLR 610.

14 (1998) 194 CLR 355.

15 (2014) 253 CLR 531.

*Corporation v Brown*.<sup>16</sup> These cases have been chosen for two reasons. First, as each was decided after *CIC Insurance*, they provide evidence of the modern approach. Second, each of the cases illustrates a different aspect of that approach. While a greater number of cases may have revealed further depth to contextualism, the number of cases analysed allows a concise, albeit simplified, account to be given.

In Part III, I go on to raise and respond to a number of potential objections to the claim that the High Court has established and maintained a coherent, general approach to interpretation based around contextualism.

In Part IV, I briefly conclude on the role of contextualism in statutory interpretation.

## II CLARIFYING CONTEXTUALISM: GENERAL PRINCIPLES

Upon analysis of the recent work of the High Court in the area of statutory interpretation, several general principles are apparent.

### A The Context in Its Widest Sense Is an Essential Consideration in All Cases; the Court Rejects Reading in Isolation: *Minister for Immigration and Border Protection v WZAPN*<sup>17</sup>

The most basic quality of contextualism is that it is not optional.<sup>18</sup> The High Court has asserted on a number of occasions that context is essential in reading legislation. In *CIC Insurance*, the High Court insisted that consideration of the context did not depend on the finding of an ambiguity in the provision in question read in isolation. The context is to be considered ‘in the first instance’ and ‘context’ is used here in its ‘widest sense’.<sup>19</sup> More recently, the High Court majority in *Independent Commission Against Corruption v Cunneen* described looking to the context as ‘essential’.<sup>20</sup>

The recent case of *WZAPN* illustrates the indispensable quality of context. Two appeals against refusals to grant protection visas were heard together. *WZAPN* was a stateless Faili Kurd born in Iran. The Independent Merits Reviewer (‘IMR’) found that, should he return to Iran, there was a real chance he would be detained for short periods when he failed to produce identification. In the other appeal, *WZARV*, the IMR accepted that the claimant would be

16 (2003) 77 ALJR 1797.

17 (2015) 254 CLR 610 (‘*WZAPN*’).

18 This is not surprising when one considers the theory of language which emphasises that meaning is connected with use: Joseph Campbell and Richard Campbell, ‘Why Statutory Interpretation Is Done as It Is Done’ (2014) 39 *Australian Bar Review* 1, 12–14. They contrast this with the presupposition that ‘words “contain” or “convey” a meaning’ (at 13) and with the misleading assumption that words contain a ‘core’ meaning (at 12). See also *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956, 2958 [5] (Lord Steyn): ‘The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it’.

19 *CIC Insurance* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

20 (2015) 256 CLR 1, 28 [57] (French CJ, Hayne, Kiefel and Nettle JJ).

interviewed at the airport upon his return to Sri Lanka and that it would be usual for such questioning to be completed in a matter of hours. In both cases the IMR found that the claimants failed to demonstrate that the frequency or length of detention, or the treatment he would receive whilst in detention, met the requirement, in section 91R(1)(b) of the *Migration Act 1958* (Cth), that the 'well-founded fear of being persecuted' which the *Convention Relating to the Status of Refugees*<sup>21</sup> speaks about 'involves serious harm':

- (1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

...

- (b) the persecution involves serious harm to the person; ...

Both claimants relied on an 'instance' of serious harm set out in paragraph (a) in the following subsection:

- (2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of serious harm for the purposes of that paragraph:

- (a) a threat to the person's life or liberty;  
 (b) significant physical harassment of the person;  
 (c) significant physical ill-treatment of the person;  
 (d) significant economic hardship that threatens the person's capacity to subsist;  
 (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;  
 (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

The claimants did not take the impossible position that paragraph (a) ought to be read, pure and simple, in isolation.<sup>22</sup> But their construction equated to the literal meaning of the paragraph read in isolation. The claimants put this argument: 'the text of s 91R(2)(a) indicates that no such evaluative exercise is required because a threat to liberty is to be regarded, of itself and without more, as an instance of serious harm'.<sup>23</sup> For support, they attempted to distance paragraph (a) from the general principle of 'serious harm' in subsection (1). It was argued that paragraph (a) included a threat to the person's life,<sup>24</sup> and other paragraphs in subsection (2) included an express qualitative element such as 'significant'.<sup>25</sup> In effect, they argued, subsection (2) enlarged the ordinary meaning of 'serious harm' by providing an 'instance'.<sup>26</sup> The claimants'

21 Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1(A)(2).

22 To do so would have left them practically without any interpretative arguments.

23 *WZAPN* (2015) 254 CLR 610, 627 [42] (French CJ, Kiefel, Bell and Keane JJ).

24 *Ibid.*

25 *Ibid* 628 [47] (French CJ, Kiefel, Bell and Keane JJ).

26 *Ibid.*

arguments were not without force. To a degree, the purpose of an ‘instance’ is to provide ‘a particular case’.<sup>27</sup>

However, the Court refused to accept the argument that paragraph (a) was an ‘instance’ separate from the general principle it was illustrating. It held that, like the concept of ‘serious harm’, which called for a ‘qualitative judgment’,<sup>28</sup> the application of section 91R(2)(a) ‘requires an evaluation of the likely circumstances of the loss of liberty feared by the claimant’.<sup>29</sup> Foremost amongst many contextual considerations lined up in support was the general principle for which section 91R(2)(a) was an instance – ‘serious harm’ in section 91R(1)(b). The Court agreed<sup>30</sup> with observations by Gummow J in an earlier case that the six paragraphs of section 91R(2) ‘all take their colour from the specification of “serious harm” in the opening words of the sub-section’.<sup>31</sup>

The case suggests that no statutory provision, not even an ‘instance’, can be safely read in isolation or semi-isolation. The context is to be comprehensively considered, and to focus on part of the relevant context is likely to lead to error.

### **B Context Is Layered; It Can Be Discretely and Sequentially Considered: *Victims Compensation Fund Corporation v Brown*<sup>32</sup>**

Contexts differ for each case. They are often messy. There have been calls for a ‘defined and defensible legal methodology’ in statutory interpretation,<sup>33</sup> such as this one:

The courts need to have strategies in place and a defined and defensible legal methodology to protect against the accusation that they are illegitimately imposing their own idiosyncratic values in the interpretation of legislation, completely removed from any real democratic endorsement. If they cannot do this, then in the medium to long term, they will diminish public respect for their neutrality as impartial appliers of the law, which would itself undermine rule of law values.<sup>34</sup>

Yet, in respect of the identification of indications of meaning, statutory interpretation does not lack a defined and defensible legal methodology in practice. The existence of such a methodology is well illustrated in a number of High Court cases,<sup>35</sup> including *Victims Compensation Fund Corporation v Brown* – a judgment of Heydon J concurred in by all four other members of the High Court – McHugh ACJ, Gummow, Kirby and Hayne JJ. The case was brought as a result of the first and second respondents being injured in the course of a home

27 One meaning of ‘instance’ in Bruce Moore (ed), *The Australian Oxford Dictionary* (Oxford University Press, 2<sup>nd</sup> ed, 2004).

28 *WZAPN* (2015) 254 CLR 610, 625 [35] (French CJ, Kiefel, Bell and Keane JJ).

29 *Ibid* 630 [52] (French CJ, Kiefel, Bell and Keane JJ).

30 *Ibid* 629 [50] (French CJ, Kiefel, Bell and Keane JJ).

31 *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 233 CLR 1, 9 [19].

32 (2003) 77 ALJR 1797.

33 See also Gina Curró and Michael Longo, ‘Educating Humpty Dumpty: Statutory Interpretation in the First Year of Australian Law’ (2014) 48 *Law Teacher* 321, 343.

34 Sir Philip Sales, ‘Modern Statutory Interpretation’ (2017) 38 *Statute Law Review* 125, 131.

35 See, eg, *Mansfield v The Queen* (2012) 247 CLR 86 (*‘Mansfield’*). The joint reasons (Hayne, Crennan, Kiefel and Bell JJ) proceeded by considering the following in this sequence: the provision in doubt at 96 [29]–[30]; the Act as a whole at 96–9 [31]–[43]; the legislative history at 99 [44]–[47]; the (alleged) wider context at 100 [48]–[50].

invasion. The assailant was later convicted of malicious wounding. The first and second respondents claimed compensation under the *Victims Support and Rehabilitation Act 1996* (NSW). 'Compensable injuries' were specified in a Table set out in Schedule 1 to the Act. Clause 5 of Schedule 1 provided:

The following applies to the compensable injury of shock:

- (a) Compensation is payable only if the symptoms and disability persist for more than 6 weeks ...

The first and second respondents both claimed for shock. However, while each had 'symptoms' of shock which persisted for six weeks, neither had a disability. The assessor and the Victims Compensation Tribunal took the view that 'and' in clause 5(a) ought to be read conjunctively. The District Court and the majority of the Court of Appeal held that it ought to be read disjunctively. Which of these views was correct was the issue which presented itself before the High Court.

Heydon J's reasoning progressed in four stages or steps. His Honour began by examining the provision in question, focusing on the ordinary meaning of the critical word 'and'. This supported the conjunctive construction of the phrase in question.<sup>36</sup>

The second stage in his reasoning was to move beyond the provision in doubt to the statutory context: other provisions of the Act, in particular, schedule 1 to the Act.<sup>37</sup> He considered the table in schedule 1 assigning amounts of compensation according to the number of weeks of shock. The use of 'and' in the table gave rise to arguments for both the conjunctive and disjunctive constructions.<sup>38</sup> In contrast, in clause 8 of the Schedule, Heydon J found strong support for the conjunctive construction. Here the drafter had used the expression 'symptoms *or* disability'.<sup>39</sup> Heydon J also agreed with comments of Spigelman CJ in the Court of Appeal about the Table, including that there was no reference to recovery for disability alone.<sup>40</sup>

The third stage in the survey took in the legislative history.<sup>41</sup> This history was in two parts. In the first, his Honour considered the pre-enacting legislative history. Here he considered the evolution of statutory compensation schemes for victims of crime. He found a 'tendency to ever more refinement'.<sup>42</sup> In the second part Heydon J examined the enacting history: a law reform report which led to the Bill (which became the Act) being introduced, and the second reading speech of the Minister responsible for the Bill.<sup>43</sup> His Honour concluded the examination of the third stage with the finding that 'the Act as a whole, and its background, point more to a conjunctive construction than a disjunctive construction'.<sup>44</sup>

36 *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797, 1799 [13].

37 *Ibid* 1799–800 [14]–[17].

38 *Ibid* 1799–800 [14].

39 *Ibid* 1800 [15] (emphasis added).

40 *Ibid* 1800 [16].

41 *Ibid* 1800–3 [17]–[28].

42 *Ibid* 1801 [22].

43 *Ibid* 1802–3 [24]–[27].

44 *Ibid* 1803 [28].

The fourth stage took in the wider context, beyond the Act as a whole and its legislative history. He considered the operational consequences of each construction, with a focus on the conjunctive construction. It was considered that it did not lead to harsh, irrational or anomalous outcomes. In making this judgment he took into account not only the caps and mechanisms imposed by the Act but also other Australian compensation legislation in recent times.<sup>45</sup>

The final stage reviewed the opposing arguments that had found support in the Court of Appeal.<sup>46</sup>

Heydon J concluded with the holding that, under clause 5(a), ‘the true construction of these words’ (‘symptoms and disability’) required both symptoms and disability to persist.<sup>47</sup>

A noteworthy, if unheralded, thing about this judgment, and others like it,<sup>48</sup> is the systematic and logical way the Court surveyed the context. As will be apparent from the above, Heydon J’s analysis ‘spiralled’ out from the provision in question to each contextual layer: the immediate statutory context; the remainder of the Act as a whole; the legislative history (successively the pre-enacting and enacting history) and finally taking in the wider context beyond the Act and its background.<sup>49</sup> This is no coincidence. The sequence was defined, each of the four main stages being headed up accordingly.<sup>50</sup>

Further, the sequence is defensible. By attending to the context in this way the Court’s reasoning was enhanced. The words of the provision were rightly emphasised: they constituted the starting point<sup>51</sup> and the end point.<sup>52</sup> The process facilitated the ready examination of each piece of the context. By arranging the pieces of the context this way, the reader could better see that a comprehensive examination of the legal context had been undertaken. The logical sequence, assisted by headings, also made the reasons more readable as well.

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45 Ibid 1803–4 [28]–[30].

46 Ibid 1804–5 [31]–[34].

47 Ibid 1805 [35].

48 See *Mansfield* (2012) 247 CLR 86, discussed above n 35. For examples of other courts following this spiral approach, see *Scott-Mackenzie v Bail* [2017] VSCA 108 and *Beadle v La Bianca* [2012] WASC 415.

49 This analysis draws on Justice Susan Glazebrook, ‘Filling the Gaps’ in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis NZ, 2004) 153, 169–76. Her Honour posits a ‘spiral’ approach to the identification of interpretative factors. The stages are: provision; Act as a whole; legislative history and wider context. Compare ‘the statutory text, context, and purpose’, an aphorism which is cited in many cases, for example, *Comcare v Martin* (2016) 258 CLR 467, 479 [42] (The Court). While useful as an aide-memoire, the aphorism is not as logical and easy to apply.

50 ‘Ordinary meaning’: *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797, 1799 [13]; ‘Textual aspects of the rest of the Act’: at 1799–800 [14]; ‘Background to the legislation’: at 1800 [17]; ‘The 1996 legislation’: at 1802 [26].

51 Ibid 1799 [13].

52 Ibid 1805 [35].

### C Contextualism Requires Close Attention to the Text: *Project Blue Sky Inc v Australian Broadcasting Authority*<sup>53</sup>

One of the most basic skills in handling contextual material is also one of the hardest to perfect in practice. The problem for judges lies in the nature of language, as Frankfurter pointed out: 'The difficulty is that the legislative ideas which laws embody are both explicit and immanent. And so the bottom problem is: what is below the surface of the words and yet fairly a part of them?'<sup>54</sup>

The High Court has described how the text is to be handled: with a 'close attention'.<sup>55</sup> This skill recalls the description by Justice Megarry of how the legal practitioner approaches law. According to him, the legal practitioner is like an orchid lover; he or she examines the facts and the law 'with a magnifying glass'.<sup>56</sup>

While all contextual material demands a close attention, this requirement has a particular application to the statute in question. A statute is different to many other pieces of writing. A parliamentary counsel has observed: 'The language of Acts is tight and spare, and every word will be assumed to have a purpose. So Acts can be approached only with an effort'.<sup>57</sup>

By giving the text close attention the interpreter is able to pick up on all the supports the drafter has laboured to provide. From the interpreter's perspective, they are the clues to ascertaining the intention of Parliament, the objective of statutory interpretation.<sup>58</sup> The presumed or imputed intention of Parliament is determined by identifying objective indications of meaning in the context and evaluating which of the rival contentions as to meaning (constructions) commands the greater support from those indications. That construction is then attributed to the Parliament and is considered the legal meaning.<sup>59</sup>

However, giving a statute close attention is more difficult than it seems, because when we read non-legal texts we are often reading only for the main

53 (1998) 194 CLR 355 ('*Project Blue Sky*').

54 Justice Felix Frankfurter, 'Some Reflections on the Reading of Statutes' (1947) 47 *Columbia Law Review* 527, 533.

55 *Muslimin v The Queen* (2010) 240 CLR 470, 475 [4] (The Court).

56 R E Megarry, 'Law as Taught and Law as Practised' (1966) 9 *Journal of the Society of Public Teachers of Law* 176, 178.

57 Geoffrey Bowman, 'The Art of Legislative Drafting' (2005) 7 *European Journal of Law Reform* 3, 7.

58 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 411 [88] (Kiefel J); *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ).

59 On the objectivity of the process, see *Singh v Commonwealth* (2004) 222 CLR 322, 335–6 [19] (Gleeson CJ), citing *Wilson v Anderson* (2002) 213 CLR 401, 417–19 [7]–[10]; *R v Secretary of State for the Environment, Transport and the Regions; Ex parte Spath Holme Ltd* [2001] 2 AC 349, 396 (Lord Nicholls). See also *Lacey v A-G (Qld)* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), where it is pointed out that intention in law is not an objective mental state of the legislature either. On intention being attributed see *Zheng v Cai* (2009) 239 CLR 446, 455 [27]–[28] (The Court); *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, 556 [65] (Gageler and Keane JJ); Justice Stephen Gageler, 'Legislative Intention' (2015) 41 *Monash University Law Review* 1, 7. On intention being a reasonable imputation see also *R v Secretary of State for the Environment, Transport and the Regions; Ex parte Spath Holme Ltd* [2001] 2 AC 349, 396 (Lord Nicholls).

idea.<sup>60</sup> The subtleties there do not matter to us. With legislation they do. Everything down to the finest detail potentially matters. Bland or common words are easily glossed.

*Project Blue Sky* is a cautionary tale. The case involved a challenge to the making of a broadcasting standard. The standard preferred Australian television programs. The standard was purportedly made under sections 122 and 158(j) of the *Broadcasting Services Act 1992* (Cth). Section 158(j) set out the function of ‘develop[ing] program standards relating to broadcasting in Australia’. Section 122 set out a specific function in relation to television programs:

- (1) The ABA must, by notice in writing:
  - (a) determine standards that are to be observed by commercial television broadcasting licensees; and
  - ...
- (2) Standards under subsection (1) for commercial television broadcasting licensees are to relate to:
  - ...
  - (b) the Australian content of programs.
  - ...
- (4) Standards must not be inconsistent with this Act or the regulations.

The appellants, companies involved in the New Zealand film industry, complained that clause 9 of the impugned standard conflicted with section 160(d) of the same Act. This was because there was a free trade, anti-discrimination international agreement between Australia and New Zealand: the *Australia New Zealand Closer Economic Relations Trade Agreement* and the *Trade in Services Protocol*.<sup>61</sup> Section 160 read:

The ABA is to perform its functions in a manner consistent with:

- (a) the objects of this Act and the regulatory policy described in section 4; and
- (b) any general policies of the Government notified by the Minister under section 161; and
- (c) any directions given by the Minister in accordance with this Act; and
- (d) Australia’s obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country.

For present purposes, the issue was the scope or legal meaning of section 122 in the light of the directive in section 160(d). Before the case reached the High Court, the meaning of section 122 was considered by the Federal Court at first instance and on appeal to the Full Court. The majority of the Full Court (Wilcox

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60 James Boyd White, ‘The Study of Law as an Intellectual Activity: A Talk to Entering Students’ in James Boyd White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press, 1985) 49, 57.

61 *Project Blue Sky* (1998) 194 CLR 355, 380 [63]–[65] (McHugh, Gummow, Kirby and Hayne JJ).

and Finn JJ) did not discuss the words 'relate to' in section 122. But they appear to have assumed it meant 'concerned only with'<sup>62</sup> for they said:

The only standard the ABA could set, consistent with the Protocol, would be one that which allowed for there to be no Australian content programs at all, provided that New Zealand programs were broadcast in lieu of programs having Australian content.<sup>63</sup>

In their view there was actual conflict between sections 122(2)(b) and 160(d).<sup>64</sup> Colourfully, they commented: 'The ABA has been put in the same position as the man instructed to be faithful to his wife and love her above all others but to accord her sister no less favourable treatment'.<sup>65</sup>

The Federal Court majority favoured section 122, on the basis that it was a special provision, whereas section 160(d) was a mere general provision.<sup>66</sup> This meant that the order of the primary judge declaring the standard invalid ought to be set aside.<sup>67</sup>

The filmmakers appealed to the High Court. Magnifying glass in hand, four of the judges (McHugh, Gummow, Kirby and Hayne JJ) zeroed in on the words 'relate to' in section 122. What concerned them was the Federal Court majority's claim that, under section 122, 'the ABA is to provide for preferential treatment of Australian programs'.<sup>68</sup> But, the judges of the High Court retorted, 'Parliament has done no such thing'. Pulling out the words of section 122, they continued: '[Parliament] has said that the ABA must determine standards that "relate to ... the Australian content of programs"'.<sup>69</sup>

They added that the words 'relate to' are 'extremely wide'. The judges took the meaning to be: 'require the existence of a connection or association'.<sup>70</sup> They therefore held it merely required the existence of a *connection* between the content of the Standard and the Australian content of programs. Crucially, a standard could deal with matters other than the Australian content of programs. Therefore, they held, the injunction of section 160(d), and a standard under sections 158(j) and 122, could both operate together: 'There is nothing in the Act to prevent the ABA from utilising the power conferred by s 158(j) to determine program standards in a general way and at the same time carry out its obligation to determine the Australian content of programs'.<sup>71</sup>

The Court clarified the requirement of section 160(d): it only required the standard not to discriminate against persons of New Zealand nationality or origin or the services that they provide.<sup>72</sup> The Court acknowledged that one of the objects of the Act was biased to Australia: 'to promote the role of broadcasting

62 *The Australian Oxford Dictionary* (Oxford University Press, 2<sup>nd</sup> ed, 2004) gives one meaning of 'relate' as '4. ... concern'.

63 *Australian Broadcasting Authority v Project Blue Sky Inc* (1996) 71 FCR 465, 482.

64 *Ibid* 483.

65 *Ibid*.

66 *Ibid* 484.

67 *Ibid*.

68 *Ibid* 483.

69 *Project Blue Sky* (1998) 194 CLR 355, 387 [87] (McHugh, Gummow, Kirby and Hayne JJ).

70 *Ibid*. This equated to the third meaning of 'relate' in *The Australian Oxford Dictionary*, above n 62.

71 *Project Blue Sky* (1998) 194 CLR 355, 387 [87].

72 *Ibid* 388 [89] (McHugh, Gummow, Kirby and Hayne JJ).

services in developing and reflecting a sense of Australian identity, character and cultural diversity': section 3(e). But, to prove their point, they gave a helpful example to illustrate how the two provisions (sections 122 and 160) could work together harmoniously, consistent with this object:

the ABA could determine a standard that required that a fixed percentage of programs broadcast during specified hours should be either Australian or New Zealand programs or that Australian and New Zealand programs should each be given a fixed percentage of viewing time.<sup>73</sup>

In short, close attention to the words 'relate to' in section 122 led the High Court to find a way to give both provisions work to do. With this knowledge the judges concluded on the scope of section 122 with respect to services provided by persons of New Zealand nationality or origin: 'The ABA has complete authority to make a standard that relates to the Australian content of programs as long as the standard does not discriminate against persons of New Zealand nationality or origin or the services that they provide'.<sup>74</sup>

### **D Contextual Material Is Critically Analysed Before Being Assigned Any Weight: *Mansfield v The Queen***<sup>75</sup>

What puzzles many commentators is how the largely 'frail guidelines'<sup>76</sup> of the law of interpretation function as law. If each side is putting up arguments based on indeterminate 'rules', how are judicial decisions made? Commentators make all sorts of suppositions about how the decisions are made, including that judges simply select the guidelines which will justify the result they desire.<sup>77</sup>

More enlightened commentators recognise that the contest of meaning is determined by 'the interpreter [assessing] the respective weights of the relevant interpretative factors and [determining] which of the opposing constructions they favour on balance'.<sup>78</sup> But the further question arises: how does this assessing occur? By what criteria? Is it still ultimately a matter of judicial subjectivism?

A response which goes a long way to explaining the judicial assessment process is that the weighing is the result of critical analysis of the argument. It is a skill that is illustrated in the case of *Mansfield*. The appellants were charged with conspiracy to commit a contravention of section 1002G of the *Corporations Act 2001* (Cth). *Mansfield* was also charged with committing the substantive offence. The offence, colloquially known as 'insider trading', applied to a person (an insider) who possesses 'information that is not generally available'.<sup>79</sup> Section 1002G(1) was the key provision for interpretation purposes (emphasis in original):

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73 Ibid 388 [90] (McHugh, Gummow, Kirby and Hayne JJ).

74 Ibid 388 [89] (McHugh, Gummow, Kirby and Hayne JJ). Their Honours further held that the standard was not invalidated by the breach of section 160(d): at 392–3 [99]–[100].

75 (2012) 247 CLR 86.

76 Sir Garfield Barwick, 'Foreword' in D C Pearce, *Statutory Interpretation in Australia* (Butterworths, 1974) vii, vii.

77 Jones, above n 7, 505.

78 Ibid 486. See also Frankfurter, above n 54, 527–8.

79 *Corporations Act 2001* (Cth) s 1002G(1)(a).

Subject to this Division, where:

- (a) a person (in this section called the insider) possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate; and
- (b) the person knows, or ought reasonably to know, that:
  - (i) the information is not generally available; and
  - (ii) if it were generally available, it might have a material effect on the price or value of those securities;

the following subsections apply.

It was alleged that the appellants were told information by the managing director of a listed public company (AdultShop) about the expected profit and turnover of the company and about a particular shareholding in the company which was not generally available. It was further alleged that, knowing the matters revealed in the conversations, the appellants bought or procured the purchase of AdultShop shares and thus contravened section 1002G(2).

At the trial the defendants submitted that there was no case to answer as the prosecution had not established that each had possessed 'information'. The trial judge held that the relevant provisions were contravened only if the 'information' alleged to be not generally available was a 'factual reality'. As evidence was led for one statement that it was false, and as no evidence was led for the other statements that they were true, the trial judge entered judgments of acquittal. The Court of Appeal, by majority, allowed the appeal. The issue before the High Court was whether 'information' included false information (the wide construction). The appellants argued that it did not include such information (the narrow construction). The Court unanimously agreed with the wider construction.<sup>80</sup>

The technique of the Court (both in the joint judgment and in that of Heydon J) was to set out the appellants' arguments under three broad headings, critically examine their cogency, conclude on their weight, and finally determine which construction was preferable.

The appellants' central submission was that the word 'information' takes its ordinary meaning. The appellants cited one of the entries for 'information' in the *Oxford English Dictionary*: 'Knowledge communicated concerning some particular *fact*, subject, or event'.<sup>81</sup> Though the definition referred to 'fact', the joint judgment pointed out that the other elements of the definition (particularly 'subject') did not make a distinction between truth and falsity.<sup>82</sup> The Court effectively found that the submission as to ordinary meaning lacked cogent evidence. This was because the 'evidence' supplied by the *Oxford English Dictionary* was equivocal and therefore the ordinary meaning did not point to the appellants' construction.<sup>83</sup>

80 *Mansfield* (2012) 247 CLR 86, 96 [28] (Hayne, Crennan, Kiefel and Bell JJ), 107 [77] (Heydon J).

81 *Ibid* 95 [26] (Hayne, Crennan, Kiefel and Bell JJ) (emphasis in original).

82 *Ibid* 96 [30] (Hayne, Crennan, Kiefel and Bell JJ).

83 Heydon J also relied on case law support for the ordinary meaning (*Mansfield* (2012) 247 CLR 86, 102 [59]–[61]) and took judicial notice of the ordinary meaning of 'knowledge' and 'information': at 103 [62]–[64].

The second principal argument of the appellants was that their construction was supported by the legislative scheme which dealt with insider trading. The appellants argued that the market misconduct provisions of the *Corporations Act 2001* (Cth) supported their argument that ‘information’ excludes false information. This was said to be because the person supplying the information (here, Mr Day) would be guilty of engaging in misleading or deceptive conduct. The High Court found that this submission lacked logic and was not supported by legislative practice. It was pointed out that the conveying of false information may lead to two offences being committed; one applying to the supplier and the other to the receiver prohibiting conduct by persons in possession of inside information.<sup>84</sup> Heydon J similarly pointed out the fallacy of assuming ‘that legislation which deals with a particular problem is to be read as attacking that problem in only one way, to the exclusion of all other concurrent possibilities’.<sup>85</sup>

The appellants further submitted that ‘not generally available’ in section 1002G(1) was a reference to confidential information that could be said to belong to someone, and that this implied information that conveyed a fact and not a fiction. The appellants’ purposive argument relied on a passage in a law reform report by the Committee of Inquiry into the Australian Financial System, which had been approved in a report of the Standing Committee on Legal and Constitutional Affairs of the House of Representatives (*‘Griffiths Report’*). The passage was: ‘Investor confidence ... depends importantly on the prevention of the improper use of confidential information’.<sup>86</sup> But the Court was not persuaded by this argument. Again the problem was a lack of cogent evidence. This is because, immediately before this quoted passage, the Campbell Committee had expressed a broader purpose: ‘ensuring “that the securities market operates *freely and fairly*, with all participants having equal access to relevant information.”’<sup>87</sup> This broader purpose supported the wider construction of ‘information’, since the market would not operate freely or fairly if the appellants acted upon false information.<sup>88</sup>

The third of the principal arguments advanced by one of the appellants (Mansfield) was that ‘the international regulatory approach to insider trading is consistent only with the appellant’s primary submission that “information” necessarily means a matter of fact or precise circumstances as opposed to falsity’. The patina of evidence supplied in support by counsel for Mansfield was a reference in the *Griffiths Report* to ‘the importance of [the] Australian regulatory framework being viewed in the context of the international regulatory framework’. Hayne, Crennan, Kiefel and Bell JJ refused to give this submission any weight, saying it ‘does not assist in the resolution of the question of

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84 Ibid 98 [41] (Hayne, Crennan, Kiefel and Bell JJ).

85 Ibid 104 [68].

86 Committee of Inquiry into the Australian Financial System, Parliament of Australia, *Australian Financial System: Final Report of the Committee of Inquiry* (1981) 382 [21.118] (*‘Campbell Report’*), cited in *Mansfield* (2012) 247 CLR 86, 99 [45] (Hayne, Crennan, Kiefel and Bell JJ); 105–6 [71] (Heydon J).

87 *Campbell Report*, above n 86, 382 [21.119], cited in *Mansfield* (2012) 247 CLR 86, 99 [45] (Hayne, Crennan, Kiefel and Bell JJ) (emphasis added), 105–6 [71] (Heydon J).

88 *Mansfield* (2012) 247 CLR 86, 99 [47] (Hayne, Crennan, Kiefel and Bell JJ).

construction raised by these appeals for determination in this Court'.<sup>89</sup> This was because there was no evidence that the Commonwealth Parliament had based the legislation in question on any particular overseas model. Therefore, the alleged interpretative factor was not derived from any interpretative criterion of the law and hence was not part of the legal and admissible context. Heydon J took a similar view, describing the submission as founded on 'an invalid approach to the construction of Australian legislation'.<sup>90</sup>

In summary, the Court used various tools of critical thinking to assess the appellants' arguments. The argument from ordinary meaning was subject to conflicting evidence. The argument from the other provisions in the Act lacked logic and was contrary to legislative practice. The argument from the legislative history was inaccurate; the law reform material supported the opposing construction. And the argument from international practice lacked relevance for the task at hand. We therefore see the Court employing a variety of critical thinking tools: relevance, factual accuracy, evidence and logic.

### E Contextualism Does Not Permit Weight to Be Given to a Statement of Meaning in Extrinsic Materials: *Berenguel v Minister for Immigration and Citizenship*<sup>91</sup>

Not surprisingly, extrinsic materials have been at the heart of contextualism. The *CIC Insurance* case itself followed a line of English cases going back to the 19<sup>th</sup> century which had allowed an exception to the exclusionary rule that prohibited reliance on extrinsic parliamentary materials.<sup>92</sup> Those common law authorities had allowed reference to law reform reports setting out the mischief.<sup>93</sup>

In *Berenguel* the plaintiff challenged the refusal of the Minister to grant a skilled (residence) visa, a criterion of which was that the applicant has 'vocational English'.<sup>94</sup> Vocational English was relevantly defined in regulation 1.15B(5) of the *Migration Regulations 1994* (Cth) as:

If a person applies for a General Skilled Migration visa, the person has ***vocational English*** if the person satisfies the Minister that the person has achieved, *in a test conducted not more than 2 years before the day on which the application was lodged*:

- (a) an IELTS test score of at least 5 for each of the 4 test components of speaking, reading, writing and listening; ...<sup>95</sup>

89 Ibid 100 [50] (Hayne, Crennan, Kiefel and Bell JJ).

90 Ibid 106 [75].

91 (2010) 84 ALJR 251 ('*Berenguel*').

92 (1997) 187 CLR 384, 408–9 (Brennan CJ, Dawson, Toohey and Gummow JJ). The case directly relied on (at 408 n 46) was *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg Aktiengesellschaft* [1975] AC 591.

93 For a general discussion of the *CIC Insurance* case and extrinsic parliamentary materials, see Matthew T Stubbs, 'From Foreign Circumstances to First Instance Considerations: Extrinsic Material and the Law of Statutory Interpretation' (2006) 34 *Federal Law Review* 103, 115–6; Jacinta Dharmananda, 'Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation' (2014) 42 *Federal Law Review* 333.

94 *Migration Regulations 1994* (Cth) cl 885.213.

95 Emphasis added (in italics and not in bold).

At the time of the application (21 April 2008) the applicant had booked but not sat or passed the IELTS test. Later, on 10 May 2008, he sat the test. The applicant received the test results on 7 June 2008 (he passed). The decision to refuse the visa application was made on 12 December 2008.

The critical words of regulation 1.15B were: ‘not more than 2 years before the day on which the application was lodged’. The Minister’s construction was that the test score must have been achieved two years prior to the time of application.<sup>96</sup> In other words, the two year period *ended* on the day of application. An alternative construction favourable to the applicant was ‘that the test [had to be] conducted no earlier than two years before the application was lodged’.<sup>97</sup> According to this construction, the regulation set the *earliest time* for the test. The Court considered various indications for each of the competing constructions before preferring the applicant’s construction.<sup>98</sup>

What is presently worth highlighting is the way in which the Explanatory Statement was treated. This is the Statement that accompanied the amendment to the *Migration Regulations* inserting regulation 1.15B(5). The Statement read:

*The effect of this amendment* is that applicants for a new General Skilled Migration visa may establish that they have vocational English, if required to do so to satisfy a criterion for grant of the relevant visa, on the basis of a test taken within the previous two years (rather than the previous 12 months for applicants required to have vocational English under other current regulations).<sup>99</sup>

On its face the Explanatory Statement set out the intended effect of the regulation. To use the words of Mason P in *Harrison v Melhem*,<sup>100</sup> the Statement was ‘a statement directly addressing the intended meaning of the provision that is in the course of being enacted’.<sup>101</sup> In short, it was a ‘statement of meaning’,<sup>102</sup> also called a ‘statement of [the Minister’s] intention’.<sup>103</sup> This was so because it stated that ‘the effect of this amendment’ is that for ‘applicants’ the test must have been ‘taken within the previous two years’. This would appear to be a reference to within two years of the application. The intended effect put in the Statement matched the Minister’s construction.

Despite this alignment, the High Court (constituted by French CJ, Gummow and Crennan JJ) studiously did not give weight to the Statement *as a statement of meaning*. But the Court did not ignore the Statement, as a textualist might.<sup>104</sup> The Statement assisted the Court in inferring a legislative purpose. Indeed, the purpose it found favoured *the applicant*: ‘The passage supports the inference that the purpose of requiring an applicant to undergo a language test is to establish

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96 *Berenguel* (2010) 84 ALJR 251, 255 [22].

97 *Ibid* 255 [25].

98 *Ibid* 255 [26].

99 *Ibid* 254 [21] (emphasis added).

100 (2008) 72 NSWLR 380.

101 *Ibid* 401 [172].

102 *Ibid* 399 [162] (Mason P).

103 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 525 [70] (French CJ).

104 See discussion below at Part III(A).

that the applicant currently has an appropriate standard of English competency'.<sup>105</sup>

The significance of the case for contextualism is the way the Court implicitly rejected giving weight to 'answers' in the form of statements of intended meaning or effect set out in extrinsic parliamentary materials. The context, we gather from the case, supplies aids to solving interpretative problems, not answers. Since an 'answer' is, by definition, not part of the 'the process of construction'<sup>106</sup> it cannot be a contextual aid. To give weight to an executive view would also risk violating the separation of powers.<sup>107</sup>

The Court's approach to the Explanatory Statement is consistent with the orthodox view relating to the proper use of extrinsic parliamentary materials, which is that their use is restricted to deriving the mischief or purpose or the surrounding circumstances.<sup>108</sup>

The High Court's approach is to be contrasted with *Pepper v Hart*.<sup>109</sup> In that case a majority of the House of Lords not only gave weight to an extrinsic statement directly addressing the intended meaning, they gave it determinative weight.<sup>110</sup>

## F Contextualism Is Text-Based: *Taylor v The Owners – Strata Plan No 11564*<sup>111</sup>

Contextualism is an approach to interpretation that requires regard to all materials and factors in the legal context of a provision in doubt, including of course that supplied by the provision in doubt. But this does not mean that all indications of meaning are equal in weight. As Bell and Engle say: 'English law

105 *Berenguel* (2010) 84 ALJR 251, 254–5 [21] (French CJ, Gummow and Crennan JJ).

106 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232, 256 [33] (French CJ, Kiefel, Bell and Keane JJ).

107 For a comparable case rejecting executive-made regulations as an interpretative aid, see *Dietman v Brennan-Kuss* (2015) 123 SASR 24, 38 [45] (Kourakis CJ), with whom Bampton J at 40 [55] and Muecke DCJ at 40 [56] agreed.

108 The orthodox view was propounded by the New South Wales Court of Appeal in *Harrison v Melhem* (2008) 72 NSWLR 380, 401 [172] (Mason P), with whom Spigelman CJ at 382 [1], 384 [12] and Beazley JA at 403 [191] generally agreed, and Giles JA at 403 [192] agreed. It has been followed by other appeal courts: *Hauveliuk v Furler* (2012) 259 FLR 28, 38 [30] (The Court); *BGM16 v Minister for Immigration and Border Protection* (2017) 252 FCR 97, 119 [103] (Mortimer and Wigney JJ). A similar holding was given in *R v Abdulla* (2005) 93 SASR 208, 226 [75] (Besanko J). A judicial query about the orthodox view was expressed in *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211, 217 [27] (Basten JA). For a critical analysis of the orthodox view, see Jeffrey Barnes, 'Statements of Meaning in Parliamentary Debates: Revisiting *Harrison v Melhem*' [2018] *University of New South Wales Law Journal Forum* (forthcoming).

109 [1993] AC 593.

110 *Ibid* 642 (Lord Browne-Wilkinson), with whom Lord Keith at 616, Lord Bridge at 617, Lord Griffith at 617, Lord Ackner at 619 and Lord Oliver at 619 agreed. See at 635 where Lord Browne-Wilkinson rejected the distinction between the mischief and the (subjective) intention of Parliament in enacting the legislation. *Pepper v Hart* has been severely criticised by a number of commentators including J H Baker, 'Statutory Interpretation and Parliamentary Intention' (1993) 52 *Cambridge Law Journal* 353; Lord Johan Steyn, '*Pepper v Hart*; A Re-examination' (2001) 21 *Oxford Journal of Legal Studies* 59; Aileen Kavanagh, '*Pepper v Hart* and Matters of Constitutional Principle' (2005) 121 *Law Quarterly Review* 98; Jones, above n 7, 566.

111 (2014) 253 CLR 531 ('*Taylor*').

takes the view that [the statutory text and the intention of Parliament] are closely connected, but that primacy is to be given to the text in which the intention of Parliament has been expressed'.<sup>112</sup>

Further, the High Court has observed that the text of the provision in question<sup>113</sup> constitutes a limit: 'Purposive construction does not justify expanding the scope of a criminal offence beyond its textual limits'.<sup>114</sup>

However, the notion of a textual 'limit' should not be pressed too far. It does not mean that, *independent of interpretation*, a text has a limit, as if for instance the ordinary meanings of the text read in isolation are the only choices for interpreters. Strained (non-grammatical) readings are possible.<sup>115</sup> The meaning of a text is ultimately what the interpreter finds to be the presumed intention. As judicially observed, 'Parliament can give a word any meaning it wishes'.<sup>116</sup>

However, the words still matter – in an indefinable way. This is because an interpreter strives to find an interpretation that is an interpretation *of those words*. As the legal philosopher, Joseph Raz says, 'every interpretation is of an object'.<sup>117</sup> Or as put in recent text, '[w]hen we speak of context and purpose, we are not leaving the text behind: we refer to the context and purpose *of the text*'.<sup>118</sup>

The apparent indefinability of the general limit imposed by statutory words is reflected in the general way members of the High Court and other senior judges have expressed the limit: 'It is the words of the statute that ultimately govern';<sup>119</sup> 'inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is *reasonably open* and more closely conforms to the legislative intent';<sup>120</sup> and '[c]onstruction must be text based'.<sup>121</sup>

Only general guides are available to assist in determining whether a construction is reasonably open or text-based, such as whether an insertion is 'too big, or too much at variance with the language in fact used by the legislature'.<sup>122</sup> Another guide that is frequently cited is that put by McHugh J: 'If the legislature uses language which covers only one state of affairs, a court cannot legitimately

112 John Bell and Sir George Engle, *Statutory Interpretation* (Oxford University Press, 3<sup>rd</sup> ed, 2005) 22.

113 It is not sufficient to say that *the statutory scheme* imposes a textual limit: *Taylor* (2014) 253 CLR 531, 549 [39] (French CJ, Crennan and Bell JJ).

114 *Milne v The Queen* (2014) 252 CLR 149, 164 [38] (The Court).

115 *Momcilovic v The Queen* (2011) 245 CLR 1, 45 [40] (French CJ); *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, 651 [9] (French CJ and Bell J).

116 *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287, 289 (Wilcox J).

117 Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009) 226.

118 Lisa Burton Crawford et al, *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2017) 241 (emphasis in original).

119 *Weiss v The Queen* (2005) 224 CLR 300, 305 [9] (The Court).

120 *CIC Insurance* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (emphasis added) (citations omitted).

121 *R v Young* (1999) 46 NSWLR 681, 687 [12] (Spigelman CJ).

122 *Western Bank Ltd v Schindler* [1977] Ch 1, 18 (Scarman LJ), cited by Lord Nicholls of Birkenhead in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 592, and cited with approval in *Taylor* (2014) 253 CLR 531, 548 [38] (French CJ, Crennan and Bell JJ).

construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances'.<sup>123</sup>

Judges are also constrained by the separation of powers<sup>124</sup> and more generally by 'a sense of responsibility and of the limits of the judicial office'.<sup>125</sup> At bottom, statutory interpretation is controlled by constitutional principle.

Of course, the difficulties in enforcing the textual 'limit' are not always encountered. For instance, they are not faced if the contest is between two grammatical readings. But difficulties were encountered in the *Taylor* case. The appellant's husband had been killed when an awning outside a shop collapsed on him. She took proceedings in the Supreme Court of New South Wales, claiming damages under the *Compensation to Relatives Act 1897* (NSW). The central interpretative issue was the meaning of section 12(2) of the *Civil Liability Act 2002* (NSW). Section 12 provided:

- (1) This section applies to an award of damages:
  - (a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or
  - (b) for future economic loss due to the deprivation or impairment of earning capacity, or
  - (c) for the loss of expectation of financial support.
- (2) In the case of any such award, the court is to disregard the amount (if any) by which the claimant's gross weekly earnings would (but for the injury or death) have exceeded an amount that is 3 times the amount of average weekly earnings at the date of the award.

The critical words in subsection (2) were 'the claimant's gross weekly earnings'. This issue arose as it was accepted that, had he lived, Mr Taylor would have earned income substantially in excess of the 'cap' set out in the subsection. Mrs Taylor argued that 'the claimant's gross weekly earnings' referred to the person who makes or is entitled to make a claim, that is, *her* earnings. The respondents put various opposing constructions including: that 'claimant' meant 'the impaired person';<sup>126</sup> that the words 'or deceased person's' ought to be implied in the text after 'claimant's';<sup>127</sup> and that the words 'the claimant's gross weekly earnings' meant 'the gross weekly earnings on which the claimant relies'.<sup>128</sup>

Reasons for judgment were delivered by French CJ, Crennan and Bell JJ (jointly) and by Gageler and Keane JJ (jointly). The latter (who formed the minority on the result) tended to agree with French CJ, Crennan and Bell JJ's rejection of the construction that would have implied 'or deceased person's' in

123 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 113 (McHugh J), cited with approval in *Taylor* (2014) 253 CLR 531, 549 [39] (French CJ, Crennan and Bell JJ).

124 *Taylor* (2014) 253 CLR 531, 549 [40] (French CJ, Crennan and Bell JJ).

125 Justice Frank Callaway, 'Judges and Statutes' [2005] (Winter) *Bar News: The Journal of the NSW Bar Association* 25, 25 <[http://archive.nswbar.asn.au/docs/resources/publications/bn/bn\\_winter05.pdf](http://archive.nswbar.asn.au/docs/resources/publications/bn/bn_winter05.pdf)>.

126 *Taylor* (2014) 253 CLR 531, 546 [30] (French CJ, Crennan and Bell JJ).

127 *Ibid* 546 [31] (French CJ, Crennan and Bell JJ). This construction had been adopted by the majority of the Court of Appeal of the Supreme Court of New South Wales, extracted at 545 [26].

128 *Ibid* 546 [33] (French CJ, Crennan and Bell JJ) (emphasis removed).

the provision.<sup>129</sup> The minority settled on the third-mentioned construction – that the words ‘the claimant’s gross weekly earnings’ ought to be read as ‘the gross weekly earnings on which the claimant relies in the claim for damages that is the subject of an award of damages’.<sup>130</sup> In regard to this construction, the majority differed. French CJ, Crennan and Bell JJ held that it ‘cannot be reconciled with the language that the Parliament has enacted’, that is, ‘the claimant’s gross weekly earnings’ in section 12(2).<sup>131</sup>

The majority explained their decision by comparing the respondents’ constructions with the text. The minority explained their conclusion by including a reference to the claimant in their construction (a feature that was missing from the Court of Appeal’s construction). Although the members of the High Court differed on the interpretative outcome, each showed how the construction they preferred related to the text in question and was in their view ultimately text-based.

### III CROSS-EXAMINING CONTEXTUALISM

Having argued that contextualism may be defined in a principled way, I now consider arguments that might be made in opposition to this thesis. A brief response is made to each potential objection.

#### A ‘Textualism, Rather than Contextualism, Has Been Propounded in Recent Times by the High Court – Witness the 2009 *Alcan* Case’

It is a misconception that the High Court strayed from contextualism in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*.<sup>132</sup> The Court’s practice in that case and other cases since *CIC Insurance* is more consistent with contextualism than the narrower general approach of textualism.<sup>133</sup>

Textualism is often associated with the work and writings of Justice Antonin Scalia of the United States Supreme Court. With Bryan Garner, he wrote:

Both your authors are textualists: We look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject

129 Ibid 557 [67]. Gageler and Keane JJ described it as a ‘very strained construction’.

130 Ibid 557 [70].

131 Ibid 550 [41].

132 (2009) 239 CLR 27 (*Alcan*’).

133 This is not to deny of course that contextualism and textualism overlap. An instance of this is the text-based principle of contextualism, considered above, Part II(F). Scalia and Garner opine that: ‘Textualism, in its purest form, begins and ends with what the text says and fairly implies’: Justice Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012) 16. Compare:

‘This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text’. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials.

Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.

*Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) (citations omitted).

*judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair reading's anticipated consequences.*<sup>134</sup>

Compare Australian authorities that are consistent with contextualism. Appropriate reference may be had to extrinsic sources (including parliamentary materials) in the process of inferring the legislative purpose.<sup>135</sup> And it is uncontroversial that regard may be had to the consequences (especially any adverse consequences) of a construction that is contended for.<sup>136</sup>

However, it is accepted that, on the face of some general statements in the *Alcan* case, the High Court could be taken as presenting a different approach to interpretation; an approach that tended towards textualism. In this case, Hayne, Heydon, Crennan and Kiefel JJ, with whom French CJ agreed,<sup>137</sup> propounded:

This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.<sup>138</sup>

The statement was puzzling in certain respects.<sup>139</sup> A query one may have with the statement is with the idea that context beyond the provision 'may' be required. On one reading this is contrary to the principle that the context in its widest sense is an essential consideration.<sup>140</sup> On the other hand, saying that the meaning 'may require' consideration of the context might have been intended, unexceptionally, to flag that, *if* wider contextual material is available, then consideration of that material would be required. Another query is with the notion that historical and extrinsic materials 'cannot be relied on to displace the clear meaning of the text'. On its face this is contrary to contextualism, since clarity is a condition reached *after* the context is examined.

Regardless, *Alcan* was not, or at least is not now, a threat to contextualism. The reasoning in the case itself is consistent with contextualism. The case concerned a disputed assessment of stamp duty. The assessment related to two transactions by which Alcan acquired 100 per cent of the shares in Gove Aluminium Ltd ('GAL'). The dispute turned on the assessability of options to

134 Scalia and Garner, above n 133, xxvii (emphasis added). On extra-textually derived purposes, the authors also reject the use of legislative history to find indications of statutory purpose: at 376. In regard to consequences, they subscribe to an absurdity doctrine (at 234–9), but it does not resemble the Anglo-Australian doctrine, for which see Jones, above n 7, 783; Pearce and Geddes, above n 2, 79–81 [2.38]–[2.39]; Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles* (Thomson Reuters, 2014) 32–4 [1.120].

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

136 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ); *CTM v The Queen* (2008) 236 CLR 440, 509 (Heydon J).

137 *Alcan* (2009) 239 CLR 27, 30 [1].

138 *Ibid* 46–7 [47] (citations omitted).

139 Justice Susan Kenny, 'Constitutional Role of the Judge: Statutory Interpretation' (2014) 1 *Judicial College of Victoria Online Journal* 4, 10, 11  
<[http://www.judicialcollege.vic.edu.au/sites/default/files/jcv\\_online\\_journal\\_vol01\\_0.pdf](http://www.judicialcollege.vic.edu.au/sites/default/files/jcv_online_journal_vol01_0.pdf)>.

140 See Part II(A) above.

renew particular Crown leases held by GAL. The interpretative question was the meaning of ‘land’ in section 56N(2)(b) of the *Taxation (Administration) Act* (NT). In section 4(1), the Act provided a definition of ‘land’ which included ‘lease of land’ but the definition of ‘lease of land’ excluded an option to renew a lease.

The Commissioner argued, among other things, that the definition of ‘land’ in the Act had been displaced by a contrary intention in the substantive provisions of the Act. The Commissioner relied on the Court of Appeal’s reasoning:

Exclusion of the option to renew would also reduce the revenue of the Territory. I am unable to discern any sound reason for applying the definition of lease to a conveyance of a lease. For these reasons, in my view a ‘contrary intention appears’ and the definition does not apply to a conveyance of a lease.

...

Over the years since 1978, the legislature has consistently increased its capacity to raise revenue by closing off avoidance practices and increasing the range of transactions attracting duty ...<sup>141</sup>

In rejecting the Commissioner’s construction, the joint judgment of the High Court considered the Act.<sup>142</sup> But they did not solely consider that source and nor did they apply conditions on referring to extrinsic materials. The judges also considered three extrinsic indications of meaning: the ordinary meaning of the words “‘lease’ ... does not include ... an option to renew a lease’;<sup>143</sup> the consequences of the ordinary meaning of the provision in question once the definition was inserted;<sup>144</sup> and the history of amendments to the Act.<sup>145</sup> The consequences and history merely indicated that a general purpose of the Act was to raise revenue.<sup>146</sup> But this general legislative purpose was ‘insufficient to support an intention to exclude a clearly expressed definition and to substitute a quite different meaning’.<sup>147</sup>

In short, consistent with contextualism, matters outside the provision at stake, which the judges themselves acknowledged to be ‘contextual or historical considerations’,<sup>148</sup> were considered. It is true that their Honours held that the alleged inferences were not persuasive in this case because they were ‘not based on the text’.<sup>149</sup> But this is not to be taken as any requirement that indications of meaning must be found in the text. It simply observes that the argument, *which was sought to be based on the text*, was not so based.

141 *Commissioner of Territory Revenue v Alcan (NT) Alumina Pty Ltd* (2008) 24 NTLR 33, 51 [45], 59 [76] (Martin (BR) CJ), cited in *Alcan* (2009) 239 CLR 27, 43 [36] (Hayne, Heydon, Crennan and Kiefel JJ).

142 *Alcan* (2009) 239 CLR 27, 48 [52].

143 *Ibid* 41 [29]. The ordinary meaning of the words took in the common law definition of lease which included, as an incident, an option to renew a lease: at 42 [36] (citing the Court of Appeal of the Northern Territory).

144 *Ibid* 46 [45].

145 *Ibid* 48 [52].

146 *Ibid* 48 [53].

147 *Ibid*.

148 *Ibid*.

149 *Ibid* 48 [52].

It may also be observed that French CJ, who agreed with the joint judgment, expressly affirmed contextualism when he noted that 'it must be accepted that context and legislative purpose will cast light upon the sense in which the words of the statute are to be read'.<sup>150</sup>

In any case, the High Court quickly clarified the position regarding extrinsic materials. In 2012 (repeated in 2014)<sup>151</sup> the Court said, in terms perfectly consistent with contextualism:

'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text.<sup>152</sup>

Finally, High Court cases decided since *Alcan* demonstrate that that case did not establish a general approach consistent with all the tenets of textualism. It will be recalled that a distinguishing feature of contextualism is the full use of extrinsic aids to interpretation including appropriate reference to extrinsic parliamentary materials in determining the legislative purpose and regard also to the consequences of a construction that is contended for.<sup>153</sup> Experience shows that on a number of recent occasions the High Court has had regard to parliamentary materials for indications of the mischief or purpose.<sup>154</sup> The same applies to paying regard to the consequences of a construction that is contended for.<sup>155</sup>

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150 Ibid 31 [4].

151 *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (The Court).

152 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (The Court) (citations omitted), citing *Alcan* (2009) 239 CLR 27, 46–7 [47].

153 See Parts II(B) and (E) above.

154 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 413–4 [95] (Kiefel J) (second reading speech); *Mansfield* (2012) 247 CLR 86, 99 [45] (Hayne, Crennan, Kiefel and Bell JJ) (law reform report), 105–6 [71] (Heydon J) (law reform report); *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 636 [57], 637 [59] (The Court) (second reading speech); *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 10 [4], 27 [54] (French CJ, Hayne, Kiefel and Nettle JJ) (second reading speech); *Ueese v Minister for Immigration and Border Protection* (2015) 256 CLR 203, 220 [58] (French CJ, Kiefel, Bell and Keane JJ) (explanatory memorandum), 236 [112] (Nettle J) (second reading speech); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 608 [88] (Gageler J) (dissenting) (second reading speech), 649–50 [229] (Nettle and Gordon JJ) (second reading speech); *Minister for Immigration and Border Protection v Kumar* (2017) 260 CLR 367, 387 [55] (Nettle J) (dissenting) (explanatory memorandum); *Talacko v Bennett* (2017) 260 CLR 124, 145–6 [68]–[69] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ) (explanatory memorandum; law reform report); *Wilkie v Commonwealth* (2017) 349 ALR 1, 25 [106] (The Court) (explanatory memorandum); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 351 ALR 190, 214 [107] (Keane, Nettle and Gordon JJ) (parliamentary materials).

155 *Berenguel* (2010) 84 ALJR 251, 255 [26] (The Court); *Wicks v State Rail Authority of New South Wales* (2010) 241 CLR 60, 77 [54] (The Court); *Shahi v Minister for Immigration and Citizenship* (2011) 246 CLR 163, 174–5 [31], 177 [38] (French CJ, Gummow, Hayne and Bell JJ); *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, 19 [41] (Heydon J); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 407 [73] (Crennan and Bell JJ); *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 134 [28] (French CJ, Crennan and Kiefel JJ), 157 [101], 159 [109] (Heydon J); *Mansfield* (2012) 247 CLR 86, 105 [69]–[70]

## B ‘Section 15AA of the *Acts Interpretation Act 1901* (Cth) and Equivalent State Provisions Require Disputes over Meaning to Be Determined, Not According to the Principles of Contextualism, But in Accordance with the Terms of Those Provisions’

Section 15AA of the *Acts Interpretation Act 1901* (Cth) states that:

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.<sup>156</sup>

It is true that, *if read literally and in isolation*, section 15AA would subvert or circumvent contextualism because it purports to determine the legal meaning solely on the basis of the construction which best achieves the purpose of the Act.<sup>157</sup> But it has not been read that way. The High Court has indicated that section 15AA is but a ‘guide’ and has opined that it reflects ‘general systemic principle’.<sup>158</sup> This appears consistent with what the Full Federal Court had earlier observed, that ‘s 15AA ... requires that a court construing federal legislation have regard to its purpose or object’.<sup>159</sup>

It is submitted that section 15AA has been read that way by the High Court for various reasons.<sup>160</sup> Fundamentally, it is because section 15AA is subject itself to interpretation, which means it is read within the context of, and subject to, the principles of contextualism. The modern approach to statutory interpretation denies rigid rules of interpretation<sup>161</sup> (in the main<sup>162</sup>). Another reason is the weak

(Heydon J); *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 635 [49] (The Court); *Taylor* (2014) 253 CLR 531, 550 [44] (French CJ, Crennan and Bell JJ); *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 27 [54] (French CJ, Hayne, Kiefel and Nettle JJ); *Ueese v Minister for Immigration and Border Protection* (2015) 256 CLR 203, 218–9 [48]–[51] (French CJ, Kiefel, Bell and Keane JJ); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 647 [221] (Nettle and Gordon JJ); *R v Independent Broad-Based Anti-corruption Commissioner* (2016) 256 CLR 459, 473 [50] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), 481 [77] (Gageler J); *Forrest & Forrest Pty Ltd v Wilson* (2017) 346 ALR 1, 14–15 [63] (Kiefel CJ, Bell, Gageler and Keane JJ).

156 Equivalent provisions are the *Legislation Act 2001* (ACT) s 139 and the *Acts Interpretation Act 1954* (Qld) s 14A. Other jurisdictions have a provision that replicates the earlier version of s 15AA:

*Interpretation Act 1987* (NSW) s 33; *Interpretation Act 1978* (NT) s 62A; *Acts Interpretation Act 1915* (SA) s 22; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation Act 1984* (Vic) s 35(a); *Interpretation Act 1984* (WA) s 18.

157 The *Australian Law Dictionary* takes the simplistic view that there is an approach favoured by parliaments, namely the purposive approach: Trischa Mann (ed), *Australian Law Dictionary* (Oxford University Press, 3<sup>rd</sup> ed, 2017) 847.

158 *Thiess v Collector of Customs* (2014) 250 CLR 664, 672 [23] (The Court). The reference to a ‘guide’ comes from a quotation from the reasons for judgment in *Cabell v Markham* (1945) 148 F 2d 737, 739, an extract that was approved of by the High Court in the *Thiess* case.

159 *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393, 406 [50] (The Court).

160 For an extended discussion of the second version of s 15AA of the *Acts Interpretation Act 1901* (Cth), see Michael Kirby, ‘The Never-ending Challenge of Drafting and Interpreting Statutes – A Meditation on the Career of John Finemore QC’ (2012) 36 *Melbourne University Law Review* 140.

161 *Taylor* (2014) 253 CLR 531, 548 [37] (French CJ, Crennan and Bell JJ). In *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 401 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ) their Honours said, in relation to statutory interpretation, that ‘courts must be wary of propounding rigid rules’. Incidentally, in *Momcilovic v the Queen* (2011) 245 CLR 1 the general interpretative ‘rule’ in section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) was also read subject to contextualism, or as one commentator observed, the ‘self-correcting tendencies of Australian

terms in which section 15AA is cast. The section refers to 'the purpose or object of the Act'. But ordinarily a legislative purpose at that level of generality will carry much less weight than the purpose or object of the provision or group of provisions in question, for this is what a judge is normally seeking.<sup>163</sup>

### C 'Purposeful Interpretation Is a Better Description of Contemporary Interpretation than Contextualism'

There is no doubt that ascertaining the legislative purpose of the provision in question, and giving weight to a construction that promotes the purpose over a construction that does not, or giving weight to a construction that promotes it to a greater extent than a rival construction, are extremely important aspects of interpretative practice in the High Court and other Australian courts. As mentioned above,<sup>164</sup> Australian 'Acts Interpretation Acts' command attention to the legislative purpose. The common law also requires regard to the purpose: 'The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute'.<sup>165</sup> Apart from authority, there are compelling reasons for regard to purpose.<sup>166</sup> Fundamentally, it is because legislation is a purposive act.<sup>167</sup>

Expressions of contextualism often recognise the importance of statutory purposes, as in this example: '[T]he modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it'.<sup>168</sup>

It is true that judges sometimes refer to 'purposive construction',<sup>169</sup> and some commentators write as if it were the general approach.<sup>170</sup> The phrase, 'purposive construction' is harmless if it refers to a construction that (after full regard to the

jurisprudence': Cheryl Saunders, 'Constitutional Dimensions of Statutory Interpretation' in Anthony J Connolly and Daniel Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, 2015) 27, 28. The Court interpreted the Charter having regard to, among other things, the contextual aid that '[c]onstruction should favour coherence in the law': *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 236 [42] (The Court).

162 Statutory interpretation contains some true rules (see Jones, above n 7, pt XI, discussing, among others, the basic rule of statutory interpretation, the plain meaning rule, the rule *ut res magis valeat quam pereat*, and the informed interpretation rule). But the residual interpretative criteria are not true rules since they are rebuttable: at 480–1.

163 See Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 32. See also the discussion of the *Alcan* case in Part III(A), above.

164 Part III(B).

165 *Project Blue Sky* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

166 For a fuller discussion of the reasons for increased regard to the purpose, see *Australian Finance Direct Ltd v Director of Consumer Affairs (Vic)* (2007) 234 CLR 96, 112 [35] (Kirby J).

167 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 204 (Stephen J); John Leahy, 'Commentary 2' in Bette Moore (ed), *Drafting for the 21<sup>st</sup> Century: Proceedings of the Conference at Bond University Gold Coast* (Law Reform Commission of Victoria and Bond University School of Law, 1991) 91, 91; Frankfurter, above n 54, 538–9; John M Kernochan, 'Statutory Interpretation: An Outline of Method' (1976) 3 *Dalhousie Law Journal* 333, 353, cited in Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) 176 n 17.

168 *Inland Revenue Commissioners v McGuckian* [1997] 1 WLR 991, 999 (Lord Steyn).

169 *Taylor* (2014) 253 CLR 531, 548 [37], 549 [40] (French CJ, Crennan and Bell JJ).

170 Benedict Coxon, 'Open to Interpretation: The Implication of Words into Statutes' (2009) 30 *Statute Law Review* 1, 3; Mann, above n 157, 847.

context including the legislative purpose) promotes the purpose to a greater or lesser extent.

But the importance of regard to the legislative purpose does not mean it amounts to a general approach. There are five basic difficulties with equating purposive analysis with a general approach such as contextualism. To avoid labouring the point, I will be brief.<sup>171</sup> First, the statutory purpose may not be identifiable.<sup>172</sup> Parliament may have ‘deliberately refrained from forming or expressing a purpose’.<sup>173</sup>

Second, if statutory purposes are identifiable, they may be conflicting.<sup>174</sup> Further, the provision in question may ‘[reflect] a political compromise’ between different purposes.<sup>175</sup> Speaking of section 15AA of the *Acts Interpretation Act* 1901 (Cth), Gleeson CJ observed:

That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.<sup>176</sup>

Third, the weight of statutory purposes necessarily varies. A statutory purpose may receive less weight if it has to contend with a weighty interpretative factor, such as an argument that an opposing construction minimises infringement of a fundamental common law right. In such a case the presumption against infringement of a fundamental common law right

is a principle of construction which is not to be put to one side as of ‘little assistance’ where the purpose of the relevant statute involves an interference with the liberty of the subject. It is properly applied in such a case to the choice of that construction, if one be reasonably open, which involves the least interference with that liberty.<sup>177</sup>

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171 See also Gleeson, above n 163, 31–3.

172 *Avel Pty Ltd v A-G (NSW)* (1987) 11 NSWLR 126, 127 (Kirby P); Chief Justice Robert French, ‘Bending Words: The Fine Art of Interpretation’ (Speech delivered at the Faculty of Law Guest Lecture Series, University of Western Australia, 20 March 2014) 14.

173 Gleeson, above n 163, 33.

174 *Ibid.* For an example, see *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 643 [109] (Gummow J), citing and approving *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (Unreported, Federal Court of Australia, Lindgren J, 6 May 1997).

175 *Carr v Western Australia* (2007) 232 CLR 138, 143 [7] (Gleeson CJ).

176 *Ibid* 143 [5]. For similar observations, see *Victims Compensation Fund v Brown* (2002) 54 NSWLR 668, 671–2 (Spigelman CJ) (dissenting as to outcome); *Metal Manufacturers Pty Ltd v Lewis* (1988) 13 NSWLR 315, 326 (Mahoney JA); *Tullamore Bowling & Citizens Club Ltd v Lander* [1984] 2 NSWLR 32. For examples of purposes that were cut back by provisions, see *Project Blue Sky* (1998) 194 CLR 355, 388 [90] (McHugh, Gummow, Kirby and Hayne JJ); *J J Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297, 307 [30] (Jessup J).

177 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 582 [11] (French CJ, Kiefel and Bell JJ). Their Honours were responding to a comment of Gageler J (dissenting) in the same case at 605–6 [81].

Further, a purpose may not be given much weight if it is expressed in terms 'too general to provide any useful guidance in respect of the ... point of construction now in issue'.<sup>178</sup> As mentioned, it may receive little weight if the section evidently reflects a political compromise. And, since the purpose 'resides in [a statute's] text and structure'<sup>179</sup> it will be given *no weight* if a construction, claimed by its proponent to promote the purpose, cannot be reconciled with the text.<sup>180</sup>

Fourth, statutory purpose is 'a concept which is not logically congruent with that of legislative intention'.<sup>181</sup> Increased emphasis on statutory purpose<sup>182</sup> should not be confused with the total process of statutory interpretation. In other words, statutory interpretation merely involves, among other things, the identification of a statutory purpose.<sup>183</sup> Legislative intention is many things, and includes expressing a conclusion or 'product' of the processes of statutory interpretation.<sup>184</sup> In that process the judge ascertains all relevant indications of meaning and ultimately exercises a judgment as to whether the indications 'point' more toward one or the other of the rival contentions as to meaning.<sup>185</sup> Although the purpose can be found in a number of ways,<sup>186</sup> it is but one of the potential indications of meaning.

Fifth, the purpose of a provision is not a standalone object, free of interpretation. In other words, determining the purpose is itself an interpretative act.<sup>187</sup> It must be found by reading contextually. For example, a statutory statement of purpose cannot necessarily be taken at face value. It may have to be read with fundamental common law principle. The purposes of the Act include those resulting from implying the common law principle.<sup>188</sup>

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178 *Pham v Victims of Crime Assistance Tribunal* [2016] VSCA 102 [48] (McLeish JA), with whom Tate JA at [1] and Ferguson JA at [2] agreed. See also *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232, 271 [94] (Gageler J); *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797, 1804 [33] (Heydon J).

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

180 *Taylor* (2014) 253 CLR 531, 545 [28], 549-50 [41] (French CJ, Crennan and Bell JJ).

181 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 225-6 [45] (French CJ).

182 *Bropho v State of Western Australia* (1990) 171 CLR 1, 20 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

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

184 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 390 [25] (French CJ and Hayne J).

185 *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797, 1803 [28] (Heydon J).

186 In *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), the High Court helpfully pointed to three main methods of gaining assistance in determining the legislative purpose: by regard to express statement of purpose in the statute, by inference from the text, and by appropriate reference to extrinsic materials.

187 *R v Secretary of State for the Environment, Transport and the Regions; Ex parte Spath Holme Ltd* [2001] 2 AC 349, 396 (Lord Nicholls).

188 *DPP v Dover* (2013) 39 VR 601, 609-10 [36], 610 [38], 610-11 [40], 611 [43] (Tate JA), with whom Maxwell ACJ at 602 [1] and Garde AJA at 612 [53] agreed.

### D ‘Courts Have a Discretion to Consider Relevant Interpretative Factors’

If a judge did possess a discretion to consider relevant interpretative factors, this would seriously undermine contextualism. It would mean that a judge could choose not to consider part of the context that is relevant. But it is a myth<sup>189</sup> that a judge has such a discretion.<sup>190</sup> It is beyond doubt that the judge has a duty to consider ‘all available indications’,<sup>191</sup> ‘the full range of relevant factors’,<sup>192</sup> and ‘the whole range of circumstances relevant upon a question of statutory interpretation’.<sup>193</sup> Of course, this involves a judgment as to relevance and sometimes judges will disagree. But this is different from having a discretion.

### E ‘Contextualism Cannot Account for the Concept of the Intention of Parliament’

It is not true that contextualism cannot account for the concept of the intention of Parliament. To begin, the intention of Parliament is a multi-functional concept. As discussed above,<sup>194</sup> it expresses, in relation to a provision the meaning of which is in doubt, the intention or legal meaning which the court reasonably imputes to Parliament. French CJ and Hayne J have spoken of this function in terms of legislative intention being ‘the product of those processes [of statutory construction], not the discovery of some subjective purpose or intention’.<sup>195</sup> This is true, but it is not the full picture.

In addition, legislative intention has an evaluative function.<sup>196</sup> As noted in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*<sup>197</sup> and more recently by Kiefel J (as her Honour then was), the intention of Parliament is the ‘fundamental object of statutory construction’.<sup>198</sup> Bennion similarly notes that the intention of Parliament is the ‘paramount criterion’.<sup>199</sup> The intention of Parliament relates to contextualism not merely by being the ‘product’ of contextualism’s processes, but by regulating those processes. For instance, the legislative intention is employed as a gatekeeper for the interpretative criteria of the law, that is, in determining the considerations that are

189 The commentator who unwittingly created a wildfire of misunderstanding was John Willis of Dalhousie Law School. His article, ‘Statute Interpretation in a Nutshell’ (1938) 16 *Canadian Bar Review* 1 is critiqued in Jones, above n 7, 505. For a recent repetition of the myth see Michael Brogan and David Spencer, *Becoming a Lawyer: Success at Law School* (Oxford University Press, 3<sup>rd</sup> ed, 2014) 216.

190 Jones, above n 7, 505.

191 *Commissioner of Police (NSW) 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.

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

193 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405 (Kitto J), 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).

194 Part II(C).

195 *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378, 390 [25].

196 Reed Dickerson, ‘Statutory Interpretation: A Peek into the Mind and Will of a Legislature’ (1975) 50 *Indiana Law Journal* 206, 217. The author gives the example of extrinsic materials.

197 (1980) 147 CLR 297, 320 (Mason and Wilson JJ).

198 *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378, 411 [88] (Kiefel J).

199 Jones, above n 7, 441.

admissible by courts in weighing alternative constructions. As we saw above<sup>200</sup> in the discussion of the *Mansfield* case,<sup>201</sup> the High Court rejected a policy argument as to what the law ought to be on the ground that the alleged consideration could not reasonably be attributed to the Parliament. Similarly, the High Court has employed the intention of Parliament to reject a 'judicially constructed policy'.<sup>202</sup> Various other alleged interpretative factors have been rejected by courts for the reason that they cannot be reasonably attributed to the Parliament. They include departmental policies and procedures,<sup>203</sup> departmental manuals and bulletins,<sup>204</sup> the opinions of government agencies,<sup>205</sup> and the opinion of a minister after the legislation had been enacted.<sup>206</sup>

### F 'When the Meaning of Words Is Clear from the Words Themselves, There Is No Need to Resort to the Context'

Surprisingly, some commentators still take this view.<sup>207</sup> But High Court authority requires the context to be considered before the meaning of any word can be authoritatively determined.<sup>208</sup> It is also common in the literature for commentators to argue that 'plainness' is the result of a process of reading in context.<sup>209</sup>

### G 'The Principles Do Not Deliver, or Amount to, a Universal Criteria-Based Method for Interpreting Legislation, That Is, a Method that Employs the Same "Rule" or "Rules" Each Time'

This is a clichéd, and to my mind valueless, criticism of statutory interpretation. It is a misconception to imagine or assume that statutory problems could permit such a formulaic approach. Statutory problems are not all the same. The contexts differ from problem to problem. Hence, the approach in any particular case is determined *by the problem*,<sup>210</sup> rather than a top-down formula that the objection assumes is possible. But, though statutory interpretation is in an important sense case-based and lacking a precise formula for interpretation, this does not mean it lacks a coherent method or general approach.

200 Part II(D).

201 (2012) 247 CLR 86.

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

203 *Barnes v Victoria* [2015] VSCA 343 [46] (The Court).

204 *Port of Brisbane Corporation v Commissioner of Taxation* (2004) 140 FCR 375, 386 [26] (Moore J).

205 *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331, 377 [217] (The Court).

206 *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1, 6 [10] (McHugh J).

207 Mann, above n 157, 847; Brogan and Spencer, above n 189, 214. However, the last-mentioned authors describe the 'context method' as 'endearing': 215.

208 *CIC Insurance* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

209 Aharon Barak, *Purposive Interpretation in Law* (Sari Bashi trans, Princeton University Press, 2005) 4, 12–14 contains a discussion of the literature. See also Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press, 1989) 513.

210 Justice Susan Crennan, 'Blackstone's "Signs" and Statutory Interpretation' (Speech delivered at the CLE Lecture, Victorian Bar, Melbourne, 28 November 2007) 11.

## H ‘Contextualism Leaves Out of Account Judicial Philosophies and Other Reasons Why Judges May Differ’

One cannot overlook the reality that judges sometimes disagree. The reasons for different interpretations beyond doctrinal considerations are complex and contested.<sup>211</sup> One factor is the nature of law. ‘The law’, as Justice Basten said recently, ‘is not a complete and coherent system, with fixed boundaries’.<sup>212</sup> Another factor, according to a former Chief Justice of the High Court of Australia, is 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’.<sup>213</sup> An English judge has similarly acknowledged that ‘impression ... may present ... itself differently to different minds’.<sup>214</sup> Having said this, it should not be assumed that such personal factors will overpower doctrinal considerations.<sup>215</sup> For instance, judges can put aside policy considerations outside the statute.<sup>216</sup>

A contextual account of statutory interpretation can recognise the influence of different judicial minds. Bennion’s treatise, which at its core is contextual,<sup>217</sup> is one such account. In it he incorporated the phenomenon which he calls ‘differential readings’:<sup>218</sup> ‘the situation where different minds arrive at different assessments of the legal meaning of an enactment’.<sup>219</sup>

## I ‘Finding Cases that Support a General Approach Does Not Prove the Approach Is Taken in All Cases’

It is true that the method taken in this article – using case studies – cannot definitively prove the way the High Court operates. But it can provide indications of its practice and, through tentative generalisation, provide a basis for further research into judicial method.

211 For reviews of the literature see Jeffrey Barnes, ‘Statutory Interpretation’ in Ian Freckelton and Hugh Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Thomson Reuters, 2009) 721, 745–9; Jones, above n 7, 99–102; Jeffrey Barnes, ‘Statutory Interpretation and Administrative Law’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 119, 133–7.

212 Basten, above n 10, 1.

213 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 synthesis of the values of Kirby J in statutory interpretation, see Barnes, ‘Statutory Interpretation’, above n 211, 750.

214 *R v Secretary of State for the Environment; Ex parte Camden London Borough Council* [1998] 1 WLR 615, 622 (Lord Nolan).

215 Mason, above n 213, 82.

216 The *Mansfield* case is an instance where non-legal considerations were put to one side: see Part II(D) above. See also examples in the study of Kirby J’s career in Barnes, ‘Statutory Interpretation’, above n 211, 749.

217 See his informed interpretation rule: Jones, above n 7, 537. This states:

It is a rule of law (in this Code called the informed interpretation rule) that the person who construes an enactment must infer that the legislator, when settling its wording, intended it to be given a fully informed, rather than a purely literal, interpretation (though the two usually produce the same result).

218 *Ibid* 99–102.

219 *Ibid* 99.

#### IV CONCLUSION

The idea that statutory interpretation is nothing more than a miscellany of rebuttable canons is widely held. But it is misleading. Beneath the intention of Parliament, and encircling and linking to the canons, is the modern general approach – contextualism. It is not just a buzz word. High Court cases since the leading case of *CIC Insurance* indicate that contextualism is principled. In the simplified account presented here, several principles are essayed. In summary, the principles: require regard to the context in every case; tell the interpreter how to approach the process sequentially; instil the importance of a close examination of the text; involve a critical examination of the arguments; encompass a multifactorial rather than an answer-based process; and oblige the legal meaning to be text-based.

Challenges to contextualism can be envisaged. However, they either lack substance or do not undermine contextualism's importance. Contextualism has a far greater claim than either 'textualism' or 'purposivism' to being the general approach to statutory interpretation by the High Court (though textual analysis and purposive analysis are key aspects of contextualism).

Contextualism performs a vital role. The principles structure a process that at the point of detail is inherently variable – for interpretation occurs in particular circumstances and in relation to a particular statutory provision dealing with a particular subject matter. Like the statutes it monitors, statutory interpretation may be 'broad and deep and variegated', as Lord Wilberforce once observed.<sup>220</sup> But, at the same time, statutory interpretation does not lack a general approach that lends coherence to the interpretative enterprise – for contextualism performs this function.

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220 Lord Wilberforce, 'A Judicial Viewpoint' in Attorney-General's Department, *Symposium on Statutory Interpretation* (Australian Government Publishing Service, 1983) 5, 6.