

# Statutory interpretation for drafters

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## 1—Introduction

1 The role of drafters in formulating the legislative text has a significant effect on how drafters approach issues of statutory interpretation. The purpose of this paper is to examine statutory interpretation from a drafter's perspective.

2 This paper first discusses in general terms statutory interpretation from a drafter's perspective, and how this differs from the more conventional approaches to statutory interpretation. It then looks at more specific topics of statutory interpretation from a drafter's perspective. These topics are grouped as follows:

- general approaches to interpretation—these are the basic “rules” of interpretation, and other issues of broader application;
- extrinsic aids to interpretation—these are the documents that are associated with legislative text (such as explanatory memoranda) and the material printed in an Act that does not form part of the Act;
- intrinsic or grammatical aids to interpretation—these can be explanatory material or ways of structuring substantive provisions. In both cases the material forms part of the Act;
- legal assumptions—these may be presumptions about the legal effect of provisions, or meanings given to particular text (often by way of definition in the *Acts Interpretation Act 1901*).

(This list is based loosely on the arrangement of Pearce & Geddes “Statutory Interpretation in Australia” (5th ed. 2001).)

3 It is not practical in this paper to cover the entire field of statutory interpretation, or to cover any matter in great depth. To do so might constitute a complete text on statutory interpretation. Instead, this paper briefly discusses examples of topics from within each of the above groups.

4 Drafters have to take into account other issues besides statutory interpretation. These issues include the use of plain English drafting techniques and the drafting of provisions to take account of political considerations. These issues are discussed at various points where they intersect with interpretation issues.

## 2—How drafters approach questions of statutory interpretation

### 2.1—*Interpretation for non-drafters*

5 In many cases the meaning of legislation will be clear and a decision on how to interpret a particular provision will be easy. The decision might be made without applying any special rule of statutory interpretation, or it might be clear that a specific rule of statutory interpretation applies to the case.

6 In other cases the legislation will not be clear, and the question of whether or how specific rules of statutory interpretation apply will be difficult to resolve. Despite the difficulty, legal advisers and judges have to decide whether the result in issue is, or is not, a correct interpretation. There is authority to the effect that courts are not allowed to pronounce the task impossible.

The section has been described as curious, lacking in plain purpose, and perplexing. Any construction of it has been said to produce "anomalies" ranging from results which may appear generous to results insusceptible to accurate calculation or "analytical certainty". ... The provenance of the amendments was uncertain, their purposes and terms were often felt to be unclear, the difficulties caused by them were castigated as time-consuming and the overall operation of some of the provisions was said to be "extraordinarily difficult and close to unworkable". Numerous judicial calls have been made for reconsideration of the legislation. So far they have fallen on deaf parliamentary ears. ... Complaints about a legislative text which is "unnecessarily complicated and opaque" may be understandable. But the judicial duty is to give meaning to the purpose of Parliament expressed in the words which it has chosen (*Vanit v. R* (1997) 149 ALR 1 per Kirby J at p 11).

(See also Pearce & Geddes at para 1.3.)

#### *Example*

In *Australian Health Insurance Association v. Esso Australia* (1993) 116 ALR 253, the Full Federal Court considered whether an injunction should be issued against the respondent under section 67A of the *National Health Act 1953* for conducting a health insurance business in breach of section 67 of that Act. The main issue was whether section 67 had been breached, but the respondent also argued that the Federal Court did not have jurisdiction to grant the injunction.

Subsection 67A(1) provides as follows:

- (3) Where, on the application of the Minister, the Council or any other person, the [Federal] Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute a contravention of subsection 67(1), the Court may grant an injunction in such terms as the Court determines to be appropriate.

Black CJ (with whom Sheppard J agreed on this point) held that, while it was important for the Parliament to make its intention plain through an express referral to jurisdiction, in this case jurisdiction had been conferred.

The intention of the parliament revealed by s 67A(1) is in my view clear enough. It is clear that the parliament contemplated that injunctions may be granted in appropriate cases to enforce the scheme of which s 67 is a critical part. ... It is also clear that unless s 67A(1) confers jurisdiction to hear and determine an application of the nature described in s 67A(1), the whole section is

devoid of effect since there can no exercise of any of the powers it confers or that are conferred by the Federal Court of Australia Act without the conferral of jurisdiction to do so. (at p.264).

Northrop J dissented. He regarded the express conferral of jurisdiction as critically important. It could not be implied from the granting of power to the court by section 67A. He stated (at p.286) that “In coming to this conclusion, I am aware that s 67A can have no effect”.

(It is not clear from the report of the case why section 15C of the *Acts Interpretation Act 1901* did not apply. It seems to be the express conferral of jurisdiction that the court thought was lacking.)

## 2.2—Interpretation for drafters

7 In performing the drafting role, drafters necessarily form views on matters of statutory interpretation relating to legislation that they prepare. However, they also have the capacity to express legislation in ways that are designed to anticipate and provide answers to difficult questions of interpretation.

*Example*

Section 6 of the *AUSSAT Repeal Act 1991* provides as follows:

**6 AUSSAT not within the shield of the Crown**

To avoid doubt, AUSSAT:

- (a) is not, does not form part of, does not represent, and is not an instrumentality or agency of, the Crown; and
- (b) is taken never to have been, formed part of, represented, or been an instrumentality or agency of, the Crown.

Any doubt about whether AUSSAT was within the shield of the Crown is resolved by section 6.

*Example*

Section 34WA of the *Australian Security Intelligence Organisation Act 1979* provides as follows:

**34WA Law relating to legal professional privilege not affected**

To avoid doubt, this Division does not affect the law relating to legal professional privilege.

Any doubt about whether legal professional privilege can apply in relation to the powers under Division 3 of Part III of the Act (such as the power to question detained people) is resolved by section 34WA.

(Note: It is not suggested that the phrase “To avoid doubt” is necessary, or desirable, when including such provisions.)

8 It is a matter of judgement whether to draft a provision in a way that anticipates and answers questions of statutory interpretation or whether to rely on the application of principles of statutory interpretation to deliver the desired result. This seems to be the main impact that issues of statutory interpretation have on the task of drafting.

9 There are very many cases where interpretation will be easy, and the result will be clear, without the need for the legislation to address particular issues of interpretation expressly. For example, the question whether a provision applies in another country is in many cases answered simply by applying the presumption against the extra-territorial effect

of legislation. In such cases drafters are usually reluctant to include additional text to “clarify” an interpretational issue (although there can on occasions be pressure from sponsors of legislation to do so for presentational reasons).

10 However, in cases where interpretation will be difficult, and the result may be unclear, particular issues of interpretation may need to be dealt with expressly. Drafters in these cases are likely to want to ensure that the interpretation issues are clarified, rather than trying to reach a firm view on what the correct interpretation would be in the absence of such clarification.

11 There are several reasons why drafters will (and should) lean towards provisions that clarify difficult interpretation issues:

- most importantly, it is critical that drafters retain the ability to guarantee the legal effectiveness of what they draft. Many of these difficult questions are resolved after weighing up competing arguments. There are inevitably cases where no amount of analysis or research can make drafters certain enough of the interpretation that would be given to provisions in the absence of clarification;
- users of legislation should not be put to the trouble (and expense) of resolving issues that could have been resolved, or would not have arisen, if the legislation in question had been drafted differently;
- even if legislation is legally effective despite a difficult question of interpretation, the presence of the difficulty in the legislation may cause it to fail to meet acceptable standards of plain English;
- there are advantages in the text being more complete;
- even if it were possible to resolve such questions with a satisfactory level of certainty, there is the question of whether drafting offices always have the time or resources to do it.

12 There may however be some reasons why drafters should not overuse the option of clarifying the text in an attempt to bypass questions of interpretation:

- it can add to the length of legislation. Typically, the alteration involves inserting additional text (although this need not always be the case);
- the additional text can be confusing, because the issue it seeks to address can be quite obscure, particularly to a reader who is not legally trained. Issues of plain English can arise;
- the additional text might itself cause difficulties of interpretation, despite drafters’ best efforts. (A common problem is the insertion of provisions (often at the insistence of instructors) to clarify ambiguities that do not really exist: these provisions often start with the phrase “To avoid doubt ...” or “For the avoidance of doubt ...”).

13 There are cases where the drafters in a particular jurisdiction adopt an agreed approach on a particular issue. Unless special circumstances apply, this approach is followed in the interests of uniformity across the statute book of that jurisdiction. In the Commonwealth jurisdiction, the Drafting Directions mandate several of these approaches.

*Example*

Drafting Direction No. 5 of 2005 states that the opening words of definition sections or subsections are no longer to be qualified by phrases such as “unless the contrary intention appears”. Express qualification is unnecessary, because it is implied in any case.

14 There can be cases where legislation is deliberately ambiguous. This might be as a result of a conscious policy decision, although hopefully such cases are rare. It is also possible that legislation runs up against the boundaries of constitutional authority. Whatever uncertainty exists in the constitutional provision may need to be accepted for the purposes of the draft. To provide greater clarity might raise doubts about constitutional validity.

*Example*

Section 4 of the *Human Rights (Sexual Conduct) Act 1994* provides (in part) as follows:

**4 Arbitrary interferences with privacy**

- (1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

The term “arbitrary interference with privacy” is not defined in the Convention, but any attempt to clarify it in the Act could have created doubts about whether the Act was authorised by the powers to make laws with respect to external affairs.

### **3—General approaches to interpretation**

#### **3.1—The purposive approach to interpretation**

##### **The common law position**

15 Statutory interpretation is said to be the task of finding the intention of the legislature. The basic common law approach to finding this intention was stated in 3 “rules”:

- the literal rule—the court will give effect to the ordinary and natural meaning of the text;
- the purpose rule—the court will adopt a meaning consistent with the purpose of the legislation;
- the golden rule—the court will adopt a meaning that avoids absurdity or inconsistency arising from the ordinary and natural meaning of the text.

The purpose rule and golden rule are, at common law, generally accepted to be subordinate to the literal rule (Pearce & Geddes, para 2.4).

16 The existence of 3 rules has often been criticised. The pre-eminence of the literal rule has also been criticised. In fact complete literalism has never been achievable, because the meaning cannot be derived solely from the text. It comes also from the context, and from the knowledge and assumptions that readers bring to the task of extracting the meaning. Drafting would probably be impossible if courts used an approach of complete literalism.

17 There have been attempts to formulate a single and more flexible rule. For example:

In some cases in the past these rules of construction have been applied too rigidly. The fundamental object of statutory construction is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction (*Cooper Brookes (Wollongong) Pty. Ltd. v. Federal Commissioner of Taxation* (1981) 147 CLR 297 per Mason and Wilson JJ at 320).

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (Driedger “Construction of Statutes” (2nd ed. 1983) p.87).

##### **Section 15AA of the *Acts Interpretation Act 1901***

18 Section 15AA of the *Acts Interpretation Act 1901* was enacted in 1981. It requires use of a purposive approach.

##### **15AA Regard to be had to purpose or object of Act**

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

It is not (for obvious reasons) expressed to apply “unless the contrary intention appears”.

19 This is a significant change to the common law position. The literal approach is no longer necessarily the starting point.

Section 15AA, however, requires the purpose or object to be taken into account even if the meaning of the words, interpreted in the context of the rest of the Act, is clear. When the purpose or object is brought into account, an alternative interpretation of the words may become apparent. And if one interpretation does not promote the purpose or object of an Act and another interpretation does so, the latter interpretation must be adopted (Pearce & Geddes, para 2.8).

... the literal rule of construction, whatever the qualifications with which it is expressed, must give way to a statutory injunction to prefer a construction which would promote the purpose of an Act to one which would not, especially where that purpose is set out in the Act. Section 35 of the Interpretation of Legislation Act must, I think, mean that the purposes stated in Pt 5 of the Road Safety Act are to be taken into account in construing the provisions of that Part, not only where those provisions on their face offer more than one construction, but also in determining whether more than one construction is open. The requirement that a court look to the purpose or object of the Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before a court could have regard to purpose: *Miller v. The Commonwealth* (1904) 1 CLR 668 at p 674; *Wacal Developments Pty. Ltd. v. Realty Developments Pty. Ltd.* (1978) 140 CLR 503 at p 513. The approach required by s.35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible as a matter of construction to repair the defect, then this must be done. However, if the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes and it must be consistent with the wording otherwise adopted by the draftsman. Section 35 requires a court to construe an Act, not to rewrite it, in the light of its purposes (*Mills v. Meeking* (1990) 91 ALR 16 per Dawson J at 30-31). [*Section 35 of the Interpretation of Legislation Act 1984 (Vic.) is the Victorian equivalent of section 15AA.*]

20 Dawson J in the passage quoted above puts 2 limitations on applying section 15AA. In order for the literal meaning of a provision to be modified to give effect to legislative purpose must be “precisely identifiable” and “consistent with the wording”. Pearce & Geddes (at para 2.10) point to another: the purpose may not be discoverable. To this could be added the possibility that there could be different views about what is the purpose of the legislation in question (eg. see *Palgo Holdings Pty. Ltd. v. Gowans* [2005] HCA 28).

21 These limitations might push the courts a long way back towards the literal rule. They might also make it difficult to predict whether a court will apply a purposive approach in interpreting a particular provision.

*Example*

In *Commissioner of Taxation v. Ryan* (2000) 201 CLR 109, the High Court considered whether the Commissioner could amend, in 1994, an assessment made in 1987 that the taxpayer’s taxable income was nil. The taxpayer argued that a 3 year time limit applied to amending the assessment, under subsection 170(3) of the *Income Tax Assessment Act 1936*. The Commissioner argued that subsection 170(3) did not apply, and that there was no time limit on amending “nil” assessments. At the time, subsection 170(3) was as follows:

(3) Where a taxpayer has made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the taxpayer in any particular shall be made after the expiration of 3 years from the date upon which the tax became due and payable under that assessment.

The Federal Court (both at first instance and unanimously on appeal) had ruled that the 3 year limitation applied, because the statutory policy of certainty and finality in assessments should extend to nil assessments (and it was possible to imply a notional date from which the 3 years could run).

The High Court, by a 4-1 majority, ruled in favour of the Commissioner. On this point, Gleeson CJ, Gummow and Hayne JJ (with whom Callinan J agreed) said:

Whatever may be the elasticity of the expression “the date upon which the tax became due and payable”, it does not, and cannot, accommodate the case where no tax is due and payable (at p.122).

...the question for decision is what are the circumstances in which an amended assessment may lawfully be issued? That question is not answered by asserting the existence of any “policy” or “general intention” unless that policy or intention is to be found reflected in the provisions of the Act. Appeals to general notions of “fairness” or “justice” do no more than attempt to mask the absence of any foundation in the legislation for the conclusion which is asserted (at p.123).

Kirby J dissented. He applied a purposive approach (at pp.145-146), and did not think that subsection 170(3) precluded it.

Of the 9 judges who considered the case, 5 ruled in favour of the taxpayer and 4 in favour of the Commissioner. Subsection 170(3) has not been amended since the High Court’s decision.

22 The recent High Court decision in *Palgo Holdings Pty. Ltd. v. Gowans* [2005] HCA 28 perhaps indicates another problem with the purposive approach. The court appeared to split on how to apply the purposive approach. The issue was whether the *Pawnbrokers Act 1996* (NSW) extended to a business that structured its loan transactions as chattel mortgages while maintaining the outward appearance of a pawnbroker’s operation. The 4 judges forming the majority held that the Act did not so extend, because there was a clear and long-established distinction between transactions in which goods were pawned or pledged and transactions in which goods were mortgaged. Kirby J dissented. He thought that excluding chattel mortgages defeated the legislative purpose (which he took from the Minister’s second reading speech), and that the majority view was a “turning back to literalism”.

23 The majority, however, did not see their approach as literalism, but rather as giving the Act a purposive construction (see para 28). They drew on the legislative framework into which the Act fitted, and the enactment history of the legislation. In particular they observed that the 1996 Act lacked wording that was included in its predecessor enacted in 1902 and that seemed to apply the 1902 Act to chattel mortgages.

24 There seems to be 2 approaches to purposive construction. Both the majority and Kirby J said that they were adopting a purposive approach, but they reached diametrically opposed conclusions. It is easy to say Kirby J took a truly purposive approach, and the more conservative approach of the majority reverted to “literalism”, but the latter approach is still what the majority of the current High Court considers to be purposive, and therefore it cannot be ignored. There are no set rules on how to apply a purposive approach, and there is no real

reason to assume that it is wrong to focus on matters such as enactment history and give it greater prominence than extrinsic materials such as second reading speeches. While many may consider it unlikely that the NSW Parliament would have intended the result that the majority arrived at, it would be unwise to treat the decision as an aberration.

### **The impact on drafting**

25 Drafters traditionally assume that they should draft on the assumption that the literal approach (or perhaps the rule as formulated by Driedger (see para 18 above)) will be used in interpretation. Even after the enactment of section 15AA, relying on a purposive approach can be unsafe, for a number of reasons:

- there is no guarantee that a court will want to use a purposive approach. The 5/4 split among the judges in *Commissioner of Taxation v. Ryan* is a good example;
- even if a court wants to use a purposive approach, there is no guarantee that it will be able to identify the purpose. If the court is an appeal court, there is no guarantee that all of the judges will identify the same purpose;
- even if a court purports to use a purposive approach, there is no guarantee that it will correctly identify the purpose. (A notable example of the purposive approach going wrong may have been the interpretation of section 92 of the Constitution: over a long period (at least until *Cole v. Whitfield* (1988) 165 CLR 360) the High Court adopted radically different views on the relevant purpose.)

26 Pearce & Geddes (at para 2.12) suggest that, for the drafter, the literal and purposive rules ideally converge:

There is a final point about s.15AA and its counterparts that is perhaps worth making. Generally speaking, it is only when the drafter has fallen short on his or her ideal that the dominance of the purposive approach as dictated by these provisions assumes significance. If the drafter has achieved what he or she set out to do, applications of the literal and purposive approaches will produce the same result.

27 To some extent this states the obvious. A drafter who is trying to draft as accurately and clearly as possible will not knowingly introduce an inaccuracy or ambiguity into the text intending that a purposive approach to its interpretation will correct it. It seems to follow that the drafter should view the purposive approach more as a backstop to be used in interpreting legislation in which the drafter fails to achieve the desired accuracy and clarity.

28 However, there may be cases where the drafter is particularly interested in trying to ensure that a purposive approach is taken to interpretation of particular legislation. 2 reasons for this might be:

- because drafting the legislation in a way that relies on a literal approach to interpretation would involve excessive detail and complexity. (For judicial acknowledgement of this as a reason, see the comments of Kirby J in *Commissioner of Taxation v. Ryan* (2000) 201 CLR 109 at 145.);

- because there may be no more policy content in a proposal than a simple and direct statement. The absence of detail might leave a court with no real choice other than to adopt a purposive approach to its interpretation.

29 Given the potential for uncertain legal effects in trying to attract a purposive approach, whether to do so should ideally involve a considered policy decision by the instructors on the legislation. The purposive approach should not be adopted by accident, or as a means of avoiding difficult decisions.

30 An example of the first reason for drafting in a way that invites the purposive approach is the “coherent principles” approach that is currently proposed in the drafting of some Commonwealth tax legislation. The usual amount of detail previously included in tax laws is deliberately left out, and it is envisaged that there will be an “unfolding” of the detail at a later stage as the need arises, and preferably not in the primary legislation. There seems to be an assumption that a purposive approach will be adopted in interpreting legislation drafted using this approach.

31 Coherent principles drafting might also be an example of the second reason. Other examples of the second reason for drafting in a way that invites the purposive approach are going to be difficult to identify. Possible examples may instead be regarded as cases where the purposive and literal approaches produce the same result, at least until the literal approach starts to produce results that may not have been intended.

32 There is a passage in Bennion (“Bennion on Statute Law” 3rd ed. 1990 at pp.310-314) that could be of interest in the debate on coherent principles drafting of tax laws. He makes the point that courts must take into account drafting techniques in interpreting legislation, and describes how courts in past centuries necessarily took a robust and interventionist approach to interpretation of the simple and often badly drafted old statutes. He states that there is less need for this approach given the development (since the establishment of the UK Parliamentary Counsel Office in 1869) of the current British practice of precision drafting. Coherent principles drafting may be viewed (positively or negatively) as a reversal of the trend.

33 The proponents of the coherent principles approach might need to consider *Palgo Holdings Pty. Ltd. v. Gowans* [2005] HCA 28. The majority of the High Court focussed on enactment history, particularly the fact that a later Act left out detailed provision from a corresponding earlier Act. The court implied from this that there was an intention underlying the new Act not to cover the matters dealt with in that provision. In some cases this could present problems if applied to provisions drafted using a coherent principles approach. It suggests that great care should be taken deciding which detailed provisions of an earlier Act can be left out.

34 How then can drafters try to ensure that a purposive approach is taken to interpretation of particular legislation? One thing that can be done is to include an objects clause. An objects clause can help in 2 ways. First, it implies that the legislature had in mind a purposive approach to interpretation. Secondly, in supplying a statement of what the purpose is, it removes the risk of the courts and other readers applying the wrong purpose or not being able to discern any purpose. Objects clauses are dealt with later in this paper (At Part 4-1).

35      Something to avoid is the inclusion of provisions that can be read as inconsistent with the legislative purpose. This is more difficult than it might seem. If there is an attempt to use a purposive approach in interpretation in order to solve a problem that was not foreseen in drafting the legislation, how could the drafter have ensured that there was no inconsistency? Here are 2 examples of where the High Court considered that the text of the legislation precluded a purposive approach to interpretation:

*Example:*

In *Commissioner of Taxation v. Ryan* the High Court majority was unable to get past the direct reference to tax being “due and payable”, and was therefore unable to apply a purposive approach that would have corrected what was probably an oversight in the relevant provision.

For the majority, the strained construction placed on the text by the purposive approach advocated by Kirby J and the full Federal Court was unacceptable. (It involved, in particular, creating a notional date on which tax was due and payable, so that the 3 year period in subsection 170(3) could start.)

*Example*

In *Concrete Constructions (NSW) Pty. Ltd. v. Nelson* (1990) 169 CLR 594, the High Court considered the reach of section 52 of the *Trade Practices Act 1974*:

**52 Misleading or deceptive conduct**

(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).

One of the issues considered was whether section 52 was restricted to the misleading or deception of consumers, because it was included in a Part with the heading “Consumer protection”. On this point, the court divided. The majority held that the heading could not “be used to impose an unnaturally constricted meaning” on the provisions of the Part, despite seeming to acknowledge that consumer protection “lies at the heart of the legislative purpose of section 52” (at p.601).

The minority held that section 52 applied to misleading or deception of a person in the capacity of a consumer. McHugh J (Brennan J agreeing) found that the purpose of section 52 was the protection of consumers and not others (at pp.616-617). See also Toohey J at pp.610-611.

36      One way to reduce the problem of potential inconsistency with a purposive approach would be to avoid including unnecessary detail in the legislation, because such detail might provide the “hooks” for arguments based on a literal approach. A simple and direct provision, with no accompanying detail, may leave courts with no practical alternative to a purposive approach. Unfortunately there are no easy steps to guide the drafter in deciding what details are unnecessary, and it can involve difficult judgement calls.

## 4—Extrinsic aids to interpretation

### 4.1—Use of extrinsic material

#### How courts use extrinsic materials

37 Section 15AB of the *Acts Interpretation Act 1901* was enacted in 1984:

#### **15AB Use of extrinsic material in the interpretation of an Act**

- (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
  - (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
  - (b) to determine the meaning of the provision when:
    - (i) the provision is ambiguous or obscure; or
    - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

*[Subsection (2) is a non-exhaustive list of extrinsic materials that may be considered. Most notably, it includes the explanatory memorandum and the Minister's second reading speech.]*

- (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:
  - (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
  - (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

38 There is now a substantial amount of case law on section 15AB and its State counterparts. It is analysed in great detail in Pearce & Geddes (paras 3.9 to 3.25). For the purposes of this paper, it is sufficient to point out the numerous limitations that the courts have put on the use of section 15AB:

- the court has to find an ambiguity or obscurity, or an unreasonableness or manifest absurdity in the ordinary meaning, before the section can be used. There is no precise guidance as to what these terms mean. However, courts have a lot of freedom in deciding whether they are present, and in practice, this requirement may be more apparent than real;
- extrinsic materials cannot be used to supplant the text of the law. See *Re Bolton; ex parte Beane* (discussed below). This has parallels in the idea that a purposive approach cannot be applied inconsistently with the wording of legislation: see paragraphs 21 and 22 above;
- the court will not have regard to extrinsic materials that “amount to no more than an expression of opinion of what the relevant legislation means” (*Hunter*

*Resources Ltd. v. Melville* (1988) 77 ALR 8 (Mason CJ and Gaudron J at p. 11));

- the court will not take into account extrinsic material that it thinks is wrong. It is perhaps worth noting that there are an increasing number of statements to the effect that explanatory memoranda are unreliable (eg. the Third Report of 2004 of the Senate Scrutiny of Bills Committee);
- the court has a discretion to refuse to take into account extrinsic material. Subsection 15AB(3) gives the court some reasons for such a refusal.

*Example*

In *Re Bolton; ex parte Beane* ((1987) 162 CLR 514), the High Court considered the validity of a warrant issued under section 19 of the *Defence (Visiting Forces) Act 1963* for the arrest of an American citizen who had deserted from the US Marine Corps while in Vietnam during the Vietnam war and who was now a permanent resident in Australia.

Section 19 referred to warrants for the arrest of deserters and detainees, without requiring that they be members of “visiting forces” (i.e. forces present in Australia). The Minister’s second reading speech in 1963 expressly stated that the deserters and absentees to whom the provision applies “need not be deserters or absentees from a visiting force”.

The High Court held that the provision was nonetheless limited, by the context of the Act as a whole, to members of visiting forces. On the application of section 15AB, Mason CJ, Wilson and Dawson JJ said:

The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law (at p.518).

In our opinion, notwithstanding the expressed intention of the government in introducing the law into the Parliament - an aspect of the matter which, as we have said, must give the Court cause for earnest consideration - we would not be justified in reading an implication carrying such serious consequences for the liberty of the individual into s.21(1) of the Act (at p.520).

39 Pearce & Geddes (paras 3.3 to 3.5) also refer to the common law rule for use of extrinsic materials. Some of the restrictions on section 15AB might not apply, but the precise scope of the rules is unclear.

### **The impact on drafting**

40 The issue that commonly arises for drafters in relation to extrinsic materials is the extent to which drafters can rely on issues being dealt with in extrinsic materials rather than in the legislation itself. In the Commonwealth, the drafter usually has no input into the wording of the explanatory memorandum (or any other extrinsic materials), so this issue typically takes the form of instructions not to legislate expressly to ensure a particular result, because an appropriate statement pointing to that result will be included in the explanatory memorandum.

41 The risks in following this course should be apparent from the approach that the courts take to section 15AB. There are a number of concerns:

- the court might decide that there is not the ambiguity, obscurity, unreasonableness or manifest absurdity required to activate section 15AB;
- the court might decide that it must give effect to its interpretation of the legislative text despite a statement in the explanatory memorandum to the contrary;
- the court might decide that the statement in the explanatory memorandum is wrong.;
- the court might decide to exercise its discretion to refuse to take into account extrinsic material.

42 If the result in question is not apparent from the legislative text it is unwise to put one's faith in the explanatory memorandum being able to bring about the result. *Re Bolton; ex parte Beane* (discussed above) should convince even the most optimistic instructors of the dangers of over-reliance on extrinsic materials. On the other hand, if the result is apparent from the legislative text, there should be no problem with the explanatory memorandum reinforcing the point.

## 5—Intrinsic or grammatical aids to interpretation

### 5.1—Objects clauses

#### How courts use objects clauses

43 Courts look at objects clauses to see whether they can adopt a purposive approach to interpretation to particular legislation. In some cases, they may have a significant effect on how a question of statutory interpretation is resolved, or at least may be quite useful to a court in arriving at a sensible outcome.

#### *Example*

In *Tickner v. Bropho* (1993) 114 ALR 409, the Full Federal Court considered whether the Minister was obliged to consider applications for declarations under sections 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. Those sections provided that the Minister “may” make declarations in relation to areas if applications are received. The Act includes an objects clause:

#### **4 Purposes of Act**

The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.

The Court unanimously held that the Minister had an obligation to consider applications. The objects clause was cited as part of the reasoning:

It would be surprising if an Act that has as its stated purpose the preservation from injury of areas that are of particular significance to Aboriginals did not require the Minister to consider, on receipt of a valid application for a declaration, whether the subject of the application was in fact a significant Aboriginal area. In my view, to interpret the Act in such a way as to impose no such requirement would frustrate its purpose and an interpretation that has such an effect should be rejected (per Black CJ at p.418). (See also Lockhart J at p.434.)

44 However, a court will not use an objects clause to override what it considers to be the clear and unambiguous text of an operative provision.

#### *Example*

In *In the Marriage of B* (1997) 140 FLR 11, the Full Family Court considered how the objects clause (section 60B) in Part VII of the *Family Law Act 1975* affected the operative provisions of the Part (in particular section 65E).

#### **60B Object of Part and principles underlying it**

(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

*[Subsection (2) listed “principles underlying these objects”, relating to shared parental responsibility. They were expressed to apply “except when it is or would be contrary to a child’s best interests”.]*

**65E Child’s best interests paramount consideration in making a parenting order**

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

*[Subsection 68F(2) listed a number of matters that the court must consider in determining what is in the child’s best interests.]*

The Full Family Court dismissed an appeal against an order that applied section 65E, but that allowed a mother and children to be relocated away from the father. It said:

Section 60B is important in this exercise as it represents a deliberate statement by the legislature of the object and principles which the Court is to apply in proceedings under Part VII. The section is subject to s.65E. Nor does it purport to define or limit the full scope of what is ordinarily encompassed by the concept of best interests. The object contained in sub-section (1) can be regarded as an optimum outcome but is unlikely to be of great value in the adjudication of individual cases. The principles contained in sub-section (2) are more specific but not exhaustive and their importance will vary from case to case. They provide guidance to the Court’s consideration of the matters in s.68F(2) and to the overall requirement of s.65E. The matters in s.68F(2) are to be considered in the context of the matters in s.60B which are relevant in that case. But s.65E defines the essential issue.

**Using objects clauses in drafting**

45 Objects clauses have a legitimate role in promoting a purposive approach to interpretation. *Tickner v. Bropho* (above) shows that this can be beneficial. However, drafters cannot rely on objects clauses to cover shortcomings in operative provisions. Any perceived inconsistency between the meaning of an operative provision and an objects clause will be resolved in favour of the operative provision.

46 A potential problem in drafting objects clauses is the temptation to use them to achieve other goals. One of these is to increase support for the legislation (or the proposed legislation). It is suggested that drafters should not encourage the use of objects clauses for this purpose, as there are better mechanisms for achieving it, such as the Minister’s second reading speech. However, it should be acknowledged that the sponsors of legislation are often very enthusiastic about expanding the role (and length) of objects clauses to make legislation more saleable, and drafters can find this enthusiasm hard to counter.

47 Another potential misuse of an objects clause is as a description of the features of the legislative scheme in question. There are better ways to include explanatory material to describe a legislative scheme. Outline provisions and readers guides are 2 such ways (see the *Income Tax Assessment Act 1997* for numerous different examples of this). There is no reason why they cannot coexist with objects clauses in the same legislation, fulfilling different functions.

48 An objects clause should focus on promoting a purposive approach. They should be used to guide the interpretation of the legislation. Ideally, they should be short and simple. Adding other material may obscure the message and could lead to confusion about what the purpose really is.

## 5.2—Examples and “*eiusdem generis*”

### How courts use examples

49 Section 15AD of the *Acts Interpretation Act 1901* was enacted in 1987:

#### 15AD Examples

Where an Act includes an example of the operation of a provision:

- (a) the example shall not be taken to be exhaustive; and
- (b) if the example is inconsistent with the provision, the provision prevails.

50 In considering section 15AD, drafters generally think of examples as explanatory material. Section 15AD is there to ensure that examples do not change the meaning of the substantive provisions whose operation the examples are illustrating. Thus it averts what is seen as a potential problem with including examples in legislation.

51 However, many examples may also be intended to have some substantive effect. It is quite common for an operative provision to include a passage along the lines of “for example...” or “such as ...”. In these cases, drafters generally assume that the provision will be interpreted to cover the example. Examples used in this way seem to be performing a role analogous to an inclusive definition.

#### *Example*

In *Fair Trading Corporation v. Owners Corporation*, SP43551 [2002] NSWSC 624, the NSW Supreme Court considered the scope of a definition of “major structural defect”, part of which was:

(b) [*a defect*] in a substantial functional element essential to the habitability of a dwelling (for example, a panel wall, masonry veneer wall or slab on ground) which is of such a kind that the element itself does not have adequate structure for its purposes.

On the use of the examples, Burchett AJ said:

Some assistance is to be gained from the examples of a panel wall, masonry veneer wall and slab on ground. But the assistance is limited. The examples show that the language must be understood in a sense wide enough to cover these things. However, just because they are only examples, they cannot have a narrowing effect, so as to exclude other things that fall fairly within the language of the provision. Cf s 15AD of the *Acts Interpretation Act 1901* (Cwlth), which has not been adopted in the New South Wales *Interpretation Act 1987*, but appears merely to confirm the approach the ordinary principles of construction would generally require a court to take.

52 It seems to have been assumed without argument that section 15AD applies to an example that has some substantive effect. But is an example of this kind “an example of the operation of a provision”? The explanatory memorandum on section 15AD is unclear, but it may suggest otherwise:

Proposed new s.15AD will allow in appropriate cases examples to be included in Acts to illustrate the operation of difficult provisions.

It may be that section 15AD was never intended to apply to “examples” that add meaning to a provision, but this does not seem to have been raised in any reported case.

53 Paragraph 15AB(a), which states that examples are not exhaustive, seems readily applicable to examples that are partly substantive. However, the inconsistency rule in paragraph 15AD(b) may have an unexpected effect. If the examples in the paragraph under consideration by the NSW Supreme Court in *Fair Trading Corporation v. Owners Corporation* were inconsistent with the rest of the provision in that they extended beyond its scope, the rest of the provision would, under paragraph 15AD(b), prevail. This seems to depart from the general principle that specific provisions prevail over general provisions.

### **The *ejusdem generis* rule**

54 Under the *ejusdem generis* rule, if a broad term is accompanied by a number of specific terms, the broad term should be read down to cover only those matters in the same category as the specific terms.

#### *Example*

In *Canwan Coals Pty. Ltd. v. FCT* (1974) 4 ALR 223, the NSW Supreme Court considered whether expenditure on an installation for storage of coal was deductible. This turned on whether the installation was a “railway, road, pipeline or other facility” within the meaning of section 123A of the *Income Tax Assessment Act 1936*. Sheppard J held that it was not:

... the use of the words “railway”, “road” and “pipeline” before the words “or other facility” does indicate that the legislature contemplated a particular kind of installation. What it had in mind was an installation upon which or through which minerals would actually move or be conveyed from the mine to a place of manufacture or shipment. Obviously the word “facility” would include a conveyor system, an aerial rope-way, a chute and an elevator, but in my opinion it does not include an installation, however important and indispensable, which is a separate and distinct storage area (at p. 228).

55 In a sense the *ejusdem generis* rule operates as the reverse of section 15AD. If the provision in the above example had said “a facility (for example, a railway, road or pipeline)”, the result may have been different, because (in the words of Burchett JA quoted above) the examples “cannot have a narrowing effect”.

### **Choices for drafters**

56 There seems to be a number of options that drafters should be aware of in drafting provisions with non-exhaustive “lists”:

- draft the list as a (partly substantive) example—section 15AD ensures that the list does not narrow the effect of the associated operative provision(s). However, the possibility that the example itself might be read down under section 15AD might need to be considered;
- draft the list in a way that attracts the *ejusdem generis* rule—this would be appropriate if it is intended that the list constitute a genus that will be used to reduce the scope of an associated broader term;

- draft the list as an inclusive statement—an inclusive list will not be read down under section 15AD. If there is a risk that the list could be used to read down an associated broader term, words indicating that it was included “without limiting the scope” of the broader term might be considered.

*Example*

In *Vernon-Carus Australia Pty. Ltd. and Thomas Creevey and Associates v. Collector of Customs* (1995) 21 AAR 450, the Federal Court considered the meaning of the phrase “wadding, gauze, bandages and similar articles (for example, dressings, adhesive plasters, poultices)” in a Customs Tariff Schedule. Northrop J made the following obiter comments:

By way of comment, it is noted that prior to the 1987 Customs Tariff Act coming into operation, the relevant provision referred to "... similar goods, including dressings, adhesive plasters, poultices and the like, being goods ... ". Applying the normal rule of construction, these inclusive goods, probably, would have come within item 3005 even if they did not come within the class common to the preceding words, but the matter is not completely clear, see *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395. The use of the words "for example" give rise to different problems. ...[Here Northrop J set out section 15AD]

The Court need not express any final view on the matter in this case except to say that the examples indicate that the Parliament intended to give a wide meaning to the words "similar articles" in item 3005, but at the same time some limitation must be placed on those words, possibly by the application of the *eiusdem generis* rule and if an example could not be so included, goods of that kind would not fall under item 3005.

57 Northrop J seems to be saying that when the provision was expressed to “include” dressings, adhesive plasters and poultices they were clearly covered, but when expressed as examples they might not be, if they are outside the general phrase that precedes them (reading down the general phrase by using the *eiusdem generis* rule).

## 6—Legal assumptions

### 6.1—The meaning of “may”

#### Subsection 33(2A) of the *Acts Interpretation Act 1901*

58 Subsection 33(2A) of the *Acts Interpretation Act 1901* was enacted in 1987:

- (2A) Where an Act assented to after the commencement of this subsection provides that a person, court or body may do a particular act or thing, and the word *may* is used, the act or thing may be done at the discretion of the person, court or body.

It does not expressly allow for a contrary intention, but section 2 of the Act does.

59 Subsection 33(2A) was intended to clarify the common law position under which “may” was sometimes interpreted as imposing an obligation (i.e. reading it as “must”), and at other times interpreted as conferring a discretion. According to the explanatory memorandum:

There is a rule of interpretation that “may” means “shall” in some circumstances. Accordingly, out of caution, it has become customary to follow the word “may” with the words “at (his) discretion”. This is cumbersome, particularly when expressed in non-sexist language. Parliamentary Counsel never draft “may” as meaning “shall”. It is proposed to define “may” as always importing a discretion. However, in the interests of caution, proposed new s.33(2A) will only apply to Acts assented to after the amendment is made.

60 Chapter 11 of Pearce & Geddes contains an analysis the vast amount of case law on when “may” imports a discretion or an obligation. The effect of subsection 33(2A) and its State and Territory counterparts is described as follows:

The diversity of approaches evidenced by the foregoing cases does not seem to be affected to any marked extent by the inclusion in most Australian jurisdictions of a provision in the Acts Interpretation Act to the effect that the use of the word “may” imports a discretion and “shall” an obligation. In many cases no reference is made to the provision, the courts discussing the issue only in common law terms. In other cases the courts have pointed to the fact that the Interpretation Acts are all expressed to apply unless the contrary intention appears which leads one back to the common law position: (at para 11.33).

61 A typical judicial approach is to “begin with the prima facie presumption that permissive or facultative expressions operate according to their ordinary natural meaning” (citing *Ward v Williams* (1955) 92 CLR 496 at 505). The court then examines the broader legislative context to see if the presumption holds true in the particular case.

#### *Example*

In *Samad v. District Court (NSW)*(2002) 209 CLR 140, the High Court considered a NSW regulation stating that “the Director-General may suspend or cancel a licence ...” on specified grounds. The licence was to supply methadone and one of the grounds specified was disruption to the amenity of the area. The NSW Court of Appeal had held that, once the ground was made out, the Director General had an obligation, not a discretion, to suspend or cancel.

The High Court disagreed with this interpretation and allowed the appeal. Gleeson CJ and McHugh J described the approach to these questions as follows:

When a statutory power is conferred by the use of words of permission, there may arise a question whether the effect is to impose an obligation, or, at least, an obligation that must be performed in certain circumstances. Even where it is plain that the intention of the legislature was permissive, questions may arise as to the nature of the considerations that the person in whom the power is confided may be entitled or bound to take into account in the exercise of the discretion conferred. Issues of this kind are to be resolved as a matter of statutory interpretation, having regard to the language of the statute, the context of the relevant provision, and the general scope and objects of the legislation (at p.152).

The NSW equivalent of subsection 33(2A) was referred to as being subject to a contrary intention (citing *Ward v. Williams*). On this point, Gaudron, Gummow and Callinan JJ said:

The precept referred to in *Ward v Williams* is reflected in s 9 of the Interpretation Act 1987 (NSW), when read with s 5(2) of that statute (at p. 161).

The High Court does not seem to view provisions like subsection 33(2A) as making any change to the previous law.

## The impact on drafting

62 The primary issue for drafters is whether it is safe to rely on subsection 33(2A) to ensure that “may” will be interpreted as conferring a discretion. While it seems to be common for drafters to assume that subsection 33(2A) has this effect (after all, if it does not, what was it meant to achieve?), in practice the statutory context may be more significant. Courts have consistently held that there is a rebuttable presumption rather than a clear rule that “may” connotes a discretion.

63 However, some decisions may indicate how drafters can encourage courts to interpret “may” as conferring a discretion. There is authority to the effect that a court will take note of the fact that the legislation in question appears to use “may” and “must” in a way that carefully delineates which provisions confer discretions and which provisions impose obligations.

### *Example*

Subsection s 23DND(4) of the of the *Health Insurance Act 1973* provided that “The Minister may approve the grant of the licence [for a collection centre] only if: ...” and set out a number of requirements. In *Gribbles Pathology (Victoria) Pty Ltd v. Minister for Health* [2000] FCA 1596, the Federal Court considered whether subsection s 23DND(4) gave the Minister a discretion whether to grant a licence, or whether it obliged the Minister to grant the licence if the requirements were met.

Finn J held that the subsection should be interpreted as conferring a discretion. A major part of the reasoning was as follows:

A very notable feature of Part IIA of the Act is the pervasive use of the terms “shall” and “shall not” and “may” and “must”: see eg s 23DC, s 23DF, s 23DL, s 23DN, s 23DNA, s 23DNB and s 23DND. That usage would appear to be designed, with the respective word pairings [*sic*] being used in counterpoint fashion. The patterns of language used in the Part are themselves strongly suggestive of the word “may” being used in its ordinary, permissive sense.

Notwithstanding the apparent infelicity in form of s 23DND - and most notably its omission of a separate, express power to grant or refuse an approval - the drafting method employed in the Act with its corresponding indication of intended meaning, would probably be sufficient to justify rejection of the applicant's case (para [34]).

This is reassuring, because drafters distinguish between “may” and “must” quite deliberately. However, there is no guarantee that a court will always find that this argument outweighs all others to the contrary, and the argument relies on an absolutely consistent use of “may” in the legislation in question.

64 There is also authority to the effect that, in rewriting a provision without a phrase such as “in his or her discretion”, a discretion is not converted to an obligation.

*Example*

Subsection 89(3) of the of the *Australian Securities Commission Act 1989* provided that “The Commission may pay such amount as it thinks reasonable on account ... [of witness etc. expenses]”. This replaced subsection 296(10) of the *Companies Act 1981*, which provided that “The Commission may, in its discretion, pay ...”

In *Westpac Banking Corpn. v. Australian Securities Commission* (1997) 143 ALR 35, the Federal Court held that the Commission had a discretion whether to pay expenses under subsection 89(3). Cooper J said:

The deletion of the words “in its discretion” after the word “may” in s 89(3) was in my view intended to give effect to s 33(2A) of the Acts Interpretation Act 1901 (Cth) and not intended to alter the nature of the discretionary power as it existed under the previous legislation upon which s 89(3) was based (at p. 42).

65 There are 2 situations in which drafters seem to use “may” without intending to confer a discretion:

- the phrase “may not” is often used as an alternative to “must not”, i.e. to prohibit conduct. For example:
  - (2) A person appointed to act in the office of Registrar during a vacancy may not continue to act in that office for more than 12 months. (Subsection 21(2) of the *Administrative Appeals Tribunal Act 1975*.)

The phrase is not being used to confer a discretion not to take certain action(s). There is no intention to apply subsection 33(2A);

- the phrase “may only” is often used as an alternative to formulations such as “must not ... unless”, possibly in an attempt to avoid a negative statement. For example:
  - (2) The Presiding Member may only engage persons who have suitable qualifications and experience. (Subsection 40(2) of the *Fisheries Administration Act 1991*.)

The phrase is not being used to confer a discretion to take only certain action(s). Once again, there is no intention to apply subsection 33(2A).

It is not suggested that “may not” and “may only” are necessarily ambiguous. However, their frequent use is an over-reliance on the contrary intention to subsection 33(2A). This makes it hard to maintain (as was asserted in the explanatory memorandum) that whenever drafters use “may” they intend to confer a discretion. It is suggested that, as a matter of drafting practice, these phrases should be avoided and alternatives should be used.

66 A more general issue is whether to reinstate the practice, generally not employed since the enactment of subsection 33(2A), of including after “may” a phrase such as “in his or her discretion”, “if he or she thinks fit” or “but is not required to”. Pearce & Geddes (at para 11.5) state that these phrases emphasise the intention that the power is discretionary, but are not conclusive:

But it is at least a useful starting point to know that it will be up to the person who asserts that such words are mandatory to make out a substantial case.

See also *Westpac Banking Corpn. v. Australian Securities Commission* (discussed above), which indicates that these phrases should not be necessary.

67 There are arguments either way on this question. It might be a logical response to the courts treating subsection 33(2A) as simply restating the common law position. On the other hand, it would be contrary to the plain English intent behind subsection 33(2A), and a better way might be to look at ways to fix subsection 33(2A) rather than conceding that it is ineffective.

## 6.2—Power to revoke or vary instruments

### Subsection 33(3) of the *Acts Interpretation Act 1901*

68 Subsection 33(3) of the *Acts Interpretation Act 1901* is as follows:

- (3) Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Subsection 33(3) in effect overrides the common law doctrine of *functus officio*, under which there is no further function to perform once a particular statutory function has been performed.

69 For subsection 33(3) to apply, there must be a power to make an “instrument”. While there is a line of authority to the effect that this means an instrument of legislative character (eg. *Australian Capital Equity v. Beale* (1993) 114 ALR 50, 64), it is generally thought that the better view is that instruments of an administrative character are also covered. The authority commonly cited is *Barton v. Croner Trading Pty. Ltd.* (1984) 54 ALR 541:

The word “instrument” is of wide import ... In the Acts Interpretation Act the word is used to include, at least, any writing designed to carry into effect a statute: see, for example, ss 33(3), 34B(2)(c), 46(a). (at p.557)

(Note however that this case was concerned with section 46, not subsection 33(3).)

70 Subsection 33(3) will not apply if the court finds a contrary intention. The most common situations in which a contrary intention can arise seem to be:

- where the legislation sets out its own process for revoking or varying the instrument;
- where revocation or variation would unfairly prejudice an interested person (such as the possibility that the person has organised their commercial affairs relying on the instrument, or would be liable to penalty if the instrument did not remain in its original form).

71 There are 2 other principles that could be relevant in a particular case even if subsection 33(3) does not apply:

- it is possible that a court will interpret the power to make the instrument to include a power to revoke or vary it (eg. see *Nguyen v. Minister for Health and Ageing* [2002] FCA 1241 at para 67 et seq). However, there is authority to the effect that the scope to imply the power to revoke or vary is limited to cases of necessity;
- a court may rule that the decision to make the instrument is void through jurisdictional error. If so, there is nothing on which the doctrine of *functus officio* can operate, so the instrument can be (or must be) “remade” (eg. see

### The impact on drafting

72 It is safe for drafters to assume that subsection 33(3) can apply to instruments of an administrative character. In order for the provision in question to attract the operation of subsection 33(3), it should refer to the power being exercised “in writing” in order to pick up the reference in subsection 33(3) to an instrument.

73 Drafters should be aware of the possibility of a contrary intention to the application of subsection 33(3). The creation of a specific but limited power to revoke or vary an instrument could preclude the application of subsection 33(3) to cases not covered by the specific power. This is fine if this result is intended. If it is not intended, a provision expressly preserving the operation of subsection 33(3) in cases not covered by the specific power may be warranted.

74 If revocation or variation would unfairly prejudice an interested person, and it is still intended to have a power to revoke or vary, a specific power should be considered, or a provision expressly preserving the operation of subsection 33(3).

75 There are many examples of the operation of subsection 33(3) being preserved (with or without modification):

*Example*

Section 37Y of Schedule 2 to the *Dairy Produce Act 1986* provides as follows:

- (1) The SDA scheme may be varied, but not revoked, in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*.
- (2) Subclause (1) does not limit the application of subsection 33(3) of the *Acts Interpretation Act 1901* to other instruments under this Act.

76 There are also many cases of explanatory notes to provisions pointing out that subsection 33(3) provides for variation or revocation of an instrument.

*Example*

Subsection 24(1) of the *Gene Technology Act 2000* provides as follows:

- (1) The Ministerial Council may issue codes of practice in relation to gene technology.

Note: Subsection 33(3) of the *Acts Interpretation Act 1901* confers power to revoke or amend an instrument issued under an Act.

These notes often go further and assert that the instrument in question can be varied or revoked under subsection 33(3).

*Example*

Subsections 56C(5) and (6) of the *Higher Education Funding Act 1988* provide as follows:

(5) The Minister may declare, in writing given to an institution, that a specified information system meets the guidelines relating to information systems that may be used by a student to give to an appropriate officer of the institution a document, notice, certificate or request that the student is required or permitted by a provision mentioned in paragraph (1)(a) to give.

Note: A declaration under this subsection may be revoked. See subsection 33(3) of the *Acts Interpretation Act 1901*.

(6) The Minister may issue written guidelines relating to information systems that may be used to give documents, notices, certificates or requests that students are required or permitted by a provision mentioned in paragraph (1)(a) to give.

Note: A declaration under this subsection may be revoked or varied. See subsection 33(3) of the *Acts Interpretation Act 1901*.

If there is no real doubt that subsection 33(3) applies to the instrument, an explanatory note would not present a problem. However, if there is some doubt, it is suggested that the note is not a guarantee that subsection 33(3) will apply. A court may simply disagree with the note and rule to the contrary. A substantive provision would be safer.

*Example*

Subsection 88(2) of the *Airports (Transitional) Act 1996* provides as follows:

(2) To avoid doubt, the declaration may be varied or revoked, in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*, at any time before the specified day.

77 The issues of implied powers to revoke or vary and jurisdictional error (see paragraph 71 above) do not seem to give rise to any issues for drafters.

78 If the instrument making power in question is conditional, it is possible that subsection 33(3) will not work satisfactorily, because it would require “the like conditions” to be satisfied before there could be a variation or revocation. For example, if the Minister has a power to appoint in writing a person whom the Minister thinks is a fit and proper person, the Minister would, under the strict terms of subsection 33(3), have to be satisfied that the person is a fit and proper person before revoking the appointment. Unless subsection 33(3) is amended to fix this anomaly, it is advisable to include specific powers of variation and revocation in cases such as these.