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THE OLD GIRL STILL LOOKS GOOD TO ME

PURPOSIVE INTERPRETATION OF NEW ZEALAND LEGISLATION

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Purposive interpretation directions in New Zealand interpretation legislation

1 The title of this paper derives from correspondence between two of the twentieth century's greatest jurists, the Englishman H L A (Herbert) Hart and the American, Lon Fuller. Hart denied any necessary connection between law and morality. Fuller believed that subjecting human conduct to the governance of rules was inevitably informed by purpose. Hart's biographer, Professor Nicola Lacey, refers to a "friendly dialogue" between the protagonists. In a response to a review by Hart of Fuller's *The Morality of Law* in 1965, in an exchange described by Lacey as "a curio of an era free from the constraints of political correctness", Fuller wrote:

I was delighted to see so sharp a joinder of issue. All I can say of Miss Purpose is that the Old Girl still looks good to me. One of her enduring charms is that she is a very complex creature indeed, subject to unpredictable moods of surrender and withdrawal. I believe deeply in her without pretending that I really understand her. So the high romance of which you complain will probably continue despite your thoughtful reminder that our liaison promises trouble.²

2 Statutory directions regarding the interpretation of legislation have been a part of New Zealand's legal landscape from its early days as a Crown colony. New Zealand's first

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² *A Life of H L A Hart The Nightmare and the Noble Dream* (OUP, 2004), 196, 201.

locally-enacted interpretation legislation, the Interpretation Ordinance 1851 (NZ), was declared and enacted by Sir George Grey as Governor in Chief of New Zealand with the advice and consent of the Legislative Council (including William Swainson as Attorney-General). The Ordinance contained an express legislative direction regarding purpose.

3 As Sir Kenneth Keith, a Judge of the Supreme Court of New Zealand, explains:

In 1851 William Swainson . . . prepared an Interpretation Ordinance which, in terms of unity, closely tracked Lord Brougham's [UK] Act of 1850 [– An Act for shortening the language used in Acts of Parliament], but in terms of local initiative and distinctiveness gave an additional direction to the Judges never included in United Kingdom interpretation statutes that '[t]he language of every Ordinance shall be construed according to its plain import, and where it is doubtful, according to the purpose thereof.' . . . That legislative emphasis on purposive interpretation has continued, with only a brief intermission in the 19th century, until the present day. The courts may not always have acted in accordance with that instruction, but it has certainly been prominent in argument and judgments in recent decades.³

4 For reasons unknown, the direction to have regard to purpose was not carried forward into the Interpretation Act 1868 or the Interpretation Act 1878. However, it reappeared in the Interpretation Act 1888, and has been a feature of interpretation statutes ever since.

5 Section 5(7.) of the 1888 Act stated:

Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything which Parliament deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good, and shall accordingly receive such fair large, and liberal construction and interpretation as will best insure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning, and spirit :

6 It seems clear that section 5(7.) derived from legislation in Upper Canada in 1849.⁴ Section 6(i.) of the Acts Interpretation Act 1908 and section 5(j) of the Acts Interpretation Act 1924 were in identical terms.

7 There are clear differences between the 1851 Ordinance and the provisions of the 1888, 1908, and 1924 Acts. For one thing, priority was given to purpose rather than literal

³ "The Unity of the Common Law and the Ending of Appeals to the Privy Council" (2005) 54 ICLQ 197, 200.

⁴ New Zealand Law Commission, *A New Interpretation Act* (NZLC R17, 1990) paras 34ff, as cited by K J Keith (2005) 54 ICLQ 197, 200.

meaning. Under the 1851 Ordinance, purpose was engaged only if the meaning of the text was ambiguous.⁵ Section 5(j) has been described as the “cardinal rule” or “main rule” of statutory interpretation in New Zealand.⁶

8 The Interpretation Act 1999 came into force on 1 November 1999. Section 5 provides:

5 Ascertaining meaning of legislation

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
- (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

Compare: 1924 No 11 s 5(j)

9 The explanatory note to the Bill for the 1999 Act says:

Clause 5 provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose. This principle takes the place of that expressed in section 5(j) of the Acts Interpretation Act 1924. Section 5(j) requires legislation to be given such fair, large, and liberal interpretation⁷ as will best ensure the attainment of the object of the legislation according to its true intent, meaning, and spirit. As noted by the Law Commission (*see* para. 40 of the Commission’s report), section 5(j) is a statement by Parliament that the purpose in enacting a statute is central to the purpose of interpretation.

Clause 5 confirms the purposive approach to the interpretation of legislation inherent in section 5(j) and adopted by the Courts in New Zealand. The importance of purpose is recognised by including *clause 5* as a separate clause in *Part 2* [(principles of interpretation)] of the Bill.

⁵ Spiller, Finn, and Boast, *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001), 101–102.

⁶ J F Burrows, “The cardinal rule of statutory interpretation in New Zealand” (1969) 3 NZULR 253; *Police v Christie* [1962] NZLR 1109, 1112, per Henry J; *R v Pora* [2001] NZLR 37, 61 per Keith J; Legislation Advisory Committee, *Guidelines on Process and Content* (2003 Supplement to 2001 ed) para 3A.1.2 (“the main rule”).

⁷ Debating the 2nd reading, on 2 December 1997, of the Bill enacted as the Interpretation Act 1999, Hon Dr Michael Cullen joked: “My colleague Jonathan Hunt and I are both somewhat disturbed that that part of the old Acts Interpretation Act that is named after us—that is, the fair large and liberal interpretation clause—will be removed from the statute for the future.”: (1997) NZPD 5915 (2 December 1997). Later, in the Committee of the whole House stages of the Bill, Hon Lianne Dalziel, fair-haired and a lawyer, remarked in similar vein that she regretted the imminent repeal of section 5(j) because she had grown up with it as a law student and because she had always regarded it as a reasonably accurate description of herself —“fair, large, and liberal”.

- 10 The New Zealand Court of Appeal, in a judgment given a matter of a few weeks before the Interpretation Act 1999 came into force on 1 November 1999, speaking of Part 2 of the Social Security Act 1964, said that the Part “. . . as with all legislation, must be given a purposive interpretation, as provided historically in s 5(j) of the Acts Interpretation Act 1924 and now in s 5 of the Interpretation Act 1999.”: *Tyler v Attorney-General*.⁸
- 11 Indeed, as New Zealand’s leading commentator on statute law Professor J F Burrows QC observes, “[t]he purposive construction of statutes can properly be said to be the modern method of approach.”⁹ However, that has not always been the case.

A former Law Draftsman’s (Denzil Ward’s) views on judicial neglect of s 5(j)

- 12 As Sir Kenneth Keith says, “[t]he courts may not always have acted in accordance with” the purposive interpretation instruction in New Zealand interpretation legislation. One notable observer of judicial neglect of that instruction was D.A.S. Ward.¹⁰
- 13 In 1955, Ward criticised neglect of the Acts Interpretation Act 1924 section 5(j).¹¹ Ward renewed his criticism in 1957:

The ‘fair, large, and liberal construction’ rule laid down by section 5(j) of the Acts Interpretation Act 1924 is not applied in all cases. It is not even applied in a majority of cases. Other rules laid down by that Act are not always applied when they should be. It need hardly be said that the responsibility for this situation rests mainly on counsel.¹²

⁸ [2000] 1 NZLR 211, para [23]. *Tyler* is discussed by Ross Carter, (2001) 22(1) Stat LR 20–37.

⁹ J F Burrows, *Statute Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2003), 135.

¹⁰ Ward was appointed as an Assistant Law Draftsman in 1942, as First Assistant Law Draftsman in 1947, and as Law Draftsman in 1958. From 1966–1974, he was Counsel to the Law Drafting Office (which the Statutes Drafting and Compilation Amendment Act 1973 renamed, on 21 November 1973, as the Parliamentary Counsel Office).

¹¹ “Interpretation of Statutes—The Effect of A Repeal” (1955) 31 NZLJ 248, 249: “The ‘fair, large, and liberal construction’ required by s. 5 (j) to be given to all Acts, whether penal or beneficial, is not required by the United Kingdom Act [ie, the Interpretation Act, 1889 (UK)]. Though some of the provisions of our Act [ie, the Acts Interpretation Act 1924 (NZ)] are declaratory, some of them directly reverse judicial *dicta*. It is often forgotten that s. 2 of the Act creates a statutory presumption that, in all matters to which the Act is capable of being applied, it does apply. The operation of that presumption can be avoided only by showing that a construction different from the statutory one is required by the intent and object of the enactment being construed, or by its context.”

¹² “Trends in the Interpretation of Statutes” (1957) 2 VUWLR 155, 160–161, 171–172. “In 1958 [Ward] wrote a report on *Trends in the Interpretation of Statutes* as part of a Carnegie Social Science Research Project conducted by the Law Faculty at Victoria University (2 V.U.W. Law Review, No. 3, October 1957; republished in (1958) N.Z.L.J. 326, 342).”: (1963) NZLJ 334. See too K J Scott, *The New Zealand Constitution* (Oxford at the Clarendon

14 Discussing in 2002 statutory interpretation in the 1960s, the Hon Justice J J McGrath, a Judge of the Supreme Court of New Zealand, said that Ward’s articles “were influential in the teaching of statutory interpretation and gave a generally accurate picture of judicial ambivalence concerning the correct approach to statutory language at that time”.¹³

15 In a paper delivered at the 1963 Law Society Conference,¹⁴ Ward returned to his theme that the Acts Interpretation Act 1924 section 5(j) had been neglected, not merely by counsel but also by the courts. He said that with few exceptions, the courts were not making the approach that Parliament had directed them to make and that the long-established method of relying on contradictory rules or presumptions culled from the judgments of the English courts had led to a “chaotic situation”. He noted, however, that there were encouraging signs of the courts recognising their statutory obligation as regards interpretation. As Professor John Burrows has said:

Not only did these features of early interpretation – literalism and the protection of values – run across each other, both of them could lead to the non-attainment of the purpose of the statute. Literalism could result in a myopic attention to words which was blind to the wider purpose; and the value-based approach, concentrating as it did on the rights of the individual, could frustrate the purpose of legislation passed for the wider public good. This was pointed out in an important article in 1963 by the New Zealand Law Draftsman Denzil Ward. He regretted the fact that the purposive approach mandated by section 5(j) of the Acts Interpretation Act 1924 was so often ignored.¹⁵

16 In the discussion that ensued, views ranged from Mr Cooke’s (later Lord Cooke of Thorndon) (that there was great attraction in the suggestion that the courts should have a freer hand in approaching statutes) to Mr Dugdale’s (that, if Mr Dugdale were in Mr Ward’s position as Law Draftsman he “would not be rooting for section 5(j) becoming more fashionable but would be wanting to repeal the jolly thing” to encourage more literal, and hence more faithful, interpretation). Ward diplomatically promised to bear

Press, 1962), 43–46.

¹³ “Reading Legislation and Ivor Richardson” (2002) 33 VUWLR 1017–1042, 1019.

¹⁴ “A Criticism of the Interpretation of Statutes in the New Zealand Courts” [1963] NZLJ 293–302. Discussed by J L Robson (ed), *The British Commonwealth—The Development of its Laws and Constitutions, Volume 4, New Zealand* (2nd ed, Stevens & Sons, London, 1967), chapter 15 (“Legal Trends within New Zealand”), 480. See too H R Gray, “A Rationale of Law Reform” (1966) 2(2) NZULR 162, 171.

¹⁵ “The Changing Approach to the Interpretation of Statutes” (2002) 33 VUWLR 981, 983.

Mr Dugdale's suggestion in mind. It is also interesting to read the comments of Professor Davis who, in endorsing Ward's plea for Courts to rely more often on section 5(j), made his own plea for judges to "please tell us" when they are doing so and not leave it to readers to speculate whether they were relying on general canons of interpretation, a specific canon, or on section 5(j) itself.

A probable explanation for neglect of s 5(j) in the 1950's and 1960's is excessive fidelity or deference at that time in New Zealand to English case-law, and to English textbooks (such as *Craies* and *Maxwell*). Neither the Interpretation Act 1889 (UK), nor the Interpretation Act 1978 (UK), contains a purposive interpretation instruction equivalent to s 5(j). Consequently the English cases and English commentaries stressed other approaches, canons, maxims, and principles. Perhaps as citation of English case-law waned, and citation of local case-law grew, in New Zealand courts,¹⁶ so too was the purposive interpretation instruction in s 5(j) increasingly followed in New Zealand.

17 Judicial reactions to Ward's criticism have certainly changed over time.

18 The Rt Hon Sir Alexander Kingcome Turner responded in the late 1960s: "It is suggested that the courts ought to take a broader view than they do in construing new statutory provisions. There is, in my opinion, some merit in these suggestions; but perhaps not quite so much as was urged by the Parliamentary Law Draftsman, Mr Denzil Ward, in his address to the New Zealand Law Society's Conference at Auckland in 1963."¹⁷

19 But Justice McGrath said in 2003 that, "Over the forty years since Ward spoke out, especially during the latter half of that period when Sir Owen Woodhouse, Lord Cooke of Thorndon, and Sir Ivor Richardson were, successively, President of the Court of Appeal, the basic method of the New Zealand Courts has been to focus on the scheme and purpose of the legislation."¹⁸

¹⁶ Rt Hon Sir Ivor Richardson, "Trends in Judgment Writing in the Court of Appeal", Legal Research Foundation New Zealand Legal Method Seminar, 2 March 2001, 5.

¹⁷ "Changing the Law" (1969) 3 NZULR 404, 418.

¹⁸ "Purpose, *Hansard*, Rights, and Language" in R Bigwood (ed), *The Statute: Making and Meaning* (Wellington, LexisNexis, 2004), 229.

Examples of judicial discussion and application of s 5 of Interpretation Act 1999

20 It is instructive to look at a selection of recent cases coming before the High Court, Court of Appeal and, more recently, the Supreme Court, to gauge the extent to which the New Zealand courts apply a purposive construction and, specifically, section 5(1) of the Interpretation Act 1999. This is rather a long catalogue, but including extensive extracts from judgments will, it is hoped, indicate the weight of judicial reliance on purpose in modern-day statutory interpretation.

21 In *Attorney-General v Reid*,¹⁹ the High Court (Doogue and Gendall JJ, at paras [7] and [9]) cited and reproduced the text of s 5 and observed that “[w]e are enjoined by s 5(1) of the Interpretation Act 1999 to ascertain the meaning of s 88A of the Judicature Act from its text and in the light of its purpose.” The Judges concluded:

. . . that the Employment Tribunal and the Employment Court are ‘inferior Courts’ for the purposes of s 88A of the Judicature Act 1908. . . . Such a conclusion is, in our view, consistent with the apparent purpose of s 88A that there should be control by [the High Court] of litigation by vexatious litigants in respect of all Courts of originating jurisdiction other than Courts of superior jurisdiction.²⁰

22 *R v Rongonui*²¹ was an appeal against conviction for murder. Among other issues before the Court of Appeal was the nature of the partial defence of provocation which is provided for in s 169 of the Crimes Act 1961, and which, if applicable, reduces what would otherwise be murder to manslaughter. In construing s 169, Thomas J commented:

Reverting to the function of the section is undoubtedly material. Section 5(1) of the new Interpretation Act 1999 expressly provides that the meaning of an enactment must be ascertained from its text ‘and in the light of its purpose.’ While it might be said that this provision adds little or nothing to its predecessor, the more prolix s 5(j) of the Acts Interpretation Act 1924, there is no doubt that the change in wording was introduced to emphasise to the Courts the importance of the purpose of a statutory provision in arriving at its meaning. Section 5(1) was the most widely discussed provision in the new Act. The Law Commission

¹⁹ [2000] 2 NZLR 377.

²⁰ paras [38] and [39].

²¹ [2000] 2 NZLR 385.

report, the select committee report and the parliamentary debates all expressly sanctioned reference to a statute's purpose.²²

23 In *Warner v United Kingdom*,²³ Nicholson J said in the High Court (at para [25], and in a decision affirmed on appeal without reliance on the Interpretation Act 1999):

....applying the provisions of s 5 of the Interpretation Act 1999 by ascertaining the meaning of the warrant provision in s 18 [of the Extradition Act 1999] from the text of the Act and in light of its purpose and taking into consideration the organisation and format of the Act, I consider that the three-page document which accompanied the request for surrender as a supporting document, was a warrant for the arrest of Mr Warner for the offences stated therein within the meaning of s 18(4)(a)(i) of the Act.

24 In *Police v Sinclair*,²⁴ Heron ACJ said:

The view I take in this case is that the legislation has deliberately or unintentionally, probably the latter, omitted words which would have put their intention beyond doubt. Having regard however to the general words used, I am prepared to find that the broad definition of 'unlicensed' covers the situation of someone who has allowed his or her driver licence to expire. . . . In doing so, I am doing no more than I am required by law to do, under s 5 of the Interpretation Act 1999, which is to ascertain the meaning of an enactment from its text and in the light of its purpose. . . . One of the purposes of this legislation was to reform the rules relating to motor vehicle licensing and to enforce those rules by sanctions which included forbidding people to drive and confiscating their vehicles if they did so. By reference to context and those other matters referred to, all of which I consider fall under s 5(3) of the Interpretation Act 1999, I have no doubt that expired licence holders were intended to fall into the net. Had the legislation used language inconsistent with or irrelevant to the status of expired licence holders, I would be bound by the text of the statute, but I have no difficulty in bridging the gap caused by omitting precise reference to a category when the general meaning of unlicensed is considered. But for the text of ss 113 and 96 of the Land Transport Act [1998], it is easy enough to equate the status of unlicensed driver with someone whose licence has expired and a new application to obtain a licence is required. No authority was cited to me that could justify or explain any perceivable difference.

25 *R v Pora*²⁵ was a successful appeal against a minimum period of 13 years' imprisonment imposed on Pora, who committed murder in March 1992, was first convicted in 1994,

²² para [161].

²³ [2001] 1 NZLR 331.

²⁴ [2001] 1 NZLR 355, paras [27]–[29].

²⁵ [2001] 2 NZLR 37. *Pora* is discussed by Andrew Butler, [2001] PL 586; Janet McLean, [2001] NZ Law Rev 421, 439–444; Philip Joseph, [2001] NZ Law Rev 451–457; and Jeremy Waldron, (2004) 10(4) Otago LR 631.

and who, after a successful appeal to the Court of Appeal, was convicted again, and appeared for sentence, in 2000, when the sentencing judge regarded himself as required to impose that minimum period by an intervening (and expressly retroactive) 1999 “home invasion offending” amendment. Section 5 of the Interpretation Act 1999 featured prominently in the Court of Appeal’s judgments, but other “aids to construction, presumptions or pointers” were probably determinative.

26 Discussing s 5 of the Interpretation Act 1999, Keith J said:

New Zealand Courts, unlike those in the United Kingdom, are and indeed have been for almost all of the past 150 years subject to a general statutory direction about how they are to interpret legislation (Interpretation Ordinance 1851–1868, Interpretation Act 1888, Acts Interpretation Act 1908 and Acts Interpretation Act 1924, s 5(j)). That ‘cardinal rule’, as it has rightly been dubbed, is not at the option of the Judges. The direction, now given in s 5(1) of the Interpretation Act, is mandatory. Under the Part heading, “Principles of Interpretation”, and the section heading, “Ascertaining meaning of legislation”, Parliament says that: ‘The meaning of an enactment must be ascertained from its text and in the light of its purpose.’ . . . We accept at once that meaning is not to be ascertained only from the immediate text. The surrounding law and often other material will be relevant – as this case plainly indicates.

. . . That surrounding material includes the drafting history. One issue which the Law Commission considered in proposing a new Interpretation Act was whether a direction like that then given by s 5(j) of the Acts Interpretation Act 1924 should be maintained in a new Interpretation Act. The central argument for including it was democratic: ‘The courts are to give effect to the law enacted by Parliament. True, it is for the courts to determine the meaning of the words that Parliament writes. That is their constitutional role. Are directions or guides of the s 5(j) type needed or helpful in that context? Does experience show that they can in some situations provide a useful reminder of the need of the interpreter to pursue the purpose of the law maker? That reminder can emphasise for the interpreter the relevant statements of the law maker’s purpose and meaning. Even if the proposition is well understood there is value in its declaratory statement. The law is more accessible. It can help rebut the unthinking use of presumptions which might be used to defeat parliamentary purpose. It can help emphasise the central position of statutes in our legal system; they are not merely a gloss on the common law. The direction can enhance the likelihood of an interpretation consistent with democratic theory.’ ‘A New Interpretation Act’ NZLC R17 (1990), para 59. . . . The commission made this comment while accepting the strength of the arguments for statutory directions to protect rights as well, arguments which had just been accepted by Parliament in enacting the Bill of Rights including the interpretive direction in s 6 (see paras 33–58 of the report). The directions both to protect rights and to give effect to the text and purpose of the particular enactment could well be in conflict – as they are in this case.²⁶

²⁶ paras [103]–[106].

27 Section 5 was also mentioned by the Chief Justice, Dame Sian Elias:

The starting point must be the text and purpose of the statute being considered (s 5(1) of the Interpretation Act 1999). Next it is appropriate to look to the wider legislative context (*Ahmad v Inner London Education Authority* [1978] 1 QB 36 at p 48 per Scarman LJ). It is the function of the Court to give effect to the will of Parliament as expressed in statutes. They are the background against which the Criminal Justice Act is to be applied. Finally, it is proper to take into account the principles of construction adopted by Judges in their decisions. But in applying these principles (for the most part expressions of common sense) it is important to recognise that they are aids to ascertaining the meaning of the statute, not inflexible rules. What the statute means has to be confronted in context and is ‘not answered by maxims’ (*Cobiac v Liddy* (1969) 119 CLR 257 at p 268 per Windeyer J).²⁷

28 The main enactments to be interpreted were—

- s 80 of the Criminal Justice Act 1985 (the power, which under the Criminal Justice Amendment Act 1993 first became available on 1 September 1993, to impose minimum periods of imprisonment for home invasion murders). This section was amended by the Criminal Justice Amendment Act (No 2) 1999 by the addition of new subsection (2A) to require imposition of a minimum period of imprisonment of at least 13 years if the offence involved “home invasion”
- s 4(2) of the Criminal Justice Act 1985 (which precludes the Court from imposing a sentence in the nature of a penalty which could not have been imposed on the offender at the time of the offence (except with the offender’s consent), and which is expressed to apply “Notwithstanding any other enactment or rule of law to the contrary”)
- s 2(4) of the Criminal Justice Amendment (No 2) Act 1999 (which requires a minimum period of imprisonment pursuant to s 80, as amended by that 1999 Amendment Act, to be imposed on persons convicted of “home invasion offending”, even if the offence was committed before the date on which the amended section came into force).

29 The Crown conceded that the power in s 80 (as amended in 1999) to impose minimum periods of imprisonment could not apply to crimes committed before 1 September 1993

²⁷ para [5].

(the date on and after which that power first became available under the Criminal Justice Amendment Act 1993).

30 The appeal therefore had to be allowed because the power was *unavailable* in respect of Pora (who had committed murder in March 1992). Given that result, Richardson P preferred, “in the absence of full argument”, to express no other conclusions (para [60]). But the 6 other Judges went on, anyway, to discuss in more detail the operation of s 2(4).

31 Both the Crown and the Court of Appeal accepted (in *Pora* (at para [82]), as well as in an earlier case *R v Poumako*²⁸ (at para [54])) that the imposition of a minimum term of imprisonment (which is part of the sentencing process, and which on being imposed becomes part of the sentence passed on the offender by the Court) involved the imposition of a penalty. The Court contrasted this to any question of administration of a Court-imposed sentence, and to earlier judicial acceptance of the propriety of backdating changes in the administration of penalties already imposed. It was however suggested (eg, paras [15] and [102]) that the promoters of the 1999 amendment may have backdated the changes to s 80 because they (mis)understood s 80 as concerning simply the administration of the criminal penalty, rather than as being a power to impose a penalty or order in the nature of a penalty. In any event, section 2(4) does not expressly override or repeal the prohibition on retroactive penalties in s 4(2).

32 Sections 4(2) and 2(4) were therefore seen as conflicting, which made the issue (for the 6 Judges other than Richardson P) how to resolve that conflict (which should prevail?) and, in resolving it, determine the extent (if any) of the retroactive operation of s 2(4).

33 There was, among those 6 Judges, a difference in approach between—

- Keith, Gault, and McGrath JJ, who said s 2(4) was, under s 1 of the Criminal Justice Amendment (No 2) Act 1999 (para [24]) and canons of construction, part of, but a provision later and more specific than s 4(2) of, the 1985 Act, and a provision not to be deprived of any effect at all, so that s 2(4) partly displaced (or partly impliedly repealed) s 4(2), with the result that the power conferred by s 80

²⁸ [2000] 2 NZLR 695. *Poumako* is discussed by Philip Joseph, [2000] NZ Law Rev 301, 313–319; Andrew Butler, [2001] PL 28; Janet McLean, [2001] NZ Law Rev 421, 439–444; and Jeremy Waldron, (2004) 10(4) Otago LR 631.

(that is, the power to impose minimum periods of imprisonment for home invasion murders)—

- ▶ was exercisable for offences committed before s 2(4) came into force; but
- ▶ could not be exercised for offences committed before 1 September 1993 (the date on and after which the power to impose minimum terms of imprisonment first became available under the Criminal Justice Amendment Act 1993—see paras [87]–[91] for the Judges’ reasons for accepting the Solicitor-General’s concession of this backdating limit, which reasons include that s 2(4) refers to an order “under that section”, ie, under s 80 as substituted in 1993); and
- the Chief Justice & Tipping J (with whom Thomas J concurred), who said s 2(4) conflicted with s 4(2) and should, because it is inconsistent with fundamental rights, international obligations, and presumptions against retrospectivity, and does not expressly override or repeal s 4(2), be treated as of no effect.

34 Thomas J summarised the Judges’ difference in approach by reference to s 5(1) of the Interpretation Act 1999, and as follows (the summary highlights that the term “enactment” means – s 29 of the Act – “the whole or a portion of an Act or regulations”):

In applying [s 5(1) of the Interpretation Act 1999] Keith J focuses on s 2(4). He finds that there is no ambiguity in the meaning of the subsection so that, as it is the later and specific provision, it prevails over s 4(2). For her part, the Chief Justice accepts the plain meaning of both subsections and focuses on the conflict in the context of the Act as a whole. . . . Consistently with the draft judgment which I circulated earlier, I consider that the Chief Justice’s approach is the correct approach. To my mind, it is not legitimate to focus exclusively on s 2(4). Of course, the meaning of s 2(4) is to be ascertained from its text and in the light of its purpose. But the same approach must be accorded s 4(2). The meaning of that subsection must also be ascertained from its text and in the light of its purpose. In the result, the meaning of s 2(4) is clear: it requires a minimum period of imprisonment pursuant to s 80, as amended, to be imposed on persons convicted of murder, even if the offence was committed before the date on which the amended section came into force. So, too, the meaning of s 4(2) is clear: it precludes the Court from imposing a sentence in the nature of a penalty which could not have been imposed on the offender at the time of the offence (except with the offender’s consent). Consequently, the interpretative problem before the Court does not relate to the meaning of s 2(4) or s 4(2) as such, but to the fact that the two subsections are in conflict. In a real sense, the ‘enactment’ for the purpose of s 5(1) of the Interpretation Act in this case is the statute as a whole. Two provisions are in conflict, and it is that conflict and not the meaning of any particular provision

which is to be resolved. . . . It will be apparent that the canons of construction constitute a premise which is entrenched in Keith J’s approach to the resolution of the conflict between the two subsections. This premise is absent from the Chief Justice’s thinking. She accepts, as I do, that there is a choice, and that in the modern era a rights-centred approach is required to resolve the conflict – and to resolve it in a manner which can be said to take rights seriously.²⁹

35 The Chief Justice and Tipping and Thomas JJ suggested that the “canons of construction” in Keith J’s approach were subordinate to and displaced by the purposive direction and statutory presumption against retroactivity in the Interpretation Act 1999 ss 5 and 7 and the New Zealand Bill of Rights Act 1990 s 25(g) (paras [29], [137]). But Keith J (eg, paras [82], [116]) saw that direction and presumption as displaced (Interpretation Act 1999 s 4 and New Zealand Bill of Rights Act 1990 s 4) not by the canons of construction, but instead by the terms of s 2(4) itself. Incidentally, Keith J (para [109]) saw those canons as tending to the same result as s 5 of the Interpretation Act 1999: “In this case the ‘rules’ about later enactments prevailing over earlier, specific enactments prevailing over general, and giving effect to the meaning of each enactment according to its purpose (a rule, to repeat, which has statutory sanction) all point to exactly the same result.”

36 Keith J also highlighted the importance of purpose:

There can be no doubt at all from the text of s 2(4), as well as from its being added to the Bill and from the statement of the Member of Parliament promoting it (*Poumako* at para [23]), that Parliament’s purpose was to apply the amended s 80 to those already before the Courts – that is to those who had been charged with or convicted of offences committed before July 1999 but who had not then been sentenced. The meaning and purpose of s 2(4) are completely in accord. Parliament clearly directed the Courts to apply the new powers in respect of home invasion murders committed earlier. We do not deny of course that s 2(4) of the 1999 Act, as we interpret it, is a serious breach of a fundamental rule of our legal and constitutional system and of New Zealand’s international obligations. We agree that we should strive to interpret legislation consistently with that fundamental rule: principle, the presumption about interpreting legislation consistently with international obligations, the strong wording of s 4 [of the Criminal Justice Act 1985] and the direction in s 6 of the Bill of Rights all require that. But Parliament’s words and purpose [in s 2(4)] are, we consider, so plain that we do not think that the breach can be removed by judicial interpretation.³⁰

²⁹ paras [126]–[128].

³⁰ paras [107], [116].

37 In *Frucor Beverages Ltd v Rio Beverages Ltd*,³¹ a majority of the Court of Appeal (Thomas and Blanchard JJ) construed s 34 of the Evidence Amendment Act (No 2) 1980 so that it protected from disclosure privileged communications not merely in the hands of registered patent attorneys, but also (and beyond the literal terms of the section) in the hands of their clients.

38 The majority identified reasons why it is legitimate for the Court to construe the section as implicitly conferring on the client the protection in issue, including that:

there is no necessary reason when considering the legitimacy of an implication to regard the ‘text’ as meaning particular words or phrases within the statutory provision rather than the text of the section read as a whole. The text of s 34, in this sense, could be said to be ‘ambiguous or obscure’ in that it does not obtain a sensible meaning when read literally. Such an approach is within the purport of s 5(1) of the Interpretation Act 1999, which requires the meaning of an enactment to be ascertained from its text and in the light of its purpose. To determine the purpose of an enactment it is, of course, necessary to have regard to its context. As demonstrated above, when regard is had to the legislative history, Parliament’s intended purpose in enacting s 34 is clear, and it is the ‘text’ of the section as a whole which fails to give effect to that purpose.³²

39 The majority summarised its decision as follows:

To sum up, a purposive interpretation is required to give effect to Parliament’s will. A problem existed relating to the confidentiality of communications between patent attorneys and their clients. The question was addressed by the Torts and General Law Reform Committee. It recommended that legislation be enacted analogous to the position as between solicitors and their clients. A Bill was introduced into Parliament to meet the problem. The explanatory note to the Bill confirms that it was intended to implement the recommendation of the Law Reform Committee, albeit in different terms. If the literal meaning of s 34 is adopted, Parliament will not have dealt with the problem – or mischief – giving rise to concern. Rather, it will have enacted a provision for which there is no sound rationale and, which in terms of Parliament’s objective is anomalous, illogical and futile. No such absurd intention should be attributed to Parliament. Moreover, the practical consequences will be inconvenient and confusing, and Parliament should not be thought to have intended to create those consequences. The Court should also bear in mind that patent attorneys and their clients appear to have relied upon and acted on the assumption that Parliament has done

³¹ [2001] 2 NZLR 604.

³² para [38].

what it set out to do and, in the explanatory note to the Bill, said it was doing. The justification for a purposive interpretation is compelling.³³

40 *Attorney-General v New Plymouth District Court*³⁴ was a judicial review of a District Court Judge’s decision that a particular charge under s 125 of the Crimes Act 1961 of committing an indecent act in a public place (presenting an erect penis to a seven-year-old boy at a public toilet) was not an “offence against the person of a sexual nature” covered by 185A(b) of the Summary Proceedings Act 1957, which would permit the boy not to give written evidence, and not to be cross-examined, at the preliminary hearing of the charge. The District Court Judge’s decision was set aside. Priestley J noted (para [11]) that “the learned District Court Judge referred to s 5 of the Interpretation Act 1999”. Priestley J added:

“There is a clear purpose underlying the provisions of Part VA of the Summary Proceedings Act to minimise the distress and trauma which will be caused by the complainant or victim of a sexual offence giving evidence at a preliminary hearing. That purpose, as a matter of legislative policy, has been seen as more important than the former right of an accused to test and probe a complainant’s evidence at a depositions hearing. . . . Given this clear legislative purpose it is important to ensure that purpose is not eroded by artificial semantic arguments or a restricted interpretation.”³⁵

41 In *Edwards v North Auckland District Legal Services Subcommittee*,³⁶ the High Court (Wild and Ronald Young JJ) said:

In order to be recognised by law, a body unincorporate may well need to have different characteristics in other legal contexts, for example in a taxation one. But s 5(1) of the Interpretation Act 1999 directs us to ascertain the meaning of s 27(1) from its text and in the light of its purpose. Its purpose is unmistakably to make any body of persons unincorporate ineligible for legal aid. We see nothing in the text of s 27(1) to suggest that the words “body of persons” have other than their ordinary everyday meaning. If reference to a dictionary is necessary to help with the meaning of these simple words, then *The Chambers Dictionary*

³³ para [31]. At the dissolution of the 47th Parliament in August 2005, the Evidence Bill (No 256–1) was before the Justice and Electoral Committee. Clauses 49 and 50 of the Bill reflect the law as stated in *Frucor* in so far as they make clear the extent of the protection from disclosure of communications intended to be confidential and made in the course of, and for the purpose of, a person obtaining professional legal services from a legal adviser. Under clause 50(2), **professional legal services** means, in the case of a registered patent attorney, obtaining or giving information or advice concerning patents or trade marks or designs or any related matters. Clauses 49 and 50 are discussed by Mark Paton and Brooke Whitaker, “Patently privileged” [2005] NZLJ 281–284.

³⁴ [2001] 3 NZLR 135.

³⁵ paras [29] and [32].

³⁶ [2002] 1 NZLR 706.

(1993 ed) gives the meaning “a number of persons united by something they have in common”. That seems to us exactly to describe Muriwhenua and Rongomaiwahine in the context of their respective proceedings and the appellants’ applications for legal aid for those proceedings. . . . If Mr Edwards and Ms Te Hau are correct, then the result would be that any member of a body could avoid s 27(1) simply by suing in their own name, even though they were only suing as a member of the body and had no interest distinct from or greater than other members of the body. That result, and the interpretation that would lead to it, defeats the obvious purpose of s 27(1), and is thus not in accord with s 5(1) of the Interpretation Act.³⁷

- 42 In *Commerce Commission v Roche Products (New Zealand) Ltd*,³⁸ Fisher J was asked to determine whether the word “arose” in the statutory time-bar in s 80(5) of the Commerce Act 1986 meant either “occurred” or “was discovered or became discoverable”. The Judge said (para [16]) “The interpretation of a statutory provision begins with s 5 of the Interpretation Act 1999.” He later added:

I conclude that the relevant purposes of the Commerce Act do not require adoption of the discoverability interpretation supported by the commission. The legislation balances the general purpose of promoting competition against the more specific purposes of avoiding future evidentiary difficulties, needlessly rearguing stale issues, prolonging commercial uncertainty, and limiting exposure to a new source of liability. The balance has been struck with a limitation period of three years. The express and implied statutory purposes do not require qualification to that unadorned period.³⁹

- 43 In *R v Cara*⁴⁰ issues before the High Court included the meaning of “service” in s 228(a) (dishonestly taking or using document), and of “offences” in s 98A (participation in organised criminal group), of the Crimes Act 1961. Potter J said:

The trend in statutory interpretation is to adopt the purposive approach where the words of the legislation are read in their fullest context and with a view to giving effect to the purpose of the legislation (Burrows, *Statute Law in New Zealand* (3rd ed, 2003) p 130). The purposive approach is reflected in s 5 of the Interpretation Act 1999 Thus although the grammatical meaning of a word is the starting point, that meaning must also be consistent with and give effect to the purpose of the legislation before it is adopted. As McHugh JA pointed out in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at p 423: “A search for the grammatical meaning still constitutes the starting point. But if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act.” Likewise Cooke P (as he then

³⁷ paras [22] and [23].

³⁸ [2003] 2 NZLR 159.

³⁹ para [38].

⁴⁰ [2005] 1 NZLR 283.

was) in *McKenzie v Attorney-General* [1992] 2 NZLR 14 at p 17 spoke of “the general principle of statutory interpretation that strict grammatical meaning must yield to sufficiently obvious purpose.”⁴¹

44 *R v M*⁴² related to minimum non-parole periods. Persons sentenced to imprisonment for a determinate term of more than two years had non-parole periods of one-third of their sentence (Parole Act 2002, s 84(1)). However, the minimum period could be increased to the lesser of two-thirds of the sentence or ten years if the circumstances of the offence were sufficiently serious to justify a higher minimum period (Sentencing Act 2002, s 86(2)); circumstances could be sufficiently serious if they were out of the ordinary range of offending of the particular kind (s 86(3)). An earlier case established that minimum period orders were designed for cases of such seriousness that release after one-third of the sentence represented insufficient denunciation, punishment and deterrence. In *R v M* the Court of Appeal held that it was clear from s 86 that the Court was to consider whether the individual circumstances of the offence actually committed were sufficiently serious rather than the inherent seriousness of the offence in generic terms.

45 Tipping J said:

It is . . . quite clear that Parliament was fully aware that it was reducing the normal non-parole period for those convicted of sexual violation by rape from two-thirds to one-third. What is less clear is what Parliament understood to be the basis upon which Judges could and should extend the one-third norm by means of a minimum-period order under s 86. There was reference to seriousness, seemingly on a per se basis, and to risk. The section as enacted introduced the concept of sufficient seriousness. In these circumstances the Court can only read the words and scheme of the section in their normal and natural sense. . . . It is sometimes said that when dealing with questions of statutory interpretation the Court should seek to give effect to the intention of Parliament. A preferable and more realistic way of expressing the Court’s task is to say that the Court is required to ascertain the meaning of what Parliament has enacted in the light of the words used and the purpose of the measure. Text and purpose, as s 5 of the Interpretation Act 1999 recognises, will usually be interdependent: meaning from text in the light of purpose.⁴³

46 *R v Smith*⁴⁴ related to the Crimes (Criminal Appeals) Amendment Act 2001. That Act validated specified procedural deficiencies in various decisions of the Court of Appeal

⁴¹ para [142].

⁴² [2003] 3 NZLR 481.

⁴³ paras [17] and [18].

⁴⁴ [2003] 3 NZLR 617.

decided under an unauthorised *ex parte* procedure, and also provided a procedure for rehearing. The needs for the validation are shown by the case of *R v Taito* [2003] 3 NZLR 577, which was decided by the Privy Council after the Act was passed, and which revealed additional deficiencies (breaches of natural justice) not dealt with by the validation. One issue before the Court of Appeal was whether, as the Crown submitted, the validation and rehearing provisions in Part II of the Act exclude the inherent power of the Court to revisit a determination in exceptional circumstances. The Crown maintained that under the statutory rehearing provisions an applicant must show “an arguable case of miscarriage in the *outcome* as opposed to the *process* by which the outcome was arrived at”. The Crown accepted that the criticisms of the Privy Council now made it arguable that the defects are so fundamental that the Court would invariably be satisfied that ‘there is an arguable case that a miscarriage of justice has occurred’. It was acknowledged that the proper course for the Court may well be to direct rehearing whenever one is sought by an appellant under s 14 and to direct oral argument. But the Crown submitted it was fatal to the availability of the inherent power that recourse to it would make ss 14, 15, and 16 of the 2001 Amendment Act redundant.

47 The Chief Justice said:

The meaning of a statute must be discovered from its text and in the light of its purpose (s 5(1) of the Interpretation Act 1999). Help in ascertaining the meaning of an enactment may be obtained from its headings and the Act’s organisation and format (s 5(3) of the Interpretation Act). A meaning consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act is to be preferred (s 6 of the New Zealand Bill of Rights Act). In cases of difficulty, the legislative history may throw some light (see J F Burrows, *Statute Law in New Zealand* (2nd ed, 1999) at p 164). . . . The terms of Part II of the 2001 Amendment Act do not purport to exclude other remedy. . . . The legislative history supports this interpretation. . . . The purpose to be discerned from the 2001 Amendment Act does not suggest that it excludes rehearing except under s 14 in all cases of wider error. The deficiencies addressed in Part II are essentially want of authority by the Court for the procedure followed. They are formal defects, in the sense that they arise only through lack of specific statutory power. Determinations without such express power do not inevitably give rise to miscarriages of justice. Parliament may remedy the omission at any time without affecting fundamental principle. If it chooses to do so, no necessary miscarriage of justice arises through rectification of the omission. In such circumstances the “additional safeguard” of a rehearing with leave only if an arguable miscarriage of justice is shown does not breach the rights to the observance of natural justice. . . . The deficiencies in the present case are quite different. Failure to hear, consideration by the Court of material not disclosed to the appellants, presumptive bias on the part of participating Judges, discrimination in treatment between appellants, and other deficiencies identified by the Privy Council are breaches of the right to justice contained in s 27(1) of the New Zealand Bill of Rights Act. They

are not mere irregularities. They are breaches of an irreducible minimum standard of justice. . . . The appellant was effectively denied his appeal, in breach of the “minimum standards of criminal procedure” provided by s 25(h) of the New Zealand Bill of Rights Act. . . . The Crown contention as to the interpretation of Part II of the 2001 Amendment Act is that rehearing is available only by leave, on demonstration of an arguable case of miscarriage of justice in the sense that the appeal on the merits is shown to have a prospect of success. That is not an adequate response to meet the failure to provide a procedure which complies with the rights contained in ss 25(h) and 27(1). . . . The 2001 Amendment Act can be given a meaning consistent with the retention of the power of the Court to correct such fundamental error in process. Interpretation of Part II in a manner which does not exclude the inherent power is therefore to be preferred, in application of s 6 of the New Zealand Bill of Rights Act. . . . It is not clear that the Crown is correct in submitting that ss 14 – 16 of the 2001 Amendment Act are redundant if the Court is able to exercise an inherent power to rehear. The circumstances of the appeals vary, as the discussion in *Taito* makes clear. If it is the case, however, that all appeals heard between 1991 and 2001 are subject to deficiencies in procedure which are wider than the qualifying grounds identified in s 13, then this may be a rare example of legislation which has proceeded under error.⁴⁵

48 In *R v Karpavicius*⁴⁶ the Privy Council was asked to interpret the Misuse of Drugs Act 1975 s 6(2A), which is as follows:

- (2A) Every person who conspires with any other person to commit an offence against subsection (1) of this section commits an offence against this Act and is liable on conviction on indictment to imprisonment for a term—
- (a) not exceeding 14 years where a Class A controlled drug was the controlled drug or one of the controlled drugs in relation to which the offence was committed;
 - (b) not exceeding 10 years where paragraph (a) of this subsection does not apply but a Class B controlled drug was the controlled drug or one of the controlled drugs in relation to which the offence was committed;
 - (c) not exceeding 7 years in any other case.

49 The question was whether the words “in any other case” in paragraph (c) cover, as argued by the appellant, only cases involving Class C drugs or whether, as the Court of Appeal held and as the prosecution argued, they cover cases involving Class C drugs as well as other cases which cannot be prosecuted under paragraph (a) or paragraph (b).

⁴⁵ paras [53]–[64].

⁴⁶ [2004] 1 NZLR 156.

50 The Privy Council (Lord Steyn delivering the opinion), advising that the appeal should be dismissed, said:

In a more literalist age it may have been said that the words of s 6(2A)(c) are capable of bearing either a wide or narrow meaning and that the fact that a criminal statute is involved requires the narrower interpretation to be adopted. Nowadays an approach concentrating on the purpose of the statutory provision is generally to be preferred: Cross, *Statutory Interpretation* (3rd ed, 1995), pp 172–175; Ashworth, *Principles of Criminal Law* (3rd ed, 1999), pp 80–81. This is reinforced by s 5(1) of the Interpretation Act 1999 (New Zealand) which provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose. The reasoning of the Court of Appeal has the virtue that it inquires into the circumstances in which the legislature used the words “in any other case”, and what the object was which the legislature had in mind. Given the scheme and structure of the legislation it is to be inferred that the legislature aimed to create a comprehensive system of control of drugs with no obvious gap. . . . Such an interpretation ascribes to the words, in their context, a perfectly natural meaning. And it is better suited to the purposes and policies underlying the legislation than the narrower interpretation.⁴⁷

Has the approach of the New Zealand Supreme Court changed anything?

51 It would be surprising if the creation of the new Supreme Court as New Zealand’s final appellate court were to herald a new approach to statutory interpretation since the first judges were all appointed from the New Zealand Court of Appeal. In *Awatere Huata v Prebble*⁴⁸ – the first substantive decision of the new Court – the issue was whether the Court of Appeal had correctly interpreted the so-called “party-hopping” provisions (ss 55A–55D) of the Electoral Act 1993, as inserted by the Electoral (Integrity) Amendment Act 2001. These “party-hopping” provisions will expire with the close of polling day for the forthcoming general election (17 September 2005).

52 As a matter of background, there are 2 kinds of members of the New Zealand Parliament. The first are members elected by territorial constituencies on the basis of securing a majority of the votes cast by voters (“constituency MPs”). The second are members who are elected on a party list the number of whom depends on the share of the party vote a party obtains (“list MPs”). The new sections reflected concern about the incidence of members of Parliament changing parties. A vacancy could result under the provisions through voluntary notice by a defecting MP or through the parliamentary leader of the

⁴⁷ paras [15] and [16].

⁴⁸ [2005] 1 NZLR 289.

relevant political party giving notice under section 55D(a) of the Electoral Act 1993 stating that the parliamentary leader “reasonably believes that the member of Parliament concerned has acted in a way that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament as determined at the last general election”.

53 Mrs Awatere Huata claimed that, because she had continued to vote in generally the same way as her former ACT party, the parliamentary leader of the party could not have “reasonably believed as a matter of fact that [she] had acted in a way that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament as determined at the last General Election”. On this ground, the Court of Appeal, by a majority, allowed Mrs Awatere Huata’s appeal. The majority Judges in the Court of Appeal were of the opinion that the legislation provided that proportionality was distorted by a member only where the member’s own conduct so altered the voting strength of a party in the House as to amount to defection.

54 The Judges of the Supreme Court rejected the approach of the majority in the Court of Appeal. The Supreme Court considered that proportionality was distorted when a member continued to serve in Parliament after ceasing to be a member of the political party for which he or she was elected. Representation in the House was much more than the exercise of voting (eg, on legislation). Focus only upon voting invited consideration of the importance and pattern of the member’s voting pattern in the House. The purposes of the Electoral (Integrity) Amendment Act 2001 emphasised the central role of political parties in the Electoral Act. Parliament was also the forum for continuing appeal to the electorate by political parties, and members also do significant work in select committees.

55 Among the reasons for the Supreme Court’s decision are a number of references to the purposes of the 2001 Amendment Act:

- the “purpose [of member notice or party notice of vacancy] was ‘to enhance the maintenance of the proportionality of political party representation in Parliament as determined by electors’[: s 4(b) Electoral (Integrity) Amendment Act 2001]. The sense of the legislation is that, whether the eventual vacancy is a result of member notice or party notice, proportionality of political party representation in Parliament as determined by electors is distorted when the party affiliation of a

member of Parliament changes; when he ‘ceases’ to be a member of the party for which he was elected.”: Elias CJ, para [49]:

- “The purpose of the Electoral (Integrity) Amendment Act 2001, which added ss 55A – 55E to the 1993 Act, includes the enhancing of the maintenance of the proportionality of political party representation in Parliament as determined by the electors. . . .The central role of party, already well established by 1993, has been enhanced by the introduction of a proportional electoral system. It is against that context that I consider the narrow interpretation given by the majority of the Court of Appeal to the scope of s 55D. I do not agree with it because of the ordinary meaning of the provisions, their purpose and their drafting history, as well as that context.”: Keith J, paras [73], [85], and [86]:
- “On becoming an independent, Mrs Awatere Huata ceased to be a member of ACT for the purposes of political party representation. She could not be an independent and represent ACT at one and the same time. That would be quite inconsistent with the fundamental purpose of ss 55A – 55E of the Electoral Act 1993.”: Tipping J, para [100].

56 *Nation v Nation*⁴⁹ related to a proceeding under the Property (Relationships) Act 1976 which began in a Family Court with appeals being decided in the High Court and the Court of Appeal. One question the Supreme Court answered in dealing with the application for leave to appeal to it was whether the decision of the Court of Appeal was final with the consequence that the Supreme Court did not have jurisdiction. The argument arose because s 7 of the Supreme Court Act 2003 gives the Supreme Court jurisdiction to hear and determine an appeal by a party against any decision of the Court of Appeal made in a civil proceeding unless an enactment “makes provision to the effect that there is no right of appeal against the decision”. It was suggested that s 67⁵⁰ of the Judicature Act 1908 as interpreted by the Privy Council in *De Morgan v*

⁴⁹ [2005] NZSC 14.

⁵⁰ Section 67 of the Judicature Act 1908, as well as the proviso to s 65 of the Act (which the Supreme Court described as “curious” and suggested showed that “the purpose of the Supreme Court Act might be thought to have not yet been fully and clearly carried through in amendments to particular provisions”), are to be amended or repealed by the Judicature Amendment Bill (No 3) (No 262–1), which was before the Government Administration Committee when the 47th Parliament was dissolved in August 2005.

*Director-General of Social Welfare*⁵¹ was a provision to that effect (because, with the exception of a single further appeal to the Court of Appeal, it makes the High Court's decision on an appeal from an inferior court final). However, counsel for the appellant responded that the purpose of the Supreme Court Act 2003 (as stated in s 3(1)(a) of that Act, set out in paragraph 69 of this paper) included improving access to justice, and that s 5 of the Interpretation Act 1999 required the Supreme Court "to weigh that purpose".

57 The Supreme Court did so, saying:

The access to justice purpose is also specifically and clearly manifested in the concrete context of the family law statutes by the repeal by the Supreme Court Act of particular finality clauses which had previously prevented appeals beyond the Court of Appeal to the Privy Council in statutes regulating child support, children young persons and their families, family proceedings, guardianship and harassment. It would not have been within the purpose of the legislation to widen access to a further level of appeal in that comprehensive way over the full range of family matters, including dissolution of marriage, guardianship and custody, and maintenance, while excluding appeals in respect of relationship property. Moreover, Parliament made amendments to the Property (Relationships) Act itself which indicated that it specifically contemplated appeals to this Court. . . . these provisions do support the overall purpose of providing for appeals in relationship property cases. We find those general and specific purposive and contextual arguments compelling . . . we see any finality effect of s 67 and, to the extent that it may be relevant, of s 68 as being superseded by the 2003 legislation so far as the Property (Relationships) Act is concerned. . . . We accordingly rule that we have jurisdiction.⁵²

58 In *Attorney-General v Ahmed Zaoui*,⁵³ the Supreme Court had to consider whether the test to be applied by the Inspector-General of Security in terms of article 33.2 of the Convention Relating to the Status of Refugees 1951 required a balancing of the possible consequences of deportation or removal against the extent of the danger to the security of New Zealand. The Court of Appeal had, in effect, ruled that article 33 required a sliding scale of seriousness of risk to national security depending on the consequences of refoulement for the refugee. The threatened danger to security would have to be of such seriousness as to justify sending the refugee back to persecution.

⁵¹ [1997] 3 NZLR 285.

⁵² paras [7], [9], and [11].

⁵³ [2005] NZSC 38. *Ahmed Zaoui* is discussed by Claudia Gieringer, "Zaoui revisited" [2005] NZLJ 285–288.

59 In rejecting a balancing or proportionality test, the Supreme Court relied on the article’s “plain meaning and purpose” (paras [25]–[27]), and on its context (paras [28]–[30]). Paragraph 1 of article 33 provides that—

No contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Under paragraph 2, the benefit of paragraph 1 may not be claimed by a refugee —

whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

60 The Supreme Court said the 2 paragraphs operate in sequence and are not related in a proportionate or balancing way. The second, if satisfied, defeats the first. The Court said:

That distinct sequential reading, based as it is on the ordinary meaning of the terms of the two paragraphs of article 33 and their purpose, is supported by a consideration of what the proportionality or sliding scale proposition would require. The decision-maker would have to measure against one another two matters which are very difficult to relate: the level of threat to the life or liberty of an individual, on the one side, and, on the other, the level of reasonably perceived danger to the security of the State. While the law may sometimes appear to require such a weighting, such an interpretation is to be avoided unless it is plainly called for.⁵⁴

61 The case concerned Part IVA of the Immigration Act 1987, which contains special procedures in immigration cases involving security concerns. Section 114A (set out in full in para [8] of the judgment) expresses the object of the Part. That object is to—

- (a) recognise that the New Zealand Security Intelligence Service holds classified security information that is relevant to the administration of this Act; and
- (b) recognise that such classified security information should continue to be protected in any use of it under this Act or in any proceedings which relate to such use; and

⁵⁴ para [27].

- (c) recognise that the public interest requires nevertheless that such information be used for the purposes of this Act, but equally that fairness requires some protection for the rights of any individual affected by it; and
- (d) establish that the balance between the public interest and the individual's rights is best achieved by allowing an independent person of high judicial standing to consider the information and approve its proposed use; and
- (e) recognise that the significance of the information in question in a security sense is such that its approved use should mean that no further avenues are available to the individual under this Act and that removal or deportation, as the case may require, can normally proceed immediately; and
- (f) ensure that persons covered by the Act who pose a security risk can where necessary be effectively and quickly detained and removed or deported from New Zealand.

62 But section 5(1) of the Interpretation Act 1999 (NZ) was not seen as central. This was because the Supreme Court was interpreting a treaty provision (article 33.2 of the Refugee Convention) directly incorporated into New Zealand law (by s 114C(6)(a) of the Immigration Act 1987), and doing so under articles 31 and 32 of the Vienna Convention on the Law of Treaties. Keith J said those articles “are accepted on all sides as stating the rules of customary international law for the interpretation of treaties and which, as such, are part of the law of New Zealand” (para [24]). Section 5(1) is, however, similar to article 31(1) of the Vienna Convention, because article 31(1) provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

63 The Supreme Court went on, as required by articles 31 and 32 of the Vienna Convention on the Law of Treaties, to consider State practice, international law, and the drafting history of article 33 of the Refugee Convention, all of which supported the sequential non-balancing approach to its construction. It concluded that to come within article 33.2, the refugee must be thought on reasonable grounds to pose a serious threat to the security of New Zealand; the threat must be based on objectively reasonable grounds; and the threatened harm must be substantial (para [45]).

64 *Hemmes v Young*⁵⁵ related to the Status of Children Act 1969. The issue was whether an adopted child can obtain a declaration under s 10 that “the relationship of father and

⁵⁵ [2005] NZSC 47, judgment 15 July 2005.

child” exists between the adopted child and a man whom the adopted child claims to be his or her biological father. An Associate Judge of the High Court (declining an application to strike out or stay a proceeding for the purpose), the High Court (reviewing the Associate Judge’s decision), and the Court of Appeal (by a 2–1 majority), all considered that an adopted child can obtain a declaration of paternity under s 10. The Supreme Court came (unanimously) to the opposite conclusion. The Court’s reasons emphasise the legal status resulting from adoptive relationships. Under the Adoption Act 1955 s 16(2), when an adoption order is made, the child concerned ceases, for almost all⁵⁶ legal purposes, to be the child of his or her biological parents, and becomes for those legal purposes the child of his or her adoptive parents. The reasons also emphasise that “relationship”, in s 10 of the 1969 Act, means the legal, and not the biological, “relationship of father and child”. Tipping J said:

The essential purpose of the Act⁵⁷ was and is to remove the legal disabilities of children born out of wedlock. The short title to the Act signals that its principal concern is with status, which is a legal concept involving legal relationships and their consequences in law. . . . The statutory context and purpose, with their focus on status, both clearly suggest that the Act is referring to legal rather than biological relationships. . . s 10 is not designed to be a vehicle for declaring biological relationships or biological facts.

Other cases

65 There are many other examples of recent decisions by New Zealand Courts in which the purposive approach to interpretation has been expressly applied. A selection of cases and dicta are set out in the Appendix of this paper. It will be noticed that section 5(1) has been applied in a wide variety of contexts including a case involving minority buy-out rights of shareholders under the Companies Act 1993.⁵⁸

⁵⁶ Exceptions include enactments on forbidden marriages or civil unions, and the crime of incest (s 16(2)(b) proviso).

⁵⁷ The Act’s purpose was stated in its Title until 1 July 2005, when the Status of Children Amendment Act 2004 repealed the Title and re-enacted it as a new s 2A (purpose of sections 3 and 4)—in part because the Amendment Act added to the Act a new Part 2 (Status of children conceived as result of AHR procedures) with its own purpose. The purpose of the new Part 2 might have been, but was not, later amended by the addition of a reference to a woman who is the civil union partner of a birth mother, given the amendments made to the Act by the Relationships (Statutory References) Act 2005.

⁵⁸ *Natural Gas Corporation Holdings Ltd v Infratil 1998 Ltd* [2000] 3 NZLR 727.

Judicial commitment to purpose

66 Judicial practice clearly indicates that section 5(1) and the purposive approach are paramount in statutory interpretation in New Zealand. In ascertaining meaning of a statutory text, the New Zealand courts will look at legislative history, the surrounding statutory provisions, statutory scheme and object, express purpose or object provisions, and reports by law reform bodies. Through all these cases there is a careful avoidance of literalism. Section 5(1) achieves a beautiful balance between literal meaning and wider object. Text is enlarged by purpose, and purpose is constrained by text.

Extra-curial expressions of judicial attitude

67 Some legislators see clear advantages in ‘purpose clauses’. Debating on 15 June 1999 the Select Committee’s report on the Interpretation Bill, Lianne Dalziel said:

. . . one of the good things Parliament has done over recent years is to introduce what is known as the ‘purpose clause’. This requires Parliament to exercise a certain degree of discipline over establishing the purpose of a piece of legislation and writing this into the law itself. . . . I think that is the basis of cl 5(1) . . . writing the purpose into the legislation will be an advantage to all who have to read it.

68 But observations by judges, especially in environments less restrained than that of judgment writing, are also relevant here. Just as contracts are construed not in a vacuum but against their factual background, so too are statutes construed in the wider context from which they emerge and in which they operate.

Justice Michael Kirby has discussed the similarities in approach to interpreting contracts and statutes and observed that as modern legislatures have become more representative and more active and as text, both contractual and statutory, has become plainer, literalism has given way to purposive and contextual construction.⁵⁹

More recently, Lord Steyn suggested that it is a fundamental principle underlying the interpretation of statutes that Parliament legislates for a liberal democracy and that while Parliament can legislate contrary to human rights, it must do so expressly and confront

⁵⁹ *Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts* (2003) 24(2) Stat LR 95–111 (paper delivered to the Clarity and Statute Law Society Joint Conference, Cambridge University, 13 July 2002).

the political cost. Constitutional type statutes will receive different consideration by the courts.⁶⁰

69 The relevance of purpose provisions in statutes was the subject of dialogue between the Chief Justice of New Zealand and 2 senior Supreme Court Judges and the House of Lords select committee on the Constitutional Reform Bill in London in May 2004. This exchange took place in the context of evidence given by those New Zealand judges about considerations relating to the setting up of a Supreme Court to replace appeals to the Privy Council. The Chief Justice has prepared a short paper addressing these issues. The paper commences with a statement of the overall purpose of the Supreme Court Act 2003 as set out in section 3(1)(a),—

- (i) to recognise that New Zealand is an independent nation with its own history and traditions; and
- (ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions; and
- (iii) to improve access to justice.⁶¹

70 In response to a question from the Chairman regarding purpose clauses, the Chief Justice observed that “purpose clauses are quite common in New Zealand” and invited Sir Kenneth Keith to expand. In doing so, Sir Kenneth noted that:

....it has probably in the last 20 years become much more popular and much more common too to include them and it does relate to the fact that since almost the beginning, since 1851, I think, our Interpretation Act required courts, in the event of ambiguity, to try to find a purpose and to interpret legislation consistent with the purpose, so we have a purpose of approach [*sic*] over a longer period possibly than here and certainly it has become common to include provisions like this.

....I think it is probably not a bad idea for legislation sometimes to indicate where it came from and subsection (2) does reflect part of the debate on the Bill which was directed at so-called “judicial activism”.

⁶⁰ Lord Steyn, *Interpretation (Treaties, Constitutions, Statutes, and Contracts)*, Lecture at Victoria University of Wellington, 9 September 2003. Compare Steyn, “The Intractable Problem of the Interpretation of Legal Texts” (2003) 25 Syd LR 5.

⁶¹ Section 3(2) goes on to state that nothing in the Act affects New Zealand’s continuing commitment to the rule of law and the sovereignty of Parliament.

71 Later in the discussion, Lord Carter returned to purpose clauses. He said:

Also on the purpose clause, I was struck by the need for the purpose clause and the fact that it is not unusual in your legislation. They are not favoured in this country, parliamentary draftsmen do not like them, government departments do not like them because they are concerned about judicial review and also of course with enforceability. Business managers do not like them because at the beginning of committee stage there is another Second Reading debate....Is it anything to do with the fact that you have a unicameral system? Does that have any bearing on it?

72 The Chief Justice responded by saying:

I think it may have something to do with our traditions in the sense that perforce in a colonial state, you are much more reliant on legislation because you do not have the infrastructure for the development of the law in other ways, and I think we have always had a less suspicious view of legislation in the judiciary and a more co-operative attitude and I think that may be one of the reasons why Parliament has been willing to explain what it is doing so that judges get on the same wavelength.⁶²

73 Justice Gault added:

....they are popular with the judges because they do assist in difficult interpretation circumstances and an overall statement of the legislative intent can help very materially in difficult interpretation areas.

74 Sir Kenneth Keith had the last word:

I would also add that I think they have the advantage, and I think it is an advantage, of controlling the judicial function because they do indicate what the purpose is, subject to the problems of how that might be written and, therefore, the judges are confined to their statement and they cannot scout around in a lot of other places or make their own use of a particular policy to look for other purposes. I agree with the Chief Justice's point about the co-operative approach.

75 The following considerations emerge. First, there is a long history of reference to purpose. Second, statements of legislative purpose are part of the environment of trust between legislature and judiciary. Third, they assist the courts in difficult cases. Fourth, they constrain "judicial activism". It is important for legislative drafters to take account of what judges say "off the bench". The legislative drafter will then have a better idea of

⁶² Compare the Chief Justice's similar comments at the first sitting of the Supreme Court of New Zealand: "... we have always depended heavily on statute law . . . A less suspicious, more cooperative approach to legislation than applies in some other jurisdictions is our way.": [2004] NZLJ 293 and 294.

both what to expect and what will assist. If the courts make it clear that only the clearest language will be effective to abrogate constitutional rights and that there is no room for implied repeal, then clear language will have to be used. Likewise, if the courts say they are assisted by statements of legislative purpose, put them in.

76 The conclusion to be taken from both the New Zealand judicial practice and preference is that as long as judges at all levels see a value in purpose clauses, legislative drafters probably have an obligation to include them in statutes.

Are there downsides?

77 There are numerous considerations against invoking purpose and purpose provisions in legislation. The main ones include—

- abandonment of text in favour of purpose leads to uncertainty, notably in fiscal statutes where certainty and long-term planning are critical. This consideration has recently been discussed by Natalie Lee in *A Purposive Approach to the Interpretation of Tax Statutes*?⁶³
- using purpose to “fill gaps” may lead courts to fill gaps that are not really there to be filled. This consideration was discussed by a senior New Zealand Crown Counsel, Grant Liddell, in 1989 and 1990 annual reviews of *Administrative Law*⁶⁴
- express statements of purpose invite trouble. They are often no more than pious incantations. This view is attributed to Professor Reid Dickerson by Sir Geoffrey Bowman in *Why is there a Parliamentary Counsel Office*?⁶⁵
- express statements of purpose risk conflict or an unclear relationship with specific provisions. This consideration has been most recently referred to by Sir Geoffrey Bowman in the article just mentioned. Sir Geoffrey contends that a purpose

⁶³ (1999) 20(2) Stat LR 124–143. See too Vinelott, “Interpretation of Fiscal Statutes” [1982] Stat LR 78.

⁶⁴ [1989] NZ Rec Law Review 330; [1990] NZ Rec Law Review 294.

⁶⁵ (2005) 26 Stat LR 69, 77–78.

provision may make a specific provision have a wider or narrow application, or it might achieve nothing.⁶⁶ So why have it?

- what is the value of purpose when judges in the same case and even different courts in the same case applying the purpose test can come to different conclusions? *R v Pora* might be an example of the former and *Attorney-General v Ahmed Zaoui* might be an example of the latter.

How valid are these concerns?

78 A useful starting point is provided by Sir William Dale in his article *Principles, Purposes, and Rules*.⁶⁷ Purpose provisions say “why” an Act does what it does. Principles provisions say “what” an Act does in general terms. The specific provisions also say “what” an Act does, but do so in more detailed terms. As Dale pointed out, presumably all legislation has a purpose. If it is legitimate to state that purpose in detail, why not also in more general terms? Fiscal legislation is no different from other legislation around which business entities are formed and commercial transactions planned and constructed. Because of its inherent complexity, may not a purpose provision be useful?

79 The concern about unnecessary or extravagant gap filling is exaggerated when one looks at recent judicial pronouncements about the limits of this type of judicial activity. In *Inco Europe v First Choice Distribution*,⁶⁸ the House of Lords has made it clear that the court will only correct an error if it is clear what the intended purpose is, that the drafter has failed to give effect to that purpose, and what in substance Parliament would have said. In other words, the drafter must, at least in the Judges’ view, have got it spectacularly wrong. *Inco Europe* has been applied in *R (on the application of the Confederation of Passenger Transport UK) v Humber Bridge Board and Anor*,⁶⁹ and by the New Zealand Court of Appeal in *Securities Commission v Midavia Rail Investments BVBA & Ors*.⁷⁰

⁶⁶ *ibid*, 77–78. Alec Samuels mentions similar arguments in “Statement of Purpose and Principle in British Statutes” (1998) 19(1) Stat LR 63 and 64.

⁶⁷ (1988) 9 Stat LR 15–26.

⁶⁸ [2000] 2 All ER 109, 115, per Lord Nicholls.

⁶⁹ [2004] 4 All ER 533.

⁷⁰ (CA 28/05, 14 March 2005), concerning rule 446L of the High Court Rules.

- 80 Internal conflict of the kind mentioned by Sir Geoffrey Bowman ought to be capable of avoidance by careful drafting. The New Zealand Legislation Advisory Committee's *Guidelines on Process and Content of Legislation* state that purpose provisions "need to be drafted with restraint. . . . Doctrinal essays on non-justiciable concepts do not make the legislation more effective".⁷¹ Policy-rich language and 'manifesto speak' should always be eliminated no matter how much politicians and officials might like it. Purpose statements in the statute itself may operate as a restraint on courts seeking out purpose in extraneous material and become what Sir Kenneth Keith described as a constraint on so-called 'judicial activism'. Garth Thornton lists 5 rules for drafting purpose provisions that are helpful to drafters in this regard.⁷²
- 81 As for the consideration that invocation of purpose can in the same case lead judges or courts off in different directions, it may be said that most of the interpretation issues are usually finely balanced anyway, and that different views will at times be inevitable.

The re-emergence of purpose in interpretation

- 82 It is interesting to speculate why the courts have adopted the purposive approach to interpretation with such vigour.
- 83 Several explanations are possible. First, it may be that Denzil Ward's criticisms of the late 1950's and early 1960's struck home. Second, and perhaps more cynically, judges with an activist cast of mind saw the possibilities of engaging purpose as a means of pushing their own perspectives and values. Third, legislation is unquestionably the major source of law; no longer an interloper into the domain of the common law that has to be constrained by presumptions designed to protect personal and property rights. In *Pora* Sir Kenneth Keith spoke of "the central position of statutes in our legal system", adding that "they are not merely a gloss on the common law". And as Justice Michael Kirby, in common with many other judges, has observed:

⁷¹ Legislation Advisory Committee, *Legislative Change: Guidelines on Process and Content* (Report No 6), December 1991, para 32, and see too para 23 of (Report No 5), March 1990.

⁷² *Legislative Drafting* (4th ed, Butterworths, 1996), 154–158.

If the interpretation of contractual documents is an important part of the modern judge's vocation, the construction of statutes is now, probably, the single most important aspect of legal and judicial work.⁷³

84 It might also be suggested that it is not merely interpretation that features so prominently in the courts' work. The uncontested application of legislation is at least, if not more, significant. One need not think much beyond rules of court and procedural statutes for examples. The uncontested application of legislation is an everyday part of modern life.

85 Fourth, the courts have probably come to realise that when the bare words do not easily yield up meaning, recourse to wider considerations of legislative purpose are extremely helpful. Fifth, relaxation by the English courts in the 1960's and 1970's of the rules against use of material beyond the text⁷⁴ and statutory recognition in some jurisdictions of the legitimacy of recourse to extrinsic aids have given the courts powerful tools to ascertain purpose. "It is better to switch on the light than grope in the dark".⁷⁵ Sixth, and as suggested in paragraph 16 of this paper, from the 1970's onwards, New Zealand courts decreased citation of, and deference to, English authorities, and increased their citation of, and confidence in, local case-law adopting purposive interpretation. Seventh, there are powerful democratic considerations. Parliament is the real law maker. The courts' role is to interpret and apply legislation, not read it down or redesign it. Parliament cannot hope in a statute of general application to cover every situation. There will always be cases where the statute's application is not clear. An astute, erudite, and experienced New Zealand Judge has described the court's interpretative role as "interstitial legislating".⁷⁶

Purpose, Parliament, and the courts

86 Discussion about judicial approaches to interpretation is inevitably linked to the relationship between legislature and judiciary. The New Zealand Supreme Court was established on 1 January 2004, but did not commence to hear appeals until 1 July 2004.

⁷³ *Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts* (2003) 24(2) Stat LR 95, 96.

⁷⁴ *Corocraft Ltd v Pan American Airways Inc* [1968] 1 QB 616, 638; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 191.

⁷⁵ Symposium on Statutory Interpretation (Aust Govt Printer, Canberra, 1983), cited by J F Burrows *Statute Law in New Zealand* (2nd ed, Butterworths 1999), 167.

⁷⁶ Hon Justice David Baragwanath, Human Rights, Democracy and the Rule of Law in the 21st Century, *Indigenous Rights and Minority Rights: Promotion or Repression: A Commonwealth View From New Zealand*. Human Rights Legislation and its Application in New Zealand *The Tensions of Judicial Review in Human Rights*.

In the period between 1 January and 30 June 2004, the Court could hear and determine applications for leave to appeal. All appeals require leave. Considerable controversy surrounded the establishment of the new court and the ending of appeals to the Privy Council. While that was to some extent predictable, what surprised was a controversy of a different kind that arose shortly before the court commenced to hear appeals.

- 87 In a speech in the House on 24 May 2004 on the occasion of the 150th anniversary of the first sitting of the House, the Deputy Prime Minister, Dr Michael Cullen, referred expressly to the doctrine of parliamentary sovereignty and recent challenges to it. He said:

Thus it would now seem to be settled doctrine that New Zealand is a sovereign State in which sovereignty is exercised by Parliament as the supreme maker of law....There is an increasing tendency to challenge the exercise of this sovereignty. This comes not just from some radical Maori, who argue that sovereignty has never been legally acquired in New Zealand; it also comes from the heart of New Zealand's judiciary.

In my view, we are approaching the point where Parliament may need to be more assertive in defence of its own sovereignty....In our tradition, the courts are not free to make new law. We need the judges' impartial rulings on what the law says and how it applies in individual cases, but if they then begin to express views on what the law should be, or on what it says, they enter dangerous territory.⁷⁷

- 88 Dr Cullen elaborated on this theme in an article published in the New Zealand Law Journal in July 2004 entitled *Parliamentary sovereignty and the Courts*.⁷⁸ He said:

For the time being, the respective roles of the Parliament and the judiciary are quite clear. Parliament proposes, debates and enacts laws, and appoints from its own elected members an Executive to administer those laws and perform the functions of government. The role of the Courts is to apply the law to individual cases, which may include ordering the Executive to modify any exercise of power that is ultra vires. Where the law is found to be ambiguous, the Courts must interpret the statute to the best of their abilities, taking into account the intent of Parliament in passing the law. It remains the prerogative of Parliament to make new law or to amend existing law to clarify its intent.

⁷⁷ Address to Her Excellency the Governor-General, 24 May 2004, *Hansard*.

As Professor Jeremy Waldron has correctly observed in response to Dr Cullen's comments, judges, in New Zealand's legal tradition, do make law, but they cannot override statutes. Equally Parliament, while it passes interpretation legislation, respects the courts' role as interpreters of legislation: "'Compared with what': Judicial Activism and the New Zealand Parliament", unpublished lecture, Faculty of Law, Victoria University of Wellington, 11 August 2005.

⁷⁸ [2004] NZLJ 243.

89 Predictably, the news media leapt in, adding fuel to the flames by publishing a succession of articles centred around comments made by the Chief Justice to the House of Lords Select Committee on the Constitutional Reform Bill and referred to earlier in this paper. The furore, interesting while it lasted, has evaporated. But it is interesting to reflect on what might have provoked and sustained it. In New Zealand terms, it was certainly unprecedented and not a little troubling. Was it, for example, being suggested that the courts were straying well beyond the legislative text and its purpose or even using purpose to justify interpretations plainly at odds with the statute? If that was the thrust of the political concerns, we doubt that the judicial record supports such anxiety. Certainly, there is nothing in the judgments discussed in this paper that suggests there is any cause for alarm.

90 The anxieties that legislators sometimes express arise, one suspects, not from what judges do and say in the course of their work in the courts, so much as from what they sometimes say “extra-judicially”, unrestrained by the confines of traditional judicial method.

91 There have been interesting pronouncements by judges on both sides of the Tasman in recent times on this issue. In a paper entitled *The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millenium*,⁷⁹ delivered at Victoria University of Wellington Law Faculty’s Centennial Lecture on 30 June 1999, Justice E W Thomas, then a Judge of the New Zealand Court of Appeal, said:

.....this paper might well have begun where it has ended, with a plea for a more positive jurisprudence in which the relationship of Parliament and the courts is in the nature of a fruitful partnership in the law-making business together, but with Parliament the dominant partner working within the limits of the constitution. The single most debilitating influence on that more positive jurisprudence has been the judiciary’s fulsome deference to the sovereignty of Parliament. With a grip of iron the concept has strangled the coherent development of the [common] law. Consequently, the more widely it is accepted that there is no magic in the notion of parliamentary legislative supremacy or, at least, the possibility is accepted that the courts may in certain circumstances intervene to overrule Parliament and protect the constitution, the less likely it is that this unnecessary judicial deference will persist. Blind or mechanical adherence to the doctrine of parliamentary supremacy will have been dealt a telling blow. Liberated from an unnecessary obeisance to the doctrine and its collateral perception of Parliament as the sole law-making institution, the

⁷⁹ (2003) 31 VUWLR 5, 35.

courts can develop a more positive jurisprudence which will better serve the ends of justice and better meet the current needs and reasonable expectations of the community.

92 The title of the Judge’s address may have led listeners to expect a few cautious propositions. In contrast to the title, there is nothing tentative about any of it. It is not at all clear where the fulsome deference to the concept of parliamentary sovereignty may be. Nor is it apparent that the development of the common law is being strangled by the concept’s “iron grip” or that the judiciary displays a blind mechanical adherence to the concept. Where is the clamour for it to be dealt a telling blow?

93 In an address to a conference at Melbourne University on sovereignty organised by the Institute of Comparative and International Law in 2003, the Chief Justice of New Zealand said:

I will suggest that a fixation with parliamentary sovereignty and the relative democratic merits of parliament and the courts to the exclusion of a wider perspective is impoverishing our constitutional thinking. I want to avoid the labels of supremacy and activism and protestations of democratic legitimacy. I want to suggest that our own political institutions and community experience have moved on from a monolithic and obsolete view of the fundamentals of law as a quest for the power that trumps.

It is time to release some energy. Parliamentary sovereignty is an inadequate theory of our constitutions. An untrammelled freedom of parliament does not exist. We need to develop a better consciousness of the dependencies of our societies upon the law of the constitution and a feel for the constitutional movement, in renunciation of an immobility which is unreal.⁸⁰

94 The Chief Justice refers to international constraints on law making, relocation of authority both within nation states and to broader regional organisations of nation states, the notion that parliamentary sovereignty is underpinned by common law, judicial oversight of valid law making, the impact of domestic human rights law and the possibility that there may be rights-based limits on legislative competence, and to stricter interpretation of legislative powers. But do any of those considerations seriously challenge the traditional concept of parliamentary sovereignty?

⁸⁰ Rt Hon Dame Sian Elias GNZM, *Sovereignty in the 21st century: Another spin on the merry-go-round* (2003) 14 PLR 148, 163.

95 In delivering the Robin Cooke Lecture 2004 in Wellington, New Zealand in November last year, Justice Kirby said that, for Australia, sovereignty belongs to the people who are Australian nationals and that parliamentary sovereignty is inappropriate to Australia's constitutional arrangements. He went on to say that talk of parliamentary sovereignty —

leads parliamentarians to believe that they enjoy a plenary and uncontrolled power. At least under Australia's constitutional arrangements, that is never so. Their powers are always subject to the written Constitution and ultimately determinable by courts of law. Where governments enjoy large majorities in a unicameral parliament, or effective majorities in both houses of a bicameral parliament, the role of the courts in protecting minority rights becomes more important. It is a power to be exercised lawfully, wisely and for the purpose of protecting the true sovereign – all the people of the polity concerned.⁸¹

96 Speaking in relation to the position in New Zealand, Justice Kirby said even in an environment where there is no written constitution, no superior Bill of Rights, no tradition of judicial review of unconstitutional laws, and a history of temperate law-making, it is natural that judges, conscious of the importance of human rights, will speculate about judicial means to protect the people in extreme cases from a statute apparently valid on its face. “The ‘deep lying’ rights theory will doubtless continue to evolve in New Zealand.”⁸²

97 In more generalised terms, the Judge commented:

A nation's constitution is like a symphony. Sometimes it is like the sound of a multitude of voices. Normally, the sound is acceptably harmonious, at least in countries like Australia and New Zealand. But sometimes there is upsetting colophony [*sic*] that causes pain and distress. In most civilised societies today, by the use of enforceable human rights instruments, reinforced by national, regional and international human rights law, the law making process of the national legislature is supplemented by judicial protections. In this sense, the legislators are not “sovereign”, if they ever were. . . . In this way, the legislators in Parliament are reminded of their subordination, more than in occasional and sometimes chancy elections, to the basic rights of the true sovereign – the people whom all officials serve.⁸³

⁸¹ Hon Justice Michael Kirby AC CMG, *Deep Lying Rights - A Constitutional Conversation Continues*, Robin Cooke Lecture 2004, Victoria University of Wellington, Wellington, New Zealand, 25 November 2004, 41.

⁸² *ibid*, 42.

⁸³ *ibid*, 43.

98 The *Australian* of 26 November 2004 carried an interesting response under the heading “*Courting an opponent to popular government*”—“*Memo to Justice Kirby: the judiciary is not set up to be the federal opposition*”. The writer, Dennis Shanahan, targeted the Judge’s comments about the role of judicial scrutiny increasing in relation to the size of a government’s majority, saying this implied that the relative strength of the Government should govern judicial behaviour and that, paradoxically, the greater the Government’s mandate after a democratic election, the greater the court’s vigilance should be. So, asks the writer, “Who’s respecting the sovereignty of the people now?”⁸⁴

99 It is precisely this kind of rhetoric that alarms legislators. Is it surprising that there should be a reaffirmation of classic Dicean principles and a reassertion of the role of Parliament as principal law maker of the kind made by Dr Cullen and others in recent times? It is also rhetoric that alarms some judges. Justice Dyson Heydon has observed in relation to Australia:

Even in the short life of judicial activism in this country, there have been extraordinary instances of the freaks of fortune and the instability of judicial grandeur....It is legislatures which create new laws. Judges are appointed to administer the law, not elected to change it or undermine it.⁸⁵

100 Those views are at opposite ends of the spectrum. One wonders whether in reality there is so much at issue. The challenge for those who draft the law and for legislators is to be,

⁸⁴ In a newspaper comment in the *Telegraph* of 10 August 2005, UK Tory leader Michael Howard said: “Recently, Lord Donaldson, the former Master of the Rolls, gave an interview to the BBC. He said that the role of the judiciary was to interpret and apply the will of Parliament. There was, he said, a balancing act to be performed — between measures to counter terrorism and the loss of freedom this entailed. But, crucially, he said this act ‘has to be performed by Parliament, not judges’. I agree. Others do not. In December, the House of Lords ruled that it was illegal to detain foreign nationals in Belmarsh Prison because they were suspected terrorists. The judgment was based on two grounds. First, that the policy was discriminatory because it did not apply to British citizens. Second, that their detention was not a proportionate response to the terrorist threat Britain actually faced. Summing up, Lord Hoffman made the following claim: ‘The real threat to the life of the nation comes not from terrorism but from laws such as these.’ [(See *A v Secretary of State for the Home Department* [2004] UKHL 56 at paragraph [97], and compare *R v Z* [2005] UKHL 35.)] As Prime Minister Tony Blair has said, it is doubtful whether those words would be uttered today. Given that judicial activism seems to have reached unprecedented levels in thwarting the wishes of Parliament, it is time, I believe, to go back to first principles. The British constitution, largely unwritten, is based on the separation of powers. Ever since the Glorious Revolution established its supremacy, Parliament has made the law and the judiciary has interpreted it. . . . The Human Rights Act has drawn British judges into areas of political controversy through no fault of their own. It is, however, vital for the future of our country that the judiciary exercises these powers with self-restraint, recognising that Parliament, accountable as it is directly to the people, must be allowed to exercise the supreme responsibility of deciding what powers are to be conferred on the executive. Parliament must be supreme. Aggressive judicial activism will not only undermine the public’s confidence in the impartiality of our judiciary, but it could also put our security at risk — and with it the freedoms the judges seek to defend. That would be a price we cannot be expected to pay.”

⁸⁵ *Judicial Activism and the Death of the Rule of Law* (2004) 10(4) Otago LR 493.

in the words of Lord Steyn in *R (Anufrijeva) v Secretary of State*, sufficiently “specific and unmistakable”.⁸⁶ In that case, a majority of the House of Lords considered the wording of a regulation failed to make it clear that the entitlement of an asylum seeker to income support ended when a decision to reject a claim for asylum was recorded. The majority said it had to be communicated since communication of a decision affecting a right to a benefit was a fundamental constitutional principle that could be abrogated only in the clearest terms. Lord Bingham said, consistently with the principle of legality, “effect should be given to a clear and unambiguous legislative provision” and that there was “nothing unclear or unambiguous about the words” of the provision, and that irrespective of whether one approved of the procedure, effect should be given to the “clear and obvious” meaning.

- 101 The drafters of the statute considered by the High Court of Australia in *Dossett v TKJ Nominees Pty Ltd*⁸⁷ thought that by specifying the situations in which the former statutory regime continued to apply to common law actions for personal injuries, they had made it clear that in situations not specifically mentioned the new and less favourable rules were to apply. The Supreme Court of Western Australia plainly thought they had.
- 102 The consequences of decisions such as *Daniels v Attorney-General*⁸⁸ can be avoided by the careful use, not necessarily of a specific purpose provision, but of a provision or provisions that make it clear whether or not the legislation creates a free-standing right available to an individual to bring an action against a government claiming failure to provide educational opportunity to a particular standard.
- 103 Legislative drafters never deliberately fudge or obscure. Parliaments sometimes intend to displace established common law rights, remove existing statutory entitlements, or override court judgments even as between the parties.⁸⁹ Governments have to make hard decisions. Strict observance of a constitutional or legal principle might involve costs to the taxpayer of such magnitude that complete or partial abrogation of principle is the only

⁸⁶ [2003] 3 All ER 827, 842.

⁸⁷ [2003] HCA 69.

⁸⁸ [2003] 2 NZLR 742.

⁸⁹ See, for example, the Crown Forest Assets Amendment Act 1995 and other retrospective legislation discussed in the introduction and Appendix 1 of (Report No 9), June 1996, of the Legislation Advisory Committee.

option, however distasteful. The courts are not, as we read the judgments, saying that they will never give effect to legislation designed to have this effect so long as it is manifestly clear on its face.

Has Palgo “return[ed Australia] to the dark days of literalism”?

104 The High Court of Australia’s 4–1 decision on 25 May 2005 in the case of *Palgo Holdings Pty Ltd v Gowans*⁹⁰ has highlighted purposive construction in Australia. As will be well known, the High Court allowed Palgo’s appeal, reversing decisions of the New South Wales Supreme Court and New South Wales Court of Appeal (decisions placing emphasis the Act’s purpose), and holding that the interchangeable terms “pawn” and “pledge” in the Pawnbrokers and Second-hand Dealers Act 1996 (NSW) did not include mortgages of personal property. The majority held that the relevant transactions were mortgages of chattels and hence bills of sale regulated instead by the Bills of Sale Act 1898 (NSW). Consequently Palgo’s 2001 conviction, and resulting \$6000 fine, for carrying on business as a pawnbroker without a licence, were quashed.

105 In his typically clear dissent, Kirby J regarded the appeal as “test[ing] the adherence of this Court to three oft-repeated principles for the elucidation of contested statutory language”, namely: (1) purposive interpretation; (2) contextual interpretation; and (3) access to extrinsic materials.

106 Citing the Australian counterparts⁹¹ to New Zealand’s section 5(1), Kirby J said:

Time was, not so long ago, that Australian lawyers could say with reasonable confidence that this Court consistently applied the foregoing principles, which are obviously inter-related. That trend was encouraged by legislative instruction. Obviously, there are limits to any interpretation that involves an apparent departure from requirements that appear to be demanded by the language of the legislation. Moreover, interpretation is a text-based activity in which divergences of opinion are common and inescapable. . . . Because the approach taken by this Court to problems of statutory interpretation is influential upon all

⁹⁰ [2005] HCA 28. *Palgo* was noted by Duncan Berry, “Are Australian judges retreating from a purposive approach to judicial interpretation?”, Newsletter of the Commonwealth Association of Legislative Counsel (CALC), June 2005, 20–21.

⁹¹ Acts Interpretation Act 1901 (Cth), s 15AA; Interpretation Act 1987 (NSW), s 33; Interpretation of Legislation Act 1984 (Vic), s 35(a); Acts Interpretation Act 1954 (Q), s 14A; Acts Interpretation Act 1915 (SA), s 22; Interpretation Act 1984 (WA), s 18; Acts Interpretation Act 1931 (Tas), s 8A; Legislation Act 2001 (ACT), s 139; Interpretation Act 1978 (NT), s 62A.

Australian courts, we should be on guard against any temptation to return to the dark days of literalism. Above all, this Court should strive to be consistent. In all cases, but especially in legislation enacted to achieve important social objectives, the purposive approach is the correct one to follow.⁹²

107 The following paragraphs (97–98) of Kirby J’s dissent give a sense of some of the issues:

. . . where a word that has a legal meaning is defined in a statute to include activities not normally falling within that legal meaning, this supports a conclusion that Parliament intended the word to be used in its wider, non-technical sense. Section 5 [(‘buy-back’ contracts)] of the 1996 Act, which effectively widens the meaning of pawned goods, thus supports the adoption of the non-technical meaning of ‘pawned goods’. . . . In any event, the unqualified observance of the traditional common law test relating to the interpretation of technical words appearing in a statute may no longer be appropriate given the adoption of the purposive approach and the enactment of s 33 of the Interpretation Act 1987 (NSW). Rules of thumb developed in earlier times for consistent interpretation must bend to the express instruction of Parliament.

108 Kirby J concluded, under the heading “an erroneous outcome”:

The most that can be said for the appellant’s argument is that Parliament, in enacting the 1996 Act, could have defined ‘pawned’, and failed to do so. Yet it is possible that the word ‘pawned’ was not defined because the drafter in the 1996 Act took this Court at its word when, as it has repeatedly done, it proclaimed that the purposive and not the literal approach is the method of statutory construction that now prevails in Australia. This Court has not hitherto withdrawn the purposive approach from the interpretation of penal legislation. It is an approach harmonious with general movements in the law, and elsewhere, that seek to give meaning to contested language and to terminate the misfiring of texts that was the main legacy of the era of literalism. To the extent that the present decision represents a turning back to literalism, I disagree. No clear judicial authority requires it. The 1996 Act obviously did not intend it. The ordinary use of language denies it. The important social purposes of the legislation are frustrated by it. Supposedly clever legal drafting of the appellant’s document is rewarded. The interests of borrowers and the victims of household thefts of pawnable goods and police are defeated. The result is undesirable. In my opinion, it is unnecessary and legally wrong.⁹³

109 As will also be well known, the effect of the decision of the High Court of Australia was reversed by the Pawnbrokers and Second-hand Dealers Amendment Act 2005 (No 62), which (s 2) came into force on 1 July 2005.

⁹² paras [39] and [40].

⁹³ paras [112] and [113].

110 One is tempted to suggest that the divergence of opinion on the court in *Palgo* is no more than another instance of reasonable difference and that Kirby J’s language is an overstatement, and alarmist. The statute has to make it clear that a transaction can be both a pawn or pledge and a chattel mortgage, which it has now done. The message from the High Court in both *Dossett* and *Palgo* is really no more than to say “make it clear”.

Some conclusions

111 This paper suggests the following conclusions:

- generally speaking, s 5 has, as Sir Kenneth Keith suggests, “been prominent in argument and judgments in recent decades”, and certainly has not been neglected in the way that Denzil Ward suggested its predecessor s 5(j) was in the 1960’s. Ward (and Professor Davis) would be pleased, indeed, to see the extent to which the purposive approach dominates statutory interpretation and the degree to which it is explicitly acknowledged by judges as material in individual cases
- courts sometimes do not have express recourse to purposive interpretation arguments as the Act is clear enough anyway (eg, *Warner v United Kingdom* in the Court of Appeal, where Thomas J said “Counsel entered upon extensive arguments relating to the application of the Interpretation Act 1999, the scheme and objective of the Extradition Act, the applicability of a purposive approach, and the current existence and relevance of the principle that penal statutes are to be construed strictly. We do not consider it necessary to address these issues”⁹⁴)
- s 5 applies to interpretation of itself and is capable of being displaced by express provision or context (Interpretation Act 1999 s 4), is displaced by articles 31 and 32 of the Vienna Convention on the Law of Treaties if treaty provisions are directly incorporated by local Acts, and may if it applies be of less significance than other canons of construction or “aids to construction, presumptions or pointers” or other interpretative directions such as section 6 of the New Zealand Bill of Rights 1990 (eg, *R v Pora*) or the principle that the Courts must strain to avoid depriving a provision of all effect

⁹⁴ [2001] 1 NZLR 331, 339, para [14].

- as Francis Bennion says, “In statutory interpretation the unit of inquiry is usually a single proposition (‘an enactment’). Each enactment has its own limited purpose, to be understood within the larger purpose[s] of the Act containing it—or sometimes within a broader purpose still, when the subject is dealt with by several Acts.”: *Statutory Interpretation—A Code* (3rd ed, 1997), s 304
- text and purpose will, ideally, be in accord or co-extensive or “interdependent” (*R v M*) but, if they are not, purpose can be—
 - used to overcome limits of the literal text (eg, *Frucor Beverages Ltd v Rio Beverages Ltd*, *Nation v Nation*)—which can create inaccessible law unless the text is amended so that it is aligned with the purposive interpretation; or
 - subordinated to the limits or confines of the text (eg, *Palgo*)
- it is sometimes suggested that purpose applies differently in different areas, eg, criminal law (see, eg, Acts Interpretation Act 1954 (Qd) s 14A(2), but compare *R v Karpavicius*, where the Privy Council rejected the notion that a criminal statute required a narrow construction, and see too the House of Lords’ 19 May 2005 decision in the “Real IRA” case: *R v Z* [2005] UKHL 35)—s 5 applies equally to revenue and non-revenue Acts—the (now repealed) Income Tax Act 1994 (NZ) s AA3(1) performed a similar role to section 5(1)
- evidence of purpose varies, but may be found within or outside the relevant Acts and, if within, may come from an express statement of purpose (or 2 or more of them at different levels within the Act) or simply from other text or from both. Express statements of purpose do, as Sir Kenneth Keith suggests, limit so-called ‘judicial activism’, but equally judges are unlikely to see them as exhaustive. Sometimes the same Act may balance conflicting purposes (eg, *Methanex Motunui Ltd v Spellman*⁹⁵ — which is quoted in the Appendix of this paper —

⁹⁵ [2004] 1 NZLR 95.

the purposes of New Zealand's Arbitration Act 1996 balance finality of arbitration with procedural safeguards for the parties)

- judicial opinion in New Zealand supports express statements of purpose
- readers of legislation may be assisted by express statements of purpose in getting their bearings whether the Act is a large reforming statute or a small amendment
- concerns about purpose statements are exaggerated and are avoided by careful drafting
- analysis of case law over the last 10 years indicates strong and not merely nominal reliance on purpose
- where constitutional or fundamental rights are involved, only the clearest statement of legislative purpose will suffice: purpose will not lightly be inferred
- public expressions of judicial attitude to the role of the courts and the relationship with the legislature are somewhat at odds with the reality of judicial decision-making which is traditional, careful, cautious, and respectful of legislative purpose
- purpose is alive and well in New Zealand, it is ingrained into judicial thinking and analysis, there is no risk of a return to literalism, and the statutory injunction in section 5(1) of the Interpretation Act 1999 is taken seriously and at face value
- there is still plenty of life in the Old Girl.

Appendix

Examples of briefer judicial citations of s 5 of Interpretation Act 1999

Some other, briefer citations of section 5 are as follows:

- “. . . the term “public” [in s 3(b) of the New Zealand Bill of Rights Act 1990] is a term of uncertain import. Plainly, its meaning turns on the statutory context. In New Zealand, the meaning of the expression is to be ascertained from the text and in the light of the purpose of the enactment: s 5(1) of the Interpretation Act 1999.”: *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233, para [49]:
- “. . . interpretation of the definition must also accord with the underlying purposes of the distribution provisions read in light of the Act as a whole: s 5 of the Interpretation Act 1999.”: *Re DML Resources Ltd (In Liquidation)* [2004] 3 NZLR 490, para [56]:
- “Pursuant to s 5 of the Interpretation Act 1999, the meaning of an enactment is to be ascertained from its text and in the light of its purpose. Before turning to the individual questions of interpretation in more detail it will be useful to consider the relevant purposes of the Arbitration Act. . . . The statutory purpose that has tended to attract the most attention since the 1996 Act was enacted is that of finality. . . . But in that climate it would be easy to overlook an important competing consideration. By the 1996 Act Parliament also revealed a clear intention to ensure that each party would enjoy, and where necessary be able to enforce, a minimum standard of procedural protection.”: *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95, paras [38], [39], and [44]:
- “The meaning of an enactment must be ascertained from its text and in light of its purpose: s 5(1) of the Interpretation Act 1999.”: *Norske Skog Tasman Ltd v Clarke* [2004] 3 NZLR 323, para [144]:
- “This is not a situation in which human rights norms favour a departure by the Courts from a purposive interpretation of the words of s 67 [of the Casino Control Act 1990] in accordance with s 5 of the Interpretation Act 1999.”: *Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621, para [46]:

- “The meaning of the expression is to be ascertained from its context and in the light of the statutory purpose: s 5 of the Interpretation Act 1999.”: *B v Canterbury District Law Society* [2002] 3 NZLR 113, para [35]:
- “The starting point for the interpretation of any statute or statutory provision is s 5 of the Interpretation Act 1999. . . .”: *Copyright Licensing Ltd v University of Auckland* [2002] 3 NZLR 76, para [8]:
- “It is necessary to construe the term within the context of the Act and in the light of its purpose (s 5 of the Interpretation Act 1999). In ascertaining the meaning of the statutory provisions it is appropriate to look at explanatory material (s 5(3) of the Interpretation Act). The explanatory note to the Copyright Bill which led to the enactment of the [Copyright] Act [1994] stated”: *Video Ezy International (NZ) Ltd v Roadshow Entertainment (NZ) Ltd* [2002] 1 NZLR 855, para [15] (the Bill’s explanatory note is of course not “provided in the enactment”: s 5(2)):
- “Parliament has instructed the Courts to ascertain the meaning of a statutory provision from its text and in the light of its purpose (s 5(1) of the Interpretation Act 1999).”: *Foodstuffs (Akl) Ltd v Commerce Commission* [2002] 1 NZLR 353, para [48]:
- “The starting point is s 5 of the Interpretation Act 1999 I look first at the text or wording of the [Optometrists and Dispensing Opticians] Act [1976], in the light of its purpose.”: *Association of Dispensing Opticians of New Zealand Inc v Opticians Board* [2001] 3 NZLR 549, paras [21] and [22]:
- “The three statutes concerned are linked, and should be construed together. In terms of s 5 of the Interpretation Act 1999 meaning is to be ascertained from the text in light of the statutes’ purpose. Fairness and justice of course have a bearing upon probable parliamentary intention, but are not determinants in their own right. Subjective understandings as to what was intended, held by promoters of the legislation, and even by responsible Ministers of the Crown, are not controlling. The statutes concerned must be considered in light of any relevant Bill of Rights and Treaty requirements.”: *Te Runanga o Ngai Tahu v Waitangi Tribunal* [2001] 3 NZLR 87, para [54]:

- “The present-day starting point is s 5 of the Interpretation Act 1999. Section 5 sets out the overriding principle governing the interpretation of statutes in New Zealand. . . .”: *Vela Fishing Ltd v Commissioner of Inland Revenue* [2001] 1 NZLR 437, paras [18], [19], which case suggests s 5 (like its predecessor s 5(j)) “makes no distinction between revenue statutes and other statutes”—note too that the Court did not cite the Income Tax Act 1994 s AA3(1) (interpretation—principle of interpretation). In dealing with the *Vela* case, the Privy Council cited the purpose provisions of the Income Tax Act 1994 and Tax Administration Act 1994: [2004] 1 NZLR 313, para [1]:
- “At issue is the proper interpretation of s 112(4)[of the of the Companies Act 1993]. Its interpretation must be in accordance with the provisions of s 5 of the Interpretation Act 1999.”: *Natural Gas Corporation Holdings Ltd v Infratil 1998 Ltd* [2000] 3 NZLR 727, para [19]:
- “the provisions of s 5(1) of the Interpretation Act 1999, [emphasise] that Courts are obliged to adopt a purposive approach to any question of legislative interpretation”: *Island Bay Residents’ Assn (Inc) v Wlgn City CI* [2000] 2 NZLR 737, para [26]:
- “For the argument to be seen in its context, it is necessary to refer to the relevant statutory provisions [of the Matrimonial Property Act 1976], taking into account the provisions of s 5 of the Interpretation Act 1999.”: *Dawson v Dawson* [2000] 2 NZLR 630, para [7].

8 September 2005

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Wellington

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