

THE DRAFTER AS INTERPRETER

Investigating How Interpretation Interacts with Legislative Drafting

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‘Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.’¹

A—Introduction

The importance of the drafter in the legislative process is underlined in the literature on the role of the drafter. Far from being a ‘mere scribe’,² the drafter is variously described as a ‘problem solver’,³ a ‘craftsman in the use of language’,⁴ a ‘legal theoretician’,⁵ ‘an architect of social structures’,⁶ and an ‘ardent democrat ... fired by a sense of the public importance of his function’.⁷

My contribution today is aimed at a different, though complementary, aspect of legislative drafting. I wish to consider the drafter as interpreter.

My broad thesis is that in the literature the role has been largely glossed and sometimes misunderstood. Specifically, I wish to highlight the interconnection between the use of common drafting tools and the law of interpretation. A greater awareness of the interpretative dimensions of the art of drafting will enhance the other important roles I have alluded to.

In Part B of the paper I analyse an article in the literature on drafting and statutory interpretation. The article raises questions which are considered in the following parts of the paper.

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¹ *Lacey v Attorney-General (Qld)* (2011) 275 ALR 646 at 661 [43].

² A fact disputed in *Penfold* 2006: 475.

³ Kolts 1988.

⁴ Thornton 1987: 2.

⁵ Hackett-Jones 1988: 54.

⁶ Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1958) 200, cited in Crabbe 1993: 22.

⁷ Bennion 1990: 21.

In Part C, I outline the technique of judicial interpretation, making comparisons with the view in the drafting literature. A model of the law of interpretation is presented to assist in the identification of interpretative criteria — in the course of drafting and for the purposes of analysing case law.

In Part D I illustrate how interpretation interacts with drafting. Using the model presented in the previous part, four court cases involving a range of drafting tools are analysed. Lessons for drafters are drawn from each experience.

Part E concludes on the questions raised in Part B before considering briefly some possible objections to the main points advanced in the paper.

B—The drafting literature

The drafter's interpretative role has not gone unnoticed in the literature. In a paper with considerable currency, a former First Parliamentary Counsel in the Commonwealth Office of Parliamentary Counsel, Hilary Penfold, analysed the drafter's interpretative role.⁸

The author recognised the implicit importance of the law of interpretation when she wrote that:

The basic tenets of statutory interpretation quickly become second nature to any skilled drafter, and to any skilled reader of legislation, and are relied on all the time, usually unconsciously.⁹

Yet it seems that for a drafter interpretation is very much attenuated. She said that '[l]egislative drafters engage in direct statutory interpretation only incidentally in the course of working out the legislative status quo before they start work on changing it'.¹⁰

Unsurprisingly for a legislative drafter, she suggested it was the *legislative* law of interpretation that has the greatest impact on the work of drafters. She instanced the fact that '[m]any of the provisions of our interpretation legislation are regularly relied on by drafters'.¹¹ She also pointed to how a drafter 'would include a purpose clause as an extra chance to direct users of legislation towards the "intended" construction of the legislation'.¹²

However, the common law — the general rules of interpretation as she called it — had little value for the drafter.

From time to time drafters may rely on such presumptions [for instance, syntactical presumptions such as the *eiusdem generis* rule] ... In general, however, apart from the legislative rules of statutory interpretation, drafters think very hard before relying on rules or presumptions of statutory interpretation ...

Drafters are more inclined to assume that the best that can be hoped for from the courts (and other users) is that they will heed Sir Harry Gibbs's exhortation to 'begin with the assumption that words mean what they say'. Unfortunately, this exhortation is of limited value.¹³

⁸ Penfold 2006. Also published at Penfold 2007. An earlier version was published at Penfold 1995. The author has since been appointed a Judge of the Supreme Court of the Australian Capital Territory.

⁹ Penfold 2006: 485.

¹⁰ Penfold 2006: 471.

¹¹ Penfold 2006: 485.

¹² Penfold 2006: 486.

¹³ Penfold 2006: 487, 488.

As a result, she suggested that it is almost as if interpretation is something which occurs *after* the drafting process and is therefore separate from drafting. She wrote:

Many of the general rules of interpretation are of little value to the drafter as he or she works. At best, they may serve to get the drafter out of a hole that is only recognised long after his or her dealings with a Bill have finished.¹⁴

For understandable reasons, she suggested the drafter has his or her mind elsewhere:

Obviously, the drafter is trying to ensure that there are no ambiguities or uncertainties in the language he or she chooses. If the drafter recognises a potential problem in the Bill, he or she will try to resolve the problem before the Bill is finalised, rather than relying on the courts to solve it by applying a rule of interpretation.¹⁵

While I have some sympathy for these remarks, and I hope some appreciation too for the position of drafters in the legislative process, I nevertheless see the paper as raising a number of issues. The main questions I wish to discuss are:

- How accurate is it to describe the law of interpretation as a set of rules? Is there a better way?
- Can a drafter ever rely on an interpretation Act? If not, why not?
- Is it sufficient that interpretation is largely an unconscious part of the work of the drafter? Does this mean that interpretation is going under the radar? Should drafters be sensitised to the law of interpretation? Should they be more aware in their work of the way in which drafting interacts with the law of statutory interpretation? If so, how?

C—The technique of statutory interpretation

In the Penfold article discussed above, the law of interpretation is presented as rules, one of which may be applied to the facts. Here are some examples:

Many of the provisions of our interpretation legislation are regularly relied on by drafters.¹⁶

...

Many of the general rules of interpretation are of little value to the drafter as he or she works. ... Some rules of interpretation are expressly aimed at cases in which the court finds an ambiguity or uncertainty in the language of the Act.¹⁷

...

From time to time drafters may rely on such presumptions if they have no alternative ...¹⁸

...

¹⁴ Penfold 2006: 487.

¹⁵ Penfold 2006: 487.

¹⁶ Penfold 2006: 485.

¹⁷ Penfold 2006: 487.

¹⁸ Penfold 2006: 487.

(... drafters would think very hard in order to avoid relying on most rules or presumptions of statutory interpretation). This is largely because, as the cases demonstrate, the courts cannot be relied on to apply any particular rule of interpretation in a particular way, or at all.¹⁹

Although I would be critical of suggestions that the courts interpret by applying a particular rule of interpretation, in fairness to this author, it has to be acknowledged that courts *have* often assumed that a particular interpretative factor can have such force. For example, they have often said that ‘doubt as to a penal enactment must always be resolved in favour of the accused’.²⁰

Nevertheless, it is a mistaken view. According to Bennion, the author of a ‘magisterial’²¹ work on statutory interpretation,

Perhaps the biggest mistake made about statutory interpretation is that the court selects which ‘rule’ it prefers, and then applies it, to the exclusion of all other ‘rules’.²²

If, as a matter of law, statutory interpretation is not the application of a particular ‘rule’, what is it then? Spigelman CJ, recently retired from the Supreme Court of New South Wales, has summarised the technique of statutory interpretation this way:

Law is a fashion industry. Over the last two or three decades the fashion in interpretation has changed from textualism to contextualism. Literal interpretation — a focus on the plain or ordinary meaning of particular words — is no longer in vogue. Purposive interpretation is what we do now ... In constitutional, statutory and contractual interpretation there does appear to have been a paradigm shift from text to context.²³

This statement is helpful in indicating the general methods of interpretation which are ‘in vogue’. It would seem correct to say that courts give greater emphasis to the wider context of a statutory provision. But we ought not take from this statement that contextualism — considered as distinct from textualism — is *the* preferred method. What is needed is a description of the practice of interpretation which encompasses both textualism and contextualism. As far back as 1957 Kitto J (in an opinion which has been cited often lately²⁴) said this:

The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation ... It is not a question of the actual intention of the legislators, but of the proper inference to be perceived upon a consideration of the document in the light of all its surrounding circumstances.²⁵

¹⁹ Penfold 2006: 488.

²⁰ Bennion 2009: 109-110.

²¹ Twining and Miers 1999: 215n.

²² Bennion 2008: 545.

²³ Spigelman 2007.

²⁴ *Singh v Commonwealth* (2004) 222 CLR 322 at 336 [19] per Gleeson CJ; *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393; [2010] FCAFC 119 at [51].

²⁵ *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405.

It is interesting to note that leading writers on statutory interpretation in other common law countries take a similar view to Kitto J. Sullivan writes, ‘The factors that justify outcomes in statutory interpretation are multiple ...’.²⁶ Bennion writes that there may be ‘many’ relevant criteria in a particular case;²⁷ the court’s task being ‘to identify *all* the relevant factors and then conduct a balancing exercise.’²⁸ The balancing exercise constitutes the basic rule of statutory interpretation and the centrepiece of his 1500 page work:

The basic rule of statutory interpretation is that the legislator’s intention is taken to be that in any case of doubtful meaning the enactment shall be construed in accordance with the general guides to legislative intention laid down by law; and that where these conflict the problem shall be resolved by weighing and balancing the interpretative factors concerned.²⁹

But if there are potentially a number of factors to be considered in each case, how, in a practical sense, can one identify them? A helpful model has been provided by a senior New Zealand judge, Justice Susan Glazebrook.³⁰ She describes a ‘spiral approach’ to interpretation which takes in successively the following stages:

- The provision in question, or the immediate context
- The Act in question as a whole
- The legislative history of the Act in question
- The wider context, including the common law.³¹

The framework enunciated by Justice Glazebrook is used in the next part of the paper to analyse four cases on interpretation involving a range of drafting tools.

D—Drafting tools and the law of interpretation

‘Drafting tools’ is a generic term encompassing the devices and conceptual vehicles drafters use and create to lay down the law in a proposed form or to give guidance on the law.

Of course there are many such tools and I have insufficient space to discuss them all. I have chosen four tools on the basis of these criteria:

- the tools are discussed in recent or fairly recent cases
- the tools illustrate a range of the tools, including operational provisions, aids to interpretation and, for want of a better word, drafting aids.

As representative of operational provisions I have chosen a case on broad terms and a case on savings and transitional provisions.

As representative of aids to interpretation I have chosen a case on a heading.

As representative of drafting aids I have chosen a case in which ‘reliance’ could have been placed on a provision in an Interpretation Act.

²⁶ Sullivan 2008: 21.

²⁷ Bennion 2008: ix.

²⁸ Bennion 2009: 110; emphasis in original.

²⁹ Bennion 2008: 544.

³⁰ Glazebrook 2004. She is a member of the Court of Appeal.

³¹ Glazebrook 2004: 169-76. For an elaboration of this model by the present author, see the Appendix. It sets out the criteria which may be drawn upon from each of these interpretative domains.

Use of a broad term

Drafters commonly use broad terms in their drafting.³² Other synonymous terms for this tool are 'general principles drafting', 'fuzzy drafting' and the 'European style'.

Bennion defines a broad term as

... another technique of brevity. By use of a word or phrase of wide meaning, legislative power is delegated to the processors whose function is to work out the detailed effect.³³

Courts, says Bennion, refer to broad terms by means of such descriptions as an 'open-ended expression'; 'word of the most loose and flexible description' and a 'somewhat comprehensive and somewhat indeterminate term'.³⁴

While 'doubt is necessarily created' with the use of a broad term,³⁵ Bennion adds that we are in practice concerned with a term 'whose application to some cases is clear and to others doubtful'.³⁶

Bennion gives examples of the terms as 'pending land action' and 'accommodation'.³⁷ The broadest of broad terms include vague concepts such as 'reasonable' or 'just' or 'fit and proper'.³⁸

There is a valuable comparative discussion of general principles drafting by Turnbull in an article in *Statute Law Review*.³⁹ He defines general principles drafting as

one of several names for the style used when the drafter deliberately states the law in general principles and leaves the details to be filled in by the courts, by subordinate legislation or in some other way.⁴⁰

It is appropriately considered he says when 'even a plain language rendering of the policy would be extremely complex or inordinately long'.⁴¹

Finally, I do not wish to sound too definite about the broad term as a legal category. Like all categories of thought it has its uses; but legislative form lies on a spectrum of generality; in the eloquent words of Hackett-Jones, 'The parliamentary counsel, as a legal theoretician, mediates between the foreground and the background of the legislative field', deducing 'appropriate principles' for dealing with problems that have arisen or are anticipated.⁴²

I raise the broad term or general principles drafting in the current context for the reason that, when this style is employed, the drafter cannot be unaware of the role of interpretation since it is a style deliberately employed to engage the interpreter in a partnership enterprise with the legislature.

³² Murphy 1992: 10.

³³ Bennion 1990: 237.

³⁴ See authorities in Bennion 1990: 237.

³⁵ Bennion 1990: 237.

³⁶ Bennion 1990: 239.

³⁷ Bennion 1990: 237.

³⁸ Bennion 1990: 246.

³⁹ Turnbull 1997.

⁴⁰ Turnbull 1997: 26.

⁴¹ Turnbull 1997: 29.

⁴² Hackett-Jones 1988: 54. '[T]he foreground consists of the circumstances in which, and the institutional and procedural structures and forms through which, [the legislation] will operate', whereas 'the background consists of the principles underlying the legislation and the social and economic objects at which it is directed': Hackett-Jones 1988: 45.

I shall now draw your attention to a recent case involving a broad term and seek to draw out lessons for drafters from the interpretation of this broad term. The case is *Virgin Blue Airlines Pty Ltd v Federal Commissioner of Taxation*.⁴³ The case involved a provision of the *Fringe Benefits Tax Assessment Act 1986* (Cth). Section 39A(1)(f) provided that the provision of car parking facilities to employees constituted a taxable fringe benefit if

the car is parked at, or in the vicinity of, [the] primary place of employment.

The Virgin Blue Airlines case focussed on the meaning of 'in the vicinity of' in that provision.

The car parking facility at the centre of the case was the Melrose Car Park within the bounds of Melbourne Airport. The primary place of employment of the appellant's employees who used the car parking facilities was Terminal 3. The shortest practicable route between the entrance to the car park and that terminal was approximately 1.9 to 2km by road. The distance would take 20 to 25 minutes to traverse by foot. A shuttle bus operated between the car park and Terminal 4 or Terminal 2. The journey from the car space to Terminal 3 via the shuttle bus took about 15 to 20 minutes one way, including the time it took to walk from the Terminal 4 bus stop to the Terminal 3 entrance.⁴⁴

The issue in the case was 'whether the parking spaces provided by the appellant were in the vicinity of Terminal 3'.⁴⁵

At first instance the Federal Court held that they were. This decision was reversed unanimously by the Full Court on appeal,⁴⁶ the appeal court having found the primary judge had erred in the construction of the term.⁴⁷

The members of the appeal court all helpfully recognised the phrase 'in the vicinity of' as akin to a broad term. It is interesting to see the criteria they employed in this regard. Edmonds and Gilmour JJ described the subject phrase as 'an expression capable of wide application';⁴⁸ a 'protean phrase' ('Protean' is from the Greek and named after Proteus, a sea-god of classical mythology who was able to assume different shapes at will).⁴⁹ The phrase in question, they said, was one which required ultimately an 'evaluative judgment'.⁵⁰ In a concurring opinion, Jessup J described it as an 'imprecise term'; moreover, it was 'inherently imprecise' such that 'recourse to dictionary definitions takes the debate nowhere useful'.⁵¹ He added that while the area of uncertainty can be confined, the scope for argument cannot be eliminated altogether.⁵² Finally, the respondent's submissions made the persuasive point that 'the legislature adopted the word "vicinity" given the myriad situations in which employers might subsidise car parking for their employees'.⁵³

⁴³ (2010) 190 FCR 150; [2010] FCAFC 137.

⁴⁴ (2010) 190 FCR 150 at 154 [19]-[22], 155 [27] per Edmonds and Gilmour JJ.

⁴⁵ (2010) 190 FCR 150 at 165 [67] per Jessup J.

⁴⁶ (2010) 190 FCR 150 at 163 [60] per Edmonds and Gilmour JJ; 164 [63] per Jessup J.

⁴⁷ (2010) 190 FCR 150 at 160 [47], 162 [52] per Edmonds and Gilmour JJ.

⁴⁸ (2010) 190 FCR 150 at 157 [31].

⁴⁹ Macquarie Dictionary.

⁵⁰ (2010) 190 FCR 150 at 163 [59].

⁵¹ (2010) 190 FCR 150 at 164 [64].

⁵² (2010) 190 FCR 150 at 165 [67].

⁵³ Cited in (2010) 190 FCR 150 at 162 [51].

Importantly however, despite its breadth, none of the appeal judges saw the case as turning purely on its facts. The crucial point — and which resulted in the primary judge’s decision being reversed — is that the phrase required consideration of its statutory context before its application to the facts.⁵⁴ Jessup J went so far as to say that the sense in which ‘vicinity’ is used ‘depends entirely on context’.⁵⁵ In other words, what the court found was that vicinity could be and needed to be interpreted in its statutory context.

What was the statutory context which influenced its interpretation? For Edmonds and Gilmour JJ it included the following.

First, the terms of the provision, which were assumed to have work to do. The judges pointed out that not all car parking benefits were taxable since the legislation’s words did not say that all employer-subsidised parking was taxable.⁵⁶ Rather, the legislation imposed a test for an additional benefit of having it provided ‘at, or in the vicinity of,’ the employee’s principal place of employment.⁵⁷

The terms also ruled out attempts by the Commissioner to impose what the court regarded as a different tests: ‘physically accessible’;⁵⁸ or a car space which the employer considers to be appropriate or convenient’.⁵⁹ The judges pointed out, in the time-honoured tradition of the Rule of Law, that the question which needed to be answered was ‘whether the condition in [the] provision is satisfied’.⁶⁰

Secondly, the remainder of the Act did not indicate a meaning other than one of near in the sense of a close spatial proximity. The fact that the Act elsewhere used the words ‘at or near’ did not affect this conclusion.⁶¹

Thirdly, the legislative history. The Minister’s second reading speech to the Bill which became the Act in question, to which regard was had, stated that a taxable benefit would only arise where the car is parked ‘at or near’ the employees’ main workplace.⁶² This counted against the argument for the Commissioner that ‘vicinity’ did not necessarily mean near.⁶³ The legislative history also took in the Explanatory Memorandum and its sole example in point of a car parking facility across the street from the employee’s office.⁶⁴

Fourthly, the wider context included case law on the word ‘vicinity’ in other contexts. The case law indicated that factors other than mere proximity may well be relevant to attain the statutory purpose. In the current context the judges took this to mean that vicinity did not depend entirely on the distance as the crow flies between the car space and the place of employment, but took in the practicable routes.⁶⁵

⁵⁴ (2010) 190 FCR 150 at 157 [31], 158 [33] per Edmonds and Gilmour JJ.

⁵⁵ (2010) 190 FCR 150 at 164 [64].

⁵⁶ (2010) 190 FCR 150 at 163 [56].

⁵⁷ (2010) 190 FCR 150 at 157 [30].

⁵⁸ (2010) 190 FCR 150 at 163 [57].

⁵⁹ (2010) 190 FCR 150 at 163 [59].

⁶⁰ (2010) 190 FCR 150 at 163 [59].

⁶¹ (2010) 190 FCR 150 at 158 [36].

⁶² (2010) 190 FCR 150 at 158 [34].

⁶³ (2010) 190 FCR 150 at 161 [51].

⁶⁴ (2010) 190 FCR 150 at 158 [35].

⁶⁵ (2010) 190 FCR 150 at 162 [54].

Fifthly, the wider context took in legal norms of rationality and the avoidance of arbitrary consequences. The primary judge had reasoned, and the respondent's submissions had argued, that in applying the law one could take account of whether the car parking facility was within the same 'functional space' as the place of employment. The appeal judges found this to be irrelevant since it would have the result, for instance, that the parking by an airline employee 2 km away from their place of employment within a functional space of an airport was taxable, but an employer-provided parking in the CBD 2 km away from their place of employment was *not* taxable. Impliedly, this was not a logical result.⁶⁶ Nor did this 'unwarranted layer' promote the Act's purpose of taxing certain benefits since the airport employee derived no greater benefit from the parking than did the CBD worker.⁶⁷

Edmonds and Gilmour JJ therefore reasoned that 'vicinity' did not mean within the same functional space, nor physically accessible. Rather, it meant 'near' taking into account the spatial and geographical separation,⁶⁸ and the statutory purpose of taxing a benefit which parking in the vicinity afforded.

Jessup J broadly agreed with the reasons of Edmonds and Gilmour JJ,⁶⁹ and added some additional reasons for construing the provision in favour of the appellant.

First, he pointed to the immediate context of the crucial phrase: 'at, or in the vicinity of'. The compound expression indicated that 'vicinity' was not a distinct alternative to 'at' a place of employment, but merely an extension of car parking at a place of employment.⁷⁰

Secondly, the immediate context of 'vicinity' in the provision was concerned with car parking. The judge took judicial notice of what in common parlance to 'park' a vehicle entailed. In his judgement, in normal parlance, 'one expects to be at one's destination when one parks the car — to be "there", as it were'.⁷¹

He held that 'vicinity' meant 'the degree of proximity that would generally be regarded as appropriate to the paradigm in which the commuter had used his or her car as the single means of getting *to work*, and then parked it'.⁷²

What lessons for drafters are there from this case?

First, the drafting of a general principle does not avoid the need for processors to engage in statutory interpretation, and hence for drafters to need to be aware of this dimension. It may be somewhat misleading to see a broad term as a delegation of legislative power for this tends to suggest the court has *carte blanche*. Edmonds and Gilmour JJ in fact expressly addressed this issue. They stated that

Ultimately it is a matter of evaluative judgment. This does not put the Court in the role of legislator as the respondent submits.⁷³

Secondly, the drafting of a general principle imposes limits. It is possible to go wrong in construing a broad term. In this case the interpretative dimension was illustrated by the appeal court's rejection of the primary judge's interpretation and the rejection of the respondent's construction.

⁶⁶ (2010) 190 FCR 150 at 162 [52].

⁶⁷ (2010) 190 FCR 150 at 162 [53].

⁶⁸ (2010) 190 FCR 150 at 162 [54].

⁶⁹ (2010) 190 FCR 150 at 164 [63].

⁷⁰ (2010) 190 FCR 150 at 164 [66].

⁷¹ (2010) 190 FCR 150 at 164 [65].

⁷² (2010) 190 FCR 150 at 164 [65]; emphasis in original.

⁷³ (2010) 190 FCR 150 at 163 [59].

Thirdly, the interpretation of broad terms is not taken anywhere, or very far at least, by the assumption that words mean what they say. The interpretation of broad terms is highly contextual and influenced comparatively marginally by the ordinary and dictionary meanings of the term.

Fourthly, the contextual considerations are however similar to those operating with other more specific terms in doubt.

Finally, once defined, a broad term does give a processor latitude for value judgements, a fact the court explicitly recognised. All members of the appeal court were influenced in applying the law to the facts by the shuttle bus taking 15-20 minutes.⁷⁴ Jessup J even doubted whether an employee or an employer would see the provision of the parking space as a benefit.⁷⁵

Savings and transitional provisions

A transitional provision is 'A provision regulating the operation and effect of an amending Act during the period of transition from one statutory regime to another.'⁷⁶ A transitional provision may, but need not, introduce savings.⁷⁷ A savings provision is

A provision in a repealing statute which preserves certain rights, responsibilities, and liabilities existing prior to the adoption of the statute (often prescribed by an earlier statute) which may have been lost as a result of the unrestricted adoption of the statute or if the repealing statute had been silent on the matter.⁷⁸

A case which nicely illustrates the impact of the law of interpretation on this area of statute law is *Dossett v TKJ Nominees Pty Ltd*.⁷⁹ Put simply, the issue in the case was whether a worker's rights to sue an employer for damages were preserved by the general law (the common law and the interpretation Act) or whether they were impliedly repealed by a later enactment.

The essential facts of the case are as follows. The appellant was injured in December 1996. He contended that it arose in the course of employment by the respondent. On 1 July 1998 the appellant applied to the District Court of Western Australia, pursuant to s 93D(5) of the *Workers' Compensation and Rehabilitation Act 1981* (WA), for leave to commence proceedings at common law for damages for personal injury. However, on 5 October 1999, before the District Court had determined his application, an amendment Act⁸⁰ imposed from that date more restrictive conditions on the award of common law damages. On 19 January 2000 his matter came on for hearing. The District Court held that the amended provision applied to the plaintiff's application and that it had no power to give him leave to commence proceedings under the old law.

⁷⁴ (2010) 190 FCR 150 at 163 [60] per Edmonds and Gilmour JJ; 165 [68] per Jessup J.

⁷⁵ (2010) 190 FCR 150 at 165 [68].

⁷⁶ LexisNexis Concise Australian Legal Dictionary 2011: 586.

⁷⁷ It may do the opposite: OPC 2006: [70], or it may make 'savings' which would not otherwise be available under the general law, eg *Travel Agents Act 1986* (Vic) s 49. It follows that the terms are interchangeable to some extent. In the case I am shortly to discuss, *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1, McHugh J described s 32(7) of the *Workers' Compensation and Rehabilitation Amendment Act 1999* (WA) as a transitional provision: at 4 [2]; Gummow, Hayne and Heydon JJ described the provision as a savings provision: 11 [32]; and Kirby J described it as a transitional provision specifying savings: 19 [62].

⁷⁸ LexisNexis Concise Australian Legal Dictionary 2011: 522.

⁷⁹ (2003) 218 CLR 1.

⁸⁰ *Workers' Compensation and Rehabilitation Amendment Act 1999* (WA).

In the High Court the appellant argued that his application for leave under the old law was saved by the general savings provision in s 37(1) of the *Interpretation Act 1984* (WA) which included:

“Where a written law repeals an enactment, the repeal does not, *unless the contrary intention appears* —

...

- (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
- (c) affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal;

...

- (f) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligation, liability, burden of proof, penalty or forfeiture, and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty or forfeiture may be imposed and enforced as if the repealing written law had not been passed or made.” (Emphasis added)

However, the appellant was met by the argument that the transitional provisions in the later Act did express a contrary intention; they expelled the general savings provisions in the Interpretation Act. The transitional provision set out in s 32(7) of the amendment Act read:

The amended provisions do not affect the awarding of damages in proceedings —

- (a) commenced before the assent day; or
- (b) for the commencement of which the District Court gave leave under the former provisions before the assent day, and the former provisions continue to apply in relation to those proceedings.

It was argued by the respondent employer that the high particularity of the transitional provision excluded proceedings that did not qualify on the either of the specified grounds.⁸¹

The appellant worker responded in part by pointing to a unique Western Australian provision regarding the effect of statutory changes. Section 37(2) of the Interpretation Act read:

The inclusion in the repealing provisions of an enactment of any express saving with respect to the repeals effected thereby shall not be taken to prejudice the operation of this section with respect to the effect of those repeals.

⁸¹ (2003) 218 CLR 1 at 6 [10]; 20 [66].

The High Court took two lines of approach to determine the law arising from the three relevant Acts: the 1981 workers compensation Act; the 1999 amendment Act, and the 1984 general interpretation Act. One approach, taken in the joint reasons of Gummow, Hayne and Heydon JJ, was to lay emphasis on s 37(2) of the Interpretation Act.⁸² This approach has particular relevance in Western Australia but not in other Australian jurisdictions which do have such a provision ‘strengthening’ the general law of interpretation.⁸³ The other approach, taken by McHugh J and Kirby J in separate opinions, has more general relevance since their reasoning did not solely depend on s 37(2) but was also based on the interaction between the general law preserving accrued rights, in the common law and in the Interpretation Act, and the transitional provision in s 32(7) of the amendment Act.

McHugh J and Kirby J both held that s 32(7) in the amendment Act contained no foundation for an inference of contrary intention sufficient to oust the applicability of the general law in the Interpretation Act.⁸⁴ While the provision did not make reference to the saving of the appellant’s application for leave, neither did it remove the saving effected by the Interpretation Act.⁸⁵

How did McHugh J and Kirby J respond to the tension between the general savings provision and the transitional provision? In other words, how did they resolve the competing constructions of s 32(7) urged upon the court: the construction (advanced by the respondent) that Parliament had there stated the *only* proceedings which were saved; and the construction (advanced by the appellant) that the provision merely identified two categories of proceedings for which *express* savings were enacted.⁸⁶

McHugh J began by simply noting the terms in which the transitional provision was cast. He pointed out that the transitional provision said nothing about pending *applications* for leave to commence proceedings for damages.⁸⁷ This made it more difficult to find an ‘irresistible inference’ that the amending provision had impliedly excluded the preservation of the worker’s application for leave under the old law.

Both judges extended this review of the terms of the transitional provision by contrasting it with what a drafter *could* have said to make it clear that the worker’s accrued rights under the general law did not survive the amendment. In other words they pointed to the absence of certain wording in the terms of the transitional provision. It was pointed out that the terms did not say anything direct about the effect and operation of the general savings provision.⁸⁸ It was said that the transitional provision could have said, but did not say, that ‘common law rights that existed at the assent day but which had not been the subject of a grant of leave to proceed, were thereby “abolished”’.⁸⁹ The transitional provision could have said, but did not, that ‘proceedings could continue “in and only in” those cases commenced as specified by s 32(7)’.⁹⁰ Another formulation which could have been used, but was not, was that the transitional provision ‘applies notwithstanding

⁸² (2003) 218 CLR 1 at 11 [32].

⁸³ (2003) 218 CLR 1 at 12 [33].

⁸⁴ (2003) 218 CLR 1 at 6 [11]; 25 [84].

⁸⁵ (2003) 218 CLR 1 at 25 [84].

⁸⁶ (2003) 218 CLR 1 at 23 [77].

⁸⁷ (2003) 218 CLR 1 at 6 [11], 7 [15].

⁸⁸ (2003) 218 CLR 1 at 6-7 [11] per McHugh J.

⁸⁹ (2003) 218 CLR 1 at 24 [81] per Kirby J.

⁹⁰ (2003) 218 CLR 1 at 24 [81] per Kirby J; see also 7 [15] per McHugh J and 14 [44] per Gummow, Hayne and Heydon JJ.

any provisions of any other law, written or unwritten'.⁹¹ These alternative formulations came from the wider context of statute law.

Both McHugh J and Kirby J also considered the legislative history of the transitional provision. Rather unusually, 16 days *after* the amendment Act had received the Royal Assent and commenced, the Minister for Labour Relations made a statement in the Legislative Assembly stating 'the intent of the amendment Act'. She said that it was 'clear' that the new common law provisions did not affect the awarding of damages 'only if the proceedings have commenced or leave of the District Court was granted before the assent day'.⁹² However, both judges gave the argument based on the Minister's statement no weight. McHugh J considered that 'There is no requirement in the law of Western Australia that a court should give special weight to a Minister's opinion concerning the meaning of legislation that has been enacted by the Legislature'.⁹³ Kirby J said the statement 'scarcely represented the kind of considered adoption by Parliament of a law abolishing established rights and privileges that can be expected where law-makers set out to take away such legal entitlements'.⁹⁴ The other judges did not mention the Minister's statement.

The judges also considered the wider context including 'the broader context of legal principle and policy'.⁹⁵ McHugh J discussed a previous case⁹⁶ in which the High Court found that transitional provisions had dealt exhaustively with the saving of existing proceedings. However he considered that the decision in that earlier case rested on the specific provisions.⁹⁷

As mentioned already, all judges read the transitional provision in the context of the general interpretation Act of Western Australia and the common law it reflected.⁹⁸ Kirby J regarded the Interpretation Act as recognising a 'deep-seated common law principle'⁹⁹ that amendments to a statute will ordinarily be construed as having prospective operation only, so far as they purport to affect individual rights and privileges.¹⁰⁰

What are the lessons for drafters from this case? First, the drafting of savings provisions is through and through an interpretative act. This inevitably arises from the way in which the provision will be read with the general Interpretation Act and the common law presumption that amendments will ordinarily be construed as prospective so far as they purport to affect individual rights and privileges. As Kirby J said:

[A] provision such as s 32(7) is not to be read in isolation. It needs to be understood both in the context of common law principle and the general savings provisions enacted in the *Interpretation Act*.¹⁰¹

Secondly, there are traps in drafting transitional provisions. It is not enough to have extrinsic evidence of legislative intent. (The Minister's statement had no weight and even if made at the time the Bill was considered would not have affected the outcome.)

⁹¹ (2003) 218 CLR 1 at 24 [81] per Kirby J; see also 7 [15] per McHugh J and 14 [44] per Gummow, Hayne and Heydon JJ.

⁹² Cited in (2003) 218 CLR 1 at 20 [68].

⁹³ (2003) 218 CLR 1 at 6 [10].

⁹⁴ (2003) 218 CLR 1 at 26 [87].

⁹⁵ (2003) 218 CLR 1 at 15 [48].

⁹⁶ *G F Heublein and Bro Inc v Continental Liqueurs Pty Ltd* (1962) 109 CLR 153.

⁹⁷ (2003) 218 CLR 1 at 7 [12]. In addition, s 37(2) of the Interpretation Act 1984(WA) was a distinguishing factor: 7 [13].

⁹⁸ (2003) 218 CLR 1 at 6 [11], 7 [14] per McHugh J; 8 [21] per Gummow, Hayne and Heydon JJ; 24 [79]-[80] per Kirby J.

⁹⁹ (2003) 218 CLR 1 at 25 [84].

¹⁰⁰ (2003) 218 CLR 1 at 24 [80].

¹⁰¹ (2003) 218 CLR 1 at 24 [79].

It is also dangerous and a quite unnecessary to rely on inferences. It is not enough for the inference to be an available construction.¹⁰² A court may or may not agree that that inference ought to be found. Furthermore, the stronger the background presumption, the stronger the contrary intention needs to be manifested in the transitional provision.

Burrows and Carter comment that in drafting transitional and savings provisions the drafter —

is caught between the Scylla of the broad and non-specific guidelines in interpretation Acts, and the Charybdis of complex detailed provisions in individual statutes.¹⁰³

By this classical allusion, it is suggested that the avoidance of one danger increases the risk from the other.¹⁰⁴ But in *Dossett's* case the dispute could have been avoided by the means suggested by the judges in the High Court. Therefore the claim of Burrows and Carter seems to exaggerate the difficulties. It is not suggested however that all issues surrounding transitional provisions can be dealt with in this manner nor that drafting of such provisions is always simple.

The humble heading

The case of *Berenguel v Minister for Immigration and Citizenship*¹⁰⁵ illustrates the connection between headings and the law of interpretation. Its lessons apply to other aids to interpretation.

The Migration Regulations 1994 (Cth) provided for a class of visa known as 'Skilled — Independent'. The criteria are set out in Division 885.2:

885.21 Criteria to be satisfied at time of application

885.213 Either:

- (a) the applicant's nominated skilled occupation is in Major Group IV in the Australian Standard Classification of Occupation, and the applicant has vocational English; or
- (b) the applicant has competent English.

'Vocational English' was relevantly defined in reg 1.15B as follows:

(1) Vocational English, for a person, has the meanings given in subregulations (2), (3), (4) and (5).

...

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

- (a) an IELTS test score of at least 5 for each of the 4 test components of speaking, reading, writing and listening; ... (emphasis added)

'Competent English' was similarly defined.

¹⁰² (2003) 218 CLR 1 at 23 [77] per Kirby J.

¹⁰³ Burrows and Carter 2009: 602. The authors cite an earlier work of Burrows for this comment.

¹⁰⁴ *The Australian Oxford Dictionary* (2nd ed, 2004).

¹⁰⁵ (2010) 264 ALR 417; [2010] HCA 8.

The facts of the case were as follows. On 26 February 2008 the plaintiff booked an IELTS test (the International English Language Testing System test). On 21 April the plaintiff lodged a visa application. On 20 May the plaintiff sat the language test. He passed the standard for competent English and for vocational English. However, even though the test result was transmitted to the Department of Immigration and Citizenship on 7 June 2008, on 12 December of that year a delegate of the Minister refused the plaintiff's application. The delegate's reasons were:

You have not provided an IELTS test result [for a] test conducted not more than 2 years before the day on which the application was lodged and therefore have not meet [sic] the regulatory requirement of having vocational English at [the] time of application.

The interpretative issue in the case concerned the meaning of 'a test conducted not more than 2 years before the day on which the application was lodged' in reg 1.15B(5). Did it mean,

- (a) as the Minister contended — that the test must have been conducted by the time of application;¹⁰⁶ or
- (b) as the plaintiff contended — that 'the test was conducted no earlier than two years before the application was lodged'?¹⁰⁷

The High Court (French CJ, Gummow and Crennan JJ) found for the plaintiff. It held the delegate had misconstrued the regulation.¹⁰⁸

Clearly the technique of drafting the heading was not only unsuccessful, but it was part of the problem. Let's recall what the subdivision heading stated:

885.21 Criteria to be satisfied at time of application

The heading suggested the Minister's construction was correct. Why was it not determinative?

First, the heading and the terms of the provision itself. While the court had regard to the heading (it was part of the regulations¹⁰⁹) the court said that 'the heading does not connect grammatically to its terms.'¹¹⁰ The court seems to be saying that the substance in the heading was not reflected in the terms.

Secondly, the purpose of the provision, inferred from the provision and the background Explanatory Statement. The Statement provided:

The effect of this amendment is that applicants for a new General Skilled Migration visa may establish that they have vocational English, if required to do so to satisfy a criterion for grant of the relevant visa, on the basis of a test taken within the previous two years (rather than the previous 12 months for applicants required to have vocational English under other current regulations).¹¹¹

¹⁰⁶ (2010) 264 ALR 417 at 422 [22].

¹⁰⁷ (2010) 264 ALR 417 at 422 [25].

¹⁰⁸ (2010) 264 ALR 417 at 419 [10], 423 [27].

¹⁰⁹ (2010) 264 ALR 417 at 420-1 [15].

¹¹⁰ (2010) 264 ALR 417 at 422 [26].

¹¹¹ (2010) 264 ALR 417 at 422 [21].

The Court took the Statement, not as evidence of the intended meaning of the provision, but as evidence of the legislative purpose: 'The passage supports the inference that the purpose of requiring an applicant to undergo a language test is to establish that the applicant currently has an appropriate standard of English competency.'¹¹²

The Court accordingly held that '[t]he evident purpose of the alternative criteria in cl 885.213 is to ensure that, when the Minister or delegate decides upon the application for a visa, the applicant will have demonstrated recent competency in the English language'.¹¹³

Thirdly, the legislative context. The remainder of the regulations did not otherwise support the Minister's construction. In other words, the regulations did not elsewhere indicate that the criteria speak exclusively to satisfaction at the time of application.¹¹⁴

Fourthly, the wider context, which included the parent Act of course. Section 55 of the *Migration Act 1958* expressly provided for the Minister to have regard to additional relevant information provided before the Minister has made a decision:

(1) Until the Minister has made a decision whether to grant or refuse to grant a visa, the applicant may give the Minister any additional relevant information and the Minister must have regard to that information in making the decision.

(2) Subsection (1) does not mean that the Minister is required to delay making a decision because the applicant might give, or has told the Minister that the applicant intends to give, further information.

Fifthly, the wider context of the statute included relevant legal norms such as rationality, coherence, and fairness.¹¹⁵ In this case the legal norms the court drew on were fairness and rationality. The Court was of the view that the construction for which the Minister contend 'leads to such plain unfairness and absurdity that it is not to be preferred'.¹¹⁶ The absurdity here was that, if the Minister's construction was correct, a decision in December was taken on information to hand in April earlier that year, notwithstanding later relevant information transmitted in June of the same year. The unfairness, it seems, arose from the fact that, even though the plaintiff had booked a test nearly two months before his application, the earliest date upon which the test could be administered to him was in the month following the application.¹¹⁷

Finally, the alternative construction advanced by the plaintiff was open.¹¹⁸

What does the case demonstrate about how the law of interpretation impacts on headings? And what consequential lessons should be drawn?

The court held that the heading informed the construction of the provision in question, in the present case reg 1.15B(5) of the Migration Regulations.¹¹⁹ But even a clear heading, as this one was, was not determinative as an aid to interpretation (for that is what the heading was). The meaning of the provision was not determined by resort to one aid, and nor did the court take the meaning of the provision from the Explanatory Statement to which it had regard. The court balanced the factors which supported the Minister's construction against the factors which supported the plaintiff's construction.

¹¹² (2010) 264 ALR 417 at 422 [21].

¹¹³ (2010) 264 ALR 417 at 422 [24].

¹¹⁴ (2010) 264 ALR 417 at 423 [26].

¹¹⁵ Sullivan 2008: 8.

¹¹⁶ (2010) 264 ALR 417 at 423 [26].

¹¹⁷ (2010) 264 ALR 417 at 418 [3].

¹¹⁸ (2010) 264 ALR 417 at 422 [25].

¹¹⁹ (2010) 264 ALR 417 at 423 [26].

The lessons for drafters are that there are dangers in putting too much weight on a heading to carry the meaning of a provision. When employing a heading or any other interpretative aid the drafter needs to check that heading or aid against the text, and also against other interpretative aids.¹²⁰

'Reliance' on Acts Interpretation Acts

It will be recalled that Penfold said in passing that '[m]any of the provisions of our interpretation legislation are regularly relied on by drafters'.¹²¹ It is not clear what she meant by reliance — did she mean reliance in the sense of put complete trust in, as some commentators appear to believe,¹²² or did she mean reliance in the limited sense of have it in the back of the drafter's mind?

If the Interpretation Act is capable of determining the meaning of a later Act, it would present the drafter with an attractive resource: an Act that lays down the meaning of words and expressions for all time. However, do interpretation Acts work that way?

My case example is *Telstra Corporation Ltd v Hurstville City Council*.¹²³

The proceedings in the case were brought in the Federal Court by Telstra Corporation against 11 New South Wales local authorities and four Victorian local authorities. They sought declarations that the State legislation under which rates and charges were purportedly levied or made was either invalid or inapplicable. In separate proceedings brought by Optus Vision Pty Ltd and Optus Networks Pty Ltd against three New South Wales local authorities and one Victorian local authority, declarations to the same general effect were sought. The proceedings were heard together.

The corporations had erected or placed on, under or over a public place, telecommunications cables. The Victorian councils had purported to declare and recover rates and charges on the land occupied by the subject cables.

The Victorian *Interpretation of Legislation Act 1984* was raised in the case following the submission by Telstra and Optus that the Councils had a discretion whether or not to rate the cables. The primary judge had held there was no discretion in the local government law.

The Victorian local government law in question was s 158(3) of the *Local Government Act 1989 (Vic)*. It read as follows:

A Council may levy general rates, municipal charges, service rates and service charges by sending a notice to the person who is liable to pay them.

As to the meaning of 'may', s 45 of the *Interpretation of Legislation Act 1984 (Vic)* provided:

(1) Where in this Act or any Act passed ... on or after the commencement of this Act the word 'may' is used in conferring a power, that word shall be construed as meaning that the power so conferred may be exercised, or not, at discretion.

(2) Where in this Act or any Act passed ... on or after the commencement of this Act the word 'shall' is used in conferring a power, that word shall be construed as meaning that the power so conferred must be exercised.

¹²⁰ See Berry 2011: 57-8 for a similar point regarding objects provisions.

¹²¹ Penfold 2006: 485.

¹²² Stubbs 2006: 112, n 54; Miller 2002: 381 [10.20]; cf Lanspeary 2005: [62].

¹²³ (2002) 118 FCR 198.

(3) The provisions of this section shall have effect notwithstanding any rule of construction to the contrary and any such rule is hereby abrogated with respect to this Act and any Act passed ... on or after the commencement of this Act.

The Full Court's¹²⁴ reasoning was taken in two stages. At the first stage it suggested that, but for s 45(3), s 158(3) would have clearly imposed an obligation.¹²⁵ The court had regard first to the ordinary meaning of 'may' in the wider context of s 45(1) of the Interpretation of Legislation Act. It noted that s 45(1) restated the common law on the meaning of 'may'.¹²⁶ (This holds that when construing 'may' you begin with the prima facie presumption that a discretionary power is conferred.¹²⁷)

But this presumed meaning was not the only meaning which was possible and in this regard the court drew on the wider context of case law.

In *Finance Facilities Pty Ltd v Commissioner of Taxation (Cth)* (1971) 127 CLR 106 at 134-135 Windeyer J quoted with approval the words of Jervis CJ in *Macdougall v Paterson* (1851) 11 CB 755 at 766; 138 ER 672 at 677: 'The word "may" is merely used to confer the authority: and the authority *must* be exercised, if the circumstances are such as to call for its exercise.'¹²⁸

The court was inclined to hold that the common law prima facie meaning was ousted, that is, the provision implied a duty rather than conferred a discretionary power, by reason of the consequences of holding the power to be discretionary. The Court noted that s 158(1) of the Local Government Act 'requires a Council once per year to declare the amount it intends to raise by rates and charges, and the way in which general rates will be raised (uniform and differential rate)'. The court suggested that absurd consequences would flow if the Council had a discretion to levy rates which had been declared and, once declared, had given rise to a liability to pay:

It could hardly have been intended that once a rate had been declared, with the result that owners of rateable land become liable to pay the rates, the Council could pick and choose as to which owners should in fact be required to pay. So to construe the provision would be tantamount to permitting councils to expand the range of land that is, in some detail, declared by s 154(2) to be not rateable.¹²⁹

However, this first stage meaning had to be tested finally against another part of the wider context of s 158(3), namely the unusual wording of s 45(3) of the Interpretation of Legislation Act. This provision attempts to use a statutory enactment to oust common law 'rules' which might otherwise support 'may' being read otherwise than as conferring a discretion.

Analysing this provision was the second and ultimately determinative step in the Court's reasoning. The Court agreed with earlier criticism of such provisions but, without elaborating, referred back to its analysis of the terms of the Local Government Act.¹³⁰ By doing so, the Court suggested that this earlier analysis overcame the strong terms of s 45(3).

¹²⁴ Per Sundberg and Finkelstein JJ. After the hearing of the appeal, Katz J was unable to continue as a member of the Full Court.

¹²⁵ (2002) 118 FCR 198 at 232 [77].

¹²⁶ (2002) 118 FCR 198 at 233 [78].

¹²⁷ See authorities in Pearce and Geddes 2006: 333 [11.5].

¹²⁸ (2002) 118 FCR 198 at 232 [77].

¹²⁹ (2002) 118 FCR 198 at 232 [77].

¹³⁰ (2002) 118 FCR 198 at 233 [78].

In this earlier reasoning the Court analysed the statutory context of s 158(3). The immediate context of 'may' in s 158(3) was the verb 'levy'. The court observed that 'levy' 'can mean impose, exact or collect' (which, I infer could be discretionary). However, the remainder of the section demonstrated that 'levy' meant 'demand payment or take the necessary steps to enforce payment of that which has been imposed' (which, I infer, suggested a duty). There were two reasons for the stricter interpretation of 'levy'. First, 'levy' in s 158(3) had to be read with s 158(1). This provision, as already noted, has the effect of requiring the Council to declare rates and charges, and pursuant to that provision a liability to pay arises. Secondly, the Court cited various authorities from the wider context of the word 'levy' for this compulsory construction of 'levy'.

Having analysed the meaning of 'levy' in this way, the Court implied that the terms of the Local Government Act overcame the attempt to oust the common law in s 45(3) of the Interpretation of Legislation Act.

In summary, what were the factors which influenced the determination of the word 'may' in s 158(3) of the Local Government Act? On the one hand, the text of the provision, considering its ordinary meaning at common law and the wider legal context of s 45(1) of the Interpretation of Legislation Act, suggested that, prima facie, a discretionary power was conferred. On the other hand, the context of the provision also indicated that the Councils had no discretion:

- the immediate statutory context (the section), including the meaning of the word 'levy' which was important in displacing the wider context of s 45(3) of the Interpretation of Legislation Act; and
- the wider context, taking in the consequences of holding the power to be discretionary.

In conclusion, the above case demonstrates that a drafter cannot automatically and solely 'rely' on a provision in an Interpretation Act, such as the provision about the meaning of 'may'. That Act may supply a relevant interpretative factor but does not alone determine the legal meaning of a provision in another Act. The legal meaning of a provision affected by an interpretation Act provision is determined along normal lines (as outlined in the previous part of the paper). As a consequence, a drafter, who is aware of a relevant provision in an interpretation Act must interpret the provision being drafted against both the relevant Interpretation Act provision and other indications of meaning drawn from the interpretative criteria of the law. It is unsafe to assume the Interpretation Act sets some kind of rigid legal code. It does not. The drafter must interpret the provisional draft to be sure the word choice is one which is likely not to give rise to dispute in the way this occurred in the Telstra case.

E—Conclusions

From the technique outlined in Part C and the cases discussed in Part D I draw three main conclusions to the questions I raised earlier regarding legislative drafting and statutory interpretation:

My first conclusion is that, rather than statutory interpretation being viewed — as some still do — as supplying 'particular rules' to be applied to facts in the way rules normally are, drafters should anticipate, to the extent possible, the way courts interpret. As apparent in my four case studies, courts do not normally apply rules as such in the area of interpretation. Rather, they engage in a multifactorial assessment which draws factors from four main interpretative domains before weighing and balancing them to determine the legal meaning of a provision in doubt.

My second conclusion is that, when a definition or presumptive rule in an interpretation Act is relevant, and the drafter wishes the content of that definition or rule to apply, rather than the drafter 'relying' solely on the Interpretation Act provision, the drafter needs to as far as possible take an interpretative approach as explained in my previous point and in Part C.

My third conclusion extends the analysis of Penfold. That author has done a service by raising in public forums over a number of years the connection between drafting and interpretation. She has not left interpretation as an unconscious part of the work of drafters. In the present paper I would take her analysis further. I argue that drafters should be sensitised to, and be aware of, the way in which particular tools they use can only safely be used with a knowledge of the relevant law of statutory interpretation. In the previous part I have illustrated how four tools interacted with the law of interpretation.

Various objections might be put to these points. I briefly consider three.

(1) Against the first point an objection might be: 'Even if I do attempt to interpret, your explanation of interpretation in Parts C and D does not give me a sure way to find the right answer — the answer a court would give. So why should I bother?'

This objection has some force. No court and none of the leading commentators give that assurance. However, taking an approach which reflects the law minimises the chances of going wrong. It constrains the interpreter.

(2) Against the second point an objection might be: 'I need to rely on the Interpretation Act.'

I am not saying that you can't have an Interpretation Act. What I am saying is that interpretation is not the application of particular rules of interpretation, including a relevant provision in an Interpretation Act.

(3) Against the third point an objection might be: 'It is unrealistic to expect drafters to interpret the way a court does when a court has particular facts which are not known to the drafter.'

I think this objection has some force. Drafters cannot foresee everything which occurs. Courts do have the benefit of facts to apply an interpretation. I don't think that a drafter could have foreseen the dispute over the car space at Melbourne Airport that occupied time in the Federal Court in the Virgin Blue Airlines case. In raising that case in this paper my point is that no term in a statute is free from interpretation and this is particularly so with regards to a general principle which is designed for interpretation.

A further response I would make is to query how strong the 'I don't have facts' defence is. Drafters do engage in a form of interpretation. Sullivan says the legislature considers 'the meaning of a text apart from particular applications'.¹³¹ The drafter is an agent of the legislature. Even in the absence of a particular dispute and the availability in most cases of parliamentary materials a court may draw upon,¹³² a drafter still has some points of reference to enable him or her to engage in what is, compared to the courts, a modified form of interpretation. Hence, it can be asked:

- Is it really the case that in the *Dossett* case the drafter could not have compared the transitional provision to the general interpretation Act provision and said something more specific?

¹³¹ Sullivan 2008: 24.

¹³² For example, the Minister's second reading speech; the Explanatory Memorandum.

- Is it really the case that in the *Berenguel* case the drafter could not have considered the way the heading did not connect up with the text of the regulation? And also the problems in connecting up with the Act?
- Is it really the case that in the *Telstra* case the drafter could not have considered guides to the word 'may' other than the Interpretation Act? (assuming that this is what occurred)

As a final note, I began this paper by remarking on the very significant roles performed by drafters in the legislative process. Because of these roles, and the facts of particular disputes often not being before a drafter, interpretation for a drafter will assume a less prominent role than it receives from a judge or a lawyer in the post-enactment phase. Accordingly I recognise that a drafter's interpretation cannot always measure up to an interpretation by a judge or lawyer with respect to a particular set of facts in the implementation of legislation. This means that expectations about interpretation in the legislative process need to take cognizance of the unique position the drafter occupies. Nevertheless, a form of interpretation can and should be performed in the legislative process once the Bill takes shape. Interpretation should have greater prominence in practice than it is at least accorded in the drafting literature.

Thank you.

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APPENDIX

SOURCES OF INTERPRETATIVE CRITERIA

(Based on Glazebrook model)

I. The provision in question includes:

- intuitive readings
- the immediate legislative context of the critical word or phrase
- the ordinary meaning.

II. The Act in question as a whole includes:

- the different parts of the Act as aids to interpretation: arrangement; organisation; definitions; purpose provisions; headings; examples; other plain English aids; and legislative scheme as a whole
- the linguistic canons or grammatical aids, including
 - associated words rule (*noscitur a sociis*)
 - limited class rule (*eiusdem generis*)
 - alternative words could have been used
 - every word to be given meaning (presumption against surplusage)
 - the Act to be read as a whole
 - same words, same meaning; different words, different meaning
 - implied exclusion (*expressio unius est exclusio alterius*)
 - general provisions do not override special ones (*generalia specialibus non derogant*).

III. The legislative history of the Act in question includes:

- official reports tabled in the parliament forming part of the background to the Act
- explanatory memorandum accompanying the Bill which became the Act
- the Minister's second reading speech for the Bill which became the Act
- parliamentary speeches by other members of the parliament regarding the Bill which became the Act.

IV. The wider context includes:

- common law presumptions, for example
 - that legislative purpose be promoted
 - that the likely consequences of each proposed construction be assessed
 - that Parliament does not intend to infringe fundamental rights

- presumptions relating to the character of the provision (penal (last resort); fiscal (weak); remedial)
- presumption relating to the audience (technical meanings and legal meanings qualify presumption that words in statutes should be taken to have been used by the legislature in their ordinary sense).
- relevant Acts Interpretation Act
- other extrinsic aids such as
 - legislative evolution (prior version(s) of the legislation in question)
 - dictionaries
 - cases interpreting the same or like or earlier provisions
 - the statute book
 - common law background
 - international law
 - the views of jurists.