Re-thinking Extrinsic Materials in Statutory Interpretation: Revelations from the Legislative Process

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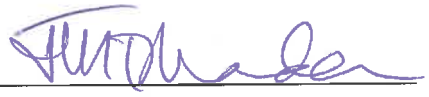
Statement of Authorship

This thesis is my original work. No other person's work has been used without due acknowledgement in the main text of the thesis. This thesis has not been submitted for the award of any degree of diploma in any other tertiary institution. Except to the extent of 'Relevant Publications' listed on the next page or where reference is made in the text of the thesis, this thesis contains no material published elsewhere.

Signed: 

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Relevant Publications

This thesis draws on certain publications of the candidate that were completed during the preparation of the thesis.

Published work	**Contribution of candidate to published work**	**Relevance to Thesis**
'Using Parliamentary Materials in Interpretation: Insights from Parliamentary Process' (2018) 41(1) *The University of New South Wales Law Journal* 4	Sole author	Chapter Seven revises and updates this article.
'Drafting Statutes and Statutory Interpretation: Express or Assumed Rules?' (2019) 45(2) *Monash University Law Review* 401	Sole author	Some of Chapter Six is drawn from and revises and updates this article.
'Re-examining the Relationship between Parliament and the Law Reform Commissions – An Australian Perspective' (2020) 22(2) *European Journal of Law Reform* 115	Sole author	Chapters Six and Seven draw from a small portion of the materials for this article.
Chapter 2 of J Barnes, J Dharmananda and E Moran, *Modern Statutory Interpretation: Framework, Principles and Practice* (Cambridge University Press, 2023)	Sole author of this chapter	Chapter Two draws from and revises and updates material from this chapter.
Chapter 24 of J Barnes, J Dharmananda and E Moran, *Modern Statutory Interpretation: Framework, Principles and Practice* (Cambridge University Press, 2023)	Sole author of this chapter	Chapter Three draws from and revises and updates material from this chapter.

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Abstract

The well-established framework of text, context and purpose in statutory interpretation emphasises a statute as a 'speech act' authored by Parliament and so to be construed in terms of conventions about language. But this framework does not sit well with the ability of courts and other interpreters to refer to extrinsic materials. It has led to a state of the law where recourse to such materials is poorly rationalised, sometimes contradictory and offers little cohesive guidance for an assessment of the probative value of extrinsic materials in an interpretative task.

In an attempt to better understand the use of extrinsic materials, this thesis adopts a different perspective. It uses an institutional approach to the use of extrinsic materials to explore whether that approach offers a clearer rationale and a more systematic framework for the use of these materials in interpretation. This approach is not about institutional power, but about the processes and participants involved in the making of statutes and extrinsic materials.

The High Court has made broad comments about the institutional setting of statutes. These comments and the very nature of extrinsic materials (products of, or relevant to, the making of a statute) invite a rigorous institutional perspective. However, despite occasional extra-judicial comments about the merits of exploring institutional factors, and a growing body of American scholarship in support of this perspective for statutory interpretation, the institutional setting of statutes has not been extensively explored in Australian statutory interpretation scholarship, and not at all for extrinsic materials.

To adopt this approach, this thesis asks what can we learn from the legislative process about the use of extrinsic materials in statutory interpretation. It uses a variety of methodologies. It starts with a historical analysis to identify the recent origins of the current law. Then it engages in a doctrinal analysis to establish the current state of the law. The thesis then undertakes a quantitative empirical analysis of High Court of Australia and Full Court of the Federal Court of Australia cases to provide evidence of patterns of use of extrinsic materials. The thesis then engages in exploratory research by examining the processes, actors, and materials involved in the making of a statute, from executive approval of a legislative proposal through to parliamentary enactment. Learnings from the exploratory research are then used as a basis for an analysis. That analysis suggests a tension in the law relating to extrinsic materials, and that an institutional perspective offers an alternative rationale for why courts refer to extrinsic materials as well as suggested guidance about their appropriate use.

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Chapter 1

Introduction

In a recent book chapter, Justice Leeming observed that:

> … how litigants go about arguing, and how courts go about determining, the construction of statutes…is a fundamentally important aspect of the modern legal system.[1]

Statements such as these reflect what is now generally accepted in Australia — the importance of statutory interpretation in law. That it is fundamentally important is hardly unexpected. Every year the nine Australian parliaments produce hundreds if not thousands of pages of statute law. Statutes impact, if not govern, nearly every area of law and how society functions. Statutory interpretation law, the principles and canons that govern how we interpret the text of those statutes, is therefore essential for much of the work of judges, legal practitioners, government entities, academics and law students.

This thesis is about statutory interpretation. More particularly, it is about the use of extrinsic materials, materials external to the statute, when interpreting the statutory text. Given the importance of statutory interpretation law and the frequency with which courts refer to extrinsic materials, it is surprising that the topic of extrinsic materials has received little attention in Australian legal scholarship in recent decades. This thesis seeks to address that lacuna in the scholarship. It does so by adopting an institutional account of the law, one which emphasises the statute as an instrument of government policy that is a product of a complex process. This is distinguishable from the linguistic explanations informing the current law, which emphasise the statute as a tool of communication, to be interpreted based on concepts used to understand language. This is the first systematic analysis of the law of extrinsic materials since pivotal statutory reforms of the 1980s, and the first systematic account from an institutional perspective in Australia.

This thesis posits that adopting an institutional approach to statutes and the use of extrinsic materials, by examination of the actors, processes, and materials relevant to the legislative process, provides insights into the use of extrinsic materials in statutory interpretation

[1] Justice Mark Leeming, 'The Modern Approach to Statutory Construction' in Barbara McDonald, Ben Chen & Jeffrey Gordon (eds), *Dynamic and Principled: The Influence of Sir Anthony Mason* (Federation Press, 2022) 45, 45.

including an alternative, legitimate rationale for recourse to those materials and useful guidance about their appropriate use. It does so by asking the question: *what can we learn from the legislative process about the use of extrinsic materials in statutory interpretation?*

The research and analysis undertaken by this thesis reveals a lack of coherency and system in the current approach to extrinsic materials, based in conventions about language. This research exposes a tension in the law. That tension is between the concepts that the courts use to rationalise recourse to, and use of, extrinsic materials and the institutional elements of the law-making processes that the courts engage with when they use the materials as interpretative aids. This thesis supports the proposition that an institutional approach to the use of extrinsic materials in statutory interpretation is a legitimate, alternative approach to the linguistic concepts that attempt to explain this use. To an extent, this perspective sheds some light on areas of the current law that are confused or unclear. This perspective also has significant expository value for use of extrinsic materials in statutory interpretation. The current approach appears to obscure institutional features of the legislative process relevant to the use of extrinsic materials. An institutional perspective suggests a basis for a more informed and systematic approach to the evaluation and use of extrinsic materials. In particular, it reveals the relevance of different types of extrinsic material and suggests pragmatic criteria for assessing the reliability and value of those materials in the interpretative task. Finally, the outcomes of these findings permit some tentative implications about the nature of statutory interpretation.

1.1 Statutory interpretation

Legal interpretation is the 'legally authoritative resolution of questions about what the content of the law is in its application to particular cases'.[2] Statutory interpretation is the process of resolving those questions when they are about the content of statute law. Although there is no legal term of art to describe statutory interpretation, the High Court of Australia has stated numerous times that the process includes the 'attribution of meaning' to the statutory text.[3]

The law of statutory interpretation is the body of law that governs the process of how we go about the process of interpretation. In Australia, that body of law has two distinct sources. The

[2] Scott Soames, 'Towards a Theory of Legal Interpretation' (2011) 6(2) *New York University Journal of Law & Liberty* 231, 231.
[3] See, eg, *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 96 ALJR 208, 222 [63] (Kiefel CJ, Gageler, Steward and Gleeson JJ); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 374 [37] (Gageler J); *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

first is legislative. Each Australian jurisdiction has its own Interpretation Act that contains provisions giving direction and presumptive rules about the interpretation of statutes,[4] including a provision allowing recourse to extrinsic materials. The Interpretation Acts of all states and territories have a provision granting discretionary powers to their courts to consider extrinsic materials to assist in the interpretation of legislation.[5] This thesis focusses on the Commonwealth Act, the *Acts Interpretation Act 1901* (Cth) (the 'AIA'). Section 15AB of the AIA was the pioneering statutory provision on extrinsic materials in Australia and the model, at least initially, for the provisions subsequently enacted in most other Australian jurisdictions. Section 15AB was also subject of significant discourse prior to its enactment.

The second source of statutory interpretation law is the common law. Although each of the Australian jurisdictions has its own Interpretation Act, the fundamental principles of statutory interpretation law are dominated by the common law. In contrast to the individualized Interpretation Acts, it is generally accepted that there is only one common law in Australia.[6] The overarching legal framework for approaching an interpretative issue is governed by that common law and is 'well settled.'[7] The proper construction of statutory text should be resolved '"by applying the fundamental principles of statutory interpretation, which require reading the text of the relevant provisions in their context" and having regard to statutory purpose'.[8] These three concepts — text, context and purpose — are the central lynchpins of the Australian approach to statutory interpretation. The object of applying these fundamental principles is to determine the 'legislative intent' of the statute.[9] For access to extrinsic

[4] See generally Dennis Pearce, *Interpretation Acts in Australia* (LexisNexis, 2nd ed, 2022).
[5] *Acts Interpretation Act 1901* (Cth) s 15AB; *Legislation Act 2001* (ACT) s 141; *Interpretation Act 1987* (NSW) s 34; *Interpretation Act 1978* (NT) s 62B; *Acts Interpretation Act 1954* (Qld) s 14B; *Legislation Interpretation Act 2021* (SA) s 16; *Acts Interpretation Act 1931* (Tas) s 8B; *Interpretation of Legislation Act 1984* (Vic) s 35; *Interpretation Act 1984* (WA) s 19.
[6] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563–564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, and Kirby JJ); *Rizeq v Western Australia* (2017) 262 CLR 1, 31 [78] (Bell, Gageler, Keane, Nettle and Gordon JJ.
[7] *R v A2* (2019) 269 CLR 507, 520 [32] (Kiefel CJ and Keane J).
[8] *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 96 ALJR 819, 827 [31] (Gordon, Edelman and Steward JJ) citing *Binsaris v Northern Territory* (2020) 270 CLR 549, 571 [54] (Gordon and Edelman JJ) and numerous other authorities. See also *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21, 35 [15] (the Court) citing numerous authorities including *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [69]-[72] (McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (NT) (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ) and *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ). There are many more High Court authorities affirming this framework, too numerous to list exhaustively here.
[9] *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 411 [88] (Kiefel J).

materials under the common law, the concept of 'context' is key. Extrinsic materials are regarded as being a component of the wider context of the statute.

1.2 What are 'extrinsic materials'?

Extrinsic materials are, as the label suggests, materials that are extraneous to the statute. They are materials that do not form part of the statutory text that is enacted by Parliament. Strictly speaking, therefore, this term refers to any materials that exist outside the statute being construed. Well known examples include the second reading speech and the explanatory memorandum that accompanies a Bill when it is introduced into Parliament, but clearly the term potentially encompasses a plethora of potential sources that cannot be exhaustively listed.

The large pool of materials that might be 'extrinsic' does fall reasonably conveniently, if not formally, into five categories.[10] These are: (a) parliamentary and executive materials generated by, or as part of, the enactment process, such as a second reading speech; (b) executive and other materials that come into existence before the Bill for the statute is presented to Parliament and have some connection to the making of that Bill, such as materials that reflect an idea that is the genesis for a Bill (for example, a law reform commission report or a government or international report), or materials that assist with the formulation of the Bill (such as drafting manuals), (c) international treaties, conventions and agreements, (d) other legislation formerly or currently on the statute books (whether of the same or another jurisdiction) and pre-existing or current case law (again, whether of the same or another jurisdiction), and (e) dictionaries and secondary sources, such as textbooks and scholarly articles.

This thesis focusses on categories (a) and (b) – parliamentary and pre-parliamentary materials that are generated by, related to, or instrumental for, the making of the statute the subject of interpretation. Although there is no judicially settled meaning of 'extrinsic materials', it is materials of this nature that courts are usually referring to when they refer to 'extrinsic materials' in statutory interpretation. These materials, as evident from their descriptions, are those materials that are the product of, or are directly relevant to, the legislative process. Even given this scope, there is a wide variety of types of these materials.

[10] These categories are consistent with those loosely adopted in major Australian texts. See, eg, Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) ch 3; Perry Herzfeld and Thomas Prince, Interpretation (Thomson Reuters, 2nd ed, 2020) 161–188.

The other reason for confining the meaning of extrinsic materials to categories (a) and (b) is that the other categories of material are distinguishable in the way they are treated by statutory interpretation law. International conventions, agreements and treaties might have some claim to being included as they can be the impetus for a statute (such as where Australia ratifies an international taxation convention and subsequently enacts a taxation statute to implement the obligations of the convention). But international agreements are the subject of some particular common law principles and presumptions that do not apply generally to pre-parliamentary and parliamentary materials.[11]

Within the fourth category, statutory material (other legislation) and judicial material (the body of common law of Australia), have always been referred to 'quite freely'[12] in Australia. As statements of law themselves, it would seem incongruous to be otherwise. So, although these materials are 'external' to the statute, they are not the subject of the law about the use of 'extrinsic materials.' Their appropriate use is governed by other considerations such as the notion of statutes *in pari materia* and the doctrine of precedent. Pre-existing statutory law such as amendments and repealed provisions (usually referred to as legislative antecedents) and pre-existing case law are part of the historical development of an Act or a provision of an Act and are regarded as components of what is usually referred to as an Act's 'legislative history'. The term legislative history is used in Australia by courts to refer broadly to the historical development of an Act, including its legislative and common law background and its background circumstances. Extrinsic materials are one component of legislative history.[13] This meaning of legislative history is different to that of the United States, where the term 'legislative history' is typically confined to the 'fixed universe of statements and documents generated during the legislative process in Congress', such as committee reports and statements made on the floor.[14]

The final category of extrinsic sources, too, is subject to different considerations. Dictionaries have been referred to freely by the courts as evidence of ordinary meaning since at least the

[11] See, eg, Dennis Pearce, *Statutory Interpretation in Australia* (n 10) 57-65.
[12] DC Pearce, *Statutory Interpretation in Australia* (Butterworths, 1st ed, 1974) 45.
[13] *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56, 71 [87] (the Court); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).
[14] Jesse M Cross, 'Legislative History in the Modern Congress' (2020) 57(1) *Harvard Journal of Legislation* 91, 94 fn 8 referring to William N Eskridge Jr, Philip P Frickey, and Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (Thomson West, 4th ed, 2007) 981–1021.

1800s.[15] Similarly, it has 'long been acknowledged' that secondary sources, such as scholarly books, treatises and articles, can be used for any legal subject, including interpretation.[16] Sometimes access to these materials is justified by reliance on the common law doctrine of judicial notice, or statutory provisions that codify that doctrine.[17]

1.3 The continuing story of extrinsic materials in statutory interpretation

The use of extrinsic materials has a long history of being muddled terrain. For most of the twentieth century, the law on statutory interpretation, including with respect to extrinsic materials, was regarded as being in an unsatisfactory state. By the 1970s the law was increasingly regarded (at least by those outside the judiciary) as having an excessive focus on text; and the law governing the judiciary's ability to refer to extrinsic materials as interpretative aids was confused and inconsistent.

Against this background, s 15AB, the provision which empowered the judiciary to refer to extrinsic materials in statutory interpretation, was inserted into the *Acts Interpretation Act 1901* (Cth) in 1984. The Attorney-General introducing the enacting Bill described its purpose as facilitating the giving of effect to the intentions of Parliament when an Act falls to be interpreted.[18] The Opposition leader, in what might be seen, with cynical contemporary eyes, as a remarkably refreshing response, enthusiastically supported the enactment and, even more, touted it as an important step in an 'ongoing experiment' in rethinking and reforming the principles of statutory interpretation.[19] The enactment of s 15AB, following hot on the heels of the enactment of s 15AA in 1981 (the provision that required the consideration of a statute's purpose) was the culmination of bipartisan support for, and unprecedented attention to, a review of the principles of statutory interpretation in the early 1980s that had captured the engagement of the Australian judiciary, government, academics, legislative drafters and the legal profession more broadly.

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[15] See, eg, *R v Peters* (1886) 16 QBD 636, 641. An American study suggests that dictionaries were first referred to in 1785: Kevin Werbach, 'Looking It up: Dictionaries and Statutory Interpretation Source' (1994) 107 *Harvard Law Review* 1437.
[16] Legal & Constitutional Committee, Parliament of Victoria, *A Report to Parliament on the Proposals Contained in the Interpretation Bill 1982* (Parliamentary Committee No 21/1982–83, October 1983) 61 referring to a number of cases including the early High Court case of *Moors v Burke* (1919) 26 CLR 265.
[17] See Jeffrey Barnes, Jacinta Dharmananda and Eamonn Moran, *Modern Statutory Interpretation: Framework, Principles and Practice* (Cambridge University Press, 2023) 489–90.
[18] Commonwealth, *Parliamentary Debates,* Senate, 8 March 1984, 582 (Gareth Evans, Attorney-General).
[19] Commonwealth, *Parliamentary Debates,* Senate, 30 March 1984, 957 (Peter Durack).

The combined package of s 15AA and s 15AB would, it was thought, shift the focus away from the perceived literalist approach to statutory text to one giving greater emphasis to the purpose of the statute, with the assistance of parliamentary and other extrinsic materials now permitted to be used under s 15AB. The predominant rationale behind the statutory reforms was that this would not only lead to more effective legislation but enable better communication between Parliament and the courts. Though s 15AB was not without its restrictions, the executive and Parliament, at least, saw s 15AB, together with its partner s 15AA as marking a new era of understanding by the courts of what Parliament intended in the statutes it enacted. Similar legislative changes were adopted by nearly all states and territories in their respective Interpretation Acts in a staggered fashion over the next decade.[20]

Despite these legislative pronouncements, the common law proved to be resilient. Common law principles with respect to statutory interpretation continued to evolve. A little over a decade after the 1984 enactment of s 15AB, in 1997 the High Court of Australia pronounced the common law 'modern' approach to statutory interpretation in *CIC Insurance Ltd v Bankstown Football Club Ltd* (*CIC Insurance*).[21] The joint judgment of Brennan CJ, Dawson, Toohey and Gummow JJ emphasised the importance of considering the context of the statutory text being construed, and clarified that context means context 'in its widest sense'.[22] That 'modern' statement with respect to wider context, now having been cited 'too often to be doubted',[23] has been taken to include the legislative history of a statute and the extrinsic materials that form part of that legislative history.[24] So, when the High Court refers to the overarching framework of 'text, context and purpose' it is referring to context in its 'widest sense'.[25] Despite the continued existence of s 15AB and its equivalents, the common law principle of context in its widest sense is accepted as a separate and independent legal gateway to extrinsic materials.

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[20] South Australia did not have a statutory provision on extrinsic materials in its interpretation Act until it repealed and replaced the *Acts Interpretation Act 1915* (SA) with the *Legislation Interpretation Act 2021* (SA).
[21] (1997) 187 CLR 384.
[22] (1997) 187 CLR 384, 408.
[23] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 374 [37] (Gageler J) citing *Federal Commissioner of Taxation v Jayasinghe* (2016) 247 FCR 40, 43 [7] (Allsop CJ). See also 368 [14] (Kiefel CJ, Nettle and Gordon JJ).
[24] *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56, 71 [87] (the Court); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ), 374 [36]–[37] (Gageler J); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).
[25] Affirmed beyond doubt in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ), 374 [35]–[37] (Gageler J).

These developments have had profound consequences for the law with respect to use of extrinsic materials. One of the first consequences is that the rationale underpinning recourse to extrinsic materials has become uncertain. The premise behind the enactment of s 15AB was, at least in part, institutional. The new provision was to enable the courts to have access to evidence that helped them identify Parliament's intent or object with respect to a statute. That evidence was seen as a mode of institutional interaction or collaboration between Parliament and the judiciary in the expectation that it would assist the judiciary in its judicial function to determine the statute's legislative intent. That rationale was based in the perspective of a statute as a policy tool of the executive government; and so, executive documents purporting to explain the statute and its policy, would necessarily be of probative value.

However, the common law text, context, purpose mantra and the idea of the context of the statute appears to emphasise a linguistic rationale. It is based in understandings about language and how we communicate. In essence, this framework emphasises the statute as a written document, a tool of communication or 'speech act', the meaning of which is governed by the conventions of the language. The concept of a 'speech act' has its origins in the work of modern linguistic theorists such as John Searle,[26] which in turn has been adopted by scholars on legal language such as Frederick Bowers.[27] In this paradigm, the Parliament is the 'speaker' and the 'speech act' is the statute. Like any written word, so it is reasoned, the meaning of the speech act, the statute, is affected by the context in which it is 'spoken' and the purpose for which it was written.[28] Potential meanings of 'utterances' are inevitably affected by their context, being 'the general fabric of basic knowledge and assumptions, express or tacit, that are shared by the users of the language.'[29] So, the linguistic model says, we ask a 'reasonable person' who knows the 'admissible background' of the speech act what they would understand the notional author who used the words to mean.[30] For statutes, this admissible background includes the extrinsic materials permitted under the law. Of current

[26] See, generally, J R Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge University Press, 1979) who in turn draws on the work of language philosopher JL Austin. See, eg, JL Austin, *How to Do Things with Words: The William James Lectures delivered in Harvard University in 1955* (Clarendon Press, 2nd ed, 1975).
[27] See, eg, Frederick Bowers, *Linguistic Aspects of Legislative Expression* (University of British Columbia Press, 1989) ch 1.
[28] Leonard Hoffmann, 'Language and Lawyers' (2018) 134 *Law Quarterly Review* 553, 558.
[29] Reed Dickerson, 'Statutory Interpretation: The Uses and Anatomy of Context' (1972) 23 *Case Western Reserve Law Review* 353, 356.
[30] Hoffmann (n 28) 558.

judges, Justice Edelman has probably been most overt about the relevance of a linguistic perspective. His Honour has explained:

> The duty of courts is to give effect to the meaning of statutory words as intended by Parliament. In common with how all speech acts are understood, the meaning is that which a reasonable person would understand to have been intended by the words used in their context.[31]

This approach is not entirely consistent with the rationale behind s 15AB.

There are other ramifications. Once recourse to materials is permitted under either common law or statutory authority, the next question in the interpretative task is the use and weight of the material. This involves an evaluation of the information derived from the materials and the extent it can inform the meaning of the text. There are strands of guidance evident in the case law about this balance, but they appear broad and tend to treat extrinsic materials as homogeneous sources. For example, some principles — such as that parliamentary materials cannot 'displace the meaning of the statutory text'[32] — invite questions about the value to be derived from extrinsic materials. The principle that the purpose of a statute must ultimately 'reside' in the statute's text and structure[33] seems contradictory to the idea that one of the key reasons to look at extrinsic materials is to find evidence of purpose. Courts are instructed to begin the interpretative task with the text, and end with the text, but are permitted to look at extrinsic materials in between,[34] a principle that seems confused about the rationale for their recourse in the first place.

Thirdly, the combined effect of the co-existence of the common law principle and the statutory gateway of s 15AB has opened up the range of materials that can be considered in statutory interpretation, and effectively removed any barriers to access them. Yet despite the almost unlimited access to extrinsic materials now permitted and the circumstance that they

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[31] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 838 [95]. See also *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 162–3 [64] (Edelman J) (footnotes omitted) and *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434, 466–7 [100] (Edelman J); Justice James Edelman, 'Implications' (2022) 96 *Australian Law Journal* 800, 806–10; Justice James Edelman, '2018 Winterton Lecture Constitutional Interpretation' (2019) 45 *University of Western Australia Law Review* 1, 8–9; Justice Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1, 16.

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

[33] *Lacey* v *Attorney-General of Queensland* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[34] To paraphrase the statement in *Commissioner of Taxation (Commonwealth) v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

are 'routinely examined'[35] by courts, the common law concepts provide little guidance on how to assess the probative value of various materials. The common law informs us that the context, including extrinsic materials, has utility 'if, and in so far as, it assists in fixing the meaning of the statutory text.'[36] Essentially, this means that 'to be taken into account the contextual materials must be relevant to the matter in issue.'[37] Just like any other contextual aid, extrinsic materials must be evaluated to determine if they have utility and to identify any factors that can assist, or that suggest a construction not otherwise readily apparent.[38]

The statutory provisions also specify the need for relevance (s 15AB uses the language of 'capable of assisting') but similarly provide little use or guidance about that assessment. Section 15AB has its restrictions, but these have largely been subsumed through the ability to use the common law.

Despite these difficulties, there has been little scholarship in Australia dedicated to the modern law of extrinsic materials in statutory interpretation. There was an initial flurry of scholarship prior to and following the statutory reforms of the 1980s, mostly centered on the question of whether certain materials should be permitted as aids at all, and the merits of the statutory provisions allowing their use.[39] Some scholars wrote on the difficulties of having both a statutory and common law gateway in the mid-2000s.[40] But since then, with a few exceptions[41] and setting aside the discussions of current doctrinal principles in generalist

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[35] *Byrnes v Kendle* (2011) 243 CLR 253, 284 [97] (Heydon and Crennan JJ).
[36] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).
[37] Justice Susan Kenny, 'Current Issues in the Interpretation of Federal Legislation' (Speech, National Commercial Law Seminar Series, Melbourne, 3 September 2013) 6.
[38] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ).
[39] See, eg, Jocelynne A Scutt, 'Statutory Interpretation and Recourse to Extrinsic Aids' (1984) 58 *Australian Law Journal* 483; P Brazil, 'Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular' (1961) 4 *University of Queensland Law Journal* 1; Patrick Brazil, 'Reform of Statutory Interpretation—the Australian Experience of Use of Extrinsic Materials: With a Postscript on Simpler Drafting' (1988) 62 *Australian Law Journal* 503; SJ Gibb, 'Parliamentary Materials as Extrinsic Aids to Statutory Interpretation' (1984) 5(2) *Statute Law Review* 29; Justice JM Macrossan, 'Judicial Interpretation' (1984) 58(10) *Australian Law Journal* 547; Justice John Bryson, 'Statutory Interpretation: An Australian Judicial Perspective' (1992) 13 *Statute Law Review* 187; Hugh Roberts, 'Mr Justice John Bryson on Statutory Interpretation: A Comment' (1992) 13(3) *Statute Law Review* 209; Jeffrey Barnes, 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law—Part Two' (1995) 23 *Federal Law Review* 77.
[40] RS Geddes, 'Purpose and Context in Statutory Interpretation' (2005) 2 *University of New England Law Journal* 5; Matthew T Stubbs, 'From Foreign Circumstances to First Instance Considerations: Extrinsic Material and the Law of Statutory Interpretation' (2006) 34 *Federal Law Review* 103.
[41] Jeffrey Barnes, 'Statements of Meaning in Parliamentary Debates: Revisiting *Harrison v Melhem*' (2018) 5 *UNSW Law Journal Forum* 1; Jacinta Dharmananda, 'Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation' (2014) 32 *Federal Law Review* 333, or the discussion is in the context of a separate substantive principle such as the principle of legality. See, eg, Dan Meagher, 'The "Modern Approach" to Statutory Interpretation and the Principle of Legality: An Issue of Coherence?' (2018) 46(3) *Federal Law Review* 397, 416–7.

works devoted to statutory interpretation,[42] systematic scholarly analysis of extrinsic materials has generally been lacking.

1.4 What is an institutional approach?

To address this gap in scholarship, this thesis adopts an institutional perspective. For the purposes of this thesis, an institutional perspective is one that emphasises the statute as a product of a process, as 'part of the flow of policy-making activity that originates before the text is voted and continues after it is on the books.'[43] This perspective emphasises a statute as 'an active instrument of government' with 'ends to be achieved.'[44]

This means examining the workings of the institutions involved in making the statute and the extrinsic materials that are relevant to that process. This perspective examines the institutions not in terms of their power (ie executive power or legislative power) but in terms of their actors, components and procedures.[45] It recognizes that statutes are not made in a vacuum, but are 'the product of a complex democratic process.'[46] As Dennis Pearce has noted:

> Depending on how one looks at it, responsibility for the content of legislation may rest with or be shared by parliament, the government, the Cabinet, the minister responsible for the introduction of the legislation, the legislative drafters, the instructing officers of the relevant department, the political party which is in government, or even pressure groups which have lobbied for the legislation.[47]

To examine the use of extrinsic materials from this perspective, this thesis undertakes a disaggregation of the structures, processes, and participants in the federal legislative process, and the materials generated by, or relevant to, that process. To examine how the statute is the product of an institutional setting, the thesis examines how it came into being.

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[42] See, eg, Dennis Pearce (n 10) ch 3; Herzfeld and Prince (n 10) 161–188.
[43] James Willard Hurst, *Dealing with Statutes* (Columbia University Press, 1982) 46.
[44] Felix Frankfurter, 'Some Reflections on the Reading of Statutes' (1947) 47(4) *Columbia Law Review* 527, 538.
[45] The distinction between power and institution is derived from John Uhr, 'Parliament and the Executive' (2004) 25(1) *Adelaide Law Review* 51, 51.
[46] Oliver Jones, *Bennion on Statutory Interpretation*: *A Code* (LexisNexis, 6th ed, 2013) 447 referring to the importance of understanding the constitutional and drafting aspects of making legislation, but the principle is equally applicable to the making of a statute more generally.
[47] Dennis Pearce (n 10) 4. See also Helen Xanthaki, 'Judges v Drafters: The Saga Continues' in Jeffrey Barnes, *The Coherence of Statutory Interpretation* (The Federation Press, 2019) 58, 58 and Peter Quiggin PSM, 'Statutory Construction: How to Construct, and Construe, a Statute' in Neil Williams SC (ed), *Key Issues in Judicial Review* (The Federation Press, 2014) 78, 83.

There are four broad stages in the making of a statute: the formulation of the government policy, the process for executive approval of a legislative proposal where it has been decided that legislation is needed to implement the policy, the formulation of the Bill for the statute that reflects the policy, and the parliamentary enactment process for the Bill to become a statute. The formulation of policy is not addressed in this work as not all government policies are implemented by legislation. Consequently, this thesis commences its analysis of the legislative process from the point at which it is decided that a particular policy needs to be implemented by statute. It starts with the executive decision that a government policy should be implemented by legislation, moves through the executive approval process for that proposal, the drafting of the Bill reflecting the proposal, and the parliamentary process that converts the Bill into enacted law. The revelations of this analysis are used to provide insights into the use and practice of extrinsic materials and implications about statutory interpretation.

Of course, '[i]nstitutional considerations are not made of one cloth.'[48] Consequently there are two major limits to the institutional examination undertaken by this thesis. The first is that only the legislative process pertaining to federal statutes is considered. There are nine governments and parliaments in Australia, and some parliaments have two chambers and some are unicameral. Although there are many similarities between the legislative processes of all Australian jurisdictions, there are also differences from jurisdiction to jurisdiction in the institutions, actors, procedures and processes involved in making a statute. A rigorous institutional analysis of each would require a separate examination of the legislative process in each of the nine jurisdictions, a task beyond what is possible for this thesis. Accordingly, research on the legislative process in this thesis is confined to the making of federal statutes. Federal statutes were chosen in part because the pioneering enactment of s 15AB was a federal initiative, but also because federal statutes have impact across Australia and address a wide range of legal areas.

The second qualification is that this research is limited to the making of federal statutes, and does not address the making of federal delegated legislation. This is for a similar reason. At a broad level, the legislative process for making federal delegated legislation involves the same primary institutions — Federal Parliament and the Federal executive — but it involves different processes, actors and procedures. In addition, although delegated legislation is

[48] Arie Rosen, 'Statutory Interpretation and the Many Virtues of Legislation' (2017) 37(1) *Oxford Journal of Legal Studies* 134, 160.

generally construed pursuant to the ordinary principles of statutory interpretation,[49] there are specific common law principles and Interpretation Act provisions that apply only to delegated legislation.[50]

1.5 Why an institutional approach?

Having outlined what is meant by an institutional approach, the next logical question is why take an institutional approach? There are a number of compelling reasons.

At a fundamental level, the object of statutory interpretation is to ascertain the *legislative* intent.[51] In the words of iconic High Court statutory interpretation decision *Project Blue Sky Inc v Australian Broadcasting Authority*, this involves 'giv[ing] the words of a statutory provision the meaning that *the legislature* is taken to have intended them to have'.[52] Leaving aside discourse concerning whether the concept of legislative intent is a fiction or representative of something real, this concept, which focusses the interpretative inquiry,[53] recognizes the institution of Parliament.

The institutional setting of statutory interpretation has been judicially recognized in Australia at a broad level. The High Court of Australia has explained statutory interpretation as:

> an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. … reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.[54]

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[49] See, eg, *ENT19 v Minister for Home Affairs* [2023] HCA 18 [86] (Gordon, Edelman, Steward and Gleeson JJ) citing *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101, 110 [19] (Gummow A-CJ, Kirby, Hayne, Crennan and Kiefel J).

[50] Many of these specific principles are linked to the nature of delegated instrument as being 'delegated.' See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 6th ed, 2023) ch 30.

[51] *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 411 [88] (Kiefel J); *Momcilovic v The Queen* (2011) 245 CLR 1, 116 [261] (Gummow J); *Singh v Commonwealth* (2004) 222 CLR 322, 348 [52] (McHugh J); *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Commonwealth)* (1981) 147 CLR 297, 304 (Gibbs CJ), 320 (Mason and Wilson JJ); *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 13 (Mason J); *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 280 (Aickin J).

[52] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (emphasis added).

[53] *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 461 [77] (Gageler J); *Singh v Commonwealth* (2004) 222 CLR 322, 336 [19] (Gleeson CJ); Philip Sales, 'Legislative Intention, Interpretation, and the Principle of Legality' (2019) 40(1) *Statute Law Review* 53, 60.

[54] *Zheng v Cai* (2009) 239 CLR 446, 455-6 [28] (the Court). See also *Lacey* v *Attorney-General of Queensland* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ). For other broad statements about the constitutional framework of statutory interpretation see, eg, *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 461 [77] (Gageler J) citing *Singh v The Commonwealth* (2004) 222 CLR 322, 336 [19] (Gleeson CJ); *New South Wales Aboriginal Land Council v*

These statements acknowledge the intersectionality of statutes and statutory interpretation with respect to the key institutions in our legal system. More, they suggest a kind of 'working relationship'[55] between the courts, Parliament and the executive, in the sense that the 'rules of the game' of statutory interpretation are 'accepted', and therefore impliedly 'known', by these institutions.

But these statements, while 'potentially attractive,' are 'elusive.'[56] They warrant closer scrutiny and invite a more rigorous analysis of institutional factors relevant to statutory interpretation. The High Court has done little to dig deeper into the ramifications of these statements or the institutional setting of statutory interpretation beyond generalities about the respective institutional power of each arm of government. Nor has it been explained by the High Court 'which rules have been accepted, nor any method for determining the acceptance of a rule.'[57] As Justice Basten noted extra-judicially, the High Court statement about the principles of statutory interpretation being known by all arms of government:

> …sounds like an empirically justifiable statement, but that … may be doubted because the Court has never offered a factual basis for it. Rather, it seems to be a normative statement: that is, being pronounced by the courts (or rather the High Court) it should be accepted by all arms of government. But if that is so, where does the Court gets [sic] its authority to make such proclamations?[58]

There has been some intermittent acknowledgment of institutional factors in the context of extrinsic materials. The merits of understanding the legislative process have been the subject of occasional extra-judicial comment.[59] But these are tentative postulations rather than exacting attempts to engage in a meaningful examination of the relevance of institutional

Minister Administering the Crown Lands Act (2016) 260 CLR 232, 271 [93] (Gageler J); *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, 587 [118] (Gageler J); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A* (2020) 279 FCR 475, 505 [110] (the Court).

[55] The notion of such a relationship is advocated or assumed to have merit by several members of the judiciary. See, eg, Robert French, 'The Courts and the Parliament' (2013) 87 *Australian Law Journal* 820, 830.

[56] To paraphrase Cheryl Saunders, 'Constitutional Dimensions of Statutory Interpretation' in Anthony J Connolly and Daniel Steward (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, 2015) 27, 37.

[57] Steven Gardiner, 'What Probuild Says about Statutory Interpretation' (2018) 25 *Australian Journal of Administrative Law* 234, 247.

[58] John Basten, 'Constitutional Dimensions of Statutory Interpretation' (Speech, Constitutional Law Conference 2015, Centre for Comparative Constitutional Studies, Melbourne Law School, 24 July 2015) 10. Cf Steven Gardiner (n 57) 246 who acknowledges that the significance of the statements is unclear but assumes that they are empirical. See also Stephen Gageler (n 31) 9.

[59] Eg, Murray Gleeson, 'Statutory Interpretation' (Speech, Taxation Institute of Australia, 24th National Convention, 11 March 2009) 21; John Basten (n 58) 11.

processes or the workings of the legislative process or the ramifications of the High Court statements.

Even without the impetus of the High Court statements, an institutional perspective has merit based on the nature of statutes and extrinsic materials. A statute moves across each of the three arms of government in our system of representative democracy. The executive arm formulates the policy that animates the words in the statute and then drafts those words. The Parliament deliberates over and enacts the words reflecting the policy into law. The instrument then returns to the realm of the executive, which administers the law reflected in those words. If there is doubt, the instrument comes before the judiciary which attributes meaning to the enacted words to give content to the policy reflected in those words. Viewing a statute in this way sees it as a central instrument in our legal system. Along the same lines, extrinsic materials are the product of, or related to, institutions involved in the legislative process, or the generation of the statute. The ability of courts to use them in the interpretative task compels questions about their origin and the interrelationship between the executive, Parliament and the judiciary. Consequently, as soon as courts are permitted to go outside the statutory text and consider parliamentary, executive and other pre-parliamentary materials, they must evaluate the relationship between the written evidence of what the executive or Parliament, the very institutions that made the statute, intended and their duty to give meaning to the primary authoritative material, the statutory text. Extrinsic materials are used as probative evidence about what Parliament is targeting in the Act, particularly with respect to the purpose of the Act, to assist with the ascertainment of meaning. On the other hand, it is 'emphatically' the duty of the courts to attribute meaning to the statutory text as the authoritative statement of the law.[60]

The merit of an institutional perspective is also evident from scholarship from other jurisdictions. The importance of institutional factors features to varying degrees in the works

[60] *Brown v Tasmania* (2017) 261 CLR 328, 480 [486], 486 [506] (Edelman J) citing *Marbury v Madison* 5 US 137, 177 (Marshall CJ) (1803), *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35 (Brennan J) and *R v Holmes; Ex parte Altona Petrochemical Co Ltd* (1972) 126 CLR 529, 562 (Windeyer J).

of legal interpretation theorists such as Vermeule[61] and Dworkin[62] and legal theory scholars such as Rubin.[63] An institutional approach to statutory interpretation is the subject of relatively recent doctrinal legal scholarship in the United States. What has been referred to as a 'promising new school of statutory interpretation that tries to wed the work of Congress with that of the courts' has emerged over the last few decades.[64] Recently, it has been labeled the 'process-based' approach to statutory interpretation.[65] This American scholarship asserts the importance of understanding the legislative process for statutory interpretation, including with respect to legislative history (in the sense used in the United States). Former American judge and professor Robert Katzmann has referred to the 'knowledge gap' between the judiciary and Congress and the need to close the gap for institutional comity, including in the realm of statutory interpretation.[66] American scholar Victoria Nourse proposes a decision theory of statutory interpretation based in an understanding of Congressional procedures for the making of statutes.[67] American scholars have argued an institutional perspective yields better outcomes in statutory interpretation generally, whether through better understanding of the drafting of statutes, the enactment process, or the bureaucracy behind Congress.[68] The

[61] Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press, 2006). See also Cass R Sunstein and Adrian Vermeule, 'Interpretation and Institutions' (2003) 101 *Michigan Law Review* 885.
[62] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 337, who argues that his imaginary judge of superhuman intellectual power Hercules should read statutes 'in whatever way follows from the best interpretation of the legislative process as a whole'.
[63] Edward L Rubin, 'Law and Legislation in the Administrative State' 89(3) *Columbia Law Review* 369, 372.
[64] Rebecca M Kysar, 'Interpreting by the Rules' (2021) 99(6) *Texas Law Review* 1115, 1116–7. See also John F Manning, 'Inside Congress's Mind' (2015) 115(7) *Columbia Law Review* 1911, 1911 who refers to a 'new generation' of scholarship. Though there are certainly earlier works reflecting this idea: eg: Eric Lane, 'Legislative Process and Its Judicial Renderings: A Study in Contrast' (1986) 48 *University of Pittsburgh Law Review* 639; Elizabeth Garrett, 'Legal Scholarship in the Age of Legislation' (1999) 34 *Tulsa Law Journal* 679; Abner J Mikva, 'Reading and Writing Statutes' (1987) 48(3) *University of Pittsburgh Law Review* 627; Holger Fleischer, 'Comparative Approaches to the Use of Legislative History in Statutory Interpretation' (2012) 60 *The American Journal of Comparative Law* 401.
[65] See, eg, Kysar (n 64) 1117 and Cross (n 14) 93 adopting the description given by Amy Coney Barrett, 'Congressional Insiders and Outsiders' (2017) 84 *The University of Chicago Law Review* 2193, 2193.
[66] Robert A Katzmann (ed), *Judges and Legislators: Toward Institutional Comity* (The Brookings Institution, 1988) 9, 183–4. See also Robert A. Katzmann, *Judging Statutes* (Oxford University Press, 2014).
[67] Victoria Nourse (n 46). See also Victoria F Nourse, 'A Decision Theory of Statutory Interpretation: Legislative History by the Rules' (2012) 122 *Yale Law Journal* 70.
[68] See, eg, above n 64 and JM Cross and AR Gluck, 'The Congressional Bureaucracy' (2020) 168(6) *University of Pennsylvania Law Review* 1541; Cross (n 14); James J Brudney and Ethan J Leib, 'Statutory Interpretation as "Interbranch Dialogue"?' (2019) 66 *UCLA Law Review* 346; William N Eskridge, 'Vetogates and American Public Law' (2015) 31(4) *The Journal of Law, Economics & Organization* 756, 773–6; Ganesh Sitaraman, 'The Origins of Legislation' (2015) 91(1) *Notre Dame Law Review* 79; Jarrod Shobe, 'Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting' (2014) 114(4) *Columbia Law Review* 807; Abbe R Gluck and Lisa Schultz Bressman, 'Statutory Interpretation from the Inside —An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I' (2013) 65 *Stanford Law Review* 901; Lisa Schultz Bressman and Abbe R Gluck, 'Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation and the Canons: Part II' (2014) 66 *Stanford Law Review* 725; Richard A Posner, 'Reply: The Institutional Dimension of Statutory and Constitutional Interpretation' (2003) 101 *Michigan Law Review*

scholarship has its critics,[69] but it has ignited a discussion on a new perspective on the law of statutory interpretation in the United States. However, American literature, while interesting and generative of ideas, cannot be directly used in an Australian context. As a federal constitutional republic with a separate President and Parliament, the institutional aspects of its legislative process are quite different to those found in Australia.

In Australia, an institutional perspective is well known in the discipline of political science,[70] and it has been explored in other areas of law, including with respect to constitutional law principles[71] and parliamentary scrutiny of legislation impacting human rights.[72] Nor is it entirely new to statutory interpretation, though the scholarship is limited. The relevance of institutional operations has been referred to in varying degrees in academic works on interpretation dealing with discrete topics such as judicial review,[73] deference,[74] the principle of legality,[75] and the nature of the concept of 'legislative intent.'[76] Relatedly, Lisa Burton Crawford has recently adopted the perspective of legislation as an institutional practice to examine rule of law implications.[77] Outside of academia, Australian legislative drafters, those who actually draft the statutes, have raised the desirability and merit of interpreters being

952; Victoria F Nourse and Jane S Schacter, 'The Politics of Legislative Drafting' (2002) 77(3) *New York University Law Review* 575.

[69] Ryan D Doerfler, 'Who Cares How Congress Really Works?' (2017) 66 *Duke Law Journal* 979; John F Manning (n 64); Amy Coney Barrett (n 65).

[70] See, eg, Patrick Weller, Dennis Grube and RAW. Rhodes, *Comparing Cabinets: Dilemmas of Collective Government* (Oxford University Press, 2021) 9.

[71] See, eg, Gabrielle Appleby and Anna Olijnyk, 'Parliamentary Deliberation on Constitutional Limits in the Legislative Process' (2017) 40(3) *University of New South Wales Law Journal* 976; Gabrielle Appleby and Anne Carter, 'Parliaments, Proportionality and Facts' (2021) 43(3) *Sydney Law Review* 259.

[72] See, eg, Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia* (Springer, 2020); Laura Grenfell and Julie Debeljak (eds), *Law Making and Human Rights: Executive and Parliamentary Scrutiny across Australian Jurisdictions* (Thomson Reuters, 2020).

[73] See, eg, Mark Aronson, 'Judicial Review of Administrative Action: Between Grand Theory and Muddling Through' (2021) 28 *Australian Journal of Administrative Law* 6; Lindsay Blayden, 'Institutional Values in Judicial Review of Administrative Action: Re-Reading Attorney General (NSW) v Quin' (2021) 49(4) *Federal Law Review* 594.

[74] See, eg, John McMillan, 'Statutory Interpretation and Deference: An Executive Perspective' in Janina Boughey and Lisa Burton Crawford (ed), *Interpreting Executive Power* (Federation Press, 2020) 24 and Janina Boughey, 'The Case for "Deference" to (Some) Executive Interpretations of the Law' in Janina Boughey and Lisa Burton Crawford (ed), *Interpreting Executive Power* (Federation Press, 2020) 34.

[75] See, eg, Lisa Burton Crawford, 'An Institutional Justification for the Principle of Legality' (2022) 45(2) *Melbourne University Law Review* 511; Steven Gardiner (n 57) 243–52; Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University of Law Review* 372; Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41 *Monash University Law Review* 329.

[76] See, eg, Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Sydney Law Review* 39, 64–7; Richard Ekins, 'Statutes, Intentions and the Legislature: A Reply to Justice Hayne' (2014) 14 *Oxford University Commonwealth Law Journal* 3.

[77] Lisa Burton Crawford, 'The Rule of Law in the Age of Statutes' (2020) 48(2) *Federal Law Review* 159 drawing on the work of Edward Rubin.

more familiar with drafting practices.[78] Finally, the enactment of s 15AB itself suggests the relevance of the institutional setting for extrinsic materials.

1.6 Methodology

This thesis uses a variety of methodologies. Following this introduction, it commences with a historical analysis to identify the recent origins of the current law. Then it engages in a doctrinal analysis to establish the current state of the law. The thesis supplements the doctrinal research by undertaking a quantitative empirical analysis of High Court of Australia and Full Court Federal Court of Australia cases to provide evidence of patterns of use of materials. The thesis then engages in exploratory research by examining the processes involved in the making of a statute, from executive approval of the legislative proposal to the drafter's preparation of the Bill reflecting the proposal, and then parliamentary enactment of the Bill as a statute. This exploratory research identifies processes, actors, materials and characteristics of materials that might assist with understanding the use of extrinsic materials. The outcomes of all chapters are then drawn together and analysed to identify what can be learned from the institutional approach and its implications.

(a) Chapter Two: Historical statutory reforms and common law developments

Chapter Two examines the statutory reforms to the *Acts Interpretation Act 1901* (Cth) of the 1980s and the subsequent development of the common law in relation to the use of extrinsic materials. The chapter focusses first on the enactment of the purpose provision, s 15AA, and the 'ground-breaking'[79] provision on extrinsic materials, s 15AB, which sought to streamline and expand the previously limited and confused state of the law with respect to the use of extrinsic materials. Examining the recent history sets the scene for analysis of the current state of the law. But more importantly, it reveals that one of the key reasons for the enactment of ss 15AA and 15AB was institutional. Both reforms focussed on the function of a statute as a policy tool of government. They were at least in part an attempt to enlarge the pool of extrinsic information available for statutory interpretation, especially parliamentary materials

[78] Hilary Penfold, 'Legislation in the Courts' [2019](1) *The Loophole: Journal of the Commonwealth Association of Legislative Counsel* 2, 6–7; Eamonn Moran, 'The Coherence of Statutory Interpretation: Drafting Perspectives' in Jeffrey Barnes (ed) *The Coherence of Statutory Interpretation* (Federation Press, 2019) 50, 57; Daniel Lovric, 'Legislative Counsel and the Judiciary: Divergences in Statutory Interpretation?' [2015](2) *The Loophole: Journal of the Commonwealth Association of Legislative Counsel* 42.
[79] Stephen Gageler (n 31) 6.

that reflected executive policy and intent, to enhance the ability of the judiciary to interpret consistently with that intent.

The chapter then addresses the common law on extrinsic materials, which continued to develop despite the statutory reforms. This culminated in the 'modern' common law approach, expressed in the 1997 High Court decision *CIC Insurance Limited v Bankstown Football Club Ltd,*[80] which uses the concept of the 'wider context' of the statute, based in conventions about language rather than institutional considerations. This development explains the existence of two independent and different legal authorities for access to extrinsic materials and so helps explain the consequent confusion over the rationale for their recourse. The existence of both routes of access to materials also has another consequence. There are effectively no barriers for recourse to extrinsic materials, but both authorities leave open questions about their use.

(b) Chapter Three: Current Law on Extrinsic Materials

Chapter Three moves on from the historical context and provides a doctrinal analysis of the contemporary Australian law on the use of extrinsic sources. Australian law continues to be governed by the unusual situation of having two independent and different legal authorities to access materials – the *legislative* authority of the relevant Interpretation Act and the *common law* authority of judge made law. Yet the precise status of each gateway in relation to the other and how they are reconciled remains unclear. Perhaps more significant however is that the common law, which dominates recourse to use of extrinsic materials, is unclear. This chapter reveals how the judiciary navigates (or does not navigate) both gateways and, having obtained recourse to extrinsic materials using one of those gateways, how it approaches the use of those materials, especially with respect to purpose. The analysis reveals difficulties with current principles and the foundations supporting those principles. This doctrinal analysis serves two purposes. It provides a systematic analysis of the law with respect to extrinsic materials in statutory interpretation. Secondly, in doing so, it reveals the difficulties of the current approach dominated by the common law, which is based in a linguistic framework that focusses on Parliament as the author in a formal, constitutional sense. This chapter is central to understanding current law and practice, which can then be analysed from an institutional perspective in Chapter Eight. The doctrinal analysis is supplemented by the empirical research of the next two chapters.

[80] (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

(c) Chapter Four: Empirical Observations on Use of Extrinsic Materials: Method

The next two chapters address empirical quantitative research undertaken for this thesis. This research is a critical component of understanding the practice of courts. A multi-method approach to understanding a situation provides evidence from different perspectives. Integrating the findings from both methods can enhance the explanatory power of the research.

Chapter Four explains the methodology used for the data collection on the use by courts of extrinsic material. The study examines the case law of two courts: the High Court of Australia and the Full Court of the Federal Court of Australia. Over 200 High Court cases from 2016 to 2019 and over 200 Full Court cases from mid-2018 to mid-2019 were coded for the existence of particular features including citation of extrinsic materials, type of material and use. The chapter explains how the cases were chosen, the features (variables) that were counted for each decision, the reasoning behind the definitions of the variables, the limitations of the study and how the data was recorded. All coding was undertaken in accordance with a written codebook, which is included with the next chapter, Chapter Five. The codebook provides the rules governing how each case was coded. The data was then analysed using statistical software.

(d) Chapter Five: Empirical Observations on Use of Extrinsic Material: Findings

Chapter Five presents the results of the statistical analysis of the data collection explained in chapter four. This chapter focuses on what the data reveals about the practice of the courts as reflected in the cases analysed. It identifies some of the characteristics of the cases that were analysed. It then presents the findings of the frequency of citation of extrinsic materials, the frequency of citation of legal authority, and of the typology of material cited. The chapter also presents findings on whether the materials were used to support the reasoning of the court, or were merely cited, or were cited but rejected as non-probative. This study, the first of its kind in Australia in statutory interpretation, complements the doctrinal analysis of Chapter Three by providing empirical evidence about the patterns of use for extrinsic materials. As well, these findings are essential as they provide information that supports an institutional approach and that can be analysed in the light of the legislative process studied in the next two chapters. Incidentally, the data analysis suggests some statistically significant relationships between the use of extrinsic materials and other factors such as the age of the statute being construed and the existence of a dissenting judgment.

(e) Chapter Six: Legislative Process I

Chapters Six and Seven turn to the legislative process. Chapter Six addresses the pre-parliamentary process and Chapter Seven the parliamentary process. These chapters provide a systematic analysis of the process required to enact a federal statute, including the actors, processes and materials relevant to that process. These chapters provide a deep understanding of the roles played by participants involved in the making of a federal statute and the materials that the legislative process generates. They support the perspective of a statute as the product of a complex process. This understanding is critical to analyse the law and empirical data from an institutional perspective in order to highlight the difficulties of the current emphasis on the linguistic approach in relation to extrinsic materials, to support an institutional perspective as an alternative rationale for recourse to materials, and to offer pragmatic suggestions on potentially relevant materials and guidance on their use.

Chapter Six examines the materials generated by institutions involved in the pre-parliamentary process, from policy formulation to preparation of a federal Bill before it is introduced into Parliament. Given the limitations of what is publicly available at this stage of Bill development, this chapter focusses on the information that can be derived from the process and on the publicly available drafting manuals and guides prepared and used by Commonwealth parliamentary counsel, key members of the executive in the legislative process. Other publicly available pre-parliamentary materials relevant to Bill making which are considered are law reform commission reports, and manuals and administrative documents produced by key executive players such as the Department of the Prime Minister and Cabinet. This chapter examines the nature, content and genesis of these pre-parliamentary materials to assess their utility as interpretative aids and how they contribute to 'assumed knowledge' between the arms of government.

(f) Chapter Seven: Legislative Process II

Chapter Seven examines the next step in the making of a statute — the workings of the Federal Parliament. It examines the actors and procedures involved in the enactment process and identifies materials produced as part of the enactment of a Bill into a statute in Federal Parliament. This analysis covers well-known documents such as second reading speeches, explanatory memoranda, and parliamentary committee reports but also identifies less familiar but potentially probative materials such as the Minister's speech in reply. This chapter

examines the nature, content and genesis of these parliamentary materials to assess their utility as interpretative aids and to identify potentially relevant factors that may be used to evaluate their utility. This in turn provides information that contributes to building a common understanding between Parliament and the judiciary which has implications for 'assumed knowledge' between the arms of government.

(g) Chapter Eight: Insights and Implications of an Institutional Approach

Having obtained a multi-dimensional insight into the use of extrinsic materials and having engaged in a robust analysis of the legislative process, Chapter Eight synthesizes that research and directly addresses the primary question of this thesis. The chapter reveals a tension in the law in that the courts are adopting institutional elements when they refer to extrinsic materials, yet the rationalization for recourse to those materials emphasises concepts of context and purpose that are based in linguistic conventions about text, and a view of Parliament as author of that text in a formal, technical sense. Adopting an institutional perspective also exposes some of the deficit of the concepts of context and purpose when used for extrinsic materials. The thesis shows that understanding the legislative process provides a legitimate, alternative rationale for recourse to extrinsic materials in statutory interpretation. Finally, it finds that an institutional approach can offer various pragmatic and conceptual suggestions. Understanding the legislative process assists with identifying relevant material and in assessing the reliability and value of that material relevant to their practical application in the task. Secondly, the chapter uses an institutional perspective to explore some of the ramifications for statutory interpretation generally, in particular the High Court's statement about statutory interpretation reflecting a shared understanding across the three arms of government. The outcomes of the research provide real content for the shared knowledge that those arms of government are assumed to possess.

The objective of this research is to offer some critical insight into the Australian approach to the relationship between the statutory text and the use of extrinsic materials in statutory interpretation. In doing so, the thesis addresses a gap in Australian scholarship about the role of these materials in statutory interpretation by adopting a novel perspective.

Chapter 2

Statutory reforms and common law developments: background to contemporary law

'The only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law of to-day by seeing how it took shape.'[1]

2.1 Introduction

In contemporary statutory interpretation law, when construing a statutory provision courts are required to consider the purpose of the Act containing the provision, and to consider that provision in its context, which includes matters outside the Act. Courts are able to resort to a wide range of extrinsic materials in the process of this task and do so frequently, often to help identify the statutory purpose. It is easy to forget that this state of affairs is a relatively recent development. Up until the 1980s, consideration of purpose was not an integral part of the interpretative task, and the law relating to recourse to extrinsic materials, especially parliamentary materials, was unclear and inconsistent.

The recent historical developments that led to the current state of the law can be divided into three stages. The first was the legislative enactment requiring the courts to consider the concept of 'purpose' as a distinct and integral part of the interpretative process. The concept of purpose itself was not new, but the enactment of s 15AA in the *Acts Interpretation Act 1901* (Cth) ('AIA') in 1981 was an emphatic legislative message to interpreters to engage in a purposive analysis for every interpretative task regardless of the clarity, or otherwise, of the statutory text.

The enactment of s 15AA paved the way for the second stage. A few years later, in 1984, s 15AB was inserted into the AIA. Section 15AB was a dramatic reform at the time. It widened the range of extrinsic materials that courts were permitted to refer to including, most controversially, parliamentary materials such as second reading speeches. The section also attempted to provide a more structured approach to the circumstances in which those

[1] *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529, 595 (Windeyer J).

materials could be used. This was at a time when structure and coherency in this area was lacking at common law.

Several factors influenced these legislative reforms. Despite Australia's imminent final separation from the legal system of the United Kingdom, legal developments in the UK remained of considerable influence and interest in Australia and there had been substantive discourse in the UK on statutory interpretation leading up to the 1980s. This led to two UK reports recommending a legislative provision requiring purpose to be considered in interpretation.

There was also a home-grown impetus. The legislative reforms were provoked by executive and parliamentary dissatisfaction with the then state of statutory interpretation law and the perceived formalistic approach of the courts, especially the High Court. There was a perception of judicial sluggishness, if not inertia, in moving the law of statutory interpretation forward at a time of dawning realization of the importance that statutes were beginning to assume. Sections 15AA and s 15AB were a composite package. Despite changes in government, both were the subject of strong parliamentary (and executive) bi-partisan support as a means to adjust the balance between the Parliament and the judiciary by emphasising the object of statutory interpretation as one of *legislative* intent. The reforms were an open and express attempt by the executive and Parliament to communicate to the judiciary the broad approaches that the former regarded as appropriate for the judiciary to adopt to determine that intent. The key to those approaches was the concept of the 'purpose' of the statute, and a key means to find that purpose was to refer to extrinsic materials. Both enactments were followed by similar enactments in nearly all states and both self-governing territories.

Yet despite the legislative enshrinement of the concept of purpose and the existence of statutory gateways permitting access to a wide range of materials, the common law continued to develop independently. This led to the third stage of recent history. Either prompted or accelerated by the statutory reforms to the AIA, there was a judicial sea-change. Beginning just before the enactment of s 15AA, the High Court began to place a greater emphasis on the notion of purpose as an integral component of statutory interpretation in a manner that did not rely on the s 15AA instruction or its equivalents.

But the more striking common law development was the one relating to extrinsic context. In 1997, the joint judgment of Brennan CJ, Dawson, Toohey and Gummow JJ in the High Court pronounced the common law 'modern' approach to statutory interpretation in the decision of *CIC Insurance v Bankstown Football Club Ltd*.[2] The statements made in this decision focussed on the 'context' of the statute and made it clear that context included the 'wider' context - outside the statute - and that that 'wider context' included extrinsic materials. More, the wider context should be considered without the need to satisfy any requirement of ambiguity in the statutory text or any other threshold. It is to be considered from the start of the interpretative process.

This chapter explores these historical developments, which assist with understanding the current law discussed in Chapter Three. These developments are significant not only for establishing a separate common law interpretative approach, but for putting the reformative statutory provisions enacted in the previous decade to one side. This history also reveals the dichotomy in approach between the statutory and common law. In enacting ss 15AA and 15AB, Parliament had focussed on enacting a legislative mechanism for providing evidence from the legislative process to the courts. But the judiciary in turn reclaimed the area and articulated their own 'modern' response by way of developing previously existing concepts.

2.2 The law before 1980s statutory reforms

Although recent history is the focus of this chapter, it is necessary to provide a brief overview of the state of the law immediately prior to the legislative reforms in the 1980s in order to understand the issues that were their target.

For centuries, the object of construing a statute has been to determine the 'legislative intent' of the statute. At the same time, the law relating to statutory interpretation had been governed by the common law, not statute. The existence of these two core premises has meant that, at a broad level at least, statutory interpretation has always reflected a story about the dynamic between the legislature and the courts.

[2] (1997) 187 CLR 384.

At one stage that dynamic was very different to now. In the thirteenth and fourteenth centuries,

> when laws were few and rarely passed, when the business of legislation was confined to a small and select class, to which practically the judiciary belonged, when the legislative and the judicial bodies sat in the same place, and, indeed, in the same building,- in such a state of things, it may well be that the judiciary might suppose themselves to possess, that they might indeed really possess, a considerable, personal knowledge of the legislative intent, and that they might come almost to consider themselves as a co-ordinate body with the legislature.[3]

The lack of any 'inkling of separating the legislative and judicial functions'[4] meant that judges often had personal knowledge of statute making since they 'bore the principle share in lawmaking.'[5] If judges did not have actual knowledge, they could consult with their 'legislator brethren.'[6] There were few real 'rules' of interpretation.[7] Judges were open to examine 'any means available for ascertaining the actual intention of the lawmakers.'[8] Legal history scholar Thorne goes so far as to suggest that during this time the judicial treatment of statutes was little more 'than an incidental, routine function of judicial administration.'[9]

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[3] Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* (Baker, Voorhis & Co, 2nd ed, 1874) 242. See also Theodore FT Plucknett, *Statutes and Their Interpretation in the First Half of the Fourteenth Century* (Cambridge University Press, 1922) 49–50, 55.
[4] William D Popkin, *Statutory Interpretation: A Pragmatic Approach* (Carolina Academic Press, 2018) 6. See also Plucknett (n 3) 20–21.
[5] Plucknett (n 3) 49. See also SE Thorne, 'Equity of a Statute and Heydon's Case' (1936) 31 *Illinois Law Review* 202, 203. Cf Vincent JG Power, 'Parliamentary History as an Aid to Statutory Interpretation' (1984) 5(2) *Statute Law Review* 38 who suggests that judges who personally participated in the legislative process were more inclined to use parliamentary materials when construing statutes.
[6] Sir John Dyson, 'The Shifting Sands of Statutory Interpretation' (Speech, Statute Law Society Conference, London, 9 October 2010) 4. See also P Brazil, 'Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular' (1961) 4 *University of Queensland Law Journal* 1, 4 who gives an example gathered from Professor Plucknett from 1366 when a judge tasked with interpreting a statute went to those in the council who made it to ask what it meant.
[7] Samuel E Thorne, *A Discourse upon the Exposicion & Understanding of Statutes, with Sir Thomas Egerton's Additions* (Huntington Library, 1942) 3–4 who argues that a body of law that might be termed 'statutory interpretation' did not really begin until the 16th century with the 'great outburst' of legislation that marked the reign of Henry VIII and emerging parliamentary sovereignty.
[8] Brazil, 'Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular' (n 6) 4.
[9] Thorne, *A Discourse upon the Exposicion & Understanding of Statutes* (n 7) 3. For a brief but informative summary of the development of statutory interpretation principles from the 13th century to the 20th century, see Justice Ashley Black, 'Development of Principles of Statutory Interpretation' (Speech, Francis Forbes Society For Australian Legal History-Introduction To Australian Legal History Tutorials, 1 October 2013).

Over time, institutional, political and other forces meant that the judiciary gradually separated from the legislature and such 'personal knowledge' was no longer possible.[10] By the middle of the fourteenth century 'the intimacy between those that made and those that construed the law disappeared as the judiciary developed into a separate and isolated institution'.[11] With that development, the intent of Parliament could only be known through the written instrument, and so the 'science of interpretation' began to develop.[12] That 'science' focussed on the statutory text.

By the time that the Commonwealth of Australia was established in 1901,[13] there was a recognizable body of statutory interpretation law. One consequence of the view that Australia was 'settled' by the English (rather than colonised) was that the Australian legal system inherited English common law.[14] (Australia would not cut all ties to the English legislature and court hierarchy until 1986.[15]) English statutory interpretation law, and so Australian statutory interpretation law, consisted almost entirely of judge made law. Interpretation Acts had been in existence in Australia since the 19th century, but were primarily aimed at providing drafting shortcuts to shorten Acts (such as default provisions for the meaning of words) or to provide interpretation assistance on technical or specific matters (such as for the time of commencement).[16] They did not suggest any particular generic interpretative approach. Consequently, for a large part of the twentieth century, Australian statutory

[10] Thorne, 'Equity of a Statute and Heydon's Case' (n 5), 203-4; Plucknett (n 3) 55–6; Brazil, 'Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular' (n 6) 5.
[11] Brazil, 'Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular' (n 6) 5. See also Plucknett (n 3) 56.
[12] Plucknett (n 3) 56. Cf Thorne, *A Discourse upon the Exposicion & Understanding of Statutes* (n 7).
[13] *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12.
[14] See, generally, Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) ch 2 for a discussion of how the English settlers brought the common law to Australia so far as it could be applied.
[15] *Australian Act 1986* (Cth) and the *Australia Act 1986* (UK). See George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory-Commentary and Materials* (Federation Press, 7th ed, 2018) ch 3 and see generally Twomey, ibid, for a fulsome treatment of the background to and negotiation of the Australia Acts.
[16] See, eg, *Acts Shortening Act 1852* (NSW) 16 Vict, c 1; *An Ordinance for Avoiding Unnecessary Repetitions 1843* (SA) 7 Vict, c 1; *An Act For Shortening And Explaining The Language Used In Acts Of Council, Legal Proceedings, Deeds And Other Documents 1853* (Tas) 17 Vict, c 1; *An Act to Interpret and Shorten the Language of Acts of Council 1851* (Vic) 15 Vict, c 1; *Shortening Ordinance 1844* (WA) 8 Vict, c 11. For historical information on the Acts, see Dennis Pearce, *Interpretation Acts in Australia* (LexisNexis, 2nd ed, 2023) 3–5 and Chad Jacobi, *Interpretation Acts: Origins and Meaning* (Lawbook Co, 2019).

interpretation law was heavily influenced, if not bound, by the 'settled rules of construction' enunciated by English superior courts.[17]

These settled rules included the concept of legislative intent as the ultimate objective of statutory interpretation. It remained, said our first Chief Justice of the High Court of Australia shortly after federation, the 'the first duty of the Court …to ascertain, if possible, the intention of the legislature' when construing statutes.[18] But as the judiciary no longer had first-hand knowledge about the actual, subjective intent of the lawmakers,[19] this intent was understood as being expressed by the statutory language:

> The only safe and legitimate guide to the legislative intention is the language of the legislature itself fairly interpreted.[20]

Under that broad umbrella, four strands dominated the discourse about statutory interpretation during the twentieth century, though they were by no means the sum of all that law. The first was an emphasis on the grammatical meaning of statutory text. In the mid-1800s, Lord Chief Justice Tindal in the House of Lords stated in the *Sussex Peerage Case* that:

> If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver.[21]

This approach was known as the 'literal rule.' It was inherited by the newly formed High Court of Australia in the early 1900s. The classic early Australian statement of this so-called 'rule' is that of Justice Higgins in the 1920 High Court decision of *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*:

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[17] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 148 (Knox CJ, Isaacs, Rich and Starke JJ). See also Justice Stephen Gageler, 'The Coming of Age of Australian Law' in Barbara McDonald, Ben Chen, and Jeffrey Gordon (eds), *Dynamic and Principled: The Influence of Sir Anthony Mason* (Federation Press, 2022) 8, 24 who notes that most scholarship on law in Australia, including statutory interpretation, was derivative of English texts until the 1970s.

[18] *Borough of Glebe v Lukey (Australian Gaslight Co)* (1904) 1 CLR 158, 175 (Griffiths CJ, Barton J agreeing). See also 179 (O'Connor J). See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2 (Higgins J).

[19] Horst Lucke, 'Statutes and the Intention of the Lawmaker as the Ultimate Guide to Their Applicability: History and Prospects' (2010) 45 *Supreme Court History Program Yearbook* 1, 7.

[20] *Phillips v Lynch* (1907) 5 CLR 12, 27–8 (Isaacs J).

[21] (1844) 11 Cl. & Fin 85, 143; 8 ER 1034, 1057 (Lord Tindal CJ).

> The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.[22]

While this approach clearly emphasised the grammatical meaning of the text, it was not quite as clinical as the above quotes might first suggest. As indicated by both Lord Tindal and Justice Higgins, the courts did consider the 'ordinary' meaning of statutory words.[23] Further, in determining whether the language was clear, it was 'firmly established' that the 'whole document must be looked at' to ascertain the meaning of the text.[24] If, *when read in the context of the whole document*, the meaning of a provision was 'literally clear and unambiguous' then the unqualified words were to be given effect.[25] Having said that, not all components of the statute were considered a part of that instrument.[26]

Second, there was the so-called golden rule, which had emerged in the nineteenth century, usually traced back to *Grey v Pearson* in 1857.[27] The 'golden rule' provided that the grammatical meaning be adopted, unless it led to 'some absurdity, or some repugnance or inconsistency *with the rest of the instrument*…but no farther'.[28] The absurdity must be 'so great' as to convince the court 'that the intention [of the Parliament] could not have been to use them in their ordinary signification.'[29] The onus of showing that the words 'do not mean what they say' lay 'heavily' on the party who alleged it.[30]

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[22] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 162 (Higgins J). See also *Sargood Bro. v Commonwealth* (1910) 11 CLR 258, 279 (O'Connor J) citing *Tasmania v Commonwealth and Victoria* (1904) 1 CLR 329, 339 (Griffith CJ) adopting the *Sussex Peerage Case* statement (1844) 11 Cl. & Fin 85, 143; 8 ER 1034, 1057 (Lord Tindal CJ).
[23] See also *Markell v Wollaston* (1906) 4 CLR 141, 150 (O'Connor J).
[24] *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 388 (Isaacs J). See also *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234, 244 (Dixon J).
[25] *Metropolitan Gas Company v The Federated Gas Employees' Industrial Union* (1925) 35 CLR 449, 455 (Isaacs and Rich JJ). See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 149 (Knox CJ, Isaacs, Rich and Starke JJ), 161–2 (Higgins J); *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337, 371 (Dixon J).
[26] Eg: *Sussex Peerage Case* (1844) 11 Cl & Fin 85, 143; 8 ER 1034, 1057 (Lord Tindal CJ) (discussing the preamble); *Bowtell v Goldsborough Mort & Co. Ltd* (1906) 3 CLR 444, 451 (Griffiths CJ) (discussing the preamble); *Birch v Allen* (1942) 65 CLR 621, 625-6 (Latham CJ) (discussing the long title).
[27] (1857) 6 HLC 61; 10 ER 1216.
[28] Ibid 106, 1234 (Lord Wensleydale) (emphasis added).
[29] *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 764–5 (Lord Blackburn).
[30] *Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 11 CLR 311, 341 (Higgins J) citing *Richards v McBride* 8 QBD 119, 122 (Lord Tenterton CJ) and *Grey v Pearson* (1857) 6 HLC 61, 106: 10 ER 1216, 1234 (Lord Wensleydale).

Twentieth century statutory interpretation law also recognized a narrower version of the modern notion of legislative 'purpose.' The 'mischief rule' had been clearly enunciated in the 1584 decision of *Heydon's Case.*[31] *Heydon's Case* provided that the courts may look for the 'mischief and defect' that the common law 'did not provide for', and the remedy that Parliament had resolved by statute to 'cure' that mischief.[32]

Mischief was a limited concept. The notion of 'mischief' focussed on identifying the pre-existing deficiency of the common law. Further, courts generally required ambiguity on the face of the statute before they would use it.[33] One view of the 'rule' was that it was evidence of an effort by the judiciary to make the interpretation of statutes 'something more than merely a grammatical exercise.'[34]

As well as these 'rules', many syntactical canons of construction, such as *ejusdem generis*, were well established tools for providing guidance on word meaning.[35] The courts made not infrequent references to the 'object' or 'purpose' of a provision or Act, to be inferred from the statute, to assist interpretation.[36] (Although the two are interrelated, the concept of the purpose of the statute is not equivalent to the notion of 'mischief'. This distinction is returned to in [2.6] of this chapter).

Inherent in the focus on the grammatical meaning of the text for determining the intention of Parliament was 'an inherited understanding that the material to which a court could look to ascertain that intention was limited.'[37] Chief Justice Latham in 1942 typified the High Court approach at that time to statutory construction when he said:

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[31] *Heydon's Case* (1584) 3 Co Rep 7a; 76 ER 637. Though this case was not necessarily the origin of the use of 'mischief'. See Samuel L Bray, 'The Mischief Rule' (2021) 109(5) *Georgetown Law Journal* 967, 977.
[32] Ibid 7b; 76 ER 637, 638.
[33] See, eg *National Mutual Life Association of Australasia Ltd v Godrich* (1909) 10 CLR 1, 9 (Griffith CJ); *Miller v The Commonwealth* (1904) 1 CLR 668, 674 (Griffith CJ); *Wacal Developments Pty. Ltd. v. Realty Developments Pty. Ltd* (1978) 140 CLR 503, 513 (Stephen J).
[34] Thorne, 'Equity of a Statute and Heydon's Case' (n 5) 215.
[35] See Roy Wilson and Brian Galpin, *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 11th ed, 1962) 320-30 citing decisions reaching back hundreds of years.
[36] See, eg, *Phillips v Lynch* (1907) 5 CLR 12, 22-3 (O'Connor J), 31(Higgins J); *The Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208, 239 (O'Connor J) citing *River Wear Commissioners v. Adamson* (1877) 2 App Cas 743, 763 (Lord Blackburn); *Potter v Minahan* (1908) 7 CLR 277, 304, 306 (O'Connor J), 323 (Higgins J); *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234, 244 (Dixon J).
[37] Justice Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1, 4.

> The words of a statute, when applied to the state of facts with which the statute deals, speak for themselves. They express the intention of Parliament. A statute may be based upon the report of a committee or of many committees, or upon cabinet memoranda, or upon a resolution of a political party or of a public meeting, or upon an article in a newspaper. The intention of Parliament as expressed in the statute cannot be modified or controlled in a court by reference to any such material…[38]

This area was the subject of some exceptions and carve-outs that could not always be reconciled. It was generally accepted that, if the words of the statute were ambiguous, it might be necessary to consider the 'background' of the statute to assist in ascertaining the legislative intent. The 'background' referred to information relating to the legal, social and economic conditions in which the statute was made. In *Tasmania v Commonwealth and Victoria*, O'Connor J explained:

> The intention of the enactment is to be gathered from its words. If the words are plain, effect must be given to them; if they are doubtful, the intention of the legislature is to be gathered from the other provisions of the Statute aided by a consideration of *surrounding circumstances*.[39]

Such 'surrounding circumstances', his Honour said, included 'contemporaneous circumstances' such as the history of the law and historical facts.[40] This was generally taken to include the common law and legislation that existed at enactment, and any matter generally known of which the court was prepared to take judicial notice. Recourse to statutes *in pari materia* was permitted.[41] Dictionaries were regularly consulted for assistance with ascertaining an 'ordinary' meaning (just as today).[42]

Despite reference to surrounding circumstances being acceptable in cases of textual ambiguity, a fourth 'rule' — known as the 'exclusionary rule' — prohibited access to many

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[38] *South Australia v Commonwealth* (1942) 65 CLR 373, 409-10 (Latham CJ). See also *Tasmania v Commonwealth* (1904) 1 CLR 329, 359 (O'Connor J).
[39] (1904) 1 CLR 329, 359 (emphasis added). See also *Evans v Williams* (1910) 11 CLR 550, 571 (Isaacs J); *The Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208, 238 (O'Connor J); *Sovar v Henry Lane* (1967) 116 CLR 397, 405 (Kitto J).
[40] *Tasmania v Commonwealth* (1904) 1 CLR 329, 359 (O'Connor J); *Miller v The Commonwealth* (1904) 1 CLR 668, 673-4 (Griffith CJ). See also *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405 (Kitto J).
[41] See, eg, *Phillips v Lynch* (1907) 5 CLR 12, 20 (O'Connor J); *Ramaciotti v Federal Commissioner of Taxation* (1920) 29 CLR 49, 53 (Knox CJ).
[42] See, eg, *Markell v Wollaston* (1906) 4 CLR 141, 150 (O'Connor J); *McKernan v Fraser* (1931) 46 CLR 343, 360 (Dixon J), 373 (Evatt J).

extrinsic materials that constituted part of the legislative history of an Act.[43] But the scope and application of this 'rule' was unclear and inconsistent. Courts differentiated, without clear or principled justification, between different types of extrinsic material.[44] For example, one long standing exception to the rule allowed reference to the reports of law reform commissions to identify the 'evil' (ie mischief) that the Act sought to address.[45] Yet the permissibility of recourse to draft bills annexed to those same reports was unclear.[46]

There was a particular intransigence about recourse to executive and parliamentary materials.[47] Amendments made to bills during the passage of the bill in Parliament were excluded.[48] Reference to statements of government policy and communications between Ministers or other executive officers was usually refused.[49] Perhaps reflecting what has been described as the 'deep seatedness of the judges' aversion to examining legislative processes',[50] the High Court was particularly stringent in its refusal to allow reference to parliamentary debates or other proceedings in Parliament (such as the Committee stage) as an aid to interpretation.[51] That High Court position reflected House of Lords decisions which continued to maintain a strong exclusionary stance in the 1900s in relation to parliamentary debates and parliamentary records.[52] Even so, there was inconsistency in this area too. As

[43] The decision *Millar v Taylor* (1769) 4 Burr 2303; 98 ER 210 is usually cited as the decision establishing the exclusionary rule. For an argument that the history of the rule is more complex than typically thought, see John J Magyar, 'Debunking Millar v Taylor: The History of the Prohibition of Legislative History' (2020) 41(1) *Statute Law Review* 32. For Australia, see eg, *South Australia v Commonwealth* (1942) 65 CLR 373, 409 (Latham CJ) (quoted above); *Victoria v Commonwealth* (1975) 134 CLR 81, 152–4 (Gibbs CJ).

[44] See Legal & Constitutional Committee, Parliament of Victoria, *Report on Interpretation Bill 1982* (Report No 21/1982-83, October 1983) 62–65 for a detailed discussion of cases making a distinction based on typology. See also Jocelynne A Scutt, 'Statutory Interpretation and Recourse to Extrinsic Aids' (1984) 58 *Australian Law Journal* 483, 487–488 and Commonwealth Attorney-General's Department, *Extrinsic Aids to Statutory Interpretation* (Policy Discussion Paper No 285/1982, October 1982) 7–12.

[45] *Eastman Photographic Material Company Limited v Comptroller-General of Patents, Designs and Trade Marks* [1898] AC 571, 575 (Lord Halsbury); *Assam Railways & Trading Co Ltd v Commissioners of Inland Revenue* [1935] AC 445, 457–9 (Lord Wright).

[46] Cf *South Australia v Commonwealth* (1942) 65 CLR 373, 409–410 and *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200, 212 (the Court).

[47] See, eg, South Australian Law Reform Committee, *Law Relating to Construction of Statutes* (No Ninth Report, 1970), an early Australian review of the law which rejected an unrestricted use of legislative materials and maintained that parliamentary materials should not be used.

[48] DC Pearce, *Statutory Interpretation in Australia* (Butterworths, 1st ed, 1974) 47–8.

[49] Ibid 48. See, eg, *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735, 776 (Starke J).

[50] Brazil, 'Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular' (n 6) 10.

[51] See, eg, *Australasian United Steam Navigation Co Ltd v Hiskens* (1914) 18 CLR 646, 672 (Isaacs J); *South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd* (1977) 139 CLR 449, 457 (Barwick CJ), 461 (Gibbs J), 470, 476–7 (Mason J), though Murphy J in dissent supported reference to parliamentary debates (at 481).

[52] See, eg, *Davis v Johnson* [1979] AC 264; *Beswick v Beswick* [1968] AC 58; *Warner v Metropolitan Police*

Dennis Pearce has pointed out, it is possible to find instances of courts referring to parliamentary debates for 'historical background' during this time.[53]

In addition to the distinction made between the typology of materials, where recourse to extraneous materials was permitted, the materials could only be used to identify the mischief that the statute was intended to address.[54] Use of the material was not permitted to identify the remedy for addressing that mischief,[55] or 'for the purpose of ascertaining directly what the Act was intended to mean'[56] or as a 'guide to meaning.'[57] That distinction, as Pearce explained in 1974, was a problematic one.[58] The restriction required either a 'compartmentalising' of the judge's mind[59] or that the judge be 'selective in their reading'[60] of the material, both of which were artificial and practically fraught. As Lord Reid explained when rejecting counsel's invitation to look at a committee report:

> It is true that we were only asked to [look at the report] in order to see what the committee thought was the problem to be solved. But it would require superhuman powers of detachment to avoid noting what they recommended as the remedy.[61]

To put it another way, this meant that, even when recourse to an extrinsic source was permitted, the judiciary could not look at that source 'for the purpose of providing *direct* evidence of the intentions of the lawmakers' but they were permitted to use them 'as *indirect*

Commissioner [1969] 2 AC 256.
[53] Pearce, *Statutory Interpretation in Australia* (1974) (n 48) 47.
[54] See, eg, *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, 600 (Stephen J); *Wacando v Commonwealth* (1981) 148 CLR 1, 25 (Mason J); *Commissioner of Taxation (Cth) v Whitfords Beach Pty Ltd* (1982) 150 CLR 355, 373–4 (Mason J).
[55] *Miller v The Commonwealth* (1904) 1 CLR 668, 674 (Griffiths CJ, delivering the judgment of the Court); *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503, 513 (Stephen J).
[56] *Wacal Developments v Realty* (1978) 140 CLR 503, 509 (Gibbs J); *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200, 211 (the Court). JD Heydon, 'Theories of Constitutional Interpretation: A Taxonomy' (2007) (2007 Winter) *Bar News: Journal of the NSW Bar Association* 12, 15 traces this distinction back to 1852.
[57] *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200, 211 (the Court).
[58] Pearce, *Statutory Interpretation in Australia* (1974) (n 48) 46, 143 referring to cases cited at 66. Similar comments about the artificial distinction were made in Commonwealth Attorney General's Department, *Another Look at Statutory Interpretation* (Australian Government Publishing Service, 1982) 3 (John Greenwell); Victorian Parliament Joint Legal & Constitutional Committee (n 44) 80–81.
[59] Symposium, Attorney-General's Department, *Another Look at Statutory Interpretation* (Australian Government Publishing Service, March 1981) 4 (Patrick Brazil) ('Attorney-General's Department, Symposium 1981').
[60] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 622 (Viscount Dilhorne).
[61] *Smith v Central Asbestos Co Ltd* [1973] AC 519, 529 (Lord Reid).

evidence of intention, by way of indicating the mischief or defect intended to be remedied by the enactment'.[62]

2.3 Enactment of s15AA: the first stage: purpose

By the second half of the twentieth century, the state of statutory interpretation law in Australia was the subject of some dissatisfaction and commentary seeking change.[63] At least two developments contributed to the momentum for reform.

The first was the influence of English developments. The 'gradual, and messy, legislative process that began in 1968 and ended with the Australia Acts 1986'[64] to abolish the last avenue for appeals from Australian courts to the Privy Council was still mid-process. Australian common law, including statutory interpretation law, still primarily 'told England's story.'[65] In the UK, against the background of an acknowledgement that the interpretation of statutes was becoming a major part of the judicial function,[66] concern over the unsatisfactory state of the law of statutory interpretation led to a joint review by the UK Law Commission and the Scottish Law Commission. This review resulted in a report in 1969 (the '1969 UK/Scottish Report').[67] The report was the culmination of wide ranging consultation on a jointly produced 1967 working paper (the 'Joint Working Paper').[68]

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[62] Brazil, 'Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular' (n 6) 14.

[63] See, eg, Peter Brett 'The Theory of Interpreting Statutes' (1953) 2(2) *University of Queensland Law Journal* 99, 103; Herbert Mayo 'The Interpretation of Statutes' (1955) 29(4) *Australian Law Journal* 204; JL Montrose, 'Judicial Implementation of Legislative Policy' (1957) 3 *University of Queensland Law Journal* 139. . The High Court itself referred to the 'rigid rules of English law governing interpretation' in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200, 212 (the Court). There appeared to be similar sentiment in New Zealand, despite a long standing statutory provision requiring a construction that best ensures the attainment of the object of the statute: DAS Ward, 'A Criticism of the Interpretation of Statutes in the New Zealand Courts' [1963] (June) *The New Zealand Law Journal* 293.

[64] Chief Justice Murray Gleeson, 'The Privy Council – An Australian Perspective' (Speech, Anglo-Australasian Lawyers Society, The Commercial Bar Association, and the Chancery Bar Association, London, 18 June 2008) 2.

[65] Paul Finn, 'Statutes and the Common Law' (1992) 22 *University of Western Australia Law Review* 7, 9.

[66] The Law Commission and the Scottish Law Commission, *The Interpretation of Statutes* (Law Com. No. 21, Scot. Law Com. No. 11, 9 June 1969) 3.

[67] Ibid.

[68] Each of the Law Commission and Scottish Law Commission published a separately named paper though they are identical: Scottish Law Commission, 'Memorandum No 6 Interpretation of Statutes' (10th August 1967); Law Commission, 'Working Paper No. 14' (10th August 1967). See The Law Commission and the Scottish Law Commission (n 66) 2 fn 1. Other international developments with respect to legislative change also had some impact, such as the *Interpretation Act 1960* (Ghana). See Commonwealth Attorney General's Department, 'Extrinsic Aids to Statutory Interpretation' (n 44) 10–11.

It was generally accepted by the Commissions that, while the rules of statutory interpretation might be 'individually reasonably clear', they were 'often difficult to apply, particularly where they appear to conflict with one another and when their hierarchy of importance is not clearly established.'[69] They expressed concern over the lack of a 'coherent system' of rules[70]. The mischief rule, they said, was 'outdated' as it assumed that a statute was 'subsidiary' or only 'supplemental' to the common law, whereas many modern statutes marked 'a fresh point of departure rather than a mere addition to, and qualification of, common law principles.'[71] More, it was inadequate in that the rule did not guide the interpreter as to how to find the 'mischief', especially given the limitation on access to extrinsic materials.[72]

Much of the discussion of the inadequacies of the current law was framed in terms of a lack of communication between the legislature and the courts about the policy underlying the legislation.[73] This led them to recommend 'limited' statutory intervention in a number of areas of statutory interpretation, one of which was to 'emphasise the importance in the interpretation of a provision of … the general legislative purpose.'[74]

Despite this new emphasis on legislative policy and an express recognition that legislation is not 'made in a vacuum',[75] there was little movement by the Commissions on the use of extraneous materials. It was regarded as 'self-evident' that background matters such as information relating to legal, social and economic aspects were relevant to understanding statute.[76] But, following analysis of the nature of parliamentary materials, the Commissions concluded that reports of parliamentary proceedings should not be used by the courts, one of

[69] The Law Commission and the Scottish Law Commission (n 66) 1.
[70] The Law Commission and the Scottish Law Commission (n 66) 6.
[71] Ibid 20. See also 7, 49 n 177.
[72] Scottish Memorandum No 6 (n 68) 35, 49; The Law Commission and Scottish Law Commission (n 66) 20. The Commissions also criticise the golden and literal rules: Law Commission and Scottish Law Commission (n 66) 17–20.
[73] Eg, Scottish Memorandum No 6 (n 68) 13–15, 46; The Law Commission and the Scottish Law Commission (n 66) 3, 49.
[74] The Law Commission and the Scottish Law Commission (n 66) 49. See also App A. The other areas marked for legislative intervention were clarification about intrinsic context, to emphasise the importance in interpretation of materials reflecting international obligations, to provide assistance to the courts in ascertaining whether a provision is intended to give a remedy in damages and to encourage specially prepared explanatory material in selected cases.
[75] Ibid 27.
[76] Ibid 27.

the main reasons being 'the difficulty arising from the nature of our Parliamentary process of isolating information which will assist the courts.'[77] Limited exceptions were suggested for committee reports and other documents that had actually been presented to Parliament and the possibility of a specially prepared explanatory memorandum for select cases was canvassed.[78]

The 1969 UK/Scottish Report was followed by a government appointed Committee inquiry in 1975, chaired by The Right Honourable Sir David Renton, which also led to a report (the 'Renton Report').[79] Though the Renton Report focussed on the drafting and making of legislation, it also agreed with the 1969 UK/Scottish Report's statements about the relationship between legislative drafting and interpretation.[80] The Report endorsed the 1969 UK/Scottish Report's recommendation to enact a statutory provision that required the adoption of a construction that promotes the legislative purpose of a provision.[81] It also supported the continued exclusion of access to reports of proceedings in Parliament, and restricted access to pre-parliamentary material.[82] A few years after the Renton Report, a legislative amendment to the UK Interpretation Act to incorporate such a purpose provision was introduced into the House of Lords.[83]

The impact of the UK reports in Australia was 'accelerated' by a second impetus: a period in the decade preceding 1981 of what was perceived as an unnecessarily literalist approach by the High Court.[84] Commentators, legal and political, had expressed concern about the High Court's 'legalism, its emphasis on literalism and its refusal to look to the spirit of legislation

[77] Ibid 36.
[78] The Law Commission and the Scottish Law Commission (n 66) 51 App A.
[79] Committee appointed by the Lord President of the Council, *The Preparation of Legislation (the 'Renton Report')* (No Comnd 6053, May 1975) (the '*Renton Report*'). That the deficiencies of the statute book was a prominent concern at the time is further illustrated by publications of the Statute Law Society (an independent educative charitable body): Statute Law Society, *First Report of the Committee appointed to propose solutions to the deficiencies of the Statute Law System in the United Kingdom* (Sweet & Maxwell, 1972); Statute Law Society, *Report of the Committee appointed by the Society to examine failings of the present Statute Law System* (Sweet & Maxwell, 1970).
[80] Ibid 135–36.
[81] Ibid 143, 157.
[82] Ibid 141, 143, 157. See also 57–8.
[83] Lord Scarman introduced an Interpretation of Legislation Bill to enact a purpose provision and other recommendations of the 1969 UK/Scottish Report into the House of Lords in 1980 and 1981, but both attempts were unsuccessful: Ross Carter, 'Interpretation Acts—Are They, and (How) Do They Make for, Great Law?' (2022) 43(1) *Statute Law Review* 1, 24–6; Jeffrey Barnes, 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law - Part One' (1994) 22(1) *Federal Law Review* 116, 149–154. At the time of writing, the *Interpretation Act 1978* (UK) still does not contain a purpose provision.
[84] Barnes ibid 154.

as well as to its letter…'[85] Such criticism had gathered following a series of decisions of the High Court on Commonwealth tax legislation which were seen as 'over-literal interpretations of Commonwealth statutes that have tended to defeat the intentions of the legislature.'[86] One case singled out for attention was *Commissioner of Taxation (Commonwealth) v Westraders,*[87] where Barwick CJ referred to the 'ingenious use' by the taxpayer of the provisions of ss 36 and 36A of the *Income Tax Assessment Act* 1936 (Cth) 'to produce what is claimed to be an allowable deduction from a taxpayer's assessable income.'[88] The Chief Justice explained that it was:

> not for the court to mould or to attempt to mould the language of the statute so as to produce some result which it might be thought the Parliament may have intended to achieve…….'That result may seem … contrary to the general policy of the Act … [but]… the fault lies with the form of the legislation at the relevant time and not with the courts whose duty it is to apply the words which the Parliament has enacted'.[89]

Whether the tax cases did demonstrate strong literalism is open to question.[90] But, as Jeffrey Barnes has noted, 'rightly or wrongly, cases such as these were not viewed by persons outside the Court as raising a purely taxation issue. The High Court itself had become the focus….'[91] Even a House of Lords judge visiting Australia in 1980 remarked on the hesitancy of Australian courts to adopt a more purposive approach: 'Indeed, when I, an English judge, read

[85] David Solomon, 'The Legislative Record of the Australian Parliament' in JR Nethercote (ed) *Parliament and Bureaucracy: Parliamentary Scrutiny of Administration: Prospects and Problems in the 1980s* (Hale & Iremonger, 1982) 135, 140. See also Anonymous, 'Statutory Guidelines for Interpreting Commonwealth Statutes (Current Topics)' (1981) 55(10) *Australian Law Journal* 711, 711.
[86] Editor, 'Statutory Guidelines for Interpreting Commonwealth Statutes (Current Topics)' (1981) 55(10) *Australian Law Journal (Current Topics)* 711, 711.
[87] (1980) 144 CLR 55.
[88] (1980) 144 CLR 55, 59.
[89] (1980) 144 CLR 55, 60 citing in part the Federal Court decision from which the Commissioner had appealed: (1979) 38 FLR 306, 319–320 (Deane J). The case was specifically mentioned in the parliamentary debates on the Bill for s 15AA. See, eg, Commonwealth, *Parliamentary Debates,* Senate, 28 May 1981, 2311 (Gareth Evans, Shadow Attorney-General).
[90] Sir Anthony Mason has stated that this view of the tax cases is an 'over-simplification' and that the decisions may better be understood as the application of the (then) strong interpretative presumption that ambiguity be resolved in favour of the taxpayer: Chief Justice Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 161.
[91] Barnes, 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law - Part One' (n 83) 155.

some of the decisions of the High Court of Australia, I think they are more English than the English.'[92]

Against this background, the Commonwealth Attorney-General's Department held a symposium on statutory interpretation, attended by representatives from all arms of government, as well as legal academics and practitioners, in March 1981. One of its objectives was to consider whether there were measures that needed to be undertaken 'by way of law reform.'[93]

The symposium was commenced on the premise that 'it cannot be pretended that the principles of statutory interpretation form the most stable, consistent or logically satisfying part of our jurisprudence.'[94] It was asserted that there were still 'strong strands of literalism' remaining in the Australian judiciary[95] and that, unlike the United Kingdom where the common law had developed to a point by the 1980s where a purposive approach enjoyed wide judicial support, it was 'hard to find any authoritative statement on the purposive approach' in Australia or to point to a similar trend in judicial pronouncement.'[96] Varying views about the adequacy of the mischief rule were expressed.[97]

Two months after the symposium, on 27 May 1981, the Attorney-General introduced the Statute Law Revision Bill into the Senate.[98] This bill inserted a new s15AA into the AIA, the wording of which was very similar to the purpose provision suggested in the 1969 UK/Scottish Report.[99]

> (1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly

[92] Lord Scarman, 'Ninth Wilfred Fullagar Memorial Lecture: The Common Law Judge and the Twentieth Century - Happy Marriage or Irretrievable Breakdown' (1980) 7 *Monash University Law Review* 1, 6.
[93] Attorney General's Department, Symposium 1981 (n 59) 1 (Opening of Seminar, Patrick Brazil).
[94] Ibid.
[95] Ibid 18 (Patrick Brazil).
[96] Attorney-General's Department, Symposium 1981 (n 59) 18 (Patrick Brazil). See also Barnes, 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law - Part One' (n 83) 158 who notes that purposive interpretation had become 'fashionable' in England by 1978.
[97] Attorney-General's Department, Symposium 1981 (n 59) 1–8, 16–21.
[98] Commonwealth, *Parliamentary Debates*, Senate, 27 May 1981, 2166 (Peter Durack, Attorney-General).
[99] The Law Commission and the Scottish Law Commission (n 66) App A.

> stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.[100]

In his Second Reading Speech, the Attorney-General Senator Durack said:

> …under our constitutional arrangements it is the function of an independent judiciary to interpret the law and no proposals which we make can or should undermine the freedom that this function requires. Nevertheless the general approach to be adopted to statutory interpretation is something which this Parliament can - and at this stage should - address…
>
> The effect of the provision to be inserted in the Acts Interpretation Act will be to confirm that in interpreting provisions regard is to be had to the object or purpose underlying the Act in question…[101]

Despite the Opposition criticising the Government for limited notice of debate and for the fact that the proposed s15AA was 'quite remarkably well hidden' in the amending Bill,[102] the proposal had bi-partisan support in both Houses. It was regarded as uncontroversial — easily satisfying 'the man on the Bondi train.'[103] Indeed, it was lauded as a 'splendid innovation' and one that the Opposition 'wholeheartedly' applauded.[104] Other States and Territories, at various times over the next decade, followed the Commonwealth and enacted a purpose provision in their respective Interpretation Acts.[105]

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[100] *Statute Law Revision Act 1981* (Cth) s 115, Sch 1. Curiously no mention was made of the March Symposium 1981 in the second reading speech or in the Explanatory Memorandum to the Bill. The Opposition's Press Release (Office of Senator Gareth Evans, 'Interpreting Tax Laws' (Press Release, 28 May 1981) stated that a purpose provision had been suggested by Labor backbencher, Mr Ralph Jacobi (Hawker, SA).

[101] Commonwealth, *Parliamentary Debates*, Senate, 27 May 1981, 2166 (Peter Durack, Attorney-General). See also the Attorney-General's Speech in Reply: Commonwealth, *Parliamentary Debates*, Senate, 28 May 1981, 2314. The shadow Attorney-General Senator Evans made similar comments to the effect that the provision is not a matter of anyone, including the Executive, trying to interfere with how courts adjudicate: Commonwealth, *Parliamentary Debates*, Senate, 28 May 1981, 2313.

[102] Commonwealth, *Parliamentary Debates*, Senate, 28 May 1981, 2309 (Gareth Evans, Shadow Attorney-General).

[103] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 June 1981, 3437 (Mr Jacobi).

[104] Commonwealth, *Parliamentary Debates*, Senate, 28 May 1981, 2310 (Gareth Evans, Shadow Attorney-General). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 3436 (Mr Jacobi).

[105] *Interpretation Ordinance 1967* (ACT) s 11A (inserted by the *Interpretation (Amendment) Ordinance 1982* (ACT), since replaced by *Legislation Act 2001* (ACT) s 139); *Interpretation Act 1987* (NSW) s 33 (as enacted); *Interpretation Act 1978* (NT) s 62A (inserted by the *Interpretation Amendment Act 1998* (NT)); *Acts Interpretation Act 1954* (Qld) s 14A (inserted by the *Acts Interpretation Amendment Act 1991* (Qld)); *Acts Interpretation Act 1915* (SA) s 22 (inserted by *Acts Interpretation Act Amendment Act 1986* (SA), since replaced by *Legislation Interpretation Act 2021* (SA) s 14); *Acts Interpretation Act 1931* (Tas) s 8A (inserted by *Acts*

2.4 Enactment of s15AB: the second stage-extrinsic materials

The enactment of s 15AA in 1981 had maintained the status quo for the law on the use of extrinsic materials. Sub-s (2) of the new s 15AA provided:

> (2) Nothing in sub-section (1) shall be construed as authorizing, in the interpretation of a provision of an Act, the consideration of any matter or document not forming part of the Act for any purpose for which that matter or document could not be considered apart from that sub-section.

However, sub-s (2) was clearly a 'holding provision'.[106] Both the executive and Parliament saw the purpose provision as paving the way for further legislative action permitting access to extrinsic materials, especially parliamentary materials. Justice Basten (as he then was) has suggested that the purpose provision incentivized the legislature to reduce 'the opacity of its output by making available to the courts materials…which might explain why a particular form of words had been adopted.'[107] But, with respect, it is arguable that the executive had planned this next step in legislative reform from the start. This is apparent from the press releases of both the Government and the Opposition for the proposed s 15AA[108] and in the parliamentary debates on s 15AA. In his second reading speech for s 15AA, Attorney-General Senator Durack asserted that 'the time has come' for the matter of extrinsic materials to be 'fully explored.'[109] Other speakers during the debates on both sides of politics agreed, with comments that it was 'crucially important'[110] and 'a matter of urgency.'[111]

By the late 1970s, even High Court judges were noting that the 'limits to the permissible use of material extrinsic to the legislation itself in aid of its interpretation are not clear.'[112]

Interpretation Amendment Act 1992 (Tas)); *Interpretation of Legislation Act 1984* (Vic) (as enacted); *Interpretation Act 1984* (WA) s 18 (as enacted).

[106] Commonwealth, *Parliamentary Debates*, Senate, 30 November 1983, 3030 (Mr Gietzelt, Minister for Veterans' Affairs).

[107] Justice John Basten, 'Legislative Purpose and Statutory Interpretation' in Jeffrey Barnes (ed), *The Coherence of Statutory Interpretation* (Federation Press, 2019) 134, 145–6.

[108] Office of the Attorney-General, 'New Guidelines for the Interpretation of Commonwealth Laws' (Press Release, 35/81, 27 May 1981) 2–3; Office of Senator Gareth Evans, 'Interpreting Tax Laws' (Press Release, 28 May 1981) 2.

[109] Commonwealth, *Parliamentary Debates*, Senate, 27 May 1981, 2167.

[110] Commonwealth, *Parliamentary Debates*, Senate, 28 May 1981, 2312 (Gareth Evans, Shadow Attorney-General).

[111] Commonwealth, *Parliamentary Debates*, House of Representatives, 10 June 1981, 3438 (Mr Jacobi). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 2 June 1981, 2894 (Mr Fife).

[112] *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, 599 (Stephen J).

Although some High Court justices maintained that change in regard to resort to Hansard required parliamentary action,[113] the High Court and other courts were demonstrating a greater acceptance of resort to extrinsic materials, including parliamentary materials, as an interpretative resource in limited circumstances.[114] One commentator noted in 1983 that '[c]ertain Justices of the High Court appear ready to support the idea that the intention of Parliament as stated during debates (particularly in the second reading speeches) should no longer remain shrouded on the other side of the rose garden.'[115]

The Federal Attorney-General soon moved forward. On 14th October 1982, the government tabled in both houses of Parliament a Policy Discussion Paper on extrinsic materials that had been prepared by the Attorney-General's department.[116] At the same time, the government announced a proposal for a second Canberra symposium of 'parliamentarians, eminent judges and other lawyers, as well as other interested groups' to take place in early 1983, for which the paper would form the basis for discussion.[117] Both the Labor Opposition and the Australian Democrats (the largest minor party at the time) welcomed the development.[118]

The second symposium was held on 3rd February 1983 (the '1983 symposium'). The issue of resort to, and use of, extrinsic materials raised many more issues than had a purpose provision; and the debate was 'vigorous and wide-ranging'.[119] Diverse views existed about

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[113] See, eg, *South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd* (1977) 139 CLR 449, 478 (Mason J).
[114] Eg: *Wacando v Commonwealth* (1981) 148 CLR 1, 25–6 (Mason J); *Commissioner of Taxation (Cth) v Whitfords Beach Pty Ltd* (1982) 150 CLR 355, 373–4 (Mason J); *TCN Channel Nine Pty Ltd v Australian Mutual Provident Society* (1982) 62 FLR 366, 379–80 (the Court); *Minnesota Mining and Manufacturing Co v Beiersdorf* (1980) 144 CLR 253, 290–91 (Aickin J, Stephen, Mason and Wilson JJ agreeing). See also Attorney-General's Department, *Extrinsic Aids to Statutory Interpretation* (n 44) 9; Jocelynne A Scutt, 'Federal Policy Discussion Paper on Extrinsic Aids to Statutory Interpretation (Current Topics)' (1983) 57(3) *Australian Law Journal* 129, 130. See also the federal courts: DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (Butterworths, 3rd ed, 1988) 35–36. See also Victorian Parliament Legal & Constitutional Committee (n 44) 105.
[115] Ibid, Scutt, 'Federal Policy Discussion Paper on Extrinsic Aids' 130.
[116] Attorney-General's Department, *Extrinsic Aids to Statutory Interpretation* (Policy Discussion Paper No 285/1982, Attorney-General's Department, October 1982); Commonwealth, *Parliamentary Debates*, Senate, 14 October 1982, 1483–4 (Mr Chaney on behalf of the Attorney-General); Commonwealth, *Parliamentary Debates*, House of Representatives, 14 October 1982, 2037–2038 (Mr Brown, Acting Attorney-General).
[117] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 October 1982, 2039 (Mr Brown, Acting Attorney-General). See also Commonwealth, *Parliamentary Debates*, Senate, 14 October 1982, 1485 (Mr Chaney).
[118] See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 14 October 1982, 2039 (Mr Bowen); Commonwealth, *Parliamentary Debates*, Senate, 14 October 1982, 1485 (Gareth Evans); Commonwealth, *Parliamentary Debates*, Senate, 14 October 1982, 1485–6 (Mr Haines).
[119] Federal Attorney-General, *Extrinsic Aids to Statutory Interpretation* (Department of the Senate Paper No 20006, Ministerial Statement, 30th November 1983) (n 44) 2, tabled in House of Representatives:

numerous matters: whether a distinction should be made between types of materials; whether Hansard should be included at all; if Hansard was included should only the second reading speeches be permitted; whether there should be different rules for different kinds of legislation; the efficacy of a specialised explanatory memorandum to the Bill which Parliament would approve;[120] whether any ambiguity threshold was required for access; if recourse was permitted, the efficacy of the distinction between using the material to identify the mischief but not to assist directly with meaning; and the constitutional validity of a statutory provision directing the courts as to what they should or should not consider.[121] There were also practical concerns raised such as the capacity of courts, especially lower courts, to access permitted materials, concern about the 'ordinary' person being able to rely on statutory wording, and the potential for recourse to extraneous materials to increase litigation costs and unduly burden the profession and the courts.[122]

In summing up at the end of the 1983 symposium, then High Court of Australia Justice Sir Anthony Mason stated:

> The law as it presently stands [on resort to extrinsic materials] is neither clear nor convincing…That there are anomalies in the present law is beyond question…It is generally felt that this doubt and uncertainty should be set at rest by the Parliament or by the High Court, preferably by the Parliament.[123]

Sir Anthony went on to conclude that it was 'generally agreed that cautious use should be made of extrinsic materials and that their potential to assist is restricted to cases of

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Commonwealth, *Parliamentary Debates*, House of Representatives, 1 December 1983, 3171 (Mr Bowen) and in the Senate: Commonwealth, *Parliamentary Debates*, Senate, 30 November 1983, 3027–8 (Mr Gietzelt) ('Attorney-General, Ministerial Statement').See also Justice JM Macrossan, 'Judicial Interpretation' (1984) 58(10) *Australian Law Journal* 547, 549 who said there was 'thorough discussion of the various proposals'.

[120] It had not yet become common practice for an explanatory memoranda to accompany a bill. The policy paper, *Extrinsic Aids to Statutory Interpretation* (n 44) ch IV had suggested this idea. It initially had the support of the then Attorney-General but was ultimately abandoned.

[121] Interestingly, the question of whether use of Hansard by the courts violated parliamentary privilege was not a concern, unlike in the United Kingdom where it was a significant issue raised in the seminal House of Lords decision of use of parliamentary material, *Pepper v Hart* [1993] AC 593. A few years later, parliamentary proceedings were clearly made an exception from parliamentary privilege when used for interpretation of an Act: *Parliamentary Privileges Act 1987* (Cth) s 16(5).

[122] See, generally, the transcript of the symposium proceedings: Symposium, Attorney-General's Department, *Symposium on Statutory Interpretation* (5 February 1983) ('Attorney-General's Department, Symposium 1983').

[123] Ibid 81–82 (Sir Anthony Mason). See also Victorian Parliament Legal & Constitutional Committee (n 44) which was considering, among other things, a statutory provision on extrinsic materials for the Victorian interpretation Act. It describes the law on extrinsic materials as a 'judicial jungle': 44. See also 79.

ambiguity'.[124] However, while there was broad agreement about liberating the courts with respect to those materials by legislative reform, the precise scope of that reform remained unresolved.

The 1983 symposium had been held in the middle of a Federal election campaign. Just over a month later, in March 1983, there was a change of government. The Coalition Government that had proposed s 15AA and propelled the initiative on extrinsic materials was out, and a new Labor Government came in. But the change of government did little to dispel the enthusiasm of the executive on both sides of politics for legislative reform on recourse to extrinsic materials. The Labor Government immediately took the reins of the initiative that the Coalition had instigated. Indeed, widening the range of extrinsic aids for statutory interpretation had been a proposal forming part of the Labor party's Law and Justice Policy launched by the then Shadow Attorney-General Senator Gareth Evans shortly before the federal election.[125] Later in 1983, the new Labor government tabled a report in Parliament of the 1983 symposium, together with a statement by now Attorney-General Senator Evans announcing his intention to examine legislative proposals.[126]

In March of the following year, the Labor Government introduced a Bill to amend the AIA. The Bill included a new s15AB governing recourse to extrinsic materials.[127] At the commencement of his second reading speech, Attorney-General Senator Evans stated that:

> The purpose of this bill is to facilitate the giving of effect to the intentions of the Parliament when Acts of Parliament fall to be interpreted.'[128]

It is perhaps remarkable to think so now, but at the time of its enactment the new s 15AB was considered 'ground-breaking'.[129] Indeed, Cabinet materials reveal that one of the concerns of

[124] Attorney-General's Department, Symposium 1983 (n 122) 82 (Sir Anthony Mason). See also Macrossan (n 119) 549 who states that a vote taken among symposium delegates favoured 'by a vast majority' that 'judges should be free to have regard to any material which they might think relevant to their task of interpretation' and a majority also thought a statutory provision was 'desirable'.
[125] Australian Labor Party, 'Law and Justice Policy' (launched by Senator Gareth Evans, 23 February 1983) [3.5].
[126] Attorney-General, Ministerial Statement (n 119) 3.
[127] The Acts Interpretation Amendment Bill 1984 was introduced into the Senate on 8 March 1984: Commonwealth, *Parliamentary Debates*, Senate, 8 March 1984, 582 (Gareth Evans, Attorney-General). Section 15AB was inserted by cl 7.
[128] Commonwealth, *Parliamentary Debates*, Senate, 8 March 1984, 582.
[129] Justice Stephen Gageler, 'Legislative Intention' (n 37) 6.

the government about enacting the provision was that it would be criticised 'as being too radical'.[130] Certainly the new provision generated considerably more debate in Parliament than had s15AA, reflecting many of the issues raised at the 1983 symposium. But s 15AB was ultimately enacted with bipartisan support and without amendment in May 1984.[131]

The new s 15AB provided, in abbreviated form:[132]

> (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> (a) to confirm that the meaning of the provision is the ordinary meaning…….; or
>
> (b) to determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.
>
> (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes [*list of various materials provided, including second reading speeches and any official record of debates in Parliament*].
>
> (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:

[130] Cabinet Submission 677, *Acts Interpretation Bill* (6 March 1984) (examined in National Archives of Australia, Series No A13977, Cabinet Submission 677 - Acts Interpretation Amendment Bill, 6 March 1984 (Gareth Evans, Attorney-General) Item Barcode 31424664) 2. It was also described as 'revolutionising' (Commonwealth, *Parliamentary Debates*, Senate, 30 March 1984, 955 (Peter Durack)) and as a 'novelty' (Editor, 'Comments: Amending Australia's Interpretation Act' (1984) 5(1) *Statute Law Review* 184, 185). Examination of correspondence in the National Archives of Australia revealed concerns with the Treasury Department about the provision and lamenting the lack of consultation: National Archives of Australia, Series No A7073, J14/33, Acts Interpretation Amendment Bill 1984 Section 15AB 1984, Item Barcode 22158284.
[131] The date of Royal Assent of the Acts Interpretation Amendment Bill 1984 was 15 May 1984.
[132] The full text of s15AB is set out at in the Appendix at the end of this chapter.

> (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
> (b) the need to avoid prolonging legal or other proceedings without compensating advantage.[133]

Within the next decade, all states and territories except South Australia subsequently enacted a provision on recourse to extrinsic materials in their respective Interpretation Acts.[134] Most provisions as originally enacted mirrored or were substantially similar to s 15AB. The exception was Victoria, which enacted a simplified provision (discussed in next section [2.5]). South Australia continued to rely solely on the common law in this area until 2021.[135]

2.5 Behind the Statutory Reforms-the Judiciary's need for 'guidance'

The approach that courts take to the construction of statutes is not 'a self-evident juristic truth'.[136] At its most fundamental, when determining the legislative intent of a statute there is a choice to be made between an approach that focuses on 'what Parliament has said' and one that focuses on 'what Parliament meant to say'.[137] In the twentieth century, the judiciary had focussed on the former.

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[133] This enacted provision did not reflect the draft proposal made in the symposium (see Attorney-General's Department, Symposium 1983 (n 122) 76) and the exact derivation of the provision is not clear. It is very similar to Art 32 of the Vienna Convention on the Law of Treaties 1969. One commentator has linked the connection to the role of Patrick Brazil who led the Australian delegation to the Vienna Conference and was Secretary of the Commonwealth Attorney General's Department at the time of the enactment of s 15AB: KJ Keith, *Interpreting Treaties, Statutes and Contracts* (Occasional Paper No 19, New Zealand Centre for Public Law, Wellington, 2009) 37 fn 102. See also Pearce and Geddes, *Statutory Interpretation in Australia* (1988) (n 114) 45.
[134] *Interpretation Ordinance 1967* (ACT) s 11B, inserted by the *Interpretation (Amendment) Ordinance 1985* (ACT) (since replaced by *Legislation Act 2001* (ACT) s 141); *Interpretation Act 1987* (NSW) s 34, as enacted; *Acts Interpretation Act 1954* (Qld) s 14B inserted by the *Acts Interpretation Amendment Act 1991* (Qld); *Interpretation Act 1978* (NT) s 62B, inserted by the *Interpretation Amendment Act 1998* (NT); *Acts Interpretation Act 1931* (Tas) s 8B inserted by *Acts Interpretation Amendment Act* 1992 (Tas); *Interpretation of Legislation Act 1984* (Vic) s 35(b), as enacted; *Interpretation Act 1984* (WA) s 19, as enacted.
[135] In 2021 South Australia enacted a provision on extrinsic materials mirroring s 15AB when it repealed the *Acts Interpretation Act 1915* (SA) and enacted the *Legislation Interpretation Act 2021* (SA). A Bill to amend the *Acts Interpretation Act 1915* (SA). A Bill for a statutory provision on extrinsic materials (modelled on the Victorian provision) had been introduced in 1984 in the South Australian Parliament. However, although it passed through many stages of enactment, it eventually lapsed. For a brief explanation of the events that led to the lapse in SA, see James Crawford and Susan Graebner, 'The Role of Parliament in Law-Making: The Legal View' (1986) 1 *Legislative Studies* 24, 29.
[136] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 645 (Lord Simon).
[137] Ibid.

But the Commonwealth statutory reforms of the 1980s appeared to be an attempt to walk a tightrope between the two approaches — attempting to maintain the importance of the statutory text, what Parliament 'said', but at the same time permitting recourse to materials that were evidence of what Parliament (and the executive) meant to say. The overall objective of this balancing act was to create a framework for better communication by Parliament to the judiciary about the objective or purpose of the statute being construed, which would be reflective of government policy. Embedded also in those enactments was a parliamentary reminder about the need for judicial deference to the legislature. It is, after all, the judicial function to interpret the statute in accordance with *Parliament's* intent.

The enactment of s 15AA had a clear objective. In light of the increasing importance of statutes and the dissatisfaction with the apparently formalistic judicial approach to their interpretation, the executive government and Parliament proposed a legislative requirement to send a clear instruction to the judiciary. That message was that the purpose or object of a statutory provision must be an integral consideration in the interpretative task. In the eyes of the executive and Parliament, mandatory consideration of purpose would prevent the undue focus on the text that the courts had apparently adopted.

This approach was based on the premise that a statute is a policy tool that has a significant role in the system of government. There was a strong bi-partisan sentiment that the courts, most notably the High Court, 'need more guidance'[138] to determine what Parliament intended, and executive statements about the purpose or policy of a statute was if not the key then certainly a strong helping hand. In comparison to the 'literalist approach'[139] of the High Court in recent years, s 15AA, it was reasoned, would improve the probability that 'Parliament's intention would prevail.'[140]

Section 15AA also had a second and complementary purpose — to legitimise legislative reform to open up the range of materials that the courts could refer to as interpretative aids,

[138] Commonwealth, *Parliamentary Debates*, Senate, 28 May 1981 (Senator Durack, Attorney-General) 2315. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 10 June 1981, 3436 (Mr Jacobi).
[139] Commonwealth, *Parliamentary Debates*, Senate, 28 May 1981, 2311 (Gareth Evans, Shadow Attorney-General).
[140] Commonwealth, *Parliamentary Debates*, Senate, 28 May 1981, 2313 (Gareth Evans, Shadow Attorney-General). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 10 June 1981, 3436 (Mr Jacobi). Though there were some concerns about the limitation in the drafting: Commonwealth, *Parliamentary Debates*, House of Representatives, 10 June 1981, 3439 (Mr Duffy). This was an issue later identified by the High Court in *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249, 262 (Dawson, Toohey, Gaudron JJ). Discussed further in Chapter Three.

especially parliamentary material. The mischief rule had been too narrow, not only in terms of what it sought to identify (a deficiency in the existing law) and by being shackled to a finding of ambiguity,[141] but because it gave no indication as to how the 'mischief' was to be found.[142] To assist in finding the purpose, judges, it was reasoned, should be permitted to consider a wider range of extrinsic materials forming part of the statute's history, especially parliamentary materials such as the second reading speech. This link between purpose and extrinsic materials was made plain and open, by both sides of politics, right from the time of the first symposium in 1981 until s 15AB was enacted in 1984.[143] The objective was for the judiciary to be able to see what Parliament meant in order to maximize the judiciary's fidelity, or deference, to parliamentary 'intent'. It is therefore hard to disagree with the comment that statutory interpretation scholar Pearce made a few years after the reforms, that the new provisions were really about encouraging the courts 'to take into account matters that the Executive saw as relevant to the interpretation of the legislation.'[144] In other words, the executive, and Parliament, were directing the courts to material that they viewed as revelatory of the purpose of the statute, or any other information to assist with ascertaining parliamentary intent. Access to parliamentary materials was a way to encourage, or enable, judicial deference to what Parliament (or the executive who proposed the Bill) wanted. Perhaps for this reason, one attendee at the 1983 symposium noted that that 'members of Parliament were among the most enthusiastic supporters' of s15AB.[145]

A legislative direction to courts to have regard to the purpose of a statute is ostensibly straight forward. The opening up of the range of extrinsic materials that a court can consider is 'more problematic'[146] when it comes to determining the precise scope and requirements of the law that govern that access. As Finn has noted, there is 'no fixed formula' to 'determine the point

[141] See [2.2] - *Heydon's Case* (1584) 3 Co Rep 7a; 76 ER 637.
[142] As acknowledged by the Law Commission and the Scottish Law Commission (n 66). See above n 72.
[143] See, eg, Commonwealth, *Parliamentary Debates*, Senate, 27 May 1981, 2166–7 (Peter Durack, Attorney-General); Attorney-General (Cth), *New Guidelines for the Interpretation of Commonwealth Laws* (Press Release, 35/81, 27 May 1981); Commonwealth, *Parliamentary Debates*, Senate, 8 March 1984, 583 (Gareth Evans, Attorney-General).
[144] Dennis Pearce, 'Executive Versus Judiciary' (1991) 2 *Public Law Review* 179, 186.
[145] Patrick Brazil, 'Reform of Statutory Interpretation - the Australian Experience on Use of Extrinsic Materials: With a Postscript on Simpler Drafting' in *New Zealand Law Commission Preliminary Paper No 8* (1988), 161. Mr Brazil was in attendance at the 1983 symposium as then Deputy Secretary of the Attorney-General's Department.
[146] Scutt, 'Statutory Interpretation and Recourse to Extrinsic Aids' (n 44) 484.

at which judicial deference to the legislature should occur'.[147] For s 15AB, there were three main themes surrounding its enactment, some principled, some practical.

First, Parliament was careful not to *require* the courts to look at parliamentary and other materials. It is evident from the second reading speeches and debates for s 15AB (and s 15AA) that the executive government and opposition were cognisant of not proposing legislative reforms that might be regarded as undermining the independence of the judiciary and its judicial function to interpret and therefore be constitutionally questionable.[148] Consequently, the terms of s 15AB are discretionary, signalled by the word 'may' in the chapeau in s 15AB(1). Instead, the debates on s 15AB reveal a hope and expectation that Parliament would be able to rely on the 'good sense' of judges to use the materials appropriately, emphasising the need for 'cooperation' between the judiciary and Parliament for the provision to work.[149]

Secondly, the provision was drafted to be expansive and non-exhaustive regarding the materials that could be referred to.[150] This broadened the potential for courts to find probative evidence of what Parliament intended. But at the same time, there was a recognition that what Parliament had actually said (ie the statutory text) had ultimate authority. So while the section enlarged the potential range of material to 'any material…capable of assisting in the ascertainment of' meaning, the circumstances in which the material could be considered were constrained.[151] One of three 'threshold' hurdles had to be met[152] — reference to confirm the ordinary meaning,[153] to determine the meaning *if* the provision is 'ambiguous or obscure,'[154] or to determine the meaning *if* the results of an ordinary meaning is 'manifestly absurd or is unreasonable.'[155]

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[147] Finn (n 65) 15.
[148] See, eg, Commonwealth, *Parliamentary Debates*, Senate, 8 March 1984, 583 (Gareth Evans, Attorney-General). This issue had been raised at the Attorney-General's Department, Symposium 1983 (n 122) 76 (Gerald Murphy). See also Commonwealth, *Parliamentary Debates*, Senate, 28 May 1981, 2314 (Peter Durack, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 28 May 1981, 2313 (Gareth Evans, Shadow Attorney-General).
[149] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 3 April 1984, 1288 (Lionel Bowen) referring to the Attorney-General, Ministerial Statement (n 119).
[150] Explanatory Memorandum, Acts Interpretation Amendment Bill 1984, 3.
[151] Jeffrey Barnes, 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law - Part Two' (1995) 23 *Federal Law Review* 77, 96 notes this contradictory policy of encouraging purpose but also restricting it.
[152] Commonwealth, *Parliamentary Debates*, Senate, 30 March 1984, 962–3 (Gareth Evans, Attorney-General).
[153] *Acts Interpretation Act 1901* (Cth) s15AB(1)(a).
[154] *Acts Interpretation Act 1901* (Cth) s15AB(1)(b)(i) (emphasis added).
[155] *Acts Interpretation Act 1901* (Cth) s15AB(1)(b)(ii) (emphasis added).

Third, there was the practical (and rule of law) concern that 'ordinary' readers, such as the public and administrators, would still be able to rely on the 'ordinary' meaning of statutory text. This needed to be balanced against the desire of the executive for the judiciary to be able to identify the 'real' intent of that text by reference to the parliamentary record. These two interests are arguably inconsistent.[156] But s 15AB(3) was an attempt to achieve an appropriate balance by directing that 'the desirability of persons being able to rely on the ordinary meaning' be considered when determining the weight to be given to extrinsic material.[157]

That s 15AB was an attempt at a compromise of these competing interests is reflected in the Attorney-General's second reading speech:

> Judges are neither required to nor prohibited from looking at any materials. On the other hand, the Parliament in section 15AB would be giving a clear lead as to the way in which extrinsic materials can best be used, without imposing undue burdens on the users of legislation or on the legal system generally.[158]

It is interesting to compare s 15AB to the equivalent provision enacted by the Victorian Parliament at the same time. Although the Commonwealth provision is typically credited as the pioneering provision, the comparable Victorian provision, s 35(b) of the *Interpretation of Legislation Act 1984* (Vic), was enacted almost contemporaneously with s 15AB.[159] While s 35(a) of the Victorian Act reflected an almost identical purpose provision to s 15AA as enacted by the Commonwealth in 1981, the Victorian provision on extrinsic materials, s 35(b), simply said (and still says) that the courts may refer to 'any matter or document that is relevant' (with a short, non-exhaustive, list of examples).[160] The 1983 Victorian parliamentary

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[156] Montrose (n 63) 146–147; SJ Gibb, 'Parliamentary Materials as Extrinsic Aids to Statutory Interpretation' (1984) 5(2) *Statute Law Review* 29, 35.

[157] See, eg, Commonwealth, *Parliamentary Debates*, Senate, 8 March 1984, 583 (Gareth Evans, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 30 March 1984, 962–3 (Gareth Evans, Attorney-General); Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 1984, 1287–1288 (Lionel Bowen). Post-enactment of s 15AB, ss 15AB(3) was also seen as an important provision: Francis Bennion, 'Hansard Help or Hindrance? A Draftsman's View of *Pepper v. Hart*' (1993) 14 *Statute Law Review* 149, 156; Editor, 'Amending Australia's Interpretation Act - Comments' (1984) 5(1) *Statute Law Review* 184, 187.

[158] Commonwealth, *Parliamentary Debates*, Senate, 8 March 1984, 583 (Gareth Evans).

[159] The Interpretation of Legislation Bill 1984 (Vic), which included s 35(b), was introduced into the Victorian Legislative Council on 28 February 1984. The Acts Interpretation Amendment Bill 1984 (Cth), inserting s 15AB, was introduced into the Senate on 8 March 1984. The *Acts Interpretation Amendment Act 1984* (Cth) received Royal Assent on 15 May 1984. The *Interpretation of Legislation Act 1984* (Vic) was assented to on 22 May 1984.

[160] Interestingly, the same words 'matter or document' were initially included in an early draft of s15AB, but were deleted and the arguably narrower 'material' substituted during drafting: National Archives of Australia, Acts Interpretation Amendment, Series No A2863, 1984/27, Barcode 32992352.

committee report that had reviewed the matter at length before enactment had considered and rejected any constraints on recourse, including an ambiguity threshold.[161]

Finally, the possibility of identifying factors relevant to evaluating extrinsic materials (once it was established that recourse was permissible) had been raised in the Policy Discussion Paper and the 1983 Symposium.[162] But ultimately s 15AB(3) contained the only reference to the issue of weight. The Victorian parliamentary committee took an even broader view in 1983. Section 35(b) does not have any equivalent provision to s 15AB(3) about weight.[163] Having opened the door wide to the extrinsic world, the Victorian Parliament surrendered responsibility of evaluation to the judiciary. The Victorian parliamentary committee explained:

> It is the job of the judge or magistrate to determine the relevance of all material coming before a court, and once relevance has been determined, to decide what weight might be given to it. There is no reason for judges to be less able to assess the relevance and weight of statements made in Parliament than they are able to assess relevance and weight of other extrinsic materials.[164]

Given subsequent common law developments, the Victorian provision is now more consistent with contemporary law.

2.6 Development of the Common Law: the third stage-judiciary strikes back

It might be expected that legislative pronouncements with respect to two key areas of statutory interpretation would have been the definitive and (subject to further legislative amendment) final legal position. After all, the doctrine of legislative supremacy that underpins our legal system dictates that '[l]egislation of a parliament, acting within its constitutional powers, has an authority that displaces the common law to the extent of the statutory provisions.'[165] If Parliament has spoken about a matter, it is a curious situation for

[161] Victorian Parliament Legal & Constitutional Committee (n 44) 118–120.
[162] Commonwealth Attorney General's Department, 'Extrinsic Aids to Statutory Interpretation' (n 44) 20–1; Attorney-General's Department, Symposium 1983 (n 122) 29.
[163] An equivalent provision to s 15AB(3) had been included by all those jurisdictions that enacted an extrinsic material provision except the Northern Territory.
[164] Victorian Parliament Legal & Constitutional Committee (n 44) 91. See also 65.
[165] *Neindorf v Junkovic* (2005) 80 ALJR 341, 350–1 [42] (Kirby J).

the courts to continue to develop that law in an independent and, in the case of s 15AB, divergent manner. Nevertheless, that is what occurred.

(a) Section 15AA and the common law

According to a well-regarded practitioner journal at the time, there was a 'noticeable lack of enthusiasm by way of reaction to the new s15AA'.[166] This may in part have been due to an initial perception that s 15AA did not mark a significant departure from the mischief rule.[167] With respect, that view 'would be mistaken.'[168] Section s 15AA was a statutory *requirement,* with purpose to be considered even if the words were clear —unlike the mischief rule.[169] Second, s 15AA, and again unlike the mischief rule, did not impose any threshold of ambiguity before purpose could be taken into account. Dawson J made both points clear in *Mills v Meeking,*[170] a 1990 High Court decision. When considering the almost identical purpose provision in the Victorian Interpretation Act,[171] Dawson J expressly stated that the 'statutory *injunction*' or 'requirement' of s15AA is 'more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule' and that it 'needed no ambiguity before a court should consider the purposes of an Act'.[172]

In addition to the points made by Dawson J, there was another difference between s 15AA and the previous law which utilised the concept of 'mischief'. As noted earlier in this chapter, the concept of mischief is a narrow one, referring to a 'defect' in the pre-existing law which is sought to be remedied.[173] Not every statute will address a 'mischief'. Purpose, as will be

[166] Editor, 'Statutory Guidelines for Interpreting Commonwealth Statutes' (n 86) 712.
[167] See, eg: Justice Bryson, 'Statutory Interpretation: An Australian Judicial Perspective' (1992) 13 *Statute Law Review* 187, 202.
[168] RS Geddes, 'Purpose and Context in Statutory Interpretation' (2005) 2 *University of New England Law Journal* 5, 10.
[169] Pearce and Geddes, *Statutory Interpretation in Australia* (1988) (n 114) 30. See also Justice Bryson (n 167) 201; Patrick Brazil, 'Reform of Statutory Interpretation - the Australian Experience of Use of Extrinsic Materials: With a Postscript on Simpler Drafting' (1988) 62 *Australian Law Journal* 503, 505; Editor, 'Statutory Guidelines for Interpreting Commonwealth Statutes' (n 86) 712. Cf Barnes 'Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law - Part One' (n 83) 162–3 for some of the more permissive views of the purpose provision that existed in the wake of its enactment.
[170] (1990) 169 CLR 214.
[171] *Interpretation of Legislation Act 1984* (Vic) s 35(a).
[172] *Mills v Meeking* (1990) 169 CLR 214, 235. See also 222 (Mason CJ and Toohey J) who refer to what s 35(a) 'requires'. That it was a statutory requirement had been made clear by another dissenting judge in an earlier decision: *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 423 (McHugh JA).
[173] *R v A2* (2019) 269 CLR 507, 521 [33] (Kiefel CJ and Keane J).

discussed further in Chapter Three, refers more broadly to what the statute seeks to achieve, which may or may not be related to a mischief.[174]

The initial lack of enthusiasm for s 15AA may have been attributable to indications, prior to the enactment of s 15AA, that the High Court had started to place greater emphasis on considering the purpose of a statute independently of anticipated legislative change. The joint judgment of Mason and Wilson JJ in the 1981 High Court decision of *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Commonwealth),*[175] handed down just a week before s 15AA was enacted,[176] is often cited as evidence of a 'shift in mood and emphasis' of the High Court, away from a literal approach and towards an 'openness to discerning policy.'[177] In that judgment, Mason and Wilson JJ observed that in the past some rules of interpretation had 'been applied too rigidly'.[178] They then went on to say that the propriety of departing from the literal rule should extend to:

> …any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, *including the policy* which may be discerned from those provisions.[179]

More broadly, Justice Leeming, writing extra-judicially, suggests that the judgment heralded a change in approach to statutory interpretation to 'one which involves evaluative choices' rather than formulaic rules, because it recognized 'how language (even legal language) works'.[180]

The 1990 High Court decision of *Bropho v Western Australia* was another key development.[181] The Court was required to construe Western Australian legislation. No reference was made to s 18, the purpose provision of the *Interpretation Act 1984* (WA) and

[174] Ibid. See also Bray (n 31) 997–999.
[175] (1981) 147 CLR 297.
[176] The Statute Law Revision Bill 1981 received Royal Assent on 12 June 1981. The decision of *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Commonwealth)* (1981) 147 CLR 297 was handed down on 5 June 1981.
[177] Justice Bryson (n 167) 194. See also Geddes (n 168) 15–16; Justice Mark Leeming, 'The Modern Approach to Statutory Construction' in Barbara McDonald, Ben Chen, and Jeffrey Gordon (ed), *Dynamic and Principled: The Influence of Sir Anthony Mason* (Federation Press, 2022) 45, 55 who goes further and describes the joint judgment of Mason and Wilson JJ as 'revolutionary'.
[178] *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Commonwealth)* (1981) 147 CLR 297, 320.
[179] *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Commonwealth*, 321 (emphasis added).
[180] Justice Mark Leeming, (n 177) 56.
[181] (1990) 171 CLR 1.

almost identical to s 15AA. Instead, in a unanimous judgment, the Court observed that legislative intent:

> must, of course, be found in the provisions of the statute — including its subject matter and disclosed *purpose and policy* — when construed in a context which includes permissible extrinsic aids.[182]

The obligation to consider purpose at common law was put beyond doubt in the iconic 1998 High Court decision of *Project Blue Sky Inc v Australian Broadcasting Authority* (‘*Project Blue Sky*’).[183] In that case, the Court was required to construe Commonwealth legislation. Again, no reference was made to s 15AA. Instead, the Court observed that the purpose of a statute may be one of the considerations that ‘require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning’.[184] As will be further discussed in chapter 3, Interpretation Act provisions about purpose are now regarded as a ‘statutory reflection of a general systemic principle’ that is well established at common law.[185]

(b) Section 15AB and the common law

Section 15AB was initially given a ‘cautious reception.’[186] This may have been attributable in part to a residual reluctance of courts to refer to extrinsic material, especially parliamentary materials.[187] It may also have been due to the nature of the section. Although s 15AB was enacted to work with s 15AA, it also constrained it.[188] The section ‘has its limits.’[189] As noted, there are three alternative, yet specific, circumstances in which a court may refer to extrinsic materials.

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[182] *Bropho v Western Australia* (1990) 171 CLR 1, 21–22 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (emphasis added) citing in part *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 423 (McHugh J). Though at 20 the Court did refer to s 19 of the *Interpretation Act 1984* (WA), the s 15AB equivalent.
[183] (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).
[184] (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (emphasis added).
[185] *Thiess v Collector of Customs* (2014) 250 CLR 664, 672 [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ)).
[186] Justice Bryson (n 167) 202.
[187] Crawford and Graebner (n 134) 28. Eg: *Catlow v Accident Compensation Commission* (1989) 167 CLR 543, 549–50 (Brennan and Gaudron JJ) where the Court considered Victorian legislation and the ‘extremely broad’ s 35(b) of the *Interpretation of Legislation Act 1984* (Vic), which does not have restrictions like s 15AB. Still the joint judgment asserted that if the meaning of the text was plain then extrinsic materials were not of assistance.
[188] Barnes, ‘Statutory Interpretation, Law Reform and Sampford’s Theory of the Disorder of Law - Part Two’ (n 151) 95.
[189] *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112 (McHugh J).

The three instances, contained in sub-ss (1)(a), (1)(b)(i), and (b)(ii), are not immediately straightforward and involve some technicality. The two alternative limbs of sub-s (1)(b)(i) and (ii) contain some familiar thresholds that have to be met before recourse is permitted — ambiguity or obscurity ((b)(i)) and the ordinary meaning having a manifestly absurd or unreasonable result, respectively. The drafting suggests that if the text is clear on its face (i.e. without resort to extrinsic materials) or the ordinary meaning does not lead to a manifestly unreasonable or absurd result, then neither sub s (1)(b)(i) or (ii) permit use of extrinsic materials.[190] Sub-section (1)(a) has no such gateway, but only allows use of material to *confirm* the ordinary meaning.[191] In 1988, Dennis Pearce and RS Geddes explained that this meant that:

> …if the provision under consideration was clear on its face, extrinsic materials may *only* be used to confirm the literal meaning…they cannot alter the interpretation which the court, without reference to those materials, would place upon the provision…[192]

A further difficulty is that the provision leaves open questions about the role of purpose, now an integral consideration under s 15AA.[193] Sub-sections (1)(a) and (1)(b)(ii) suggest that the purpose must be determined from the statute itself and before the sub-section can be used to refer to an extrinsic source. The third limb, sub-section (1)(b)(i) and its gateway of ambiguity or obscurity, gives no clear direction as to how purpose is to be incorporated in their application.

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[190] See, eg, *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416 where the Court refused to look at a second reading speech to depart from the clear meaning as there was no ambiguity, and *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112 (McHugh J) who refused to rely on s 15AB to refer to various sources of extrinsic materials the literal meaning of the section being construed 'is neither ambiguous nor obscure'. Although not expressly stated, the implication of the majority judgment was similar as they relied on the common law: 99–100 (Toohey, Gaudron and Gummow JJ)
Examples where ambiguity was relied on: *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351; *Re Bolton; Ex Parte Douglas Beane* (1987)162 CLR 514; *Coco v R* (1994) 179 CLR 427 (also relying on unreasonableness). See also Brazil, 'Reform of Statutory Interpretation' (n 169) 505–8.

[191] See, eg, *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 where the second reading speech and Explanatory Memorandum were used to confirm the meaning.

[192] Pearce and Geddes, *Statutory Interpretation in Australia* (1988) (n 114) 47. Bryson queries this construction in Justice Bryson (n 167) 202. Cf Hugh Roberts, 'Mr Justice John Bryson on Statutory Interpretation: A Comment' (1992) 13(3) *Statute Law Review* 209. 214-215 who opined that it did mean that the material was to be disregarded.

[193] DC Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 101–2; Roberts (n 192) 203.

Consequently, despite some early commentary that the provision was a balanced approach to the use of extrinsic materials,[194] other views were less sanguine. One scholar went so far to say that the section, instead of clarifying the position on extrinsic materials, 'merely succeeded in compounding the previous state of muddle.'[195] Another described s 15AB as being 'devised with a view to pleasing everybody, or if not everybody, then many people, and with a view to sounding reasonable, but any clear underlying idea which it expresses is hard to find.'[196]

It was against this background that the common law on extrinsic matters continued to develop. The notion of context was key to this development. As seen in 2.2, where the language was ambiguous, consideration of the whole statute and the 'background' of the statute had been acceptable at common law prior to the statutory reforms. In 1957, in *Attorney General v Prince Ernest Augustus of Hanover,* Viscount Simonds said:

> …words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context….[197]

Viscount Simonds' recognition of the realities of linguistic understanding extended beyond the intrinsic context of the Act, though not as far as most extrinsic materials. His Lordship had gone on to say:

> … and I use "context" in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia*, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy.[198]

It was these words that were cited, and an expansion of the concept they embodied foreshadowed, in the dissenting judgment of Mason J in the 1987 High Court decision of *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*.[199] Partly influenced by the 'shift'

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[194] Hong Kong Law Reform Commission of Hong Kong, *Report on Extrinsic Materials as an Aid to Statutory Interpretation* (Report, March 1997) 153; Editor 'Amending Australia's Interpretation Act – Comments' (1984) 5(1) *Statute Law Review* 184, 187; Justice JM Macrossan (n 119) 566.
[195] Donald Gifford, *Statutory Interpretation* (Law Book Company Limited, 1990) 129.
[196] Justice Bryson (n 167) 203.
[197] [1957] AC 436, 461. See also *Black-Clawson Ltd v Papierwerke Waldhof-Aschaffenburg* AG [1975] AC 591, 613 (Lord Reid).
[198] [1957] AC 436, 461.
[199] (1985) 157 CLR 309.

to purpose noted in *Cooper Brookes*, but relying on older UK authority, [200] his Honour stated an 'innovative'[201] approach to construction which insisted that 'context' be considered at the start of the interpretive process, not only when ambiguity arose, and included not only intrinsic context (the four corners of the Act) but also the existing state of the law, other statutes and the 'mischief.'[202]

In 1997, what is now referred to as the 'modern' common law approach to interpretation, with 'context' having a central role, emerged. In that year, the High Court handed down the decision of *CIC Insurance Ltd v Bankstown Football Club Ltd* ('*CIC Insurance*').[203] In the course of interpreting Commonwealth legislation, the majority judgment of Brennan CJ, Dawson, Toohey and Gummow JJ stated (in part citing Mason J in *K&S Lake City Freighters Pty Ltd*):

> It is well settled that at common law, *apart from any reliance upon s15AB* of the *Acts Interpretation Act 1901* (Cth), the court may have regard to reports of the law reform bodies to ascertain the mischief which a statute is intended to cure. *Moreover, the modern approach* to statutory interpretation (a) insists that the *context be considered in the first instance*, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" *in its widest sense* to include *such things as* the existing state of the law and *the mischief* which, *by legitimate means such as* those just mentioned, one may discern the statute was intended to remedy.[204]

Later in the same year, several High Court judges relied on the principles enunciated in *CIC Insurance* to refer to an explanatory memorandum, as well as law reform commission materials.[205] Two years later, a unanimous High Court judgment referred to parliamentary debates.[206]

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[200] Citing English cases *Prince Ernest Augustus of Hanover* [1957] AC, 461 and *Re Bidie* [1948] 2 All ER 995, 998.
[201] Geddes (n 168) 19.
[202] *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315.
[203] (1997) 187 CLR 384.
[204] (1997) 187 CLR 384, 408 (citations omitted, emphasis added).
[205] *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 99–102 (Toohey, Gaudron and Gummow JJ). See also 112 (McHugh J).
[206] *Attorney-General (Cth) v Oates* (1999) 198 CLR 162, 175–6 [28] – [30] citing both s 15AB and the common law.

Consequently, both context and purpose were now key considerations in statutory interpretation at common law. This was confirmed the year following *CIC Insurance*, in the joint judgment in *Project Blue Sky* (which was noted earlier in relation to the common law principle of purpose) which stated in the now well-known passage:

> …the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The *context of the words*, the consequences of a literal or grammatical construction, *the purpose of the statute* or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.[207]

There are a number of aspects to the combined effect of the statements in *CIC Insurance*, and the impact of *Project Blue Sky*, that are important with respect to the common law on extrinsic materials and the impact on the operation of s 15AB and its equivalents. First, the statements affirm that the common law avenue to extrinsic materials exists *independently* from s 15AB ('apart from any reliance upon s 15AB') and so is not diminished or impacted by that provision or its equivalent provisions in other jurisdictions. That independence was reaffirmed in another High Court decision on Commonwealth legislation shortly after *CIC Insurance*.[208]

Secondly, the statement affirms Mason J's assertion in *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* that consideration of context is not dependent upon any ambiguity or other threshold. It must be considered from the start of the interpretative process. That proposition recognized that context could cause words to 'wear a very different appearance.'[209] This principle is quite different to the constraining thresholds of s 15AB. Third, the reference to context in its 'widest sense' makes clear that it encompasses extrinsic matters, which includes extrinsic materials. Context, the majority stated, includes the existing law and the mischief the statute was intended to remedy. That mischief may be discovered by

[207] (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (emphasis added; footnotes omitted). J Spigelman AC, 'The Intolerable Wrestle: Developments in Statutory Interpretation' (2010) 84 *Australian Law Journal* 822, 824 refers to this as the judgment that brought 'context' and 'purpose' together.
[208] *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 99, 100 fn 23 (Toohey, Gaudron and Gummow JJ) 112 (McHugh J).
[209] (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

'legitimate means', one of such means being a law reform body report. That 'legitimate means' could include other materials was borne out later in the same year. Several High Court judges relied on the principles enunciated in *CIC Insurance* to refer to an explanatory memorandum, as well as law reform commission materials.[210] Two years later, a unanimous High Court judgment referred to parliamentary debates, citing both the *CIC Insurance* principles and s 15AB.[211]

Fourth, the common law developments appeared to be based in linguistic considerations, a recognition about language and how it communicates. The concept of context reflects 'our conventions for understanding language, which are the techniques by which we understand words.'[212] Understanding the historical background or surrounding circumstances that existed when a statute was enacted, including extrinsic materials that form part of that wider context of the statute, is an 'important function of context in the dynamics of communication.'[213] Knowledge of that collection of material helps to build a picture of the understandings that existed at the time the statute was made therefore allowing the reader to have access to the same understandings as the author, which enables the reader to make reasonable assumptions about what is to be communicated by the text.[214] Similarly, the emergence of the importance of purpose at common law reflected a rejection of rigid approaches to interpreting words, and acknowledgment that the underlying object of the written work containing those words could impact their meaning. Further, *CIC Insurance* opened the door to that purpose being identified by consideration of the wider context, which includes extrinsic materials.

It is unclear what prompted these common law developments, despite the legislature having already opened the door. Geddes has posited that the 'staggered introduction of the state and territory equivalents of ss 15AA and 15AB, together with the absence of an equivalent of s 15AB in South Australia until 2021, combined to make inevitable the survival of' common law principles.[215] Geddes suggests, too, that the statutory reforms influenced the development

[210] *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 99–102 (Toohey, Gaudron and Gummow JJ). See also 112 (McHugh J).
[211] *Attorney-General (Cth) v Oates* (1999) 198 CLR 162, 175–6 [28] – [30].
[212] *Unions NSW v New South Wales* (2019) 93 ALJR 166, [169].
[213] Reed Dickerson, 'Statutory Interpretation: The Uses and Anatomy of Context' (1972) 23 *Case Western Reserve Law Review* 353, 356.
[214] Leonard Hoffmann, 'Language and Lawyers' (2018) 134 *Law Quarterly Review* 553, 558.
[215] Geddes (n 168) 17. South Australia relied on the common law for recourse to extrinsic materials until 2021: see n 135. See eg, *Gerhardy v Brown* (1985) 159 CLR 70 where the High Court permitted recourse to a second reading speech and reports.

of the common law.[216] A similar point has been made extra-judicially by Justice Gageler who has characterised the statutory enactments as leading to subsequent 'analogical development of the common law.'[217] Analogical development of common law by reference to legislation was still a fledgling concept in Australia at the time.[218] There had been a similar development with respect to recourse to international materials. While s 15AB(2)(d) expressly lists 'any treaty or other international agreement that is referred to in the Act' as an example of material that can be referred to under s 15AB(1), s 15AB(1) itself is wide enough to encompass not only international agreements referred to in the Act but other international materials. Despite that statutory gateway, in the mid-1990s the High Court made it clear that there is a common law principle that permits recourse to a range of international materials.[219]

There may also be broader reasons. The concept of there being one 'Australian' common law speaking with a single voice on these matters (a concept that was emerging at the time of the enactments), [220] might have overshadowed the esoteric differences and enactment timings of the state and territory Interpretation Act provisions. The existence of one Australian common law would also have enabled the High Court to maintain its 'iron grip'[221] on statutory interpretation law, protectively guarding its judicial duty, and exclusive province, to interpret, and quietly forming its own approach following the directions from Parliament about how that duty should be fulfilled.

2.7 Conclusion

Until the 1980s in Australia, the approach to the interpretation of statutes had been determined solely by the judiciary. The Commonwealth statutory reforms of the 1980s, supported by both sides of politics, were designed to shift the judiciary's focus in

[216] Geddes (n 168) 17.
[217] Justice Stephen Gageler, 'Legislative Intention' (n 37) 7. See also Finn (n 65) 22. For the concept of analogical development of the common law generally, see Anthony Mason, 'The Interaction of Statute Law and Common Law' (2016) 90 *Australian Law Journal* 324, 331–8 and Michelle Gordon, 'Analogical Reasoning by Reference to Statute: What Is the Judicial Function?' (2019) 42(1) *University of New South Wales Law Journal* 4.
[218] See, generally, D St L Kelly, 'The Osmond Case: Common Law and Statute Law' (1986) 60 *Australian Law Journal* 513.
[219] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).
[220] Anthony Mason, 'Future Directions' (n 90) 151–55. See also Anthony Mason, 'The Interaction of Statute Law and Common Law' (2016) 90 *Australian Law Journal* 324, 326 citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Lipohar v The Queen* (1999) 200 CLR 485, 505 [44] (Gaudron, Gummow and Hayne JJ).
[221] Paul Finn, 'Statutes and the Common Law: The Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52, 62.

construction to the purpose of a statute, and to provide some means for assisting with the finding of that purpose. These changes were viewed by the executive and legislative arms of government as necessary, or at least expedient, to enhance the potential of the judiciary to come to a more authentic view about the legislative intent of a statute. They were, in effect, an attempt to shift some power to the legislature (and the executive) from the judiciary, which was seen to be focussing too much on a statute as a collection of words to be interpreted semantically. The reforms were not a rejection of the importance of statutory text, but a clear communication to the judiciary that interpretation should reflect the reality that a statute is a policy tool with an object to be achieved. Liberalizing the scope of extrinsic materials was designed to allow the judiciary to identify the 'will' or 'object' of Parliament. In enacting the reforms, Parliament was assuming a kind of shared vision, or even 'something of a collaborative exercise',[222] between Parliament and the judiciary — one that was based on the concept of the 'purpose' or function of the statute.

Further, the premise of an assumed vision between Parliament and the judiciary about the 'will' of the statute and the emphasis on a statute as being a policy tool raises questions about whose 'will' the statute actually reflects. The reforms reveal the deep connection between the executive and legislative branches in statute making. It was the executive (regardless of which side of politics) promoting the legislative changes, albeit with the ultimate support of Parliament, for the judiciary to have access to executive and other materials. The relationship between the executive and Parliament will be returned to in the analysis of the legislative process.

Despite these 'legislative prods',[223] the judiciary continued to develop the common law. It is not entirely clear what provoked this common law resilience. Whatever the reasons, the judiciary soon adopted the idea of greater permissibility for extrinsic materials, and emphasised a different concept to develop that idea —— the concept of 'context'. As explored in the next chapter, the common law developments have had significant implications for s 15AB and the law governing extrinsic materials generally. That also has implications for the relationship between the judiciary and Parliament in statutory interpretation. The focus of the

[222] Guy Aitken, 'Division of Constitutional Power and Responsibilities and Coherence in the Interpretation of Statutes' in Jeffrey Barnes (ed), *The Coherence of Statutory Interpretation* (Federation Press, 2019) 22, 24 (emphasis omitted).
[223] Justice JM Macrossan (n 119) 566.

next chapter is to examine how the fledgling principles and concepts established by the historical developments discussed in this chapter have manifested in contemporary law.

Appendix to Chapter Two

Full version of s 15AB of the *Acts Interpretation Act 1901* (Cth)

(as originally enacted and still current)

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

(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;

(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;

(c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;

(d) any treaty or other international agreement that is referred to in the Act;

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;

(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and

(h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

Chapter 3

Contemporary Law of Extrinsic Materials: Dominance of Context

'*…most modern academics…[are] overly vulnerable to the argument that, since most courts are doing something, that something defines compelling legal principle.*'[1]

3.1 Introduction

The enactment of s 15AB in the 1980s, addressed in the previous chapter, was based on the premise that resort to extrinsic materials, especially parliamentary materials such as the second reading speech, would provide much needed evidence to the judiciary about the policy agenda and plan of the executive government proposing the law. Section 15AB's partner, s 15AA, was intended to direct the courts to that policy plan. Then, despite those legislative pronouncements, either analogically or for other reasons, the common law on recourse to extrinsic materials continued to develop. The statements in *CIC Insurance v Bankstown Football Club Ltd*[2] (*CIC Insurance*) laid the foundation for the 'modern' approach to extrinsic materials which used the concept of 'wider context' to permit access to extrinsic materials, and the notion of purpose as a key reason to look at them. But unlike its statutory counterpart, the common law principles were grounded in linguistic conventions about language.

These developments have had profound consequences for the law on extrinsic materials in statutory interpretation. One consequence is that the common law linguistic framework for statutory interpretation has come to dominate the rationale behind recourse to extrinsic materials, a paradigm which is not entirely consistent with the institutional impetus for s 15AB. The second is that the existence of two gateways, which has not only created some uncertainty in the law but has opened up recourse to extrinsic materials to the extent that there is an almost unlimited range of historical extrinsic material that is potentially available as an extrinsic aid.

[1] Reed Dickerson, 'Statutory Interpretation in America - Dipping into Legislative History II' (1984) 5 *Statute Law Review* 141, 141.
[2] (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

These impacts in turn have other consequences. Both the statutory and common law developments were focussed on *access* to extrinsic materials. Yet once it is established that material may be considered to assist with resolving an interpretative issue, the next logical question became which materials of the vast pool of material should be used and the weight and value to be given to that material. The common law has developed some broad guiding principles with respect to assessment of materials, but they are at a high level of generality and are sometimes unclear in their application.

This chapter explores these consequences and the state of the current law. It chapter lays the groundwork for exploring the courts' approach to the use of extrinsic materials from an institutional perspective. Importantly, it reveals the limitations of the contemporary framework of text, context, and purpose, based as it is in notions of language convention centring on the 'speech act' of Parliament.

3.2 Contemporary framework for statutory interpretation

The outcomes of the statutory reforms and common law developments discussed in Chapter Two remain the foundations of the current law of statutory interpretation. Generally, the key concepts established by the end of the 1990s remain fundamentally unchanged, albeit with greater explication of their nature and import.

(a) The nature of statutory interpretation: fundamental object and institutional setting

The 'fundamental object' or 'central question' of statutory interpretation is to ascertain the legislative or parliamentary intent.[3] As seen from Chapter Two, this is not a new concept. Questions of statutory interpretation have been 'formulated, and answered, by reference to legislative intention'[4] for centuries. The notion of 'intent' has been described as a 'lodestar',[5]

[3] *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 411 [88] (Kiefel J); *Momcilovic v The Queen* (2011) 245 CLR 1, 116 [261] (Gummow J); *Singh v Commonwealth* (2004) 222 CLR 322, 348 [52] (McHugh J); *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Commonwealth)* (1981) 147 CLR 297, 304 (Gibbs CJ), 320 (Mason and Wilson JJ); *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 13 (Mason J); *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 280 (Aickin J).
[4] *Singh v Commonwealth* (2004) 222 CLR 322, 335 [19] (Gleeson CJ).
[5] Cheryl Saunders, 'Constitutional Dimensions of Statutory Interpretation' in Anthony J Connolly and Daniel Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (The Federation Press, 2015) 27, 36.

a 'constitutional compass',[6] and 'a message for judges about judging'.[7] It expresses the responsibility of the court, in its constitutional context, to give effect to the intent of the legislature, which has the responsibility for making the legislation.[8] This concept, or device, is not confined to the common law. The interpretation legislation of the Commonwealth, States and Territories reinforce the centrality of the notion by using the language of the 'intent' of the statute. For example, all Interpretation Acts provide that that their provisions are subject to the contrary intent of the statute being interpreted.[9]

It is well accepted in modern statutory interpretation that 'legislative intent' does not refer to the subjective mental intent of any individual parliamentarian, drafter or other individual involved in the authorship of the statute, nor to some aggregation of the collective individual mental states of those individuals.[10] Legislative intent is described as 'objective.'[11] It is the intention to be inferred and attributed to Parliament by the process of statutory interpretation. The notion of inference or attribution is well accepted. As has been, and continues to be, routinely cited from *Project Blue Sky Inc v Australian Broadcasting Authority*, it is the 'duty of a court is to give the words of a statutory provision *the meaning that the legislature is taken to have intended them to have.*'[12]

As summarised by Chief Justice Gleeson in *Singh v Commonwealth*:

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[6] Justice Susan Kenny, 'Constitutional Role of the Judge: Statutory Interpretation' (Speech, Judicial College of Victoria and the Melbourne Law School, The University of Melbourne, 15 March 2013) 13.
[7] Justice Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1, 14 citing Victoria F. Nourse, 'A Decision Theory of Statutory Interpretation: Legislative History by the Rules' (2012) 122 *Yale Law Journal* 70, 85.
[8] *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 461 [77] (Gageler J); *Singh v Commonwealth* (2004) 222 CLR 322, 336 [19] (Gleeson CJ).
[9] *Acts Interpretation Act 1901* (Cth) s 2; *Legislation Act 2001* (ACT) s 6; *Interpretation Act 1987* (NSW) s 5; *Interpretation Act* 1978 (NT) s 3; *Acts Interpretation Act 1954* (Qld) s 4; *Legislation Interpretation Act 2021* (SA) s 3; *Acts Interpretation Act 1931* (Tas) s 4; *Interpretation of Legislation Act 1984* (Vic) s 4; *Interpretation Act 1984* (WA) s 3.
[10] *Wik Peoples v Queensland* (1996) 187 CLR 1, 168–9 (Gummow J); *Singh v Commonwealth of Australia* (2004) 222 CLR 322, 336 [19] (Gleeson CJ); *Zheng v Cai* (2009) 239 CLR 446, 455-456 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Lacey* v *Attorney-General of Queensland* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Aubrey v The Queen* (2017) 260 CLR 305, 322 [30] (Kiefel CJ, Keane, Nettle and Edelman JJ); *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 460 [75] (Gageler J). *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 838 [98] (Edelman J).
[11] *Momcilovic v The Queen* (2011) 245 CLR 1, 136 [327] (Hayne J); *Wilson v Anderson* (2002) 213 CLR 401, 418 [8] (Gleeson CJ); *Al-Kateb v Godwin* (2004) 219 CLR 562, 622 [167] (Kirby J); *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 471 [77] (Gageler J) citing *Singh v The Commonwealth* (2004) 222 CLR 322, 336.
[12] (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (emphasis added).

> … it is through the meaning of the text, understood in the light of background, purpose and object, and surrounding circumstances, that the legislature expresses its intention, and it is from the text, read in that light, that intention is inferred.[13]

Justice Edelman has made similar comments. His Honour has described 'the prolific references by courts to parliamentary intention' as 'that which a reasonable person would understand to have been intended by the words used in their context.'[14] It is, he explains, 'shorthand to describe the same general approach that people take to the understanding of language'.[15]

Despite the objective nature of legislative intent being well accepted in Australia, statements by the High Court in the mid-2000s, taken to suggest that legislative intent is a fiction, triggered discourse on what that 'intent' actually does or should represent.[16] The core issue raised by the Court's statements is whether it is appropriate to regard 'legislative intent' as merely an outcome of the interpretative process, a meaningless label, or whether it represents a 'real' intent of Parliament, in the sense of the statute being a deliberate group act.[17]

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[13] *Singh v Commonwealth of Australia* (2004) 222 CLR 322, 336 [19] (Gleeson CJ). See also *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405 (Kitto J); *Byrnes v Kendle* (2011) 243 CLR 253, 283 [97] (Heydon and Crennan JJ).

[14] *Mondelez Australia Pty Ltd v Automotive, Food Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 838 [95] (Edelman J). Gleeson CJ expressed intent in similar terms in *Wilson v Anderson* (2002) 213 CLR 401, 418 [8].

[15] *Mondelez Australia Pty Ltd v Automotive, Food Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 839 [98] (Edelman J). See also *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 37 [76] (Edelman J); Justice James Edelman '2018 Winterton Lecture Constitutional Interpretation' (2019) 45(1) *University of Western Australia Law Review* 1, 11-16.

[16] *Zheng v Cai* (2009) 239 CLR 446, 455-6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Lacey v Attorney General (Queensland)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, 389 [25] (French CJ and Hayne J); *Queensland v Congoo* (2015) 256 CLR 239, 265-6 [36] (French CJ and Keane J). Other cases cited in support for this view include *Mills v Meeking* (1990) 169 CLR 214, 234 (McHugh J); *Thompson v Byrne* (1999) 196 CLR 141, 147 [13] (Gleeson CJ, Gummow ,Kirby and Callinan JJ); *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 339-340 (Gaudron J), 345–6 (McHugh J); *R v Hughes* (2000) 202 CLR 535, 563 [60] (Kirby J); *Momcilovic v The Queen* (2011) 245 CLR 1, 85 [146] (Gummow J), [315], [319] (Hayne J).

[17] See, eg, Richard Ekins 'Intentions and Reflections: The Nature of Legislative Intent Revisited' (2019) 64(1) *The American Journal of Jurisprudence* 139; Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Sydney Law Review* 39; Jim South, 'Are Legislative Intentions Real?' (2014)(3) 40 *Monash University Law Review* 853; Kenneth Hayne, 'Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?' (2013) 13(2) *Oxford University Commonwealth Law Journal* 27; Richard Ekins, 'Statutes, Intentions and the Legislature: A Reply to Justice Hayne' (2014) 14(1) *Oxford University Commonwealth Law Journal* 3; Philip Sales 'Legislative Intention, Interpretation, and the Principle of Legality' (2019) 40(1) *Statute Law Review* 53; Philip Sales, 'In Defence of Legislative Intention' (2019) 48(1) *Australian Bar Review* 6; Robert French, 'The Principle of Legality and Legislative Intention' (2019) 40(1) *Statute Law Review* 40; Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018) 18; Jeffrey Goldsworthy, 'Lord Burrows on Legislative Intention, Statutory Purpose, and the 'Always Speaking' Principle' (2022) 43 *Statute Law Review* 79. For a direct comparison of views see Patrick Emerton and Lisa Burton Crawford, 'Statutory Meaning Without Parliamentary Intention: Defending the High Court's "Alternative

However, for the purposes of this thesis, in the course of making these statements, the Court expressly acknowledged, in a broad sense at least, the institutional setting of statutory interpretation. Statutory interpretation was explained within the overarching constitutional framework of our legal system. Chief Justice Gleeson stated that statutory interpretation should be considered in the context of its constitutional framework.[18] This perspective was put front and centre a short time later by the French High Court. In the 2009 decision of *Zheng v Cai,* in a unanimous judgment the court stated:

> … judicial findings as to legislative intention [of a statute] are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. ….

Further, the court went on to say that:

> ….the preferred construction by the court of the statute in question is reached by the application of rules of interpretation *accepted by all arms of government* in the system of representative democracy. (footnotes omitted; emphasis added)[19]

In other words, as was expressed in another High Court decision shortly afterwards:

> [a]scertainment 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.[20]

The High Court then explained that the principles and presumptions of statutory construction are to be regarded as 'the product of what in *Zheng v Cai*…was identified as the interaction between the three branches of government established by the Constitution,' and as such they 'reflect the operation of the constitutional structure in the sense' so described.[21] This is

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Approach" to Statutory Interpretation' and Jeffrey Goldsworthy, 'Response to Contributors' both in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, 2019) 39 and 270-76 respectively.

[18] *Singh v Commonwealth of Australia* (2004) 222 CLR 322, [19] (Gleeson CJ).

[19] (2009) 239 CLR 446, 455-456 (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

[20] *Lacey v Attorney General for the State of Queensland* (2011) 242 CLR 573, 592 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 22 [58] (Gageler J); *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232, 271 [93] (Gageler J); *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398, 423 [64] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[21] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ). See also *Queensland v Congoo* (2015) 256 CLR 239, 265 [36] (French CJ and Keane J); *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, 366-7 [87]

recognition of the relevance of a broader perspective about statutory construction, one that envelops all arms of government and assumes interaction in the sense of shared understandings between those institutions. With the retirement of French CJ from the Court such broad pronouncements in the High Court have waned. However, the institutional framework of statutory construction has remained a consistent judicial theme in statutory interpretation.[22] One judge has gone so far to suggest that the rules of construction manifest a 'dialogue between the courts and Parliament'.[23] Assertions about the role of statutory interpretation in the interaction between the three arms of government have also featured in commentary, including extra-judicial comments.[24]

These comments go to the heart of the role and interpretation of statutes in the Australian legal system. As Justice Basten has explained, the *Zheng* statement has at least two important ramifications:

> First, it highlights the significance of the doctrine of separation of powers as it applies to the legislature and the judiciary. Second, it identifies the function of statutory interpretation as an important, if not critical, point of reference in determining where that boundary lies.'[25]

This includes, he went on to say, the boundary of the executive arm of government.[26] This institutional perspective helps define the demarcation between the role and functions of each arm as it 'imposes limits on the range of constructional choices available to courts in the process of statutory interpretation.'[27]

At a high level of generality '[I]t is not difficult to accept that principles of statutory interpretation…identify or reflect key aspects of the relationship between the legislature and

(Hayne J); *Attorney General for the State of South Australia v Adelaide City Corporation* (2013) 249 CLR 1, 31 [42] (French CJ).

[22] See, eg, *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 461[77]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, 461 [98] (Nettle and Gordon JJ); *Brown v Tasmania* (2017) 261 CLR 328, 442 (Edelman J)..

[23] *Hughes v The Queen* (2017) 263 CLR 338, 420 [203] (Nettle J).

[24] See, eg, Chief Justice Robert French, 'The Courts and the Parliament' (2013) 87 *Australian Law Journal* 820; Justice John Basten, 'Constitutional Dimensions of Statutory Interpretation' (Speech, Constitutional Law Conference, Centre for Comparative Constitutional Studies, Melbourne Law School, 24 July 2015); Justice RM Mitchell, 'Statutory Construction as an Expression of Constitutional Relationships: Approaches of the French High Court' (Speech, 24 November 2016); Kenny (n 6).

[25] Justice John Basten, 'Separation of Powers – Dialogue and Deference' (2018) 25 *Australian Journal of Administrative Law* 91, 92. See also Robert French, 'The Principle of Legality and Legislative Intention' (2019) 40 *Statute Law Review* 40, 45.

[26] Justice John Basten 'Separation of Powers' (n 25) 94.

[27] Robert French. 'The Principle of Legality and Legislative Intention' (n 25) 46. See also *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [42] (French CJ); John Basten 'Separation of Powers' (n 25) 92.

the judiciary.'[28] But, as Justice Gageler has stated extra-curially, 'such statements raise questions which demand further principled inquiry.'[29] As noted in Chapter One, Justice Basten, writing extra-judicially, questioned whether they were empirically justifiable statements or normative statements.[30] The institutional approach adopted by this thesis permits some contribution to further understanding these statements, discussed in Chapter Eight.

(b) Text, context purpose

The *CIC Insurance v Bankstown Football Club Ltd* (*'CIC Insurance*') common law principle, one of the key developments discussed in Chapter Two, describing the 'modern' approach to statutory interpretation, is now well entrenched.[31] That principle, that construing statutory text requires the text to be considered in its context, including the wider context of the statute, from the start of the interpretative process has, as then New South Wales Chief Justice Allsop stated, 'been cited too often to be doubted.'[32]

There was a period following the historical developments discussed in Chapter Two when statements about the importance of the statutory text made by in High Court cases such as *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*[33] and *Saeed v Minister for Immigration and Citizenship*[34] were taken to suggest a retreat from the *CIC Insurance* wider context principle. The apparent emphasis on the text in those statements led some courts to question whether the common law had reverted to a more textualist approach, where extrinsic materials should only be referred to if other means of statutory construction were exhausted or a threshold of ambiguity met.[35]

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[28] John Basten, 'Constitutional Dimensions of Statutory Interpretation' (n 24) 2.
[29] Justice Stephen Gageler, 'Legislative Intention' (n 7) 9.
[30] John Basten, 'Constitutional Dimensions of Statutory Interpretation' (n 24) 10. As also noted in Chapter One, see also Steven Gardiner, 'What Probuild Says about Statutory Interpretation' (2018) 25 *Australian Journal of Administrative Law* 234, 246 who acknowledges that the significance of the statements is unclear but assumes that they are empirical.
[31] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).
[32] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 374 [37] (Gageler J) citing *Federal Commissioner of Taxation v Jayasinghe* (2016) 247 FCR 40, 43 [7] (Allsop CJ). *Federal Commissioner of Taxation v Jayasinghe* was reversed by *Federal Commissioner of Taxation v Jayasinghe* (2017) 260 CLR 400 but not as to this principle.
[33] (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).
[34] (2010) 241 CLR 252, 265 [33] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
[35] See, eg, *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* (2018) 54 VR 721, 733 [55] (Riordan J); *Construction, Forestry, Maritime, Mining and Energy Union v BHP Billiton Nickel West Pty Ltd* (2018) 263 FCR 558, 563 [25]-[26] (Rangiah J); *SM v R* (2013) 46 VR 464, 477 [49] (Weinberg JA).

The High Court eventually made it clear that that characterisation was not correct. In two significant cases, *SZTAL v Minister for Immigration and Border Protection*[36] in 2017 and *R v A2*[37] in 2019, the Court re-emphasised that consideration of the context, including the wider context, was to be undertaken at the first stage of the process of construction, without the need for any ambiguity to be established first.[38] In a passage that is now often cited alongside the well-known statements in *CIC Insurance*, Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection* said:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense.[39]

Two years later, the High Court expressed the point even more clearly. The Court explained that earlier judicial statements in those cases about the importance of the text:

> serve to remind that the text of a statute is important … [but] [n]one of these cases suggest a return to a literal approach to construction. They do not suggest that the text should not be read in context and by reference to the mischief to which the provision is directed.[40]

Consequently, any remnant suggestion that context, including wider context, should not be considered until some ambiguity is established 'cannot withstand the weight and clarity of High Court authority'.[41]

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[36] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362.
[37] *R v A2* (2019) 269 CLR 507.
[38] See also Jacinta Dharmananda, 'Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation' (2014) 42 *Federal Law Review* 333 which argued that *Saeed* did not lead to restrictions on the 'context' principle.
[39] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ). See also 374 [36]-[37] (Gageler J, dissenting but not as to principle).
[40] *R v A2* (2019) 269 CLR 507, 522 [36]-[37] (Kiefel CJ and Keane JJ). See also 521 [33] (Kiefel and Keane JJ).
[41] *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Bay Street Appeal)* (2020) 282 FCR 1, 6 [5] (Allsop CJ). For further High Court affirmations see *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 96 ALJR 819, 827 [31] (Gordon, Edelman and Steward JJ) (citations omitted); *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* (2021) 270 CLR 118, 143 [54] (Gordon J); *Mondelez Australia Pty Ltd v Automotive, Food Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 833 [66] (Gageler J); *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 162 [64] (Edelman J).

The fundamental common law principle requiring consideration of purpose is, too, well entrenched as an essential component of statutory interpretation at common law.[42] By 2007, Kirby J observed that 'acceptance of the purposive approach to the interpretation of legislation …represents one of the most important doctrinal shifts in the reasoning of this Court in recent times.'[43]

Against that common law background, the language of the federal statutory provision on purpose, s 15AA, has been amended since it was first enacted in 1981. The version of s 15AA that had been enacted with strong bi-partisan support in 1981 had instructed interpreters to prefer 'a construction that would promote the purpose or object underlying the Act' over a 'construction that would not promote that purpose or object'.[44]

In 2011, the Federal Parliament enacted the *Acts Interpretation Amendment Act 2011* (Cth) (the '2011 Amendment Act') which repealed the original version of s 15AA in the AIA and substituted a new purpose provision.[45] The new, and still existing, s15AA contains the following language:

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

The explanatory memorandum to the 2011 Amendment Act reveals that the Commonwealth Parliament adopted this new language to address a perceived limitation in the wording of the originally enacted s 15AA.[46] That limitation had been highlighted in the 1990 High Court decision, *Chugg v Pacific Dunlop Ltd.*[47] When considering the Victorian equivalent of s 15AA, Dawson, Toohey and Gaudron JJ had observed that the provision only offered 'a limited choice' between a construction that would promote the purpose or object of an Act and one that would not promote that purpose or object.[48] In other words, on this, arguably

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[42] See *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56, 71 [89] (the Court) citing *Thiess v Collector of Customs* (2014) 250 CLR 664, 672 [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).
[43] *Australian Finance Direct Limited v Director of Consumer Affairs Victoria* (2007) 234 CLR 96, 112 [36].
[44] See Chapter Two [2.3].
[45] *Acts Interpretation Amendment Act 2011* (Cth) s 23.
[46] See Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth), 19 [99]-[101].
[47] (1990) 170 CLR 249.
[48] *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249, 262. This was also the reason given for the Queensland and ACT parliaments to adopt 'best achieve' language. See Queensland, *Parliamentary Debates*, Legislative Assembly, 21 May 1991, 7641-2 (DM Wells, Attorney-General); Explanatory Statement, Legislation (Statutory

strict, reading, s 15AA was not engaged where the choice was between two or more constructions that both promote Parliament's purpose.

The broader wording of the 'best achieve' language might suggest that emphasis be given to purpose in the interpretative task than is required by the original version. But the limitation identified in *Chugg v Pacific Dunlop Ltd* seems to have been more abstract than real.[49] The differences between the two versions are sometimes noted by courts.[50] But, despite ample opportunity for the High Court and other appellate courts to explore any differences in the scope or application of the new language, it appears to have had negligible impact on the role of purpose for the interpretative task. The Full Court of the Federal Court viewed the changes as 'purely stylistic'.[51]

The lack of judicial attention to any meaningful differences between the two versions is likely to be due to the existence of the well-established common law principle that consideration of purpose is an integral component of the interpretative task. The 'best achieve' provisions appear to reflect the degrees of choice with respect to purpose that the judiciary was already undertaking anyway.[52] Further, even if a court applied the strict 'limited choice' meaning of the old language (which still exists in New South Wales, Northern Territory, Tasmania, Victoria and Western Australia) the common law would still require purpose to be taken into account.[53] Indeed, the High Court now tends to characterise the mandatory statutory

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Interpretation) Amendment Bill (ACT) 2003, 10. This limitation in the drafting had been foreshadowed in the Commonwealth parliamentary debates when s 15AA had been originally enacted: Commonwealth, *Parliamentary Debates,* House of Representatives, 10 June 1981, 3439 (Mr Duffy).

[49] As well as the Commonwealth, each of New South Wales, the Northern Territory, Tasmania, Victoria and Western Australia enacted an interpretation Act provision reflecting the 1981 version of s 15AA and those provisions have remained substantially the same as, or identical to, that original version. South Australia also had the original version and only adopted the 'best achieves' language for its purpose provision in 2021 when it enacted a new interpretation Act: *Legislation Interpretation Act 2021* (SA) s 14. The *Legislation Interpretation Act 2021* (SA) repealed and replaced the *Acts Interpretation Act 1915* (SA) in its entirety. The Interpretation Acts of both the ACT and Queensland have had the 'best achieve' language for their interpretation Act purpose provisions since 2003 and 1991 respectively: the *Legislation (Statutory Interpretation) Amendment Act 2003* (ACT) s 4; *Acts Interpretation Act 1954* (Qld) s 14A, inserted by the *Acts Interpretation Amendment Act 1991* (Qld).

[50] Eg, *CPB Contractors Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC 70, [46]-[47] (O'Callaghan and Wheelahan JJ).

[51] *Singh v Minister for Immigration and Citizenship* (2012) 199 FCR 404, 420 [63] (the Court).

[52] For other arguments against any significant impact from the change of wording, see Michael Kirby 'The Never-Ending Challenge of Drafting and Interpreting Statutes - A Meditation on the Career of John Finemore QC' (2012) 36(1) *Melbourne University Law Review* 140, 170-171.

[53] A strict application of the 'limited choice' language has rarely occurred. The impact of the wording was observed is *Stamford Property Services Pty Ltd v Mulpha Australia Ltd* (2019) 99 NSWLR 730. In that case at 753 [99], McCallum JA (dissenting) observed on appeal that the primary judge's determination that s 33 of the *Interpretation Act 1987* (NSW) (a 'limited choice' purpose provision) was not applicable did not mean that purpose should not be considered, given the common law principle. Leeming JA, with whom Emmett AJA

requirement to consider purpose reflected in s 15AA and its equivalents as a 'statutory reflection of a general systemic principle' that exists at common law. [54]

Section 15AB of the *Acts Interpretation Act 1901* (Cth), unlike s 15AA, has remained unchanged since its original enactment. This is despite the subsequent evolution of the common law, and the opportunities presented by two reviews of the AIA,[55] and the 2011 Amendment Act discussed earlier in this section.

Some commentators have argued that there has been a subtle shift in the relative importance of purpose and context, in that the notion of context has assumed greater emphasis in the interpretative task. Whereas a little over a decade ago, the Australian approach to statutory interpretation tended to be described as 'purposive'[56], more recently the label of 'contextual' has crept into discourse.[57]

(c) Linguistic Framework

Acceptance of the principles of context and purpose at common law has led to the development of what might be considered the pithy mantra of 'text, context and purpose'. That is, the proper construction of statutory text should be resolved '"by applying the fundamental principles of statutory interpretation, which require reading the text of the

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substantially agreed, did not address the point but considered the purpose of the Act, concluding it did not materially assist: at 751 [90].

[54] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 375 [39] (Gageler J) citing *Thiess v Collector of Customs* (2014) 250 CLR 664, 672 (French CJ, Hayne, Kiefel, Gageler and Keane JJ). See also *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56, 71 [89] (the Court). That the statutory provision is a requirement was discussed in Chapter Two ([2.6](a)) referring to *Mills v Meeking* (1990) 169 CLR 214, 222 (Mason CJ and Toohey J), 235 (Dawson J). See also *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31, 56-7 [69] (French CJ and Kiefel J).

[55] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Clearer Commonwealth law: Report of the inquiry into Legislative Drafting by the Commonwealth* (Report, September 1993); Attorney-General's Department and Office of Parliamentary Counsel, *Review of the Commonwealth Acts Interpretation Act 1901* (Report, Commonwealth of Australia, 1998). The only amendment to s 15AB suggested was to add to the non-exhaustive list of documents in s 15AB(2) 'to include specific references to additional forms of extrinsic materials': Attorney-General's Department and Office of Parliamentary Counsel, *Review of the Commonwealth Acts Interpretation Act 1901* (Report, Commonwealth of Australia, 1998) 35.

[56] See, eg, Suzanne Corcoran, 'Theories of Statutory Interpretation' in Suzanne Corcoran and Stephen Bottomley, *Interpreting Statutes* (The Federation Press, 2005) 8, 25.

[57] See, eg, Justice Mark Leeming, 'The Modern Approach to Statutory Construction' in McDonald, B., Chen, B., & Gordon, J (eds), *Dynamic and Principled: The Influence of Sir Anthony Mason* (Federation Press, 2022) 45, 50; Justice John Basten, 'Legislative Purpose and Statutory Interpretation' in Jeffrey Barnes (ed), *The Coherence of Statutory Interpretation* (The Federation Press, 2019) 134, 135-136; Jeffrey Barnes, 'Contextualism: The Modern Approach To Statutory Interpretation' (2018) 41 *University of New South Wales Law Journal* 1083.

relevant provisions in their context" and having regard to statutory purpose'.[58] This overarching legal framework for approaching an interpretative issue is governed by that common law and is 'well settled.'[59] This approach emphasises the role of the judiciary as one focussed on ascertaining 'the linguistic content' of the statutory provision.[60]

As seen from Chapter Two, the seeds for the common law concepts of context and purpose had been sown in twentieth century law, at a time when the language of the statute was the primary focus of interpretation. The notions of context and purpose have essentially been amplified and modernized, but they are still fundamentally based in linguistic concepts about how we communicate using written (or spoken) words. The 'text, context, purpose' approach emphasises the statute as a written document, a tool of communication or a 'speech act', the meaning of which is governed by the conventions of the language.[61] Using this lens, the Parliament is the 'speaker' and the 'speech act' is the statutory text. This perspective of Parliament is a formal, constitutional one, assuming the single body of Parliament as the author given that the 'language used by Parliament is the medium through which it expresses its authority.' [62] The focus on determining the meaning of the language views context and purpose as concepts that 'supply additional information for the meaning that combines with the literal text.'[63] As explained in *SZTAL v Minister for Immigration and Border Protection* ('*SZTAL*'):

> Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested,

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[58] *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 96 ALJR 819, 827 [31] (Gordon, Edelman and Steward JJ) citing *Binsaris v Northern Territory* (2020) 270 CLR 549, 571 [54] (Gordon and Edelman JJ) and numerous other authorities. See also *Australian Building and Construction Commissioner v Pattinson* (2022) 96 ALJR 426, 437 [40] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 273 CLR 21, 35 [15] (the Court) citing numerous authorities including *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 [69]-[72] (McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (NT) (2009) 239 CLR 27, 46-7 [47] (Hayne, Heydon, Crennan and Kiefel JJ) and *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ). There are many more High Court authorities affirming this framework, too numerous to list exhaustively here.

[59] *R v A2* (2019) 269 CLR 507, 520 [32] (Kiefel CJ and Keane J).

[60] Dale Smith, 'Is the High Court Mistaken about the Aim of Statutory Interpretation?' (2016) 42(2) *Federal Law Review* 227, 232 who labels this 'the meaning thesis'.

[61] As discussed in Chapter One, the notion of a 'speech act' is derived from linguistic theorists such as J R Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge University Press, 1979) who in turn draws on the work of language philosopher JL Austin.

[62] Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 27.

[63] *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 96 ALJR 208, 227 [93] (Edelman J).

> and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.[64]

The role of context is to provide clues as to meaning. As William Popkin has explained, the term "context" is what else besides the isolated word must be considered to determine statutory meaning.

> Internal context refers to the statute's language surrounding the words being interpreted. …External context refers to information about the world outside the statute that sheds light on the text's meaning. It includes the common understanding of the language that the writer and reader are likely to share, the purposes of the text, and the surrounding background of values in which the text is adopted.[65]

Similarly, purpose, like the notion of context, also accords with ordinary conventions about understanding language.[66]

> A search for the purposes or intended aims of the legislature involves a construct used to determine the meaning of the words used by that legislature. It is not a search for subjectively held purposes of any or all of the members of the Parliament that passed the law. Rather, it is a construct that accords with our conventions for understanding language, which are the techniques by which we understand words. The same language techniques require a concurrent consideration of the meaning of words used in their context together with the purpose for which the words are used, in the sense of their intended aim. Hence, purpose must be identified by the same context, and hence the same extrinsic materials, that elucidate the meaning of the words.[67]

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[64] (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ). *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 162 [64] (Edelman J).
[65] William D Popkin, 'The Collaborative Model of Statutory Interpretation' (1988) 61(3) *Southern California Law Review* 541, 592. See also Leonard Hoffmann, 'Language and Lawyers' (2018) 134 *Law Quarterly Review* 553, 554.
[66] *Unions NSW v New South Wales* (2019) 264 CLR 595, 656 [169] (Edelman J).
[67] *Unions NSW v New South Wales* (2019) 264 CLR 595, 656 [169] (Edelman J). See also *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 838 [95] (Edelman J); *Federal Commissioner of Taxation v Tomaras* (2018) 265 CLR 434, 466-7 [100] (Edelman J); Justice James Edelman, 'Implications' (2022) 96 *Australian Law Journal* 800, 806; Justice James Edelman, '2018 Winterton Lecture Constitutional Interpretation' (2019) 45 *University of Western Australia Law Review* 1, 8-9.

As the quote above suggests, these linguistic concepts are interwoven. Context is 'those matters to be considered (simultaneously) together with the text.'[68] The purpose of the text is 'informed by … textual and contextual considerations'[69] which usually 'disclose the immediate purpose or group of purposes that the document is intended to accomplish.'[70] Contextual and purposive considerations must be evaluated, but ultimately understanding both context and purpose has utility only 'in so far as…it assists in fixing the meaning of the statutory text.[71] The combination of text, context, and purpose are the key to determining legislative intent.[72]

3.3 Consequences of Two Gateways

(a) Independent legal authorities

One consequence of the historical developments discussed in Chapter Two and the evolution to the current state of the law discussed in the previous section is that it is clear that the law with respect to access to extrinsic materials remains, as envisaged by the 'modern' statement in *CIC Insurance*,[73] governed by two authorities − one common law and one legislative. That they are separate and independent legal authorities for recourse to extrinsic sources has been consistently confirmed.[74] This effectively means that there are two separate, and alternative, legal routes to extrinsic sources.[75]

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[68] *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 162 [64] (Edelman J).
[69] *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, 586 [114] (Gageler J).
[70] Reed Dickerson, 'Statutory Interpretation: The Uses and Anatomy of Context' (1972) 23 *Case Western Reserve Law Review* 353, 362.
[71] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (the Court).
[72] *Corporate Affairs Commission of NSW v Yuill* (1991) 172 CLR 319, 324 (Brennan J); *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 622 [158] (Nettle, Gordon and Edelman JJ).
[73] The modern statement of Brennan CJ, Dawson, Toohey and Gummow JJ about wider context is prefaced by the words 'apart from any reliance upon s15AB of the *Acts Interpretation Act 1901* (Cth)' *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408. See Chapter Two [2.6](b).
[74] See, eg, *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 99 (Toohey, Gaudron and Gummow JJ), 112 (McHugh J); *Attorney-General (Cth) v Oates* (1999) 198 CLR 162, 175 [28] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 406 fn 100 [70] (Crennan and Bell JJ); *Taylor v Attorney General (Cth)* (2019) 268 CLR 224, 256 [87] (Nettle and Gordon JJ); *Kelly v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FCAFC 130, [88] (the Court); *Sydney Seaplanes Pty Ltd v Page* (2021) 106 NSWLR 1, 13 [41] (Bell P); *CPB Contractors Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC 70, [61] (O'Callaghan and Wheelahan JJ); *FCS17 v Minister for Home Affairs* (2020) 276 FCR 644, 647 [8] (Allsop CJ); *Burns v Minister for Health* (2012) 45 WAR 276, 284 [27] - [28] (Martin CJ, Newnes JA agreeing at 296 [81]).
[75] *Sydney Seaplanes Pty Ltd v Page* (2021) 106 NSWLR 1, 13 [41] (Bell P); *FCS17 v Minister for Home Affairs* (2020) 276 FCR 644, 647 [8] (Allsop CJ); *CPB Contractors Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC 70, [61] (O'Callaghan and Wheelahan JJ); *Burns v Minister for*

This state of affairs leads to a somewhat confused situation given the quite different scope and requirements of the common law and legislative authorities. At common law, it is well established that context is not a concept 'confined to the immediate context supplied by other provisions in a statute of which one or more provisions are the subject of the immediate inquiry.'[76] Context 'includes the course of the legislative history of the [provision] and extrinsic materials pertaining to that legislative history'.[77] As explained in Chapter Two, this principle, derived from *CIC Insurance* and affirmed in *SZTAL*, requires the context, including wider context, to be considered from the start of the interpretative process. There are no thresholds or requirements, such as ambiguity on the face of the statute or otherwise, that need to be met under the principle to legitimately consider extrinsic materials.[78]

In contrast to that principle, it will also be recalled from Chapter Two that the Commonwealth legislative gateway, s 15AB of the AIA (and its equivalents), 'has its limits.'[79] The provision contains three alternative avenues for access to extrinsic materials, at least one of which must be satisfied if s 15AB is to be relied on for use of those extrinsic materials. The first provides that materials may be considered under s 15AB(a) to 'confirm that the meaning of the provision is the ordinary meaning.' This has no ambiguity or other requirement for access to materials, but the materials cannot be relied on other than to confirm (i.e., it cannot be relied upon to support a non-ordinary meaning). Alternatively, ss 15AB(b)(i) provides that materials may be considered to 'determine the meaning' of provision when the provision is 'ambiguous or obscure,' but suggests that the ambiguity or obscurity must be apparent from the face of the statute and not after recourse to materials. The final avenue is ss 15AB(b)(ii) which permits access to 'determine' meaning but only where the 'ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying

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Health (2012) 45 WAR 276, 284 [27] - [28] (Martin CJ, Newnes JA agreeing at 296 [81]). Though some confusion is still sometimes evident. See, eg, *Petch v R* (2020) 103 NSWLR 1, 34 [150]- [151] (Cavanagh J) where material was rejected as it did not meet any of the thresholds of s 15AB; *Construction, Forestry, Maritime, Mining and Energy Union v BHP Billiton Nickel West Pty Ltd* (2018) 263 FCR 558, 563 [26] (Rangiah J) who, despite citing CIC Insurance, stated that '[o]nly if ambiguity remains, can the Explanatory Memorandum be considered'. In *CPB Contractors Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC 70, [60] Callaghan and Wheelahan JJ 'respectfully' disagreed with those comments.

[76] *Sydney Seaplanes Pty Ltd v Page* (2021) 106 NSWLR 1, 11 [30] (Bell P).

[77] *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56, 71 [87] (the Court); *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 833-4 [67] (Gageler J); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ), 374 [36]-[37] (Gageler J); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (the Court).

[78] See [2.2] of Chapter Two and [3.2] above.

[79] *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112 (McHugh J). See [2.6](b).

the Act leads to a result that is manifestly absurd or is unreasonable.' Section 15AB is a far cry from the simplicity of the common law principle.[80]

Despite clear acceptance of these two gateways, there has been little judicial guidance on how to reconcile them or how they should operate coherently. In the early years after enactment of s 15AB, the High Court applied the s 15AB restrictions with some attention.[81] In contemporary times, courts might cite both authorities, only one of the authorities, or, particularly in the High Court, often do not cite an authority at all.[82] So, the basis on which extrinsic materials are referred to or why one authority is preferred over another is often unclear.

The most insightful recent suggestion that directly addresses this issue has been from Justice Gageler. In a 2020 High Court decision, His Honour applied the *CIC Insurance* principle to legitimize recourse to an explanatory memorandum.[83] He then went on to observe that the constrained language of s 15AB can be understood to accentuate 'the Parliament's commitment to the governance of the enacted statutory text' and that those constraints acknowledge how consideration of extrinsic material could assist in ascertaining meaning.[84] This suggests the common law principle is the primary source for access to materials, but that the restrictions in s 15AB are used to guide, but not govern, how we might use extrinsic materials.[85]

That the common law now dominates the law on extrinsic materials is also suggested by reforms in other Australian jurisdictions. For example, in 2003 the Australian Capital Territory passed amendments to the provision on extrinsic materials in its Interpretation Act. The ACT Parliament repealed the provision modelled on s 15AB and enacted a provision that simply provides that '[i]n working out the meaning of an Act, material not forming part of the Act may be considered'[86]. These amendments were not considered to effect significant

[80] For a detailed discussion of the technicalities of s 15AB, see Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) 99-102. See also Chapter Two [2.6](b) which discusses the limitations.
[81] See Chapter Two [2.6](b).
[82] See the empirical findings in Chapter Five.
[83] *Mondelez Australia Pty Ltd v Automotive, Food Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 833-4 [67].
[84] *Mondelez Australia Pty Ltd v Automotive, Food Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 834 [69].
[85] This approach is also implied in *R v A2* (2019) 269 CLR 507, 545-6 [124]-[125] where the joint judgment of Bell and Gageler JJ cites the *CIC Insurance* principle as the entry to context, and then cites one of the heads of the NSW equivalent provision of s 15AB for how extrinsic materials might be used.
[86] *Legislation Act 2001* (ACT) s 141(1). The phrase 'working out the meaning of an Act' is defined broadly in s 138.

change in the law, but were to 'reflect significant common law developments' in statutory interpretation.[87] A similar sentiment was expressed when South Australia's Parliament enacted a provision on extrinsic materials for the first time in 2021. The new provision reflects s 15AB, but its enactment was not regarded as having a substantial effect on the existing common law approach to materials in South Australia.[88] Some commentators have called for reform of s 15AB in a similar manner to the ACT, to bring the legislation more in line with the common law. As one described it, it is 'time now for the reforming statute to take account of the developments which it spawned, but which have now overtaken it.'[89]

Practically, the existence of two independent gateways may not be important. Under the common law principle there is no threshold to be met before the wider context is considered. Under s 15AB, the existence of three avenues means that it is likely that almost all questions of statutory construction 'involve an argument that the case falls under one or more of these three heads'.[90] The combined effect of both common law and legislative authorities is open access to extrinsic materials.

But the more fundamental issue from the existence of two different authorities is that it confuses the rationale for recourse to extrinsic materials. As discussed in Chapter Two, the parliamentary and executive plan behind s 15AB involved an institutional perspective which recognized the relevance of how statutes are made and their function in the legal system as policy tools. The common law, however, explains recourse by reference to linguistic considerations based in a focus on Parliament as the author. That development has overtaken the institutional underpinning of s 15AB.

That development has also led to a somewhat ironic and difficult situation. In opening the door to extrinsic materials, the common law invites consideration of the law-making process and so recognition of the statute in its institutional context. In other words, the need to understand the legislative process and the materials it generates in a meaningful sense is a

[87] Australian Capital Territory, Legislative Assembly, *Parliamentary Debates*, 13 March 2003, 999 (Mr Stanhope); Explanatory Statement, Legislation (Statutory Interpretation) Amendment Bill 2003 (ACT) 1.
[88] See, eg, South Australia, *Parliamentary Debates*, Legislative Council, Explanation of Clauses, 6 May 2021, 3367 (RI Lucas, Treasurer); South Australia, *Parliamentary Debates*, Legislative Council, 24 June 2021, 3903 (RI Lucas, Treasurer).
[89] Matthew T Stubbs, 'From Foreign Circumstances to First Instance Considerations: Extrinsic Material and the Law of Statutory Interpretation' (2006) 34 *Federal Law Review* 103, 124. See also RS Geddes, 'Purpose and Context in Statutory Interpretation' (2005) 2 *University of New England Law Journal* 5, 23-25.
[90] *Pepper v Hart* [1993] AC 593, 614 (Lord Mackay) who, when considering whether recourse to Hansard should be permitted, rejected these three heads as the basis for recourse on the basis that it 'practically every question of statutory construction' will involve an argument about one or more of them.

byproduct of the *CIC Insurance principle*. As Canadian scholar Ruth Sullivan has observed, consideration of the 'wider context' of legislation is recognition at a fundamental level that 'legislation in not an academic exercise.'[91] Once an interpreter, including the court, starts to examine the law-making process, the interpretative task starts to look like something more than an exercise based in language conventions.

(b) The pool of materials available

Another consequence of there being effectively no barrier to what extrinsic materials may be considered is that the pool of potentially relevant materials is wide. This is clear from both statute and common law.

The *CIC Insurance principle* refers to context 'in its widest sense'. Former Chief Justice Spigelman has noted extra-judicially that '… with respect to the formulation in *CIC Insurance*, no judgment has attempted to identify a list of matters capable of being encompassed within the concept of "context" when understood "in its widest sense."' [92] The statements in *CIC Insurance* itself refer to the wider context as *including* such things as the existing state of the law and the mischief which the statute was intended to remedy but were not definitive about its scope. [93] Given the wider context includes extrinsic materials that form part of the history of a statute, that context can capture 'any material that may throw light on the meaning that the enacting legislature intended to give to the provision'[94] that forms part of that history.

Similarly, the categories of materials available under s 15AB are not closed. As noted in Chapter Two, s 15AB and its equivalents read:

> (1) … in the interpretation of a provision of an Act, if *any material not forming part of the Act* is capable of assisting in the ascertainment of the meaning of the

[91] Ruth Sullivan, *The Construction of Statutes* (LexisNexis, 7th ed, 2022) 4.
[92] J Spigelman AC, 'The Intolerable Wrestle: Developments in Statutory Interpretation' (2010) 84 *Australian Law Journal* 822, 827.
[93] (1997) 187 CLR 384, 408 (emphasis added).
[94] *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 230 [124] (McHugh J). That s 15AB provides for use of a wide range of materials is also acknowledged in the joint judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ: at 207 [31]. See also *Singh v Commonwealth* (2004) 222 CLR 322, 332 [12] (Gleeson CJ).

> provision, consideration may be given to that material [for certain purposes – this is the three limbs])].[95] (emphasis added)

The words 'any material not forming part of the Act' in s 15AB(1) indicate that the material that may be considered is open-ended. A list of items then follows in s 15AB(2)(a) to (h). But the breadth of s 15AB(1) is confirmed by the chapeau to that list:

> (2) *Without limiting the generality of subsection* (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law *includes*…..[96] (emphasis added)

The words 'without limiting the generality of subsection (1)' and 'includes' confirm that this list is by way of example and is not exhaustive.

This natural reading of the section reading of s 15AB is confirmed by the enacting materials for s 15AB and subsequent case law. [97]

The consequences of having no real barrier to considering extrinsic materials is evident from the range of types of materials that have been cited by the courts. References in judicial decisions to explanatory memoranda[98], second reading speeches[99] and law reform commission reports are familiar. But many other parliamentary and pre-parliamentary materials have been examined (though not necessarily given probative weight). Some examples of parliamentary materials include parliamentary committee inquiry reports,[100]

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[95] Similar wording is used in the Interpretation Act provisions of New South Wales, the Northern Territory, Queensland, South Australia, Tasmania and Western Australia.
[96] The equivalent provisions of the New South Wales, Queensland, the Northern Territory, South Australia, Tasmania and Western Australian interpretation Acts similarly contain a list preceded by the word 'includes'.
[97] The equivalent provisions of the New South Wales, Queensland, the Northern Territory, South Australia, Tasmania and Western Australian interpretation Acts similarly contain a list preceded by the word 'includes'.
[97] Explanatory Memorandum, Acts Interpretation Amendment Bill 1984 (Cth) 3 where it states that s 15AB(2) 'sets forth, in a non-exhaustive way, the main categories of extrinsic materials that can assist in the interpretation of Acts'. See also *Singh v Commonwealth* (2004) 222 CLR 322, 336 [20] (Gleeson CJ); *Australian Rail, Tram and Bus Industry Union v Busways Northern Beaches Pty Ltd (No 2)* [2022] FCAFC 55, [63] (Snaden J); *Feldman v Nationwide News Pty Ltd* (2020) 103 NSWLR 307, 323 [68] (Bell P, Macfarlan JA agreeing at 351 [209], Payne JA agreeing at 351 [210]); *Commissioner of Taxation v Murray* (1990) 21 FCR 436, 448-449 (Hill J, Sheppard J agreeing). *Cf* Jeffrey Barnes, 'Statements of Meaning in Parliamentary Debates: Revisiting Harrison v Melhem' (2018) 5 *UNSW Law Journal Forum* 1 who argues that the phrase 'capable of assisting' should be read down to narrow the range of material. This point is discussed in [3.4(b)].
[98] Referred to as the 'Explanation of Clauses' in South Australia, 'Explanatory Statement' in the ACT and NT, 'Explanatory Notes' in New South Wales and Queensland and the 'Fact Sheet' and 'Clause Notes' in Tasmania.
[99] Referred to as the explanatory speech in Queensland and the presentation speech in the ACT.
[100] See, eg, *Northern Territory v Griffiths* (2019) 269 CLR 1, 137 [333] (Edelman J); *Palmer v Australian Electoral Commission* (2019) 269 CLR 196, 208-9[27]-[29] (Kiefel CJ, Bell, Keane, Nettle, Gordon and Edelman JJ).

(including submissions made to a parliamentary committee inquiry[101]), statements in the second reading debates other than the Minister's second reading speech[102], ministerial statements in Parliament,[103] proposed amendments to Bills and debates about those amendments, [104] a government response to a report,[105] a human rights statement of compatibility for a Bill, [106] a Commonwealth Bills Digest,[107] and contemporaneous parliamentary briefing paper.[108] Examples of pre-parliamentary materials include government position or discussion papers,[109] media releases,[110] a public departmental information paper,[111] drafting instructions,[112] a drafting manual,[113] and model Bill provisions, exposure drafts of Bills or commentary on those Bills[114] and what might be described as 'ad hoc' reports produced by a variety of bodies, such as the Australian Bureau of Statistics, the Productivity Commission, the Family Law Council to name just a few examples[115], that have a connection to the genesis of the statute. Perhaps even more expansive, courts have also cited

[101] See, eg, *Hocking v Director-General, National Archives of Australia* (2020) 94 ALJR 569, 585-6 [60]-[62] (Kiefel CJ, Bell, Gageler and Keane JJ), 613 [208] (Edelman J).
[102] See, eg, *Brown v Tasmania* (2017) 261 CLR 328, 499-500 [549] (Edelman J).
[103] See, eg, *Kuczborski v Queensland* (2014) 254 CLR 51, 78-9 [62] (Hayne), 98-9 [141] (Crennan, Kiefel, Gageler and Keane JJ), 136 [293] (Bell J).
[104] See, eg, *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334, 355-6 [36] (French CJ, Kiefel, Bell and Keane JJ).
[105] See, eg, *Wilkie v The Commonwealth* (2017) 263 CLR 487, 533-4 [99] (the Court); *Farm Transparency International Ltd v New South Wales* (2022) 96 ALJR 655, 663 [4] (Kiefel CJ and Keane J).
[106] See, eg, *Clubb v Edwards* (2019) 267 CLR 171, 206 [90] (Kiefel CJ, Bell and Keane JJ), 270-275 [279] [283] [286] [289] (Nettle J). A statement of compatibility is for legislation of the Commonwealth, Victoria, the ACT and Queensland. This document is discussed further in Chapter Seven.
[107] See, eg, *Makarov v Minister for Home Affairs (No 3)* [2020] FCA 1655, [94] (Katzmann J), affd *Makarov v Minister for Home Affairs* [2021] FCAFC 129. A Bills Digest is a publicly available written analysis of a Commonwealth Bill produced by the Parliamentary Library of the Australian Parliament. This material is discussed in Chapter Seven.
[108] See, eg, *Edwards v The Queen* (2021) 95 ALJR 808, 817 [52] (Edelman and Steward JJ).
[109] See, eg, *Stephens v The Queen* (2022) 96 ALJR 871, 876 [14][15][17] (Keane, Gordon, Edelman and Gleeson JJ), 884 [57] (Steward J); *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232, 297 [176] (Nettle and Gordon JJ).
[110] See, eg, *Tjungarrayi v Western Australia* (2019) 269 CLR 150, 183 [97] (Nettle J).
[111] See, eg, *Tjungarrayi v Western Australia*, ibid, 180-2 [93]-[96] (Nettle J).
[112] See, eg, *Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation* (2011) 199 FCR 226, 275-6 [156]-[157] (the Court).
[113] See, eg, *Minister for Immigration and Border Protection v CED16* (2020) 94 ALJR 706, 711 [28] (Edelman J).
[114] See, eg, *Australian Securities Commission v King* (2020) 94 ALJR 293, 315 [117], 316 [122] (Nettle and Gordon JJ) *The Queen v Holliday* (2017) 260 CLR 650, 664 [49]-[51] (Kiefel CJ, Bell and Gordon JJ).
[115] See, eg, *Wilkie v The Commonwealth* (2017) 263 CLR 487, 545 [145] (the Court); *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, 409-10 [72], [75] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *R v A2* (2019) 269 CLR 507, 517-8 [21]-[24] (Kiefel CJ and Keane J).

parliamentary and other materials relating to other statutes, such as previous versions of the statute or statutes *in pari materia*.[116]

The common law does provide for one limitation: that only extrinsic materials that were publicly available or were otherwise 'known' or in the contemplation to Parliament (objectively constructed), at the time of the enactment of the provision being construed can be legitimately used as interpretative aids. This assumption is sometimes traced back to the House of Lords decision *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* where Lord Reid stated:

> An Act is addressed to all the lieges and it would seem wrong to take into account anything that was not public knowledge at the time. That may be common knowledge at the time or it may be some published information which Parliament can be presumed to have had in mind.[117]

The limitation has logic if underpinned by a linguistic rationale based in the Parliament as author of the text. As Larry Alexander explains 'no rational communicator can be said to have intended an uptake while aware that her target audience lacked the evidence necessary to infer that intended uptake.'[118]

As seen from Chapter Two, the Court was never 'bound to shut its eyes to public general knowledge of the circumstances in which the legislation was passed.'[119] The court has always allowed itself to take judicial notice of the 'matrix of facts' on which a statute was founded.[120] What the *CIC Insurance* principle achieved was to emphasize the importance of background and to bring clearly within the permissible range of 'context' a broad array of material and matters.

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[116] See, eg, *Alley v Gillespie* (2018) 264 CLR 328, 338-9 [21] (Kiefel CJ, Bell, Keane and Edelman JJ); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 370 [22] (Kiefel CJ, Nettle and Gordon JJ); *Talacko v Bennett* (2017) 260 CLR 124, 146 [68] (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ).
[117] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 614. For Australia, see *Deputy Commissioner Tax v Moran* (1939) 61 CLR 735, 793 (Evatt J); *Minister for Immigration & Multicultural Affairs v WABQ* (2002) 121 FCR 251, 271 [71] (Hill J); *Commissioner of State Revenue (Vic) v EHL Burgess Properties Pty Ltd* (2015) 209 LGERA 314, 329 [52] (the Court).
[118] Larry Alexander, 'Goldsworthy on Interpretation of Statutes and Constitutions: Public Meaning, Intended Meaning and the Bogey of Aggregation' in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, 2019) 5, 11.
[119] *Deputy Commissioner Tax v Moran* (1939) 61 CLR 735, 793 (Evatt J).
[120] *Black-Clawson International Ltd v Papierwerke Waldorf-Aschaffenberg* [1975] AC 591, 646 (Lord Simon). See also *Australian Investment & Development Pty Ltd v Commissioner of State Revenue* [2019] VSCA 69, [35] (the Court) citing *Commissioner of State Revenue v EHL Burgess Properties Pty Ltd* (2015) 209 LGERA 314, 329 [52] (the Court), in turn citing *Singh v Commonwealth* (2004) 222 CLR 322, 332 [12] (Gleeson CJ).

On its face, 15AB has no such limitation, either in the timing of the material or whether Parliament can be taken to be aware of it.[121] A natural reading of the chapeau to ss 15AB(1) and 15AB(2), referred to earlier, does not include any temporal limitation. There is a weak argument that some of the examples in the list in s 15AB(2) (such as reports of committees of Parliament made to Parliament before the provision was enacted, and the explanatory memorandum laid before Parliament before the provision was enacted) might support an implication that the materials permitted under s 15AB must have been 'known' to Parliament at time of enactment. This may be supported by the historical background to its enactment discussed in Chapter Two, which revealed that the primary focus of the executive was to provide clear access to parliamentary materials for the statute being enacted.

The qualification that materials permitted under the common law or s 15AB must have been publicly known or available to the enacting Parliament has not been clearly expressed as a principle in Australia, though there is evidence of the restriction being applied in the case law.[122] More, unlike in the United States, the principle of deference (which permits post enactment executive interpretations to be used as interpretative aids) has been not been endorsed in Australia. [123]

But this area too is not without uncertainty. It may not be necessary for the material to be 'known' to the Parliament. For example, in *R v A2*, various members of the High Court referred to a report published by the Family Law Council to construe a provision of the *Crimes Act 1900* (NSW). The report was published in June 1994, but it was referred to by the Minister in May 1994 in his second reading speech for the enactment of the relevant provision. Members of the Court took it as 'likely that advance copies were available to those responsible for drafting the Bill and the Second Reading Speech.'[124] In other words, it was

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[121] *Cf Legislation Act 2001* (ACT) s 141(2)(c) which provides that in deciding whether material not forming part of an Act should be considered, one of the factors is 'the accessibility of the material to the public', though there is no requirement for it to have been accessible at the time of enactment.

[122] See, eg, *Linfox Australia Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia* (2019) 271 FCR 365, 388 [117] (the Court); *Federal Commissioner of Taxation v Traviati* (2012) 205 FCR 136, 145-6 [45]-[46] (Middleton J). *Commissioner of Taxation v Murray* (1990) 21 FCR 436, 449 (Sheppard J agreeing at 436 with Hill J's statements on s 15AB); *Australian Investment and Development Pty Ltd v Commissioner of State Revenue* [2019] VSCA 69, [60] (the Court) (acknowledging the concept of what is 'known' to parliament as part of context, though for extrinsic materials).

[123] *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 153, 158 [59]; *Williams v Commonwealth of Australia* (2014) 252 CLR 416, 458 [39]-[41] (French CJ, Hayne, Kiefel, Bell and Keane JJ). Though some Australian scholars have argued for a deference doctrine. See, eg, Janina Boughey and Lisa Burton Crawford (ed), *Interpreting Executive Power* (Federation Press, 2020) chs 2, 3 and 4.

[124] *R v A2* (2019) 269 CLR 507, 519 [26] (Kiefel CJ and Keane J). See also 549 [134] (Bell and Gageler JJ) who note that 'the Minister's reference to the Family Law Council's recommendation suggests that advance copies of the Report were available to the Parliament.'

sufficient that the Report was available at the time of enactment to the executive proposing the bill rather than to Parliament as a whole.[125]

There is precedent for an inference to be drawn from post enactment extrinsic material where Parliament had the opportunity to address the issue raised in the post enactment material about the provision but did not do so. An example of this use is in the dissenting judgment of Gageler J in *Independent Commission Against Corruption v Cunneen*.[126] The High Court was construing s 8 of the *Independent Commission Against Corruption Act 1988* (NSW). A report of an independent review of the Act, including s 8, was published in 2005. The report contained statements about the meaning of s 8. Later in the same year, Parliament amended the Act, adopting some recommendations of the report but not amending s 8. The report was therefore post enactment material for the purposes of s 8. In those circumstances, Gageler J stated:

> That a legislature has refrained from amending a statutory provision following receipt of a report explaining the provision to have a particular textually available meaning is a factor which tells in favour of not departing from that meaning in construing the provision in the context of the statute as otherwise amended.[127]

This suggests that Parliamentary inaction or silence following awareness about the content of extrinsic materials that postdate a provision being enacted may be used to infer something about that provision.[128] (In the United States, this is sometimes called 'the dog that did not bark' canon.[129])

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[125] See also *Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation* (2011) 199 FCR 226, 268 [111] 275 [156] where the Full Court endorsed the primary judge's use of internal correspondence between a government department and the Australian Tax Office; *Australian and New Zealand Banking Group Ltd v Commissioner of Taxation* (1994) 48 FCR 268, 291-2 (Hill J) (where a post enactment handbook was used to identify mischief of a provision).

[126] (2015) 256 CLR 1.

[127] (2015) 256 CLR 1, 44 [113]. *Cf* the majority who dismissed the value of the statement in the report: 16 [16] (French CJ, Hayne, Kiefel and Nettle JJ). McColl JA used similar reasoning, in dissent, in *AQO v Minister for Finance and Services* (2016) 93 NSWLR 46, 67 [89]. *Cf AQO v Minister for Finance and Services* (2016) 93 NSWLR 46, 80 [145]-[146] (Basten JA).

[128] It is not unusual for silence in legislative history, including in extrinsic materials, to be used to infer that a change was not intended. See eg, *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376, 390 [86]-[87] (the Court); *Rizeq v Western Australia* (2017) 262 CLR 1, 28 [69] (Bell, Gageler, Keane, Nettle and Gordon JJ).

[129] Anita S. Krishnakumar, 'The Sherlock Holmes Canon' (2016) 84(1) *The George Washington Law Review* 1. For the United Kingdom, see Diggory Bailey, 'Interpreting Parliamentary Inaction' (2020) 79(2) *Cambridge Law Journal* 245.

3.4 Guidance on the use of accessible materials

Back in 1983 when the Commonwealth and Victoria were at the coalface of discussions on a statutory provision permitting access to extrinsic materials,[130] Justice McPherson of the Queensland Supreme Court, when referring to judicial scrutiny of materials, noted there were two questions. One was whether you look at extrinsic materials, an issue which in Australia is, in practical terms at least, now settled. The 'next question' His Honour said, 'which is the difficult one' is 'what you do with it when you have looked at it; what weight you give to it.'[131] To this might be added another question – which materials do you look at?

There are numerous ways that extrinsic materials can assist with interpretation. Canadian scholar Sullivan has identified that material comprising legislative history might be used to provide information as part of the background of a statute, as evidence of the mischief addressed by statute or statutory provision, evidence of the statute's or provision's purpose, evidence of its intended effect, evidence of its intended operation, evidence of its intended meaning, to help trace legislative evolutions, or to identify international obligations.[132]

In Australia, the High Court has stated that legislative history, including extrinsic materials, has 'utility, if, and in so far as, it assists in fixing the meaning of the statutory text.'[133] The language of s 15AB, as discussed above, is reference to material that is 'capable of assisting in the ascertainment of the meaning of the provision'.[134] As a matter of principle, both are broadly stated and reflect the axiomatic notion that the material must be relevant.

But having opened the door to a wide range and type of materials, the framework of text, context and purpose provides little guidance on how to evaluate or distinguish between the great variety of extrinsic materials. The immediate context supplied by surrounding provisions within the statute is a context entirely of words. Extrinsic materials that constitute extrinsic context are not uniform in type or source. Justice Edelman, writing extra-judicially,

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[130] See Chapter Two.
[131] Victorian Parliament Joint Legal & Constitutional Committee, *A Report to Parliament on the Proposals Contained in the Interpretation Bill 1982* (Parliamentary Committee No 21/1982-83, Parliament of Victoria, October 1983).
[132] Ruth Sullivan (n 92) 660 – 64. In Canada, the courts 'rely on a wide range of legislative history materials for a wide range of purposes': at 658).
[133] *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56, 71 [87] (the Court) citing *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (the Court) and *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (the Court).
[134] The Victorian provision simply uses the word 'relevant': *Interpretation of Legislation Act 1984* (Vic) s 35(b).

has noted generally the difficulties of assessing the weight of different aspects of context and determining which aspects are relevant to the meaning of the statutory words.[135]

As noted in Chapter Two, the possibility of identifying factors relevant to evaluating extrinsic materials had been raised in the discussions leading up to enactment of s 15AB.[136] But the only statutory guidance that was ultimately enacted in the AIA was ss 15AB(3). It will be recalled from Chapter Two that s 15AB(3) provided that 'in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters' to, in summary, '(a) the 'desirability of persons being able to rely on the ordinary meaning conveyed by the text' and '(b) the need to avoid prolonging legal or other proceedings without compensating advantage.'[137]

Some importance was attached to ss 15AB(3) during the parliamentary debates for the enactment of s 15AB.[138] However, that perceived importance at enactment has not translated into prominence in judicial practice. Sub-section (a) is seen as a reflection of the fundamental rule of law principle that 'people are entitled to expect that the law which binds them means what it says',[139] and that the established common law approach, considering the text having regard to its context and purpose 'applies to like effect'.[140] The lack of reference to sub-section (b) may be explained by the fact that concerns about increased workloads and increased costs of prolonged legal proceedings, resulting from widening the range of interpretative aids, which prompted sub-section (b), did not, by available accounts, come to fruition.[141]

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[135] Justice James Edelman, 'Uncommon Statutory Interpretation' (2012) 11 *The Judicial Review* 71, 72-4.
[136] See Chapter Two, [2.5] which refers to Commonwealth Attorney General's Department, 'Extrinsic Aids to Statutory Interpretation' (n 44) 20–1; Attorney-General's Department, Symposium 1983 (n 122) 29. Factors for evaluation of materials had also been raised in Legal & Constitutional Committee, Parliament of Victoria, *Report on Interpretation Bill 1982* (Report No 21/1982-83, October 1983) 76-77; The Law Commission and the Scottish Law Commission, *The Interpretation of Statutes* (Law Com. No. 21) (Scot. Law Com. No. 11), 9 June 1969) 31.
[137] See Chapter Two Appendix.
[138] Commonwealth, *Parliamentary Debates*, Senate, 30 March 1984, 962-3 (Senator Evans, Attorney-General); Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 1984, 1288 (Mr Bowen); Commonwealth, *Parliamentary Debates*, House of Representatives, 3 May 1984, 1795 (Mr Griffiths).
[139] *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 414 [438] (French J). See also *Ribbon v The Queen* (2019) 134 SASR 328, 377 [114]-[115] (Peek J) referring to *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 339-40 (Gaudron J). Cf *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 230 [124] (McHugh J) who suggests that s 15AB(3) 'has probably modified the common law position' but is not clear as to how.
[140] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 31-2 [5] (French CJ).
[141] Patrick Brazil, 'Reform of Statutory Interpretation—the Australian Experience of Use of Extrinsic Materials: With a Postscript on Simpler Drafting' (1988) 62 *Australian Law Journal* 503, 512; DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (Butterworths, 3rd ed, 1988) 49; *Pepper v Hart* [1993] AC 593, 618 (Lord Griffiths).

Apart from this very limited statutory guidance, neither of the statutory or common law principles governing access to materials provide much guidance on their utility and how to assess them. Having opened the door wide to the world of extrinsic materials, the Commonwealth Parliament left the responsibility of evaluation to the judiciary. But to the extent the common law provides guidance, it is contained in common law statements of, mostly broad, principle that give rise to more questions than they resolve. The principles raise questions of coherence with respect to the use of extrinsic materials.

(a) Evidence of purpose in using extrinsic materials

Since the statutory reforms of the 1980s and the subsequent development of the context principle, there is no doubt that extrinsic materials are used as evidence of the purpose of a statute or statutory provision. As seen in Chapter Two, one of the key reasons for the enactment of s 15AB was to broaden the range of material to assist with consideration of purpose under the earlier enacted s 15AA. Similarly, the *CIC Insurance principle* states that context in its widest sense is to be taken *'to include* such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.'[142] While the common law formulation focussed on the concept of 'mischief' there is little doubt from the more recent formulations of the principle that the wider context, including extrinsic materials, can be used as evidence of purpose.

> The application of the [statutory and common law] rules [of construction] will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials.[143]

The notion of purpose is variously described in the case law as the 'intended aim' or 'goal' of the legislature,[144] 'the end sought to be accomplished'[145] 'the public interest sought to be

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[142] *CIC Insurance Limited v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (emphasis added).
[143] *Lacey* v *Attorney-General of Queensland* (2011) 242 CLR 573, [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Ruddick v Commonwealth* (2022) 96 ALJR 367, 395 [133] (Gordon, Edelman and Gleeson JJ); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, [25] (French CJ and Hayne J); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46-7 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Northern Territory v Collins* (2008) 235 CLR 619, [99] (Crennan J).
[144] *Unions NSW v New South Wales* (2019) 264 CLR 595, 657 [171] (Edelman J).
[145] *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 573 [18] (Gleeson CJ).

protected and enhanced,'[146] the 'intended practical operation of the law or what the law is designed to achieve in fact'[147] or 'the object for the advancement or attainment of which [the] law was enacted…'[148] Sometimes it is used interchangeably or together with 'policy.'[149] The purpose of a statute is not the statute's foreseeable consequences or the means adopted to achieve its purpose.[150]

Consideration of purpose may include the 'mischief' to which the statutory provision was directed. The traditional concept of 'mischief' which has existed in statutory interpretation for decades,[151] is 'a defect in the law which is now sought to be remedied' that 'may point most clearly to what it is that the statute seeks to achieve.'[152] As Justice Gageler has stated, '[e]xpressed in more arcane terms, the 'purpose' is the positive counterpart of 'the mischief to redress of which [the] law is directed.'[153] While every statute has some purpose, not every statute will have a mischief as it 'might be enacted for the creation of some new good, rather than for the resolution of an existing problem.'[154]

Yet despite the key role of purpose in interpretation and that extrinsic materials are one source for identifying that purpose, the High Court has placed restrictions on this role:

> The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.[155]

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[146] *Brown v Tasmania* (2017) 261 CLR 328, 392 (Edelman J citing *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 300).
[147] *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 459 [72] (Gageler J) citing other authorities; *Richardson v Forestry Commission* (1988) 164 CLR 261, 311. See also *Unions NSW v New South Wales* (2019) 264 CLR 595, 656 [169]; *Brown v Tasmania* (2017) 261 CLR 328, 391-2 [208]-[209] (Gageler J).
[148] *Al-Kateb v Godwin* (2004) 219 CLR 562, 608 [121] (Gummow J) citing *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 487.
[149] See, eg, *Esso Australia Pty Ltd v The Australian Workers' Union* (2017) 92 ALJR 106, 126 (Gageler J); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389 (French CJ and Hayne J), 405 (Crennan and Bell JJ). The *Acts Interpretation Act 1954* (Qld) Sch 1 s 36 defines 'purpose' for an Act as including 'policy objective.'
[150] *Unions NSW v New South Wales* (2019) 264 CLR 595, 656-7 [170] (Edelman J) (citations omitted); *Brown v Tasmania* (2017) 261 CLR 328 at 362 [99], 392 [209], 432-3 [322] (Gordon J).
[151] The concept of mischief should be distinguished from the old mischief rule. The mischief rule was overtaken with the enactment of s 15AA. (See Chapter Two, [2.6]). The notion of mischief itself remains.
[152] *R v A2* (2019) 269 CLR 507, 521 [33] (Kiefel CJ and Keane J)
[153] *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, 584 [102] (citations omitted).
[154] Samuel L Bray, 'The Mischief Rule' (2021) 109(5) *Georgetown Law Journal* 967, 977 who makes a similar distinction between purpose and mischief as Justice Gageler *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 (n 154).
[155] *Lacey* v *Attorney-General of Queensland* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389 [25] (French CJ and Hayne J).

This creates a type of conundrum. The conundrum is that one of the reasons an interpreter refers to extrinsic context, including parliamentary and executive materials, is to identify the object of the statute or the statutory provision being construed, but yet the interpreter must ultimately be able to 'source' that purpose in the statutory text. As one Federal Court judge has expressed it:

> ..... to use extrinsic materials to ascertain purpose appears to contradict what has been emphasised by the High Court as the correct source of purpose – namely, the statutory text. The web that has been woven in the authorities is not always easy to disentangle.[156]

Associated with the principle about the purpose residing in the text are several cautionary principles. One is that the purpose of a statute must not be 'imputed' to the statutory text from extrinsic materials in a type of reverse analysis. At an obvious level, this proposition is to ensure against policy making by judges which would extend beyond their function in the constitutional framework. It cautions against the judiciary (or other interpreters) imposing their own 'idiosyncratic policy preference'[157] or 'their own idea of desirable policy' gathered from materials (or otherwise) and then imputing it to the legislature and characterising it 'as a statutory purpose.'[158]

Consequently, the courts warn, it is a 'mistake' to begin with 'judicial elaborations, ministerial statements or historical considerations.[159] Ideas about purpose found in the extrinsic context, including parliamentary materials, are not a warrant for 'attributing a wider operation to a statute than its language and evident operation permit.'[160] More, it is not legitimate to identify a legislative purpose not apparent from the text of the relevant provisions, to examine extrinsic material and notice that there is nothing positively inconsistent with the identified purpose, and then to answer the question of construction by reference to the purpose that was initially assumed.[161]

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[156] *Country Carbon Pty Ltd v Clean Energy Regulator* (2018) 267 FCR 126, 155 [117] (Mortimer J).
[157] *Clubb v Edwards* (2019) 267 CLR 171, 343 [496] (Edelman J).
[158] *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, 14 [28] (French CJ, Hayne, Kiefel and Bell JJ). See also *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 390 [26] (French CJ and Hayne J).
[159] *Australian Finance Direct Limited v Director of Consumer Affairs Victoria* (2007) 234 CLR 96, 111 [34] (Kirby J) citing *Combet v The Commonwealth* (2005) 224 CLR 494 at 567 [135].
[160] *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 412 [89] (Kiefel J). See also *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531, 549 [40] (French CJ, Crennan and Bell JJ).
[161] *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 395 [41] (French CJ and Hayne J).

A consequence of these seemingly circular principles is that the purpose, as revealed by extrinsic materials, will sometimes be 'confounded by the construction which the court places on the words actually used.'[162] This begs the question of the role of extrinsic materials in providing evidence about purpose and seems to be at odds with the principles enabling their recourse. Section 15AB was intended to allow recourse to extrinsic materials produced during the legislative process to provide evidence of the intent of Parliament, including the purpose of the statute being construed. In the text, context and purpose framework, purpose 'necessarily interconnected' with contextual analysis.[163] Purpose 'must be identified by the same context, and hence the same extrinsic materials, that elucidate the meaning of the words.'[164] It is unclear how this framework works consistently with the principles about extrinsic materials.

(b) Evidence of purpose distinguished from effect or intent

Further complicating the law on the utility of extrinsic materials is a line of appellate court authority that suggests that a distinction needs to be made between statements about the Bill's purpose the mischief underlying the Bill, which is relevant, and statements about the Bill's intended meaning or effect, which are not. This proposition was made in the New South Wales decision of *Harrison v Melhem ('Harrison')*.[165]

In *Harrison*, the interpretative issue was whether the word 'and' in a statutory provision should be construed conjunctively or disjunctively. A Minister's statement in Parliament was taken to reveal the Minister's understanding of the meaning of 'and' as conjunctive.[166] Chief Justice Spigelman and President Mason, in two separate judgements, distinguished between statements of meaning in second reading speeches and statements which identify the purpose or object of the statute.[167] Mason P said:

> However broadly the notion of "purpose" or even "intent" is itself pressed, it does not, in my view, require or even permit a court to give any weight to a statement directly

[162] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* [2007] FCAFC 132 [197] citing *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518.
[163] Geddes (n 90) 45-6.
[164] *Unions NSW v New South Wales* (2019) 264 CLR 595, 656 [169] (Edelman J) and generally [168]-[172].
[165] (2008) 72 NSWLR 380 ('*Harrison*').
[166] See ibid 390-1 [118] (Mason P, Beazley and Giles JJA agreeing).
[167] Ibid 384-5 [12]-[17] (Spigelman CJ); 399 [162] (Mason P, Beazley and Giles JJA agreeing)

> addressing the intended meaning of the provision that is in the course of being enacted.[168]

Spigelman CJ similarly determined that parliamentary statements of intention as to meaning of words were not 'capable of assisting' within the words of s 34(1) (the NSW equivalent of s 15AB).[169] Both judges indicated that the distinction applied equally to parliamentary materials accessed via the interpretation legislation gateways, as well as those by the common law.[170]

This approach has been cited in numerous State decisions,[171] but the High Court has yet to directly address the distinction made in *Harrison*.[172] Some Australian commentators have argued that *Harrison* has established a definitive common law principle that statements of meaning in parliamentary materials must not be considered.[173] With respect, this position is questionable. While the judges in *Harrison* were forthright about their skepticism of statements of meaning they still used the language of 'rarely'[174] and 'seldom'[175] in relation to the proposition. Many subsequent authorities have used similarly open language when referring to *Harrison* and its statements on use of parliamentary materials.[176] More recent New South Wales authority suggests the *Harrison* proposition is about *weight*, rather than relevance. When referring to an explanatory memorandum the Court said:

> While statements explaining the background to the enactment, the mischief being addressed and the legislative purpose will usually inform the process of construction undertaken by the court, *statements as to the legal meaning or effect* of particular

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[168] Ibid 401 [172].
[169] Ibid 384 [12].
[170] Ibid 384 [12]-[14] (Spigelman CJ); [172] (Mason P, Beazley JA and Giles JA agreeing).
[171] See, eg, *Lowe Pty Ltd v Belgravia Nominees Pty Ltd* [2020] WASCA 180, [207] (the Court); *Southern Cross Group Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2019) 110 ATR 16, 28 [53] (Ward CJ); *BGM16 v Minister for Immigration and Border Protection* (2017) 252 FCR 97, 119 [103] (Mortimer and Wigney JJ); *Haureliuk v Furler* (2012) 6 ACTLR 151, 162 [30] (the Court); *R v Nguyen* (2010) 204 A Crim R 246, 250 [18]-[19] (Barr AJ; Beazley JA and Buddin J agreeing); *Amaca Pty Ltd v Novek* (2009) 9 DDCR 199, 214-5 [72]-[78] (Campbell JA); *Redman v Return to Work Corp (SA)* (2021) 305 IR 326, 354-5 [104] (Livesey JA, Bleby JA agreeing at 365 [149]) citing *Burch v South Australia* (1998) 71 SASR 12, 38-9 (Bleby J); *Palace Gallery Pty Ltd v Liquor and Gambling Commissioner* (2014) 118 SASR 567, 581-2 [49] (the Court).
[172] *Harrison* has been cited by the High Court for other reasons.
[173] Jeffrey Barnes, 'Statements of Meaning in Parliamentary Debates' (n 97) and Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2nd ed, 2020) 180. *Cf* Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) 109.
[174] *Harrison v Melhem* (2008) 72 NSWLR 380, 384 [12] (Spigelman CJ).
[175] Ibid 399 [162] (Mason P).
[176] See, eg: *Lowe Pty Ltd v Belgravia Nominees Pty Ltd* [2020] WASCA 180, [207] (the Court); *Southern Cross Group Services Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2019) 110 ATR 16, 28 [54] (Ward CJ); *Attorney-General (Tas) v CL* (2018) 28 Tas R 70, 97 [81] (Porter AJ); *BGM16 v Minister for Immigration and Border Protection* (2017) 252 FCR 97, 119 [103] (Mortimer and Wigney JJ).

> words of the enactment are usually given less weight in that process.[177] (emphasis added)

Regardless of whether the distinction is about relevance or weight, there are sound reasons to question the veracity of a bright line distinction between statements of meaning and statements of purpose in parliamentary materials.

First, it is not supported by the language of s 15AB nor the principle enunciated in the *CIC Insurance* principle. The language in s 15AB of 'material capable of assisting in the ascertainment of meaning' would need to be read down and there is nothing in the language to suggest such a judicial gloss.[178] The *CIC Insurance principle* is similarly in non-exhaustive terms. While it is true it focusses on finding the mischief and purpose, the inherent nature of 'context', as has been discussed, is anything that can rationally assist.

Second, there is an artificiality to the distinction that is reminiscent of the historical distinction between being permitted to use extrinsic materials to assist in identifying the mischief a statute targets, but not being permitted to use it to identify the remedy intended to address the mischief.[179] Lord Browne-Wilkinson explained:

> … the distinction between looking at reports to identify the mischief aimed at but not to find the intention of Parliament in enacting the legislation is highly artificial…. Given the purposive approach to construction now adopted by the courts in order to give effect to the true intentions of the legislature, the fine distinctions between looking for the mischief and looking for the intention in using words to provide the remedy are technical and inappropriate.[180]

The distinction also gives rise to practical and conceptual difficulties. A practical difficulty is that, just as with the old mischief/remedy distinction, it may mean that an interpreter would need to ignore one part of a second reading speech or other parliamentary material, but could

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[177] *Harvey v Minister for Primary Industry and Resources* [2022] FCAFC 66, [154] (the Court) citing as examples *Nominal Defendant v GLG Aust Pty Ltd* 228 CLR 529 at [22] (Gleeson CJ, Gummow, Hayne and Heydon JJ), [82] (Kirby J) and *Harrison v Melham* (2008)72 NSWLR 380. Note special leave to appeal to this decision to the High Court of Australia has been granted: [2022] HCATrans 229.

[178] *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211, 217 [27] (Basten JA). But cf Jeffrey Barnes 'Statements of Meaning in Parliamentary Debates' (n 97) who argues that the words 'capable of assisting' should be read down in light of *Harrison*.

[179] See [2.2].

[180] *Pepper v Hart* [1993] AC 593, 635. This discussion was in the context of the House of Lords considering whether to abandon or to at least make significant exceptions to the exclusionary rule. For the exclusionary rule see [2.2].

refer to another, rather than reading the material as a whole.[181] Drawing that line in the first place may not be easy. Conceptually, as has been argued by Justice Basten, 'linguistic meaning and purpose are inexorably woven.'[182]

Finally, it is possible to identify decisions, including High Court decisions, where the court has relied on statements in parliamentary materials for a variety of reasons, including for effect, intent and linguistic meaning.[183] One example is the High Court case of *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*[184] where the interpretative issue was the meaning of 'day' in a statutory provision in the *Fair Work Act 2009* (Cth) calculating leave. In that decision, the majority relied heavily on the explanatory memorandum to the Bill for the Act to attribute what was described as a 'non-ordinary' meaning to that statutory word.[185] Some of the portions of the memorandum relied on gave multiple examples of the intended operation of the provision and to the intended entitlement.[186] While the portion of the memorandum relied on were not expressly couched in terms of 'meaning', arguably that was their import and they were clearly statements about intended effect and operation of the provision.[187]

It is possible, as one scholar has argued, to characterise the use of those statements about the effect of a statute or its linguistic meaning as statements used to *infer* purpose and so to comply with the *Harrison* proposition.[188] But it is questionable why such machinations are necessary, steeped as they seem to be in the pre-1980s skepticism of the value of parliamentary materials. It is tempting to suggest that the restriction is based in residual

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[181] See, eg, *Amaca Pty Ltd v Novek* (2009) 9 DDCR 199, 215 [77] (Campbell JA). That part of a second reading speech can be distinguished on the basis of evidence of intent and evidence of purpose was recognized in *Harrison*: at 384 [12]-[13] (Spigelman CJ).
[182] *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211, 217 [27] (Basten JA). See also *Power Rental Op Co Australia v Forge Group Power Pty Ltd* (2017) 93 NSWLR 765, 785 [87] (Ward JA).
[183] See, eg, *Stephens v The Queen* (2022) 96 ALJR 871, 885 [63] (Steward J); *Berenguel v Minister for Immigration and Citizenship* (2010) 84 ALJR 251, 254-5 [21] (French CJ, Gummow and Crennan JJ); *Australian Securities and Investments Commission v King* (2020) 94 ALJR 293, 315 [115] 316-7 [123] (Nettle and Gordon JJ); *Mills v Commissioner of Taxation* (2012) 250 CLR 171, 187-8 [27]-[28] (Gageler J); *Grajewski v Director of Public Prosecutions (NSW)* (2019) 264 CLR 470; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, 619 [153] (Nettle, Gordon and Edelman JJ).
[184] (2020) 94 ALJR 818.
[185] The meaning was described as a 'notional day' construction and was determined to mean a day by reference to a calculation based on an employee's ordinary hours of work in a certain period.
[186] See, eg, *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 826-28 [30]-[38] (Kiefel CJ, Nettle and Gordon JJ); 840-1 [103][106] (Edelman J).
[187] Although in dissent, the same may be said for Justice Gageler's use of the explanatory memorandum: at *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 840-1 [103] [106].
[188] See Jeffrey Barnes, 'Statements of Meaning in Parliamentary Debates' (n97) 13, fn 97.

judicial concern to guard their exclusively judicial interpretative function and not to actually, or by perception, be seen to abrogate to Parliament the ability to determine legislative meaning. However characterized, a statement in parliamentary materials should not be deemed presumptively irrelevant, or of little weight, 'simply because it is couched in terms of intention.'[189] The material is still capable of telling us something about the intent behind the statute.

This discussion is not to suggest that parliamentary statements of intent or meaning should be *equated with* or *determinative of* meaning by themselves. But like any other evidence available in extrinsic material, the content of parliamentary materials must be evaluated for relevance and weight in the context of that material and the interpretative issue.[190]

(c) Evidence of extrinsic materials and the statutory text

In a 2013 speech, Justice Kenny of the Federal Court of Australia gave a speech in which she referred to High Court statements that the task of statutory interpretation 'must begin with a consideration of the [statutory] text' and '[s]o must the task of statutory construction end.'[191] Her Honour then observed:

> the authors of this statement also acknowledged that the text must be considered in its context, including its legislative history, although they went on to say that "[l]egislative history and extrinsic materials cannot displace the meaning of the statutory text". This statement is perplexing. Issues of statutory interpretation arise because the text is uncertain. There is circularity in such a statement that may lead one to doubt its true effect.[192]

Justice Kenny was identifying a principle that has been consistently cited since shortly after the statutory reforms widening access to extrinsic materials were effected.[193] It is a principle

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[189] *Owen v South Australia* (1996) SASR 251, 256 (Cox J).
[190] The distinction has been rejected in the United Kingdom.
[191] *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ). See also *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (the Court).
[192] Kenny (n 6) 9. Justice James Edelman has, more broadly, noted extra-judicially the tension in statutory interpretation surrounding context and purpose: Edelman (n 135) 74.
[193] See, eg, *Taylor v Attorney General (Cth)* (2019) 268 CLR 224, 256 [87] (Nettle and Gordon JJ); *Grajewski v Director of Public Prosecutions (NSW)* (2019) 264 CLR 470, 478-9 [19] (Kiefel CJ, Bell, Keane and Gordon JJ); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 405 [70] [87] (Crennan and Bell JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Northern Territory v Collins* (2008) 235 CLR 619, 642 [99] (Crennan J); *North Australian*

that is based in the concepts of text and context. A variation of the principle is that paraphrases of statutory language in parliamentary materials should not be substituted for the text.[194] The principle attempts to guide how far context can be used to inform the meaning of the text. The principle reflects the idea that:

> Extrinsic material 'cannot be determinative; it is available as an aid to interpretation.' Extrinsic material does not displace the text but can illuminate the meaning conveyed by the text.[195]

This principle is intended to remind us legislative history, including extrinsic materials, 'should not deflect the Court from its duty to resolve an issue of statutory construction, which is a text-based activity'.[196]

But having invited interpreters to look at extrinsic materials, the principle raises questions about how much the material is permitted to 'illuminate' the meaning of text. A case often cited as an exemplar of the principle is *Re Bolton*.[197] In a Second Reading Speech for the bill, the Minister clearly stated that the intent of the statute regarding the scope of a particular provision. But, while Mason CJ, Wilson and Dawson JJ said that the speech deserved 'serious consideration,' they said the intent it reflected was not reflected in the language of the statute:

> The words of a Minister must not be substituted for the text of the law…It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law. [198]

The case of *Re Bolton* is a stark example of the rejection of compelling evidence in extrinsic material. There may have been other relevant statutory interpretation principles, unrelated to extrinsic materials, impacting this outcome.[199] But the principle essentially reflects the perspective of Parliament as the author and so the statutory text 'constitutes the authentic

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Aboriginal Justice Agency Limited v Northern Territory (2015) 256 CLR 569, 608 [86] (Gageler J); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 47 [47] (the Court).

[194] *Baini v The Queen* (2012) 256 CLR 469, 476 [14] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[195] *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569, 608 [86] (Gageler J). See also 649-50 [229] (Nettle and Gordon JJ).

[196] *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247, 265 [42] (Crennan, Bell and Gageler JJ).

[197] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518.

[198] Ibid 518.

[199] See Dan Meagher, 'The "Modern Approach" to Statutory Interpretation and the Principle of Legality: An Issue of Coherence?' (2018) 46(3) *Federal Law Review* 397 which discusses the relationship between the principle of legality and the contextual principle.

voice of the constitutionally legitimate lawmaker.'[200] But Justice Kenny's statement alludes to the obscurity of the broad principle and the text, context, purpose framework with respect to the 'appropriate' use of evidence in extrinsic materials. For the day-to-day practice of interpretation, that framework provides little guidance with respect to materials. Perhaps there is something larger at stake here. As with the issue concerning the content of material that indicates meaning discussed in the previous section, it is possible that this principle too concerns guarding the judicial function. As one recent High Court judgment described it, the 'function of the Court is to give effect to the will of the Parliament as expressed in the law, not to bend it to accord to what an officer of the executive may have conjectured to be its meaning.'[201]

More, while the principle of context (and the statutory provisions) allow access to the products of the legislative process, the dominant paradigm of linguistic conventions is insufficient to assist in determining how they are evaluated to inform meaning of text. As Dan Meagher has noted, '[i]nstitutional respect for the legislative work of the political arms of government requires more by way of explanation and justification if useful and sometimes compelling legislative history is not used by the courts in the interpretative process.'[202]

This does not mean that the words in extrinsic materials cannot be probative; it means that they are not determinative or alone sufficient to provide the answer to the interpretative issue.

(d) Evidence from different types of materials

The broad principles that govern the use of extrinsic materials give generic guidance. They raise questions about their appropriate application given their broad nature. Further questions arise given the court about the use of different types of materials.

The historical background to the law on extrinsic materials examined in Chapter Two revealed that, prior to the statutory reforms, the law distinguished between different types of materials as one of the basis for excluding, or permitting, recourse to the materials. Now that we are permitted to refer to a wide range of materials, those materials form part of a generic pool of evidence. The non-exhaustive nature of s 15AB and the *CIC Insurance principle* and

[200] *Australian Finance Direct Limited v Director of Consumer Affairs Victoria* (2007) 234 CLR 96, 112 [34] (Kirby J).
[201] *Taylor v Attorney General (Cth)* (2019) 268 CLR 224, 256 [87] (Nettle and Gordon JJ).
[202] Meagher (n 199) 425.

the range of materials that courts refer to (discussed in [3.5] above) indicate that the type of material does not *per se* provide for the assessment of relevance or weight. Having opened the door to consider materials relevant to the making of the statute, there appears to be no apparent system in how to assess them.

As noted in Chapter Two, the relevance of typology was raised at the 1983 symposium on use of extrinsic materials,[203] and was considered by the 1983 Victorian parliamentary committee report on Victoria's proposed statutory provision.[204] Apart from s 15AB(3) in the AIA, no statutory provision about evaluating the weight or value of extrinsic materials was ultimately enacted. Perhaps more importantly given its dominance in governing extrinsic materials, the notions of context and purpose provide little guidance or system for evaluating materials beyond the principles just described above. This is not to say that there is no explanation given for use of material, but the explanations appear to be more in the nature of ad hoc observations about the material rather than reflecting a systematic or coherent approach. More, it is not uncommon for one material to be used in starkly different ways between judges on the same court. The example of *Mondelez* referred to earlier in this chapter is one such example, where the majority and minority judgments made very different use of an explanatory memorandum. There are others. In a recent case note of the High Court case of *R v A2*, in which the both the majority and the minority referred to a number of the same pieces of extrinsic material (including a second reading speech and a discussion paper), Justice Basten noted how it was 'remarkable that so much weight was given to extrinsic material with no common understanding as to its import' between the judgments.[205]

The case law is not short of generic judicial cautions about how contradictory or ambiguous statements in extrinsic materials are unlikely to be of use,[206] or about being aware of political rhetoric in second reading speeches.[207] There are statements that recognise that a statute may be the outcome of a political compromise,[208] and to be cautious that the parliamentary materials themselves not be subject to interpretation.[209] Some statements reflect a more

[203] See [2.5].
[204] Victorian Parliament Joint Legal & Constitutional Committee (n 166) 65.
[205] Justice John Basten, 'Can Context Mutilate Text?' (2022) 96 *Australian Law Journal* 392, 395.
[206] Eg, *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* (2018) 54 VR 721, [75] (Riordan J); *Taylor v Attorney General (Cth)* (2019) 268 CLR 224, 277 [148] (Edelman J).
[207] Eg, *BGM16 v Minister for Immigration and Border Protection* (2017) 252 FCR 97, 119 [102] (Mortimer and Wigney JJ); *Andrews and Morrissy Developments Pty Ltd v Port Phillip City Council* (2019) 241 LGERA 280, 287 [32] (Osborn JA).
[208] *Carr v Western Australia* (2007) 232 CLR 138, 143 [7] (Gleeson CJ). See also *Singh v Commonwealth of Australia* (2004) 222 CLR 322, 336 [19] (Gleeson CJ).
[209] *Ribbon v The Queen* (2019) 134 SASR 328, 3821 [126] (Peek J).

considered understanding of the role of a particular material. For example, it has been suggested that statements made by members of parliament not being the minister introducing the Bill may often be unhelpful,[210] that statements about a version of a provision that is subsequently amended in parliament are unlikely to assist,[211] general statements about the legislative process,[212] and about the genesis and context of a submission made by a government agency to a parliamentary inquiry to determine its utility for an interpretative issue.[213] The closest suggestion of a systematic approach has come from Justice Gageler, who has observed that the quality and provenance of parliamentary materials are relevant to their assessment as interpretative aids.[214]

While these statements have merit, given the broad range of extrinsic materials available and the likelihood of their continued use, a greater awareness of the nuances and complexities of the legislative process, including the parliamentary process, and the materials it generates as well as some consideration of more specific criteria when considering them, is likely to result in a more meaningful assessment of those materials. The focus on the statute as a piece of text to be considered in its context arguably does not provide the tools or structure for a coherent approach.

3.5 Conclusion

The existence of two different pathways to extrinsic materials, s 15AB and its equivalents, and the common law pathway, give rise to an unsatisfactory state of the law. The common law appears to undermine the rationale and operation of those statutory provisions.[215] More, it is difficult to reconcile how the statutory and common law gateways operate together coherently. This may be why it is not always clear in the authorities which legal gateway is relied upon when referring to extrinsic materials, or why one gateway has been cited over another.

The lack of clarity about the coherency of the relationship between the two authorities gives rise to a question about the principle or rationale which underpins the court's ability to access

[210] *Mills v Meeking* (1990) 169 CLR 214, 236 (Dawson J).
[211] *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* (2012) 201 FCR 147, 168 [81] (the Court); *Avel Pty Ltd v Attorney-General (NSW)* (1987) 11 NSWLR 126, 128-9 (Kirby J).
[212] *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, 586 [114] (Gageler J).
[213] *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, 587-8 [122]-[126] (Gageler J).
[214] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 834 [67] (Gageler J).
[215] Geddes (n 90) 23. See also Jacinta Dharmananda, 'Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation' (2014) 32 *Federal Law Review* 333, 342.

to materials. As seen from Chapter Two, the two independent authorities differ in their historical underpinnings. But beyond recognizing their co-existence, the courts have offered little explanation by way of reconciling the two pathways or of explaining how they may form part of a coherent body of law.

The lack of any threshold to extrinsic materials at common law and the co-existing statutory and common law gateways to those materials, mean that, in effect, there is little in the way of a barrier to recourse to historical extrinsic materials for interpretative purposes. There is an almost unlimited range of historical extrinsic material that is potentially available as an extrinsic aid, including parliamentary and executive materials. Given that, intended or not, interpreters may now (or must under the common law gateway) consider a wide range of materials generated by the legislative process. To do so meaningfully, this necessarily must involve some judicial understanding of, and respect for, the legislative process and what parliament intended, as reflected in those materials. The very act of looking at parliamentary and executive materials suggests much more than a textualist paradigm.

Yet the guiding principles governing the use of extrinsic materials still appear to be based in a textual framework, reflective of a statute as the document approved by Parliament. It is axiomatic that the text is the ultimate authority and that it is the court's exclusive function to declare its meaning. But some key principles, such as the purpose residing in the text and the restrictions on the evidence of the influence of extrinsic materials on the text, continues to emphasise a textualist approach at the expense of using evidence in materials. Conversely, there are examples of the High Court attributing meaning to text, on the basis of evidence in extrinsic materials, which is not evident from a plain meaning.

In addition to the fundamental question about the principles underpinning recourse to extrinsic materials, the almost unfettered ability for courts to refer to a wide range of material gives rise to issue of the assessment of that material for weight and probative value. As will be seen in Chapters Six and Seven, the legislative process is complex and nuanced. Bright line assertions about the inherent value of any particular category of material run the risk of creating an arbitrary assessment of the material.

The analysis in this chapter reveals the uncertainty of the current state of the law with respect to extrinsic materials. The next chapter explores the practices of the courts through empirical quantitative research. Both methods of research combine to reveal a picture of the use of extrinsic material which can be analysed from an institutional perspective in Chapter Eight.

Chapter 4

Case Content Analysis – Method

'*Our case material is a gold mine for scientific work...*'[1]

4.1 Introduction

The case law analysis in the previous chapter examined the current state of the law with respect to extrinsic materials. That chapter identified the key legal principles which permit recourse to extrinsic materials and guide their use. This chapter and Chapter Five also examine case law but do so using another research method: empirical quantitative analysis. The purpose of this empirical research is to gather evidence of what the courts are actually doing with respect to extrinsic materials and to identify whether any patterns emerge. The research focuses on obtaining information on the frequency with which courts cite extrinsic materials for statutory interpretation cases, the types of materials that they refer to, and the frequency with which they are used to support their reasoning for a statutory interpretation question. This research is a critical component of understanding the practice of courts as it provides insight that goes beyond the linguistic framework that characterises the law discussed in Chapter Three. It lays additional groundwork for an institutional analysis by providing information that might be usefully explained from an institutional perspective.

The empirical work reflected in this chapter and Chapter Five also serves other purposes. The research provides information about the court's current practices with respect to extrinsic materials that can be analysed in the light of the findings about extrinsic materials in Chapters Six and Seven. This enables pragmatic suggestions to be made about useful materials. The empirical analysis complements and supplements the research of Chapter Three to provide a more robust and nuanced understanding of the law and practice of the courts. This is particularly important in light of review of the case law, which has areas of uncertainty and obscurity.

[1] Herman Oliphant, 'A Return to Stare Decisis' (Part Two)' (1928) 14(3) *American Bar Association Journal* 159, 161 (cited in Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 *California Law Review* 63, 63).

This research involved undertaking a quantitative systematic content analysis of High Court and Federal Court of Australia Full Court decisions. This Chapter Four provides an overview of the research design, data collection, coding process and decisions. It explains the scope and limitations of the research.

The research involved reading and coding over 200 High Court cases and over 200 Federal Court of Australia Full Court cases between 2016 and 2019 and between 2018 and 2019 respectively. This chapter explains the identification of the population and sample selections the subject of the study, the concepts, variables and coding rules used for the case analysis, and the process of the data collection. All cases within these periods were coded for a number of factors, but the primary focus of the research is whether they involved an interpretative issue, and if they did, whether any member of the court referred to extrinsic material, and if a judge did, the type of material used. Some key coding concepts are singled out for explanation and justification. It is necessary to explain the research design and parameters so the scope of the research, and its limitations, are clear. Comprehensive identification and explanation of the coding rules for the collection of the data on the cases is provided in a Codebook, which is incorporated in Chapter Five (for ease of reference when considering the data findings). Appendix A to this thesis provides a complete list of the High Court decisions that were coded for the study and Appendix B provides a complete list of all Federal Court of Australia Full Court decisions that were coded for the study.

This chapter identifies the assumptions, scope and limitations of the study. One key thing to note at the outset is that the data collection focuses on observable and quantifiable aspects of the court's use of extrinsic materials. The data collected does not include information on the existence or frequency of judicial *reasons* for reliance or otherwise on extrinsic materials (which in any event would be problematic for a quantitative study).

The next chapter, Chapter Five, explains the method of data analysis, the findings of the research and the limitations of those findings. Considering both the patterns of use and the law relating to extrinsic material in light of the examination of the legislative process supports an institutional perspective and has conceptual and pragmatic implications. These inferences and implications are discussed in Chapter Eight.

4.2 Systematic Content Analysis – Design and Method

Doctrinal research 'asks what the law is on a particular issue' and that analysis involves a 'synthesis of rules, principles, norms, interpretative guidelines and values' which explain the law.[2] Empirical research is concerned with observable facts or data about the world.[3] It 'seeks to capture real-life evidence (law in practice), regarding the world based on either the researcher's and/or other people's observations or experiences'.[4] Or, as Leeuw and Smeets have succinctly noted, doctrinal analysis is concerned with the laws 'in the books,' while empirical research is concerned with laws 'in action.'[5]

Undertaking empirical research involves:

> the systematic collection of [data] and its analysis according to some generally accepted method. Of central importance is the *systematic* nature of the process, both of collecting and analyzing the information…[6]

There are many forms of legal empirical research and the method may be quantitative or qualitative. It may involve analysis of materials, interviews, observation or survey responses. The method used for this study is sometimes referred to as systematic content analysis. With this method:

> a scholar collects a set of documents, such as judicial opinions on a particular subject, and systematically reads them, recording consistent features of each and drawing inferences about their use and meaning.[7]

The systematic content analysis of this study is quantitative, in that the data collected is coded numerically, and then analysed by statistical software that provides numerical results.[8] This is different to qualitative analysis which 'does not depend on statistical quantification, but

[2] Frans L Leeuw and Hans Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar Publishing, 2016) 3 in part citing C McCrudden (2006) 'Legal Research and the Social Sciences' 122 *Law Quarterly Review* 632, 634.
[3] Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69 *University of Chicago Law Review* 1, 2-3.
[4] Aikaterini Argyrou, 'Making the Case for Case Studies in Empirical Legal Research' (2017) 13(3) *Utrecht Law Review* 95, 97.
[5] Leeuw and Schmeets (n 2) 2 citing Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12, 15. See also Peter Cane and Herbert M Kritzer, 'Introduction' in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 1. The genesis of empirical legal research is linked to American Legal Realism movement: see Leeuw and Schmeets (n 2) 20-40 for a discussion of its roots.
[6] Peter Cane and Herbert M Kritzer, 'Introduction' (n 5) 4. (emphasis in original)
[7] Hall and Wright (n 1) 64.
[8] Using SPSS (Statistical Package for Social Sciences) v29 software.

attempts to capture and categorize social phenomena and their meanings'[9] (such as interviews or direct observation). This study might be described as 'descriptive' quantitative research as it attempts to describe and document a phenomenon - the patterns of use of extrinsic materials.[10]

Content analysis is thought to be well suited for examining aspects of judicial method.[11] Legal empirical analysis, including systematic content analysis, has been used in legal scholarship for decades.[12] In the United States, there are numerous empirical studies in statutory interpretation legal scholarship, including many quantitative studies.[13] In Australia, there is a growing body of empirical legal scholarship, including in quantitative content analysis.[14] To

[9] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 927, 927-8. See also Lee Epstein and Gary King, 'The Rules of Inference' (n 3) 2; Wing Hong Chui, 'Quantitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2nd ed, 2017) 50-51.

[10] Wing Hong Chui (n 9) 48, 52 who distinguishes between exploratory, descriptive and explanatory (or causal) designs. See also Leeuw and Schmeets (n 2) 44 and Lee Epstein and Andrew D Martin, 'Quantitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 901, 913.

[11] Hall and Wright (n 1) 93. See also Jack Knight, 'Are Empiricalists Asking the Right Questions About Judicial Decision-Making?' (2009) 58 *Duke Law Journal* 1581 who argues for more empirical studies of decisions to address issues of method and mechanism rather than outcome.

[12] For some historical background, particularly in systematic content analysis, see Or Brook, 'Politics of Coding: On Systematic Content Analysis of Legal Text' in Marija Bartl and Jessica C Lawrence (eds), *The Politics of European Legal Research* (Edgar Online, 2022) 109, 112-117 and Mark A. Hall and Ronald F. Wright (n 1) 67-76. For a more extensive appraisal of the history of legal empirical research generally, starting in the 1920s, see Herbert M Kritzer, 'The (Nearly) Forgotten Early Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 875.

[13] There are too many to list exhaustively but following are some examples that include studies of use of legislative history: Jorge L Carro and Andrew Brann, 'The US Supreme Court and the Use of Legislative Histories: A Statistical Analysis' (1982) 22(3) *Jurimetrics* 294; Nicholas S Zeppos, 'Use of Authority in Statutory Interpretation: An Empirical Analysis' (1992) 70 *Texas Law Review* 1073; Jane S Schacter, 'The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond' (1998) 51 *Stanford Law Review* 1; James J Brudney and Corey Distlear, 'The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law' (2009) 58 *Duke Law Journal* 1231; James J Brudney, 'Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court' (2007) 85 *Washington University Law Review* 58; James J Brudney and Corey Ditslear, 'The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras' (2006) 89(4) *Judicature* 220; David S Law and David Zaring, 'Law versus Ideology: The Supreme Court and the Use of Legislative History' (2010) 51(5) *William & Mary Law Review* 1653; Lawrence Baum and James L Brudney, 'Two Roads Diverged: Statutory Interpretation by the Circuit Courts and the Supreme Court in the Same Cases' (2019) 88(3) *Fordham Law Review* 823; Jonathan H. Choi, 'An Empirical Study of Statutory Interpretation in Tax Law' (2020) 95(2) *New York University Law Review* 363. For a Canadian study, see John James Magyar, 'The Evolution of Hansard Use at the Supreme Court of Canada: A Comparative Study in Statutory Interpretation' (2012) 33(3) *Statute Law Review* 363.

[14] See, e.g., Kylie Burns, 'The Australian High Court and Social Facts: A Content Analysis Study' (2012) 40(3) *Federal Law Review* 317, 322 n 44 which list some Australian empirical work and is itself a content analysis study. See also David J Carter, James Brown, and Adel Rahmani, 'Reading the High Court at a Distance: Topic Modelling the Legal Subject Matter and Judicial Activity of the High Court of Australia' (2016) 39(4) *University of New South Wales Law Journal* 1300. See also the annual series of statistical work by Andrew

the best of the writer's knowledge, this is the first quantitative empirical study of statutory interpretation in Australia.

The empirical quantitative research reflected in this thesis provides a more complete picture of the use of extrinsic materials as interpretative aids. More, it provides data about the practice of the courts that is amendable to an institutional analysis and one that is a viable alternative to the current linguistic concepts of context and purpose. A multi-method approach to research provides 'revelations from different sources' which in turn can enhance the explanatory power of the research.[15] As scholar Frank Cross has noted, descriptive claims underlying theoretical analyses are often 'woefully underevidenced'.[16] Provided that the parameters of the research are clear, quantitative empirical research provides as close as possible to an 'objective' evidence about the practice of law, 'in the sense of generating falsifiable and reproducible knowledge' on how it is applied in practice.'[17]

One of the distinguishing features of quantitative approaches to empirical research, including systematic content analysis, in comparison to traditional doctrinal legal research, is that 'the data collection and its subsequent analysis must follow a specific path.'[18] Mark Hall and Ronald Wright describe the path for systematic content analysis as having three steps.[19] Maryam Salehijam builds on those three steps to expand them to suggest a more comprehensive five steps, which is the path adopted by this thesis: '(1) determination of a suitable research question or hypothesis …; (2) identification and collection of sufficient data for analysis; (3) coding of the data, which has its own stages; (4) drawing of conclusions/observations; and (5) reporting the findings in a manner comprehensible to the

Lynch (for some years co-authored with George Williams) from 2003 to 2019, listed in Andrew Lynch, 'The High Court on Constitutional Law: The 2019 Statistics' (2020) 43(4) *University of New South Wales Law Journal* 1226, 1242-3.

[15] Laura Beth Nielsen, 'The Need for Multi-Method Approaches in Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 951, 955 referring to J Brewer and A Hunter, *Foundations of Multimethod Research: Synthesizing Styles* (Sage Publications, 2006).

[16] Frank B Cross, *The Theory and Practice of Statutory Interpretation* (Stanford University Press, 2009) 22 who undertook an empirical analysis of interpretive decisions in the Rehnquist Supreme Court.

[17] Or Brook, 'Politics of Coding: On Systematic Content Analysis of Legal Text' in Marija Bartl and Jessica C Lawrence (eds), *The Politics of European Legal Research* (EdgarOnline, 2022) 109, 119.

[18] Maryam Salehijam, 'The Value of Systematic Content Analysis in Legal Research' (2018) 23(1) *Tilburg Law Review* 34, 36.

[19] Hall and Wright (n 1) 79. See also Brook (n 17) 110.

legal community.'[20] This Chapter Four explains steps one, two and three. Chapter Five addresses steps four and five.

4.3 The Research Question

As indicated by Salehijam's five steps, an empirical investigation must start with a specific and answerable research question.[21] Epstein and Martin have stated that the question should satisfy two criteria. First, that the question has potential implication for the 'real world' and, secondly, that it seeks to engage the existing literature.[22] The question must be directed to test a theory or hypothesis,[23] described as 'a reasoned and precise speculation about the answer to the research question.'[24]

The overarching question of this thesis is how knowledge of the statute making process might assist our understanding of the use of extrinsic materials in statutory interpretation in Australia. The empirical study described in this chapter contributes to answering that overarching question by posing a narrower question: 'what extrinsic materials are actually, and most frequently, referred to in statutory interpretation decisions of the High Court of Australia and the Full Court of the Federal Court of Australia?' The answer to that question as revealed in this study contributes to answering the overarching thesis question. The answer supplements the doctrinal analysis by providing objective evidence of the materials actually used by the courts.[25] As noted by Hall and Wright, coding and analysing cases does not 'end the discussion' but moves it 'to a more observable evidentiary basis'.[26]

The study contributes to the institutional perspective adopted in this thesis by providing observable evidence about the frequency of use of extrinsic materials in statutory interpretation, the type used and how they are used. Many of these materials are the same materials that will be examined in later chapters in the context of the legislative process. The knowledge the study produces therefore contributes to the benchmark of knowledge that will

[20] Salehijam (n 18) 36. Wing Hong Chui (n 9) 54 supplements Hall and Wright's three steps further and suggests seven steps but there are no substantive differences.
[21] See also Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (Oxford University Press, 2014) 23; Wing Hong Chui (n 9) 54; Leeuw and Schmeets (n 2) 47.
[22] Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (n 19) 27.
[23] Ibid 23; Wing Hong Chui (n 9) 55.
[24] Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research,* (n 21) 31.
[25] Hall and Wright (n 1) 83, 99; Argyrou (n 4) 97; Salehijam (n 18) 38; Wing Hong Chui (n 9) 49; Andrew Lynch, 'The High Court on Constitutional Law' (n 14) 1227.
[26] Hall and Wright (n 1) 85.

be compared to the learnings from examining the legislative process. The doctrinal work together with this empirical work provides the picture of the contemporary law that can be compared to learnings from the legislative process, including the assessment of the utility of different types of extrinsic materials generated by that process.

4.4 Selecting Cases – Identifying the Data

(a) Target population

The second step for systematic analysis is to identify and collect sufficient data for the analysis. It is important to identify the target population of a quantitative study. If the target population is not clearly identified, then 'evaluating the quality of the inferences [from the data collection]… becomes impossible.'[27]

There are two target populations for this study. The first target population is High Court of Australia (the 'High Court') decisions. The second target population is decisions of the Full Court of the Federal Court of Australia (the 'Full Court Federal Court'**)**.

Analysing High Court cases was an obvious choice. The High Court is at the apex of the court hierarchy in Australia and delivers the final and authoritative statement of the common law of Australia.[28] As seen from Chapter Three, a significant portion of the law on the use of extrinsic materials for statutes is comprised of the common law. High Court decisions on common law principles for statutory interpretation and extrinsic materials are therefore relevant to all Australian legislation, regardless of the jurisdiction of the legislation being construed. Recourse to extrinsic materials is also governed by the statutory provisions of the interpretation Acts of each jurisdiction, which are not uniform. However, as also seen from Chapter Three, the idiosyncrasies of the interpretation Act provisions on extrinsic materials across jurisdictions while not irrelevant, have limited relevance and impact. Consequently, the

[27] Lee Epstein and Gary King, 'The Rules of Inference' (n 3) 101. See also Robert M Lawless, Jennifer K Robbennolt and Thomas Ulen, *Empirical Methods in Law* (Aspen Publishers, 2010) 142; Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research,* (n 21) 63-64.
[28] *Lipohar v the Queen* (1999) 200 CLR 485, 505 [44] (Gaudron, Gummow and Hayne JJ); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Rizeq v Western Australia* (2017) 262 CLR 1, 78 [31] (Bell, Gageler, Keane, Nettle and Gordon JJ), 43 [114] (Edelman J). See [2.6(b)].

High Court's discourse on the use of extrinsic materials in statutory interpretation is relevant to, and where comprised of common law binding on, all Australian jurisdictions.

The analysis of the Full Court Federal Court decisions is to provide information that might expand upon the observations that can be made from the High Court study. High Court cases are, due to the process of special leave, a 'select' group of cases. (See the further discussion on special leave in 'Data Qualifications' below). Decisions of the Full Court were chosen as a separate target population in order to gather information on the practices of a Court lower in the hierarchy (and therefore without the triage of 'special leave') but still sufficiently superior within the judicial hierarchy to make authoritative pronouncements about the law.

Second, the breadth of jurisdiction reposed in the Federal Court makes it a significant forum in Australia.[29] The Full Court Federal Court's jurisdiction includes original and appellate jurisdiction. Its original jurisdiction is limited to specific heads, although it may hear other matters that the Chief Justice determines are of 'sufficient importance.'[30] But its appellate jurisdiction is extensive.[31] For civil matters, it decides appeals from a decision of a single Federal Court judge exercising original jurisdiction.[32] The jurisdiction of the Federal Court sitting as a single judge is extensive. It includes law on bankruptcy, restrictive trade practices, native title, corporations, admiralty, and numerous other matters arising under federal legislation.

The Full Court Federal Court's jurisdiction for civil matters also includes appeals from judgments of a court (other than a Full Court of a Supreme Court) of a State, the ACT or the Northern Territory exercising federal jurisdiction as provided in relevant legislation. It hears appeals from the Federal Circuit Court (with some exceptions) as well as such matters and appeals provided in specific legislation (such as the *Fair Work Act 2009* and the *Administrative Appeals Tribunal Act 1975*).[33] The Full Court also has jurisdiction to hear appeals on a range of criminal matters,[34] though some of those appeals do require leave.[35]

[29] Mary Crock and Ronald McCallum, 'Australia's Federal Courts: Their Origins, Structures and Jurisdiction' (1995) 46 *South Carolina Law Review* 719, 750-751; Justice James Allsop, 'An Introduction to the Jurisdiction of the Federal Court of Australia' [2007] *Federal Journal of Scholarship* 15.
[30] *Federal Court of Australia Act 1976* (Cth) s 20(1A).
[31] *Federal Court of Australia Act 1976* (Cth) s 25.
[32] *Federal Court of Australia 1976* (Cth) s 24.
[33] *Federal Court of Australia 1976* (Cth) s 24.
[34] *Federal Court of Australia Act 1976* (Cth) s 30AE(1), s 30AA.
[35] *Federal Court of Australia Act 1976* (Cth) s 30AV.

Finally, the federal jurisdiction of the Full Court means that it primarily focusses on federal legislation. This is consistent with this thesis' focus on the federal legislative process.

In summary, the breadth of the Full Court's jurisdiction, its authority as a superior court, and its link to federal legislation led to the conclusion that it would be a meaningful population for examining the judicial practice of use of extrinsic materials.

It is good research practice to explain how the data, which in this instance is the judicial decisions, was located.[36] The source of data for both High Court and Full Court decisions populations is archival or 'stored' data.[37] That is, the cases were already existing and had been collected and stored by another party in 'raw' form.[38] The High Court cases were identified by reference to the official website of the High Court which publishes the judgments of the Court.[39] This database contains all published High Court decisions from 2000 to the present and so includes all High Court judgments in the selected time frame (see below in (b) regarding the time frame).[40] The website containing the decisions is publicly available. Medium neutral citation versions of the cases can be obtained from that website. However, once the High Court case was identified from the High Court website, a report series version of the decision was downloaded from Westlaw AU[41] and used for analysis. If an authorised report version of the decision was available, this was downloaded in preference to an unauthorised report version.

The decisions of the Full Court were identified from the Australasian Legal Information Institute (AustLII) website.[42] This database publishes all Full Court decisions that the Federal Court chooses for publication and lists them as a separate category which can be navigated by year.[43] Like the High Court database, this database is publicly available. The AustLII database

[36] Hall and Wright (n 1) 80.
[37] Lawless, Robbennolt, and Ulen (n 27) 127; Leeuw and Schmeets (n 2) 133.
[38] Lawless, Robbennolt, and Ulen (n 27) 126-7.
[39] < http://www.hcourt.gov.au/publications/judgments >
[40] Description of database: http://eresources.hcourt.gov.au/about It would be rare that the High Court did not publish a decision therefore the risk of the population being incomplete is extremely small: Lee Epstein and Gary King, 'The Rules of Inference' (n 3) 106.
[41] Westlaw AU is an online platform generated by Thomson Reuters that contains Australian cases, legislation and commentary. It is available by subscription.
[42] AustLII is an online free-access platform for Australian legal information, including cases, legislation and commentary, that is a joint enterprise of UTS and UNSW faculties of Law: http://www.austlii.edu.au/about.html
[43] http://www.austlii.edu.au/faq.html#q1.9

was chosen ahead of the data available on the official Federal Court website as it is easier to navigate according to year. As with the High Court decisions, where a reported version of the case was available on Westlaw AU, that version was downloaded and used for analysis. Authorised reports were downloaded in preference to unauthorised reports. If neither was available, the medium neutral citation version of the case was used.

(b) The Samples

The 'sampling frame' for the population of the High Court study and for the Full Court study is the theoretical universe of all those cases.[44] This is clearly an unmanageable number of cases to analyse by one individual.[45] So, a sample of cases for each court was chosen by reference to a time restriction. For High Court decisions, the four-year period from 2016 to 2019 was chosen. This means that all High Court decisions in those years were analysed, resulting in a total of 222 High Court cases being examined. After excluding some cases for the reasons discussed below (in point 7 of [4.4](c)), 203 cases were included in the sample. For Full Court decisions, a one-year period from July 2018 to June 2019 was chosen. Similarly, all Full Court decisions in that period were analysed. Although the time period was shorter for the Full Court decisions, the volume of decisions delivered by the Full Court each year meant that the number of Full Court decisions coded, a total of 247 Full Court cases, was approximate to the number of High Court cases coded.

Other methods were considered for selecting cases. For example, another possible approach is to select High Court and Full Court cases since the introduction of section 15AB (in 1984),[46] or from the pivotal case *CIC Insurance* decision (in 1997),[47] as the target population and to use a random sampling approach for each year of that period to choose cases. However, this approach was rejected for a number of reasons. First, examining all decisions over a restricted period avoids many of the issues arising from selection bias and random sample selection.[48] Second, as the purpose of this study is to complement the doctrinal research on contemporary legal principles governing extrinsic materials, it was preferable to obtain evidence about

[44] Hall and Wright (n 1) 101.
[45] Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research,* (n 21) 85 advise that researches should collect 'as much data as resources and time allow.'
[46] See [2.4].
[47] See [2.6]
[48] Hall and Wright (n 1) 102.

recent court practices (rather than historical patterns) and a recent time period permitted this. Finally, systematic content analysis of case law 'works best when the judicial opinions in a collection hold essentially equal value, such as where patterns across cases matter more than a deeply reflective understanding of a single pivotal case.'[49] As one of the main purposes of the systematic content analysis is to detect patterns and regularity with respect to extrinsic material use, choosing a restricted time period where the cases over the period hold equal value was preferable to using sampling techniques over a longer period of time such that it might be open to argument that the cases are not equivalent. As noted above, the time periods for each of the High Court and Full Court were chosen so that a roughly similar number of decisions of each court were analysed and that there was at least some overlap in the time periods examined.[50]

(c) Data Qualifications

It is an important part of assessing the data collected for a quantitative study to 'know your source of data, its limitations, who collected it and for what purpose.'[51] Unlike some other case law databases,[52] the High Court database and AustLII database do not rely on any coding or filtering with respect to the cases they house (at least that is observable to a user).[53] However, certain other limitations of the data should be identified.

(a) High Court and Westlaw AU Databases

1. As noted above, the High Court website was used to identify cases within each calendar year and where available, reported versions of a High Court case were downloaded from Westlaw AU and used for analysis. However, not all reported decisions were available in an authorised report series.[54] Some cases were only available in a non-authorised report series such as the Australian Law Journal Reports.

[49] Ibid 66. See also Salehijam (n 18) 36.
[50] According to count of cases on AustLII there were between 192 and 241 cases for each of 2016, 2017, 2018 and 2019. In contrast, the number of decisions of the High Court were 53, 56, 63 and 50 for the same years.
[51] Lawless, Robbennolt, and Ulen (n 27) 127.
[52] In the United States literature, use of filtered databases is often used for empirical studies. See, eg, Carolyn Shapiro, 'Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court' (2008) 60 *Hastings Law Journal* 477 who discusses the limitations of the US Supreme Court database given the databases coding protocols. Use of Shepard's Citations, an American legal citation index, is also common. See, eg, Lee Epstein, William M Landes, and Adam Liptak, 'The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court' (2015) 90 *New York University Law Review* 1115.
[53] Though, as noted above, for AustLII this is subject to the cases that the Federal Court provides to AustLII.
[54] Authorised reports contain judgments that have been approved by a judges or their associate*: Australian Guide to Legal Citation* (Melbourne University Law Review Association Inc., 4th ed, 2018) 50.

2. The High Court database consists of published decisions of the High Court. There is nothing in the description of the database that suggests that there are any High Court judgments delivered that are not made available on the database.[55] However, the database used does contain only final Court decisions. It does not include written submissions made by Counsel to the Court nor the transcript of the High Court proceedings (which are available through another portal). Accordingly, there may be a situation where, for example, counsel for a party has referred to an extrinsic material in their written submission or during the hearing, but then that material is not mentioned in the judgment. One cannot discount that in these circumstances a judge may still be influenced by the discussion of that material, even if he or she does not raise it in their judgment. This study only measures extrinsic materials to the extent they are referred to in the official record of the decision: the judgment.
3. The High Court determines interpretation issues from all Australian jurisdictions, and so examines federal, State and territory legislation. In contrast, this thesis examines the process of making statutes in the *federal* sphere only. This juxtaposition raises the legitimate question of the aptness of examining all High Court decisions in the chosen four-year period. As noted briefly above and as is more clearly evident from the analysis in Chapter Three, the High Court's approach to the use of extrinsic materials is highly dependent on the common law. So even taking into account the different provisions on extrinsic materials in the individual jurisdictions across Australia (some of which are the same as the Commonwealth provision) High Court decisions are highly relevant for all jurisdictions. However, this factor should be noted and, for that reason, each case was coded for the jurisdiction of the statute being considered (see [4.4](e) below.).
4. The High Court has original jurisdiction in certain specific types of matter and must hear those matters brought before it.[56] The Court also sits as the Court of Disputed Returns to try petitions disputing the validity of elections or returns of persons to Federal Parliament.[57] But the bulk of the matters before the High Court are appellate matters,[58] selected by the High Court itself for determination, through the process of

[55] High Court of Australia, *Judgments* (Webpage) < http://www.hcourt.gov.au/publications/judgments >
[56] *Australian Constitution* ss 75 and 76.
[57] *Commonwealth Electoral Act 1918* (Cth) ss 354, 376.
[58] See, e.g., High Court of Australia, *Annual Report 2021-2022* (Report, 30 November 2022) 22; High Court of Australia, *Annual Report 2019-2020* (Report, 30 October 2020) 22 for the number of matters of original jurisdiction of the Court of Disputed Returns.

special leave.[59] In deciding a special leave application, the High Court may have regard to 'any matters that it considers relevant' but must consider whether (1) there is a question of law 'of public importance' or that requires differences between different courts to be resolved, or (2) it is a matter to be heard in 'the interests of the administration of justice.'[60] The following statistics provide a sense of the degree of selection resulting from the special leave process: in the 2021/2022 financial year, 382 special leave applications were filed and 53 of those were granted special leave by the High Court.[61] For the financial years 2016/2017, 2017/2018, 2018/2019 and 2019/2020 (which overlap though are not identical to the four year period analysed) those numbers were 498/69, 523/65, 565/43, and 455/52 respectively.[62] These statistics reveal that there is a substantial level of triage conducted by special leave applications and therefore that the database of High Court cases is heavily weighted in favour of matters the High Court considers to be of significant legal relevance or public importance.

5. Subject to the qualification in (7) below, all decisions on the database were treated equally, regardless of the number of judges sitting for the matter (i.e. whether single judge, three judges or a full court) and regardless of whether the Court was sitting in its original, delegated[63] or appellate jurisdiction, and regardless of whether the decision was interlocutory or not.[64]
6. The composition of the Court changed over the four-year period the subject of the study. At the start of 2016, the Court members were Chief Justice French and Justices Kiefel, Bell, Gageler, Keane, Nettle and Gordon. By the end of 2017, the members of the Court had changed to Chief Justice Kiefel (formerly Justice Kiefel) and Justices Bell, Gageler, Keane, Nettle, Gordon and Edelman. These members of the Court remained the same until the end of the study in 2019. These changes over the time period of the study mean that each decision is not, strictly speaking, a 'like for like' comparison. However, this study is concerned with use of extrinsic materials by a particular institution, the High Court, not individual judges.

[59] *Judiciary Act 1903* (Cth) s 35A; High Court Rules 2004 (Cth) pt 41.
[60] *Judiciary Act 1903* (Cth) s 35A.
[61] High Court of Australia, *Annual Report 2021-2022* (Report, 30 November 2022) 20.
[62] High Court of Australia, *Annual Report 2019-2020* (Report, 30 November 2022) 20; High Court of Australia, *Annual Report 2021-2022* (Report, 30 October 2020) 20.
[63] Court of Disputed Returns.
[64] Interlocutory decisions are still decisions on legal issues.

7. Some decisions on the database were excluded from coding, which brought the sample down to 203 from 222 cases.[65] First, applications for special leave to appeal decisions, which occasionally appeared in the High Court decisions database, were excluded from the population of cases coded. High Court special leave decisions and High Court final decisions are not of an equivalent nature – not of 'essentially equal value'.[66] Special leave decisions are concerned with the merits of whether a matter is sufficiently important to warrant leave to be granted (see above), rather than engaging in any final determination of a legal issue, including the meaning of statutory text. Second, decisions of the High Court sitting as the Court of Disputed Returns in circumstances where the court's task is to gather evidence and determine the facts in advance of consideration of the legal issue were excluded from the database.[67] This is because these judgments primarily relate to the determination of facts, and not legal issues. Third, decisions that were appeals from the Supreme Court of Nauru were excluded.[68] This is because they involved appeals from a non-Australian court and often involved Nauru legislation in circumstances where the law applied to resolve the Nauruan dispute was not clear.[69]

(b) Full Court Federal Court-AustLII and Westlaw AU Databases

1. AustLII publishes all of the decisions of the Full Court that the Federal Court makes available to them, and then AustLII arranges them in chronological order in a separate category of 'Full Court' decisions.[70] There is the possibility that these published cases may not be an exhaustive list of all cases heard by the Full Court as it is the Court that chooses which cases will be reported.[71] Subject to this qualification, no category of decisions was excluded from the data collection.

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[65] These cases were tagged to keep track of them. For explanation of how the records of each case analysis were stored, see below n 72.
[66] Hall and Wright (n 1) 66.
[67] Eg, *Re Roberts* [2017] HCA 39.
[68] There was an agreement between the Government of Australia and the Government of the Republic of Nauru which provided the High Court with jurisdiction to hear appeals from the Supreme Court of Nauru in certain circumstances. The Republic withdrew from the agreement in December 2017: BBC, *Fears for asylum seekers as Nauru cuts Australia appeal court ties* (Webpage, 2 April 2018) < https://www.bbc.com/news/world-asia-43615482 >
[69] See Andrew Roberts, 'Appeals to Australia from Nauru: The High Court's Unusual Jurisdiction', AUSPUBLAW (Blog Post, 4 December 2017) < https://auspublaw.org/blog/2017/12/appeals-to-australia-from-nauru/ >
[70] AustLII, *Federal Court of Australia - Full Court* (Webpage) < http://www.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/FCAFC/ >
[71] AustLII, Frequently asked questions (Webpage) < http://www.austlii.edu.au/faq.html#q1.7 – See answer to question 1.9 'How do you choose the cases which will be reported?' Lee Epstein and Gary King, 'The Rules of

2. The AustLII website was used to identify cases within the relevant time period. Where available, reported versions of those identified Full Court decisions were downloaded from Westlaw AU and used for analysis. As with the High Court decisions, not all decisions were available in an authorised report series. Many cases were only available in a non-authorised report series or in a medium neutral citation version.
3. As with the High Court data, the AustLII database used for Full Court cases only contains published decisions, not written submissions or hearing transcripts, and so the same qualification made with respect to High Court cases above applies here.
4. Members of the Full Court sitting from one case to another vary considerably. Even leaving aside the impact of new appointments and retirements, hearing of Full Court matters is spread among over 50 judges of the Federal Court.[72] This means that members of the Full Court deciding a matter regularly changed from case to case. For the same reasons as expressed above for the High Court, this is not seen as pertinent for this study, but is merely noted by way of qualification.

4.5 Coding of the Cases

Subject to cases excluded as identified above in [4.3](c), each of the High Court and Full Court cases within the relevant time periods were examined individually. First, if the decision was lengthy, a search of the decision was undertaken using key terms to quickly identify the possible presence of extrinsic materials.[73] Then the authorised version or, if no authorised version, another version of the case was read in full.[74] In this study, a 'textual analysis' method of analysing the case content was adopted for collecting the data.[75] This simply (in idea at least) involves analysing the textual content of each decision to obtain the information

Inference' (n 3) 106 have criticised studies based on published reports only, but it is unlikely that the Federal Court withholds a significant number, if any, of its decisions from publication.

[72] See, e.g., Federal Court of Australia, *Annual Report 2019-20* (Report, 19 September 2022) 7 which states that at 30 June 2022 there were 54 judges of the Court.

[73] The key terms were compiled from the Pre-Test discussed in [4.5] and included, for example, Cabinet, *CIC Insurance*, Committee, construction, Charter, Covenant, Convention, Debate, draft, Explanatory Memorandum, extrinsic, Hansard, interpretation, legislative history, manual, parliament, protocol, report, speech and treaty.

[74] A summary of each of the decisions with relevant information supporting how they were coded was entered and key concepts tagged in the note recording application 'Evernote' https://evernote.com/ . This provided a written summary of all findings that are entered into the Excel spreadsheet, as well as providing a quick way to search notes on each decision, a form of backup of the analysis, and a record to use as a check if coding entries in the Excel spreadsheet appeared to be in error.

[75] A recognized method of collecting data: Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (n 21) 81-83. Epstein and Martin consider 'systematic content analysis' to be a slightly more sophisticated version of textual analysis.

to be recorded.[76] Extracting this data was done manually (i.e. by hand, not by software).[77] Extracting it manually was regarded as preferable to relying on software to identify key words, particularly for collecting data on the different types of extrinsic material. Given the potentially unlimited range of materials that could be used, and the importance of context within the judgment for coding some of the concepts, it was thought that collecting data manually would provide more accurate results.[78] For example, if only an electronic search of the word 'report' was used this would pick up an expert medical report relevant to a fact finding exercise in a decision as well as a royal commission report or government department report which is used to identify the mischief of a statute. In many instances, the word must be read in its context to determine the nature of the material. Further, merely identifying that a term or phrase was used in a decision does not indicate whether courts cited it approvingly or disapprovingly.[79] The content of the decision needed to be read to collect the data on the use of the material. (See (d) below.)

Each decision was coded separately and then the results were entered directly into an Excel spreadsheet.[80] Direct entry of data is recommended, as every extra step increases the potential for error.[81] As explained later in the chapter in [4.4](e), the name and medium neutral citation for a decision was entered in the spreadsheet. The medium neutral citation was used as it enabled easy location of individual cases if they needed to be re-visited. For this reason, in this chapter where example cases from the study are referred to, both the medium neutral citation and (if available) the reported version citations are given.

Good practice requires that the systematic recording, or 'coding', of the data extracted from the databases follows systematic and consistently applied coding rules. Coding rules can be based on theories or on 'themes, topics, concepts, terms of keywords found in the data'.[82] The coding for this study was primarily focussed on topics and concepts. Like any human

[76] Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (n 21) 81.
[77] Counted by hand, not computer. Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (n 19) 81 notes that use of software for coding and generating the data is becoming more common.
[78] Cf David S Law and David Zaring, 'Law versus Ideology: The Supreme Court and the Use of Legislative History' (2010) 51(5) William & Mary Law Review 1653, 1686-1687 who used electronic searches and so acknowledged that their findings could be under represented.
[79] See the brief discussion about the limitations of using term frequency analysis in statutory interpretation in Choi (n 13) 389-90.
[80] The excel spreadsheets were subsequently directly uploaded to the SPSS software for analysis.
[81] Lee Epstein and Andrew D Martin, *Introduction to Empirical Legal Research* (n 21) 113; Lawless, Robbennolt, and Ulen (n 27) 170.
[82] Leeuw and Schmeets (n 2) 131.

endeavour, coding is not a perfect exercise,[83] but it should be done in such a manner as to minimise coder discretion.[84] This is to maximise the replicability of the research, a key feature of empirical work.[85] Replicability refers to the ability of another researcher to be able to 'understand, evaluate, build on, and reproduce the research without any additional information from the author.'[86]

In order to be replicable, the coding must be as objective and consistent as possible and performed in accordance with a set of clear and precise coding rules. Those coding rules are contained in a codebook that identifies and explains each variable, how it is measured and the rules in relation to those measurements. This not only makes the research method transparent, but replicable.[87] In order to ensure transparency, a codebook should be made available to other researchers and readers. The Codebook for this study is included at the end of Chapter Five (which presents the findings (the 'Codebook').

There is 'no one set format'[88] for a codebook, but it should be 'sufficiently rich' so that the data can not only be coded reliably but can also be used by a third person to replicate, or build on, the findings.[89] The more clearly a researcher can clarify the concepts or themes being coded so that they can be measured empirically, 'the better their tests will be.'[90] A 'major source of unreliability in measurement is vagueness'.[91] Consequently, the Codebook strives to have 'clear and detailed definitions of each variable, the range of values the variable can take and the contours of each category.'[92] Nearly all of the variables for this study are categorical variables, in that they capture 'a quality of the observation under study' and are not capable of

[83] Harry T Edwards and Michael A Livermore, 'Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking' (2009) 58(8) *Duke Law Journal* 1895, 1926. The reality is that people 'make mistakes': Jason Rantanen 'The Future of Empirical Legal Studies: Observations on Holte & Sichelman's Cycles of Obviousness' (2020) 105 *Iowa Law Review Online* 15, 28; Hall and Wright (n 1) 105.
[84] Lawless, Robbennolt, and Ulen (n 27) 173; Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (n 21) 106.
[85] See Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (n 21) 59.
[86] Lee Epstein and Gary King, 'The Rules of Inference' (n 3) 38. *Cf* Jason Chin and Kathryn Zeiler, 'Replicability in Empirical Legal Research' (2021) 17 *Annual Review of Law and Social Science* 239 who refer to research as replicable if researchers can access all information necessary to attempt a replication by requiring researchers to make available the input data, the steps used to collect it, methods, coding rules, and conditions of analysis.
[87] Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (n 21) 106.
[88] Lawless, Robbennolt, and Ulen (n 27) 179.
[89] Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (n 21) 106; Lee Epstein and Gary King, 'The Rules of Inference' (n 3) 83.
[90] Lee Epstein and Gary King, 'The Rules of Inference' (n 3) 76.
[91] Lee Epstein and Gary King, 'The Rules of Inference' (n 3) 83.
[92] Lawless, Robbennolt, and Ulen (n 27) 173.

mathematical comparisons.[93] As noted at the beginning of this chapter, the variables identified for this study are for the purpose of providing information on the type and regularity of extrinsic materials used recently in the High Court and the Full Court of the Federal Court.

For each variable a 'value' must be given. Values are the categories of the variables.[94] The values for each variable must be exhaustive and must be mutually exclusive, with more rather than few preferable (depending upon the study and the variable).[95] So, for example, in this study one variable is whether a decision mentions extrinsic materials or not. The values for this variable are 'yes', 'no' or not applicable.[96]

To assist with the development of a clear coding rules, a 'pre-test' or 'pilot' test (the 'Pre-Test') for the blue print of a methodology was done before the full-scale study.[97] The pre-testing allows variables and values to be identified, tested and refined inductively.[98] The Pre-Test for this study involved coding 130 High Court decisions delivered between 2013 and 2015[99] using a draft codebook. The Pre-Test enabled the Codebook to be finalised to a greater extent than it would have been had the Pre-Test not been done. After the Pre-Test, several of the variables, value definitions and coding rules were revised, with a record kept of revision decisions in a journal.[100] However, adjustments to coding rules does not stop after a pre-test. Coding can be an 'iterative' process which may require adjustments to be made to the rules as points arise that were not foreseen when the data collection began.[101] As is explained in the discussion of variables in [4.4], this was the case for several variable descriptions. Where coding was adjusted, the Codebook was adjusted and, if necessary, decisions re-coded.

By way of summary, the variables identified in the Codebook fall into three groups. The first group are variables that capture basic characteristics of the decision: name and citation, case

[93] Ibid 172. Categorical variables that only take two values – such as yes or no – are binary variables.
[94] Lee Epstein and Andrew Martin, 'Coding Variables' in K. Kempf-Leonard (ed), *The Encyclopaedia of Social Measurement* (Academic Press, 2005) 321, 321.
[95] Ibid 323-324; Lawless, Robbennolt, and Ulen (n 27) 176.
[96] The value 'not applicable' is needed for when a decision is coded as not being a statutory interpretation decision and therefore the absence or otherwise of extrinsic materials is irrelevant.
[97] A pre-test is recommended by Lee Epstein and Gary King, 'The Rules of Inference' (n 3) 54. See also Hall and Wright (n 1) 107.
[98] Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (n 21) 96.
[99] All High Court decisions from 2015 and 2014 were reviewed. The first 25 decisions of 2013 were reviewed.
[100] Lee Epstein and Gary King, 'The Rules of Inference' (n 3) 103 suggest keeping a journal or some other record of decisions that affect the codebook rules and the reasons for those decisions. This journal was invaluable for reminding the researcher about the reason for coding choices, especially as the study was conducted part time over several years.
[101] Lawless, Robbennolt, and Ulen (n 27) 176.

identification number, and year of publication. The second group are those variables that do not directly relate to statutory interpretation, but which it was thought might be fruitful to collect to see if any inferences can be drawn between the use of extrinsic materials and those variables. These include matters such as statute age, statute subject, statute jurisdiction and whether the decision included a dissenting judgment or not. The third group of variables are those directly related to statutory interpretation and extrinsic materials. These are whether the case was a statutory interpretation decision or not, if it was a statutory interpretation decision, then whether there was reference to extrinsic material, the legal basis for referral to that material (if any), the type of extrinsic material referred to, and the use made of that material. The full description of each variable and the values attributed to each variable are given in the Codebook.

In addition to providing clear coding rules, it is necessary to explain how the variables were defined so that the findings can be understood in the context of those choices. Accordingly, the remainder of this chapter provides some background to, and explanation of, the choices that were made when formulating the coding rules in the Codebook.

(a) Variable - Identifying a Statutory Interpretation Decision

The threshold question for each decision that was analysed was whether at least one judgment in the decision involved the interpretation of a statute. The values for this variable were simply yes or no. Defining this variable had its challenges. In case law, the task of statutory interpretation is usually described in short form as 'the attribution of meaning to statutory text.'[102] This was the definition for this variable that was initially used to identify a 'statutory interpretation' decision in the Pre-Test and for early coding. That is, the question asked was whether at least one judgment in the decision had addressed the *meaning* of statutory text. It is a description that has been used in a recent American empirical analysis.[103]

However, in the course of coding it became evident that the description was problematic. First was the problem of its scope. It is certainly the case that the 'problem of meaning' is 'the

[102] *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ). See also *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 374 [37] (Gageler J); *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 96 ALJR 208, 222 [63] (Kiefel CJ, Gageler, Steward and Gleeson JJ)

[103] See Anita S Krishnakumar, 'Cracking the Whole Code Rule' (2021) 96(1) *New York University Law Review* 76, 91 and n 63 who coded cases as statutory if they 'involved analysis of a statute's meaning.'

essence of the business of judges in construing legislation',[104] but it is not the totality of the statutory interpretation task. There are arguably many other ways in which a court can be involved in statutory interpretation. Although it might be accepted that 'interpretation' of text is distinct from application of the text to facts, the line between the two is not always an easy one to draw.[105] Further, consideration of the scope of operation of statutory text may involve consideration of the nature and precedential value of common law principles that already exist to give content to the statutory provision.[106] The scope and operation of statutes may also be considered when it is necessary to decide how two different statutes operate in harmony or inconsistently.[107] Consideration of the operation of statute may also be a step in judicial review,[108] including jurisdictional error where the latter involves decision making under statute.[109] These situations don't always sit easily with the description 'attribution of meaning' but have a legitimate claim to being part of statutory interpretation.

Second, determining whether the decision was concerned with the 'attribution of meaning' involved considerable coder discretion. As has been noted earlier in this chapter, for a robust empirical study, '[a]s far as possible, human judgment should be removed from coding'.[110] Early coding revealed that drawing a bright line between where a court has and has not attributed meaning to statutory text or engaged in broader aspects of interpretation, including application, required considerable evaluation in some instances. Reasonable minds can differ

[104] Felix Frankfurter, 'Some Reflections on the Reading of Statutes' (1947) 47(4) *Columbia Law Review* 527, 528.
[105] Jeffrey Barnes, Jacinta Dharmananda and Eamonn Moran, *Modern Statutory Interpretation: Framework, Principles and Practice* (Cambridge University Press, 2023) 6-8 citing John Bell and Sir George Engle, *Cross on Statutory Interpretation* (Oxford University Press, 3rd ed, 2005) 34 who say that application has a claim to being described as interpretation.
[106] As noted in *Carter v Bradbeer* [1975] 1 WLR 1204, 1206 the 'strict doctrine of precedent' can only be of narrow application to statutes but prior cases can have significant persuasive value. See also Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as Common Law Process' (2011) 37(2) *Monash University Law Review* 1 for a discussion of the interaction between statutory interpretation and the doctrine of precedent. (See, eg, costs under s 43(1) of the *Federal Court of Australia Act 1976* (Cth) in *Innes v AAL Aviation Limited (No 2)* [2018] FCAFC 130).
[107] See, eg, *NSW Commissioner of Police v Cottle* (2022) 96 ALJR 304; *Minister for Immigration and Border Protection v Egan* (2018) 261 FCR 451.
[108] Eg, many of the Federal Court of Australia Full Court decisions that were coded concerned judicial review with respect to a decision made under a Commonwealth Act, such as the *Migration Act 1958* (Cth).
[109] In *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 133 [24] (Kiefel CJ, Gageler and Keane JJ) explain jurisdictional error in a statutory decision-making process as referring to 'a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking the characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it.'
[110] Lee Epstein and Andrew Martin, 'Coding Variables' (n 94) 326.

on how to characterise the relevance of a statute to a question of law. As Justice Leeming has noted extra-judicially:

> I am … conscious that minds might differ as to whether an appeal involving a question of law is one based on statute, or is a 'pure' principle, and that many appeals involve more than one question.[111]

Consequently, the decision was made to revise the definition of this variable.[112] The revised definition counted a decision as a statutory interpretation case if at least one judgment in the decision interprets the text of an Australian statute, where interpretation is taken to mean the attribution of meaning to statutory text, whether by inquiry into the meaning of the text, clarification or explanation of the meaning, or inquiry into the appropriate scope or application of the text, and whether or not the meaning was the primary issue before the court. This minimized coder discretion and the need for judgment.

It is accepted that the revised definition errs on the side of generosity for what is coded as a 'statutory interpretation' case. This is accounted for in the findings in Chapter Five. More importantly, however, the coding of this variable does not impact the counting of later variables relating to the presence and use of extrinsic materials. Indeed, using inductive reasoning, a decision that refers to extrinsic materials is most likely a decision involving statutory interpretation.

One consequence of this expansive definition was that decisions that addressed a statutory provision, where the content of that provision or its application was determined primarily on the basis of common law precedent, was counted as a statutory interpretation case. Two examples illustrate. In *Ramsay Health Care Australia Pty Ltd v Compton*[113] the Court was required to consider s 52 of the *Bankruptcy Act 1966* (Cth). The content of s 52 was determined by reference to long standing case law and was not in doubt. However, the decision concerned the application of s 52 to the facts before the court. The case was counted

[111] Justice Mark Leeming, 'The Modern Approach to Statutory Construction' in Barbara McDonald, Ben Chen and Jeffrey Gordon (eds), *Dynamic and Principled: The Influence of Sir Anthony Mason* (Federation Press, 2022) 45, 47.
[112] This decision was made in February 2018 shortly after coding began.
[113] [2017] HCA 28; (2017) 91 ALJR 803.

as a statutory interpretation decision. Another example is *Castle v The Queen*[114] where the Court considered the common law proviso in s 353 of the *Criminal Law Consolidation Act 1935* (SA), which provided that errors in a lower court decision in the determination of a conviction for a criminal charge meant that the verdict should be set aside unless there had been 'no substantial miscarriage of justice'. The Court determined that the proviso was to be interpreted in accordance with the principles stated in another High Court decision,[115] but the dispute before the Court concerned what those principles were and their application to the facts. This case was also counted as a statutory interpretation decision.

The broad (revised) definition was subject to a number of caveats. These are specified in the Codebook, but two warrant brief explanation here. The first is that decisions that only make a passing reference to a statute or that only paraphrase a provision, without more, were not coded as decisions relating to statutory interpretation. So, for example, if the only reference in a judgment to a statutory provision is to cite the provision under which the matter was appealed, then that was not counted. The High Court case of *Re Canavan*[116] illustrates this point. The Court was tasked with the interpretation of s 44(i) the *Australian Constitution*. The Court referred to the *Commonwealth Electoral Act 1918* (Cth) to identify how the question came to be before the Court as the Court of Disputed Returns. This was regarded as a passing reference which was insufficient for the decision to be coded as a statutory interpretation decision.[117]

Second, only judgments relating to the interpretation of *statutes* (principal Acts and amending Acts) were counted as statutory interpretation decisions. Cases that were concerned only with the interpretation of delegated legislation,[118] the *Australian Constitution*, international instruments and quasi legislation (such as practice directions or Administrative Arrangements) were not counted. Accordingly, a judgment that addressed a legal issue that was only about the interpretation of any of these other instruments was counted as a 'no'. The primary reason for excluding these legal instruments is that, as explained in Chapter One, this

[114] [2016] HCA 46; (2016) 259 CLR 449.
[115] The case was *Weiss v The Queen* (2005) 224 CLR 300.
[116] [2017] HCA 45; (2017) 91 ALJR 1209.
[117] This situation should be distinguished from decisions where a statutory provision is being challenged on the grounds of constitutional validity, and the provision must be construed before the issue of validity can be addressed. As the Codebook rules make clear, such a decision *would* be coded as a statutory interpretation decision.
[118] See, eg, *Vo v Minister for Home Affairs* [2019] FCAFC 108; (2019) 269 FCR 566.

thesis is focussed on the making of statutes and their interpretation. Delegated (and quasi) legislation are subject to different law making and parliamentary scrutiny processes and different laws of interpretation, many of which are due to the relationship between statute and the delegated legislation that it is empowered to make.[119] The *Australian Constitution* is an enactment of the United Kingdom and therefore it has not been subject to the law making process of Australia.[120] Further, there is a separate and distinct body of law governing its interpretation.[121] The same is true of international documents.[122]

A 'no' was recorded if the only reference to statutory text in any of the judgments was to a State Agreement.[123] Although it depends upon the provisions of the ratifying statute, generally courts have taken the view that such an agreement '…is not to be interpreted like a statute… usual principles which govern the construction of a written contract apply'.[124]

However, a case involving the interpretation of another legal instrument was distinguished from a case where a judgment engaged in the interpretation of a statute as a step towards resolving the non-statutory issue. For example, if the issue to be determined by the court was the meaning or validity of a clause in regulations, the court may, as a first step, construe the enabling provision in the statute that permits the making of the regulation. A 'yes' will be recorded as the first step is clearly interpretation of a statute. Similarly, where there is a question of federal constitutional law and the constitutional question was either avoided or

[119] See, generally, Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 6th ed, 2023) chs 2-3 (for the making of delegated legislation for all Australian jurisdictions) and chs 30 and 31 (for interpretation).
[120] *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9. Though statutes passed by Federal Parliament to facilitate an amendment to the Constitution would be included.
[121] Though the traditional view is that the Constitution be construed according to ordinary principles of statutory construction, other approaches have emerged since federation and, although many concepts overlap in the interpretation of the Constitution and statutes, a separate body of common law has emerged. See, generally, Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2nd ed, 2020) 383-91.
[122] International agreements concluded between States are generally construed pursuant to the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 23 January 1980) Prt III.
[123] A State Agreement is a legal agreement between a government and a company to develop a major proposed project that is ratified by Parliament by enactment of a statute containing the Agreement. Historically, they have been used in Western Australia for large mining project as well as oil and gas projects, and land and industrial developments.
[124] *Mineralogy Pty Ltd & Ors v The State of Western Australia & Anor* [2005] WASCA 69, [13]-[14] (McLure JA, Steytler P agreeing at [1], Roberts-Smith JA agreeing at [6]). Some portions of the ratifying statute may be interpreted as a statute if they can be characterised as having 'statutory force': see *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832, 857-8 [123]-[127] (Edelman J). See generally J Southalan, 'State Agreements' in K Dharmananda and L Firios (eds), *Long Term Contracts* (Federation Press, NSW, 2013) 170.

decided after the judgment interpreted the statute relevant to the constitutional issue then that decision was coded as a 'yes'.[125]

(b) Variable - Identifying Extrinsic Material

If a decision was identified as a 'statutory interpretation' decision, then the next variable was whether at least one judgment in that decision referred to extrinsic materials. The values for this variable were yes, no or not applicable. A decision was coded as 'not applicable' if the decision had been coded as *not* being a decision relating to a statutory interpretation decision.[126]

The key concept for this variable is the definition of 'extrinsic materials'. Inherent in the label itself is the suggestion that 'extrinsic materials' are any materials that exist externally to a statute. However, as observed in Chapter One, the term 'extrinsic materials' is used more specifically in statutory interpretation in Australia, though unfortunately still without a clear definition. Generally, the judiciary appears to use the term when referring to materials that form part of the legislative history of the statute being construed to the extent that those materials are created by the executive, Parliament or other body.[127] It is well accepted that 'extrinsic materials' includes materials such as an explanatory memorandum, second reading speech, Parliament minutes, Hansard, parliamentary committee report, statement of compatibility, law reform commission report, other report, government documents, international materials, draft Bills, and a bills digest. In other words, they are materials that exist outside the statute being construed that were in existence prior to, or generated in connection with, the statutory provision being considered. But, as discussed in Chapter Three, the precise limits of those materials cannot be exhaustively stated.[128]

Initially 'extrinsic materials' were defined for coding purposes (subject to certain exceptions) as any external materials that were in existence prior to the statute being enacted. However,

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[125] This approach was adopted from a similar approach taken by Nicholas S Zeppos (n 13) 1088.
[126] The question about statutory interpretation is a 'filter question' in that it filters out cases that will not be analysed for variables relating to extrinsic materials from that point and will only be coded as not applicable for those variables: Lawless, Robbennolt, and Ulen (n 27) 178-9. The value of 'na' is used as simply leaving values blank without attributing a value can cause statistical issues when analysing the data: Lee Epstein and Andrew Martin 'Coding Variables' (n 94) 326.
[127] See, eg, *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56, 71 [87] (the Court). See Chapter One [1.2].
[128] See [3.3].

like the variable of statutory interpretation explained above, the Pre-Test and early coding made it clear that sometimes this rule was difficult to apply. While the application of that definition is clear for commonly used materials such as the explanatory memorandum and second reading speech, the date of creation of other materials was not always clear from the judgment. In those instances, early attempts to research the timing for when the cited material was created (i.e. to see if it was in existence before the statute was enacted) were sometimes time consuming and difficult.[129]

Accordingly, a decision was made to expand the definition of 'extrinsic materials' to refer, subject to certain express exclusions explained below, simply to any material external to the statute regardless of whether it came into existence before or after the enactment of the statute or the statutory provision being construed. This made the variable clearer and more objective and did not require further research that created a possibly complex step that increased the potential for error. Secondly, it was reasoned that the next key variable for the coding of the materials for their typology would provide more information about those materials.

Both the revised definition and the former definition of 'extrinsic materials' could, potentially, cover materials that might be within the Australian concept of 'legislative history' but beyond the scope of what courts typically mean when they use the term 'extrinsic materials'.[130] The Australian concept of 'legislative history' is broad, including legislative antecedents and pre-existing case law. Analysing cases for these materials is beyond the scope of this thesis and therefore this empirical study. More, they are bodies of material that are governed, at least to some extent, by separate legal principles. Consequently, while they may form part of 'legislative history' of a statute, these materials were expressly excluded from the scope of 'extrinsic materials' for coding.

Following is an explanation of those excluded materials and other materials that were expressly carved out of the variable 'extrinsic materials'.

[129] Determining whether the material was in existence before the enactment of the statutory provision was particularly time consuming where the court was considering a statutory provision that was amended or inserted after the original statute enactment, and where the material was international material.

[130] On this note, comparisons with empirical legal scholarship on 'legislative history' done in the United States (see, eg, n 13) should be regarded with care. As in Australia, it is difficult to find a clear definition of 'legislative history' accepted in American case law or scholarship. However, the way the term 'legislative history' is used in American case law and scholarship strongly suggests that it only refers to materials generated *by the legislature* during the making of the statute such as committee reports, committee hearings, and floor debates.

(1) Legislative antecedents - the legislative enactments, amendments and repeals that form part of the 'legislative evolution' of a statute. As explained above, 'extrinsic materials' does not include 'the successive enacted versions of the provision from its inception to the version in place when the relevant facts occur.'[131] For example, if the statute being construed in a decision is *Statute A 2022* (Cth) and the court refers to the statute it replaced, *Statute X 1990* (Cth), *Statute X* itself forms part of *Statute A*'s legislative history but is not counted as 'extrinsic material'.

(2) Pre-existing case law, current case law (including findings/decisions of tribunals or other statutory or administrative bodies) and other legislation (such as other statutes and delegated legislation), including similar legislation,[132] were not counted as extrinsic material. For example, where the decision is construing *Statute A 2022* (Cth) which prohibits racial discrimination and a judgment refers to the similar *Statute Z 2011* (Vic) which prohibits racial discrimination (arguably a similar statute), that Victorian *Statute Z 2011* forms part of the broader context of *Statute A 2022* (Cth), but is not considered 'extrinsic material' for this study. Similarly, a judicial decision about the meaning of a provision in *Statute A 2022* (Cth) is not counted as extrinsic material. While other legislation and case law are 'extrinsic' to a statute in a strict sense, and may form part of the historical context of the statute if they are pre-existing, reference to these materials are not regarded as 'extrinsic materials' and they give rise to a distinct and separate set of issues in statutory interpretation.[133]

(3) Extrinsic material does not include any Official Record of the Debates of the Australian Federal Convention on the *Constitution*, including the Convention Drafting Committee.[134] These materials are typically relevant to the interpretation of the *Constitution*. As noted above, for issues of constitutional validity it is sometimes the case that a statute will be construed first before the issue of validity is addressed. In those circumstances, determining whether the Debates were referred to in the course of interpreting the *Constitution* or for the statute could be problematic. So the Debates were excluded.

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[131] Ruth Sullivan, *The Construction of Statutes* (LexisNexis, 7th ed, 2022) 627. See also James Steele, 'Statutory Forebears: Legislative Evolution as a Means of Statutory Interpretation' (2017) 39(3) *Statute Law Review* 303, 305-6 citing Francis Bennion, *Bennion on Statutory Interpretation* (Butterworths, 5th ed, 2008) 602.

[132] Similar legislation, or statutes *in pari materia*, refers to two or more statutes that deal with the same subject matter along the same lines: *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 371 [24] (Kiefel CJ, Nettle and Gordon JJ).

[133] Such as the doctrine of precedent, stare decisis and in pari materia issues.

[134] Eg, *Day v Australian Electoral Officer for the State of South Australia* [2016] HCA 20, [39]-[40]; (2016) 261 CLR 1, 20-1 (the Court).

(4) Private legal instruments such as wills and contracts or quasi-private instruments (such as Administrative Arrangements or private arrangement guidelines.[135])
(5) Academic or extra-judicial scholarship or commentary.
(6) Dictionaries, such as the Oxford or Macquarie Dictionary. The use of dictionaries has been long approved at common law to assist with statutory interpretation.'[136] Its use is not reliant on the law of extrinsic materials.
(7) Written evidence in relation to determination of facts such as sworn evidence (like an affidavit or testimony.[137])
(8) If there was insufficient information in the judgment to identify the nature of the extrinsic material, then it was not counted.[138]

Subject to the exclusions in (1) to (8) above, extrinsic material was taken to include materials external to a statute even if those materials related to another version of the provision or Act being interpreted. For example, where *Statute B* is enacted in 1986, then s 10 of *Statute B* is amended in 2001, and s 10 of *Statute B* comes before the court in 2010, the second reading speech for the 1986 original enactment is counted as extrinsic material. Similarly, if there is a law reform commission report relevant to the creation of *Statute B* and then *Statute B* is re-enacted as *Statute C* and the court is considering *Statute C*, then the report is still extrinsic material. The rationale for this coding rule is that the material is extrinsic, relevant to the evolution of the Act and of a type that is accepted as coming within the term 'extrinsic materials'.

Finally, a decision was only counted once for whether it referred to extrinsic material or not, even if more than one judgment in the decision (if it contained multiple judgments) referred to extrinsic material. To do otherwise risks distorting the results. By confining the collection of data to whether *at least one* judgment refers to material allows the results to be expressed in those terms and to be considered in that context. For example, if every reference in each judgment was counted, a unanimous decision with a single joint judgment that refers to a

[135] Eg, *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1.
[136] *Polo/Lauren Co LP v Ziliani Holdings Pty Ltd* (2008) 173 FCR 266, 273 [24] (the Court); *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498, 505 [28] (Mason P, Stein JA agreeing at 511 [56] and Giles JA agreeing at 511 [57]).
[137] *Wilkie v The Commonwealth* [2017] HCA 40; (2017) 91 ALJR 1035.
[138] See, e.g., press release and report of United Nations Special Rapporteur on Torture in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34, [106]; (2017) 262 CLR 362, 398; reference merely to "extrinsic materials" by Nettle J in *Police v Dunstall* [2015] HCA 26; (2015) 256 CLR 403, [76].

second reading speech would be counted as one, where as a unanimous decision with 3 separate judgments each referring to the same speech would be counted 3 times. This seemed to have potential to provide bloated results, as opposed to a result that allows clearer counting by reference to 'at least one judgment.'[139]

If extrinsic material was referred to, the decision was coded for whether statutory or common law authority was cited for the referral to that material. The answers were coded for statutory authority, common law authority, where both common law and statutory authority were cited, or where neither was cited. Clearly, this does not capture the situation where authority for recourse to material was cited in submissions to, or argument before, the court, but not repeated in the judgment.

(c) Variable – Types of Extrinsic Material

If the answer to the variable as to whether at least one judgment in the decision refers to 'extrinsic material' was coded 'yes', then the type of extrinsic material was coded. The variables for typology included the familiar explanatory memorandum, second reading speech, and law reform commission reports, as well as Parliament minutes, Hansard (other than the second reading speech), parliamentary committee report, statement of compatibility, other report, government document, international materials, draft Bills or models for Bills, and a bills digest. These categories were listed as separate variables rather than as values for a single variable of 'type' as decisions can refer to more than one type of extrinsic material. Values should be mutually exclusive which precludes recording references to many types.

A decision was only counted once for a particular type of extrinsic material, regardless of how many judgments referred to the material and how many times the material was referred to in the judgment. But that decision could count for more than one type of extrinsic material. This approach was adopted from Czarnezki and Ford[140] as being the clearest and least complicated approach to counting. For example, in *New South Wales v Robinson*,[141] the joint judgment of

[139] This approach was discussed and agreed with Pauline Ding, at the time a consultant in the Statistical Consulting Unit at the Australian National University, at the beginning of the research design. This approach was adapted from James J Brudney, 'Below the Surface' (n 13) 31-32 in his analysis of House of Lords' decisions.
[140] Jason J Czarnezki and William K Ford 'The Phantom Philosophy? An Empirical Investigation of Legal Interpretation' (2006) 65 *Maryland Law Review* 841, app E, 900.
[141] [2019] HCA 46; (2019) 266 CLR 619.

Kiefel CJ, Keane and Nettle JJ referred to (among other things) a New South Wales Law Reform Commission Report and to a second reading speech (both more than once).[142] The joint judgment of Bell, Gageler, Gordon and Edelman JJ also referred to (among other things) the New South Wales Law Reform Commission Report and to a second reading speech (both more than once).[143] The decision was counted once for a law reform commission report (LRCRep) and once for a second reading speech (SRS).

As discussed in Chapter Three,[144] the common law principle of context encompasses 'any… matter that could rationally assist understanding of meaning' of text,[145] and so it is not possible to foresee every type of material that might be referred to within the definition of 'extrinsic materials' in the Codebook. Given the open ended nature of extrinsic materials, the category 'other' was used to capture any materials not falling within any of the specific categories. The use of 'other' is acceptable in coding as it is not possible to anticipate everything and it is 'typically necessary.'[146]

The categories for extrinsic materials emerged from the Pre-Test and the process of coding. As a 'rule of thumb', where pretesting or coding reveals that the 'other' response accounts for 10 percent or more of responses then a new value or category should be added.[147] This process led to the adoption of additional categories of extrinsic materials during coding. For example, sometimes the court referred to second reading speeches or explanatory memoranda for a statute other than for the statute being construed. This led to the decision to adopt additional variables for explanatory memorandum, speeches etc. that related to statutes other than the one being construed. To exclude these parliamentary and executive materials because they were not directly related to the enactment of the statute being interpreted risked providing an inaccurate picture of materials referred to. Exclusion would be a missed opportunity to acquire further data about other materials used. To distinguish between the two types of materials, the second body of materials were labelled and coded as 'other second reading speech' 'other explanatory memorandum' etc.

[142] See, e.g., [2019] HCA 46, [40][43]; (2019) 266 CLR 619, 643, 645.
[143] See, e.g., [2019] HCA 46, [96][100]; (2019) 266 CLR 619, 666, 667.
[144] [3.3].
[145] Hon Murray Gleeson AC, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 29.
[146] Lee Epstein and Andrew Martin, 'Coding Variables' (n 94) 323.
[147] Lee Epstein and Andrew Martin, 'Coding Variables' (n 94) 323 citing L Shi, *Health Services Research Methods* (1997, Delmar Publishers). See also Lawless, Robbennolt, and Ulen (n 27) 176-77.

(d) Variable – Use of extrinsic material

If extrinsic material was present in at least one judgment of a decision, then the decisions were coded for how the material was used by those judges who referred to it. Three variables were used: interpretative asset, referenced or rejected. The extrinsic materials were examined in the context in which they were used by the court. No separate attempt was made to distinguish between reasoning forming part of the *ratio decidendi* and portions forming part of *obiter dicta*.

The concept of an 'interpretative asset' was adopted from the work of American statutory interpretation scholar James J. Brudney who has done several empirical studies about the use of interpretative aids in statutory interpretation decisions, including extrinsic materials.[148] Brudney describes an 'interpretative asset' to mean where a material is affirmatively relied on as a probative or determining factor to support the reasoning process of the judge in relation to application of the statute.[149] In this study it includes where a judge has used material (the 'asset') to 'justify or buttress'[150] their reasoning. A decision was coded as using extrinsic material as an interpretative asset if at least one of the judgments did so.[151]

A decision was coded as 'referenced' if at least one of the judgments referred to or discussed extrinsic material but did not rely on it for their reasoning nor reject its value. This included where a judgment made a passing mention to the material or did not address it in a way meaningful to the interpretative issue.[152] Use of material was also coded as referenced when at least one judgment in the decision merely referred to the material as part of summarizing another argument without giving any indication about its probative value (or lack of probative

[148] See, e.g., James J Brudney, 'Below the Surface' (n 13); James J. Brudney and Corey Distlear, 'Decline and Fall of Legislative History - Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras' (n 13); James J Brudney and Corey Distlear 'Liberal Justices' Reliance on Legislative History' (2008) 29 *Berkeley Journal of Employment and Labor Law* 117; James J Brudney, 'Canon Shortfalls and the Virtues of Political Branch Interpretive Assets' (2010) 98 *California Law Review* 1199.
[149] James J Brudney and Corey Ditslear (n 13) 221 n 4; James J Brudney and Corey Distlear, 'Canons of Construction and the Elusive Quest for Neutral Reasoning' (2005) 58 *Vanderbilt Law Review* 1, 24-25, nn94, 97.
[150] James J Brudney, 'Below the Surface' (n 13) 30.
[151] *Cf* Anita S Krishnakumar (n 103) 169 who coded for a distinction between when an opinion used 'legislative history' to corroborate an interpretation dictated by other tools or canons and when the opinion actively references the legislative history to reach its result.
[152] A similar approach to what is a 'passing mention' was recently used in Lawrence Baum and James L Brudney, 'Two Roads Diverged' (n 13) 839.

value).[153] For example, where the reference was made as part of summarizing the argument of a party or as part of explaining procedural history.

One additional rule deserves further explanation. Determining how extrinsic material is used can be challenging when a judge relies on the *absence* of something in extrinsic materials to support their reasoning. For example, in *Lordianto v Commissioner of the Australian Federal Police,*[154] Kiefel CJ, Bell, Keane and Gordon JJ used the absence of any expressed intent about a statutory provision in an explanatory memorandum and a law reform commission report to support a view about the construction of the provision.[155] Absence used in this way was coded as using the material as an interpretative asset on the ground that the absence of something in the material is used in a probative way. This rule is consistent with the legal approach identified in Chapter Three.[156]

A decision was coded as 'rejected' if at least one of the judgments rejected or dismissed the value ascribed to extrinsic material by another judge, the lower court, another court or a litigant. Use of extrinsic materials was also coded as 'rejected' if a judgment referred to extrinsic material but then concluded that the material did not assist in resolving the dispute.[157]

Again, each of these choices was coded as a separate variable rather than as three separate measurements of one variable. This was because different judges in a single case might use extrinsic material in different ways. For example, in *R v A2,*[158] a variety of extrinsic materials were referred to across four judgments. In some judgments, one particular material was relied upon and in another it was rejected. In such a case, the material could also be coded as both an interpretative asset and as rejected. This can occur where, for example, the court rejects the way an inferior court has used the material, but then uses it differently in a probative way.[159]

[153] A similar approach was adopted in Czarnezki and Ford (n 140) 897-8 where they counted various interpretative tools, not just extrinsic materials.
[154] [2019] HCA 39; (2019) 266 CLR 273.
[155] [2019] HCA 39, [108]; (2019) 266 CLR 273, 314 [108].
[156] See [3.3(b)] referring to the 'the dog that did not bark' principle.
[157] Idea for this rule from Czarnezki and Ford (n 140) 899.
[158] [2019] HCA 35, (2019) 269 CLR 507.
[159] See, eg, *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52, [53]-[57]; (2016) 260 CLR 340 on the use of a government discussion paper.

It is accepted that the definitions of these three variables are open to criticism in the context of quantitative empirical research as they do involve some subjective judgment.[160] Such 'weight laden' variables run the risk of coder discretion, judgment or bias as they require an evaluation of how the material was relevant, or not, to the reasoning in the judgment.[161] As noted earlier in this chapter, as much as possible 'human judgment should be removed from coding'[162] and these variables invoke at least some level of judgment. Epstein and Martin state that where a judgment is needed, 'the rules underlying the judgments should be wholly transparent to the coders and other researchers.[163] Consequently, the rules about exercising the judgment for coding for interpretative asset, referenced or rejected are made as clear as possible in the Codebook.

To the extent that judgment does exist in the coding of these variables, the reliability of the findings as objective data will be considered in that context. This is discussed further in Chapter Five. But, even accepting that the results for these variables are qualified, it was thought there was merit in recording them as they provide some level of guidance with respect to how materials are used.

(e) Other Variables

As indicated in [4.5], the remaining variables are divided into two groups. The first group are those recording the basic characteristics of the case and the second are variables that give further information about the judgments in the decision where it was thought there may be inferences that can be drawn in terms of their relationship to use of extrinsic materials.

The variables capturing the characteristics of the case are its name and citation, case ID number and the year of the case. For the year, given the time periods chosen for the population samples, this means the values ranged between 2016 and 2019 for the High Court decisions and were 2018 or 2019 for the Full Court decisions.

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[160] Some empirical studies of statutory interpretation recognize that it is difficult to avoid some of the variables requiring some 'judgment calls': eg, Amy Semet, 'Statutory Interpretation and Chevron Deference in the Appellate Courts: An Empirical Analysis' (2022) 12(2) *UC Irvine Law Review* 621, 661.
[161] Cf Nicholas S Zeppos (n 13) 1089-90 and n 76 who favoured a pure counting method though without the assessment of weight for this reason.
[162] Lee Epstein and Andrew Martin, 'Coding Variables' (n 94) 326.
[163] Lee Epstein and Andrew Martin, 'Coding Variables' (n 94) 326.

Following are brief explanations of the variables in the second group.

1) The jurisdiction of the statute being construed. This required choosing from Commonwealth, Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia. If more than one statute was addressed in the reasoning and two or more were from different jurisdictions then the decision was coded as 'multiple'.
2) The number of judgments in each decision. A separate statement of opinion as to how a case should be resolved is recorded as a separate judgment (concurring or dissenting) regardless of whether reasons are given or not.[164] The exception is the High Court of Australia 'welcome cases', so called to describe the genre of cases in which a newly appointed Justice delivers the lead judgment and the rest of the bench offers an unqualified, solo concurrence.[165] The welcome cases are counted as one judgment.
3) Whether there was a dissenting judgement or not. Determination of whether there was a 'dissent' or not is based upon the Australian modified Harvard rules as explained by Lynch for his High Court statistical studies.[166] That rule is that a Justice is considered to have dissented when he or she voted to dispose of the case in any manner different from the final orders issued by the Court. This rule will not apply in cases where the final orders are determined by application of a procedural rule (for example, resolution of deadlock between an even number of Justices through use of the Chief Justice's casting vote). The latter type of case should be discounted from any study attempting to quantify dissent. Opinions that concur in the orders of the Court, even if not belonging to any actual majority, are not dissenting. This measurement was chosen as being clearer and more objective to code, compared to a measurement that has been used in other empirical legal research counting dissent which is based on disagreement concerning the reasoning of the judges.[167]

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[164] From Andrew Lynch, 'Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia' (2002) 24 *Sydney Law Review* 470, 484.
[165] Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2015 Statistics" (2016) 39 University of New South Wales Law Journal 1161' (2016) 39 *University of New South Wales Law Journal* 1161, 1168.
[166] Andrew Lynch 'Dissent: Towards a Methodology' (n 168) 483-484 who has used this methodology for dissent in the yearly High Court studies of the High Court on constitutional law: see n 14. See also Andrew Lynch, 'Does the High Court Disagree More Often in Constitutional Cases? A Statistical Study of Judgment Delivery 1981-2003' (2005) 33(3) *Federal Law Review* 485, 488-89, 495-6.
[167] See, e.g., Michael Blackwell, 'Indeterminacy, Disagreement and the Human Rights Act: An Empirical Study of Litigation in the UK House of Lords and Supreme Court 1997–2017' (2020) 83(2) *Modern Law Review* 285, 295-6 who uses this measurement and cites other UK studies using the measurement.

4) The subject matter of the statute being construed. The different categories for this variable were compiled on an iterative basis. The coding started with a list of subjects but, if none on the list satisfied a particular category, then a new one was added. Strictly speaking this is not an exhaustive list in terms of the potential subjects of statutes in the universe of statutes, but it is an exhaustive list in terms of the statutes addressed in the decisions in the population coded. The subject of a statute was determined by reference to the subject in the short title of the Act. So, for example, a case considering an issue under the *Migration Act 1958* (Cth) was coded as migration (the subject title of the legislation) even if the interpretative issue related to the area of administrative law. Coding by reference to the short title minimised the evaluative judgment that would be needed to determine the subject based on the substance of the Act. Another reason is that an Act can address more than one subject. If more than one statute was addressed in the court decision, then the subject was coded as 'multiple'.
5) The age of the statute being construed. This is measured on a purely mathematical basis using the year of 2019 as the baseline and the year of the original enactment of the statute as indicated by its short title. So, for example, the *Income Tax Assessment Act 1997* (Cth) was coded as 22 years (2019 – 1997 = 22). This method of calculation is potentially misleading in some respects as it does not take into account the age of the statutory provision being construed which, due to being enacted or amended in a later year, might be quite different. For example, in *Commissioner of Taxation v Sharpcan Pty Ltd*,[168] the High Court was construing a provision of the *Income Tax Assessment Act 1997* (Cth) which has been inserted by the *Tax Laws Amendment (2006 Measures No 1) Act 2006* (Cth). Using 2019 as the baseline, the provision itself was only 13 years old, rather than the 22 years calculated by reference to the year of the original enactment of the statute. However, to attempt to measure age in any more sophisticated manner beyond the original enactment year would have been time consuming and research intensive, given the complexities of the legislative antecedents of some statutes and the need to determine which version of the statute the Court was considering. Recording the year of the original enactment provides guidance on how many years the statute has been on the statute books, which in turn may or may not be relevant to the absence or existence of extrinsic materials in a judgment.

[168] [2019] HCA 36; (2019) 269 CLR 370.

6) For Full Court decisions only, whether the decision was appealed to the High Court or not was coded simply on a yes or no basis. Epstein and Martin recommend collecting as much data as possible.[169] This variable was simple to define and count and it was thought that it may have a relationship to the use of extrinsic materials.

4.6 Conclusion

The aim of the empirical methodology reflected in this chapter is to collect evidence of the frequency with which materials are used and the type of materials that the courts refer to and the frequency of that reference. The variables adopted and the coding rules are formulated to be as objective and clear as possible. It is accepted that the coding for the use of the materials (interpretative asset, referenced or rejected) and, to a lesser extent, the determination of whether a decision involves the interpretation of a statute, arguably leaves open room for coder discretion. In defence of that data collection, the findings can be analysed with that caveat in mind.

The coding for whether extrinsic materials are referred to and the collection of information about the type of material provides objective information. This data collection contributes to an understanding of judicial practice, as opposed to judicial understanding of principle, therefore providing a multidimensional view on the current law and practice. This is the case regardless of the findings from the data collection that are presented in Chapter Five. The value of this data collection also lies in providing information about current use of materials that can be compared to what is learned from the legislative process in Chapters Six and Seven.

[169] Epstein and Martin, *An Introduction to Empirical Legal Research*, (n 21) 85. See also Lawless, Robbennolt, and Ulen (n 27) 175.

Chapter 5

Case Content Analysis – Findings

'... a Goldilocks dilemma--one where the best use of content analysis is not to aim for too much, or too little, but just enough insight.'[1]

5.1 Introduction

The previous Chapter Four explained the method for quantitative empirical work undertaken by this thesis. Using the case content analysis method described in that chapter, data was collected on High Court of Australia and Full Court of the Federal Court of Australia decisions using the coding rules in the Codebook (which appears at the end of this chapter). That data was analysed according using statistical software. This Chapter Five presents the findings of the analysis of the date which was performed using IBM statistical software 'SPSS', a well-known statistical application for the humanities.

This thesis posits that an institutional approach to extrinsic materials in statutory interpretation provides insight. The purpose of this quantitative research is to obtain empirical evidence of the courts' practices in relation to extrinsic material, including any patterns of use that may support an institutional perspective. The research also serves a secondary purpose which is to gather information that can be used in combination with the case law analysis of Chapter Three and therefore provide a more nuanced picture of the current law and practice with respect to extrinsic materials.

As more fully explained in Chapter Four, the analysis findings reflect data analysis of two population samples. The first sample consisted of 203 High Court of Australia cases in the four-year period from 2016 to 2019. The second sample consisted of 247 Federal Court of Australia Full Court cases in the one-year period from July 2018 to June 2019.

The chapter starts by providing an overview of some general characteristics of the cases in each of the samples analysed. One key characteristic is the percentage of the cases in each sample that are 'statutory interpretation' cases within the coding definition. Being coded as a

[1] Mark A. Hall and Ronald F. Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 *California Law Review* 63, 90.

statutory interpretation case filters down the cases that are then coded in relation to extrinsic materials. The next portion of the chapter presents the findings on a key portion of the study - the percentage of cases coded as statutory interpretation where at least one judgment cited extrinsic material. In this chapter, 'citing' extrinsic material means that at least one judgment in the case mentioned extrinsic material. This data (at this stage) does not involve any assessment about how or if the material was used. If extrinsic material was cited, the findings with respect to whether any legal authority was cited for that citation are presented. It will be recalled from Chapter Three that courts may refer to extrinsic material by either relying on a statutory provision in an Interpretation Act or by relying on the common law principle of context.[2] The research reveals the frequency with which the two legal authorities were cited.

The chapter then moves on to another key part of the study about typology. As explained in Chapter Four, if at least one judgment referred to at least one piece of extrinsic material then the type for that material was recorded. Then, the results of the analysis focus on how the materials were used. As Chapter Four detailed, there were three choices counted: at least one judgment in a case relying extrinsic material for its reasoning, at least one judgment merely cited extrinsic material (just a reference) without relying on it or rejecting it, and at least one judgment in the case rejecting the interpretative value of the material.

Broadly speaking, the results support the conclusion that judges in the High Court and the Full Court of the Federal Court are frequently citing extrinsic materials, and frequently relying on them. The frequency was higher in the High Court than the Full Court of the Federal Court. The results also support a conclusion that judges are referring to a variety of types of materials. Clear 'favourites' of types of material emerged. The explanatory memorandum, for example, was one of the most frequently cited extrinsic materials.

Finally, analysis of the data collected reveals some statistically significant relationships between the use of extrinsic material and other variables. The data for these variables was collected based on the basis of good practice in quantitative research to collect as much data as resources permit. But it accepted that the explanatory force of these relationships for the purposes of this thesis is unclear.

[2] See Chapter Three [3.3].

5.2 Reliability Check

It is good practice for a 'reliability check' to be performed on the coding of the data after it is complete. One common practice if for another researcher to be asked to code a random sample of the cases the subject of the study and recode them using the Codebook.[3] Given the nature of a doctoral thesis, using another researcher was not possible. Instead, to provide some level of checking, 10 per cent of the cases in the High Court study and 10 per cent of the cases in the Full Court study were randomly chosen and re-coded by the author. In addition, the standard practices of 'cleaning the data' were also undertaken.[4]

5.3 Overview of the Characteristics of the Cases

As explained more fully in chapter four, the target population of the analysis consisted of decisions of the High Court of Australia ('High Court') and the Full Court of the Federal Court of Australia ('Full Court FCA'). The sample of cases for the High Court was High Court decisions in the four-year period from 2016 to 2019, which resulted in a total of 203 cases being analysed.[5] The sample for Full Court FCA decisions was all Full Court FCA decisions from 1 July 2018 to 30 June 2019, resulting in a total of 247 Full Court FCA cases being analysed.[6] The data collected from these samples was uploaded to statistical software platform IBM SPSS Statistics for analysis.[7]

As a starting point, it is useful to provide some of the general characteristics of the analysed cases which emerged from the collected data. This not only provides some context to the findings on the cases with respect to extrinsic material, but is relevant to some of the relationships identified later in the chapter.

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[3] Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69 *University of Chicago Law Review* 1, 87; Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (Oxford University Press, 2014) 114; Lee Epstein and Andrew Martin, 'Coding Variables' in K. Kempf-Leonard (ed), *The Encyclopaedia of Social Measurement* (Academic Press, 2005) 321, 327.

[4] Cleaning data can be done in a number of ways, but I visually inspected the excel spreadsheets containing the original data for obvious errors. Then, once it was uploaded to the statistical software SPSS I undertook another visual inspection. Thirdly, I corrected the data for missing or incorrectly entered data from some preliminary test analyses.

[5] As explained in Chapter Four, some High Court decisions in the 2016-2019 period were excluded from the sample. See [4.4](c)].

[6] Clean final versions of the original excel spreadsheets and also of the original spreadsheets converted to SPSS codes for uploading to SPSS are available on file with the author.

[7] Version 29.

The threshold question for analysing the court practises about extrinsic materials was to identify the cases in which there was an issue of statutory interpretation. It will be recalled from Chapter Four that a case was counted as a statutory interpretation case if at least one judgment in that case interprets the text of an Australian statute, where interpretation is taken to mean the attribution of meaning to statutory text, whether by inquiry into the meaning of the text, clarification of meaning or explanation of the meaning, or inquiry into the appropriate scope or application of the text, and whether or not the meaning was the primary issue before the court.[8]

Of the 203 High Court cases that were analysed, 168, or 82.8%, of those cases were counted as statutory interpretation cases. Of the 247 Full Court FCA cases, 177, or 71.7%, were counted as statutory interpretation cases. These findings leave little doubt that the work of judges in both courts, as evidenced from this study, involves regular examination of statutes.

Where a case was a statutory interpretation case, certain characteristics in relation to the statute the subject of consideration in the judgment were recorded: the age of the statute, the subject area of the statute (as evidenced by the short title) and the jurisdiction in which the statute was made.[9] The age of a statute was identified by reference to the year in the short title with 2019 being the year chosen for calculation. For example, in *Commissioner of Taxation v Tomaras*[10], the High Court was required to construe the *Family Law Act 1975* (Cth). The age was calculated by reference to 1975. Where at least one judgment in a case considered more than one statute, the age of the oldest statute was used. Choosing to record age by reference to the oldest statute was on the basis of simplicity.

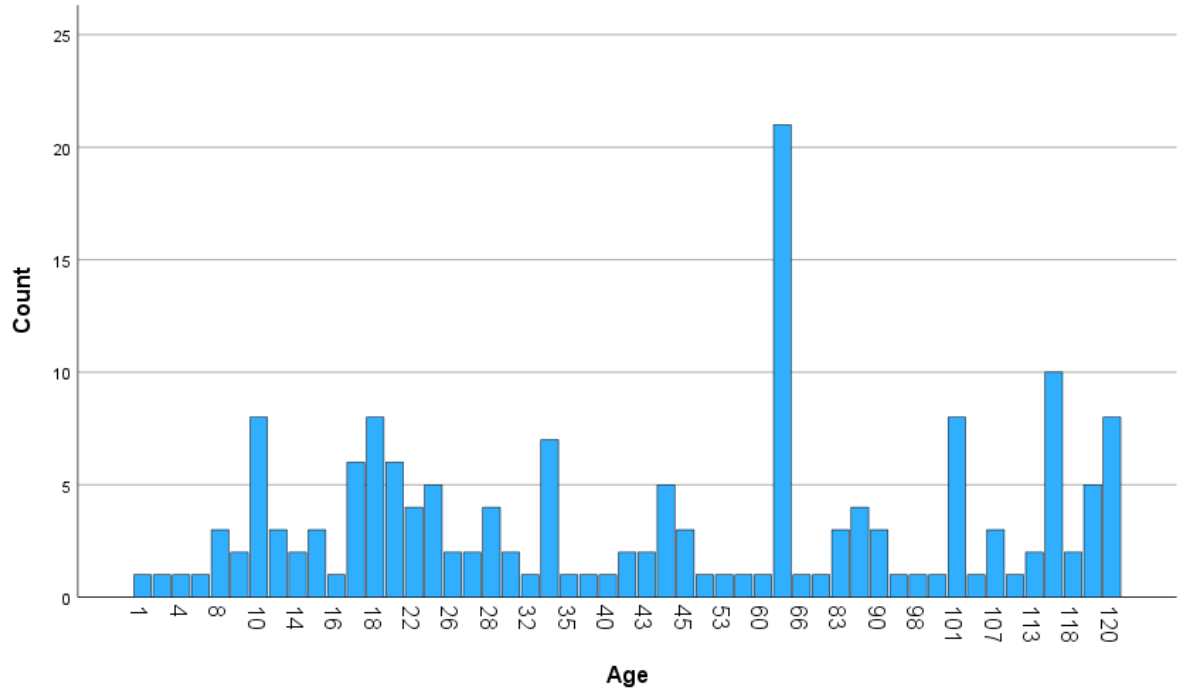
(a) High Court of Australia

As one might expect with a court that is at the apex of the court hierarchy, the range of ages of the statutes considered by the High Court was extremely wide. The 'youngest' statute considered by at least one judgment in a case was one year old and the oldest statute considered by at least one judgment in a case was 120 years old.[11] Figure 1 illustrates the age distribution for the High Court.

[8] For the reasons for this admittedly broad definition, see Chapter Four [4.5(a)].
[9] See [4.5](e)
[10] (2018) 265 CLR 434.
[11] This age being calculated from the base year of 2019. See [4.5](e).

Figure 1 High Court-Range of Ages of Statutes

Number of cases = 168

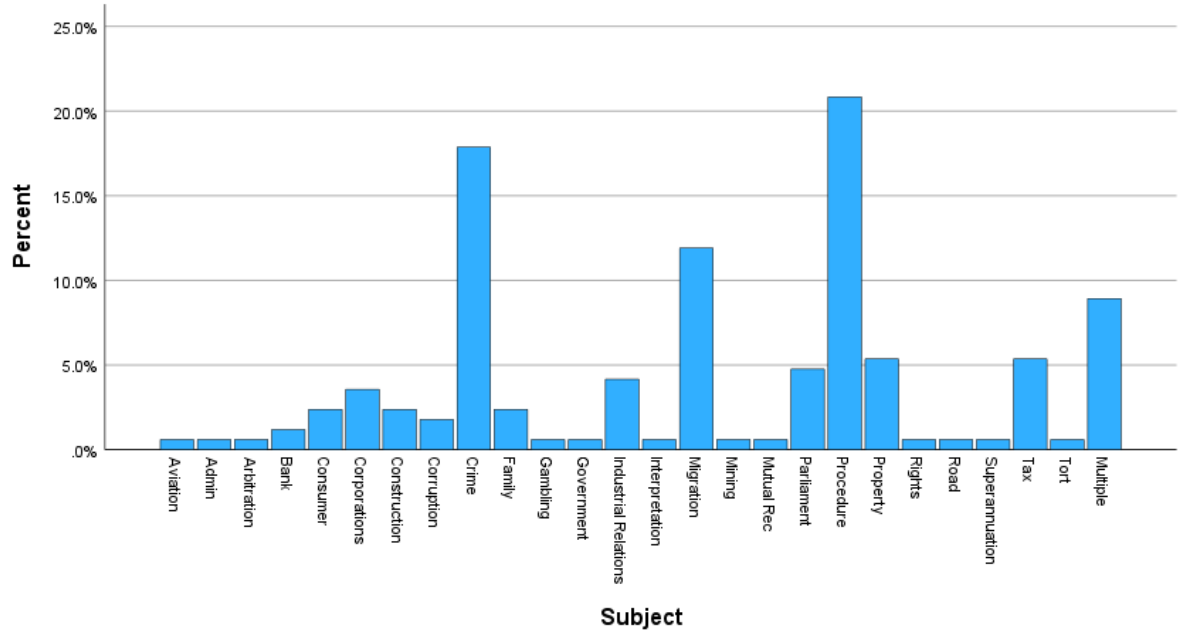


In statutes were also counted for their subject. As explained in Chapter Four, the categories were identified from the pre-test and from the iterative process that is coding, and the categories are based on the short title of the statute. By the end of coding there were 39 possible categories of subject to choose from, including a category that counted the instances where more than one statute was considered. Where there was more than one statute, it was counted in the 'multiple' category. Of the 39 categories, 26 categories were counted in the High Court sample. The top three subjects of statutes that were most frequently before the court were procedure, crime, and migration. Statutes coded as 'procedure' were before the Court in 20.8% of statutory interpretation cases.[12] Figure 2 illustrates the frequencies.

[12] 'Procedure' is defined in the Codebook to mean matters of court/tribunal practice and procedure including jury procedure, foreign judgments, jurisdiction, judicial power, admissibility of evidence, costs, appeals, limitation actions, abuse of process. The frequency for crime and migration was 17.9% and 11.9% respectively.

Figure 2 High Court-Frequency of Statute by Subject

Number of cases = 168



The next characteristic counted was the jurisdiction of the statute that was considered. Again, unsurprisingly given the High Court's role as the final court of appeal from all states and territories, the High Court considered statutes from the Commonwealth, and all six states and two territories. However, the origin of statutes most frequently involved was the Commonwealth, in that 48.8% of cases counted as statutory interpretation cases involved a Commonwealth statute. The frequency for other jurisdictions was, generally speaking, commensurate with the population of those jurisdictions. The next most frequently involved jurisdictions were New South Wales and Victoria. Other jurisdictions were represented loosely in order of population: Queensland, South Australia, Western Australia, Tasmania, Australian Capital Territory and the Northern Territory.[13] Two or more statutes with different jurisdictions were considered in at least one judgment of a case 6% of the time.

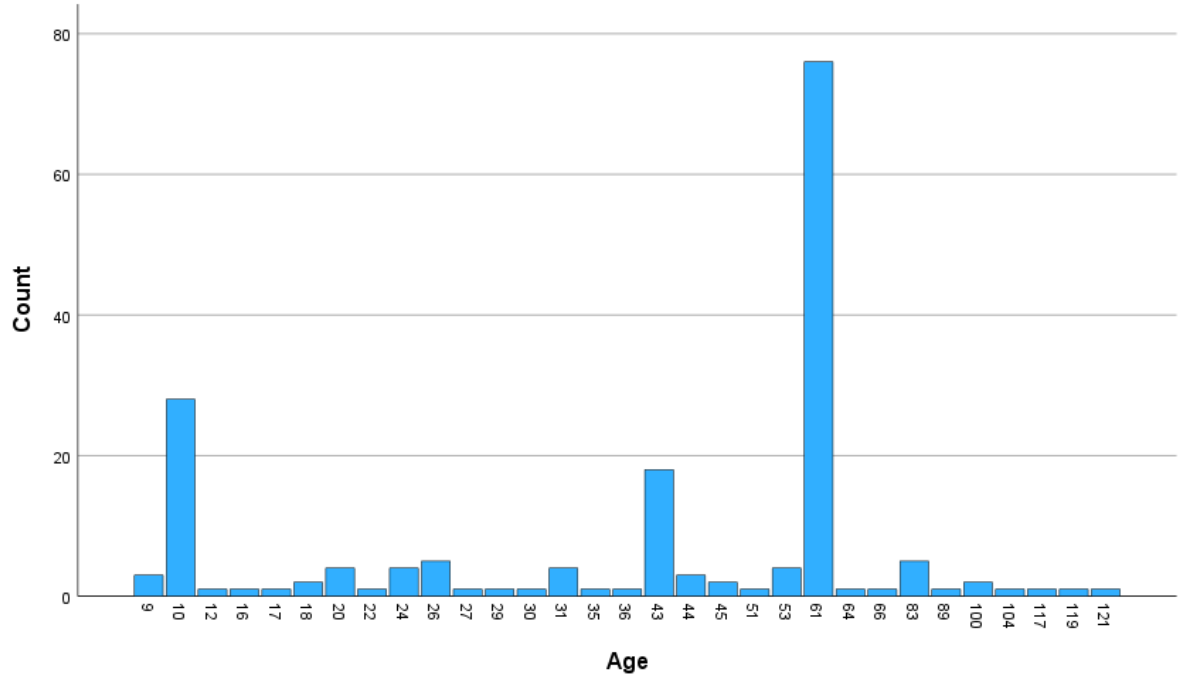
[13] New South Wales (12.5%), Victoria (10.1%), Queensland (7.7%), South Australia (6%), Western Australia (4.2%), Tasmania (1.8%), ACT (1.2%) and Northern Territory (1.8%)

(b) Full Court of the Federal Court of Australia

In the Full Court FCA sample, the age range of the statutes was very similar to the High Court. The youngest statute was 9 years old and the oldest was 121 years old, though the distribution of ages was quite different. See Figure 3 for a summary.

Figure 3 Full Court FCA-Range of Ages of Statutes

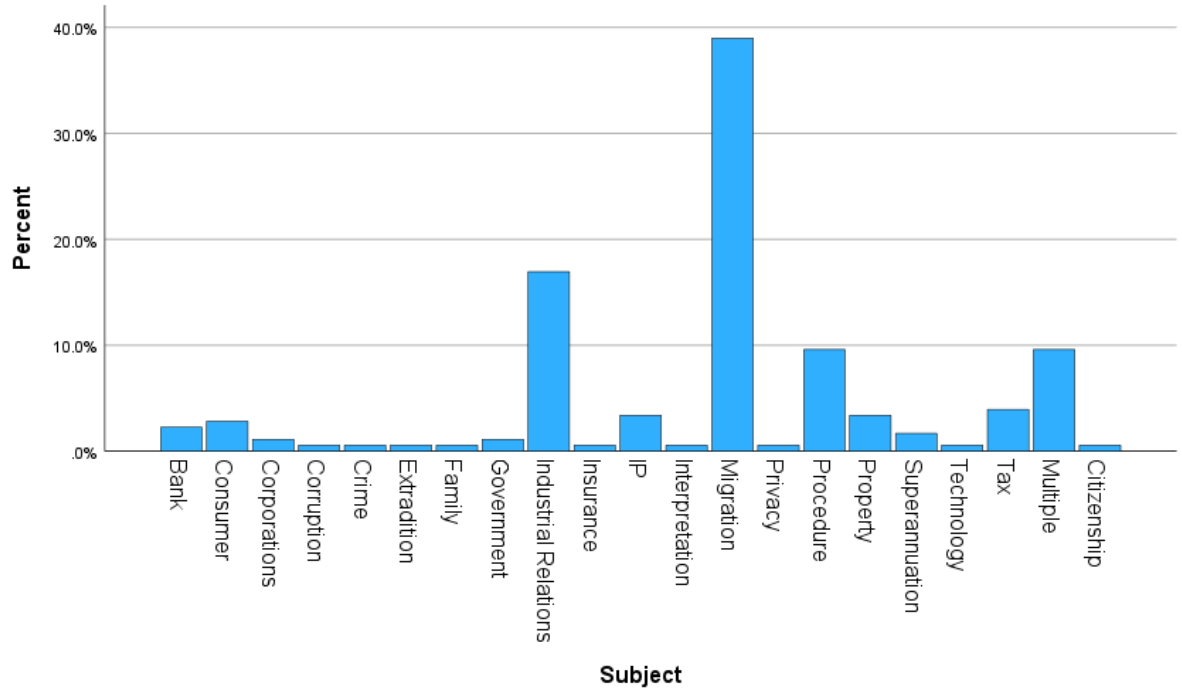
Number of cases = 177



The subjects of the statutes considered by the Full Court FCA were not as diverse as those of the High Court. In the Full Court FCA cases, 21 subjects were counted. The top three were migration, industrial relations and procedure. Multiple statutes with different subject areas were considered with the same frequency as statutes coded as procedure.[14] As can be seen from Figure 4 below, migration featured heavily in the Full Court FCA's work, comprising 39% of statutory interpretation cases.[15]

[14] The frequency of statutes coded as 'industrial relations' was 16.9% and 'procedure' and 'multiple were 9.6%.
[15] That migration law was a substantial portion of the Federal Court's work is supported by the Court's annual report during the same period: Federal Court of Australia, *Annual Report 2018-19* (Report, 6 September 2019) 29.

Figure 4 Full Court FCA-Frequency of Statute by Subject



With respect to the jurisdiction of statutes, given the remit of the Full Court FCA it is not unexpected that over 90% of the statutes in cases counted as statutory interpretation cases in the Full Court FCA were Commonwealth statutes. The next most frequent category for jurisdiction was where the Court considered more than one statute from different jurisdictions (coded as 'multiple') just over 7% of the time.

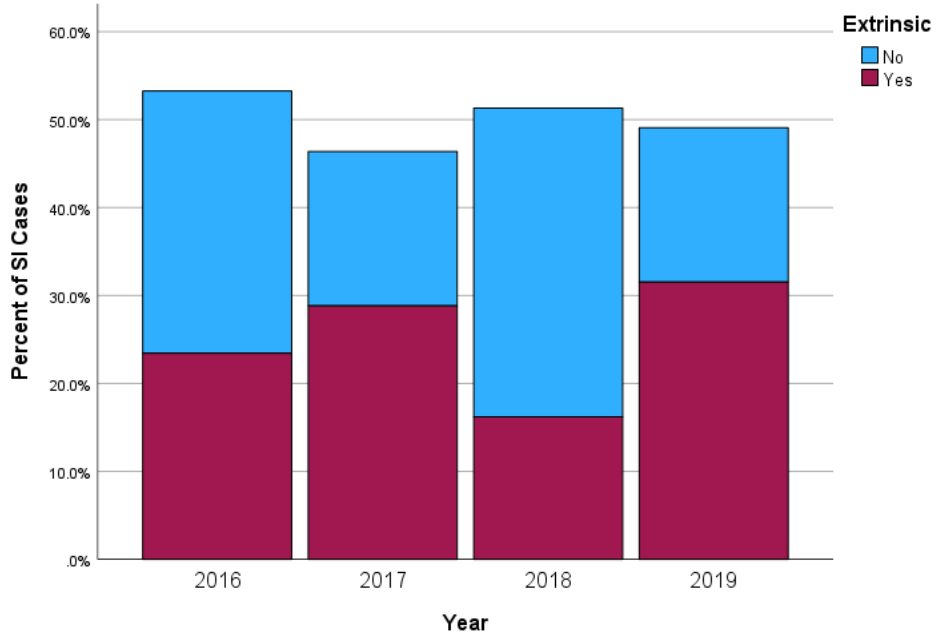
5.4 What does the data reveal about patterns?

The primary goal of this study is to provide a snapshot of the practice of the High Court and the Full Court FCA with respect to the use of extrinsic materials in a manner that may be indicative of the broader population of case law and so the practices of those Courts more generally. The study provides evidence of patterns, or lack of patterns, of those practices that inform an institutional perspective. The results of the practices discovered from this research will be drawn together with the case law analysis of Chapter Three and the research to provide a fuller picture of judicial practice and its implications in Chapter Eight.

(a) Patterns of citation of extrinsic materials

The results of this research support the conclusion that courts frequently go beyond the four walls of the statutory text in statutory interpretation and cite extrinsic materials. (As mentioned above, citing materials means mentioning them. Whether they were used for their probative value or not is the subject of another counting exercise, discussed below in (c)). Of the 168 cases categorised as statutory interpretation cases in the High Court decisions, at least one judgment in each of those cases cited extrinsic material 66.1% of the time (111 of the 203 cases). On a year-by-year basis in the four-year study, extrinsic materials were cited in statutory interpretation cases the majority of the time in three of those four years, ranging between frequencies of 60.5% and 77.8%. The exceptional year was 2018 where extrinsic materials were cited just under half of the time (47.4%). Figure 5 illustrates this spread.

Figure 5 High Court: Citation of Extrinsic by Year[16]



Compared to the High Court, the rates of frequency of citation of extrinsic materials was lower. In the Full Court FCA, at least one judgment in all cases cited extrinsic material only 33.9% of the time (60 of the 177 statutory interpretation cases).

Some comments may give these findings a little more context. First, it will be recalled that the definition for the variable 'statutory interpretation' which was used to count whether a case

[16] Syntax: GRAPH /BAR(STACK)=PCT BY Date BY Extrinsic.

was a statutory interpretation was generous, for the reasons given in Chapter Four.[17] This broad definition of a statutory interpretation case may skew the frequency rate. If it were possible to be confident that confining the definition of a statutory interpretation case to 'attribution of meaning' did not entail too much coder discretion, the results may have differed. Second, although it is not possible to state definitely, it can be observed from the data that a significant portion of the work of the Full Court FCA is migration. With such a large portion of the work before the Court consisting of the same subject and the Court having to address it repeatedly, it is possible to infer that there is a lesser need for external interpretative aids. This may be relevant to statutes such as *Migration Act 1958 (Cth).* However, regardless of the impact of either of the two previous points, it is clear that extrinsic materials are frequently cited, though in the High Court more often that the Full Court FCA.

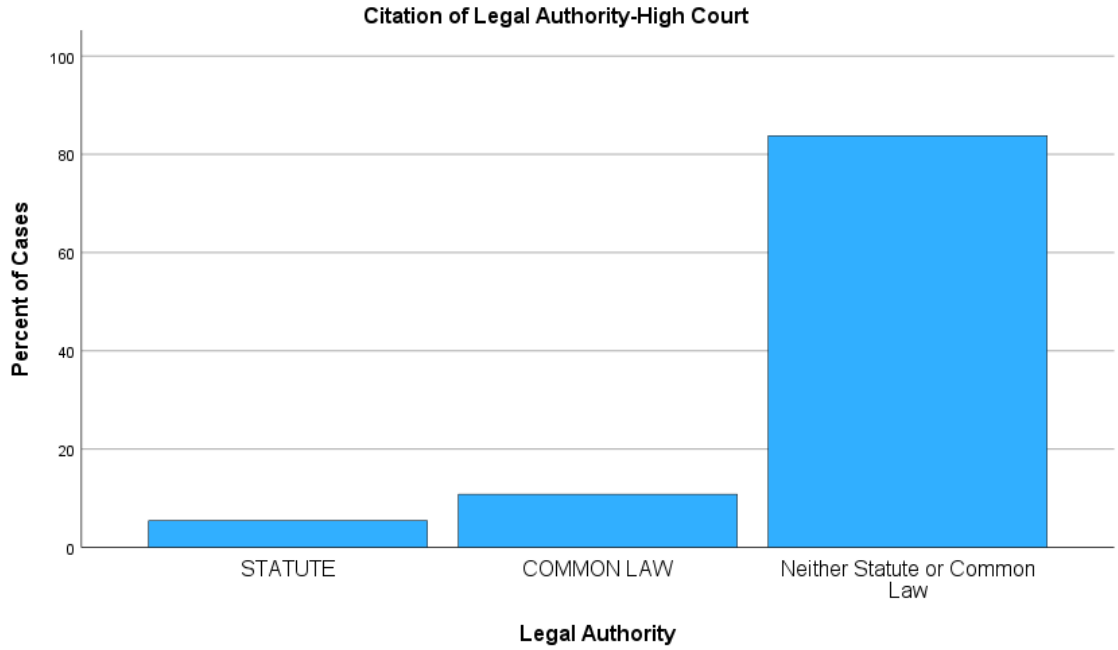
(b) Patterns of citation of authority

Despite the frequent recourse to extrinsic materials, in the overwhelming majority of both High Court and Full Court FCA cases, no legal authority – either statutory or common law - was cited for recourse to the material. In the High Court, no judge in the case referred to either authority 84.8% of the time where extrinsic material was cited. In the Full Court FCA, no judge referred to either authority in 71.7% of the cases.

If authority was cited, the common law was cited more frequently than an Interpretation Act provision. In the High Court, at least one judgment referred to common law authority for reference to extrinsic materials 10.8% of the time (compared to an Interpretation Act, which was 5.4%). In the Full Court FCA, at least one judgment referred to common law authority for reference to extrinsic materials 13.3% of the time (compared to an interpretation Act authority which was 8.3%). In the Full Court FCA, both common law and statutory authority were cited in the same case in 6.7% of the cases counted as citing extrinsic materials. In the High Court there were no instances of both authorities being cited. Figures 6 and 7 illustrate these frequencies.

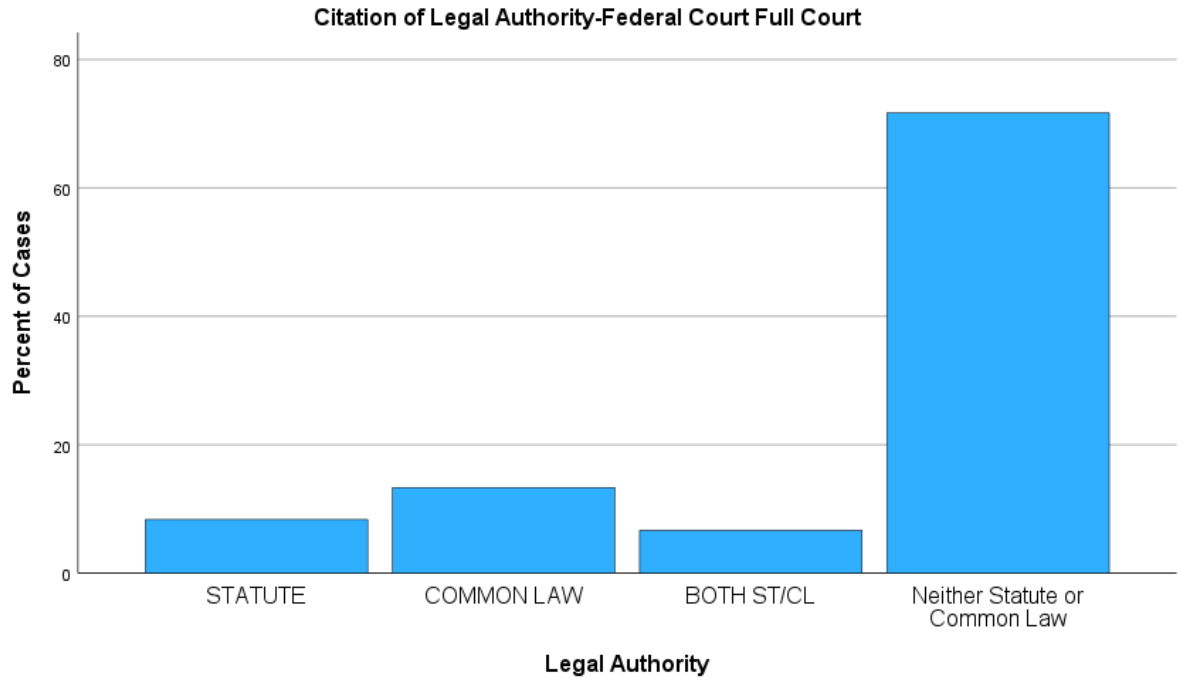
[17] See [4.5](a).

Figure 6-Citation of Legal Authority-High Court of Australia



Note 1: There was another option to count - both statute and common law – (see Full Court FCA below), but in the High Court data there was no citation of both in any judgment.

Figure 7-Citation of Legal Authority-Full Court FCA



These results about the frequency of citation of extrinsic materials and the paucity of citations of authority indicate two things. First, the results provide empirical evidence that the courts

regularly (though more frequently for the High Court) engage with materials generated by the legislative process.

Second, as noted above, the lack of frequency with respect to the citation of legal or common law authority for recourse to materials may indicate that the practice is so well established and accepted that citation of authority is not thought necessary. As discussed in Chapter Three, it has been noted that the common law principle of context based in *CIC Insurance,* for example, has been 'cited too often to be doubted.'[18] Alternatively, it may suggest confusion over which authority should be appropriately cited. Paucity of citation of authority and the fact that, where authority is given, common law principle is cited in preference to statutory provision suggests that, as the case law analysis does, the common law principles with respect to extrinsic materials have come to dominate that law.[19]

(c) Patterns of Types of Materials

Having established the frequency of reference to extrinsic materials, the next key results related to the types of materials cited. The cases were counted for 20 different types of materials: explanatory memorandum, second reading speech, minutes, Hansard, parliamentary committee report, statement of compatibility, law reform commission report, other report, government document, guide, draft, international material, digest, other explanatory memorandum, other second reading speech, other minutes, other Hansard, other parliamentary committee report, other statement of compatibility and other. [20] As explained in Chapter Four, these categories emerged from the pre-test and from the iterative process of coding.[21] As indicated from the list, international materials, defined in the Codebook, to refer to international covenants, agreements etc[22]. Chapter One explained that these materials are not 'extrinsic materials' for the purposes of this thesis.[23] However, they were recorded for completeness, particularly given their significance for the Federal Court FCA.

[18] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 374 [37] (Gageler J, dissenting but not as to principle) citing *Federal Commissioner of Taxation v Jayasinghe* (2016) 247 FCR 40, 43 [7] (Allsop CJ). See Chapter Three [3.2].
[19] See Chapter Three.
[20] See Codebook at the end of this chapter for fuller descriptions of each label.
[21] Chapter Four [4.5(c)].
[22] See Codebook at the end of this chapter.
[23] Chapter One [1.2].

It will be recalled from Chapter Four (see [4.5(c)]) that the category type of 'other' particular type of material is referring to material that relates to the making of a statute other than the one being construed. For example, in the High Court case of *Hughes v The Queen*,[24] the Court was required to construe the *Evidence Act 1995* (NSW). In the course of their reasoning, at least one judge cited the second reading speech of the Evidence Bill 1991 (Cth).[25] This speech was recorded as 'other second reading speech' as it relates to a different statute. Another example is *Western Australian Planning Commission v Southregal Pty Ltd*,[26] where each of the judgments cited the second reading speech and Hansard relevant to legislative antecedents to the Act being construed.[27] These materials were coded as other speech and other Hansard.

A type of material was counted when at least one judgment in a case cited that type of material. Accordingly, the results do not accommodate the rate at which separate judgments within each decision cited a material. For example, in *New South Wales v Robinson*,[28] there were two joint judgments. Each of the joint judgments referred to, among other materials, a second reading speech and a law reform commission report. However, the case was only counted once for a speech and the report. Consequently, within decisions, the findings may under represent references to materials.

Both the High Court and Full Court FCA cited a wide range of extrinsic materials. As can be seen from Figure 8 below, judgments in the High Court cited a wider range of materials (seventeen of the possible twenty types) and did so more frequently than in the Full Court FCA. Of the 111 High Court cases that cited extrinsic material, only three types of material - minutes, digests and other statements of compatibility - were absent.

[24] 263 CLR 338.
[25] Ibid 413-4 [189] (Nettle J).
[26] (2017) 259 CLR 106.
[27] See, eg, 120-1 [46]-[48] (Kiefel CJ and Bell J), 130-1 [72] (Gageler and Nettle JJ) 156-157 [156] (Keane J).
[28] (2019) 266 CLR 619.

Figure 8 Types of Materials Cited - High Court[29]

N = 111

High Court Table 1

Type of Material	Sum	% of SI cases referring to extrinsic
Explanatory Memorandum	54	48.6%
Second Reading Speech	60	54.1%
Minutes	0	0%
Hansard	14	12.6%
PCReport	6	6.4%
Statement of Compatibility	4	3.6%
LRCReport	24	21.6%
OtherReport	24	21.6%
Government	11	9.9%
Guides	3	2.7%

High Court Table 2

Type of Material	Sum	% of SI cases referring to extrinsic
Draft	3	2.7%
International	22	19.8%
Digest	0	0%
O/Memorandum	15	13.5%
O/SR Speech	20	18%
O/Minutes	1	0.9%
O/Hansard	8	7.2%
O/PCReport	7	7.3%
O/SofCompatibility	0	0%
Other	1	0.9%

Note: Percentages do not add up to 100% as more than one material might be cited in a decision.

The range of materials cited by the Full Court FCA was not as broad as the range cited by the High Court. Overall, only twelve of the possible twenty types of materials were cited: see Figure 9 below. Like the High Court, there were no Full Court FCA judgments that cited minutes, digests or other statements of compatibility. But, in addition, parliamentary committee reports, statements of compatibility, drafts, other minutes, and other Hansard were also absent.

[29] Syntax: DESCRIPTIVES VARIABLES=Memo SRS MIN Hansard PCReport SofComp LRCRep OtherRep GOVT Guides INTER DRAFT /STATISTICS=SUM; DESCRIPTIVES VARIABLES=Memo SRS MIN Hansard PCReport SofComp LRCRep OtherRep GOVT Guides /STATISTICS=SUM.

Figure 9 Types of Materials Cited-Full Court FCA

N = 60

Full Court Table 1

Type of Material	Sum	% of SI cases referring to extrinsic
Explanatory Memorandum	38	63.3%
Second Reading Speech	9	15%
Minutes	0	0%
Hansard	2	3.3%
PCReport	0	0%
Statement of Compatibility	0	0%
LRCReport	5	8.3%
OtherReport	8	13.3%
Government	4	6.7%
Guides	1	1.7%

Full Court Table 2

Type of Material	Sum	% of SI cases referring to extrinsic
International	20	33.3%
Draft	0	0%
Digest	0	0%
O/MEMO	5	8.3%
O/SR Speech	3	5%
O/Minutes	0	0%
O/Hansard	0	0%
O/PCReport	1	1.7%
O/SoCompatibility	0	0%
Other	1	1.7%

Note: Percentages do not add up to 100% as more than one type of material might be cited in a judgment.

Each of the courts has its clear 'favourites,' with certain types of materials being cited at a significantly higher frequency than others. For the High Court, as can be seen from Figure 8 above, the explanatory memorandum and the second reading speech for the statute being construed were clear preferences, comprising 48.6% and 54.1% respectively of all cases citing extrinsic materials. The next most frequently cited materials were law reform commission reports and other reports, but these were cited at a frequency less than half the rate for the explanatory memorandum and second reading speech.

Like the High Court, Full Court FCA results indicate a clear preference for the explanatory memorandum. But unlike the High Court, this is cited at a significantly higher rate than all other materials, including the second reading speech. References to the explanatory

memorandum comprised 63.3% of all cases citing extrinsic materials in the Full Court FCA. Again, in contrast to the High Court, the next most frequently cited category of materials was international materials with a frequency of 33.3%. The second reading speech does rank third, but with a much lower frequency of 15%. Like the High Court, other reports feature in the top five materials.

There are a number of implications that can be tentatively drawn from these results. First, the High Court, as well as referring to materials in more cases, refers to a wider range of materials and more often. Both results indicate a willingness of the Court to consider materials that exist outside the statute and are generated by actors other than parliament. But more than this, that range includes materials that are not directly related to the statute being construed. References to other explanatory memoranda, other second reading speeches, other Hansard and so forth are references to materials generated beyond the legislative process for the statute being construed and embrace materials that relate to legislative antecedents to the statute being construed, similar statutes, foreign statutes or any other statutes. This reveals the Court's recognition not only of the institutional setting of a particular statute, but its setting within the broader statutory setting. The notion of 'wider context' in common law might encompass these materials, but it does not differentiate between the materials generated by the making of the statute and those generated in the making of other statutes.

Second, the 'favourites' of the High Court, the explanatory memorandum and the second reading speech, might not be surprising. They are the materials most familiar to lawyers and were also the type of parliamentary materials that were the subject of the historical discourse on the merits of recourse to extrinsic materials or not.[30] These preferences may indicate a recognition that both materials are proximate to the statute being construed. Both the memorandum and the speech become publicly available when the statute is introduced into parliament. As is explained further in Chapters Six and Seven, both are executive documents.

These executive documents stand in contrast to the next most frequently cited type of material – those categorised as law reform commission report and those categorised as 'other reports'[31]. Law reform commission reports are any reports or papers (including an interim report, issues paper, working paper and discussion paper) written by a law reform commission of any jurisdiction in Australia or overseas whether for the statute being interpreted or any

[30] See Chapter Two.
[31] As explained further in the Codebook, these are reports not caught by any other category.

other statute or legislation. The features of these materials, including author and purpose, are quite different to the 'favourites'.

The Full Court FCA findings present a slightly different picture. Even accepting that the pool of data is smaller (sixty cases as opposed to one hundred and eleven), the range of types of materials was much narrower than the High Court, as was the frequency of referral. The clear 'favourite' for materials was the explanatory memorandum, with a frequency of 63.3% of cases citing extrinsic materials. The next most frequently cited category- international materials - was much lower at 33.3%.[32] The second reading speech was ranked third at the rate of 15%; a significantly lower frequency than the High Court. Interestingly, like the High Court, the next most frequently referred to type of material were the law reform commission reports and other reports.

There are also materials that were consistently absent. Across both High Court and Full Court FCA cases there was no references to digests, minutes or other statements of compatibility. For the Full Court FCA, other materials were absent (statements of compatibility, drafts, other minutes and other Hansard). The nature of these materials is discussed further in chapters six and seven. Absence may be indicative of a lack of recognition or awareness by the courts of other materials that potentially have probative value.

(d) Patterns of Reliance and Non-reliance

So far, the discussion has been confined to frequency of mere citation of (that is, referral or recourse to) material and the types of material that featured. The case data was also analysed for how extrinsic material was used. As explained in Chapter Four, cases were coded for three categories of 'uses'. Briefly, first, use of extrinsic material in at least one of the judgments in the decision as an interpretative asset by affirmatively reliance as a probative or determining factor to support the reasoning in the judgment regarding the meaning of the statute); second mere reference to or discussion of extrinsic material in at least one of the judgments without either reliance on the material or express rejection of reliance; and, third, reference to extrinsic material in at least one of the judgments in the decision coupled with express dismissal of its relevance or ascription to it of value than that ascribed to it by a litigant, a lower court, or another judge).[33] Where at least one judgment in a case cited extrinsic

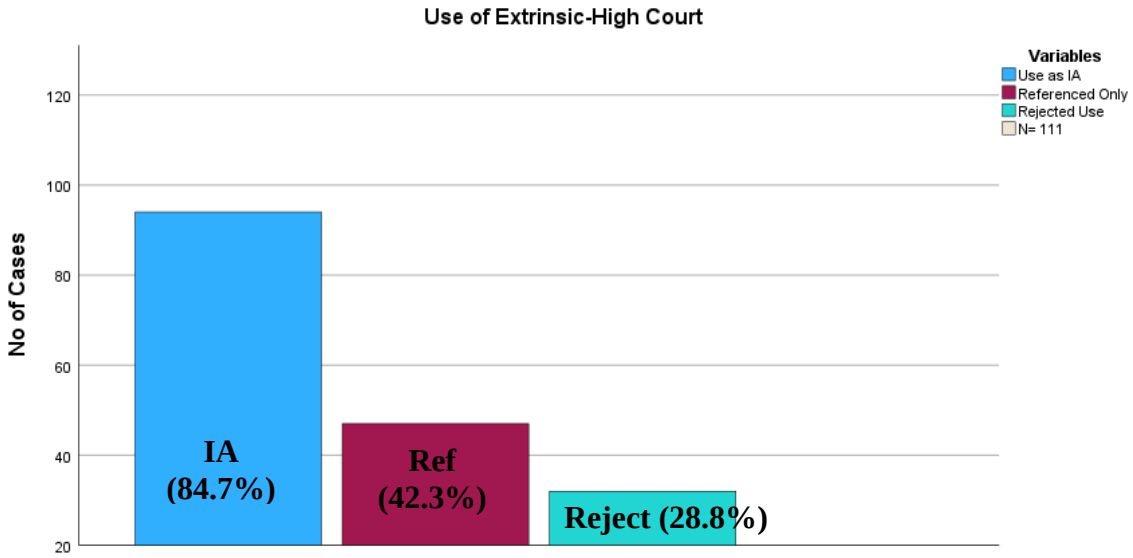
[32] The international material being, as explained above, not 'extrinsic' for the purposes of this thesis.
[33] Chapter Four [4.4(d)].

materials, that citation was then categorised as one of these three possibilities. This means that, as with recording types of extrinsic material, one decision could be counted for one, two or three 'uses'. For example, in *Unions NSW v State of New South Wales,*[34] there were several judgments referring to a variety of types of materials. One judgment relied on a second reading speech for an Act's object.[35] Another judgment rejected the value of Hansard.[36] This case would be counted both as using material as an interpretative asset and for rejecting the probative value of the material.

In the majority of cases where extrinsic material was cited, at least one judgment relied on material affirmatively, as a probative factor, to support the reasoning process of the judge who cited it (an 'interpretative asset'). This was the case for both the High Court and Full Court FCA. In the High Court, at least one judgment used at least one type of extrinsic material as an interpretive asset in nearly 85% of the cases counted. At least one judgment merely referred to material without giving any indication about its probative value (neither relying on it or rejecting it) in just over 42% of the cases counted, and at least one judgment in the decision dismissed or deflected the value ascribed to a material by another party (whether by a litigant, a lower court, or another justice) in nearly 29% of references to material. See Figure 10.

Figure 10-Use of Extrinsic-High Court

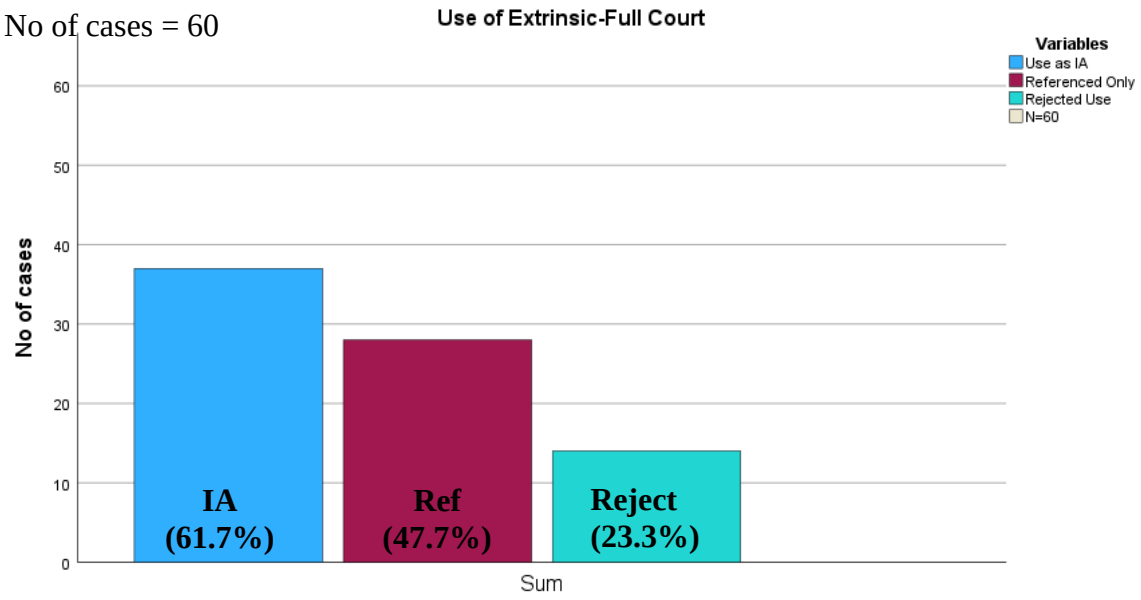
No of cases = 111



[34] (2019) 264 CLR 595. This was a constitutional law case regarding the validity of provisions of the *Electoral Funding Act 2018 (NSW)*, but the provisions needed to be construed before the constitutional law issue could be decided.
[35] Ibid 605 [7] (Kiefel CJ, Bell and Keane JJ).
[36] Ibid 650-1 [152] (Gordon J).

In the Full Court FCA, at least one judgment relied on an extrinsic material in the majority of cases referring to extrinsic materials but the rate of reliance was lower than in the High Court. At least one judgment used one type of extrinsic material as an interpretive asset in 61.7% of cases referring to extrinsic materials. There was a similar frequency of mere references to materials, being just over 46%, and of rejection of a material's probative value, at 23.3%. See Figure 11.

Figure 11 Use of Extrinsic-Full Court FCA



With the benefit of hindsight, it would have been enlightenng to have counted cases for the frequency with which the 'favourites', such as the explanatory memorandum, the second reading speech and the law reform commission report, were relied on or rejected by the courts. However, it was not possible to know with certainty in advance of undertaking this endeavour which type of extrinsic material would be cited most frequently. What can be said is that the findings from this study provide a basis for a further study about particular types of extrinsic materials.

5.5 What does the data reveal about relationships?

As noted in the Introduction to this chapter, good practice directs that we collect as much data as possible depending on resources available. The opportunity to collect data on extrinsic materials in cases presented a straightforward opportunity to collect other data, such as the existence or not of a dissenting judgment, age (see above) and, for the Full Court FCA, whether there was an appeal to the High Court, and determine if it revealed something that explains court practice from an institutional perspective. So, statistical analysis was performed to see if any relationship was suggested. As it happens, the results are difficult to explain in terms of how they contribute to an institutional perspective.

(a) Impact of dissent

An analysis of the High Court data revealed a relationship between whether there was a dissenting judgment or not and the use of extrinsic materials. A statistical analysis, called the chi-square test, was run which produced a value indicating a relationship.[37] In other words, where there was a dissenting judgment in a decision, it was more likely that at least one judgment would refer to extrinsic material. Table 1 displays the percentages of reference to extrinsic material where there is a no or yes to at least one dissenting judgment.

Table 1 High Court-Dissent and Extrinsic Materials

High Court - Dissent * Extrinsic Cross-tabulation

			Extrinsic		
			No	Yes	Total
Dissent	No	Count	52	72	124
		% within Dissent	41.9%	**58.1%**	100.0%
	Yes	Count	5	39	44
		% within Dissent	11.4%	**88.6%**	100.0%
Total		Count	57	111	168
		% within Dissent	33.9%	66.1%	100.0%

[37] The chi-square test is a test for a relationship between two categorical variables. It tests the null hypothesis that there 'true independence' between the variables. The convention is that if the resulting *p-value* is less than 0.05 then this rejects the null hypothesis and so indicates a relationship between the two variables: Robert M Lawless, Jennifer K Robbennolt, and Thomas Ulen, *Empirical Methods in Law* (Aspen Publishers, 2010) 233-4, 405. The chi-square test for this data was run in SPSS and produced a *p-value* of 0.001. As this is less than 0.05, this is 'statistically significant' and suggests a relationship between dissent and reference to extrinsic materials.

The same chi-square statistical test for the Full Court FCA data was used for the variables of dissent and extrinsic materials. In a similar way, this produced a statistically significant result which suggests that if there is at least one dissenting judgment, then at least one judgment will refer to extrinsic material.[38]

Table 2 Full Court FCA-Dissent and Extrinsic Materials

Full Court FCA Dissent * Extrinsic Cross-tabulation

			Extrinsic		
			No	Yes	Total
Dissent	No	Count	109	50	159
		% within Dissent	68.6%	**31.4%**	100.0%
	Yes	Count	8	10	18
		% within Dissent	44.4%	**55.6%**	100.0%
Total		Count	117	60	177
		% within Dissent	66.1%	33.9%	100.0%

(b) Impact of age of the statute

It might be expected that the age of a statute may have an impact on whether extrinsic materials are turned to as the longer a statute is on the statute book the greater the possibility that case law has developed that informs the content of its statutory provisions. And, as Justice Gageler has explained extra-judicially, '[a]s the cases multiply, a picture, in the form of a mosaic, emerges of the overall practical operation of the statute'.[39]

[38] The chi-square test for the Full Court data was run in SPSS and produced a *p-value* of 0.041. Again, as this is less than 0.05, this is 'statistically significant' and suggests a relationship between dissent and reference to extrinsic materials.

[39] Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1, 9.

Figure 12 High Court - Use of Extrinsic By Statute Age[40]

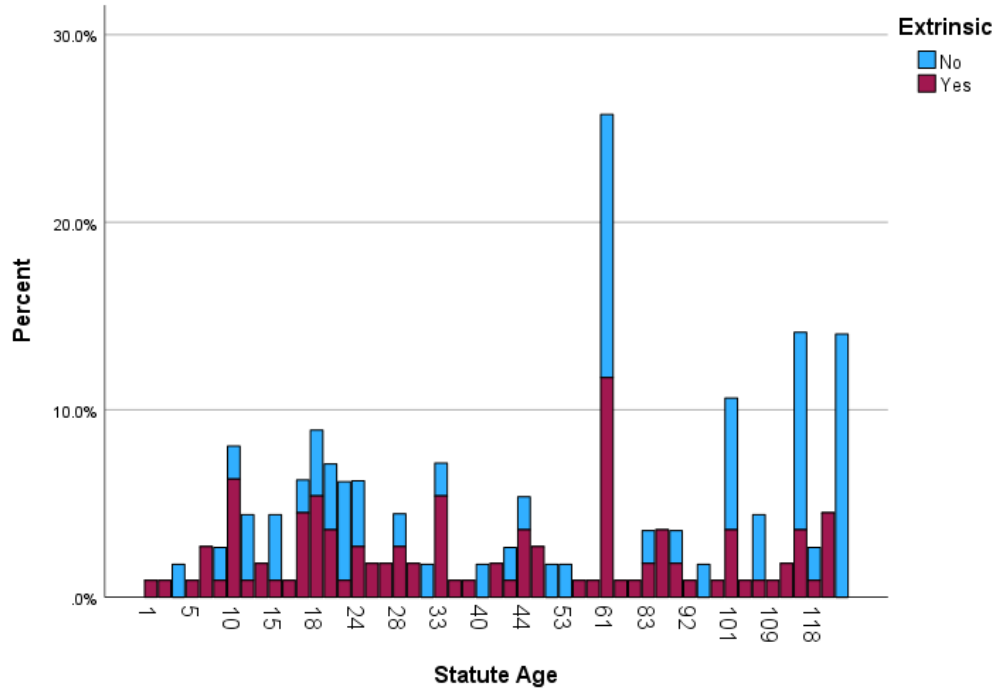
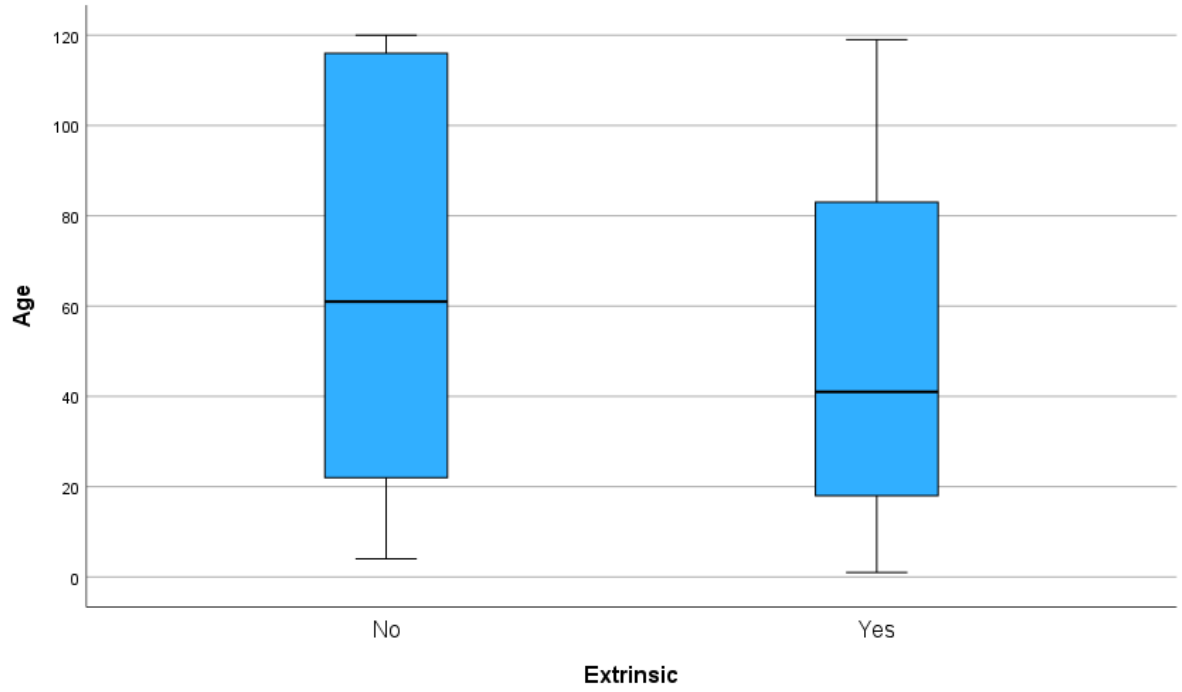


Figure 12 for the High Court does not immediately suggest a relationship between age and the use of extrinsic materials. However, the Mann-Whitney U statistical test suggests the likelihood of a relationship between the age of the statute and the use of extrinsic materials.[41] That test indicates that there may be a dependency between age and citation of material. That is, the older the statute, the less likely that extrinsic material will be referred in the cases.[42] The following diagram more clearly illustrates the relationship.

[40] Syntax: GRAPH /BAR(STACK)=PCT BY AgeBaseyear2019 By Extrinsic.
[41] Robert M Lawless, Jennifer K Robbennolt, and Thomas Ulen (n 37) 271-2. Also called a Wilcoxon Rank-Sum test. There are many different two-sample tests available, but the Mann-Whitney U was available in SPSS. This test is used as age is a 'continuous' variable (capable of measurement) and the distribution of the age of statutes the subject of High Court cases, as shown in Figure 12, does not follow a normal distribution.
[42] Like the chi-square test, the convention is that if the resulting *p-value* is less than 0.05 then the result is statistically significant. The analysis run in SPSS using the Mann-Whitney U statistical test for age and reference to extrinsic materials produced a *p-value* of 0.017, less than 0.05 so again statistically significant.

Figure 13 High Court-Age and Extrinsic Material



The bold horizontal lines in Figure 13 indicate the median age in each instance. The median age of a statute being construed where there was no reference to extrinsic materials was 61 years old. The median age of a statute being construing where there is at least one judgment cited extrinsic material was 41 years.

The Mann-Whitney U statistical test was also used for the Full Court FCA to provide some indication of whether there is a relationship between the age of the statute being construed and reference to extrinsic material. However, in contrast to the High Court cases, the test did not produce a statistically significant result for Full Court FCA cases.[43] That is, it indicated that age and reference to extrinsic materials are 'independent' or 'unrelated'. Despite that result, the median ages for the two groups do differ. The median of a statute being construed without reference to extrinsic materials was, like the High Court cases, 61 years. The median age of a statute in cases in which at least one judgment cited extrinsic material was 43 years old.

[43] The Mann-Whitney U test produced a *p-value* of 0.109. This is larger than 0.05 and so the null hypothesis that the two variables are independent is not rejected.

(c) Impact of appeals from FCAFC to High Court

The final statistical test performed was to identify the existence (or not) of a relationship between an appeal from the Full Court FCA to the High Court and the presence of extrinsic materials in the Full Court FCA case. Of the sample of 267 Full Court FCA cases, in only 12 was special leave to appeal granted and an appeal made to the High Court.[44] Given the small sample, a different statistical test was used.[45] This test produced a statistically significant result, suggesting that where a decision of the Full Court FCA was appealed to the High Court, it was more likely than not that at least one judgment in the Full Court FCA decision cited extrinsic material.[46] See the bolded percentages in Figure 14.

Table 3 Appeals from Full Court FCA and Extrinsic Material

Appeals from Full Court FCA to High Court * Extrinsic Cross-tabulation

			Extrinsic		
			No	Yes	Total
Appeal to HCA	No	Count	113	52	165
		% within Appeal to HCA	68.5%	**31.5%**	100.0%
		% within Extrinsic	96.6%	86.7%	93.2%
	Yes	Count	4	8	12
		% within Appeal to HCA	33.3%	**66.7%**	100.0%
		% within Extrinsic	3.4%	13.3%	6.8%
Total		Count	117	60	177
		% within Appeal to HCA	66.1%	33.9%	100.0%
		% within Extrinsic	100.0%	100.0%	100.0%

[44] There were numerous more cases where leave for appeal was sought but denied and some instances of special leave being granted but the appeal not proceeding.
[45] The Fisher's Exact Test, used as a substitute for the chi-square test when a certain percentage of the expected outcomes have a value less than 5.
[46] The Fisher's Exact Test produced a *p-value* of 0.023. As this is less than 0.05 it is statistically significant.

5.6 Caveats

As with any empirical analysis, there are 'a number of caveats.'[47] The first is that, being necessarily based on samples, the results cannot be regarded as definitive statements of the practices of the High Court and the Full Court FCA. The limitations of the data samples themselves were detailed in chapter four.[48] But they do provide an empirical 'snapshot' of court practices.

The second caveat is that the counting involved in the study indicates frequencies and patterns, and that, where cited, extrinsic materials are frequently used to bolster the reasoning of a judge. However, statutory interpretation is a multi-factorial exercise, rarely (if ever) drawing on only one factor to determine legislative meaning. The results do not account for, if relied upon, how the extrinsic material was used. Nor do they reveal how the extrinsic material was weighted against other interpretative aids that were material to the task. The nature of an observational empirical study of extrinsic materials is that they do not assess the relative weight of the reference to extrinsic material in the reasoning of a judgment as against the other indicia or interpretative aids that may have influenced the reasoning. As put by one scholar, an empirical analysis cannot 'fully capture the strength of a particular judge's rhetoric, the level of generality used to describe the issue, and other subtle clues' about the opinion.[49] But, the findings of an empirical quantitative study can be analysed and synthesized with the qualitative research of Chapter Three to provide a more composite understanding of court practice.[50] The composite understanding is addressed in Chapter Eight.

5.7 Conclusion

In the quote at the start of this chapter, scholars Hall and Wright refer to the 'goldilocks' dilemma of balancing what one learns from the data – not too much or not too little, but 'just enough insight'.[51] Those words have resonance.

One thing that can be confidently concluded is that there is a pattern of frequent citation of extrinsic materials, and a pattern of citation to a wide range of types of material, though in both cases this is more pronounced in the High Court than the Full Court FCA. As well, there

[47] Nicholas S Zeppos, 'Use of Authority in Statutory Interpretation: An Empirical Analysis' (1992) 70 *Texas Law Review* 1073, 1089.
[48] See [4.4(c)].
[49] Hall and Wright (n 1) 87.
[50] The advantages of a multi-method approach were discussed in Chapter Four: [4.2].
[51] Hall and Wright (n 1) 90.

is a pattern of reliance on extrinsic materials that are cited. This supports an institutional approach for court practice as it provides empirical evidence of the High Court and the Full Court FCA engaging with materials that are products of the legislative process.

Another clear pattern that emerges are the ‘favourites’ in terms of the types of materials that the High Court and the Full Court FCA resort to when using extrinsic materials. There are commonalities between the two courts with respect to the types of materials that are frequently referred to but also differences. There is also a notable infrequency or absence of citation for other types of materials. This may suggest a lack of engagement with other aspects of the legislative process, or alternatively, a lack of understanding of potentially probative materials produced from that process.

Finally, the results are suggestive of three relationships between reference to extrinsic materials and dissent, age and Full Court FCA appeals. In the light of the research of the other chapters of this thesis, including Chapters Six and Seven on the legislative process, it is difficult to assess what these relationships reveal for an institutional perspective.

Codebook

QUANTITATIVE ANALYSIS OF USE OF EXTRINSIC MATERIALS BY
HIGH COURT DECISIONS 2016-2019 AND
FEDERAL COURT OF AUSTRALIA FULL COURT FCA DECISIONS 2018-2019

Overview

As each selected decision was analysed, data was entered directly into an Excel spreadsheet using this Codebook. There is one spreadsheet for High Court cases and one for Federal Court of Australia Full Court (FCAFC) cases. The spreadsheets were then separately uploaded into the SPSS (Statistical Package for the Social Sciences) v 29 software program for analysis.

Population Samples

Population samples for High Court cases are identified from the High Court judgments database:< https://eresources.hcourt.gov.au/ >

Population samples for FCAFC cases are identified from the Austlii database: <http://www.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/FCAFC/ >

The following decisions are **excluded** from the population samples for the High Court of Australia decisions within the time period examined.

1) A decision determining whether special leave should be granted by the High Court.[52] This is because the nature of a hearing for leave to appeal is concerned with whether grounds exist for leave to be granted, rather than any final determination about a matter.
2) A decision where the High Court is sitting as the Court of Disputed Returns where the Court is conducting a trial to gather evidence and determine facts in advance of the consideration of the legal issues.[53]
3) A decision which is an appeal from the Supreme Court of Nauru or on Nauru law.[54]

For the avoidance of doubt, interlocutory injunction decisions are included in the population as these may concern substantive legal issues despite their interlocutory nature.

[52] Occasionally these decisions appeared within the database of decisions.
[53] *Commonwealth Electoral Act 1918* (Cth) ss 354, 376.
[54] See, e.g., *BRF038 v The Republic of Nauru* [2017] HCA 44; (2017) 91 ALJR 1197. This is only relevant for some years as the Government of the Republic of Nauru withdrew from the appeal arrangement at the end of 2017.

Variables

A. NAME

Variable Description: This is the name and medium neutral citation given to the decision as it appears on the High Court or Austlii database (as the case may be). The actual name and citation is entered into the spreadsheet. Cases are entered on the excel spreadsheet in numerical order, according to their medium neutral citation. (For example, [2019] HCA 1, [2019] HCA 2, [2019] HCA 3 etc)

B. CASE ID

Variable Description: This is the case ID number given to the decision by the court as it appears at the beginning of the decision in the High Court database or the Austlii database (as the case may be). The actual ID number is entered into the spreadsheet.

C. DATE

Variable Description: this is the year of the decision as it appears in the medium neutral citation and as identified and organized on the High Court database or the Austlii database (as the case may be).

Values: the actual year of the decision is entered into the spreadsheet. Given the periods examined, this means the values for High Court cases are 2016, 2017, 2018, or 2019 and the values for FCAFC cases are 2018 or 2019.

D. SI ISSUE

Variable Description: This variable is to count whether the decision relates to the interpretation of a statute. A decision is regarded as 'relating to the interpretation of a statute' if at least one judgment interprets text of an Australian statute. Interpretation is taken to mean the attribution of meaning to statutory text, whether by inquiry into the meaning of the text, clarification of meaning or explanation of the meaning, or inquiry into the appropriate scope or application of the text, whether or not the meaning is the primary issue before the court when determining that application.[55]

[55] See, eg *Ramsay Health Care Australia Pty Ltd v Compton* (2017) 91 ALJR 803; [2017] HCA 28 where the application of s 52 of the *Bankruptcy Act 1966* (Cth) was determined solely by reference to common law - section 52 was described as 'the modern statutory source of that longstanding and undisputed discretion': at 154 [77](Gageler J).

Values:

Y – indicates Yes
(coded 1 in SPSS)

N – indicates No
(coded 0 in SPSS)

Coding Rules:

1) A Yes will be recorded if at least one judgment relates to the interpretation of an Australian statute.
2) A yes will be recorded if the one or more of the judgments of the decision interprets the text even if the decision of that judgment does not turn on the interpretation of the statutory text.
3) A yes will be recorded where there is a question of federal constitutional law and the constitutional question is either avoided or decided after the judgment interpreted the statute relevant to the constitutional issue.[56]
4) A Yes will be recorded where there is a question about the interpretation or application of delegated legislation and a step in resolving the delegated legislation question is the interpretation of a statute (such as the empowering provision in the statute).
5) A Yes will be recorded where there is a question about the interpretation of a contract and a step in resolving the contractual issue is the interpretation of a statute.
6) A Yes will be recorded where there is a question of interpretation of an Australian statute that involves consideration of an international instrument.
7) Subject to 3), 4) and 5) above, a no will be recorded where the judgments relate to the interpretation of the Constitution, delegated legislation or an international instrument.

[56] Adopting a similar approach of Nicholas S Zeppos "The Use of Authority in Statutory Interpretation: An Empirical Analysis" (1992) 70 *Texas Law Review* 1073, 1088.

8) A No will be recorded if the only reference to statutory text in any of the judgments is to a State Agreement.[57]

9) A No will be recorded if the only reference to the statutory text in any of the judgments of the decision is a passing reference to statutory text. For example, if the judgment only refers to the statutory provision under which the matter was appealed.[58]

10) A No will be recorded if the only reference to the statutory text in any of the judgments of the decision is to paraphrase the text or to describe what the text does or to apply the text without inquiry into the meaning or application of any of the text.

11) A No will be recorded if the statute being considered is not an Australian statute.[59]

E. EXTRINSIC

Variable Description: whether at least one judgment in the decision refers to extrinsic material.[60] For this variable, 'extrinsic materials' refer to materials that are external to the statute, whether in its original or amended form and whether the materials came into existence before or after enactment, except for those materials expressly excluded below. Examples include explanatory memoranda, second reading speeches, Hansard, reports of parliamentary committees, law reform commission reports, Royal Commission or other inquiry reports, and Human Rights statements of compatibility (required in some jurisdictions). It also includes international covenants, conventions or treaties, drafts of bills, drafting manuals, and executive materials such as Cabinet minutes and any other material extrinsic to the Act.

Values:

Y – indicates Yes, at least one judgment in the decision refers to extrinsic material (coded 1 in SPSS)

N – indicates No, no judgment in the decision refers to extrinsic material

[57] A State Agreement is a legal agreement between a government and a company to develop a major proposed project. The Agreement is then ratified by Parliament by enactment of a statute containing the Agreement.
[58] See, e.g., *GAX v The Queen* [2017] HCA 25; (2017) 91 ALJR 698.
[59] See, eg, *Re Day [No 2]* [2017] HCA 14, [162]-[163] (Nettle J).
[60] This approach 'of at least one' was discussed and agreed with Pauline Ding at the Statistical Consulting Unit at ANU. It is also the approach adopted in James J Brudney, 'Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court'" (2007) 85 *Washington University Law Review* 1, 31-32, fn 157.

(coded 0 in SPSS)

na – indicates not applicable. This will apply when a 'No' was entered in response to the variable about whether the decision relates to the interpretation of an Australian statute (see '**D**' above).
(coded 99 in SPSS)

Coding Rules

1) A decision can only be counted once for whether it cited extrinsic material or not, even if each judgment in a multiple judgment decision refers to extrinsic material. *For example*, if there are 3 separate judgments in a case and two judgments refer to a second reading speech and one judgment refers to an explanatory memorandum, the decision is still counted as Yes once.
2) A Yes will be given even if the reference to extrinsic materials in the judgment is by the judge citing another judicial decision which in turn cites that extrinsic material. In this instance, it is the extrinsic material that is being counted, not the reference to case law.
3) Extrinsic material does include materials external to a statute that relate to another version of the provision or Act being interpreted. *For example*, Statute A is enacted in 1986, section 10 of Statute A is amended in 2001, and section 12 of Statute A comes before the court in 2010, the second regarding speech from the 1986 original enactment is counted as extrinsic material. *Example 2*: if a Law Reform Commission Report relevant to Statute A is referred to and Statute A is re-enacted as Statute B and the court is considering Statute B, then the Report is extrinsic material.

4) Extrinsic material does **not** include the following extraneous materials:

    a. Enactments constituting the 'legislative evolution' or legislative antecedents of a statute or statutory provision. This refers to 'the successive enacted versions of the provision from its inception to the version in place when the relevant facts occur.'[61]

[61] Ruth Sullivan, *Sullivan on the Construction of Statutes* (LexisNexis Canada, 6th ed, 2014) 660. See also James Steele, 'Statutory Forebears: Legislative Evolution as a Means of Statutory Interpretation' (2018) 39(3) *Statute Law Review* 303.

b. Sources of existing or pre-existing law including other legislation (the Australian Constitution,[62] other statutes, delegated legislation, domestic or international legislation), similar legislation, quasi legislation (such as practice directions or Administrative Arrangements) and any pre-existing or other case law (including findings/decisions of tribunals or other statutory or administrative bodies[63]). *For example*, if the statute considered in the decision is *Statute A* (Cth) enacted in 2015 and the court refers to the statute it replaced - *Statute B* 1990 (Cth) - *Statute B* itself is not considered 'extrinsic material'. *Example 2*, if the statute considered in the decision is *Statute A 2015* (Cth) on racial discrimination and there is a similar *Statute J 2011* (Vic) on racial discrimination referred to by the Court, that Victorian *Statute J 2011* is not considered 'extrinsic material.' Similarly, a Federal or State Court judicial decision *on Statute A 2015* (Cth) or *Statute J 2011* (Vic) is not considered 'extrinsic material.' While other sources of law are 'extrinsic' to legislation in a strict sense, and may form part of the historical context of the creation of the statute, reference to other law gives rise to distinct and separate set of issues,[64] and is not within the scope of this thesis.
c. Private legal instruments such as wills and contracts or quasi-private instruments (such as Administrative Arrangements or private arrangement guidelines[65]).
d. Secondary sources such as academic or extra-judicial commentary, books or texts.
e. Dictionaries, such as the Oxford or Macquarie Dictionary.
f. Evidence in relation to the determination of facts, such as an affidavit or oral testimony[66].
g. The Official Record or Report of the Debates of the Australian Federal Convention on the Constitution, including Convention Drafting Committee.[67]

[62] See, eg, *Burns v Corbett* (2018) 265 CLR 304, [256] (Edelman J).
[63] For example, a statutory body like Australian Communications and Media Authority.
[64] Such as the doctrine of precedent, stare decisis and *in pari materia* issues.
[65] See, eg, *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1.
[66] See, eg, *Wilkie v The Commonwealth* [2017] HCA 40; (2017) 91 ALJR 1035.
[67] See, eg, *Day v Australian Electoral Officer for the State of South Australia* [2016] HCA 20.

5) A **No** will be given is there is insufficient information within the judgment to identify the nature or date of material.

F. LEGAL

Variable Description: If the decision does refer to extrinsic material (i.e. answer Y to "refer to extrinsic material" above) then this column identifies the legal authority that the judgment cited for having recourse to that material. In multiple judgment decisions, the legal basis will be noted if at least one judgment relies on the legal authority.

Values:

ST – where a provision of interpretation legislation is cited as the legal basis for recourse to extrinsic materials = *Acts Interpretation Act 1901* (Cth) s15AB; *Interpretation Act 1987* (NSW) s34; *Acts Interpretation Act 1954* (Qld) s14B; *Legislation Interpretation Act 2021* (SA) s 16; *Acts Interpretation Act 1931* (Tas) s8B; *Interpretation of Legislation Act 1984* (Vic) s35; *Interpretation Act 1984* (WA) s19; *Legislation Act 2001* (ACT) s141; *Interpretation Act 1987* (NT) s62B.
(coded 1 in SPSS)

CL –where common law authority is cited as the legal basis for recourse to the extrinsic material (for example, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 38; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; *Thiess v Collector of Customs* (2014) 250 CLR 664).
(coded 2 in SPSS)

ST/CL –- where both statutory and common law authority are cited for recourse to the extrinsic material
(coded 3 in SPSS)

NEITH –neither statutory nor common law authority is cited for recourse to the extrinsic material.
(coded 4 in SPSS)

na - for not applicable – this is to be used when the decision has been counted as a No to whether it referred to extrinsic material (see '**E**. Extrinsic Materials' above).
(Coded 99 in SPSS).

Coding Rules:

1) Each reference to a different value will be counted, but each value is counted only once for each decision. *For example,* if a decision has 3 separate judgments and 2 of those judgments refer to common law authority and the third judgment refers to a statutory authority, then the common law authority (CL) and the statutory authority (ST) will each be counted once.
2) If it is unclear as to whether any authority has been cited in any judgment, then the value 'NEITH' should be recorded.

G. JUDGMENT

Variable Description: this refers to the number of judgments in the decision.

Values: choices are simply numerical. So a unanimous single judgment = 1, a decision comprising a joint judgment of two judges and a joint judgment of three judges = 2 etc. Coded numerically in SPSS.

Coding Rules:

1) A separate statement of opinion as to how a case should be resolved is recorded as a separate judgment (concurring or dissenting) regardless of whether reasons are given or not.[68]
2) One exception to 1) above is the 'welcome cases,' so called to describe the genre of cases in which a newly appointed Justice delivers the lead judgment and the rest of the bench offers an unqualified, solo concurrence.[69] (For example, in *Queensland Nickel v Commonwealth* [2015] HCA 12 each of six judges state separately that they 'agree' with newly appointed Justice Nettle.) These decisions are recorded as one judgment.[70]
3) No distinction is to be made between decisions which comprise a single judge, three judges or more judges. A court comprising a single judge (such as when the High Court is sitting in its original jurisdiction) is counted as one judgment, the same as a court sitting as seven judges where there is one joint judgment.

[68] From Andrew Lynch, 'Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia' (2002) 24 *Sydney Law Review* 470, 484.
[69] Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2015 Statistics" (2016) (2016) 39 *University of New South Wales Law Journal* 1161, 1168.
[70] This might be seen to be a deviation from Lynch and Williams, ibid, but the rationale is that this custom should not distort the quantitative approach by suggesting seven separate judgments.

H. DISSENT

Variable Description: This records whether there was **at least one** dissenting judgment in the decision.

Values:

Y - for yes, where there is at least one dissenting judgment in the decision.
(Coded 1 in SPSS).

N - for No, where there are no dissenting judgments in the decision. This includes where there is an unanimous single judgment and where there is a single judge decision.
(Coded 0 in SPSS).

Coding Rules:
The determination of whether there is a 'dissent' or not is based upon the Australian modified Harvard rules as explained by Lynch:[71]

(a) A Justice is considered to have dissented when he or she voted to dispose of the case in any manner different from the final orders issued by the Court. This rule will not apply in cases where the final orders are determined by application of a procedural rule. (For example, resolution of deadlock when there is an even number of Justices through use of the Chief Justice's casting vote). The latter type of case should be discounted from any study attempting to quantify dissent.

(b) Opinions that concur in the orders of the Court, even if not belonging to any actual majority, are not dissenting.

I. SUBJECT

Variable Description: The subject matter of the statute being considered by the court and the subject of the Yes for the 'D. SI Issue' (above). The subject matter is determined solely by reference to the short title of the statute.

Values:

The following are all the subjects identified during the course of coding. The numbers represent how they are coded in SPSS.

1. **AV** - aviation

[71] Andrew Lynch (n 68) 483-484 used in Andrew Lynch and George Williams (n 69).

2. **ADMIN** – administrative law including judicial power
3. **ARB** – arbitration
4. **BANK** – bankruptcy, insolvency
5. **CONSUMER** – trade practices, consumer law
6. **CORP –** corporations, insolvency
7. **CONSTR**: building and construction
8. **CORRUPT** – corruption, including investigations by statutory bodies (such as royal commission), election funding laws
9. **CRIME** – criminal legislation, sentencing, parole, proceeds of crime
10. **ENERGY** – clean energy, electricity, mining
11. **EQUITY** – equity
12. **EXTRA -** extradition
13. **FAMI** – family law
14. **GAMB -** gambling
15. **GOVT** – local government, public service, social security, budget
16. **HEALTH** – includes mental health
17. **INDREL** – industrial relations, including employment, workers compensation,
18. **INSUR -** insurance
19. **INTELL** – intellectual property including patents, trademarks, copyright
20. **INTER** – interpretation legislation
21. **MARIT** – maritime law
22. **MEDIA –** broadcasting
23. **MIGR** – migration law
24. **MINE** – mining
25. **MUTUAL** – mutual recognition law
26. **PARL** – parliament including electoral laws
27. **PRIV** – privacy laws
28. **PROC** – matters of court/tribunal practice and procedure including jury procedure, foreign judgments, jurisdiction, judicial power, admissibility of evidence, costs, appeals, limitation actions, abuse of process
29. **PROP** – native title, real and personal property, estate, compulsory acquisition, strata, community title, planning
30. **RIGHTS** – protest laws, laws relating to freedom of speech, religion etc.
31. **ROAD** – road traffic law

32. **SECURITY** – national security including terrorism, war related legislation
33. **SUPER** – superannuation
34. **TECH** – technology including electronic transactions
35. **TAX -** includes customs, stamp duty
36. **TORT** – civil liability and other tort laws
37. **TRUST** – trusts
38. **MULTIPLE** – where more than one statute is being considered by the court and those statutes cover two or more subject areas (see coding rule below).
39. **CITZ -** citizenship

Na=99

Coding Rules:

1) Some decisions may consider more than one statute when the Court is determining the matter before it. This can make the identification of subject difficult where the two or more statutes cover different areas. In this case, the subject is recorded as "multiple" (meaning more than one statute covering more than one subject area).
2) Where SI=No, then need to put na (as no relevant statute)
   (Coded 99 in SPSS)

J. <u>AGE</u>

Variable Description: This is the age, in years, of the statute being considered as calculated by reference to the year of original enactment of the statute.

Values: the age is recorded as a numerical number reflecting the years since the original enactment of the statute by reference to the year 2019 (the last year of cases coded).

Coding Rules:

1) Ages are calculated by reference to the year of 2019.
2) The year for calculation of age is identified by the year in the short title to the Act used in the decision. For example, the age of the *Migration Act 1958* (Cth) is calculated by using the year 1958. The age of the *Migration Act 1958* (Cth) is calculated as 2019 – 1958 = 61 years.

3) If more than one statute is being interpreted in the decision, or where two or more Acts are considered as part of a legislative scheme,[72] the age of the oldest statute will be calculated and recorded.
4) If SI = No, then there is no relevant statute so na
(Coded **999** in SPSS) (No coded 99 as could be confused with an age value)

K. JURIS

Variable Description: this identifies the jurisdiction of the legislation being considered by the court was enacted. This is mainly relevant to the High Court analysis which considers matters from all Australian jurisdictions.[73] It should be recorded for the FCAFC study but will be of less relevance for the FCAFC study given that the Full Court focusses on federal law.

Values: these correspond to the potential jurisdictions where a statute may have been enacted. The numbers represent how they are coded in SPSS.

1. **CTH** – Commonwealth
2. **NSW** – New South Wales
3. **QLD** – Queensland
4. **SA** – South Australia
5. **TAS** – Tasmania
6. **VIC** – Victoria
7. **WA** – Western Australia
8. **ACT** – Australian Capital Territory
9. **NT** – Northern Territory
10. **MULTIPLE**: multiple jurisdictions

99 **na** – not applicable

Coding Rules:

1) Where the decision relates to more than one statute from more than one jurisdiction, it will be recorded as "multiple."

[72] See, eg, *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36.
[73] Parliamentary processes differ to some degree across States and Territories so collecting information on jurisdiction may be important.

2) Where the decision was coded as 'No' for the variable of statutory interpretation case (see D. above) then jurisdiction of statute is irrelevant and so this is coded as 'not applicable.

L. TYPE OF EXTRINSIC MATERIAL

Variable Description: If the answer to the question of whether the decision refers to "extrinsic material" (see 'E.' above) is a "Yes" then the type of extrinsic material referred to is recorded.

Values: There are separate columns in the Excel spreadsheet that identify different types of extrinsic material. For each of these columns of type, one of the following values must be entered:

Y for Yes, if the decision does refer to that material
(Coded as 1 in SPSS)

N for No, if the decision does not refer to that material
(Coded as 0 in SPSS)

na for not applicable, to be used when the answer was "No" to whether the decision referred to extrinsic materials in 'E' above or where the answer was "No" to whether the decision was a statutory interpretation decision in 'D' above.
(Coded as 99 in SPSS).

Coding Rule: A single decision can only count once for a particular type of extrinsic material, regardless of the number of references to the material, but a single decision can count for more than one type of material.[74]

Description for each Variable:

1. **MEMO** – Explanatory Memorandum or equivalent document to the statute being interpreted, including amendments to that statute, which is presented with the bill for the Act, or the amendment to the Act, when it is introduced into parliament. Other labels for the explanatory memorandum include:
    - Explanation of Clauses document used in South Australia,[75]

[74] Adopted from Jason J Czarnezki and William K Ford 'The Phantom Philosophy? An Empirical Investigation of Legal Interpretation' (2006) 65 *Maryland Law Review* 841, app E, 900.
[75] Parliament of South Australia, House of Assembly Information Sheet, *Bills-The Legislative Process* (2014). < file://uniwa.uwa.edu.au/userhome/staff1/00069191/My%20Documents/Doctorate/PhD%20Writing/CH%207%20-%20Parliamentary%20Process/SA%20BillsLegislativeProcess.pdf >

- Explanatory Statement in the ACT and the Northern Territory[76]
- Explanatory Notes in NSW and Queensland[77]
- Fact Sheet or Clause Notes in Tasmania[78]
- Clause Notes (sometimes used before explanatory memorandum became standard for Commonwealth Acts[79])

This variable includes:

- Reference to a revised and supplementary memoranda (or the equivalent)
- Reference to an explanatory, revised and supplementary memorandum (or the equivalent) to an amendment to the statute, even if the amendment is not the provision of the Act being construed. (For example, in *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2, a judgment referred to an explanatory memorandum to the Migration Legislation Amendment Bill 1994 which amended the principal Act – the *Migration Act 1958 (Cth)* – but not the provision of the *Migration Act* being construed by the court).
- Reference to the financial impact statement and the regulation impact statement where that statement is incorporated into an explanatory memorandum (or its equivalent.[80])

This variable does not include an explanatory memorandum to another Act or amendment Act, even if that Act is a legislative antecedent to the Act being construed. For example, in *Regional Express Holdings Limited v Australian Federation of Air Pilots* [2017] HCA 55 the Court was construing a provision of the *Fair Work Act 2008* (Cth) and referred to an explanatory memorandum to the *Industrial Relations Act 1988* (Cth). The *Industrial Relations Act* is a legislative antecedent to the *Fair Work Act 2008* (Cth), but it is another Act so its explanatory memorandum is to be recorded as O/MEMO (see below).

[76] Though it is labelled an 'explanatory memorandum' in the Northern Territory interpretation Act: *Interpretation Act 1978* (NT) s 62B(2)(e).
[77] Explanatory Notes have been issued for many, if not most, New South Wales bills since about 1964.
[78] University of Tasmania, Law: Tasmanian Bills (Webpage) < https://utas.libguides.com/c.php?g=498302&p=3412792 > . See, eg, *Brown v Tasmania* [2017] HCA 43**;** (2017) 261 CLR 328.
[79] For older Commonwealth or Territory Acts. See, e.g., *Williams v Wreck Bay Aboriginal Community Council* [2019] HCA 4, [150] where Edelman J refers to 'clause notes' of the *Aboriginal Land Rights (Northern Territory) Bill 1976*.
[80] Required for Commonwealth explanatory memorandum. See Chapter Seven [7.4](a).

2. **SRS** – the second reading speech (or its equivalent) made in Parliament by the sponsor of the bill for the statute being interpreted by the Court when the bill is introduced into Parliament. This includes the speech made in Parliament when either the bill for the statute or a bill for an amendment bill to the statute is introduced into Parliament. (*For example,* Statute A is enacted in 1986, section 10A of Statute A is inserted in 2001, and section 12 of Statute A comes before the court in 2010. The second regarding speech for the 1986 original enactment is counted as SRS). As with the explanatory memorandum, some terminology may vary across jurisdictions. Other labels for the second reading speech included:
    - Agreement in Principle Speech in NSW[81]
    - Explanatory Speech in Queensland[82] and the Northern Territory[83]
    - Presentation speech in ACT[84]

    If it is not clear on the face of the judgment whether the material referred to is a second reading speech or part of the second reading debates, then if sufficient detail is provided in the judgment the reference will be researched to determine whether it is a second reading speech or only part of the parliamentary debates. If there is insufficient detail then it is recorded as Hansard. It does not cover an account of proceedings for a legislative antecedent to the statute being interpreted. This would be counted under O/SRS.

3. **MIN** – minutes: the official record of the proceedings of the Chamber during the course of the enactment of the statute being interpreted by the Court, including amendments to the statute (ie includes proceedings for the original bill or an amendment bill). These official records have different names in each jurisdiction. *For example,* in Federal Parliament, these are called "Votes and Proceedings" for the House of Representatives and "Journals" for the Senate. In Western Australia, they are called the "Votes and Proceedings" and "Minutes" for the lower house and upper house respectively. They are distinct from Hansard. It does not cover an account of proceedings for a legislative antecedent to the statute being interpreted. This would be counted under O/MIN.

[81] Known as this from 2007 to 2012 in the NSW Legislative Assembly.
[82] Made at the time of the first reading: Queensland Parliament, *Queensland Parliamentary Procedures Handbook* (Manual, August 2020) 25.
[83] *Interpretation Act 1978* (NT) s 62B(2)(f).
[84] *Legislation Act 2001* (ACT) s 142.

4. **HANSARD** – the substantially verbatim written account of the proceedings in Chambers and parliamentary committees in relation to the enactment of, or an amendment to, the statute being interpreted by the Court (ie includes accounts of proceedings for the original bill or an amendment bill) **if** the material is not covered by another specific variable (such as the SRS, PCReport, SofComp etc). This will include, for example, the record of the second reading debates, ministerial statements, consideration in detail, responses to questions, the Minister's speech in reply, debates on committee reports and committee testimony and submissions to parliamentary committees. It does not cover an account of proceedings for a legislative antecedent to the statute being interpreted. This would be counted under O/Hansard.

5. **PCReport** – a report written by a parliamentary committee that is produced in relation to the statute being interpreted by the Court (including amendments to that statute) during enactment.

6. **SofComp** – the Statement of Compatibility or "Compatibility Statement" in relation to the bill for the statute being interpreted by the Court (including an amendment bill) that is required pursuant to legislation in four jurisdictions: *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth); *the Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld) s 38. This variable is only relevant to Federal, Victorian, Queensland and ACT legislation.

7. **LRCRep** – any report or paper (including an interim report, issues paper, working paper and discussion paper) written by a Law Reform Commission of any jurisdiction in Australia or overseas whether for the statute being interpreted or any other statute or legislation. For example, a report from the Law Reform Commission of Canada will be counted for this variable.[85]

8. **OtherRep** – any report that is written by any organisation (including a Royal Commission) whether in relation to the statute being interpreted or any other statute or

[85] See, eg, *Smith v The Queen* [2017] HCA 19, [54] (2019) 259 CLR 291, 317-9.

matter **if** the report is **not** covered by any of the following more specific variables: PCReport, LRCRep, GOVT or O/PCRep.[86] This includes international reports.

9. **GOVT** – an official government announcement or statement or discussion paper generated by the government (such as a media statement, government responses, government announcement, Budget Papers, department discussion paper, government communique or any government communication/guidelines[87]) that is **not** a part of the official proceedings of Parliament (albeit that they may have been tabled in Parliament). (ie not counted as Hansard or MIN).

10. **GUIDES** – government or other official handbooks, guidelines, manuals or directions relating to the creation or operation of statutes, including drafting manuals and drafting directions[88]

11. **INTER** – any International Covenant, Agreement, Charter, Convention or Treaty or other official material relating to those international agreements (such as a guideline or handbook or explanatory note[89]) whether in existence before or after enactment of the statute being construed by the court. This includes international Model Laws, such as the UNICITRAL Model Law on International Commercial Arbitration.[90] It does not include international reports which are counted as OtherReport.

12. **DRAFT –** draft provisions of the statute before the Court. This refers to any drafts of the bill for the statute (or an amendment bill for the statute) being interpreted, proposed parliamentary amendments to the bill, and model draft legislation **unless** that model draft is contained within a LRCRep, OtherRep or O/PCRep.

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[86] See, e.g., *R v Holliday* [2017] HCA 35, [46]-[47]; (2017) 91 ALJR 874, 663-4, where Kiefel CJ, Bell and Gordon JJ referred to a report of the Criminal Law Officers Committee of the Standing Committee of Attorneys-General.
[87] See, e.g., *Tabcorp Holdings Limited v Victoria* [2016] HCA 4, [20][41] (Premier announcement) and *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50, [176][187] (Green Paper).
[88] See, e.g., *Strickland v Commonwealth Director of Public Prosecutions* [2018] HCA 53, [217]; (2018) 266 CLR 325, 401-2 where Gordon J refers to the ACC Policy and Standard Operating Procedures document that sets out the obligations imposed on an examiner under s 25A(3) of the *Australian Crime Commission Act 2002* (Cth).
[89] See, e.g., *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34, [84].
[90] See, e.g., *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, [13].

13. **DIGEST –** a Bills Digest. This refers to the publicly available written analysis of a Federal Bill produced by the Research Branch of the Parliamentary Library to provide members of Parliament with an overview of the background and purpose of the Bill before parliament.[91] This is only relevant to Commonwealth bills.

14. **O/MEMO:** an Explanatory Memorandum or equivalent document (see above under MEMO), including revised and supplementary memoranda, and memoranda presented in relation to amendment bills, that is presented to Parliament in the course of the enactment of a bill (including amendment bills) that is **not** counted by **MEMO**. This counts explanatory memoranda or equivalent documents for statutes other than the statute being construed, including explanatory memoranda for legislative antecedents to that statute. For example, in *Regional Express Holdings Limited v Australian Federation of Air Pilots*,[92] the Court was construing a provision of the *Fair Work Act 2009* (Cth) and referred to the explanatory memorandum to the *Industrial Relations Act 1988* (Cth), the Act which was superseded by the *Fair Work Act*. This was counted as O/MEMO.

15. **O/SRS:** the second reading speech made in Parliament by the sponsor of the bill for a statute *other than* a speech counted by **SRS**. This will include a second reading speech for a predecessor Act. For example, a second reading speech for the *Trade Practices Act 1974* (Cth) (no longer in force) will be counted as O/SRS if the court is construing the *Australian Consumer Law*.

16. **O/MIN**: the official record of the proceedings of the Chamber that are **not** counted by **MIN**.

17. **O/Hansard**: the substantially verbatim written account of proceedings in Chambers and committees that are **not** counted by **Hansard**.[93] This is to count Hansard in relation to other statutes or matters other than for the statute being construed by the court,

18. **O/PCRep**: a report written by a parliamentary committee that is **not** counted by **PCRep**. This is to count parliamentary committee reports in relation to matters other than

[91] See Chapter Seven, [7.4](b).
[92] [2017] HCA 55.
[93] See, e.g., *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, [288].

generated during enactment of the statute being construed by the court, including from other jurisdictions.[94]

19. O/SofC: a Statement of Compatibility or "Compatibility Statement" in relation to a bill required pursuant to either the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), *the Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic), the *Human Rights Act 2004* (ACT) or the *Human Rights Act 2019* (Qld) that is **not** counted by **SofC**.

20. OTHER – any extrinsic material that is not counted under any of the above categories from 1 to 19.

The last three variables that follow below attempt to capture how the material referred to by the Court is used. There are three variables – interpretative asset, referenced and rejected. A description of each follows.

Coding Rule for all three: A single decision can only be counted once for each of interpretative asset, referenced or rejected, regardless of the number of judgments using material as an asset or referring to it or rejecting it. However, a single decision can count for an interpretative asset, referenced and rejected if each occurs in at least one judgment of the decision.[95]

M. <u>USE AS IA</u>

Variable Description: This is whether at least one of the judgments in the decision used the extrinsic material as an interpretative asset ("IA"). The phrase 'interpretative Asset' has been used by American scholar James J. Brudney who has done several empirical studies around the use of interpretative aids in statutory interpretation decisions. Brudney refers to it to mean where a material is affirmatively relied on as a probative or determining factor to support the reasoning process of the judge in relation to application of the statute.[96]

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[94] See, e.g., *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, [286] [288] [289]; (2019) 267 CLR 1, 98-9 where Edelman J refers to two parliamentary committee reports that are not on a bill for or amending the statute being construed.

[95] Adapted from Czarnezki and Ford (n 74) 900.

[96] James J. Brudney and Corey Ditslear, 'The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras' (2006) 89 *The Judicature* 220, 221 and fn 4. See also James J and Corey Distlear 'Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect' (2008) 29 *Berkeley Journal of Employment and Labor Law* 117; James J Brudney, 'Below the Surface:

Values:

Y where **at least one** judgment uses an extrinsic material as an Interpretative Asset.
(coded 1 in SPSS)

N where **no judgment** in the decision uses the material as an Interpretative Asset.
(coded 0 in SPSS)

na if the answer to variable E. above to whether there was extrinsic material referred to was no or the answer to variable D. above to whether the decision is a statutory interpretation decision is no.
(coded 99 in SPSS)

Coding Rules:

1) A yes - The material will be regarded as an IA where it is used as an "asset to justify or buttress"[97] the judge's holding.
2) A yes if reference to the material as part of a consideration of the historical context of the Act where that context was influential on the reasoning are regarded as 'probative.'
3) A 'yes' if silence in parliamentary or other material is used to support reasoning that no change to the meaning of the statute was intended by parliament.
4) A "Yes" will **not** be given (but will be counted separately below) where:
    - The material is merely referenced or discussed but not relied on[98]
    - The judge refers to a resource but dismisses or deflects the value ascribed to it (whether by a litigant, a lower court, or another justice).[99]

Comparing Legislative History Usage by the House of Lords and the Supreme Court' (2007) 85 *Washington University Law Review* 1; James J Brudney, 'Canon Shortfalls and the Virtues of Political Branch Interpretive Assets' (2010) 98 *California Law Review* 1199.

[97] James J Brudney, 'Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court' (2007) 85 *Washington University Law Review* 1, 30.

[98] Brudney and Ditslear, 'Decline and Fall of Legislative History?' (n 96) 221, fn 4.

[99] Ibid. See also James J and Corey Distlear 'Liberal Justices' Reliance on Legislative History' (2008) 29 *Berkeley Journal of Employment and Labor Law* 117, 129 (fn 41).

N. REFERENCED

Variable Description: This is whether at least one of the judgments in the decision merely references or discusses an extrinsic material but does not rely on it for his/her statutory interpretative reasoning nor reject it.

Values:

Y for yes when **at least one** judgment references an extrinsic material.
(coded 1 in SPSS)

No for when **no judgment** references an extrinsic material.
(coded 0 in SPSS)

na if the answer to variable E. above to whether there was extrinsic material referred to was no or the answer to variable D. above to whether the decision is a statutory interpretation decision is no.
(coded 99 in SPSS)

Coding Rules:

1) A Yes should be entered where at least one judgment merely refers to the material without giving any indication about its probative value (or lack of probative value), such as part of summarizing another argument or the argument of a party or as part of explaining procedural history.
2) A Yes should be entered where at least one judgment refers to the material but then does not rely on it nor reject it.

O. REJECTED

Variable Description: This is whether at least one of the judgments in the decision refers to extrinsic material but dismisses or deflects the value ascribed to it (whether by a litigant, a lower court, or another justice).

Values:

Y for yes when **at least one** judgment rejects an extrinsic material.
(coded 1 in SPSS)

No for when **no judgment** rejects any of the extrinsic material.

(coded 0 in SPSS)

na if the answer to variable E. above to whether there was extrinsic material referred to was no or the answer to variable D. above to whether the decision is a statutory interpretation decision is no.
(coded 99 in SPSS)

Coding Rules:

A rejection should be recorded when a judgment refers to extrinsic material but then concludes that it does not assist in resolving the dispute.

P. APPEAL

This variable is for the Full Court of the Federal Court of Australia data only.
Variable description: whether there was an appeal from the decision to the High Court of Australia

Y for yes when there was an appeal.
(coded 1 in SPSS)

No for when there was no appeal.
(coded 0 in SPSS)

Coding Rules:

A case will coded as No where special leave was granted for a party to the decision to appeal to the High Court, but the appeal did not proceed.

Chapter 6

Legislative Process I: Pre-Parliamentary Actors, Process and Materials

'Legislation is the product of many minds and hands well before it comes before a legislature.'[1]

6.1 Introduction

Chapters Three to Five addressed the state of the law and practice of the courts with respect to the use of extrinsic materials in statutory interpretation. This thesis now turns to explore the institutional setting in which statutes are made. This involves an examination of the actors and processes involved in the legislative process, commencing with a decision for a government legislative proposal. This chapter focusses on this pre-parliamentary stage of statute making. The next chapter focusses on the parliamentary stage.

A Bill's journey through Parliament is the most public and well-known portion of the law making process. But it is in fact the last stage of becoming law. There is a lengthy and prescribed process, and arduous and meticulous work, involved in converting a legislative proposal to a Bill in a form that can be introduced into Parliament.

A statute is a reflection of a policy, major or minor, or has some other objective (from allocation of financial resources to correction of textual errors) that has been converted to a statement of law. The vast majority of the time this is a policy or objective of the executive government. Consequently, this chapter focusses on government Bills. The process through which that government policy or objective is turned into a Bill stands in stark contrast to the process by which a Bill is enacted into a statute. The latter is undertaken in a public arena (Parliament). The former is to some extent shrouded in mystery. The prescribed processes have become increasingly transparent through the publication of executive documents explaining how the law-making works. But the deliberations of the various actors with respect to the preparation of a specific Bill and the consequent documents generated during its formation are not, with limited exceptions, generally available for public eyes. Yet this is the

[1] George Tanner, 'Confronting the Process of Statute-Making' in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis, 2004) 49, 54.

stage when the policy behind the statute is formed, refined and translated into a draft statement of the law. It is important to understand this process to understand the institutional processes and actors involved in the Bill making as background to more transparent processes like Parliament.

This chapter identifies two distinct stages of the pre-parliamentary process. Both sections focus on the dynamics of the Bill making process and the extent to which those processes produce or help identify materials that have potential value as interpretative aids. The first stage commences from the point at which the executive decides that one of their objectives is best implemented by legislation. To make this happen, both executive policy approval and allocation of priority for the legislative proposal on the government's parliamentary agenda must be obtained. This analysis relies predominantly on dependable guides and handbooks authored by the executive. It reveals the consistent focus on the scope of the policy behind the legislative proposal, and the influence of the various actors in the executive on the process. The chapter also identifies aspects of this process, such as approval structure, that are indicative of the expected impact of the statute on existing policy.

The receipt of executive approval and allocation of priority is the prerequisite for the next stage: the drafting of the Bill to a point that it is ready for introduction into Parliament. The primary actors for this segment of the process are the Minister supporting the Bill, their department, and the Office of Parliamentary Counsel. The Office of Parliamentary Counsel, while part of the executive, operates in a quasi-autonomous role in generating the Bill text. The art of drafting is the subject of considerable scholarship and beyond the scope of this thesis. But while the drafting itself is not open for analysis, for federal government Bills, there are extensive, publicly available and authoritative Commonwealth drafting manuals that are written by the Office of Parliamentary Counsel. These materials reveal the practices and principles purportedly adopted by the Commonwealth parliamentary counsel, the people who draft the Bills, when drafting federal statutes. As such, they provide insights into assumptions made, and practices adopted, by drafters in relation to the use of text, structure, choices of language and relevance of subject matter when drafting government Bills.

To end the chapter, there is a short section on law reform commission reports, with an emphasis on the federal Australian Law Reform Commission even though the ALRC has a legislatively embedded institutional relationship with both the executive and Parliament. This pre-parliamentary material is not a necessary or even routine part of the pre-legislative

process. But such reports are an identifiable genre of pre-parliamentary report and one that featured as a frequently cited material in the empirical research reflected in Chapter Five. Consequently, some brief attention is warranted.

6.2 Government Legislative proposals and key institutional actors

The life of a statute essentially commences with the desire of the government to change something.[2] Public policy scholars frame this in terms of implementing 'policy', with legislation being a 'traditional' (though not the sole) instrument for implementing that policy.[3] That 'policy' may have any number of objectives. Legislation 'is not confined to creating incentives for people to do things or not to do things'.[4] One former United Kingdom First Parliamentary Counsel illustrates the range of objectives of legislation by identifying several categories: measures for 'regulatory change' (intended to have a specific and direct effect on the behaviour of persons), 'resource allocation and fiscal change' (alters the ways in which the resources of the executive are collected and allocated) and 'constitutional and organisational change' (governance and accountabilities in the public sector).[5] One more that might be added is 'housekeeping' change – legislation required for tidying up and maintaining the statute book.

The formulation of policy is driven by any number of forces - party political platforms, election commitments, economic forces, legal developments, technological developments and media attention, to name just a few.[6] Policy formulation is the subject of an area of rich and extensive scholarship and is beyond the scope of this thesis. For this reason, this chapter's analysis of the pre-enactment stage of the legislative process commences at the point at which an elected official (or its department) has decided that legislation is needed to implement the desired policy.[7]

The discussion is confined to legislative proposals that are formulated by the government of the day (as opposed to opposition or private member Bills). In political science scholarship, executive dominance of the legislative agenda is a well-canvassed feature of parliamentary

[2] Stephen Laws, 'Legislation and Politics' in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2013) 87, 88.
[3] Catherine Althaus et al, *The Australian Policy Handbook* (Taylor & Francis Group, 7th ed, 2022) 85.
[4] Stephen Laws, 'Giving Effect to Policy in Legislation: How to Avoid Missing the Point' (2011) 32(1) *Statute Law Review* 1, 4.
[5] Ibid 3.
[6] Althaus et al (n 3) 42-46.
[7] Department of Prime Minister and Cabinet, *Legislation Handbook* (Commonwealth of Australia, 2017) 1. See also 2 ('*Legislation Handbook*').

regimes.[8] The reality for federal legislation is evident from statistics on federal Bills that are introduced into, and enacted by, Federal Parliament. Nearly all Bills passed by Federal Parliament are government Bills. By way of example, between 1 January 2018 and 31 December 2022, 690 government Bills were passed by both houses of Federal Parliament, and only one non-government Bill was passed by both houses.[9] In fact, although procedural changes introduced in 1988 have seen a significant increase in the *initiation* of private member Bills, between Federation in 1901 and December 2017, only 30 non-government Bills have actually passed into law.[10]

The process from legislative proposal to a Bill ready for introduction into Parliament is typically a lengthy and prescriptive one. Numerous actors are responsible for the formulation of a Bill, each with varying roles and degrees of influence. As a starting point, it is useful to identify the primary actors.

- The Prime Minister. The Prime Minister is described as the 'first among equals' with responsibility for the strategic policy and organisational direction of the Government. The Prime Minister is the Chair of Cabinet and, among other things, is responsible for the membership of the Cabinet, regulates all Cabinet arrangements and sets the Cabinet's agenda.[11]

- The Cabinet. The term 'cabinet' can be ambiguous; it could refer to 'a meeting, to a particular groups of Ministers, to a decision or to a system of government.'[12] For the

[8] See, eg, Andrew Gibbons and Rhonda Evans, 'The Executive Lawmaking Agenda: Political Parties, Prime Ministers, and Policy Change in Australia' (2023) 00 *Policy Studies Journal* 1; Marija Taflaga, 'Policymaking, Party Executives and Parliamentary Policy Actors' in Andrew Podger, Michael De Percy and Sam Vincent (eds), *Politics, Policy and Public Administration in Theory and Practice: Essays in Honour of Professor John Wanna* (ANU Press, 2021); George Tsebelis, *Veto Players: How Political Institutions Work.* (Princeton University Press, 2002) 82, 93 ch 4; George Tsebelis and Bjorn Erik Rasch, 'Governments and Legislative Agenda Setting: An Introduction' in George Tsebelis and Bjorn Erik Rasch (eds), *The Role of Governments in Legislative Agenda Settting* (Taylor & Francis Group, 2010) 1–20. Thomas Brauninger and Marc Debus, 'Legislative Agenda Setting in Parliamentary Democracies' (2009) 48(6) *European Journal of Political Research* 804; Bjorn Erik Rasch, 'Institutional Foundations of Legislative Agenda-Setting' in Shane Martin, Thomas Saalfeld and Kaare W Strom (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press, 2014) 468-471.

[9] 'Bills', *Parliament of Australia, Senate StatsNet*:
< https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet#/bills?from=2018-01-01&to=2022-12-31 >

[10] DR Elder and PE Fowler, *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) 584: 10 initiated by private Members, thirteen by private Senators and seven by the Speaker and President.

[11] Department of Prime Minister and Cabinet, *Cabinet Handbook* (Commonwealth of Australia, 15th ed, 2022) 5-6 ('*Cabinet Handbook*').

[12] Patrick Weller, 'Cabinet Government: The Least Bad System of Government?' in Andrew Podger, Michael De Percy and Sam Vincent (eds), *Politics, Policy and Public Administration in Theory and Practice: Essays in*

purposes of this chapter, it refers to the specified group of senior Ministers in government who are 'empowered by the Australian Government to take binding decisions on its behalf'[13].

- The Parliamentary Business Committee of Cabinet (the 'PBC'). This is a subcommittee of Cabinet which supervises the legislative agenda of the Government. All legislative proposals require approval from the Parliamentary Business Committee.[14] Unlike most other Cabinet Committees, decisions of the PBC do not require Cabinet endorsement.[15]

- The Minister responsible for the legislative proposal, referred to as the 'sponsoring' or 'responsible' Minister.

- The Prime Minister's Office. This consists of the Prime Minister's staff. Ministers have 'complete discretion' on how to structure their ministerial offices.[16] Ministerial staff are not Australian Public Service staff.[17] The Prime Minister's Office is 'partisan, politically active and operationally sensitive'.[18]

- The responsible Minister's office. Like the Prime Minister's Office, members of this staff are not public servants.[19] Many are what are referred to as 'ministerial advisors'. Ministerial advisors are 'political partisans' whose appointment is dependent upon their

Honour of Professor John Wanna (ANU Press, 2021) 139, 142. See also Patrick Weller, Dennis Grube and RAW Rhodes, *Comparing Cabinets: Dilemmas of Collective Government* (Oxford University Press, 2021) 3-4.
[13] *Cabinet Handbook* (n 11) 6.; Elder and Fowler, *House of Representatives Practice* (n 10) 75.
[14] *Cabinet Handbook* (n 11) 11.
[15] *Cabinet Handbook* (n 11) 41; *Legislation Handbook* (n 7)8 [2.6]. See also Australian Government, 'Directory, Parliamentary Business Committee' (Webpage, last updated: 13 July 2022) < https://www.directory.gov.au/commonwealth-parliament/cabinet/cabinet-committees/parliamentary-business-committee >
[16] Terence Daintith and Yee-Fui Ng, 'Executives' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 587, 598.
[17] Minister's staff are employed under the *Members of Parliament (Staff) Act 1984* (Cth), rather than the *Public Service Act 1999* (Cth). See also Cathy Madden, 'Who Works at Parliament House?', *Flagpost* (Blogpost, 30 June 2021) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2021/June/Who_works_in_Parliament_House>.
[18] Patrick Weller, Joanne Scott and Bronwyn Stevens, *From Postbox to Powerhouse: A Centenary History of the Department of the Prime Minister and Cabinet 1911-2010* (Allen & Unwin, 2011) 247.
[19] There are exceptions. Certain officers including the Departmental Liaison Officers (DLO), Cabinet Liaison Officers and Parliamentary Liaison Officers are public servants seconded from a government department: Madden (n 17); Australian Public Service Commission, *APS Values and Code of Conduct in Practice* (Australian Government, rev ed 2021) 11.

Minister's tenure.[20] They have become an integral part of a Minister's office and are generally characterized as another layer of the executive.[21]

- The Department of Prime Minister and Cabinet (the 'DPMC'). The DPMC is part of the Australian Public Service. This department provides advice to the Prime Minister, the Cabinet, and Ministers.[22] Although in the approximately first third of its life (it was established in 1911) the DPMC did not provide policy advice, its role has developed considerably since then.[23] The DPMC now has a 'prominent role in policy initiation and development'[24] and is much more involved with the programming of legislation.[25]

- The Office of Parliamentary Counsel (the 'OPC'). The OPC is the statutory agency, established in 1970 under the *Parliamentary Counsel's Act 1970* (Cth), consisting of a specialised group of legislative drafters.[26] These drafters are responsible for the drafting of all Commonwealth government Bills.[27]

- The First Parliamentary Counsel (the 'FPC') is the head of the OPC and, as well as the Second Parliamentary Counsel, is a statutory appointment.[28] Other drafters in the OPC are Australian Public Service employees.[29]

- The 'instructing' or 'sponsoring' department is the federal department or agency that is part of the Australian Public Service[30] which is the portfolio department of the responsible Minister. This department is responsible for coordinating and progressing the proposed legislation.[31] Within the instructing department, there is an 'instructing officer who is the

[20] Patrick Weller, 'Policy Professionals in Context: Advisors and Ministers' in *Brian Head and Kate Crowley (Eds) in Policy Analysis in Australia* (Policy Press, 2015) 30.
[21] See Yee-Fui Ng, 'Between Law and Convention: Ministerial Advisers in the Australian System of Responsible Government' (Senate Lecture, Canberra, 21 July 2017) 117-118 and Jonathan Craft and John Halligan, *Advising Governments in the Westminster Tradition: Policy Advisory Systems in Australia, Britain, Canada and New Zealand* (Cambridge University Press, 2020) 86. See also Yee-Fui Ng, *Ministerial Advisers in Australia: The Modern Legal Context* (Federation Press, 2016).
[22] Description on website: < https://www.pmc.gov.au/domestic-policy >
[23] Patrick Weller, Joanne Scott and Bronwyn Stevens (n 18) 3, 246-48.
[24] Peter Hamburger, Bronwyn Stevens and Patrick Weller, 'A Capacity for Central Coordination: The Case of the Department of the Prime Minister and Cabinet' (2011) 70(4) *Australian Journal of Public Administration* 377, 378.
[25] See also GJ Yeend, 'The Department of the Prime Minister and Cabinet in Perspective' (1979) 38(2) *Australian Journal of Public Administration* 133, 139.
[26] *Parliamentary Counsel's Act 1970* (Cth) s 2.
[27] *Parliamentary Counsel's Act 1970* (Cth) s 3.
[28] *Parliamentary Counsel Act 1970* (Cth) s 4.
[29] *Parliamentary Counsel Act 1970* (Cth) s 16.
[30] *Public Service Act 1999* (Cth).
[31] *Legislation Handbook* (n 7) 4.

senior officer within the department with respect to the policy underlying the legislative proposal and is the person who will liaise with the OPC with respect to a draft Bill'.[32]

- The Federal Executive Council ('Executive Council'). This is the council that, in accordance with section 64 of the *Australian Constitution*, constitutes all Ministers of State (ie Ministers and parliamentary secretaries).[33] Legally and formally, the Council is the 'constitutional executive' which advises the Governor General of the Commonwealth.[34] In the context of legislation, it has an advisory role with respect to delegated legislation.[35]

All of the above actors can be regarded as part of the executive branch of government. Like the label 'Cabinet', the term 'executive' does not point to a readily identifiable institution.[36] The *Australian Constitution* refers to the executive as the monarch, the Governor-General, the Executive Council and Ministers appointed by the Governor-General.[37] Sometimes the term is used to describe only the elected officials appointed to the ministry (including parliamentary secretaries) who command the support of the majority in the lower house of Parliament.[38] It might also be used to refer generally to 'the Government.'[39] As Terence Daintith and Yee-Fui Ng note:

> If we strictly apply the threefold division of institutions and functions demanded by traditional separation of powers thinking, every governmental function that is not assigned to the legislature or judiciary is to be discharged by 'the executive', and that executive consists of all those parts of the governmental apparatus that are not the legislature or the judiciary.[40]

This chapter adopts the broader description of Daintith and Ng. For the purposes of making legislation, the involvement of the executive necessary includes the 'governmental apparatus'. The elected officials may drive the legislative agenda, but the public service is an integral part

[32] Ibid 4.
[33] *Cabinet Handbook* (n 11) 4.
[34] Alan J Ward, *Parliamentary Government in Australia* (Australian Scholarly, 2013) 150-1.
[35] *Cabinet Handbook* (n 11) 3-4.
[36] Daintith and Ng (n 16) 587.
[37] *Australian Constitution* ss 61, 62.
[38] Scott Prasser, 'Executive Growth and the Takeover of Australian Parliaments' (2012) 27(1) *Australasian Parliamentary Review* 48, 48.
[39] Alan J Ward, *Parliamentary Government in Australia* (Australian Scholarly, rev ed, 2013) 8.
[40] Daintith and Ng (n 16) 587, 587 referring to *Williams v Commonwealth (No 2)* (2014) 252 CLR 416 [78].

of the process in its role 'to serve the government of the day and to assist in developing and delivering its policy agenda and priorities'.[41]

The list of actors is not detailed. There are individually titled officers who have roles in the conversion of a legislative proposal to a Bill.[42] However the list captures the main institutional cogs of the executive machinery that creates a Bill.

6.3 Implementing Policy Objectives – From Proposal to Approval

All proposals for legislation generated within the government require executive approval. The level of that approval is dependent upon the policy impact of the proposed legislation. Therefore, the first step for the responsible Minister and their department is to determine the requisite executive approval for their proposal. For this purpose, proposals can be divided into two types – those that are regarded as having policy significance and those that are intended to affect technical amendments or corrections within existing policy.[43]

Legislative proposals with 'significant' policy implications must be approved by Cabinet.[44] This includes proposals that represent a 'significant or strategically important policy initiative or commitment', that significantly impact revenue or expenditure, that are 'sensitive or controversial' and or that have 'significant implications for other portfolios' or are 'not agreed to by all interested portfolios'.[45] Legislative proposals that have 'minor' policy significance may be approved by the Prime Minister (though with prior agreement of any other relevant Minister).[46] A legislative proposal that is 'consistent with the intent of existing policy' and involves only technical or corrective amendments may be approved at lower levels, by the sponsoring Minister or the FPC.[47]

The level of approval required for a legislative proposal is in of itself, indicative of the significance and impact of the proposal on policy and government intent. Each of the processes for acquiring the requisite level of approval generates relevant materials about the proposed Bill.

[41] Australian Public Service Commission (n 19) 9.
[42] See *Legislation Handbook* (n 7) 4-5 and Madden (n 17).
[43] *Legislation Handbook* (n 7) 16 which explains the four levels.
[44] Ibid. See also *Cabinet Handbook* (n 11) 11.
[45] *Legislation Handbook* (n 7) 15.
[46] Ibid 14, 16-17.
[47] Ibid 14, 19.

(a) Legislative Proposals with Significant Policy Implications

Cabinet, either on its own or through the PBC, has control over all government Bills involving significant policy. Since 1984, when the *Cabinet Handbook*[48] was first officially published,[49] the workings of Cabinet have become not only more transparent but 'more rule-bound and bureaucratic'.[50] Although Cabinet procedures 'will always in part reflect the working style of prime ministers'[51] and the dynamics of each government,[52] publicly available documents, most notably the *Cabinet Handbook*[53] (supplemented by the *Legislation Handbook*[54]), 'provide a network of rules, conventions and practices that prescribe how cabinet business should be done.'[55] The *Cabinet Handbook* is authored by the DPMC (as is the *Legislation Handbook*) and regularly updated. It provides details of cabinet procedures 'including what should appear on the agenda, how these items should be organized and presented (i.e., what items require a briefing paper and when those should be circulated), and how the discussion that follows should be recorded'.[56] Consequently, even if, like any rule book, it is subject to interpretation and amendment, the *Cabinet Handbook* is a dependable guide to process.[57]

If the legislative proposal has significant policy implications then the sponsoring Minister must first seek authority from the Prime Minister, in writing, to bring the matter before Cabinet.[58] This written request for authority must 'clearly outline the purpose and scope of the proposal', its financial implications and how it relates to Government strategic priorities.[59] After the Prime Minister has made a decision, the Minister, again in writing, is informed

[48] *Cabinet Handbook* (n 11).
[49] Patrick Weller, *Cabinet Government in Australia, 1901-2006: Practice, Principles, Performance* (University of New South Wales Press, 2007) 218-219.
[50] Ibid 222.
[51] Ibid 12. See also Hamburger, Stevens and Weller (n 24) 382.
[52] See, generally, Hamburger, Stevens and Weller (n 24).
[53] *Cabinet Handbook* (n 11).
[54] *Legislation Handbook* (n 7).
[55] Patrick Weller, *Cabinet Government in Australia, 1901-2006: Practice, Principles, Performance* (n 49) 219. Weller also includes the Department of Prime Minister and Cabinet, *A Guide on Key Elements of Ministerial Responsibility* (Commonwealth of Australia, December 1998) but is unclear if this is still in use.
[56] Nicholas Barry, Narelle Miragliotta and Zim Nwokora, 'The Prime Minister's Constitution: Cabinet Rulebooks in Westminster Democracies' (2023) 36(2) *Governance* 421, 432 (emphasis omitted). The current edition of the *Cabinet Handbook* is the 15th edition.
[57] Ibid who argue that the *Cabinet Handbook* is an authority.
[58] *Cabinet Handbook* (n 11) 23. The process described here does not include urgent submissions requiring an expedited time frame. These are called 'Short Notice Submissions' and follow a truncated process: at *Cabinet Handbook* (n 11) 25-26.
[59] *Cabinet Handbook* (n 11) 23.

whether authority has been granted for the matter to be 'brought forward' to the Cabinet, and the agreed scope of the authority for the legislative proposal.[60]

If the Prime Minister grants authority, then the sponsoring Minister must provide a written 'submission' to Cabinet. The submission is one of the most significant documents in this portion of the legislative process. Its requirements are well prescribed. It must express 'the proposal and the problem it seeks to address,'[61] and provide an analysis that justifies the proposed measure and an explanation of the outcomes and benefits of the policy.[62] The submission must also include an explanation for the preference for legislation to implement the policy, a legislation certificate from the Attorney-General's Department regarding the need for legislation, the constitutional basis for the legislation and any constitutional risks.[63] For federal legislation, the submission is not the place for draft wording or drafting instructions.[64]

Prior to the submission being made, there are at least two mandatory consultation processes that must be followed by the responsible Minister.[65] Both are designed to 'alert cabinet to any inconsistencies between the proposals in the submission and practices elsewhere in government, and to concerns from some agencies about a proposal.'[66] This is consistent with the 'whole-of-government approach', which is a feature of modern Australian government.[67] First, the Minister must prepare a 'working' exposure draft of the submission which is circulated to relevant departments and which 'invites comment and suggested changes and additions to all aspects of the policy proposal' within the submission.[68] The draft may be amended in response to comments and suggestions from those departments.

Once the draft submission has been amended (if required) following consultation and approved by the sponsoring Minister, the final draft - 'known in Canberra as the Co-ordination final version'[69] - must be circulated to interested departments and agencies for

[60] *Cabinet Handbook* (n 11) 23.
[61] Ibid 30.
[62] Ibid 32.
[63] *Legislation Handbook* (n 7) 15. Templates for submission documents exist but are not publicly available: at *Cabinet Handbook* (n 11) 33.
[64] *Legislation Handbook* (n 7) 16. *Cf,* eg, Western Australia, where drafting instructions must be included with the submission to Cabinet: Department of the Premier and Cabinet, *Cabinet Handbook* (WA Government, 2021) [1.6].
[65] *Cabinet Handbook* (n 11) 34.
[66] Althaus et al (n 3) 119.
[67] *Cabinet Handbook* (n 11) 25.
[68] *Cabinet Handbook* (n 11) 34.
[69] Althaus et al (n 3) 119.

them to be given the opportunity to provide a formal comment on the submission.[70] These formal comments are known as 'coordination comments' and form part of the final submission to Cabinet.[71] These comments are intended to be 'the impartial advice of Australian Public Service agencies to the Cabinet as a whole.'[72] Final submissions with coordination comments must be released to Cabinet Ministers at least 3 days before the Cabinet meeting.[73]

It is possible for proposals relevant to legislation also to be contained in a 'memorandum' to Cabinet, rather than a submission.[74] Memoranda are documents that are submitted by departments rather than Ministers.[75] They require the same authority, circulation, consultation and information as submissions and so are equally significant documents for legislative proposals.[76]

The Cabinet meeting considering the submission produces further important materials: the Cabinet notebooks and the Cabinet minutes. The notebooks are notes taken to record sufficient detail to enable the note takers, officers from DPMC[77], to facilitate the subsequent writing up of the Cabinet decisions in the minutes. For any government 'the nature of business discussed in the Cabinet will be a mixture of formal and informal, a mixture of major and complex policy proposals on the one hand, and political judgments about some issue or event on the other.'[78] The notes:

> do not offer a verbatim record of what was said, or even a full account of proceedings. They are the official's version of what ministers say, used only for the purpose of writing the decisions.[79]

They are 'at best idiosyncratic.'[80]

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[70] *Cabinet Handbook* (n 11) 34.
[71] *Cabinet Handbook* (n 11) 35.
[72] *Cabinet Handbook* (n 11) 20.
[73] *Cabinet Handbook* (n 11) 25. If less than 3 days, then the Cabinet Secretary approval for submission is required.
[74] *Legislation Handbook* (n 7) 15.
[75] *Cabinet Handbook* (n 11) 25.
[76] *Cabinet Handbook* (n 11) 25.
[77] *Cabinet Handbook* (n 11) 15. There are usually three official note takers in the room during Cabinet discussions.
[78] Brian Galligan, JR Nethercote and Cliff Walsh (eds), *Decision Making in Australian Government: The Cabinet & Budget Processes* (Centre for Research on Federal Financial Relations, The Australian National University, Canberra, 1990) 9.
[79] Patrick Weller, Joanne Scott and Bronwyn Stevens (n 18) 213.
[80] Ibid.

However, the Cabinet minutes (prepared by the note takers from their notes) record the decisions of the Cabinet 'in a manner that directs the action to be taken.'[81] These are significant documents in the legislative process. As the wording of minutes is often based on the recommendations in the Cabinet submission,[82] Ministers often incorporate the decisions they want as recommendations in their submissions.[83] Minutes 'often form the basis of precise interpretation and use for legislative drafting purposes'[84] and so their content is a pivotal point for the next steps in the legislative process.

(b) Legislation Proposals with Minor Policy Implications

If a Minister considers that a legislative proposal has only 'minor' policy significance and therefore does not require Cabinet approval, then he or she must write to the Prime Minister for executive approval. As in the case of Cabinet submissions, the form and content of this letter to the Prime Minister is rigorously prescribed. There is a checklist and even a sample letter annexed to the *Legislation Handbook.*[85] The Minister's letter to the Prime Minister should 'provide a clear and self-contained description of the proposal'[86] and include matters such as relevant background, the proposal's objective and effect, the reason that Cabinet approval is unnecessary and the details of consultation with other affected departments.[87] The sponsoring Department must consult with the OPC on its draft letter before it is sent to the Prime Minister.[88]

(c) Technical and Corrective Amendments within Existing Policy

If the legislative proposal only involves a technical or drafting amendment to correct an error in existing legislation, then the Minister is able to approve the proposal. Before doing so, however, he or she must consult with the OPC to confirm that the proposed amendment does constitute a technical or minor policy matter.[89]

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[81] Ibid. See also *Cabinet Handbook* (n 11) 12-13, 39.
[82] *Legislation Handbook* (n 7) 15.
[83] Patrick Weller, *Cabinet Government in Australia, 1901-2006: Practice, Principles, Performance* (n 49) 224; *Legislation Handbook* (n 7) 15.
[84] Althaus et al (n 3) 132.
[85] *Legislation Handbook* (n 7) apps E1 and E2.
[86] *Legislation Handbook* (n 7) 18.
[87] *Legislation Handbook* (n 7) 18. See also app E1.
[88] *Legislation Handbook* (n 7) 17.
[89] *Legislation Handbook* (n 7) 19. See also 22.

Certain types of drafting errors or edits may also be made by parliamentary amendment by the FPC.[90] If an error in a statute is regarded as 'purely formal' and 'of the kind that would otherwise be suitable for inclusion in a statute law revision Bill,' then the FPC may authorize the Bill that makes the amendment.[91] Corrections made by statute law revision Bills are described as amendments that only deal with tidying up, correction of errors, updating (including modernization of style) and repeal of spent provisions.[92] They are not intended to effect a change of policy or a change to the state of the law.[93] It is for that reason that FPC approval is sufficient.[94] Where the FPC can approve these legislative changes, instructing departments do not need to approach their Ministers for authority to include these amendments in Bills or as parliamentary amendments.[95] This power to make parliamentary amendments is said to reflect the common law 'slip rule' of interpretation that drafting errors would be read by a court in their correct form despite the errors.[96]

(d) Specific policy areas

The Executive Council is not generally involved with legislative proposals for Bills. As noted previously, it is mainly concerned with delegated, rather than primary, legislation.[97] However, it may perform its advisory role with respect to Australia's entry into international treaties.[98] This may be significant to subsequent Acts that incorporate all or part of a treaty. There is a formal, structured procedure involving the production of further materials. Requests for approval must be made by way of a written recommendation and a brief explanatory memorandum that explains the purpose of the proposed action, the reason for doing it, and the

[90] The power of the FPC to approve these amendments stems from a delegation by the PBC to the FPC in 1996: see Office of Parliamentary Counsel, *Drafting Direction No 4.4, Changes using FPC's editorial powers and statute law revision amendments* (Commonwealth, March 2023) 5; *Legislation Handbook* (n 7) 19.
[91] *Legislation Handbook* (n 7) 19.
[92] *Legislation Handbook* (n 7) 19. See also Department of Parliamentary Services, *Bills Digest: Statute Law Revision (Spring 2016) Bill 2016* (Bills Digest, No. 8 of 2016–17), 4.
[93] *Legislation Handbook* (n 7) 22. The FPC also has powers to make 'editorial changes' to enacted legislation in the course of preparing a compilation of an Act: *Legislation Act 2003* (Cth) ss 15V.
[94] Statute law revisions bills are distinct from statute law update bills in that the former 'are intended to contain measures that do not alter the substance of the law but rather make minor technical corrections' whereas the latter 'are intended to make minor changes to the substance and legal effect of the relevant provisions subject to amendment': Department of Parliamentary Services, *Bills Digest: Statute Update (Winter 2017) Bill 2017* (Bills Digest, No. 16 of 2017–18) 2.
[95] Office of Parliamentary Counsel, *Changes using FPC's editorial powers and statute law revision amendments* (Drafting Direction No 4.4, March 2023) 5.
[96] Department of Parliamentary Services, *Bills Digest: Statute Law Revision (Spring 2016) Bill 2016* (Bills Digest, No. 8 of 2016–17) (n 92) 2, fn 4.
[97] Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook 2021* (Commonwealth of Australia, 2021) 3-4.
[98] Ibid 4.

likely impact and effect of the action.[99] The requests are made to the Executive Council, but ultimately it is for the Governor-General to decide.

(e) Allocation of Priority of the Bill on the Legislative Programme

Obtaining the requisite policy approval is the first significant hurdle for a government legislative proposal. The second major hurdle is for the Minister to be allocated a place for the proposed Bill on the government's legislative programme. This does not follow automatically from policy approval.

Each Minister with a legislative proposal must compete with the legislative proposals of other Ministers for a place and priority in the government's programme. This allocation is important as it determines both the allocation of drafting resources to the Bill and parliamentary time. The 'competition' is done through a bidding process in which each Minister proposing legislation makes a 'bid' to the PBC for a place and priority on the governments legislative agenda.[100]

Apart from Cabinet itself, the PBC is the 'principal body' concerned with the Government's longer term policy objectives and 'decides the composition of the Government's legislation program … and undertakes a general supervisory role over the progress of legislation.'[101] One of its functions is to allocate priorities to legislative proposals for drafting and introduction.[102] The PBC will set deadlines for bids, usually at the end of the current sitting period for inclusion of the Bill in the next sitting period.[103]

There is a detailed template for the legislation bid letter to the PBC[104] and it must be 'strictly observed'.[105] The letter must include a variety of information including:[106]

- a brief description of all measures in the proposed Bill,
- the priority sought for the Bill and critical dates (if any) for passage

[99] Ibid 13. There are templates for each document in the Department of Prime Minister and Cabinet, *Federal Executive Council Handbook* (n 97) apps C1 to E5.
[100] For composition of the PBC in 2023, see < https://www.directory.gov.au/commonwealth-parliament/cabinet/cabinet-committees/parliamentary-business-committee >
[101] Elder and Fowler, *House of Representatives Practice* (n 10) 66. See also *Legislation Handbook* (n 7) 5.
[102] *Legislation Handbook* (n 7) 5.
[103] *Legislation Handbook* (n 7) 9 and Office of Parliamentary Counsel (Cth), *OPC's Drafting Services: A Guide for Clients* (7th ed, July 2022) 21 ('*OPC Guide for Clients*').
[104] *Legislation Handbook* (n 7) app C, Standard Format for a Bid for the Legislation Programme-Template.
[105] *Legislation Handbook* (n 7) app C, Standard Format for a Bid for the Legislation Programme, 1.
[106] Ibid app C.

o financial and regulatory impact

o whether the Bill contains an election commitment (and if so, which election)

o its political impact and any stakeholder sensitivities

o a short description covering the whole Bill

o status of policy approval and expected size of Bill for drafting

A Minister must list all the Bills he is bidding for in the same bid letter, in priority order,[107] thereby forcing the Minister to prioritize his own proposed Bills.

Once the PBC has received all bids for the next sitting of Parliament, it decides the priority category to be allocated to each Bill. This allocation places the Bill on the legislative programme, determines the priority of the Bill for drafting by OPC and also its priority for parliamentary time (both its introduction into Parliament and the time needed for its passage). The Bill will be assigned one of four categories to indicate its priority:[108]

- Category T - time critical Bills, for introduction and passage in the same sitting period of Parliament[109]
- Category A - high priority Bills
- Category B - medium priority Bills, and
- Category C - low priority

A former First Parliamentary Counsel has noted that it is rare for a proposed Bill to be excluded from the government's legislative program. But she goes on to note that the assignment of a Bill to a Category C, the lowest category, may have the same effect.[110]

Bid letters for Bills seeking a Category T allocation must attach a separate "statement of reasons" explaining the need for urgency. The statement must include the purpose of the proposed Bill and the ramifications if the Bill is not dealt with in one sitting.[111] This statement may eventually be tabled in the Senate if the government seeks an exemption from the Senate

[107] *Legislation Handbook* (n 7) 9.
[108] Ibid 7.
[109] As will be seen in Chapter Seven, the House and Senate standing orders provide that the expected journey of a bill will be introduction in one sitting and debate and enactment in a further sitting so Category T bills usually require the use of special parliamentary procedures to be passed in the same sitting.
[110] Hilary Penfold, 'The Genesis of Laws' (Conference Paper, 'Courts in a Representative Democracy', national conference presented by the AIJA, the LCA and the CCF, Canberra, November 1994) 5.
[111] *Legislation Handbook* (n 7) 12.

for the Bill to be considered in an expedited manner.[112] Ultimately, therefore, it may, in contrast the other bid materials, become a public document.

The minutes of the PBC reflect its decisions on priorities and also set the deadlines for drafting and introduction. They are circulated to all Ministers and departments.[113] But these decisions are not set in stone. The PBC meets at the beginning of each parliamentary sitting week to consider the legislation programme and assess priorities and consider requests for variations to the programme.[114] The content of requests for variations is also strictly prescribed.[115]

(f) Exposure Drafts of Bills

Details of proposed Bills and associated materials, including the final Bill prior to introduction into Parliament, are confidential to those who 'need to know' within Government.[116] Sometimes, however, 'exposure drafts' or draft version of the Bill are made available to the public or to a targeted group with a particular interest in the area covered by the Bill. It may also be necessary at times to release exposure drafts to state Ministers or officials, such as where complementary legislation is prepared.[117] The OPC has noted an 'increasing preference' by governments and responsible departments for exposing draft legislation for public comment prior to introduction into Parliament.[118]

A Minister who wishes to release an exposure draft prior to introduction to Parliament must have the approval of Cabinet or the Prime Minister.[119] The Minister must also have the requisite level of executive policy approval.[120]

[112] Exemption from Parliament of Australia, *Standing Orders and Other Orders of the Senate*, October 2022, SO 111. See Chapter Seven [7.5](a).
[113] *Legislation Handbook* (n 7) 8.
[114] Ibid (n 7) 5.
[115] Ibid app D 'Standard format for a request for a variation to the legislation programme'.
[116] Ibid 36.
[117] Ibid 36; Office of Parliamentary Counsel (Cth), *Legislation Approval Process* (Drafting Direction 4.3, March 2023) 3; Office of Parliamentary Counsel (Cth), *Amendments Requiring Consultation with States and Territories under an Intergovernmental Agreement* (Drafting Direction No. 4.3, October 2012) 3-4 in relation to bills that repeal or amend the Corporations legislation.
[118] Office of Parliamentary Counsel (Cth), *Annual Report 2021–22* (Report, Australian Government, 21 September 2022) 15.
[119] *Legislation Handbook* (n 7) 36. Office of Parliamentary Counsel (Cth), *Legislation Approval Process* (n 117) 3.
[120] *OPC Guide for Clients* (n 103) 19.

(g) Government Announcements Prior to Introduction of Bill

The Government sometimes issues media releases or makes other public announcements prior to a Bill being introduced into Parliament. Media releases by a Minister about proposed legislation should not be made without Cabinet or Prime Minister approval.[121] If a Minister intends to make a public announcement about proposed legislation, that announcement must be included as a recommendation in the submission to Cabinet (with a draft of the release).[122] Generally, however, 'significant policy developments' should be first announced in Parliament, unless not practicable.[123]

6.4 Drafting the Bill and the OPC

The next key step in the legislative process is the drafting of the Bill, which is performed by drafters at the OPC. Parliamentary Counsel 'have the task of translating the language of policy into the language of the law.'[124]

(a) The OPC

The OPC is the statutory agency consisting of a centralised group of specialist legislative counsel (located in Canberra) established to draft, among other things, Commonwealth government Bills to be introduced into Parliament, and government amendments made in Parliament.[125] All OPC drafters have legal qualifications.[126] Generally, they are the *only* people permitted to do the drafting of government Bills and government amendments.[127] Their 'core function' is to 'draft legally effective, [and] clearly expressed legislation that best

[121] *Legislation Handbook* (n 7) 20.
[122] *Cabinet Handbook* (n 11) 40.
[123] Ibid 40. This extends to government policy (white papers) and public policy discussion papers (green papers) which as a matter of practice should be first tabled in parliament.
[124] Stephen Laws, 'Giving Effect to Policy in Legislation: How to Avoid Missing the Point' (2011) 31(1) *Statute Law Review* 1, 16.
[125] *Parliamentary Counsel Act 1970* (Cth) ss 2–3. For history on the OPC see Carmel Meiklejohn, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting* (Australian Office of Parliamentary Counsel, 2012) 150-227. For early history of state legislative drafting offices, see Jeremy Finn, 'Legislative Drafting in Nineteenth Century Australia and the First Permanent Parliamentary Draftsmen' (1996) 17(2) *Statute Law Review* 90.
[126] *OPC Guide for Clients* (n 103) 7.
[127] *Legal Services Directions 2017* (Cth) sch 1 para 2.1, app A para 3. This is known as 'tied' work: at app A para 3A. Under para 3B of app A of the *Legal Services Directions* the 'Attorney-General may give approval for a legal services provider other than [the OPC] to undertake tied work'. See further [6.4] below.

achieves the [government's] policy intentions'.[128] The OPC is a part of the executive arm of government. It may be instructed by any federal government department but sees its 'client' as 'the Government as a whole'.[129] As such, it sees itself as the most 'independent player' in the process (presumably a description by way of comparison to the partisan agendas of the DPMC and the sponsoring department), tasked to give independent advice to government[130] One of the reasons for the government's control of the legislative agenda is that, through the OPC, they 'virtually have a monopoly on drafting power' and drafting skills for legislation.[131]

(b) Drafting Instructions and the nature of drafting

Drafting commences once the instructing department has provided written instructions to the OPC.[132] These instructions should have received clearance within the instructing department at senior executive level.[133]

Drafting instructions are the trigger for drafting − and a key document. These are 'requests from the policy and legal officers to the drafting officers [of OPC] to proceed with the drafting of legislation within the parameters set.'[134] They are 'crucial to the successful completion of the drafting effort'[135] and 'determine and delimit what the draft Bill is to contain.'[136]

Consistently with other key documents in the Commonwealth legislative process, there are detailed requirements established by the DPMC and the OPC for the form and content of drafting instructions. These requirements provide a clear picture of what must be contained in this document.

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[128] Peter Quiggin, 'Training and Development of Legislative Drafters' [2007] (2) *The Loophole* 14, 15 [3] ('Training and Development of Legislative Drafters'). See also Office of Parliamentary Counsel (Cth), *Annual Report 2021–22* (n 118) 8.
[129] Office of Parliamentary Counsel (Cth), *OPC Drafting Manual* (Manual, 3.2 ed, July 2019) 21 [149] ('*OPC Drafting Manual*').
[130] Ibid 25 [184]. The independence also stems from their ethical duty of independence as qualified lawyers.
[131] Bjorn Erik Rasch, 'Institutional Foundations of Legislative Agenda-Setting' (n 8) 469.
[132] *OPC Guide for Clients* (n 103) 10. Though see 13-14 which indicates that early access to OPC may be permitted in some circumstances such as when complex legislation is needed urgently.
[133] *OPC Guide for Clients* (n 103) 21. This refers to senior employees at SES ('Senior Executive Level') who provide strategic and other expertise at both agency and whole of APS levels. The functions of the SES are provided in section 35 of the *Public Service Act 1999* (Cth).
[134] Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing, 2014) 22-3.
[135] Ibid 21 referring to R Fox and M Korris, *Making Better Law: Reform of the Legislative Process from Policy to Act* (Hansard Society, 2010) 86.
[136] Ibid 24.

The purpose of instructions is to 'outline the key policy objectives and explain why legislation is needed.'[137] A key aspect of this checklist, which is described as the 'core of any set of drafting instructions',[138] is for the instructions to contain:

> an explanation of the key policy objectives that are to be implemented, and why legislation is needed to implement them. If the Bill …is to remedy a problem with the existing state of affairs, mention this and consider including one or more examples of the problem.[139]

As has been noted by a UK drafting scholar, this wording evokes memories of the old mischief rule in *Heydon's Case*.[140]

Other substantive matters to be included in the drafting instructions are:[141]

(i) The priority allocated to the proposal by PBC and details of the policy authority,

(ii) In 'clear and simple language', a complete and accurate description of how the Bill …is to implement the objectives.'[142] Paraphrasing the Cabinet Minute or other policy authority is not sufficient, and draft wording is discouraged.[143]

(iii) As attachments, any relevant legal opinions, and other background papers that may be helpful,[144]

(iv) Areas of complexity and evidence of consideration of 'whether there are any acceptable alternative approaches that would be less complex'[145] and

(v) Information on certain specific matters such as commencement, application, jurisdiction, consequences for non-compliance, powers to make administrative decisions, delegation powers, details of appropriations, spending and contracting, whether consequential amendments of any existing legislation will be needed, and transitional provisions.

[137] *Legislation Handbook* (n 7) 23.
[138] *OPC Guide for Clients* (n 103) 24.
[139] *OPC Guide for Clients* (n 103) 24.
[140] Xanthaki, *Drafting Legislation:* (n 134) 31 citing *Heydon's Case* (1584) 3 Co Rep 7a20. See Chapter 2 [2.2].
[141] *OPC Guide for Clients* (n 103) 23-29.
[142] Ibid 23.
[143] Ibid 23-24.
[144] Ibid 24.
[145] Ibid 25.

If the proposal is for an amending Bill, then additional matters are specified. If the proposal implements several separate policy proposals, then the instructions should address each of those separately.[146]

For Commonwealth legislation, the drafting instructions and the policy authority are inextricably linked. The latter provides the 'umbrella' under which the drafting is authorized to proceed. Sometimes, the drafting process 'reveals situations or possibilities that were not contemplated when the original authority was sought.'[147] If an issue arises that is not covered by the policy authority, then the instructing department must seek further policy approval. At all times the matters in the Bill must be covered by an existing policy approval.

Like most drafting of instruments by lawyers for clients, drafting a Bill is an 'iterative process.'[148] The drafter may ask 'lots of questions' of their instructors[149] and disputes about content are contemplated.[150] How much of this occurs will, of course, vary from Bill to Bill.

While initial instructions are nearly always in writing, communications are often oral, by phone discussions or meetings, as the OPC sees that can be 'more productive than relying solely on written exchanges.'[151] Still, the nature of the process can produce a voluminous amount of material. As well as the drafting instructions, it is likely that there will be multiple drafts, correspondence, memoranda, aids to planning such as diagrams and tables,[152] supporting documents (such as reports and legal advice) and so on. Given the range, it is difficult to identify particular categories of material beyond generalized types such as 'correspondence' or 'draft bills.'

[146] Ibid 29.
[147] Ibid 18.
[148] Lord Goldsmith, 'Parliament for Lawyers: An Overview of the Legislative Process (Sir William Dale Annual Memorial Lecture)' (2002) 4 *European Journal of Law Reform* 511, 513. Also George Tanner 'Confronting the Process of Statute-Making in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis, 2004) 49, 66.
[149] *OPC Guide for Clients* (n 103) 10.
[150] Office of Parliamentary Counsel (Cth), *Dealings with Instructors* (Drafting Direction No. 4.1, July 2020) 2-3.
[151] *OPC Guide for Clients* (n 103) 31.
[152] Office of Parliamentary Counsel (Cth), *Plain English Manual* (Manual, 1 August 2016) 10-12 ('*Plain English Manual*').

6.5 Drafting Manuals – Overview of Features

There is a further category of materials linked to the making of a Bill, namely Commonwealth drafting materials. All but one are written by the Commonwealth Office of Parliamentary Counsel ('OPC') for its parliamentary counsel to use when drafting statutes. Unlike the materials generated in the previous section, these materials are not generated *by* the legislative process but are created as standing documents to directly assist in the production of a Bill.

To guide the drafting process, the OPC has written an extensive collection of material about its own drafting. A summary follows.

- The *OPC Drafting Manual*: this provides an 'overview' of drafting and is intended as a 'starting point', highlighting main points and referring to other documents that deal with various matters in greater detail.[153] Despite its self-identified object as an overview, it contains some directives to drafters.
- Drafting directions: these are a series of nearly 40 pronouncements on a range of drafting matters which are issued by the FPC 'after consultation with all drafters and the editorial staff'.[154] OPC drafters are required to comply with these directions.[155] They are 'authoritative'[156] in the sense that they 'contain rules that should be followed by drafters unless they obtain an exemption in a particular case from [the] FPC'.[157] Drafting directions are divided into four categories on the OPC website: '[p]resentation and form of legislation', English '[u]sage', '[c]ontent' and '[p]rocedural matters' (although there is overlap between these categories, especially the first three).[158] Some are 'general' and some 'only deal with one issue'.[159]
- The *Plain English Manual*:[160] this manual is the foundation of the 'plain language' drafting style of the OPC.[161] This document has the status of a drafting direction, which, as noted

[153] *OPC Drafting Manual* (n 129) 5.
[154] *OPC Drafting Manual* (n 129) 5.
[155] Ibid; Peter Quiggin 'Training and Developing' (n 128) 20 [54].
[156] *OPC Drafting Manual* (n 129) 5 [3].
[157] Ibid 5 [5].
[158] These categories reflect the OPC *Drafting Directions Index*: Office of Parliamentary Counsel (Cth), *Drafting Directions Index* (Webpage, Index, 7 October 2020) < www.opc.gov.au/drafting-resources/drafting-directions >.
[159] Quiggin, 'Training and Development of Legislative Drafters' (n 128) 20 [54].
[160] *Plain English Manual* (n 152).
[161] Meiklejohn (n 125) 230–2. This used to be called 'plain English' but the OPC now uses the term 'plain language': see *OPC Drafting Manual* (n 129) 13 [89]–[90].

above, means that OPC drafters must comply with it.[162] To the extent that it is inconsistent with a drafting direction or a word note (see below), the latter documents prevail.[163]

- The *Amending Forms Manual*: this manual 'sets out the amending forms that OPC drafters use in amending Bills and instruments, and in amendments to Bills before Parliament'.[164] Again, all drafters are required to follow this document.[165]
- Word notes: these are a select group of notes that 'contain detailed rules about the formatting of documents and preparation of Bills'.[166] Drafters 'need to be very familiar with the matters covered by Word Notes'[167] as the format of federal legislation, including amending legislation, is 'strictly controlled'.[168]
- Two other documents: the *OPC's Drafting Services: A Guide for Clients*,[169] and the OPC's guide to *Reducing Complexity in Legislation*.[170]

All the above documents are publicly available on the OPC website.[171]

A number of these materials refer to one other key document, also publicly available but not drafted by the OPC. This is *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* prepared by the Criminal Justice Division of the Attorney-General's Department ('*AGD Offences Guide*').[172] The purpose of the *AGD Offences Guide* is to 'assist officers in Australian Government departments to frame criminal offences,

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[162] *Plain English Manual* (n 152) 1 note 2; Office of Parliamentary Counsel (Cth), *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (Drafting Direction No 2.1, 1 March 2016) 2 [1] ('*English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling*').
[163] *Plain English Manual* (n 152) 1 note 2.
[164] Office of Parliamentary Counsel (Cth), *Amending Forms Manual* (Manual, 15th ed, May 2019) ('*Amending Forms Manual*'). Description of the *Amending Forms Manual* (n 164) is from the OPC website: Office of Parliamentary Counsel (Cth), *Drafting Manuals* (Web Page) < www.opc.gov.au/drafting-resources/drafting-manuals > ('*OPC Drafting Manuals Web Page*').
[165] *OPC Drafting Manuals Web Page* (n 164); *OPC Drafting Manual* (n 129) 10 [55]–[57].
[166] Quiggin, 'Training and Development of Legislative Drafters' (n 128) 21 [56]. Selected notes available at: Office of Parliamentary Counsel (Cth), *Word Notes* (Web Page) <www.opc.gov.au/drafting-resources/word-notes>.
[167] *OPC Drafting Manual* (n 129) 21 [146].
[168] Ibid 6 [16], 10 [55].
[169] *OPC Guide for Clients* (n 103).
[170] Office of Parliamentary Counsel (Cth), *Reducing Complexity in Legislation* (Guide, Document Release No 2.1, June 2016) < https://www.opc.gov.au/publications/opcs-guide-reducing-complexity-legislation > ('*Reducing Complexity in Legislation*').
[171] Office of Parliamentary Counsel (Cth), *About the Office of Parliamentary Counsel* (Web Page) < https://www.opc.gov.au/ > and then follow tabs for each category. A perusal of the websites for other Australian parliamentary counsel offices (states and territories) reveals varying degrees of publicly available drafting manuals and guides. None, however, at the time of writing are as extensive and comprehensive as those made publicly available by the Commonwealth OPC.
[172] Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide, September 2011). ('*AGD Offences Guide*').

infringement notices, and enforcement provisions'.[173] The *AGD Offences Guide* appears to have been prepared in response to an overhaul of Commonwealth criminal offences in the 1990s which culminated in the *Criminal Code Act 1995* (Cth). The 'new framework … [of the Code] led to an intense examination of the method of drafting Commonwealth offences, which eventually resulted in standardised drafting practices'.[174]

The above listed OPC authored documents and the *AGD Offences Guide* ('OPC Drafting Materials') appear to be the primary documents that guide the OPC. There are other documents mentioned in the OPC Drafting Materials of which many appear to deal primarily with administrative, editing, or process matters.[175] Others, such as the Drafting Notes and FPC emails, appear more relevant to drafting.[176] But these documents are neither publicly available nor have the authority of drafting directions.[177]

The most immediately notable feature of the OPC Drafting Materials in terms of their potential utility as interpretative aids is that, with the exception of the *AGD Offences Guide*, they are authored by the very people who draft federal government Bills.[178] They are a direct source of information about choices made by the drafter.

Second, the information in the OPC Drafting Materials represents a standard or benchmark for government statutes. One of the objectives of having these documents is for the OPC to have 'consistency in the presentation and form of legislation' in order to provide 'a coherent statute book'.[179] To this end, the OPC Drafting Materials contain 'a substantial number of rules which must be followed when drafting legislation'.[180] As noted in one of the few judicial decisions that have referred to them, the OPC drafting manuals contain prescribed policies which are intended to be 'reflected in all legislation of the Commonwealth Parliament'.[181] Many of the documents appear to be regularly revised.[182] Drafting directions

[173] Ibid 5 [1.1].
[174] Daniel Lovric, 'Legislative Counsel and the Judiciary: Divergences in Statutory Interpretation?' [2015] (2) *The Loophole: Journal of the Commonwealth Association of Legislative Counsel* 42, 49 ('Legislative Counsel and the Judiciary').
[175] For brief descriptions of these documents see *OPC Drafting Manual* (n 129) 20–1.
[176] Drafting Notes are notes prepared by individual OPC drafters 'more in the nature of essays': Quiggin, 'Training and Development of Legislative Drafters' (n 128) 21 [55]. FPC emails are emails from the First Parliamentary Counsel ('FPC') to drafters about drafting matters: *OPC Drafting Manual* (n 129) 5.
[177] *OPC Drafting Manual* (n 129) 5–6.
[178] One exception may be where a government Bill is amended in Parliament by a private Member. See also the reference to 'outsourcing' in [6.7] below.
[179] *OPC Drafting Manual* (n 129) 6 [14].
[180] Ibid.
[181] *Eckett v Eckett* (2010) 237 FLR 324, 336 [73] (Coleman, Warnick and Thackray JJ).
[182] A perusal of the documents shows that most are recent editions.

are of particular importance. As previously noted, both the drafting directions and the *Plain English Manual* contain directions that the drafters are expected to follow.

Accordingly, it seems reasonable to view these materials as objectively constructed principles, practices, and policies governing the consistent drafting of federal government Bills that, in the absence of an exception, OPC legislative counsel are expected to follow.

It might therefore be argued that these drafting manuals are 'akin to other general reference sources that are used in statutory interpretation, such as dictionaries and grammar books, because they contain guidelines for the use of language and grammar in writing'.[183] This is one perspective. Arguably, they have greater potential utility than such reference guides. Dictionaries and grammar books, while useful as a starting point for 'ordinary' meaning, are sources generic to language, but have no inherent or rational link to *statutory* language either generally or for a particular jurisdiction. The OPC Drafting Materials are relevant not just to statutory language, but to statutes generated for a particular jurisdiction by a particular body. Consequently, they 'shed light on the shared understandings' of the drafters.[184] Consequently, they would seem to fall on the spectrum of external materials somewhere between generic sources (like dictionaries) and sources unique to the creation of a particular statute (such as a second reading speech).

The *AGD Offences Guide* is not authored by the OPC but still appears to influence the drafting process. If an OPC drafter is required to draft provisions for criminal offences, infringement notices, or enforcement provisions then the drafter must 'have regard to' the *AGD Offences Guide;* but it is 'neither binding nor conclusive'.[185]

These features may place the OPC Drafting Materials and the *AGD Offences Guide* in the genre of 'soft law'.[186] Soft law 'means different things to different people'[187] and possibly occupies 'a broad section of the spectrum between unstructured discretion and legislation'.[188]

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[183] Grace E Hart, 'State Legislative Drafting Manuals and Statutory Interpretation' (2016) 126(2) *Yale Law Journal* 438, 468.
[184] Ibid 468.
[185] Office of Parliamentary Counsel (Cth), *Criminal Law and Law Enforcement* (Drafting Direction No 3.5, June 2020) 3. See also *OPC Drafting Manual* (n 129) 16 [112].
[186] I am grateful to my doctorate supervisor, Professor Peter Cane, for this idea. See also DC Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) 3.
[187] Greg Weeks, 'The Use and Enforcement of Soft Law by Australian Public Authorities' (2014) 42(1) *Federal Law Review* 181, 182.
[188] Ibid citing Michelle Cini, 'From Soft Law to Hard Law?: Discretion and Rule-Making in the Commission's State Aid Regime' (Working Paper, Robert Schuman Centre for Advanced Studies European Forum, January 2000) 4.

A 'distinguishing feature of soft law is that it is intended to influence behaviour'.[189] Two common categories of soft law are policy statements and self-regularity codes.[190] Both the OPC Drafting Materials and the *ADG Offences Guide* are in the nature of self-regulatory documents intended to influence (drafting) behaviour for Federal legislation.

Empirically, there is always the question of the extent to which exceptions are sought from the standards or principles in these documents, or indeed the extent to which the documents are followed at all. Currently, there is no available empirical evidence about the extent of OPC drafters' actual use of the materials.[191] Even so, it is not unreasonable to make a working assumption that OPC drafting behaviour is at least influenced by the directives in these materials. This assumption is supported by the Annual Reports of the OPC, the most recently available of which states that one of the OPC's performance criteria is that the drafters apply the drafting standards and conventions consistently and that editors assess compliance with Drafting Directions for all Bills.[192] Given their source, detail and self-proclaimed authoritative status, they arguably provide a presumptive position about the drafting choices in OPC federal government Bills.

The current *AGD Offences Guide* edition (2011) is over a decade old. Despite this, it appears that the *AGD Offences Guide* is still regularly cited. The OPC has continued to refer to it in its revised editions of drafting directions (which, as noted, are authoritative documents),[193] and it is cited in explanatory memoranda and scrutiny committee reports for federal Bills.[194] So,

[189] Robin Creyke and John McMillan, 'Soft Law v Hard Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 377, 379.
[190] Greg Weeks, 'Soft Law and Public Liability: Beyond the Separation of Powers?' (2018) 39 *Adelaide Law Review* 303, 311.
[191] Some empirical work has been done on drafting in the US: Abbe R Gluck and Lisa Schultz Bressman, 'Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I' (2013) 65(5) *Stanford Law Review* 901 ('Statutory Interpretation from the Inside: Part I'); Lisa Schultz Bressman and Abbe R Gluck, 'Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II' (2014) 66(4) *Stanford Law Review* 725 ('Statutory Interpretation from the Inside: Part II'); Victoria F Nourse and Jane S Schacter, 'The Politics of Legislative Drafting: A Congressional Case Study' (2002) 77(3) *New York University Law Review* 575. In Australia, there is some empirical research on 'plain English' drafting but not specifically on drafting manuals: Jeffrey Barnes, 'The Plain Language Movement and Legislation: Does Plain Language Work?' (PhD Thesis, La Trobe University, 2013).
[192] Office of Parliamentary Counsel (Cth), *Annual Report 2021–22* (n 118) 11 See also 17.
[193] See, eg, ibid pt 1; Office of Parliamentary Counsel (Cth), *Legislation Approval Process* (n 117) 8; Office of Parliamentary Counsel (Cth), *Referral of Drafts to Agencies* (Drafting Direction No 4.2, 10 January 2023) 11–12, 14–15 ('*Referral of Drafts to Agencies*').
[194] See, eg, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Report, Digest No 7 of 2022, 23 November 2022) 38-9, 66-7 when referring to bills.

even accepting an arguably softer status, the *AGD Offences Guide* should be considered a document of influence in the drafting of Commonwealth offence legislation.

There are implications for this for their use as extrinsic materials. If they can be characterised as 'soft law' this suggests they have greater potential influence or status than other extrinsic materials.

6.6 Potential Value of Drafting Materials

Drafting manuals are not of the same nature as many of the extrinsic sources that are regularly referred to by the judiciary. The rational connection of, say, a second reading speech or a parliamentary committee report to a statute is immediately apparent — it is part of the genesis of that particular statute. That connection gives it automatic legitimacy. It is then up to the interpreter to explore the probative value of that speech or report. The OPC Drafting Materials are not linked to any one particular statute. They relate to federal government statutes. It is reasonable therefore that their potential utility may lie in different attributes. They are analogous to the *Acts Interpretation Act 1901* (Cth) (the 'AIA') which guides the interpretation of federal legislation.[195] The AIA operates as a manual, guide and dictionary for reading federal legislation. While having legislative force, the AIA contains few absolute directives and mostly operates as a presumptive starting point, subject to a contrary intention being revealed by the statute itself.[196]

The link between drafting styles and statutory interpretation has long been recognized.[197] The OPC Drafting Materials offer more detailed and particular information than merely the identification of a style. Legislative drafters themselves have raised the desirability and merit of interpreters being more familiar with legislative drafting practices.[198] They and other

[195] *Acts Interpretation Act 1901* (Cth) s 2(1).
[196] Ibid s 2(2).
[197] The link was recognized in the two UK reports that preceded the statutory reforms of the 1980s: Committee appointed by the Lord President of the Council, *The Preparation of Legislation (the 'Renton Report')* (No Comnd 6053, May 1975) 135-36; The Law Commission and the Scottish Law Commission, *The Interpretation of Statutes* (No (Law Com. No. 21) (Scot. Law Com. No. 11), 9 June 1969) 4. See Chapter Two [2.3].
[198] Hilary Penfold, 'Legislation in the Courts' [2019](1) *The Loophole: Journal of the Commonwealth Association of Legislative Counsel* 2, 6-7; Diggory Bailey, 'Bridging the Gap: Legislative Drafting Practice and Statutory Interpretation' (2020) April 2020 *Public Law* 220; Diggory Bailey, 'Legislative Drafting Practice and Statutory Interpretation: A Postscript' [2021] (October) *Public Law* 687; Eamonn Moran, 'The Coherence of Statutory Interpretation: Drafting Perspectives' in Jeffrey Barnes (ed) *The Coherence of Statutory Interpretation* (Federation Press, 2019) 50, 57; Lovric, 'Legislative Counsel and the Judiciary' (n 174); Hilary Penfold, 'Legislative Drafting and Statutory Interpretation' (2006) 7(4) *The Judicial Review* 471. For the merit of understanding the drafting process from a non-drafter, see Justice John Basten, 'Constitutional Dimensions of Statutory Interpretation' (Speech, Delivered at Constitutional Law Conference 2015, Centre for Comparative

commentators suggest a number of ways that drafting manuals may have utility in statutory interpretation. In summary, they may:

- establish the foundations for linguistic conventions, word usage and principles that are used for drafting;[199]
- contribute to our understanding of the style and structure of statutes, which in turn assists a user's understanding of what the statute is communicating;[200] and
- guide our understanding of the choices made by the drafter.[201]

Each is addressed below.

(a) Linguistic Conventions and Word Usage

The OPC Drafting Materials prescribe standards for, and practices of, language usage in federal statutes. While at first blush this seems to speak to the linguistic emphasis of the High Court discussed in Chapter Three, the material can also be seen as a part of, and contributing to, the legislative process. This material contributes to a key step in the legislative process – the drafting of the Bill.

The *Plain English Manual* and *OPC Drafting Manual* provide for some general standards, but the real detail is contained in the drafting directions. Much of the guidance in the OPC Drafting Materials, and particularly the drafting directions, in relation to word use is quite technical and detailed. But there are a number of practically useful aspects.

The first one relates to the idea of the ordinary meaning. As a starting point to determine this, it is not uncommon for a court to refer to a dictionary.[202] At least one Commonwealth legislative counsel has noted in commentary that they are unlikely to use dictionaries.[203] But,

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Constitutional Studies, Melbourne Law School, 2015) 11: 'in discussing principles stated to be generally understood and accepted, would not some reference to the institutional role of parliamentary counsel be a relevant consideration?'

[199] BJ Ard, 'Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation' (2010) 120 *Yale Law Journal* 185, 187–94; Grace E Hart (n 183) pt II; Amy Coney Barrett, 'Congressional Insiders and Outsiders' (2017) 84 (Special Issue) *University of Chicago Law Review* 2193, 2202. The extent to which drafting manuals *should* include such contents is addressed in Helen Xanthaki, 'Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?' (2010) 4(2) *Legisprudence* 111.

[200] Wim Voermans, 'Styles of Legislation and Their Effects' (2011) 32(1) *Statute Law Review* 38, 39; BJ Ard (n 199) 192.

[201] See generally ibid; Lovric, 'Legislative Counsel and the Judiciary' (n 174); Xanthaki 'Drafting Manuals and Quality in Legislation' (n 199) 123.

[202] See Chapter One [1.2].

[203] Lovric, 'Legislative Counsel and the Judiciary' (n 174) 44.

to the extent they do, the OPC Drafting Materials state that the *Macquarie Dictionary* is the 'best source of information on current Australian spelling and usage'.[204] This raises a question about the judiciary's regular reference to other dictionaries, such as the *Oxford Dictionary*.[205]

Second, it is clear from the OPC Drafting Materials, in particular the 'usage' category of drafting directions, that there are standard forms of expressions, defined terms and terminology. For example there is standardised terminology for different kinds of commencement provisions,[206] for application provisions[207] and for referencing.[208] There is a drafting direction to use particular words or expressions when striving to distinguish purpose and result in prohibitions, and details of how to express numbers, percentages and fractions.[209] Other drafting directions give specific information about how to express concepts about certain subjects such as government (how to refer to Ministers or departments), the financial sector (how to refer to different financial institutions) and family relationships (definitions of 'child' and 'parent').[210] Working assumptions are made about the use of particular words (such as 'reasonable' and 'fringe benefit') where a particular result is desired.[211] The *Plain English Manual* provides a table of 'traditional' expressions that are no longer acceptable (since 'plain language' became the style) and their appropriate 'simple' replacements.[212]

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[204] *OPC Drafting Manual* (n 129) 14 [94]; *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (n 162) 6 [33] (on spelling); Office of Parliamentary Counsel (Cth), *Formatting Rules for Legislation and Other Instruments Drafted in OPC* (Word Note, No 4.2, August 2021) 33 [174]–[175] ('*Formatting Rules for Legislation and Other Instruments Drafted in OPC*') (on italicisation). The *OPC Drafting Manual* (n 129) also refers to use of 'the Style Manual', presumably Commonwealth, *Style Manual* (John Wiley & Sons, 6th rev ed, 2002), a general text about publications; in the event of a conflict, the *Macquarie Dictionary* prevails: *OPC Drafting Manual* (n 129) 14.

[205] See, eg, *Minister for Immigration and Border Protection v Kumar* (2017) 260 CLR 367, 386 [54] (Nettle J); *R v GW* (2016) 258 CLR 108, 122 [26] (French CJ, Bell, Gageler, Keane and Nettle JJ); *King v Philcox* (2015) 255 CLR 304, 320 [24] (French CJ, Kiefel and Gageler JJ), 328 [48] (Keane J), 347 [118] (Nettle J); *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 23 [42] (French CJ, Hayne, Kiefel and Nettle JJ), 32 [76] (Gageler J).

[206] Office of Parliamentary Counsel (Cth), *Commencement Provisions* (Drafting Direction No 1.3, July 2022).

[207] Office of Parliamentary Counsel (Cth), *Use of Various Expressions in Draft Legislation* (Drafting Direction No 2.2, 21 August 2019) pt 4 ('*Use of Various Expressions in Draft Legislation*').

[208] Office of Parliamentary Counsel (Cth), *References to Cases in Notes* (Drafting Direction No 3.13, August 2020); Office of Parliamentary Counsel (Cth), *References to the Parliament* (Drafting Direction No 3.14, October 2012).

[209] *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (n 162) pts 1, 5.

[210] See generally *Use of Various Expressions in Draft Legislation* (n 207).

[211] Ibid 3–5. See also Office of Parliamentary Counsel (Cth), *Definitions* (Drafting Direction No 1.5, May 2019) ('*Definitions*').

[212] *Plain English Manual* (n 152) app 3.

These guides and expectations about the text that is to be drafted by parliamentary counsel are specific and particular. Consequently, they are likely only to be relevant to an interpretative task when text that can be subjected to one of these 'rules' is being construed. They generally do not provide guidance as a matter of principle. However, to the extent that an interpretative task touches on such text, the accepted understanding of the drafters of the use of particular terminology as reflected in these documents establishes a norm for that terminology. That norm can operate as a plausible benchmark in statutory interpretation. Consequently, a deviation from those established 'norms' might be seen as a deviation from the meaning assumed in the materials.

An example is phrases using variations of the word 'reasonable,' used in numerous federal statutes. The relevant drafting direction directs the drafter as to which of these phrases should be regarded as importing a subjective and objective element, despite, as the drafting direction itself explains, there being some discrepancy in case authority about this.[213] This awareness may assist the court in, for example, reasoning about provisions in the *Migration Act 1958* (Cth).[214]

Third, there is a brief but instructive section on punctuation. Pearce has pointed out that, although courts traditionally pay little regard to punctuation, there may be some shift in judicial attitudes.[215] For some jurisdictions, this common law position about the importance of punctuation has been changed by legislation.[216] For federal legislation, the OPC Drafting Materials provide support for the shift in the courts' approach: drafters are instructed that punctuation should be avoided unless it is 'required … by the rules of grammar' or 'to help convey a provision's meaning'.[217] In other words, punctuation, where used in federal legislation, has been carefully considered by OPC drafters and is intended to have a role in the text. So if, as Leeming JA has stated, a 'prerequisite to relying on punctuation is being

[213] *Use of Various Expressions in Draft Legislation* (n 207) 4–5.
[214] See, eg, *Commonwealth v Okwume* (2018) 160 ALD 515, where the court was required to consider, among other things, the phrase 'reasonably suspects' in s 189 of the *Migration Act 1958* (Cth).
[215] Pearce (n 186) 204-5.
[216] The interpretation legislation of the Australian Capital Territory, Queensland, and Victoria expressly refers to the punctuation: *Legislation Act 2001* (ACT) s 126(6); *Acts Interpretation Act 1954* (Qld) s 14(6); *Interpretation of Legislation Act 1984* (Vic) ss 35(b)(i), 36(3B).
[217] *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (n 162) 5 [29].

satisfied that it has been used consciously'[218] then the OPC Drafting Materials would seem to provide evidence of such consciousness.

Further, the OPC Drafting Materials contain a high degree of detail about amending Bills. As a large number of Commonwealth Bills passed each year are in fact Bills that amend existing Acts (rather than being principal Bills), this information is practically significant. For the preparation of amending Bills, the OPC drafter is directed to the 148 pages of the OPC *Amending Forms Manual*.[219] This manual, supplemented by other materials,[220] addresses various linguistic and structural aspects of drafting amending legislation. For example, there are numerous directives explaining the linguistic practice for different forms of amendment (repealing, substituting, adding, amending definitions and headings). These provide a strong starting point for understanding the language used in amending legislation. A simple example is the 'rule' that if a new principal Act is to be enacted, any consequential amendments, and any required application, saving or transitional provisions, are to be included in a separate Bill.[221] Understanding this approach would tend to negate any argument that the principal Act itself amends another Act.

All of the above also leads to a broader point. An important rationale behind the existence of the OPC Drafting Materials, as noted above, is to enhance consistency and coherency across the federal statute book. This has implications for the role of consistency in statutory interpretation. As well as the presumption about verbal consistency within a statute,[222] there is also a presumption that the legislature intends to give the same meaning to a word or phrase in a statute when used in a subsequent statute in the same jurisdiction.[223] Statutes in *pari materia* can engage this presumption — another way of saying that their text, context and purpose indicate that there should be consistency between the two statutes. Given that there has been little guidance in Australia beyond generalities about what constitutes in *pari*

[218] *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633, 659 [105]. Although a contractual interpretation decision, Leeming JA was discussing punctuation in the context of the grammatical meaning of legal texts generally. Pearce (n 186) make a similar point on the basis of modern drafting practices: at 204-5.
[219] *OPC Drafting Manual* (n 129) 10.
[220] See, eg, *Use of Various Expressions in Draft Legislation* (n 207); Office of Parliamentary Counsel (Cth), *Subordinate Legislation* (Drafting Direction No 3.8, December 2021) 24-5.
[221] *Amending Forms Manual* (n 164) 14 [27].
[222] *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J).
[223] *Lennon v Gibson & Howes Ltd* (1919) 26 CLR 285, 287 (Lord Shaw).

materia,[224] the OPC Drafting Materials, often being tailored to a particular subject matter, may provide useful support for an analysis of whether consistency is appropriate.

(b) Style and Structure

It is a key principle of statutory interpretation that the statutory text being construed must be considered in the context of the '"the instrument viewed as a whole"'.[225] The totality of the statute is also important for the purpose of the Act. As explained in Chapter Three, there is a common law principle that the purpose must ultimately be found in the Act's 'text *and* structure'.[226] For federal legislation, the 'whole' comprises all constituent parts: language, headings, readability aids (such as examples and objects clauses), long title, format, and structure.[227]

Understanding the statutory instrument as a whole is likely the area where the OPC Drafting Materials provide the greatest value for interpretation.

The materials guide us about the style of drafting adopted by OPC drafters. Understanding style is important for at least two reasons. First, because '[t]he way legislation, as a vehicle of symbolic communication, voices the message (the style of legislation) … matters. The medium of legislation is in part the message itself'.[228]

The second more specific reason is that the AIA informs us that, where words have changed between earlier and later federal statutes to adopt a 'clearer style' then we should not automatically take the changed words to express a new idea.[229] An understanding of the evolution of the drafting style of the OPC may assist in assessing changes of wording.

As noted, the OPC refers to its current drafting style as 'plain language' drafting.[230] It originated in the 1980s under the direction of FPC Ian Turnbull, who initiated a change in

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[224] Pearce (n 186) 120. See, eg, *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 371 [24] (Kiefel CJ, Nettle and Gordon JJ) 'the same subject matter along the same lines'.
[225] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ) quoting *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ). See also *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389 [24] (French CJ and Hayne J), 411 [88] (Kiefel J).
[226] *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389 [25] (French CJ and Hayne J) (emphasis added), citing *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Lacey*').
[227] *Acts Interpretation Act 1901* (Cth) s 13.
[228] Voermans (n 200) 39.
[229] *Acts Interpretation Act 1901* (Cth) s 15AC; Dennis Pearce, *Interpretation Acts in Australia* (LexisNexis Butterworths, 2nd ed, 2023) 101-2.
[230] *OPC Drafting Manual* (n 129) 13 [90]. To be distinguished from the broader plain language in law movement: see Victorian Law Reform Commission, *Plain English and the Law* (Report, rev ed, 2017).

style focusing on plain language and readability.[231] It was an important departure from the 'traditional style' that Australia had inherited from the United Kingdom[232] which had become 'elaborate' and often 'unnecessarily complex'.[233]

Although first published in 1993,[234] the *Plain English Manual* has been subject to revision and 'continues to provide the foundation for OPC's approach to plain language drafting'.[235] Essentially, this manual describes a range of techniques, attempting to strike a balance between precision and simplicity to make laws easier to understand to the extent possible given the complexity of the policy to be addressed.[236] That 'foundation' encourages 'good' writing habits (such as well constructed short sentences), rejects most traditional writing habits (such as unnecessarily long expressions and certain phrases) and focuses on structure.[237] It also encourages the use of aids within the Act to assist readability (such as headings, defined terms, objects clauses, notes, examples and graphs).[238]

Familiarity with the *Plain English Manual* assists in understanding the post-1990s drafting style of the OPC. Conversely, it also means that pre-1990s statutes should be read from a different perspective, given they were not drafted in the 'plain language' style. It is also important to be aware of the incremental nature of the development of the current style since the 1990s. Drafters are warned to 'use your discretion' and to 'be alert' when it comes to using previous Commonwealth legislation as precedent.[239] The judiciary and other interpreters may be wise to heed this warning when it comes to analysing older statutes or using the principle of *pari materia* for federal statutes. There is the concern that 'judges may

[231] Meiklejohn (n 125) 230–1; IML Turnbull, 'Clear Legislative Drafting: New Approaches in Australia' (1990) 11(3) *Statute Law Review* 161, 165.
[232] *Plain English Manual* (n 152) 5.
[233] Turnbull (n 231) 162.
[234] Meiklejohn (n 125) 232.
[235] *OPC Drafting Manual* (n 129) 13 [91]. For an explanation of some of the technical drafting changes see Edwin Tanner, 'Legislating to Communicate: Trends in Drafting Commonwealth Legislation' (2002) 24(4) *Sydney Law Review* 529.
[236] *Plain English Manual* (n 152) 6 [11]; *Reducing Complexity in Legislation* (n 170) 2 [10], 5–6 [32]–[33], 21 [132].
[237] *Plain English Manual* (n 152) chs 3, 4; Turnbull (n 231) 166–70.
[238] *Plain English Manual* (n 152) 32–4. Some examples are given in Turnbull (n 231) 169–72. See also *OPC Drafting Manual* (n 129) Attachment A; Office of Parliamentary Counsel (Cth), *Numbering and Lettering* (Drafting Direction No 1.7, October 2012). Note *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (n 162) 2 [2].
[239] *Plain English Manual* (n 152) 5 [9]. Drafters are also warned to be cautious about using legislation from other jurisdictions: *Use of Various Expressions in Draft Legislation* (n 207) 3 [2].

place too high a weight on perceived differences (or similarities) between provisions in various statutes', especially given the time constraints that drafters often operate under.[240]

As well as style, much can also be learned about the structure and format of a federal Act. For federal statutes, format and structure are governed by rules in the word notes. The 'fundamental reason for these rules is to maintain consistency in the format of Commonwealth legislation' and to prevent drafters from 'spend[ing] time trying to decide what is the "best" [formatting] approach'.[241] Like other authoritative drafting practices, these rules are approved by the FPC and departure requires consultation with the FPC.[242]

The word notes provide templates and rules to be used for formatting and placement of headings, schedules, commencement provisions, notes, examples, formatting of defined terms, formulas, tables, preambles, paragraphing, numbering, lettering, use of italics, capitals, and so on.[243] A few word notes address Bills covering a particular subject.[244]

Many of the rules are highly technical or mechanical and, so, are unlikely to be useful to the interpreter. But they do inform the reader about the layout that is generic to all Commonwealth government statutes, or relevant to statutes on a particular subject matter (more on this below). This can have repercussions for interpretation. For example, one of the formatting rules is that if a note is at the end of a provision and the drafter wishes to indicate that the note only relates to one subsection of that provision then the drafter should do so by the inclusion of a reference in a certain place in the note.[245] Not to do so, therefore, indicates that the note applies to the whole provision.

The word notes may also be useful for those readers who have not read a substantial amount of Commonwealth legislation. As the *Amending Manual* does for amending Acts, the word notes provide a 'short cut' to knowledge about the expected structure of Commonwealth statutes.

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[240] This point was made by OPC parliamentary counsel Daniel Lovric in his presentation: Daniel Lovric, 'Teaching Legislative Drafting and Statutory Interpretation from the Perspective of Legislative Counsel' (Speech, Symposium, LaTrobe Law School Centre for Legislation, Its Interpretation and Drafting, 26 October 2017) 7.
[241] *Formatting Rules for Legislation and Other Instruments Drafted in OPC* (n 204) 1 [3]–[4].
[242] Ibid 2–3 [11]–[14].
[243] Office of Parliamentary Counsel (Cth), *Formulas* (Word Note No 3.6, July 2016); Office of Parliamentary Counsel (Cth), *Tables* (Word Note No 3.4, August 2021); *Formatting Rules for Legislation and Other Instruments Drafted in OPC* (n 204).
[244] See, eg, Office of Parliamentary Counsel (Cth), *Formatting Social Security and Veterans' Affairs Bills* (Word Note No 4.6, July 2016); Office of Parliamentary Counsel (Cth), *Formatting of Excise Tariff Proposals and Bills* (Word Note No 4.4, July 2018).
[245] *Formatting Rules for Legislation and Other Instruments Drafted in OPC* (n 204) 26–7 [143]–[144].

Other documents provide guidance on how drafters use components, particularly readability aids. One example is the simplified outline, a regular feature of Commonwealth statutes. A drafting direction devoted to this feature explains that the object of the simplified outline is for an 'educated reader' to 'easily gain a general understanding of what the legislation is about'.[246] Drafters are directed that the writing style of this feature may be less formal[247] than the substantive provisions and, while not intended to be comprehensive, should '"tell a story"'.[248] The simplified outline must have substantive provisions underlying it and the drafter must strive to ensure that the simplified outline does not conflict with those provisions.[249] Significantly, the simplified outline is distinguished from 'objects' or 'purpose' provisions which have a more 'aspirational' role.[250] This knowledge may allow a swift disposal of arguments relying on specific words in a simplified outline,[251] and supports an approach which distinguishes it from a purpose provision. Commonwealth drafters see the purpose or objects clauses they draft as 'aspirational'[252] and a guide about what the Parliament is trying to do.[253]

A second example is the long title. Long titles have been used at common law as interpretative aids, even before the enactment of s 13 of the AIA in its current form.[254] The OPC clearly considers that long titles should be helpful, an approach consistent with judicial decisions.[255] It is the umbrella for all matters included in a Bill. Typical to a long title are 'catch all' generic words such as 'for related purposes' or 'for other purposes'.[256] Drafters work on the assumption that the latter is wider than the former, but neither will allow a

[246] Office of Parliamentary Counsel (Cth), *Simplified Outlines* (Drafting Direction No 1.3A, November 2016) 4 [19], where it states that an educated reader may or may not have legal training or specialist knowledge.
[247] Ibid 7–8 [48]–[50].
[248] Ibid 5 [24].
[249] Ibid 5–6 [30].
[250] Ibid 9 [57]–[59]. The *Plain English Manual* (n 152) also states that an objects clause is to give a 'bird's eye view' of a statute: at 32 [154].
[251] See, eg, *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393, 417 (Moore, Kenny and Tracey JJ for the Court).
[252] Office of Parliamentary Counsel (Cth), *Simplified Outlines* (n 246) 9 [58].
[253] *Plain English Manual* (n 152) 32.
[254] See Pearce (n 186) 189-90. Section 13 of the *Acts Interpretation Act 1901* (Cth) was enacted in its current form by sch 1 item 22 of the *Acts Interpretation Amendment Act 2011* (Cth).
[255] Office of Parliamentary Counsel (Cth), *Long and Short Titles of Bills and References to Proposed Acts* (Drafting Direction No 1.1, May 2019) 4 [19] ('*Long and Short Titles of Bills and References to Proposed Acts*'). Pearce (n 186) 190 notes that 'Members of the High Court and other courts regularly call on the long title as an aid to interpretation'.
[256] *Long and Short Titles of Bills and References to Proposed Acts* (n 255) 2 [7].

parliamentary amendment that is not within the title or not relevant to the subject matter of the Bill.[257]

Apart from the assistance in the materials in relation to specific contextual items, there are two aspects of more general application. The first concerns syntactical presumptions. In Australia, syntactical presumptions are regularly found in statutory interpretation textbooks and are not uncommonly engaged by the judiciary.[258] One of the surprising aspects of the OPC Drafting Materials is the lack of express reference to linguistic presumptions. There is little indication among the detail contained in the OPC Drafting Materials that these are used to guide drafting.

Some of the directions in the drafting materials can arguably be 'matched up' with known common law linguistic principles, such as:

- the direction to be 'ruthless in eliminating unnecessary words'[259] appears reflective of the common law principle that all words have work to do;[260]
- the 'one expression, one meaning' approach[261] is consistent with the principle that words are assumed to be used consistently across an Act;[262]
- the direction to use 'a short generic word to cover the alternatives'[263] rather than a string of alternative words may be an attempt to engage the *ejusdem generis* presumption;[264] and
- there is an oblique reference to the 'always speaking' principle.[265]

But these principles are not explicitly identified. This lack of attention is reflected in commentary of former and current legislative counsel which indicates that, although drafters may be 'well aware'[266] of common law syntactical presumptions, they 'don't generally draft

[257] See ibid 2–3 [2], [7]–[8], citing House of Representatives, *Standing Order* (4 December 2017) standing order 150(a).
[258] See, eg, Pearce (n 186) 165-84.
[259] *Plain English Manual* (n 152) 15 [57].
[260] *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ), cited in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71] (McHugh, Gummow, Kirby and Hayne JJ).
[261] *OPC Drafting Manual* (n 129) 11 [67]; *Definitions* (n 211) 3 [5].
[262] *IMM v The Queen* (2016) 257 CLR 300, 339 [143] (Nettle and Gordon JJ) (citations omitted); *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645, 660 [32] (French CJ, Crennan, Kiefel and Bell JJ) citing *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J).
[263] *Plain English Manual* (n 152) 15 [57].
[264] *R v Regos* (1947) 74 CLR 613, 623 (Latham CJ).
[265] *Plain English Manual* (n 152) 21 [84].
[266] Eamonn Moran, 'Principles of Statutory Interpretation' (2017) 5 *Judicial College of Victoria Journal* 45, 51.

in reliance on maxims'.[267] Perhaps such principles are relied upon 'unconsciously' by the drafter,[268] or they are of limited use.[269] But the lack of explicit reference must give us pause to question, or at least closely assess, the weight to be given to them when construing statutes.[270]

A second consideration is the importance of the subject matter of the statute to the drafting of that statute. The modern mantra of text, context and purpose means that we interpret statutes as a generic class of document. Formerly strict approaches to particular genres of statute, such as taxation or penal statutes, have softened.[271] There are still exceptions. Beneficial provisions may attract a liberal interpretation,[272] statutes implementing international treaties have tailored interpretative rules,[273] and provisions abrogating so called 'fundamental rights' (if this can be considered one subject) may engage the 'principle of legality'.[274]

For the OPC drafter, however, many linguistic practices and standards are more specifically tailored to a Bill's, or a provision's, subject matter. This is reflected in the 'Content' category of drafting directions on the OPC website. For example, there are materials specific to constitutional law issues; taxation; maritime or offshore areas; Commonwealth liability; conferral and exercise of powers; criminal offences, penalties and enforcement powers; evidence; governance of Commonwealth bodies; tribunals and other administrative bodies; subordinate legislation; provisions affecting Australian governments one of the few instances where a substantive statutory interpretation presumption is referred to); and provisions that implement international treaties or conventions.[275]All prescribe, to varying degrees, the

[267] Peter Quiggin, 'Statutory Construction: How to Construct, and Construe, a Statute' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 78, 88. See also Lovric, 'Legislative Counsel and the Judiciary' (n 174) 48 (drafters have a 'relatively blunt approach' to use of presumptions); Penfold, 'Legislative Drafting and Statutory Interpretation' (n 198) 488 (drafters 'think very hard' before relying on presumptions).
[268] Penfold 'Legislative Drafting and Statutory Interpretation' (n 198) 485.
[269] Ibid 487.
[270] Empirical work in the US has suggested that the common law linguistic maxims most used by the courts are the ones least used by the drafters, even though the drafters were aware of those maxims: Gluck and Bressman, 'Statutory Interpretation from the Inside: Part I' (n 191) 930. See also Nourse and Schacter (n 191) 600–1.
[271] For taxation, see Pearce (n 186) 385–96. For penal statutes, see *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 49 [57] (Hayne, Heydon, Crennan and Kiefel JJ); cf *Brown v Tasmania* (2017) 261 CLR 328, 496–7 [542] (Edelman J).
[272] Ambiguous remedial or beneficial legislation is 'to be given a "fair, large and liberal" interpretation': *AB v Western Australia* (2011) 244 CLR 390, 402 [24] (French CJ, Gummow, Hayne, Kiefel and Bell JJ), citing *IW v City of Perth* (1997) 191 CLR 1, 12.
[273] Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles: The Laws of Australia* (Thomson Reuters, 2nd ed, 2020) 278-80.
[274] The presumption that Parliament will not encroach upon 'fundamental' rights 'without expressing its intention with irresistible clearness': *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ) ('*North Australian Aboriginal Justice Agency Ltd*'), quoting, among others, *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).
[275]All can be found on the OPC website: Office of Parliamentary Counsel (Cth), *Drafting Directions* (Web Page) <www.opc.gov.au/drafting-resources/drafting-directions>.

choice of words and terminology in the context of that subject matter and, in some instances, explain the policy behind that approach.

For example, for a Bill that establishes a new Commonwealth body, the drafting direction on this topic contains numerous standard provisions and precedents for decision making, appointments, remuneration, terminations, disclosure of interests, and powers. These are just some of numerous topics addressed for the drafting of provisions relating to the establishment of statutory, corporate or other bodies.[276]A second example is the drafting direction on provisions relating to existing government bodies. It directly refers to principles of statutory interpretation governing the question of whether 'a Commonwealth Act binds the Crown'.[277] It provides a statement of understanding and suggests the text to be used for a particular desired result.[278]

The importance of subject has particular resonance for criminal legislation. As discussed, legislative counsel 'drafting provisions dealing with offences, criminal penalties, secrecy provisions and enforcement powers … should refer to' the *AGD Offences Guide.*[279] The *AGD Offences Guide* contains many drafting practices and principles for Commonwealth offences that deserve attention.[280] Drafting practice, such as the practice of clearly distinguishing each physical element of a criminal offence in a provision, may assist in understanding such a provision.[281]

A clear example is the statutory interpretation 'principle of legality': the common law principle that purports to identify 'fundamental values' of which, according to the judiciary, 'those who draft legislation … are aware'.[282] The *AGD Offences Guide* uses the concept of 'fundamental criminal law principle[s]'.[283] These are policy-driven principles to guide the drafting of Commonwealth criminal statutes. The *AGD Offences Guide* also identifies policy

[276] See, generally, Office of Parliamentary Counsel (Cth), *Commonwealth Bodies* (Drafting Direction No 3.6, January 2023).
[277] Office of Parliamentary Counsel (Cth), *Legislation that Refers to or Affects Australian Governments or Jurisdictions* (Drafting Direction No 3.10, June 2018) 2 [1].
[278] Ibid 2–3 [1]–[7].
[279] *OPC Drafting Manual* (n 129) 16 [112]; see above n 185.
[280] See, eg, *AGD Offences Guide* (n 172) ch 2 (drafting of offences), ch 3 (penalties), ch 4 (defences), ch 5 (evidentiary certificates), ch 6 (infringement notices), ch 7 (coercive powers), ch 8 (entry, search and seizure powers), ch 9 (notices to produce or attend), pt 10.1 (arrest and detention).
[281] See Lovric, 'Legislative Counsel and the Judiciary' (n 174) 49–51, who discusses drafting practice in the context of comments made by the court in *PJ v R* (2012) 36 VR 402.
[282] *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 30–1 [42] (French CJ). See also *Brown v Tasmania* (2017) 261 CLR 328, 498 [544] (Edelman J). It is described as a 'working hypothesis': *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).
[283] *AGD Offences Guide* (n 172) 8.

approaches that should only be made in 'exceptional circumstances'.[284] Bills that deviate from the principles and policies in the *AGD Offences Guide* must be referred to the Attorney-General's Department and in some cases require the approval of the Attorney-General.[285]

The 'fundamental' criminal law principles are not defined. They must be identified in a piecemeal fashion by reading through the *AGD Offences Guide*.[286] Some mirror existing normative common law presumptions, such as that retrospective criminal liability provisions should be rare,[287] that the privilege against self-incrimination may only be overridden where there is clear justification to do so,[288] and that any intended extraterritorial application must be clearly stated.[289]

Other principles are less reflective of interpretation practices and in some cases are very specific. For example, there is a 'fundamental criminal law principle' that an individual should only be responsible for their own actions;[290] that matters should only be drafted in a defence in certain circumstances;[291] and that where an Act authorises the creation of an offence in subsidiary legislation, that offence 'should not enable the creation of offences punishable by imprisonment'.[292] Others relate to the use of lethal force, entry, search and seizure without a warrant and personal searches.[293] These have no express equivalents in statutory interpretation.[294]

Given the scholarship on the 'principle of legality', this material deserves consideration.[295] As normative policy directions, they may provide some justification (or not) for the 'fundamental' rights identified by the courts, or at least provide some empirical evidence to

[284] Office of Parliamentary Counsel (Cth), *Criminal Law and Law Enforcement* (n 185) 3; Office of Parliamentary Counsel (Cth), *Referral of Drafts to Agencies* (n 193) 15.
[285] *AGD Offences Guide* (n 172) 8 [1.3.2].
[286] Though some examples are listed in *AGD Offences Guide* (n 172).
[287] Ibid 15–17.
[288] Ibid 94–6.
[289] Ibid 35–6.
[290] Ibid 32–3.
[291] Ibid 50–1.
[292] Ibid 44.
[293] Ibid 8 (use of lethal force), 80 (use of force to execute search warrant), 85–6 (entry and search without warrant), 102–3 (personal search powers).
[294] Though arguably some principles in the *AGD Offences Guide* (n 172) may be consistent with the recent purported broadening of the scope of the 'principle of legality' to the 'general system of law': see Stephen McLeish and Olaf Ciolek, 'The Principle of Legality and "The General System of Law"' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 15.
[295] For a summary of major issues, see John Basten, 'The Principle of Legality: An Unhelpful Label?' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 74.

help guide 'the High Court's (developing) jurisprudence in this area'.[296] For example, the requirement of a 'strong justification' for provisions granting personal search powers may be seen as support for an argument that the fundamental right of liberty is engaged by such a provision, or even for recognition of a fundamental right to privacy.[297]

There is a further practical aspect. If a draft Bill does depart from principles set out in the *AGD Offences Guide*, then the instructing department is expected to highlight those issues in the explanatory memorandum that accompanies the Bill when it is presented in Parliament.[298] This means that interpreters can reasonably assume that fundamental principles are followed, unless otherwise noted in the explanatory material.

(c) Drafting Choices and Statutory Purpose

The relevance of the OPC Drafting Materials to the identification of the purpose or object of a statute or statutory provision is not obvious. Nevertheless, there are three possible ways that the OPC Drafting Materials may assist in determining a statute's purpose.

First, the preceding discussion highlights ways in which the materials can aid the reader in understanding the choices and assumptions made by the drafter about the text, format, components and structure of the Act. All of these indicia contribute to understanding the operation of the statute.

Second, also as previously discussed, the court's starting point for interpretation is the 'ordinary and grammatical meaning' of the text.[299] This is often expressed as being normatively desirable, as it supports the 'underlying democratic value'[300] that 'ordinary' people bound by legislative text should be 'generally entitled to rely upon the ordinary sense of the words that Parliament has chosen'.[301] One assumption underlying this approach is that

[296] Dan Meagher, 'The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the Courts' (2014) 42(1) *Federal Law Review* 1, 15–16.
[297] Provisions about personal search powers are in *AGD Offences Guide* (n 172172) 102–3 [10.3]. The fundamental right to personal liberty is recognised in *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518, 520 (Mason CJ, Wilson and Dawson JJ), 523 (Brennan J), 532 (Deane J).
[298] *AGD Offences Guide* (n 172) 6 [1.2].
[299] *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, 13 [26] (French CJ, Hayne, Kiefel and Bell JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 31–2 [4]–[5] (French CJ).
[300] Justice John Basten, 'Choosing Principles of Interpretation' (2017) 91 *Australian Law Journal* 881, 882.
[301] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 349 [42] (French CJ), citing *Interpretation Act 1987* (NSW) s 34(3). This is the New South Wales equivalent provision of *Acts Interpretation Act 1901* (Cth) s 15AB(3).

'ordinary meaning is assumed to be the same for everyone'.[302] The intended audience of the statute does not often appear to be a factor expressly acknowledged.

Yet in drafting literature, understanding the audience of a statute is identified as an important consideration in the drafting process.[303] This is because the intended audience 'affects not only [the drafter's] choice of language and appropriate sublanguage or technical dialect, but his estimate of the range of relevant assumptions he can take for granted as already shared by the particular audience'.[304]

Recognition of the intended audience was seen as a significant factor when the plain language drafting movement was developing.[305] For the OPC drafter too, audience is a more nuanced concept than a homogeneous 'ordinary' person. There is no blanket assumption that the audience will be 'ordinary'. The materials recognise that it is not reasonable to expect that all 'statutes can be written so that everyone can understand them'.[306] Drafting is to be done with the *target* audience in mind. While recognising the challenge that some statutes have a wide variety of readers,[307] drafters are informed that striking the right 'balance between precision and simplicity' will depend upon 'who your readers are and why they read the law'.[308] It is specifically acknowledged that, especially for complex subject and policy areas, the audience is not always the general public.[309] Instead, the draftsperson should 'try to write his statute so that it can be understood by those who are supposed to understand it, namely the persons to whom it is directed, the persons who have to administer it and the courts and judges who have to apply it'.[310]

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[302] Ruth Sullivan, 'Some Implications of Plain Language Drafting' (2001) 22(3) *Statute Law Review* 145, 163.
[303] Helen Xanthaki, *Drafting Legislation* (n 134) 113–16; Stephen Laws, 'Drawing the Line' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate, 2008) 19, 24–5; ibid 158–60; Reed Dickerson, 'Statutory Interpretation: The Uses and Anatomy of Context' (1972) 23(2) *Case Western Reserve Law Review* 353, 366.
[304] Dickerson (n 303) 366.
[305] Robert D Eagleson, 'Efficiency in Legal Drafting' in David St L Kelly (ed), *Essays on Legislative Drafting* (Adelaide Law Review Association, 1988) 13, 15. See also House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Clearer Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth* (Report, September 1993) 92–6; Victorian Law Reform Commission, *Plain English and the Law* (n 230) 94–7.
[306] *Reducing Complexity in Legislation* (n 170) 1 [6] quoting EA Driedger, 'Legislative Drafting' (1949) 27(3) *Canadian Bar Review* 291, 295.
[307] *Plain English Manual* (n 152) 13 [50].
[308] Ibid 13 [48].
[309] *Reducing Complexity in Legislation* (n 170) 1 [7].
[310] Ibid 1 [6], quoting Driedger (n 306) 296.

Third, there are some references to judicial decisions on specific language in the OPC Drafting Materials.[311] This, at least, should put the interpreter on notice about the assumed knowledge and object of the drafter for particular language. As lawyers, we assume, and FPC has stated, that drafters 'are … aware of the pronouncements of courts about the way that particular sorts of provisions will be interpreted'.[312] Specific references to decisions provide a factual basis for this awareness. In some instances the materials have directed drafters about the wording to use to overcome an uncertainty at common law. For example, drafters are directed to the words to be used to indicate that a provision creates a defeasible, as opposed to indefeasible, statutory right.[313] Another example is the words to indicate whether a purpose is intended to operate by reference to a result rather than purpose.[314]

Interestingly, although drafters are sometimes directed in the OPC Drafting Materials to sections of the AIA, s 15AA, the Commonwealth legislation purposive provision, is not a central feature.[315] Perhaps the relevance of purpose is an unstated working assumption.[316]

(d) Awareness of Parliamentary Process

The Drafting Materials are also valuable from a broader perspective. They reveal a clear awareness of the parliamentary process and the scrutiny that the Bill, once introduced into Parliament, will attract.

As previously indicated, on the occasions where the draft has departed from 'fundamental principles' or standard drafting principles, the instructor is expected to highlight those issues

[311] See, eg, *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (n 162) 2 [4]–[7]; *Use of Various Expressions in Draft Legislation* (n 207) 4 [13]–[14], 5 [16]; Office of Parliamentary Counsel (Cth), *Constitutional Law Issues* (Drafting Direction No 3.1, September 2020) ('*Constitutional Law Issues*') 3 [6], 4 [11]–[15]; Office of Parliamentary Counsel (Cth), *Conferral and Exercise of Powers (Including by Governor-General)* (Drafting Direction No 3.4, October 2012) 3 [10]–[11], 4 [15]–[16]; Office of Parliamentary Counsel (Cth), *Criminal Law and Law Enforcement* (n 185) 13.
[312] Quiggin, 'How to Construct, and Construe, a Statute' (n 267) 88.
[313] Office of Parliamentary Counsel (Cth), *Constitutional Law Issues* (n 311) 3–5.
[314] *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (n 162162) 2–3 [4]–[13], discussing *Chew v The Queen* (1992) 173 CLR 626.
[315] 'Objects' clauses are discussed: see, eg, *Plain English Manual* (n 152) 32–3 [154]–[156]. There are also references to drafters identifying 'the real purpose of a provision': *Reducing Complexity in Legislation* (n 170) 11 [64].
[316] A description of the policy objectives of a proposed Bill are a 'core' aspect of drafting instructions to the OPC: *OPC Guide for Clients* (n 103) 24.

in the explanatory memorandum for the Bill (which will be presented with the Bill when introduced into Parliament).[317]

Second, there is a clear appreciation in the drafting manuals of the importance of the scrutiny that may be given to the Bill by parliamentary committees. The relevance of the scrutiny of the Senate Standing Committee on the Scrutiny of Bills is abundantly clear.[318] This relevance relates not only to the five 'standing principles' that the Committee examines but also various reports made by the Committee. The Guide also contains references to certain reports of the Australian Law Reform Commission as useful guides on particular topics.[319]

Potential scrutiny of the Committee for other types of provisions is also identified. For example, commencement provisions,[320] regulatory powers,[321] and international agreements[322] to name a few. The future scrutiny of this Committee is also emphasized in teaching materials prepared by the OPC and used to teach government departments about instructing OPC.[323]

Occasional reference is also made to the scrutiny of other parliamentary committees such as the Senate Legal and Constitutional Affairs Committee,[324] the Parliamentary Joint Committee on Human Rights[325] and, for international agreements to be reflected in domestic legislation, the Joint Standing Committee on Treaties.[326]

6.7 Limitations

Most of the documents involved in the Bill making process are confidential and so not publicly available. Cabinet documents are considered to be the property of the government of the day. They are not departmental records.[327] The convention of 'collective responsibility'

[317] See [6.7] above on Attorney-General's Department (Cth), *A Guide to Framing Commonwealth Offences* (n 172). See also, eg, Office of Parliamentary Counsel, *Commencement Provisions* (Drafting Direction 1.3, July 2022) 6 – 8, 12 where there are numerous references to the need to 'explain' in the explanatory memorandum.
[318] *OPC Guide for Clients* (n 103) 36, 38. See also *AGD Offences Guide* (n 172) 6.
[319] *AGD Offences* (n 172) 6.
[320] Office of Parliamentary Counsel (Cth), *Commencement Provisions* (n 317) 6, 8, 10, 28.
[321] Office of Parliamentary Counsel (Cth), *Regulatory Powers* (Drafting Direction No. 3.5A, March 2021) 6, 8, 10, 12.
[322] Office of Parliamentary Counsel (Cth), *Implementing Commonwealth agreements (including treaties and conventions etc.)* (Drafting Direction No. 3.11, January 2018) 2-3.
[323] Office of Parliamentary Counsel, Legislation Process Course materials, as provided to author by email on 14 June 2017 by First Parliamentary Counsel, 138 (not for distribution).
[324] Office of Parliamentary Counsel (Cth), *Regulatory Powers* (n 321) 3.
[325] Office of Parliamentary Counsel (Cth), *Regulatory Powers* (n 321) 4.
[326] Office of Parliamentary Counsel (Cth), *Implementing Commonwealth agreements (including treaties and conventions etc*. (n 322) 2.
[327] *Cabinet Handbook* (n 11) 26.

means that strict confidentiality of all Cabinet proceedings and documentation is expected.[328] Cabinet records, including Cabinet minutes, and government records generally are protected from early public released by archives legislation for at least twenty years (a period which was reduced from thirty years in 2010).[329] Cabinet notebooks are further protected during the closed period by freedom of information legislation.[330] Communications between departments and OPC drafters, including draft bills, are likely to attract legal professional privilege.[331] Other documents may attract public interest immunity.[332]

One distinct exception is the OPC Drafting Manuals which are publicly and readily available. However, it is prudent to be aware of their limitations. Just as with any extrinsic material, there will be factors which affect its probative value in any given interpretative task. At least two weaknesses have been identified in the international literature which are worth addressing here.

The first concerns the authorship of drafting manuals. In the US, congressional Bills, and therefore the manuals about drafting them, can originate from a variety of sources — legislators, their staff, congressional committees, or even individuals or groups outside the legislature.[333] One study has identified 11 different sources of draft Bills![334] Further, often the 'manuals are not regularly updated'.[335] These factors lead to questions about their reliability and quality.

For Australian federal legislation, these criticisms are not entirely persuasive.[336] First, the OPC Drafting Materials are (except for the *AGD Offences Guide*) generated from a single

[328] *Cabinet Handbook* (n 11) 7, 17. See also Mark Rodrigues, *Cabinet Confidentiality* (Parliamentary Library Research Publication, Australian Parliamentary Library, 28 May 2010) 7.
[329] *Archives Act 1983* (Cth) s 3(7). Cabinet notebooks are protected for 30 years: s 22A. Pursuant to the *Freedom of Information Amendment (Reform) Act 2010* (Cth), the open access period transitioned from 30 to 20 years over 10 years. The open access period for Cabinet notebooks transitioned from 50 years to 30 years over the same period. See Tony Lupton, 'Cabinet Confidentiality and Parliamentary Scrutiny in the Information Age' (2012) 27(1) *Australasian Parliamentary Review* 151 who argues for greater transparency.
[330] *Freedom of Information Act 1982* (Cth) s 4(1) (definition of 'document').
[331] *Waterford v Commonwealth* (1987) 163 CLR 54; *State of New South Wales v Betfair Pty Ltd* (2009) 180 FCR 543; *Tabcorp Holdings Ltd v Victoria (No 2)* [2013] VSC 541. Though note arguments made that these drafting files should be made more readily available to the public: Shannon Tomlinson, 'Public Access to Legislative Drafting Files' (2011) 21(1) *Records Management Journal* 28.
[332] *Legislation Handbook* (n 7) 36.
[333] Ganesh Sitaraman, 'The Origins of Legislation' (2015) 91(1) *Notre Dame Law Review* 79, 84; Bressman and Gluck, 'Statutory Interpretation from the Inside: Part II' (n 191) 750–2.
[334] Sitaraman (n 333) 84, pt II.
[335] Jarrod Shobe, 'Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting' (2014) 114(4) *Columbia Law Review* 807, 824.
[336] As has been argued about the manuals used in the state of Arizona: see Tamara Herrera, 'Getting the Arizona Courts and Arizona Legislature on the Same (Drafting) Page' (2015) 47(2) *Arizona State Law Journal* 367.

source — the OPC. Second, the OPC itself is a specialised, centralised, highly skilled and, in the political context of the drafting of Bills, independent group of drafters. Moreover, the materials are authoritative, often updated and publicly available.

A further criticism is that we should use with caution a document written for drafting for 'the different purpose of interpreting'.[337] However, the same caution applies to many extrinsic documents. While some may be created with an eye to subsequent interpretation,[338] the purpose of, say, a second reading speech or a committee report is far removed from the interpretative task. Understanding the multitude of purposes that an extrinsic document may serve is better considered as part of the assessment of its relevance and reliability.

But other limitations should be noted. The first one is scope. OPC Drafting Materials are only directly relevant to principal and amending statutes that started life as a government Bill drafted by the OPC. In practical terms, this may have little impact. As discussed at the beginning of the chapter, nearly every federal Bill that becomes a statute is a government Bill.[339] Nevertheless, the origin should be confirmed if the drafting materials are to be used.[340] Although unusual, governments have experimented with private sector drafters. For example, in February 2018, during estimates hearings by the Senate Economics Legislation Committee, it was revealed that the federal government was 'experimenting now with using some private sector drafters on some pieces of legislation'.[341] In other words, private law firms had been engaged as alternative drafters for select Bills. There are numerous broader concerns about such outsourcing,[342] but one potential consequence for the relevance of the OPC Drafting Materials is that it may not be clear whether a particular statute has been drafted in accordance with the practices and standards of those materials. Conversely, it might be argued that those private drafters should be aware of the OPC Drafting Materials in order to enhance

[337] Ronan Cormacain, 'An Empirical Study of the Usefulness of Legislative Drafting Manuals' (2013) 1(2) *Theory and Practice of Legislation* 205, 210.
[338] The interpretative value of an explanatory memorandum or a second reading speech is well known by policy makers: see *Legislation Handbook* (n 7) 37 [7.2], 46 [7.45]–[7.46].
[339] See above [6.2].
[340] Although often an OPC drafter is seconded to the Senate to assist private Members with drafting, so in any event the manuals may still have an influence.
[341] Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 28 February 2018, 88 (John Lonsdale). See also Tom McIlroy, 'Treasury Outsources Legislation Drafting to Law Firms', *Australian Financial Review* (online, 13 April 2018) <www.afr.com/business/legal/treasury-trial-outsources-legal-drafting-20180409-h0yivw>.
[342] See the conclusion of Select Committee on the Constitution, *The Legislative Process: Preparing Legislation for Parliament* (House of Lords Paper No 27, Session 2017–19) 47 [166]–[168]. See also points raised by academic Gabrielle Appleby in Tom McIlroy, 'Clayton Utz Part of Canberra's Trial to Outsource Legislative Drafting', *Australian Financial Review* (online, 3 May 2018) <www.afr.com/news/clayton-utz-part-of-canberras-trial-to-outsource-legislative-drafting-20180501-h0zicg>.

the possibility of consistency of the privately drafted statutes with the bulk of the statute book drafted by the OPC.[343]

It must be kept in mind that the current collection of OPC Drafting Materials pertains only to statutes enacted from the 1990s. This is due to the conversion to 'plain language drafting' that the OPC adopted from that time.[344]

A further issue lies in the possibility that the development of a new drafting practice by the OPC may lag behind its inclusion in a drafting direction. An interpreter has no way of knowing which version of a manual or direction legislative counsel may have referred to when drafting a Bill.[345] (Although the same may be said of other reference materials such as dictionaries, which are periodically updated.)

This leads to a limitation point that is inherent in drafting. The 'actual task of writing — choosing the words and putting them into effective form — is only a small piece of the drafter's task'.[346] A Bill is the product of an 'iterative process',[347] involving a kaleidoscope of ideas and players.[348] Much of the drafting task requires analysis and problem solving before words are even placed on the page.[349] There are also likely to be deviations from the standards in the OPC Drafting Materials from time to time, whether as a result of FPC approval or arising from the discretion that must at times be exercised by the drafter.[350] A drafting office cannot lay down rules for every conceivable situation.[351] It would therefore be too simple to

[343] I am grateful to one of the anonymous reviewers of the *Monash University Law Review* article that covered some of the content of this chapter for this point. See 'Relevant Publications' in preliminary pages to thesis.
[344] The change may be quite discernable: see Duncan Berry, 'A Content Analysis of Legal Jargon in Australian Statutes' (1995) 33 *Clarity* 26, who compares language in pre-1950 statutes with statutes enacted after 1990.
[345] As noted, the *Plain English Manual* (n 152) was first published in 1993: see above n 234. Drafting directions have been in existence for many decades: Meiklejohn (n 125) 231–2.
[346] Constantin Stefanou, 'Is Legislative Drafting a Form of Communication?' (2011) 37(3) *Commonwealth Law Bulletin* 407, 407, quoting Tobias A Dorsey, *Legislative Drafter's Deskbook: A Practical Guide* (TheCapitol.Net, 2006) 4.
[347] Geoffrey Bowman, 'Sir William Dale Annual Memorial Lecture: The Art of Legislative Drafting' (2005) 7(1–2) *European Journal of Law Reform* 3, 6.
[348] Ibid; Quiggin, 'How to Construct, and Construe, a Statute' (n 267) 83.
[349] Quiggin, 'How to Construct, and Construe, a Statute' (n 267) 80–1; see also Quiggin, 'Training and Development of Legislative Drafters' (n 128) 15–16.
[350] Nick Horn, 'Legislative Drafting in Australia, New Zealand and Ontario: Notes on an Informal Survey' [2005] (1) *The Loophole* 55, 87. See generally Cormacain (n 337); Brian Christopher Jones, 'Drafting Proper Short Bill Titles: Do States Have the Answer?' (2012) 23(2) *Stanford Law and Policy Review* 455 (compares state and federal use of drafting policies on short titles).
[351] Drafters generally agree that there is little that is mechanical about drafting, nor is it possible to provide exhaustive rules: Daniel Greenberg (ed), *Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation* (Sweet & Maxwell, 10th ed, 2012) 387 [8.1.1]; Xanthaki, *Drafting Legislation* (n 134) 19–20; Bowman (n 347) 4; Sandra C Markman, 'Legislative Drafting: Art, Science or Discipline?' [2011] (4) *The Loophole* 5.

consider a manual as always providing an exhaustive or definitive explanation of an aspect of a statute. So the OPC Drafting Materials are more in the nature of 'helpers not masters'.[352]

Finally, even assuming that we operated in a perfect world where choices made by the legislative counsel were transparent, clear, exhaustive and accessible by reference to the drafting manuals, the High Court has said on many occasions that the task of statutory interpretation is an objective process, and that what 'was or was not in the minds of those drafting or enacting legislation is not relevant' to construction.[353] It might possibly be argued that referring to drafting manuals involves seeking out this subjective intent.

This is a questionable criticism. The purpose of understanding and knowing of such materials is not to inquire into the subjective mind of the drafter. The value of the materials lies in the information within them about the context in which the statute is drafted. These documents express a set of standards, practices and principles which allow the interpreter to make legitimate assumptions about OPC practices.[354] They can be used in the same way as a second reading speech might be used - as evidence of the policy of a statute. This does not involve inquiring into the subjective individual mental state of the Minister or backbencher who voted for the Bill as to whether the speech was relevant to their vote. Indeed, for the extrinsic material cynic, the OPC Drafting Materials may be more credible than many parliamentary materials, as they are '[l]ess [s]usceptible to [t]ampering' for political purposes.[355]

6.8 Final Approvals Before Introduction into Parliament

Once the instructing department and the OPC have agreed on the draft Bill, the instructing department will submit the Bill, together with its explanatory memorandum (drafted by the department as discussed in the next Chapter Seven), to the Minister for approval of the text and memorandum.[356] After that, a highly structured and formalistic approval process must be completed before the Bill may be introduced into Parliament.

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[352] See Agnes Quartey Papafio, 'Drafting Conventions, Templates and Legislative Precedents, and Their Effects on the Drafting Process and the Drafter' (2013) 15(4) *European Journal of Law Reform* 371, 398. Papafio attempts to explain the balance between the drafter complying with drafting manuals at the same time as maintaining flexibility and creativity.
[353] *Firebird Global Master Fund II Ltd v Nauru* (2015) 258 CLR 31, 56 [69] (French CJ and Kiefel J).
[354] See Bailey, 'Bridging the Gap: Legislative Drafting Practice and Statutory Interpretation' (n 198) 226 who argues that the materials are 'within the potential contemplation of members during the passage of a Bill through Parliament' as they are 'set out norms according to which government legislation is drafted.'
[355] Ard (n 199) 198, who also argues that parliamentary materials are 'tangential' to the legislative process whereas drafting manuals are 'integral': at 199.
[356] *Legislation Handbook* (n 7) 35, app I.

First, ahead of the relevant sitting week, the instructing Department must submit a 'Legislation Overview' to the Legislation Section of the DPMC.[357] The Legislation Overview form provides information about the Bill, policy authority and programming considerations.[358]

This is followed by the 'LAP' or 'Legislation Approval Process.' The purpose of LAP is to 'ensure that draft Bills and parliamentary amendments have received all necessary government clearances before the Bills are introduced into Parliament or the amendments are moved.'[359] It is key step that must be completed before a Bill can be introduced into Parliament.

The LAP can be seen as the culmination of the processes and documents that have been generated in the journey to bring the Bill to this point. It focusses on two matters – policy approval (that the Bill has sufficient policy authority) and Bill text approval (that the text of the Bill has been approved by the sponsoring Minister and, if the Bill amends any legislation administered by other Ministers, those Ministers).[360] This confirmation and approval is provided by a Parliamentary Secretary or junior Minister (sometimes referred to as the 'Legislation Minister'), designated by the Prime Minister for this purpose, who meets with the FPC and the staff of the Legislation Section of the DPMC.[361]

In preparation for this meeting, it is the responsibility of the Legislation Section of the DPMC to prepare a submission on the Bill for the Legislation Minister. That submission contains documentation regarding the policy approval status of the Bill, a 'LAP Memo' prepared by the OPC drafter and cleared by the FPC, the draft Bill and the explanatory memorandum.[362]

The LAP Memo is the key document for this stage. It identifies the policy authority for the Bill, confirming (or otherwise) that the Bill is within the scope of that authority. It also sets out whether the sponsoring Minister has approved the ***whole*** text of the Bill (as distinct from the policy), and any other Ministerial approval required for the text).[363] (Documents

[357] Legislation Handbook (n 7) 50.
[358] Legislation Handbook (n 7) 50, app I.
[359] *OPC Drafting Manual* (n 129) 24.
[360] *OPC Guide for Clients* (n 103). (2022), p40.
[361] *Legislation Handbook* (n 7) 49.
[362] Ibid 49; Office of Parliamentary Counsel (Cth), *Legislation Approval Process* (n 117) 4.
[363] Office of Parliamentary Counsel (Cth), *Legislation Approval Process* (n 117) 9-10, 21. Or a parliamentary secretary: at 10.

evidencing consultation and approval of other ministers, such as a letter indicating their approval, must also be sent separately to the DPMC).[364]

The LAP Memo may also comment on other aspects of the Bill that it considers should be brought to the attention of the Legislation Minister. Examples given are where the instructors have rejected 'plain language' drafting or where there are provisions that the drafter considers may cause difficulties in Parliament.[365]

The OPC has a 'unique role' in this process by providing "independent advice" in the LAP Memo.[366] It sees itself as 'the only independent player in the approval process who knows enough about the Bill or amendments to be able to test the Bill or amendments against the policy authority within the usual deadlines.'[367] The format, content and wording of the LAP Memo are highly prescribed, with standardized wording that must be used for particular circumstances.[368]

After or concurrently with LAP, a government Bill must receive party clearance (by the Coalition Joint Party, or the Labor Party Caucus) before being introduced.[369] Draft bills are not provided to the meeting.[370]

When the Bill is ready, the Bill and its associated documents are lodged with the relevant Chamber of Parliament. Under the standing orders of each house of Parliament, the sponsoring Minister must give written notice to the originating Chamber prior to introduction (except appropriation or supply Bills or Bills dealing with taxation).[371] This notice is prepared by the OPC and delivered to the Parliamentary Liaison Officer who, after arranging for it to be signed by the relevant Minister, lodges it with the Clerk of the Chamber.[372] The notice will

[364] *Legislation Handbook* (n 7) 50.
[365] Office of Parliamentary Counsel (Cth), *Legislation Approval Process* (Drafting Direction No 4.6, March 2023) 11; Legislation Handbook (n 7) 49.
[366] Office of Parliamentary Counsel (Cth), *Legislation Approval Process* (Drafting Direction No 4.6 March 2023) 3.
[367] *OPC Drafting Manual* (n 129) 25.
[368] Office of Parliamentary Counsel (Cth), *Legislation Approval Process* (Drafting Direction No 4.6 2023), Attachment A. There are variations on the LAP procedure if the bill is urgent or if the bill covers matters already cleared in another LAP.
[369] *OPC Guide for Clients* (n 103) 2022 41; Legislation Handbook (n 7) 51. This will sometimes be preceded by clearance of the relevant party policy committee (*OPC Guide for Clients* (n 103) 41; *Legislation Handbook* (n 7) 57).
[370] *Legislation Handbook* (n 7) 57.
[371] House of Representatives, Parliament of Australia, *House of Representatives Standing Orde*rs, 2 August 2022, SO 138; Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, October 2022, SO 111.
[372] *Legislation Handbook* (n 7) 63.

appear on the Notice Paper (the daily official document showing all the business before the chamber that day) and it is at this point that the public life of the Bill begins.

6.9 Law Reform Commission Reports

All jurisdictions in Australia, including the two Territories, have a generalist law reform body to provide advice and recommendations to the executive government of that jurisdiction. Five of these – the Commonwealth, New South Wales, Queensland, Victoria and Western Australia currently have a statutory generalist commission. Although the commissions are established by Parliament, their relationship with parliament is not bilateral. The executive has a key role in determining their projects. For the Commonwealth, the executive is the only source of referrals for projects to the ALRC (though the ALRC may make suggestions).[373]

The Australian Law Reform Commission (ALRC) has described itself as 'responsible to Parliament through the Attorney-General'.[374] This is evident from the ALRC's reporting requirements. At the conclusion of an inquiry, the commission will produce a final report. This constitutes their advice to Parliament. The ALRC must submit its report to the relevant Minister, and then that Minister has a statutory obligation to table the report in Parliament within a particular time frame. The provision of their final report on a law reform inquiry to Parliament is where their formal involvement with Parliament on that topic of inquiry ends. In Australia, it remains the case that there is no obligation for a government to respond to a report or for a report to be referred to a parliamentary committee for examination. Despite recommendations by a Commonwealth parliamentary committee as far back as 1994 for Parliament to instigate more formal procedures concerning executive responses to a report,[375] this has not eventuated. Commissions may monitor developments in relation to issues covered in their past reports.[376] But, while a report gets its moment in the sun when tabled in Parliament − and Parliament can be taken to be 'aware' of that report − there is no clearly established or transparent parliamentary requirement that stipulates participation by the commission in parliamentary consideration of its recommendations, or that enables a commission to further advance or explain its report to Parliament. After the report has been

[373] *Australian Law Reform Commission Act 1996* (Cth) s 20. Recently, the ALRC has been active in making suggestions. See Australian Law Reform Commission, *The Future of Law Reform: A Suggested Program of Work 2020-25* (Report, Australian Government, December 2019).
[374] Australian Law Reform Commission, *Annual Report 2021-2022*, (Report, Australian Government, 2 October 2022) 6.
[375] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Law Reform-The Challenge Continues* (Report, May 1994) pp. xvi-xvii.
[376] The ALRC says that it does so: Australian Law Reform Commission, *Annual Report* (n 374) 29.

tabled in Parliament, 'it is for the Government to implement the recommendations in each report'.[377] As one commentator has described it, the report remains stuck 'on the edge of the parliamentary system'.[378]

The legislative recommendations of an ALRC report therefore enter the pool of myriad matters competing for the ear and attention of the Minister and their department. Even assuming that the Minister does take an interest in actioning any of the recommendations, the Minister in turn must compete in the even deeper pool of all other ministers and departments competing for Cabinet or other executive approval and a place on the legislative programme. Assuming the Minister is successful, the legislative recommendations must be transformed into a Bill.

Bills may get a 'head start' from commission reports that attach draft Bills to implement their recommendations. But, even where a Bill is included with a report, 'recommendations must first be cast into formal drafting instructions'[379] to the parliamentary counsel in any event. Ultimately, parliamentary counsel must be involved in the drafting of a government Bill.[380] Drafting instructions implementing Commission recommendations may have the benefit of the wide consultations undertaken by the Commission for their inquiry.[381] Apart from this practical input, there is very little to suggest that parliamentary counsel of any Australian jurisdiction adopt any particular approach to drafting a Bill enabling a Commission recommendation. There may be particular aspects considered based on whether it is national uniform legislation,[382] but a Commission's law reform legislative proposals *per se* do not appear to be the subject of any particular procedures.

6.10 Conclusion

Analysis of the process of converting a government legislative proposal to a Bill ready for introduction into Parliament generates both a wide range of materials in relation to the

[377] Rosalind Croucher, 'Law Reform Agencies and Government – Independence, Survival and Effective Law Reform,' (2018) 43 *University of Western Australia Law Review* 78, 79.
[378] Kathryn Cronin, 'Law Reform in a Federal System,' 21(1) *European Journal of Law Reform* 33, 41.
[379] Adam Bushby, 'Law Reform and the Executive' (2019) 21(4) *European Journal of Law Reform* 592, 599.
[380] Ibid. See also Pius Perry Biribonwoha, 'The Role of Legislative Drafting in the Law Reform Process' (2006) 32(4) *Commonwealth Law Bulletin* 601 who argues that drafters should be more involved in the law reform process.
[381] Biribonwoha (n 380) 604.
[382] Parliamentary Counsel's Committee, *Protocol on Drafting National Uniform Legislation* (Manual, 4th edn, 21 February 2018) < https://www.pcc.gov.au/uniform/Uniform-drafting-protocol-4th-edition.pdf >

specific proposal, and also reveals numerous materials that assist our understanding of the legislative process.

Many of the key materials generated that are specific to a proposal, such as the Cabinet submission, the policy approval and the drafting instructions, are not available to an interpreter for a significant period of time. Therefore, their value as extrinsic aids can be limited. But even so, key materials such as Cabinet minutes and drafting instructions should not be discounted. It is not unusual for statutes to be on the statute book for decades. Recourse to these materials becomes a practical possibility once legislatively required open access periods commence. Further, even accepting that they are not usually available, understanding the institutions, actors and approvals involved in process, with the assistance of reliable government guides (such as the *Cabinet Handbook* and the *Legislation Handbook*) reveals at least three points of significance.

First, where a Bill impacts policy, the legislative process adopted by government means that the policy underlying the Bill remains under tight control. Legislative drafters will not draft Bills beyond granted policy approval, nor will Bills be cleared for allocation to the legislative programme or introduction into Parliament without the necessary approval. If deviations occur further approval is needed. So, from its genesis, the scope of a Bill is tightly controlled.

Second, the process is tightly controlled by the executive. Cabinet and the responsible Minister drive the process and have ultimate approval, while relying heavily on the responsible departments. Given this tight control, the content and object of a Bill is well known to those within the executive involved in the legislative proposal at the time of the Bill's introduction to Parliament, including non-sponsoring departments impacted by the Bill. Underpinning this is a 'whole of government' approach to Bill making.

Finally, the process and documents reveal that the executive, including the responsible Minister and department and the OPC, are aware of the parliamentary process that the Bill will undergo, particularly with respect to the scrutiny of the parliamentary legislation committees. The Bill is not prepared in a vacuum, but with cognizance of the extent to which departures from accepted principles must be explained to Parliament. The OPC, as the most independent actor, is instrumental in raising this awareness through the drafting process.

Aside from understanding the Bill making process, this portion of the legislative process also reveals a genre of documents as potential aids, and ones that are not commonly used by

courts.[383] These are the OPC Drafting Materials, documents that are extensive and publicly available.

From a practical perspective, these materials provide genuine, objective, readily available information that assists the reader to understand the 'rules' of the language and structure of federal government statutory text. They are, arguably, 'soft law' that influences the process of Bill creation. With the exception of the *AGD Offences Guide*, they are produced by the very people who draft those statutes. There is a legitimate expectation of compliance with that code due to the proclamation of the profession itself. Accordingly, they provide objective and authoritative indicators about the drafted text that can be weighed and balanced as part of the text, context and purpose exercise.

At a broader level, if we are to view statutory interpretation as a reflection of the relationship between the arms of government involved in statute making that is based on a shared understanding, and we take that understanding to have some meaningful basis, then improving what is actually understood must be valuable. If the judiciary was to familiarize themselves with the OPC Drafting Materials, that would contribute to building a shared understanding about the eventually enacted statute. Drafting manuals may be a source of knowledge that contributes to a more legitimate 'shared frame of reference'[384] between the executive and the judiciary which supports the High Court's explanation of statutory interpretation as a reflection of accepted rules by those institutions.

[383] See empirical findings in Chapter Five [5.5].
[384] BJ Ard (n 199) 200. See also Hart (n 183) 443, 469.

Chapter 7

Legislative Process II: Parliamentary Actors, Processes and Materials

'*Although in a formal sense the legislative process ends with the enactment of a law, for the judiciary, understanding that process is essential if it is to construe statutes in a manner faithful to legislative meaning*.'[1]

7.1 Introduction

In our federal constitutional system, it seems trite to say that Parliament is the arm of government that has legislative power. Parliament enacts the statute which is the statement of the law and the subject of interpretation.

But the description of 'Parliament' enacting a statute, while undoubtedly true and ostensibly clear, obscures the complex and multifaceted process that constitutes that enactment process. That process is governed by intricate yet flexible rules, practices and procedures and involves assorted participants in addition to the individual elected politicians who sit in the chambers, and all in the broader context of a dynamic political environment.

This chapter moves on from the stage of the legislative process discussed in Chapter Six and examines the parliamentary process for the making of a statute. The previous chapter examined the portion of the legislative process up to the point of a government Bill being ready for introduction into Parliament. Chapter Seven addresses the more public second stage of the legislative process from the point that the Bill is introduced into Parliament until enactment. Like Chapter Six, and for the same reasons, this chapter focusses on federal government Bills.[2]

The chapter is intended to be dominantly descriptive in order to understand the parliamentary process and the nature of the materials produced during that process. More considered analysis of the findings of this chapter are in the analysis in Chapter Eight. This chapter does not purport to be an exhaustive study of the parliamentary process for the enactment of federal government Bills. Making a statute can be a complex process. The hundreds of pages

[1] Robert A. Katzmann, *Judging Statutes* (Oxford University Press, 2014) 8-9.
[2] See [6.2].

of the House of Representatives and Senate practice and procedure books are indicative of the myriad rules and practices and of many possible permutations in the implementation of those rules and procedures. The aim of this chapter is to investigate some key and regular aspects of the process that are potentially relevant to understanding the parliamentary portion of the making of statutes and the parliamentary materials relevant to that portion.[3]

This chapter first identifies the main institutional actors in the parliamentary process. As well as the Minister sponsoring a Bill (and the Minister's staff), this includes the sponsoring government department, other members of the executive, the Australian Parliamentary Service, non-government members and senators of the House and Senate respectively, and parliamentary committees.

The chapter then explores the genesis and characteristics of some of the key parliamentary and executive materials relevant to the enactment of government Bills in Federal Parliament. As seen from the historical discussion in Chapter Two, the appropriateness of reference to *parliamentary* materials in statutory interpretation (as opposed to other types of extrinsic material) was at the heart of the background to the enactment of s 15AB of the *Acts Interpretation Act 1901* (Cth). The judiciary's historical reluctance to use parliamentary materials, especially Hansard, as interpretative aids was only matched by the executive's enthusiasm for embracing them. In Australia, that debate about access has been resolved with legislative and common law developments. The more pressing concern is the appropriate use of these materials. This requires an understanding of the materials themselves. Many of them, such as the second reading speech and explanatory memoranda, are regularly referred to in statutory interpretation.[4] The chapter also identifies less familiar but potentially probative materials such as the Minister's speech in reply.

The chapter then examines some procedures and practices that contribute to understanding the parliamentary process, and the making of parliamentary and executive materials. Finally, the chapter identifies some of the timing issues during the passage of a Bill that are relevant to understanding the contribution of parliamentary materials to the development of a Bill inside Parliament.

[3] The chapter does not cover extraordinary orders and practices that were adopted during the 46th Parliament during the first years of the COVID-19 pandemic, except to the extent those orders and practices have become permanent.

[4] See Chapter Five on the findings with respect to materials referred to by the courts.

The study in this chapter is based on the procedural rules and established practices of the House of Representatives and Senate, parliamentary committee and other parliamentary reports and papers that inform that process, publicly available manuals and administrative documents produced by key players, and parliamentary statistics, as well as Australian secondary sources from political science scholars on the federal parliamentary process.[5] Of course, the political context of the law making process means that statutes are made against the general backdrop of the changing political balance inside Parliament from election to election, as well as the day-to-day political machinations. Consequently, the enactment of a Bill in Parliament is subject to imperatives, negotiations, compromise, and tactics among the political parties, within the political parties and among other key political players that remain mostly unseen.

7.2 Law making Role of Parliament and Overview of Process

Parliament has many roles.[6] Its legislative function is arguably 'its most important and time-consuming.'[7] Inherent to that legislative function is parliamentary scrutiny of proposed government legislation, a part of the broader role of Parliament to ensure accountability of the executive government.

The sequence of stages for Bills during the legislative process in the Commonwealth (and other jurisdictions in Australia) generally follows the Westminster structure inherited from the United Kingdom. The Office of Parliamentary Counsel prepares a notice of intention to present a Bill for Parliament (signed by the relevant Minister), which places the Bill on the parliamentary agenda.[8] The Bill is then introduced and read for a first time. The majority of all Bills are introduced into the lower House.[9] At the time of introduction, the Minister must

[5] For rules and practices, the following are critical sources and cited throughout the chapter: House of Representatives, Parliament of Australia, *House of Representatives Standing Orders*, 2 August 2022 ('*House SO*'); Senate, Parliament of Australia, *Standing Orders and Other Orders of the Senate*, October 2022 ('*Senate SO*'); Rosemary Laing (ed), *Odgers' Australian Senate Practice – As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016, as updated to 30 June 2022 by Fourth Supplement) ('*Senate Practice Book*'); DR Elder (ed), *House of Representatives Practice* (Department of the House of Representatives, 7th ed, 2018) ('*House Practice Book*').

[6] John Uhr and John Wanna, 'The Future Roles of Parliament' in In Patrick Weller and Michael Keating (Eds), *Institutions on the Edge? Capacity for Governance* (Taylor & Francis Group, 2001) 12-17 describes six roles, one of them being legislation.

[7] *House Practice Book* (n 5) 16.

[8] House SO, O138; *House Practice Book* (n 5) 353. Strictly speaking the Bill is listed on a document called the Notice Paper, which is the official list of all business before the Chamber.

[9] See House of Representatives, *Legislation Statistics* (Procedure Office, Department of the House of Representatives, 31 March 2022) for statistics from 1901 to March 2022) <https://www.aph.gov.au/Parliamentary_Business/Statistics/House_of_Representatives_Statistics >

present the explanatory memorandum for the Bill.[10] The sponsor of the Bill, usually the Minister responsible for the Bill, then makes the second reading speech. On introduction the Bill is automatically referred to certain scrutiny committees. It may (or may not) be referred to a general purpose or reference committee of either house. Parliamentary debate on the Bill, usually adjourned to a future sitting, is the next stage referred to as the second reading debates. After the second reading debates, a Bill might move to the 'detail' stage where, nominally at least, the detailed provisions of the Bill are examined. This is called 'consideration in detail' in the House and the Committee of the Whole in the Senate. It is at this detail stage that amendments to the statutory text of the Bill may be made. Once that stage is complete, with or without amendment, the Bill must be read a third time. A motion agreeing to the third reading must be passed. If successful, the Bill has passed that chamber.

Each chamber of Federal Parliament adopts this three-stage process of enactment. Once both Chambers agree to the Bill in exactly the same terms, the Bill must be assented to by the monarch's representative, the Governor-General, for it to become law.

As previously explained in Chapter Six, the vast majority of Bills that become federal Acts are ordinary government Bills introduced into the House of Representatives. The slightly different procedures for enactment of Private Member Bills, Bills initiated in the Senate and Bills subject to special procedures (such as appropriation and tax Bills and Bills relating to an amendment to the *Constitution*) are not specifically addressed here.[11] Nor does this chapter specifically cover Bills referred from the House to the Federation Chamber.[12] The 'Federation Chamber' is a kind of 'sub' chamber of the House of Representatives. The concept behind its establishment in 1994 was that it would be a 'solution to the increasing pressure of legislative business in the House'[13] by being able to consider non-controversial legislation. Its role has since been expanded to encompass other matters such as private Members' business and

[10] *House SO*, O 141.
[11] See Department of the House of Representatives, *Guide to Procedures* (Commonwealth of Australia, 6th ed, 2017) 63 for a list of Bills with special procedures which includes appropriation and supply Bills, special appropriation bills, Bills imposing a tax or charge, Bills received from the Senate, Bills altering the Constitution and bills introduced by private members. See also *House Practice Book* (n 5) 385-88.
[12] The Federation Chamber is a 'committee' that conducts House business concurrently with the House. Bills can be referred to the Federation Chamber by the House for debate; the Federation Chamber then reports back to the House with its recommendations: see *House Practice Book* (n 5) 358–60, 381, ch 21. Until 2012, the Federation Chamber was known as the Main Committee.
[13] House of Representatives Standing Committee on Procedure, Parliament of Australia, *Role of the Federation Chamber: Celebrating 20 Years of Operation* (Report, June 2015) 5.

committee.[14] Since it was established, there has been considerable variation in the frequency with which Bills have been referred by the House to the Federation Chamber.[15] Further, and in any event, the proceedings in the Chamber are substantially similar to those in the House.[16]

In Chapter Six, law reform commission reports were addressed. Given the relationship between Parliament and the Australian Law Reform Commission, it might be expected that there would be unique procedures or other processes in relation to 'law reform bills' - Bills that have emanated from a law reform commission report.[17] But the short response to that proposition, in all Australian jurisdictions, is that there is not. The parliamentary rules for scrutiny of Bills incorporating law reform based on the Commission's work are the same as for ordinary Bills.

7.3 Key Institutional Actors

When we think of 'parliament' we tend to think of it as a single body made up of the aggregate of the elected parliamentarians in the House of Representatives and the Senate. But the process of enacting a Bill involves the participation of an array of people extending far beyond elected members. Political science scholars Uhr and Wanna have argued that:

> an understanding of parliament would be improved if we adopted a wider conceptualisation of 'the parliament' and appreciated the multi-layered roles performed in and around the institution … parliament is an exciting, seething throng of activity…[18]

The 'political actors' do dominate the parliamentary process, but they are political actors drawn from not only executive government but the Opposition, minor parties and independents. There are also participants that do not lend themselves to the description of

[14] Ibid 15.
[15] See House of Representative, *Legislation Statistics* (Procedure Office, Department of the House of Representatives, 31 March 2022) < https://www.aph.gov.au/Parliamentary_Business/Statistics/House_of_Representatives_Statistics > For detail on the Federation Chamber see *House Practice Book* (n 5) ch 21.
[16] *House SO* (n 5) O 185. After the bill is considered by the Federation Chamber, the Chamber reports on the Bill to the House. See *House SO* (n 5) OO 152, 153.
[17] For eg, in the United Kingdom Parliament a fast-track legislative procedure for 'uncontroversial' Law Commission and Scottish Law Commission bills was adopted in 2010: Sir Grant Hammond, 'The Legislative Implementation of Law Reform Proposals' in Matthew Dyson, James Lee, and Shona Wilson Stark (eds), *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, 2016) 175, 184.
[18] Uhr and Wanna (n 6) 11-12.

being political, such as government departments and the parliamentary service. Following is an explication of these primary participants.

(a) Executive and Political Actors

It is an inherent component of a system of representative democracy, including one such as Australia where the *Constitution* only contains the 'bare minimum'[19] of conditions for the system, that parliamentarians be representatives of the people.[20] Such representatives are chosen through elections. They are partisan actors, be they members of the government, the official opposition,[21] minority parties or independents. The Parliament in general and the House in particular are dominated by executive government members.[22] This is for the simple reason that the political party (or coalition of political parties) having the support of the majority of members of the House becomes the government.[23] This means that, typical of Westminster style systems, a 'fusion of the executive and legislature' exists in Federal Parliament.[24]

As discussed in Chapter Six, 'government' can have numerous meanings.[25] Here, it refers to the politicians of the party or parties that constitute the government of the day, in particular those who hold offices as Ministers, including the staff of the Minister's office. As also explained in Chapter Six, at least some of these staff share with the Minister 'a common

[19] Chief Justice Murray Gleeson, 'The Shape of Representative Democracy' (2001) 27(1) *Monash University Law Review* 1, 7.
[20] Ibid (Gleeson) 3 citing AH Birch, *Representative and Responsible Government: An Essay on the British Constitution* (1964) 13-14. See also Amelia Simpson, 'Parliaments' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 563, 566 who cites the same passage.
[21] Commonly recognised as 'the party or group which has the greatest number of non-government Members in the House of Representatives': *House Practice Book* (n 5) 79.
[22] See Scott Prasser, 'Executive Growth and the Takeover of Australian Parliaments' (2012) 27(1) *Australasian Parliamentary Review* 48.
[23] *House Practice Book* (n 5) 43, subject to their being a 'hung' parliament which happened in the 43rd parliament (2010-2013).
[24] Uhr and Wanna (n 6) 15.
[25] Alan J Ward, *Parliamentary Government in Australia* (Australian Scholarly Publishing, revised ed, 2013) 12. See [6.2].

political philosophy and party commitments.'[26] They are not members of the Australian Public Service, but regulated under separate legislation.[27]

The departments that serve the Ministers, including the department responsible for a Bill, constitute the Australian Public Service and have two main responsibilities. First, they must abide by the 'APS Values,' which include impartiality, in order to provide non-partisan, relevant, and comprehensive advice to the government.[28] Second, the Australian Public Service must serve the government of the day to assist in delivering that government's policy agenda,[29] which includes legislation. Reconciling these two functions and aspirations is a contemporary issue,[30] and no doubt the demarcation changes from government to government. But, for statute making, government departments must serve their Ministers. To this extent they serve the executive political and legislative program.

The Ministers' offices and their departments are responsible for the preparation of two of the most familiar and regularly used parliamentary materials in statutory interpretation – the explanatory memorandum for the Bill and the Minister's second reading speech. Both are discussed further in [7.4].

For the sake of completeness, the Office of Parliamentary Counsel ('OPC'), discussed in detail in Chapter Six,[31] is mentioned here primarily to note its near absence in the parliamentary process. While the OPC has a key role in the pre-legislative process for federal government Bills, the OPC's role in the parliamentary process is much smaller. The days of an OPC drafter routinely attending federal Parliament during a Bill's passage have long gone.[32] Drafters may provide input into the government preparation of some executive

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[26] John Howard, 'A Healthy Public Service is a Vital Part of Australia's Democratic System of Government' (1998) 57(1) *Australian Journal of Public Administration* 3, 10; Patrick Weller, *Cabinet Government in Australia, 1901–2006: Practice, Principles, Performance* (University of New South Wales Press, 2007) 209–11; Department of Prime Minister and Cabinet, *A Guide on Key Elements of Ministerial Responsibility* (Australian Government, December 1998) pt 6.

[27] *Members of Parliament (Staff) Act 1984* (Cth) regulates the employment of staff by senators and members. For greater detail, see Nicholas Horne, 'The *Members of Parliament (Staff) Act 1984* Framework and Employment Issues' (Research Paper No 3, Parliamentary Library, Parliament of Australia, 4 August 2009).

[28] *Public Service Act 1999* (Cth) s 10; Australian Public Service Commission, *APS Values and Code of Conduct in Practice* (Australian Government, rev ed 2021) 8. See Chapter Six [6.2].

[29] Australian Public Service Commission (n 28) 9 [1.3.5], 10 [1.5.2].

[30] See Patrick Weller and Catherine Haddon, 'Westminster Traditions: Continuity and Change' (2016) 29 *Governance: An International Journal of Policy, Administration and Institutions* 483, 490, 492; Meredith Edwards 'Ministerial Advisers and the Search for Accountability' (2002) 34 *Australian Institute of Administrative Law Forum* 1, 3–4.

[31] See [6.2].

[32] Carmel Meiklejohn, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting* (Office of Parliamentary Counsel, 2012) 165.

materials relevant to the Bill (discussed further in [7.4]), but their main role in the parliamentary process is to draft government amendments to Bills where those amendments are proposed during the course of the Bill being considered by either the House or the Senate.[33] As previously explained in Chapter Six, the OPC's 'client' is the government as a whole, not the individual department it may be dealing with to draft the amendments.[34]

(b) Australian Parliamentary Service

The Australian Parliamentary Service consists of employees of the Department of the House of Representatives, the Department of the Senate and the Department of Parliamentary Services and the statutory appointments within these Departments.[35] These Departments are established, and the employee and statutory appointments made, under the *Parliamentary Service Act 1999* (Cth).[36] The Australian Parliamentary Service is not the Australian Public Service.[37] Unlike the Public Service, which is required to serve the government of the day, the Parliamentary Service:

> serves the Parliament by providing professional support, advice and facilities to each House of the Parliament, to parliamentary committees and to Senators and Members of the House of Representatives, *independently* of the Executive Government of the Commonwealth.[38]

The values of the Australian Parliamentary Service include objectivity, non-partisanship and a commitment to achieving the best results for the Federal Parliament.[39]

The Department of Parliamentary Services or, more specifically, the Parliamentary Library within that Department, is of particular importance for parliamentarians in the context of statute making. The Parliamentary Library provides research and library services to members, senators, their staff and the staff of committees, including with respect to legislation. In this

[33] Attorney-General (Cth), *Legal Services Directions 2017*, app A, r 3.
[34] Office of Parliamentary Counsel (Cth), *OPC Drafting Manual* (Manual, 3.2 ed, July 2019) 21.
[35] There is a fourth department, the Parliamentary Budget Office, but this is not significant for the purposes of this thesis.
[36] *Parliamentary Service Act 1999* (Cth) ss 9, 54.
[37] Though the *Parliamentary Service Act 1999* (Cth) s 26 recognizes that there can be mobility of employees between the Parliamentary Service and the Public Service but where this occurs the employee stops being an employee of the Service they have left.
[38] *Parliamentary Service Act 1999* (Cth) s 9(2) (emphasis added).
[39] *Parliamentary Service Act 1999* (Cth) s 10.

role, the Parliamentary Library is responsible for an important document: the Bills Digest, a written analysis of a Bill, discussed further below (in [7.4(b)]).

(c) Parliamentary Committees

The final significant category of actors in the parliamentary process are the numerous parliamentary committees. These groups can be described as 'multi-partisan' as they consist of groups of individuals drawn from more than one political party. The term 'multi-partisan' reflects the reality of committee membership.

There are typically a great many parliamentary committees at any one time.[40] The purpose of each is variable. Although nearly any committee can potentially scrutinise a Bill, most parliamentary committees are not dedicated to legislative scrutiny. They cover particular subject areas to inquire into policy matters related to those areas, to scrutinise public administration matters or to inquire into the workings of Parliament.

However, there are certain categories of committees that are focussed on legislative review. The use of committees to scrutinise Bills was 'rare'[41] until the 1970s, but since then the legislative scrutiny work of parliamentary committees, especially Senate committees, has increased significantly.[42] Following is a summary of the main committees dedicated to legislation.

(i) *House Selection Committee*. The House of Representatives Selection Committee (the 'House Selection Committee') reviews Bills as they are introduced into the House. If the Committee considers the Bill to be 'controversial' or 'requiring further consultation or debate' it may refer it to another committee.[43] The referral will be to the House 'general purpose' committee (a standing investigatory committee) or joint committee 'most appropriate to the subject area of the bill' for an advisory report.[44]

[40] At the time of writing, there are more than 60 House, Senate and joint committees.
[41] John Halligan, Robin Miller and John Power, *Parliament in the Twenty-First Century: Institutional Reform and Emerging Roles* (Melbourne University Press, 2007) 155.
[42] Bill Browne and Ben Oquist, *Representative, Still: The Role of the Senate in Our Democracy* (The Australian Institute, March 2021) 25-6. For a brief history of the emergence of the federal parliamentary committee system see Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia* (Springer, 2020) 46-48. For Senate committees, see John Vander Wyk and Angie Lilley, 'Reference of Bills to Australian Senate Committees: With Particular Reference to the Role of the Selection of Bills Committee' (Papers on Parliament No 43, Parliamentary Library, Parliament of Australia, June 2005) 4–11.
[43] *House Practice Book* (n 5) 359. See *House SO*, O 222. *House SO*, O 215 lists the general purpose standing committees.
[44] *House Practice Book* (n 5) 359. See also House Practice Book (n 5) 643-4 for general purpose committees.

The frequency with which the House Selection Committee (or its predecessors[45]) refers Bills to a committee varies with each Parliament. But, generally speaking, legislative scrutiny reports by House committees on Bills are far less common than the reports the House committees generate from referrals to investigate public policy issues or government activities.[46] Between the First Parliament in 1901 and the end of the 46th Parliament in 2022, only 302 Bills had been referred by the House to House or joint committees, with about a third of those being during the 2010–13 hung 43rd Parliament.[47] Consequently, this chapter's main focus is on the Senate parliamentary committees, where the bulk of Bill scrutiny occurs.

(ii) *Senate Legislative Scrutiny Committees.* There are two Senate committees that scrutinise every Bill introduced into the House and Senate:[48] the Senate Standing Committee for the Scrutiny of Bills ('Scrutiny of Bills Committee') and the Parliamentary Joint Committee on Human Rights ('JCHR') (together, the 'Scrutiny Committees').[49]

(iii) *Senate Standing Committee for Selection of Bills.* The Senate Standing Committee for the Selection of Bills ('Selection of Bills Committee') examines every Bill introduced into the Senate (except Bills that only concern the appropriation of revenue or moneys). Like the House Selection Committee, it is not a 'legislative scrutiny' committee in the true sense as its function is only to make referrals. It recommends to the Senate which Bills should be referred to another Senate committee for scrutiny.

(iv) *Senate General Purpose Legislation Committees.* The Senate general purpose Committees are the 'legislation' side of pairs of subject-area Senate standing

[45] The Committee did not exist in the 42nd Parliament. Bills can also be referred to by the House or by members.
[46] Ward (n 25) 182-3. Ward attributes this to governments generally having a lower house majority, used to prevent interference in its bills.
[47] Department of the House of Representatives, Procedure Office, *Bills referred to Committees of the House of Representatives* (31 March 2022) available at Parliament of Australia, *House of Representatives Statistics* (Webpage)
< http://www.aph.gov.au/Parliamentary_Business/Statistics/House_of_Representatives_Statistics >
See also Bernard Wright, 'Committee Work in a Hung Parliament: A House of Representatives Perspective' (Paper presented at 44th Presiding Officers and Clerks Conference, Canberra, July 2013).
[48] But, as established in the introduction, this chapter is confined to ordinary government Bills introduced into the House.
[49] The JCHR also scrutinises delegated legislation. There is a fourth standing legislative scrutiny committee – the Senate Standing Committee for the Scrutiny of Delegated Legislation (formerly the Senate Standing Committee on Regulations and Ordinances) established by *Senate SO*, O 23. This committee scrutinises delegated legislation, which is beyond the scope of this thesis.

> committees.[50] There are currently eight pairs required under the Senate standing orders.[51] Each pair consists of a legislation committee and a general purpose ('reference') committee. The legislation committees ('Senate Legislation Committees') examine Bills that are referred to them, usually by the Selection of Bills Committee.

Except for the JCHR, all these committees are 'creatures of the Senate standing orders'[52] and, therefore, derive their authority from Parliament.[53] As Senate committees, all members are senators. The JCHR is the only statutory committee, established under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ('*HR Scrutiny Act*'). The JCHR consists, as its name suggests, half of senators and half of members.

All of the these committees produce reports after engaging in the scrutiny function. Given their significant involvement in the scrutiny of Bills, the reports of the Senate committees and the JCHR are worthy of particular note as being potentially useful extrinsic materials for when the Bill becomes a statute. Distinct from many of the other materials produced from the parliamentary process, under the Senate standing orders and the *HR Scrutiny Act*, all these committees have a 'multi-partisan composition' of the Senate committee system referred to above.[54] Senate Legislation Committees must allocate a certain number of places to senators nominated by the government and the opposition, with a government majority, and provide places 'as nearly as practicable proportional to the numbers of those minority groups and independent senators in the Senate'.[55] The Selection of Bills Committee has an equal number of government and opposition senators in addition to the whips of any minority groups, with the Government whip as Chair.[56] The Scrutiny of Bills Committee is similarly constituted, except the Chair is an opposition nominee.[57] The *HR Scrutiny Act* only provides that the JCHR consist of equal number of members of the House of Representatives and the Senate.[58]

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[50] Except for a brief period from 2006–09 when the standing committee system reverted to single committees.
[51] *Senate SO*, O 25(1). The names and number of pairs may vary from parliament to parliament.
[52] Department of the Senate, *Senate Committees and Government Accountability: Proceedings of the Conference to Mark the 40th Anniversary of the Senate's Legislative and General Purpose Standing Committee System* (Papers on Parliament No 54, Parliamentary Library, Parliament of Australia, December 2010) 3.
[53] And ultimately, the *Australian Constitution* ss 49, 50.
[54] *Senate Practice Book* (n 5) 462. The House Selection Committee is also multi-partisan: *House SO*, O 222(b).
[55] *Senate SO*, O 25(5)(a), (6)(b). In contrast to the Senate Legislation Committees, the Senate reference committees (whose role is to enquire into subject areas, issues or any 'other matters' referred to them by resolution of the Senate) have a non-Government majority: *Senate SO*, O 25(5)(b).
[56] *Senate SO*, O 24A(2).
[57] *Senate SO*, O 24(2)(4).
[58] *HR Scrutiny Act* s 5.

But successive past Parliaments have supplemented this by passing a resolution for more detailed composition of the committee, drawing from members and senators nominated by the Government and the Opposition and one Senator from a minority group or an independent.[59]

Given each committee is comprised of different compositions of individuals, they cannot be regarded as homogeneous groups.[60] The fact that Senate Legislation Committees may also have 'participating members' emphasises this point.[61] This rule allows any senator who is not a member to participate in all aspects of the committee inquiry, including hearings of evidence and deliberations, except for voting. The Scrutiny Committees do not allow participating membership, but each of the Scrutiny of Bills Committee and the JCHR engage a legal advisor, and research officers, who have central roles in drafting their respective reports.[62]

All these Senate committees are regarded as being of 'crucial significance as a feature of the legislative process' and 'an essential part of the scrutiny function exercised by the Senate.'[63]

7.4 Parliamentary Materials

Chapters Three and Five revealed that there are certain parliamentary materials that are frequently referred to by the courts, in particular the explanatory memorandum and the second reading speech. This section looks more closely at these materials, as well as identifying and examining the nature of other key materials generated by the process that are relevant to understanding the development of a Bill during its parliamentary passage. Some parliamentary materials are produced because they are required under standing orders. Others are generated as a matter of established practice, for convenience, for political purposes or to provide assistance to parliamentarians, or a combination of any of these reasons. The journey

[59] For the current 47th parliament, see Commonwealth, *Votes and Proceedings No 1*, House of Representatives, 26 July 2022, 15-16.
[60] That all committees are not the same has been noted in two studies: Ian Holland, *Senate Committees and the Legislative Process* (Parliamentary Studies Paper No 7, Crawford School of Economics and Government, Australian National University, 2009) 7–8, 13; Richard Grant, *Can We Account for Parliamentary Committees? A Survey of Committee Secretaries* (Parliamentary Studies Paper No 9, Crawford School of Economics and Government, Australian National University, 2009) 11, 16.
[61] *Senate SO*, O 25(7).
[62] *Senate SO*, O 24(8); *Senate Practice Book* (n 5) 322, 325; Charlotte Fletcher and Anita Coles, *Reflections on the 10th Anniversary of the Parliamentary Joint Committee on Human Rights, Senate Lecture Series* (Report, 2022) 2 ('Reflections on the 10th Anniversary').
[63] *Senate Practice Book* (n 5) 321.

of a Bill through Parliament has established pathways but potentially unlimited variations as to how those pathways are realised. This means that the range of possible materials generated by the enactment of any one statute by Parliament may, or may not, be extensive. It is, however, possible to identify materials that are always or commonly produced.

(a) Executive Documents – Explanatory Memoranda, Second Reading Speeches and Statements of Compatibility

It will be recalled from Chapter Six (see [6.2]) that the Minister's office and the department that instructs the OPC to draft the Bill (the 'sponsoring department') are separate. The Minister's office consists primarily of partisan appointments and the staff are not part of the Australian Public Service. The sponsoring department is the federal department that is part of the Australian Public Service and is the department responsible for coordinating and progressing the proposed legislation. Both are involved in the making of the explanatory memoranda, second reading speeches and statements of compatibility to different degrees.

Since 1994 the House standing orders have required a Minister to present an explanatory memorandum with every Bill presented to the House (unless an appropriation or supply Bills) which 'must include an explanation for the reasons for the bill'.[64] Explanatory memoranda started out principally as aids for parliamentarians in the legislative process.[65] The explanatory memorandum is currently described by the Department of Prime Minister and Cabinet as a 'companion document to a bill, to assist members of the Parliament, officials and the public to understand the objectives and detailed operation of the clauses of the bill'.[66]

[64] *House SO*, O 141(b); *House Practice Book* (n 5) 349. Though before the standing orders were amended it had been 'standard practice' for an explanatory memorandum to be presented for over a decade: *House Practice Book* (n 5) 349. Although not mandatory, it is common practice for Appropriation and Supply Bills and private member Bills to be accompanied by an explanatory memorandum: Department of Prime Minister and Cabinet, *Legislation Handbook* (Commonwealth of Australia, 2017) 37 [7.3] ('*Legislation Handbook*'). It is also practice for private member Bills: Department of the Senate, *Preparing Private Senators' Bills, Explanatory Memoranda and Second Reading Speeches: A Guide for Senators* (Guide, September 2004) 23.

[65] Patrick O'Neill, 'Was there an EM?: Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament' (Research Brief No 15, Parliamentary Library, Parliament of Australia, 23 May 2005) 2.

[66] *Legislation Handbook* (n 64) 37.

With the exception of statute update Bills[67], the sponsoring government department prepares the Bill's explanatory memorandum.[68] Unlike in some other Australian jurisdictions,[69] the drafters of the Bill itself, the OPC, do not draft or review explanatory memoranda. The OPC expressly states that it is 'not responsible for preparing or settling' explanatory memoranda or statements of compatibility.[70] The extent of the OPC's involvement is that they may make suggestions about matters that should be addressed in the memorandum.[71] Once drafted and approved by the sponsoring department, the memorandum is submitted to the relevant Minister's office for approval at the same time as the draft Bill.[72]

The sponsoring department must also prepare the financial impact statement, the Regulation Impact Statement ('RIS') (if one is required) and the statement of compatibility with human rights ('Statement of Compatibility'),[73] all of which are typically incorporated into the explanatory memorandum.[74] The RIS is an assessment of the benefits and costs of the Bill and the broader regulatory, economic and social impacts. The Statement of Compatibility is a statement required by the *HR Scrutiny Act*.[75] The Statement is an assessment of the compatibility of the Bill with 'human rights' as defined in the Act, which refers to seven international instruments.[76]

The sponsoring department must consult with the Office of Impact Analysis (formerly the Office of Best Practice Regulation), a division of the Department of Prime Minister and

[67] The OPC prepares the explanatory memorandum for a statute update bill (Bills that make editorial changes or technical corrections: Office of Parliamentary Counsel, *Minor, technical and editorial changes (including changes using FPC's editorial powers)* (Drafting Direction No. 4.4, March 2023) 5.
[68] *Legislation Handbook* (n 64) 37 [7.4].
[69] Such as Victoria, where the drafter of the Bill is responsible for reviewing the explanatory memorandum: Office of the Chief Parliamentary Counsel, 'Guide to Preparing an Explanatory Memorandum and Template' (Guide, Victorian Government, July 2014) 5.
[70] Office of Parliamentary Counsel (Cth), 'OPC's Drafting Services: Guide for Clients' (July 2022) 11. See also Office of Parliamentary Counsel (Cth), *Dealing with Instructors* (Drafting Direction 4.1, July 2020) 2; Office of Parliamentary Counsel (Cth), *Referral of Drafts to Agencies* (Drafting Direction No 4.2, January 2023) 5.
[71] Office of Parliamentary Counsel, 'OPC's Drafting Services' (n 70) 38.
[72] *Legislation Handbook*, (n 64) 35 [6.7], 38 [7.6], 41 [7.24].
[73] *Legislation Handbook* (n 64) 38 [7.5].
[74] *Legislation Handbook* (n 64) 14.
[75] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8.
[76] Ibid s 3. The role of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the statement of compatibility in the legislative process is the subject of a discrete and substantial body of scholarship. See, eg, George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 *Statute Law Review* 58; Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the *Human Rights (Parliamentary Scrutiny) Act*' (2015) 38 *University of New South Wales Law Journal* 1046. More generally, there is a substantial body of scholarship on the role of the parliamentary committees in the scrutiny of legislation impacting human rights.

Cabinet ('DPMC')[77] about the need for a RIS and, if required, the RIS must be assessed by that office.[78]

The Minister responsible for the Bill is ultimately responsible for the Statement of Compatibility (even though the sponsoring department will prepare a draft).[79] The Attorney-General's Office may provide assistance and makes templates and other resources available to assist with preparation.[80]

One consequence of these arrangements is that the quality of memoranda 'cannot be expected to be uniform either at any period or across all departments'[81] given the variations in resources, experience, skill and knowledge between federal departments. Issues of consistency and quality have been raised by the committees themselves and commentators.[82] As discussed further in [7.5] below, both the Scrutiny of Bills Committee and the JCHR now provide notes and resources to assist sponsoring departments in an attempt to address quality issues.[83] The departments are aware of this committee audience. The critical role of the Scrutiny Committees for the smooth passage of the Bill is expressly noted in executive documents guiding departments about the legislative process.[84]

[77] The Office of Best Practice Regulation was renamed the Office of Impact Analysis in November 2022.
[78] Ibid 7–8; see also Office of Impact Analysis, 'Australian Government Guide to Policy Impact Analysis' (Australian Government, March 2023) 6, 12.
[79] *Legislation Handbook* (n 64) 40.
[80] Attorney-General's Department, *Statements of Compatibility* (Webpage) < https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/statements-compatibility#who-is-responsible-for-preparing-the-statement-of-compatibility >
[81] O'Neill, 'Was there an EM?' (n 65) 14.
[82] See Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *The Quality of Explanatory Memoranda Accompanying Bills* (Report, No 3 of 2004, 24 March 2004); Government Response to that report: Commonwealth, *Government Response to the Senate Standing Committee for the Scrutiny of Bills Third Report of 2004: The Quality of Explanatory Memoranda Accompanying Bills*, Parl Paper No 19566 (2007). For comments on the statements of compatibility, see Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2013–14* (2016) 18. See also O'Neill, 'Was There an EM?' (n 65) 14–15; Alex Hickman, 'Explanatory Memorandums for Proposed Legislation in Australia: Are They Fulfilling Their Purpose?' (2014) 29(2) *Australasian Parliamentary Review* 116; Sue Taylor, Julie-Anne Tarr and Anthony Asher, 'Australia's Flawed Regulatory Impact Statement (RIS) Process' (2016) 44 *Australian Business Law Review* 361.
[83] On their respective websites: Parliament of Australia, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, Committee *Guidelines* (Webpage) < https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Committee_guidelines > Parliament of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Notes and Resources* (Webpage) < http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources >.
[84] *Legislation Handbook* (n 64), 42–5; Office of Parliamentary Counsel, 'OPC's Drafting Services' (n 70) 36.

In contrast to the explanatory memorandum, a Minister's speech is not strictly required under the House standing orders. But it is an established practice and administrative requirement.[85] The official purpose of the speech is to explain the Bill's 'background and its key policy objectives'; it should not engage in detail. Appropriate content includes the 'minister's objectives … political considerations and intentions, and broader policy strategies which may span areas beyond the specifics of the Bill'.[86] The preparation of the Minister's second reading speech is a 'further step removed'[87] from the memorandum and the work of the OPC. The sponsoring department may be involved in drafting the speech, but the main responsibility for its preparation lies with the Minister's office.[88]

Both the memorandum and the speech are prepared with an awareness of their potential interpretative value. This is expressly recognised in numerous materials, including those that guide sponsoring departments.[89] Indeed, recognition of the potential use of the Minister's speech has even influenced committee proposals for procedural reform on House debate, where it was noted that the speech needs to be 'authoritative and able to be relied on by a court as a statement of the policy behind a Bill'.[90] Concerns have been expressed in other jurisdictions that awareness of the interpretative potential of the material they are preparing may affect the quality of executive speeches.[91]

At least one significant point can be drawn from understanding these executive materials. These materials are tools of the government of the day and are representative of *government* intent. The explanatory memorandum and the second reading speech in particular are intended to explain the executive policy agenda and the executive plan and operation of the statute respectively from the executive government's perspective. The statement of compatibility has

[85] Ibid 46 [7.47]. Once given, the speech is recorded in Hansard and so becomes written material.
[86] Ibid 46 [7.48]. Drafts are often revised by Minister's staff for 'appropriate political content': Penfold, above n 62, 10.
[87] Hilary Penfold, 'The Genesis of Laws' (Conference Paper, 'Courts in a Representative Democracy', national conference presented by the AIJA, the LCA and the CCF, Canberra, November 1994) 10.
[88] *Legislation Handbook* (n 64) 47 [7.49], 47 [7.53].
[89] *Legislation Handbook* (n 64) 37 [7.1]–[7.2], 46 [7.45]; Department of the Senate, *Guide for Senators* (n 64) 24; *House Practice Book* (n 5) 349, 362, 405–6.
[90] House of Representatives Standing Committee on Procedure, Parliament of Australia, *Arrangements for Second Reading Speeches* (Report, 2003) 6 ('*Arrangements for Second Reading Speeches*'). See also House of Representatives Standing Committee on Procedure, Parliament of Australia, *Encouraging an Interactive Chamber* (2006) 12. See also *House Practice Book* (n 5) 526.
[91] See, eg, Ruth Fox and Matt Korris, *Making Better Law: Reform of the Legislative Process from Policy to Act* (The Hansard Society, 2010) 97–8; Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012) 377.

an arguably more objective brief (given its terms of reference) but is still an executive product.

(b) Independent Analysis – Bills Digests

As noted in [7.3], the Parliamentary Library, part of the Department of Parliamentary Services, provides a range of services to parliamentarians. It is one of Australia's major research libraries, providing research services, briefs and publications as well as specialist databases, and statistical services.[92] The single largest category of publication by the Library is the Bills Digest.[93]

A Bills Digest is a publicly available guide on an individual Bill that has been presented to Parliament and is 'written to assist members of Parliament when they consider [that] Bill'.[94] Bills Digests have been produced by the Library since the 1970s with coverage of nearly all government Bills since 1993.[95] The objective of a Bills Digest is to provide 'an independent analysis of legislation before the Parliament' and 'background information and additional perspectives not provided in the explanatory material associated with the Bill.'[96] Their purpose is to provide 'information that is important for parliamentarians to be able to contribute effectively to debate'.[97]

Preparation of the Digest is subject to considerable quality control. Authors are often legally trained individuals, and subject matter specialists may review and analyse drafts of the Digest. Parliamentary Library policy governs the form and structure of Digests.[98] But generally, the Digest will address, to varying degrees dependent on the Bill, the purpose of the Bill, its

[92] Department of Parliamentary Services, Parliament of Australia, *Annual Report 2021-2022* (Report, 2022) 50.
[93] Ibid 64.
[94] Ibid 220.
[95] O'Neill, 'Was There an EM?' (n 65) 15. In limited circumstances, sometimes the decision is made not to produce a Bills Digest: Department of Parliamentary Services, 'Library-Policy – Preparing and Publishing Bills Digests' (Governance Paper No 5.13, Parliament of Australia, 26 September 2014) 2–3 (copy on file with author).
[96] Department of Parliamentary Services, Parliament of Australia, *Annual Report 2021-2022* (n 92) 88. See also Department of Parliamentary Services, 'Library-Policy – Preparing and Publishing Bills Digests', (Governance Paper No 5.13, Parliament of Australia, 26 September 2014) n 95, 1.
[97] Department of Parliamentary Services, *Annual Report 2021-2022* (n 92). See also 220.
[98] Eg, Department of Parliamentary Services, 'Library-Policy – Preparing and Publishing Bills Digests' (n 95) 2–3 (copy on file with author).

structure, background, policy positions of parties, committee involvement, and key issues for the Bill.

Of all Library publications, the Bills Digest is 'the most heavily used and most keenly awaited' by parliamentarians and their staff.[99] Timing can be an issue. The Library is not provided with a copy of the Bill for preparation of the Digest until it is presented to Parliament. The Library's objective is for the Digest for a Bill to be published in time for debate, but that is not always possible due to compressed time frames for some Bills.[100]

The Digests are not 'official' documents.[101] But they are produced by a reputable independent and non-partisan entity for the very purpose of assisting parliamentarians with debate on a Bill. Given this and the empirical evidence about actual use of the Digest, they are arguably a material worthy of more attention than they have had.[102]

(c) Committees Reports

The Senate Practice Book states that:

> The contribution of committees to which bills are referred … is of crucial significance as a feature of the legislative process and is an essential part of the scrutiny function exercised by the Senate in the performance of its constitutional role.[103]

The committees previously identified above (in [7.3]) each have different terms of reference and so the reports that they prepare cover different matters. This is discussed further below. But one common feature is that their function is essentially advisory. These committees cannot amend Bills or require Parliament to take any action in relation to a Bill. Their relevance as extrinsic materials is that the advice or recommendations of their report may influence the decisions made in Parliament.[104]

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[99] Department of Parliamentary Services, *Annual Report 2021-2022* (n 92) 88. The 2021 client evaluation of Library services found that 92 per cent of parliamentarians and their staff used the Library's research publications, a five per cent increase since the previous evaluation: at 64.
[100] Department of Parliamentary Services, *Annual Report 2021-2022* (n 92) 88. If they are not published in time for the second chamber debate, then the Parliamentary Library may publish a 'FlagPost' blog post on the Parliamentary Library webpage.
[101] See the standard disclaimer at the end of each Bills Digest. Eg, Department of Parliamentary Services, Parliament of Australia, *Bills Digest*, (Bills Digest No. 33 of 2022–23, 7 November 2022) 9.
[102] The findings in Chapter Four did not reveal any references to a Bills Digest. But Chapter Three identifies cases referring to the materials as interpretative aids, though rare.
[103] *Senate Practice Book* (n 5) 321.
[104] Geoffrey Lindell, 'How (and Whether) to Evaluate Parliamentary Committees – From a Lawyer's Perspective' (Paper presented at Canberra Evaluation Forum, 18 November 2004) 2.

(i) Senate Scrutiny of Bills Committee and JCHR

Between them, the Scrutiny of Bills Committees and the JCHR examine every Bill that is introduced into Parliament.[105] Their scrutiny is 'technical' in the sense that they confine their assessment to their scrutiny principles.[106] Despite their multi-partisan composition, the committees' function is not to engage with the policy merits of the Bills.[107]

The Committee, established in 1981[108], scrutinises Bills by reference to five principles specified in the standing orders – whether the Bill:

- trespasses unduly on personal rights and liberties;
- makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- makes rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegates legislative powers; or
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.[109]

In its report, the Committee will only comment on those Bills (or amendments) it considers have an impact on one or more of the above five principles. In the last three years, these have ranged from between 40 and 48 per cent of the Bills it has examined.[110]

The Scrutiny of Bills Committee describes itself as examining Bills on a 'non-partisan, apolitical and consensual basis to consider whether a Bill complies with the scrutiny

[105] *Senate SO*, O 24; *HR Scrutiny Act* s 7.
[106] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Annual Report 2021* (Report, 28 September 2022) 1; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Annual Report 2021* (Report, 30 March 2022) 5.
[107] Parliamentary Joint Committee on Human Rights, *Annual Report 2021* (n 106) 1; Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2021* (n 106) 3.
[108] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Ten Years of Scrutiny: A Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills* (Report, Parliament House, 1991) 1.
[109] *Senate SO*, O24(1)(a).
[110] Percentages calculated from figures in Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Annual Report 2021* (n 106) 8. This appears to be an increase from recent previous years: Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Annual Report 2016* (Report, 22 March 2017) 9.

principles'.[111] Indeed (like the even longer established Senate Standing Committee for the Scrutiny of Delegated Legislation) it has a long history of consensus.

The JCHR's role is to examine Bills for compatibility with 'human rights', which is defined by reference to the seven international covenants listed in the *HR Scrutiny Act*.[112] Unlike the Scrutiny of Bills Committee, sometimes there is dissent among the JCHR members when reporting on Bills.[113] Also unlike the Scrutiny of Bills Committees, the JCHR does sometimes invite public submissions.[114]

(ii) The Selection of Bills Committee.

The Selection of Bills Committee was established a few years after the Scrutiny of Bills Committee in 1988.[115] Its function is to examine all Bills introduced into the Senate (except Bills that only contain provisions appropriating revenue or money) and recommend whether a Bill should be referred to a Senate Legislation Committee (or sometimes another committee) and, if so, which one, when and the reporting date.[116] The Committee then presents its recommendation in a report that the Senate may or may not accept. Unlike the Scrutiny of Bills Committees and the JCHR, this committee has no express power to examine Bills until they are introduced into the Senate. To overcome this delay and 'maximise the time available for the committee inquiry'[117] the Selection Committee has adopted the practice of examining

[111] Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2021* (n 106) 3.
[112] *HR Scrutiny Act* s 3.
[113] See, eg, in Parliamentary Joint Committee on Human Rights Report, Parliament of Australia, *Human Rights Scrutiny Report: Report 6 of 2022* (Report, 24 November 2022) 85-7 Coalition members issued a dissenting report on the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022; in Parliamentary Joint Committee on Human Rights Report, Parliament of Australia, *Human Rights Scrutiny Report: Report 9 of 2020* (Report, 18 August 2020) 189-203, Australian Labor Party and Australian Greens members issued a dissenting report on the Australian Security Intelligence Organisation Amendment Bill 2020 and the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020.
[114] See, eg, Parliamentary Joint Committee on Human Rights, *Annual Report 2021* (n 106) 18.
[115] Senate Select Committee, *Senate Select Committee on Legislation Procedures-Report* (Parliamentary Paper 398/1988, Parliament of Australia, 1 December 1988) 1. Its predecessor, the Select Committee on Legislation Procedures, was established in 1988 with the Committee in its current form being established in 1990: Wyk and Lilley (n 42) 8-11.
[116] *Senate SO*, O 24A(1).
[117] Parliament of Australia, Senate Statsnet, *Bill Referred to Committees* (Webpage) < https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet#/bills/bills-referred-to-committees > See also Senate Table Office, Parliament of Australia, *Business of the Senate: 1 January to 30 June 2016* (2016) 25.

and reporting 'on the provisions'.[118] This construct allows it to consider the Bill as soon as it is introduced in the House.

There are no established criteria for the Selection of Bills Committee to determine whether a Bill should be referred to a committee. The whips assess the views among senators, taking into account numerous factors such as the Bill's political significance, party interest, community interest and existing workload of each committee.[119] They then make proposals to the Committee. One commentator has described this Committee as 'effectively a committee of whips';[120] and so, presumably decisions about referral are heavily influenced by partisan political considerations.

Individual senators may make proposals to the Selection of Bills Committee for referral of a Bill to a Senate Legislation Committee. A senator may wish for a Bill to be scrutinised from a perspective outside the terms of reference of the Scrutiny of Bills Committee or the JCHR. These proposals, which are annexed to the Selection Committee's report, are made on a 'pro forma' through a Committee member or through a whip. The information required on this form is minimal, but there is a section requiring 'reasons for referral/principal issues for consideration'. These forms are the genesis of a Bill referral recommendation to the Committee (although the Committee is not bound by them in making their final decision about referral).[121]

It is not unknown for the Selection of Bills Committee to be unable to reach a consensus on whether a Bill should be referred or, even if referral is agreed, the reporting date for the relevant committee.[122] In that instance, the committee tables its report in the Senate, noting the lack of agreement, and leaves it to the Senate to decide.

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[118] See, eg, Selection of Bills Committee, Parliament of Australia, *Report No. 8 of 2022* (Report, 1 December 2022) 3. Considering 'on the provisions' means that the committee is technically only looking at the provisions, not the Bill itself.

[119] Halligan, Miller and Power (n 41) 159; Richard Pye, 'Consideration of Legislation by Australian Senate Committees and the Selection of Bills Committee' (2008) 76 *The Table: The Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments* 34, 39. See also *Senate Practice Book* 319.

[120] Moulds (n 42) 54.

[121] Wyk and Lilley (n 42) 16. See also Pye (n 119) 39.

[122] For example, the Senate Selection of Bills Committee could not agree on the appropriate course for the Social Services Legislation Amendment (Omnibus Savings and Child Care Reform) Bill 2017: Senate Selection of Bills Committee, Parliament of Australia, *Report No 1 of 2017* (Report, 2017) [5].

(iii) Senate General Purpose Legislation Committees

As mentioned in [7.3] above, there are currently eight Senate Legislation Committees – 'Community Affairs', 'Economics', 'Education and Employment', 'Environment and Communications', 'Finance and Public Administration', 'Foreign Affairs, Defence and Trade', 'Legal and Constitutional Affairs' and 'Rural and Regional Affairs and Transport'. These, with their general-purpose committee counterparts, are the 'engines of the Senate's committee system'[123] and constitute a significant proportion of senators' work.[124] Statistics for the last four financial years indicate that between about 23 per cent and 27 per cent of all Bills are referred to Senate committees.[125] Though there are various ways for Bills to be referred to a Senate Legislation Committee, most Bills are referred to committees by the Senate adopting the recommendations of the Selection of Bills Committee.[126] Bills may be referred to committees at any stage.

The terms of referral will direct the parameters of a committee's examination. The Senate may instruct the Senate Legislation Committee on how it should examine a Bill, including what should be examined and the nature of the inquiry.[127] But, absent any specific instructions about the inquiry, the committee is free to determine the appropriate method of dealing with particular Bills, although they must consider any comments on the Bill made by the Scrutiny of Bills Committee.[128]

While there used to be a 'tradition of consensus'[129] in the committee system this is 'no longer typical'.[130] A 2016 study found that Senate Legislation Committees are more likely to generate a minority or dissenting report than other types of committees.[131] Minority reports

[123] *Senate Practice Book* (n 5) 475.
[124] Scott Brenton, 'What Lies Beneath: The Work of Senators and Members in the Australian Parliament' (Australian Parliamentary Fellow Monographs, Parliamentary Library, Parliament of Australia, 2009) 60.
[125] Department of the Senate, Parliament of Australia, *Annual Report 2021–2022* (Report, October 2022) 61. Note that the Annual Report figures refer to 'packages of bills' so the percentage of individual Bills could be even higher. Statistics generally for bills referred to committees are available at: Department of the Senate, *Senate Statsnet*, Parliament of Australia (Webpage) < https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet#/ >
[126] *Senate Practice Book* (n 5) 313; Department of the Senate, *Referring matters to committees* (Senate Guide No 13, July 2022) 2.
[127] The standing orders of both the House and the Senate also permit their committees to report on draft or 'exposure' Bills: *Senate SO*, O 25(2(a); *House SO*, O 215(b).
[128] *Senate SO*, O 25(2A); *Senate Practice Book* (n 5) 319.
[129] John Halligan and Richard Reid, 'Conflict and Consensus in Committees of the Australian Parliament' (2016) 69 *Parliamentary Affairs* 230, 236.
[130] Ibid 243.
[131] Ibid 243.

by members of the Committee are 'one device' for expressing parliamentary dissent.[132] Minority, or dissenting, reports appear at the end of the Committee report. Other labels are 'additional', 'supplementary' or 'further comments' reports which, arguably, are a form of dissent, 'if a somewhat milder version'.[133] As a potentially relevant material for interpretative purposes, it is likely only to have relevance if it has some impact on the development of the Bill within Parliament.

In addition to the report itself, a Senate Legislation Committee may decide to conduct a public inquiry into a referred Bill. In this case, written submissions from stakeholders and other interested individuals or groups (such as academics) may be produced. Public hearings lead to a transcript of witness evidence.[134] These materials can be voluminous.[135] While of themselves they may appear to be too remote to be of value as interpretative aids, they may acquire contextual significance if referred to, or relied on, in the final committee report.

(d) Hansard

A substantial volume of material is produced as a result of the spoken word in Parliament. All verbal statements in Chambers are recorded and transcribed by the Hansard Office of the Department of Parliamentary Services, thereby becoming written material.[136] The Minister and other parliamentarians have numerous opportunities to speak to a Bill, or to a matter related to the Bill, during its passage. Some key opportunities to speak are identified in this section. The transcript of these statements will be available in Hansard.

(i) Hansard: Second Reading Debates

After the Minister has read or presented the second reading speech, the next stage for a Bill in each Chamber is the second reading debate. Under the standing orders this is usually

[132] Halligan and Reid, 'Conflict and Consensus' (n 129) 235.
[133] Ibid 236.
[134] This will form part of Hansard.
[135] For example, in the 2020/2021 financial year the Senate Legislation Committees heard 921 witnesses with respect to bills: Department of the Senate, Parliament of Australia, *Work of Committees: Financial Year Statistics: 1 July 2020–30 June 2021* (2021) 7.
[136] The Senate standing orders specifically authorise Hansard (*Senate SO*, O 43(3)) whereas the authority for Hansard from the House is pursuant to a House resolution dated 5 May 1993 (reproduced in *House SO*, 112). *House Practice Book* (n 5) 214.

adjourned until a later day, presumably to give other members or senators an opportunity to consider the Bill and their responses.[137]

The purpose of the second reading debate is primarily to focus on the whole principle, or policy, of the Bill. Debate about the detail of the Bill is not permitted (this is for the next stage), although reference to amendments proposed to be moved at the next stage is permitted.[138] It is at this stage that the principle of the Bill is either 'affirmed or denied'.[139] Successful passage through the second reading means that the principles of the Bill are taken to have been agreed. Assuming that occurs, a Bill may move to the Detail Stage in the House, or the Committee of the Whole, if in the Senate.

Unlike the Minister's second reading speech, there is very little information about the process of preparation of speeches made by other members or senators during the second reading debates. Given the 'extremely high degrees of party discipline and cohesion' in Australia,[140] it is not implausible to assume that there is some degree of control exercised by the relevant Minister, governing party or (in the case of the opposition) the shadow ministry about the talking points for each speaker.[141]

In a report on federal legislation affecting human rights, the Australian Law Reform Commission Report stated that '[p]arliamentary debate is the ultimate forum for the scrutiny of, and judgments about',[142] such legislation. In this context, the conventional wisdom is that, given the focus on 'principle', the second reading is 'arguably the most important stage through which a Bill has to pass'.[143] In contrast, leading public law scholar JAG Griffith has referred to this as a 'highly formalistic view'.[144] Indeed, it has been suggested that 'second reading statements' is a more accurate description than second reading debates.[145] There may

[137] *House Practice Book* (n 5) 363; *Senate Practice Book* (n 5) 311.
[138] *House Practice Book* (n 5) 364.
[139] Ibid 361; *Senate Practice Book* (n 5) 301, 311. Debate on the wording of the second reading motion itself is permitted and a motion to amend the second reading motion is sometimes used by non-government members to make a political statement: *House Practice Book* (n 5) 366; *Senate Practice Book* (n 5) 312–13.
[140] Ward (n 25) 186. See also Halligan and Reid, 'Conflict and Consensus' (n 129) 231; J R Nethercote, 'Parliament' in Brian Galligan and Scott Brenton (eds), *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press, 2015) 137, 147.
[141] Separate specific empirical research is needed on this point.
[142] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Report 129, 2015) 58 [3.21].
[143] *House Practice Book* (n 5) 361. See also *Senate Practice Book* (n 5) 311 which states it is the 'most significant' stage.
[144] JAG Griffith, *Parliamentary Scrutiny of Government Bills* (George Allen & Unwin, 1974) 30.
[145] Patrick O'Brien, 'Room for Improvement: The Quality of Debate in Upper Houses in Australia' (2020) 34(2) *Australasian Parliamentary Review* 121, 131.

be merit in these somewhat negative views of the second reading stage given the structured nature of this stage.

First, the second reading speech of the Minister, usually given immediately following the motion for the second reading,[146] is typically read out in the House,[147] while the usual practice in the Senate is to incorporate the speech by reference into Hansard.[148] Departmental officers who, as noted, may be involved in drafting the speech, are required to keep the House practice 'in mind' with emphasis on 'readability'.[149] The second reading speech can be for up to 30 minutes long in the House[150] and (if read) 15 minutes in the Senate.[151] Questions, or 'interventions', by others are considered to be inappropriate during the speech.[152]

Next, the order of speakers in the second reading debate is largely pre-determined. The practice is for the Opposition spokesperson on the Bill to speak first.[153] After that, the Speaker or President adopts the practice of calling individuals from each side of the Chamber alternately, with parties sharing the 'call' in approximate proportion to their numbers.[154] This is usually done in accordance with a list containing an order of speakers that has been compiled prior to the debate by the whips for the government, opposition and minor parties.[155]

[146] House Practice Book (n 5), 362; Senate Practice Book (n 5) 311.
[147] Permitted since 1965: *House Practice Book* (n 5) 505; House of Representatives, *Guide to Procedures* (n 11) 35. Generally, a senator is not to read a speech (*Senate SO*, O 187) but a 'well-established' exception is where a Minister delivers a second reading speech on a Bill: *Senate Practice Book* (n 5) 254.
[148] *Legislation Handbook* (n 64) 74 [13.11]; *Senate SO*, O 187.
[149] *Legislation Handbook* (n 64) 47 [7.49].
[150] *House SO*, O 1. Though it is 'not unusual' that for important debates the standing orders are suspended to grant extended or unlimited time to Ministers and leading Members of the Opposition: *House Practice Book* (n 5) 528.
[151] *Senate SO*, O 189(1); *Senate Practice Book* (n 5) 251. Reduced from 20 minutes to 15 minutes in 2020 following recommendations by the Senate Procedure Committee, Parliament of Australia, *Routine of Business* (Report, Third Report of 2019) 1. Time limits may be different for appropriation or non-government bills.
[152] *House Practice Book* (n 5) 526. Interventions during debate generally are only permitted in limited circumstances: *House SO*, O 66A; *Senate SO*, O 197(1).
[153] *House SO*, O 1; *Senate Practice Book* (n 5) 249.
[154] *House SO*, O 65; *Senate SO*, O 186; Department of the House of Representatives, *Guide to Procedures*, (n 11) 33; *House Practice Book* (n 5) 502–3; *Senate Practice Book* (n 5) 248–51.
[155] *Arrangements for Second Reading Speeches* (n 90) 10–1; *Legislation Handbook* (n 64) 66 [12.28]; *House Practice Book* (n 5) 56.

There are time limits for each speaker[156] and, with limited exceptions, no person may speak more than once.[157]

Third, speeches must be relevant to the subject matter of the Bill, though there is some latitude about what constitutes relevance. For example, debate may extend to alternative means of achieving the Bill's objective and reasons why the Bill should or should not be supported.[158] This provides speakers with opportunities to speak on related matters that do not necessarily contribute to understanding the merits or otherwise of the Bill. Indeed, there 'are no doubt a range of audiences that members have in mind for various parliamentary speeches, and an equal variety of purposes for addressing those audiences'.[159] Apart from stating a policy position, reasons may be as diverse as influencing public opinion, encouraging party supporters or party leaders, seeking to impress with a view to advancement, to occupy time (as a political strategy) and so on.[160]

There is another reality of these 'set piece' speeches[161] worth noting. As a casual observer of Parliament will quickly note, a member making a speech during the second reading may sometimes be speaking to a near empty chamber. Many members come to the Chamber just in time to give their speeches and after giving their speech may leave the Chamber.[162] This situation is not assisted in the House by quorum rules that require a quorum for the House sitting to commence, but not always for its continuation.[163]

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[156] *House SO*, O 1; *Senate SO*, O 189. Although there is no time limit on the overall time that may be spent in the second reading stage.
[157] *House SO*, O 69; *Senate SO*, O 188(1).
[158] *House Practice Book* (n 5) 364; *Senate Practice Book* (n 5) 258, 312.
[159] David Blunt, 'Parliamentary Speech and the Location of Decision-Making' (2015) 30(1) *Australasian Parliamentary Review* 83, 97.
[160] Ibid 97–8.
[161] David W Lovell, 'The Sausage-Makers? Parliamentarians as Legislators' (Political Studies Fellow Monograph No 1, Parliamentary Library, Parliament of Australia, 1994) 10, 53.
[162] *Arrangements for Second Reading Speeches* (n 90) 2, 4. See also the Chair's Tabling Statement for the Reports on Arrangements for Second Reading Speeches/Trial of Additional Tellers' (House of Representatives, 1 December 2003).
<https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=proc/reports/secondreadingspeeches/tablingstatement.pdf>.
[163] *House SO*, O 54. See also *House of Representatives (Quorum) Act 1989* (Cth) s 3. Exceptions include a 'division' or if a member draws the Speaker's attention to the 'state of the House': *House SO*, OO 55, 58.

No doubt there are various reasons why members leave the Chamber. Parliamentarians have many other commitments, such as committee participation, when Parliament is sitting. Even if physically absent, the availability of live broadcasting and up-to-date Chamber minutes online enables members and senators (and their staff) to observe debate proceedings without being present. But observation does not equate to participation in, or contribution to, parliamentary debate on a Bill.

The House Standing Committee on Procedure has recognised the limitations of 'debate' in the House and has encouraged more interactive debate.[164] In the past, the committee has suggested new procedures and encouraged greater use of existing procedures conducive to interaction.[165]

Of all the second reading debate material, the speech that might be regarded as most responsive is the Minister's speech in reply. This is given at the end of the second reading debates and closes the debate. At this stage, the Minister is entitled to 'reply' to matters raised during the debate.[166] During that time, the Minister 'typically comments on other Members' speeches, including answering questions they may have raised' using, where needed, the advice of departmental officers sitting in the advisor's box in the Chamber.[167]

Apart from the Minister's speech in reply, given the format for the second reading debates, the second reading stage may be 'much less important'[168] than the next potential stage of the

[164] House of Representatives Standing Committee on Procedure, *Encouraging an Interactive Chamber*, above n 93, 1–4. For example, the maximum time for second reading speeches (except for the Minister and opposition spokesperson) was reduced to the current time in the 43rd Parliament: *House SO*, O 1; Politics and Public Administration, Parliamentary Library, 'The Hung Parliament: Procedural Changes in the House of Representatives' (Research Paper Series, 2013-2014, 22 November 2013–14) 46. The ability to ask questions at the end of these speeches in the House was introduced by sessional (temporary) order 142A in 2010, but the order was rarely used and was not continued: Commonwealth, *Parliamentary Debates*, House of Representatives, 29 September 2010, 142 (Anthony Albanese); Joanne Towner, 'From Minority to Majority Government: the Impact on Standing Orders' (ANZACATT Professional Development Seminar, Workshop 1A: Standing Orders, Sydney, January 2015) 8, 11.
[165] House of Representatives Standing Committee on Procedure, Parliament of Australia, *Role of the Federation Chamber: Celebrating 20 Years of Operation* (Report, 2015) 29, 36.
[166] *House SO*, OO 1, 69(c), 71; *Senate SO*, OO 189(2), 192.
[167] *Arrangements for Second Reading Speeches* (n 90) 7.
[168] Griffith (n 144) 132, 30.

Bill in terms of impact. For the House, this next stage is the Detail Stage and for the Senate, the Committee of the Whole.[169]

(ii) Hansard: Detail Stage

The function of both the Detail Stage and the Committee of the Whole is to consider the detail, or *text*, of the Bill. This is the stage when proposals for amendments to the text are debated.[170] Consequently, amendments during these stages and accompanying debate should not be taken to be directed to the principle of the whole Bill, but rather to particular clauses. They are pertinent to the purpose of individual provisions or the detail of how the Bill is seeking to achieve its policy objective.[171]

The standing orders for each Chamber provide for the Bill to be scrutinised clause by clause.[172] However, this has become an 'exceptional' circumstance.[173] Most Bills are considered, in both the House and Senate, by leave, 'as a whole.' This mean that the entire Bill is presented as a whole for amendment and for proposed amendments to be moved together, not dealt with sequentially clause by clause.[174]

In the Detail Stage, the House continues to sit as the House. In the Committee of the Whole, the Senate adopts the 'parliamentary device' [175] of forming itself into a committee consisting of all the members of the Senate (hence the name, Committee of the Whole).[176] So,

[169] Proceeding to these next steps may be delayed if the Bill has been referred to a committee. Referral of the Bill to a House or joint committee delays the Detail Stage: *House SO*, O 148. As previously noted, currently this only occurs for a minority of Bills. Referral of a Bill in the Senate to a Senate committee delays the Committee of the Whole: *Senate SO*, O 115. This timing issue is discussed further in [7.5].
[170] *House Practice Book* (n 5) 373-4; *Senate Practice Book* (n 5) 328; *House SO*, O 150; *Senate SO*, O 118.
[171] This is useful as it is well accepted in statutory interpretation law that individual clauses of a Bill may have their own 'subsidiary' or specific purpose.
[172] *House SO*, O 149; *Senate SO*, O 117.
[173] *House Practice Book* (n 5) 377. For the Senate, see *Senate Practice Book* (n 5) 330 and Rosemary Laing (ed), *Annotated Standing Orders of the Australian Senate* (Department of the Senate, 2009) 379. Indeed, the *Senate Practice Book* states that a clause-by-clause consideration of bills has not been used in 'almost three decades': *Senate Practice Book* (n 5) 333 (Supplement 39).
[174] *House Practice Book* (n 5) 377. For the Senate, see *Senate Practice Book* (n 5) 330 Ibid.
[175] Stanley Bach, *Platypus and Parliament: The Australian Senate in Theory and Practice* (Department of the Senate, 2003) 202. *Senate SO*, OO 143–8 govern the procedure for committees.
[176] In practice, this simply means that the President vacates the President's Chair, and the Chair of Committees (often the Deputy President) moves to the chair that is 'at the table' between the two clerks: Laing (n 173) 77.

technically, even though their compositions are the same, the Senate may instruct the Committee on the Bill; such instructions are 'relatively rare'.[177] More often, the Committee of the Whole is left to examine the Bill in the manner it desires.

Despite the different constructs, both the Detail Stage and Committee of the Whole are governed by processes that allow greater flexibility and more opportunities for interactive participation by parliamentarians than the second reading stage.[178] For example, time limits on speeches are shorter but members may speak an unlimited number of times.[179] No notice is required for proposed amendments[180] and motions need not be seconded.[181] These more flexible rules mean that something close to a 'question and answer' format between the Minister and other speakers can sometimes develop.[182]

Despite the potential for the Detail Stage and the Committee of the Whole to provide more interactive debate and therefore arguably more meaningful information about a Bill, many Bills bypass these stages, especially in the House. This can be done with leave of the House or Senate (as the case may be) or, if certain conditions are met, without leave.[183] In the House, approximately 75 per cent of Bills bypass this stage and go straight to the third reading.[184] Recent Senate statistics suggest that the Committee of the Whole stage may be bypassed less frequently than the Detail Stage in the House, but it is still not a common occurrence.[185]

[177] *Senate Practice Book* (n 5) 326.
[178] See, eg, O'Brien (n 145). Pg135-136 who makes this point for the Senate.
[179] *House SO*, O 1; *Senate SO*, OO 188(2), 189. As with Senate speeches, the time limit for continuous speaking in the Committee of the Whole was reduced in 2020 (from 15 minutes to 10 minutes): see above n 151.
[180] *House Practice Book* (n 5) 375; *Senate Practice Book* (n 5) 425.
[181] *House SO*, O 151. Seconding of motions is not required in the Senate: *Senate Practice Book* (n 5) 235.
[182] Note that an *expectation* of a question and answer format has developed for the main appropriation Bill. As noted, this article focuses on ordinary government bills – consideration in detail of the main appropriation bill has a 'unique style and format': House of Representatives Standing Committee on Procedure, Parliament of Australia, *Consideration in Detail of the Main Appropriation Bill* (2016) 2, 6.
[183] *House SO*, O 148; *Senate SO*, O 115(1).
[184] *House Practice Book* (n 5) 373. For many Parliaments the percentage has been much higher.
[185] See Senate statistics: Department of the Senate, Parliament of Australia, *2021-2022 Annual Report* (n 125) 47-48; Parliament of Australia, *Committee of the Whole Amendments* (Webpage) < https://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet#/bills/committee-amendments >.

There are undoubtedly a variety of reasons why Bills bypass the 'detail' stage. For example, the Bill may be urgent or non-controversial, or it simply may be because the government of the day has sufficient numbers to suspend the standing order requirement. Whatever the reason, Bills that bypass this process fail to generate what might be significant explanations or inquiries about the Bills' details.

(iii) Hansard: Debates on Committee Reports

The parliamentary committee advisory reports are not the only material generated by the legislative process that may influence a Bill. The referrals to committees, decisions about their reporting dates and the report itself (once tabled) can all be subject to debate and therefore generate Hansard material. Further, when a committee member, usually the Chair, tables a Committee's report to the Senate (or House), she will often give an explanatory statement about the report. That statement in turn may generate debate. Such debates may be for any number of substantive, political or strategic reasons.

In addition, when Senate Legislation Committees make recommendations in their report, a formal written government response must be tabled in the Senate responding to the recommendations within a certain time.[186] The tabling of the response is another opportunity for comment or debate, all of which will be in Hansard.[187]

Tabling of the legislative scrutiny reports, statements and government responses will not be an opportunity for discussion for all parliamentarians. The JCHR is a joint committee so its report is presented to both Chambers. But as the Scrutiny of Bills Committee and the Senate Legislation Committees are Senate committees, their reports are only tabled in the Senate. Senate committee reports might be the subject of comment in the House, but they are not tabled in the House and so are not debated or scrutinised in that Chamber.[188]

(iv) Hansard: Ministerial Statements

A Ministerial Statement is a statement made to the House or the Senate by a Minister to announce significant government policy developments, or to communicate matters of ministerial responsibility.[189] A Ministerial Statement is not a necessary or even common

[186] See further [7.6](b)].
[187] See *Senate SO*, O 62(4).
[188] If a House committee were presenting a report on a Bill, it would be presented in the House.
[189] Department of Prime Minister and Cabinet, *Tabling Guidelines* (Commonwealth of Australia, 2022) 19; *House Practice Book* (n 5) 609.

component of the passage of a Bill. It is more likely to pre-date the introduction of a Bill and provide background information about the policy behind a Bill that is subsequently introduced to implement the policy announced. In addition to their relevance for policy, the Senate Procedure Committee has stated that 'debates on Ministerial Statements can be among the more significant policy debates that take place in a House.'[190]

Ministerial Statements are formally approved executive statements. The Minister must have the approval of the Prime Minister both to make the statement and for its text.[191] (A Ministerial Statement is not to be confused with other statements by Ministers). Ministerial Statements have an allocated time slot in each Chamber's order of business.[192] Due to relatively recent changes in the standing orders of both Chambers, there are now greater opportunities for non-government members and senators to speak in response to a Statement.[193]

(e) Parliamentary 'Minutes'

Although expressly identified in the *AIA* as extrinsic materials[194], there are two materials that rarely feature in judicial decisions. These are the Votes and Proceedings of the House (including the Federation Chamber) and the Journals of the Senate. Both are the official records or minutes of what is actually done or decided (or deemed to have been done or decided) by the Chamber.[195] Each records decisions of the Chamber, including words of motions, amendments, divisions, documents presented (or deemed to have been presented), reference to Ministerial Statements, and committee reports presented. The Votes and Proceedings are compiled in the Table Office of the Department of the House of Representatives. Responsibility for preparation of the Journals lies with the Clerk of the Senate, in the Department of the Senate.

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[190] Senate Procedure Committee, *Third Report of 2015,* Parliament of Australia (Report, November 2015). Attachment 1, 3. See also David Solomon, *Australia's Government and Parliament* (Nelson, 6th ed, 1984) 73.
[191] Department of Prime Minister and Cabinet, *Tabling Guidelines* (n 189) 19.
[192] *House SO*, O 34. The allocation of time for Ministerial Statements is not expressly provided in the *Senate SO.* They are informally recognised: Department of the Senate, *Guide 11- Opportunities for Debating Documents and Reports* (Guides to Senate Procedure, Parliament of Australia, July 2022) 2.
[193] *House SO*, O 68A and *Senate SO*, O 169(3). For the changes to the standing orders, see Cathy Madden, Politics and Public Administration Section, *45th Parliament in Review* (Parliamentary Library, Department of Parliamentary Services, 19 August 2021) 17 for the House and Politics and Public Administration Section, Parliamentary Library, *44th Parliament in Review* (24 November 2016) 25-26 for the Senate.
[194] *Acts Interpretation Act 1901* (Cth) s 15AB(2)(h).
[195] *House SO*, O 27; *Senate SO*, O 43(1).

Both the Votes and Proceedings and the Journals are distinct from the better-known material, Hansard, which is the official record of what is *said*.[196] So, for example, where a Minister is granted leave to make a Ministerial Statement in the House announcing a significant policy development, that will be noted in the Votes and Proceedings; but the content of that statement will be recorded in Hansard.

Contrary to what is often thought, Hansard is not an exact replication of what is said in the proceedings of Parliament, but a 'substantially verbatim account'.[197] It is 'substantially verbatim' because the Hansard Office's editing policies provide that 'obvious mistakes' should be corrected, although the corrections should not add to or detract from the meaning of the speech.[198] (Some commentators have raised concerns about the potential consequences of this correction policy.[199]) Proofs are subject to review by the individuals who spoke, with final approval required from the Speaker of the House or President of the Senate, as the case may be.

The distinction between Hansard and the Votes and Proceedings, and Journals, is important. When looking for statements of purpose or objective in relation to a Bill, it is logical to look at what is *said* during debate in the Chamber. But to fully understand the effect of statements or documents presented, they must be put in the context of the decision actually made, which is clearly found in the Journals and Votes and Proceedings. Reading Hansard alone will not provide that contextual picture.

7.5 Procedure and Practices

In a recent US book examining the links between Congress and statutory interpretation, it was observed that 'actions taken within an organisation like Congress cannot be understood without understanding their procedural context'.[200] The extent to which rules and practices

[196] See [7.4(d)].
[197] Department of Parliamentary Services, *Mission Statement of Hansard*, Parliament of Australia (Webpage) < https://www.aph.gov.au/Parliamentary_Business/Hansard >. Though written speeches or statements presented in the Chamber may be used as an aid in the transcription.
[198] Ibid.
[199] See, eg, Cecilia Edwards, 'The Political Consequences of Hansard Editorial Policies: The Case for Greater Transparency' (2016) 31(2) *Australasian Parliamentary Review* 145. See also Daniel Greenberg, 'Judicial Ignorance of the Parliamentary Process: Implications for Statutory Interpretation' (Report, Judicial Power Project, March 2017) 4-6.
[200] Victoria Nourse, *Misreading Law, Misreading Democracy* (Harvard University Press, 2016) 147.

affect our understanding of federal parliamentary materials is worth examining. They provide context to the process and parliamentary materials.

(a) Political Strategy and Debate Procedure

The standing orders of the House and Senate are drafted to ensure that a Bill will be considered over several days, at the minimum,[201] and proceed through distinct stages. However, the standing orders 'ought not be seen as a strait-jacket'.[202] The reality is that the 'case for or against legislation is made in a political context'.[203] Consequently, it is not uncommon for a variety of procedures to be used to suspend or overcome standing orders.[204] There are also numerous standing orders that themselves can be used to impact the passage of a Bill. Implications about a Bill from the volume, or absence, of parliamentary debate should therefore be made with caution. Some key practices follow.[205]

In the House the use of 'debate management motions' has become routine to expedite the passage of Bills.[206] These are motions to suspend particular standing orders to 'enable the introduction and passage of a Bill through all stages without delay by a specified time, to limit the duration of particular stages, or to limit the number of speakers.'[207] In the House where the government typically has a majority, this can be an extremely effective way to control and limit debate on a Bill.

The House standing orders do contain formal procedures to 'guillotine' debate on a Bill.[208] However, these procedures have not been used in the House since 2006 due to the preference for the more flexible 'debate management motions'.[209]

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[201] Laing (n 173) 367. See, eg, *House SO*, O 142, O 148; *Senate SO*, OO 111, 112.
[202] Nethercote (n 140) 139.
[203] Stephen Laws, 'Legislation and Politics' in David Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2013) 87, 90.
[204] Devices limiting debate have a long history: see G S Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901 – 1988: Ten Perspectives* (Melbourne University Press, 1989) 192–4.
[205] The mechanisms addressed in this section are not exhaustive, but it is not possible to detail every time management device in this chapter. For some other less common devices see House Practice Book and *Senate Practice Book* (n 5) 354 (Supplement pg41).
[206] *House Practice Book* (n 5) 392.
[207] *House Practice Book* (n 5) 392.
[208] *House SO*, OO 82-85.
[209] House of Representatives Standing Committee on Procedure, Parliament of Australia, *Maintenance of the Standing Orders-Interim Report* (Report, May 2018) 9. See also *House Practice Book* (n 5) 392-393. The House of Representatives Standing Committee on Procedure has recommended that standing orders 82-85 be updated to reflect current practice but successive governments have not agreed to the recommendation.

One formal procedure in the House contained in the standing orders that does continue to be used to curtail debate is the motion for 'closure'. A member can move that another member who is speaking no longer be heard,[210] or can move that the question in issue, such as a second reading motion, be put without further debate.[211] Like all these procedures, the success of the motion will depend upon majority support.

In the Senate, the standing orders also provide for a formal 'guillotine' procedure. A motion is made that a Bill be considered urgent, which (if passed) then allows the imposition of limits on debate for all stages of the Bill.[212] In the Senate, this procedure is available only to the government because the motions to bring the procedure into operation must be made by a Minister. This procedure continues to be used in the Senate but not in the House.[213]

Sometimes, rather than using the 'guillotine' procedure to limit debate, the Senate has adopted a 'benign guillotine'.[214] This is where the Senate, in response to a notice from the government, agrees to a motion to vary its sitting hours and routine, focusing on Bills that need to be finalised.

There is no equivalent of a 'closure' motion to cut off the speech of a particular *senator* in the Senate.[215] But a motion of closure to close a debate is available.[216]

The Senate has two other relevant procedures. The first is the procedure that allows a motion, without notice, to be put that a Bill progress 'without formalities'.[217] Agreement to this means that the requirement in the standing orders for different stages of a Bill to be dealt with on separate days is suspended.[218]

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[210] *House SO*, O 80.
[211] *House SO*, O 81.
[212] *Senate SO*, O 142. See *Senate Practice Book* (n 5) 351-54.
[213] From February 2021 to December 2022, 120 bills were declared urgent: Parliament of Australia, *Bills considered under a limitation of time* (Webpage) < https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_considered_under_a_limitation_of_time
[214] Note, 'Comparative Study: Timetabling Bills and Closure Motions' (2011) 79 *The Table: Journal of the Society of Clerks-at-the-Table in Commonwealth Parliaments* 100, 108. Also called a 'civilised' guillotine because for it to work, the Senate must agree: *Senate Practice Book* (n 5) 354.
[215] Commonwealth, *Parliamentary Debates*, Senate, 12 November 1959, 1475 (Alister McMullin, President of the Senate) cited in *Senate Practice Book* (n 5) 273.
[216] *Senate SO*, O 199.
[217] *Senate SO*, O 113(2)(a). This standing order also allows Bills to be considered together.
[218] Laing (n 173) 369.

The second procedure is one to allow more time, rather than to expedite progress. It overcomes standing orders that impose a 'double deadline' for when the Senate can receive Bills from the House.[219] This deadline is known as the 'cut-off' (and is represented by a pair of scissors on the Senate's sitting calendar![220]) A Minister may initiate a procedure 'familiarly known as "an exemption from the cut-off"'[221] by which the Minister seeks the leave of the Senate for exemption from the deadlines. The government must table a statement of reasons for bringing forward the consideration of the bill.[222] This statement is a formal document drafted by sponsoring department officials,[223] and must be cleared by both the Minister and Prime Minister's office.[224] The statement must include the purpose of the Bill and the reasons for the urgency. The Senate has demonstrated a readiness to grant sought for exemptions.[225]

Another mechanism used by both the House and Senate is the contingent notice. Contingent notices are not recognised in the standing orders, but are nevertheless often used, particularly to facilitate the quick passage of legislation.[226] A contingent notice, as the name would suggest, is a notice stating that, if a certain event happens, then a motion will be moved to suspend certain standing orders.[227] A set of contingent notices is usually included in the first Notice Paper of each session of Parliament. An example is a notice 'contingent' on the motion for the second reading of any Bill, that the standing order requiring resumption of debate on the Bill at a later day be suspended to permit the debate on the same day.

Procedural rules may also be used to delay (as opposed to expedite) a Bill. An example is the 'filibuster'. While individual parliamentarians have time limits, the standing orders do not impose a time limit on the total amount of time that may be spent debating a Bill. The 'filibuster' involves a party arranging for numerous speeches (using the maximum individual time limit) to delay a Bill or to permit time for negotiating matters outside the Chamber,

[219] *Senate SO*, O 111(5)–(6).
[220] Senate Practice Book (n 5) 306 (Supp).
[221] Laing (n 173) 362.
[222] *Legislation Handbook* (n 64) 12. See also *Senate Practice* Book (n 5) 306 (Supp).
[223] For a template, structure and outline for departmental officials, see: *Legislation Handbook* (n 64) 12–13 [2.45]–[2.47].
[224] Ibid 12–3 [2.45].
[225] *Senate Practice Book* (n 5) 309.
[226] *House Practice Book* (n 5) 294, 391–2; *Senate Practice Book* (n 5) 220, 233, 353.
[227] *House Practice Book* (n 5) 294. A contingent notice overcomes the need for the absolute majority needed for the suspension of standing orders moved without notice: *Senate SO*, O 209; *House SO*, O 47.

rather than to reflect considered debate.[228] Consequently, care should be taken making implications about the volume of debate on a particular Bill.

(b) Interaction of Scrutiny of Bills Committee and JCHR

The standing and sessional orders of both Chambers are critical in providing context to legislative proceedings and the materials relevant to those proceedings. Well-established practices also provide context. Given the political context of the legislative process, there are no doubt informal practices adopted behind closed doors. But the Scrutiny of Bills Committee and the JCHR (the Scrutiny Committees), have been transparent about their approach to their tasks. This openness reveals the extent to which both committees interact with each other, and other actors involved in the parliamentary process, including members of the executive.

The Scrutiny Committees operate using what the JCHR has called a 'dialogue model'[229]. After the introduction of a Bill, the Scrutiny Committee considers the Bill, together with its explanatory memorandum. Where it has concerns about the Bill's compatibility with its scrutiny principles, the 'usual approach' of both committees is to write to the responsible Minister to seek further information, to request an amendment to the explanatory memorandum or statement of compatibility, or to request the Minister to consider an amendment to the Bill.[230] The Minister, with the assistance of the sponsoring department, will usually provide a written response. The OPC instructs parliamentary counsel to monitor Scrutiny of Bills reports for comments on bills that they have drafted, and to contact the instructing department to provide assistance in preparing a response.[231]

Both committees use a Minister's response to inform their final report. And in some instances:

[228] For example, it was alleged that the Government filibusted its own Human Rights Legislation Amendment Bill 2017 (Cth) in the Senate on 30 March 2017 to allow time to negotiate amendments to a tax Bill with a minority party: see Ashlynne McGhee, '18C: Proposed Changes to *Racial Discrimination Act* Defeated in Senate', *ABC News* (online), 31 March 2017 <http://www.abc.net.au/news/2017-03-30/18c-racial-discrimination-act-changes-defeated-in-senate/8402792>

[229] Parliamentary Joint Committee on Human Rights, *Annual Report 2021* (n 106) 7.

[230] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Annual Report 2021* (n 106) 3, 12; Parliamentary Joint Committee on Human Rights, *Annual Report 2021* (n 106) 7.

[231] Office of Parliamentary Counsel (Cth), *Dealings with Instructors* (Drafting Direction No. 4.1, 16 July 2020) 3.

> …[the] minister may undertake to address the committee's concerns in the future (for example, by amending legislation or undertaking to conduct a review of the legislation in due course) or may advise that amendments have been made to address the committee's earlier concerns when introducing a future iteration of a bill.[232]

As explained by the JCHR, the reporting of both Committees reflects the stages of this 'dialogue' model. An initial report on the Bill is tabled; assuming a response by the Minister is received, this is followed by a concluding report that incorporates any further information received from the Minister or their sponsoring department.[233] The Minister's written response is published in full on the Committees' respective websites.[234] Such ministerial responses can provide important clarifications about the Bill.

There is other evidence of communication to, if not interaction with, other actors. Both committees have developed publicly available checklists, notes and guidelines[235] to assist those writing explanatory memoranda and statements of compatibility (primarily the sponsoring departments) to adequately meet the committee's expectations about the information contained in them.[236] The Scrutiny Committees therefore have what has been described as an 'unseen influence'[237] on the development of Bills and their accompanying executive material not only during the parliamentary process, but in the pre-legislative development of the Bill.[238]

The Scrutiny Committees also interact with each other and other Senate Committees. There is a 'significant degree of informal collaboration' between the Scrutiny Committees[239] and,

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[232] Parliamentary Joint Committee on Human Rights, *Annual Report 2021* (n 106) 7; *Legislation Handbook* (n 64) 72.
[233] Parliamentary Joint Committee on Human Rights, *Annual Report 2021* (n 106) 7-8; *Senate Practice Book* (n 5) 322 (Supplement 37).
[234] The relevance of the timing of a Minister's response is discussed further in [7.6].
[235] Available on their respective webpages: Senate Scrutiny of Bills Committee, Parliament of Australia, *Guidelines* (Guide, 2nd ed, 2022); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (Guide, June 2015). See n 83.
[236] The Senate Scrutiny of Bills Committee guidelines were first published in 2021: Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2021* (n 106) 5. For background to the Scrutiny of Bills Committee provision of educative resources see Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee, Final Report* (Report, May 2012) 48-50. For background to the JCHR provision of educative resources, including other services, see Fletcher and Coles, *Reflections on the 10th Anniversary* (n 62) 2-4.
[237] Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2021* (n 106) 10.
[238] The awareness of the sponsoring departments of the requirements of the Scrutiny Committees is discussed in more detail in Chapter Six.
[239] Fletcher and Coles, *Reflections on the 10th Anniversary* (n 62) 2.

where appropriate, one may draw matters to the attention of another.[240] The JCHR also states that it assists the Senate's eight general purpose Legislation Committees (see [7.3]) by drawing their attention to a matter addressed in a JCHR report where relevant to an inquiry the Legislation Committee is undertaking.[241]

7.6 Importance of Timing in the Legislative Process

The point at which decisions are made or parliamentary materials are produced in the parliamentary process is critical to understanding their relevance and currency. An American scholar goes so far as to suggest that, when assessing parliamentary materials, timing may trump typology.[242] This section focuses on two timing issues.

(a) Amendments

As discussed in [7.4(d)], amendments to the text of a Bill are made in the Detail Stage in the House and in the Committee of the Whole in the Senate. Amendments may be proposed at these stages by the Government or by non-government members or senators. Government parliamentary amendments are drafted by the OPC and are subject to the same departmental and ministerial approvals as a Bill.[243] Given that amendments can delay the passage of the Bill, the department and Ministers are directed to proceed with them only if they are 'essential'.[244]

Non-government amendments are drafted by the party proposing them, with the assistance of offices within the Department of the House or Senate.[245] No notice is required of either government or non-government amendments.[246]

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[240] Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2021* (n 106) 6, 13.
[241] Parliamentary Joint Committee on Human Rights, *Annual Report 2021* (n 106) 11.
[242] Nourse (n 200) 88–91.
[243] *Legislation Handbook* (n 64) 54–5 [9.22].
[244] Ibid 52 [9.2].
[245] Department of the Senate, *Annual Report 2021-2022* (n 125) 45-8; Department of the House of Representatives, Parliament of Australia, *Annual Report 2021-2022* (Report, 2022) 32-3.
[246] *House Practice Book* (n 5) 374; *Senate Practice Book* (n 5) 425. Though provision of proposed amendments before are encouraged.

There are two categories of amendments for the purposes of extrinsic materials. One is amendments that are proposed, but are not agreed to by the Chamber. As these amendments are not incorporated into the Bill and do not form part of the ultimate statute, such amendments and the proposer's explanatory statements and any subsequent debate (which will form part of Hansard) are extrinsic materials. The nature of the proposals and the reasons why they failed, as evident from Hansard, may explain an aspect of the Bill.

The other category is amendments that are proposed, and agreed by both Chambers, and therefore become part of the agreed Bill and the subsequently enacted statute. These amendments are not 'extrinsic' as they become part of the enacted statute. However, the previous versions of the Bill and any debate (recorded in Hansard) surrounding the approval of the amendments will be.

The timing of agreed amendments may affect the volume and reliability of other parliamentary materials. One important example is the explanatory memorandum for the Bill.

It has become routine for a supplementary explanatory memorandum to be prepared for government amendments to Bills, whether moved in the House or Senate.[247] Further, if a House-initiated Bill is amended in the House, it is established practice for the sponsoring department to prepare a revised explanatory memorandum, to be tabled with the Bill in the Senate. (Sometimes, in that instance, the second reading speech will also be amended for the Senate).[248] The government may also prepare an addendum or replacement memorandum, if time permits, in response to parliamentary committee recommendations, especially if the committee reports before the Bill is received by the Senate.[249]

The situation for memoranda is different if a House-initiated Bill is amended in the Senate. In that instance, the practice is for the Senate to send back the Bill to the House with a message and a schedule of the agreed amendments. The House is only required to consider those amendments (not the whole Bill again) and vote on those amendments. No revisions to the

[247] *Legislation Handbook*, (n 64) 54 [9.17].
[248] *Legislation Handbook*, (n 64) 48 [7.55], 56 [9.28].
[249] Ibid 45 [7.42], 46 [7.43]; *Senate Practice Book* (n 5) 314.

explanatory memorandum are made. Consequently, the originally presented memorandum in the House may not be an accurate reflection of the final agreed Bill.[250]

The timing of amendments made during the passage of a Bill may also affect the relevance of Scrutiny Committee reports. The Scrutiny of Bills Committee's practice is to provide commentary on parliamentary amendments to Bills (as well as the Bills themselves).[251] As the introduction of the Bill and parliamentary amendments occur at different times, they will typically be addressed in separate scrutiny reports, and therefore tabled in the Senate at different times. That is, the report that examines the amendments is likely to be in a separate, subsequent report to the one on the introduced Bill. Depending upon the timing of amendments, it is possible that the report on the amendments will not be available until after the Bill has been debated or even enacted, and so will not inform debate or decisions made in Parliament on the Bill.

Conversely, the JCHR report does not examine amendments. Its report is only on the Bill as introduced. The same is true for the Bills Digests produced by the Parliamentary Library as they are generally not amended once published.[252] Consequently, both the JCHR report and Digest must be read subject to any amendments made in Parliament.

(b) Scrutiny and Senate Legislation Committee Reports

Like a Bill, parliamentary reports are confidential until tabled, or deemed tabled, in the Chamber.[253] One result of this is that a committee report does not inform or influence debate in the Chamber until it is tabled and available to parliamentarians. Timing of the tabling of the report is therefore a matter relevant to assessing the impact of the report on the Bill.

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[250] *Legislation Handbook* (n 64) 56 [9.29], 69 [12.48]. Note that if the government disagrees with the Senate amendments, the Minister must present 'written reasons' and a motion may be made for the House to adopt those reasons (thus producing further extrinsic material): *House SO*, OO 161(c), 170(b).
[251] Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2021* (Report, 30 March 2022) 3, 5, 8.
[252] Though most recently available Annual Report of the Department of Parliamentary Services states that a future focus of the Library will be producing analysis of amendments passed in second chamber debate: Department of Parliamentary Services, Parliament of Australia, *Annual Report 2022* (19 September 2022) 88.
[253] Senate Legislation Committee reports are permitted to be tabled to the President when the Senate is not sitting and this is 'deemed' to be tabled: *Senate SO*, O 38(7).

(i) Scrutiny Committees

The Scrutiny of Bills Committee's target is to table its report in time for the detailed consideration of the Bill in the Senate.[254] Similarly, the JCHR 'seeks to conclude its assessment of bills while they are still before the Parliament.'[255] As both Committees report weekly while Parliament is sitting, this tight reporting time frame means that there is a strong likelihood that most parliamentarians will have access to, at least, the initial report on the Bill (initial where a response from the Minister is sought) before substantive consideration of the Bill by the Senate.

One of the difficulties with ensuring Scrutiny Committee reports are available for substantive debate is that there is nothing in the standing orders that prevents the passage of a Bill even though the committee has not presented its final or even initial report on the Bill. There are many reasons why a Committee may not be able to report in time for consideration during the passage of the Bill. One particular issue is the timeliness of the responsible Minister's response to the Committee's request for further explanation or information about the Bill or explanatory memorandum (see [7.7.5(b)] above). The issue here lies not in the failure of the Minister to respond (although there is no formal requirement for the Minister to do so), but in the timing of that response.[256] The urgency of the government's legislative program and the timeliness of the Minister's response will affect whether the Committee's finalised report can be tabled during the passage of a Bill. A timely response is regarded as 'critical' for effective committee scrutiny.[257]

Concern about the timeliness of responses led to an amendment to Senate standing order 24 in 2017 in relation to the Scrutiny of Bills Committee.[258] Where the Scrutiny of Bills Committee has not finally reported on a Bill because the Committee has not yet received a ministerial response, the amendment permits any senator to ask the Minister for an explanation of why

[254] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Annual Report 2021* (n 106) 3. See [7.4](d)] for discussion of the Committee of the Whole.
[255] Fletcher and Coles *Reflections on the 10th Anniversary'* (n 62) 8.
[256] Both the Scrutiny of Bills Committee and the JCHR have highlighted timeliness of Minister responses as an issue in past annual reports: Scrutiny of Bills Committee: Senate Standing Committee for the Scrutiny of Bills, *Annual Report 2016*, above n 104, 4; Parliamentary Joint Committee on Human Rights, *Annual Report 2013–14*, above n 61, 16–17.; Senate Standing Committee for the Scrutiny of Bills, 'Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee, Final Report' (n 236) 26.
[257] Parliamentary Joint Committee on Human Rights, *Annual Report 2021* (n 106) 17. For some recent statistics of how many Bills are enacted before a report can be finalised see Fletcher and Coles, *Reflections on the 10th Anniversary* (n 62) 9; Parliamentary Joint Committee on Human Rights, *Annual Report 2021* (n 106) 17-18.
[258] Commonwealth, *Journals of the Senate No 74*, Senate, 29 November 2017, 2372-3 adopting a recommendation of the Standing Committee for the Scrutiny of Bills.

the Minister has not provided a response to the Scrutiny of Bills Committee's inquiry on a Bill.[259] This standing order provides the opportunity for political pressure to be applied to the responsible Minister, but is no tangible obstacle to the passage of the Bill.

(ii) Senate Legislation Committees

Unlike the Scrutiny Committees, generally when a Bill has been referred to a Senate Legislation Committee, the Bill will not be further considered in the Senate until the Committee has reported.[260] This means that senators will at least have the benefit of the report for the detailed examination of the Bill, though not necessarily for the second reading. (The passage of the Bill in the House will not be effected.[261]) In the less routine instance of a Bill being referred to a House standing or select committee, the Bill is also delayed in the House until the committee reports.[262] Consequently, parliamentary material needs to be considered bearing in mind the possibility that members or senators have not had the benefit of the report.

Second, also unlike the Scrutiny of Bills Committee and JCHR, if a Senate Legislation Committee has made recommendations in its tabled report then a formal government response is required to be given in the Senate within three months.[263] This formal response must be prepared in accordance with DPMC guidelines and must be approved by the responsible Minister before approval by the Cabinet (or the Prime Minister for matters that do not involve significant policy or other issues).[264] Dissenting or minority reports in Senate and joint committee reports must also be addressed.[265]

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[259] O 24(1)(d) to (h). See *Senate Practice Book* (n 5) 322-23. The Committee also maintains a website that lists the bills for which the committee has requested a response but it has not yet been received.
[260] *Senate SO*, OO 115(1)(3). This also applies when the 'provisions' of the Bill are referred to a Senate committee. There are some exceptions such as when the 'provisions' of a Bill are referred to committee *after* the Bill has been received by the Senate. In that case, the Bill may proceed before the committee reports. See generally *Senate Practice Book* (n 5) 317-18.
[261] Holland (n 60) found in his study that 48 per cent of Senate Bill inquiries don't report until the Bill has already passed through the House: at Holland (n 60) 15.
[262] *House SO*, O 148 for bills referred under SO 143(b).
[263] Commonwealth, *Journals of the Senate No 8*, Senate, 14 March 1973, 51; Commonwealth, *Journals of the Senate No 100*, Senate, 24 August 1994, 2054. It is six months for House reports: Commonwealth, *Votes and Proceedings No* 2, House of Representatives, 29 September 2010, 44; *Legislation Handbook* (n 64) 11.
[264] Ibid. Department of Prime Minister and Cabinet, *Tabling Guidelines* (n 189) 12.
[265] Department of Prime Minister and Cabinet, *Tabling Guidelines* (n 189) 12. House of Representatives dissenting reports need not be addressed.

Measures have been implemented to encourage a timely government response. The President of the Senate provides a twice-yearly report on the status of government responses.[266] Despite this measure, responses beyond the three-month period occur regularly.[267] Further, even if the response is received within the three-month limit, it may still not be while the Bill is before Parliament. So, referring to a Government response to assist with understanding the policy of a Bill or its provisions must take into account the possible post-enactment timing.

7.7 Conclusion

This chapter provides insight which is essential to an institutional perspective on the use of extrinsic materials in statutory interpretation. First, it demonstrates the simple assertion that 'Parliament makes statutes' obscures the complex, extensive and granular rules, practices and procedures that are engaged for that law making to occur. The reality is that 'Parliament' is myriad government, non-government and independent participants, existing both inside and outside of Parliament. It provides legitimacy to a notion of 'Parliament' quite apart from its formal, constitutional sense as the 'author' of a statute. Further, this chapter, together with Chapter Six, supports the perspective of a statute as the product of a complex process. Enactment by Parliament is but one step in that process.

Secondly, the examination of the parliamentary process in this chapter, in a similar way to Chapter Six which dealt with the pre-parliamentary process, enables identification of the extrinsic materials that may be relevant to interpretation. More, it provides meaningful information on the nature, content and genesis of these materials that are relevant to their utility as interpretative aids, and identifies other relevant factors that may be used to assist with evaluating that utility.

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[266] Available at: Department of the Senate, *Government Responses to Committee Report*, Parliament of Australia (Webpage) < https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Government_responses >.

[267] See, eg, President of the Senate, 'President's Report to the Senate on the Status of Government Responses to Parliamentary Committee Reports' (Parliament of Australia, 31 December 2022). See also Stephanie Gill, 50 Years of Government Responses to Senate Committee Reports' *Parliament of Australia, Parliamentary Library, Flagpost* (Blogpost, 14 March 2023) < https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/FlagPost/2023/March/Government_responses_to_Senate_committee_reports >

Thirdly, the chapter provides important information about the continued role of the executive. Chapter Six revealed that the pre-parliamentary process is dominated by the executive government and its policy agenda. Once a government Bill is introduced into Parliament the law-making is no longer the exclusive domain of the executive. It then involves other participants – the Opposition, independents, minor parties, government departments and the parliamentary service – all of which have the potential to impact the executive's influence on the Bill. The rules and systems governing the enactment of a Bill offer many stages for scrutiny by those non-executive actors. The detailed stage of the Bill, and the compulsory consideration of the Bill by certain committees are clear examples. These participants do not operate in isolation. There is a level of interaction, or at least communication, between many of them. This is particularly evident in the Senate committee system. However, the complex system of rules and procedures permits the executive to have some control over the passage of the Bill, such as through devices to circumnavigate or truncate critical stages. In the end, the ability of participants in the process to change the Bill is limited to parliamentary amendments (or rejection of the Bill), albeit these actions may be the result of the influence of many other aspects of the process.

The elements of the parliamentary process and their relevance to the use of extrinsic materials will, together with the research findings in Chapter Six, be brought together to analyse their impact on the use of extrinsic materials in the next chapter.

Chapter 8

Insights and Implications of an Institutional Approach

'*So taken are we with models derived from ordinary conversation, we are inclined to ignore the formalities necessary for political discourse in a numerous and diverse society…what happens in the legislature [is] more like proceedings than conversation*.'[1]

8.1 Introduction

This thesis posits that adopting an institutional approach to statutes and the use of extrinsic materials, by examination of the actors, processes, and materials relevant to the legislative process, provides insights into the use of extrinsic materials in statutory interpretation including an alternative, legitimate rationale for recourse to those materials and insightful guidance about their appropriate use. The question the thesis addressed was what an examination of the legislative process can reveal about the use of extrinsic materials in Australian statutory interpretation law. The answer to that question has a number of interrelated dimensions.

The exploration of the legislative process in the light of the law relating to extrinsic materials exposes a tension in the law. That tension is between the concepts that the courts use to rationalise recourse to, and use of, extrinsic materials and the very law-making processes that the courts engage with when they use the materials as interpretative aids. This research presents evidence that the judiciary is adopting institutional elements when it refers to extrinsic materials, but still attempts to justify its practice with traditional conceptual tools.

In statutory interpretation law, it is well accepted that the notions of text, context and purpose provide the framework for the interpretative task. These notions centre around the statutory text. This is because the approach emphasises Parliament as the author of the statute, being the entity with the sovereignty to make legislation. Consequently, the statute is dealt with in the law as an atemporal, singular document that only comes into being at the point it can be regarded as having been approved by Parliament. At that point Parliament has spoken. We are permitted to look at extrinsic materials in relation to the statute as they form part of the

[1] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 70.

background to Parliament's speech act and so form part of the 'wider context' of that act. Using the conventions of language, because the speech act is a written document and it is well accepted that context informs the meaning of language, we are permitted to have regard to those materials as context. Statutory provisions, such as s 15AB of the *Acts Interpretation Act 1901* (Cth) ('AIA'), are still cited as authority for recourse to materials but any restrictions that the sections contain have been largely superseded or are materially informed by the common law.

However, once the courts go outside the statute, even if they rationalise that recourse by reference to the relevance of context to textual meaning, the courts are no longer looking only at material produced by Parliament. While it may not have been doubted, the case law analysis and the empirical findings of this thesis provide evidence that courts use extrinsic materials and a range of types of materials. The legislative process analysis highlights the statute as a product of a process and shows that extrinsic materials are materials produced by actors involved in different stages of the making of the statute. These actors are not Parliament and the materials do not directly or formally represent the intent and purpose of Parliament. This reveals that, once courts engage with extrinsic materials, they are implicitly considering a statute from a very different perspective to the perspective that informs the common law principles. They are recognizing a statute as one of the steps in a complex, pluralist, political process in which the approval of Parliament is but one step. To put it another way, the judiciary is 'switching lanes' in its perspective on a statute when using extrinsic materials. This is not to deny the importance of the statutory text, but to demonstrate that the courts are engaging with the complex legislative process, yet attempting to justify that engagement with traditional linguistic concepts.

Recognizing this tension between principle and practice provides insight into some, though not all, of the difficulties with the current law. This tension offers an explanation for the circularity of some of the principles that guide the use of extrinsic materials. It reveals why the notion of purpose and context are not always sufficient to explain what the courts are doing when referring to extrinsic materials.

Further, if we accept this institutional, or process based, account of the use of extrinsic materials as a legitimate one, it offers a more enlightening and systematic approach to the use of extrinsic materials than the common law framework. This perspective enables us to identify materials that may be useful interpretative aids and it discloses factors that can be

used systematically to assist with the evaluation of materials for relevance and weight. Finally, acceptance of an institutional approach permits some tentative suggestions for statutory interpretation generally.

8.2 Revelations from the legislative process

The Australian law of statutory interpretation and extrinsic materials, dominated as it is by the common law, emphasises the statute as a written document authored by Parliament and that does not come into being until so authored (i.e., enacted). This approach focusses on Parliament in its sovereign sense and is essentially about legislative competence.[2] Parliament is the only body permitted to make law and the statute is the singular instrument that represents that law. Understanding the legislative process reveals, or, perhaps more accurately, reminds us that the statute is more than just a piece of writing. Even more importantly, that understanding shows that the courts already incorporate, and impliedly recognize, institutional factors in their use of extrinsic materials.

(a) Statutes and the role of Parliament

The text, context, purpose framework emphasises the statute as an 'utterance'[3] and one that is authored by Parliament. In the case of federal statutes, that means Parliament as the distinct body recognized under the *Australian Constitution* as having the power to make legislation.[4] The deep dive, undertaken by this thesis, into the process of the creation of a federal statute calls attention to another perspective which sees a statute as much more than just a written document made by Parliament. In the vast majority of cases, it a tool used by the government of the day to implement its policy. That policy starts its life as a legislative proposal that is subject to established procedures and approvals within the executive branch of government, tight control by the executive of the policy underlying the proposal and consultation across government departments. Its draft form is formulated through an iterative and creative interaction between actors within the executive arm of government, guided by well-established drafting conventions. The final written form of the statute is compiled by

[2] Richard Ekins and Graham Gee, 'Ten Myths about Parliamentary Sovereignty' in Alexander Horne, Louise Thompson and Ben Yong (eds), *Parliament and the Law* (Hart Publishing, 3rd ed, 2022) 299, 299 referring to J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999).
[3] Leonard Hoffmann, 'Language and Lawyers' (2018) 134 *Law Quarterly Review* 553, 554.
[4] Cheryl Saunders, 'Separation of Legislative and Executive Power' in Cheryl Sanders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 617, 620. For constitutional purposes, that body may be broken down into the monarch's representative in Australia, the Senate, and the House of Representatives.

specialist and skilled drafting lawyers and executive actors and is approved by senior executive members.

Actors within the executive government have tight control over the process of formulating the policy underpinning the statute through the series of decisions and approvals required before a Bill is finalized. The government adopts a whole-of-government systematic approach to the policy underlying a legislative proposal and the formulation of the Bill that will reflect it. That process highlights the importance of the characterisation of a statute as an instrument of policy.

That piece of writing is then considered according to another process within another institution, Parliament. That process incorporates a long established, historically entrenched series of stages that are governed by copious and complex rules which are both structured and flexible. In the course of that activity, the writing is subject to various forms of scrutiny by identifiable individuals and groups, some of whom interact with the executive. Some of that scrutiny concerns the policy behind the statute and some of it, though more rarely, is at the level of text. The entire process is undertaken in a political context.

Once the Bill is inside Parliament, the control of the executive over the policy underlying the Bill arguably diminishes, though it still wields considerable influence. Each chamber of Parliament has a different composition of members and different rules governing its organisation, and depending on those numbers and rules, the executive can continue to control the Bill's passage. The political reality is that in recent decades the executive federal government has often not had control of proceedings in the Senate. Political science scholars debate the extent to which parliamentary processes influence proposals, with views ranging from the claim that Parliament is merely a rubber stamp,[5] to the claim that it can have real influence over the policy of the proposed legislation before it.[6] The workings of Parliament revealed in Chapter Seven in relation to a legislative proposal show that the actors within

[5] See, e.g., John Uhr, 'Parliament and Public Administration' in JR Nethercote, *Parliament and Bureaucracy: Parliamentary Scrutiny of Administration: Prospects and Problems in the 1980s* (Hale & Iremonger, 1982) 26, 30-1 referring to John Stuart Mill's view that parliament's main function is not to govern but to consent or refuse; Sir Stephen Laws, 'What is Parliamentary Scrutiny of Legislation for?' in Alexander Horne and Andrew Le Sueur (eds), *Parliament: Legislation and Accountability* (Hart Publishing, 2016) 15, 29-31.
[6] See, e.g., Marija Taflaga, 'Policymaking, Party Executives and Parliamentary Policy Actors' in Andrew Podger, Michael De Percy and Sam Vincent (eds), *Politics, Policy and Public Administration in Theory and Practice: Essays in Honour of Professor John Wanna* (ANU Press, 2021) 183, 188; Meg Russell and Daniel Over, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford University Press, 2017) ch 10; Ekins and Gee (n 2) 319-320.

Parliament can react to the policy in a proposed statute, and even make specific changes through parliamentary amendment. For example, the reports and statements of the multi-partisan scrutiny parliamentary committees may seek to influence other members and therefore the Bill. But Parliament, in a pragmatic sense, does not *make* the policy. Finally, certain individuals, who derive their authority from being successful candidates in the Australian democratic electoral system, ultimately endorse or reject the proposed legislation. Or, as one former judge has observed:

> An analysis of the way legislation is actually made teaches that the assumption that parliament, as a disembodied institution, has given approval to each and every word used in a statute is a fiction. It is a convenient fiction. But we should not be deceived by it.[7]

For federal government statutes, which comprise the vast majority of statutes, the policy underlying a statute is the policy developed by the executive government and is the product of a deliberate and systematic process that occurs before the Bill is even introduced to Parliament.

This brief summary of the essence of Chapters Six and Seven reflects the complexity of the story behind the creation of a statute. It is a story about the operation of two branches of government, the executive and Parliament. But more, it is a story that reveals the numerous individuals, groups, processes, decisions, rules, interactions and practices that are required for that creation. First, it highlights that the process of making a statute starts well before Parliament becomes involved. Second, it offers the perspective of Parliament not as a single entity, but as an institution made up of a complex system of processes, rules, actors and behaviours. It brings into sharp focus the significance and practical import of a statute as a tool of government formulated in those institutional processes to implement government policy agenda. But more, it calls attention to the perspective of a statute as the outcome of many hands and steps. When viewing the legislative process, we can see Parliament as less the author of the statute and more its final approver or rejector, as 'critic' rather than 'author'.[8] In the scheme of the overall legislative process, Parliament plays a small, primarily

[7] Justice Michael Kirby, 'Statutory Interpretation and the Rule of Law - Whose Rule, What Law?' in David St L Kelly (ed), *Essays on Legislative Drafting* (Adelaide Law Review Association, 1988) 84, 99.
[8] Stephen Laws, 'What is the Parliamentary Scrutiny of Legislation For?' in Alexander Horne and Andrew Le Sueur (eds), *Parliament: Legislation and Accountability* (Hart Publishing, 2016) 15, 29 who argues for this view of Parliament for the United Kingdom.

technical, part.

(b) Institutional elements of extrinsic materials

There is no question that Australian courts have recourse to extrinsic materials in statutory interpretation. The case law analysis and the empirical findings provide evidence of this recourse. Indeed, the empirical findings of Chapter Five reveal that the courts frequently refer to extrinsic materials in the course of interpreting a statute. Further, in the majority of cases in which extrinsic material is cited, at least one type of extrinsic material is relied upon in at least one judgment in that case to support the interpretive reasoning within the judgment.[9]

The research provides evidence that courts refer to a wide range of types of extrinsic material. The empirical findings for the High Court and the Full Court of the Federal Court of Australia show that there are certain types of materials that are relied upon more frequently than others (such as explanatory memoranda and second reading speeches), but they also show reference to other types of materials drawn from various stages of the legislative process. The empirical evidence for the High Court in particular shows the Court is open to considering a wide range of documents, including pre-legislative documents such as law reform commission reports, ad hoc reports, and drafts, as well as material produced during the parliamentary process, such as parliamentary committee reports and chamber minutes. The High Court (more frequently than the Full Court) even draws on parliamentary materials relevant to statutes other than the specific statute being construed, such as the second reading speech or committee report for another statute.

Consideration of purpose, under both statutory and common law, is an integral part of the interpretative process. The research in Chapters Two and Three show that one of the key reasons for courts to look at extrinsic materials is to obtain evidence about the purpose of the statute. The materials are also, arguably, used for what they reveal about the intended operation or effect of the instrument.

There are examples of the courts paying attention to the relevance of timing or steps in the legislative process to assist with assessment of the utility of extrinsic materials. One example is reference to the provenance of extrinsic materials as being a relevant factor. Another example is reference to the person who made the speech, or to the stage at which a particular document, such as a submission to a parliamentary committee, was produced. Still another is

[9] See Chapter Five [5.4].

that the court might draw inferences from silence in parliamentary materials about the intent behind a statute.[10]

When considered in the light of the research undertaken on the legislative process in Chapters Six and Seven, it is not unreasonable to take the view that the courts, implicitly at least, recognize statutes as the product of a process. As their very name suggests, extrinsic materials exist outside the statutory text. Understanding the legislative process confirms the obvious point that these are not materials produced by Parliament. In Chapter Three it was explained that the common law of statutory interpretation emphasises the Parliament as the author of the statute and views the statute as a document produced upon formal parliamentary enactment.[11] Chapter Seven showed both Parliament and the statute from another perspective.

Understanding the legislative process identifies the points at which different types of material are produced across the stages of the legislative process. More importantly perhaps is that the research in Chapters Six and Seven shows that materials are made by a variety of actors in the federal law-making process, some part of the executive, some with roles in Parliament and some even outside either of those arms of government (such as an ad hoc report produced by an independent entity). Each piece of material speaks with the voice of an actor in the legislative process. For example, the second reading speech is written by the sponsoring Minister and their office, the explanatory memorandum is produced by members of the bureaucracy, a parliamentary committee report is written by an actor within the parliamentary process, and drafting manuals are written by a specialist executive player, the Office of Parliamentary Counsel.

Chapters Six and Seven show that each piece of extrinsic material has a different purpose and role in its contribution to statute making. The second reading speech is intended to explain the executive policy behind the Bill for the statute to other members of Parliament. Parliamentary committee reports provide a somewhat independent assessment of a proposed statute. Drafting manuals assist with the creation of the law itself. Other materials, such as reports of a law reform commission, are produced by bodies outside the arms of government and inspire the executive to produce a legislative proposal. So, when the courts look to material for evidence of purpose or intent, they are considering the voices not of Parliament but of other actors in the process, be it a member of the executive government, a department, a drafter or a

[10] See Chapter Three [3.3(b)].
[11] Chapter Three [3.2(c)].

committee member.

Each of these materials reveals aspects of the process of the making of the statute. If understood from this perspective, the materials are capable of assessment for the role they play in the formulation of a statute. In a way, looking at extrinsic materials is part of a 'fact finding' mission - an attempt to gain concrete information about the statute being construed.[12] As such, they are bespoke materials which constitute part of the process by which the statute being construed is made. More, the references to the relevance of timing or steps in the legislative process, while not systematic, are implicit recognitions of aspects of the legislative process.

For political scientists, and perhaps many lawyers, these findings may not be surprising. Their significance lies in what they tell us about the law governing extrinsic materials. The research supports a claim that the courts, expressly or not, are engaging with extrinsic materials using an institutional perspective on statutes, while emphasizing a linguistic approach based in an idea of Parliament and statutes in a more formalistic sense.

8.3 Linguistic approach; institutional practice

The linguistic framework of text, context and purpose and the common law principle of 'context' informs much of the judiciary's approach to extrinsic materials. This is revealed by both the case law analysis in Chapter Three and the empirical work reported in Chapters Four and Five. The empirical research reveals that the common law legal principle for access to extrinsic materials is cited more frequently than statutory authority in an Interpretation Act. The case law analysis shows that, to the extent that there are legal principles about the use of materials, they can be found in common law principles. The common law has developed in a way that seems to inform the Interpretation Act provisions, rather than as being subordinate to them. Despite the revolutionary significance of the historical statutory reforms of the 1980s, s 15AB (like its equivalents in other interpretation statutes), with its predominantly institutional foundation, appears to have lost much of its practical relevance in day-to-day statutory interpretation.

Yet despite the common law doctrine that informs the law, the judiciary incorporates

[12] An American judge and scholar has articulated this view: Richard A Posner, *Reflections on Judging* (Harvard University Press, 2013) 232-234.

observable institutional elements into its practice when accessing extrinsic materials. The available implication is that the common law employs a linguistic approach to statutes, but in the use of extrinsic materials for the interpretation of statutes reflects an institutional approach. This reveals a tension between the concepts that the courts use to rationalise recourse to, and use of, extrinsic materials and the law-making processes that the courts impliedly recognize when they use the materials as interpretative aids. This tension may not resolve some of the uncertainty in the law, but it may help explain the existence of some of that uncertainty. Some observations follow.

(a) Explanatory force of principles

Considerations of context and purpose revolve around how to attribute meaning to the words of the statute. Key High Court cases such as *CIC Insurance*, *Project Blue Sky*, *SZTAL* and *R v A2*[13] use these concepts, that emphasise ideas about communication through language, to explain and justify recourse to extrinsic materials. The principle of context offers a way of rationalising access to extraneous sources and the notion of purpose gives one reason to look at those sources.

A difficulty is that the notions of context and purpose are broadly stated ideas grappling with a complex process when it comes to extrinsic material. As others have pointed out, the fundamental principle of context is expressed at such a 'high level of generality' that it does not offer universal or even clear guidance.[14] As Popkin has noted, 'purpose and background can be defined in so many ways and with undetermined weight.'[15] Context has little 'explanatory force,'[16] with uncertain significance from task to task.[17] The principle may be able to rationalise access to the materials, but it leaves a kind of lacuna when it comes to the assessment of their weight and probative value. Both the empirical findings and the legislative process confirm that extrinsic materials are not homogeneous.

The broad nature of context does little to constrain judicial discretion. American judge and

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[13] *CIC Insurance Limited v Bankstown Football Club Ltd* (1997) 187 CLR 384; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; *R v A2* (2019) 269 CLR 507.
[14] Justice John Basten, 'Statutory Interpretation: Choosing Principles of Interpretation' (2017) 91 *Australian Law Journal* 881, 881.
[15] William D Popkin, 'The Collaborative Model of Statutory Interpretation' (1988) 61(3) *Southern California Law Review* 541, 599.
[16] Steven Gardiner, 'What Probuild Says about Statutory Interpretation' (2018) 25 *Australian Journal of Administrative Law* 234, 252.
[17] William D Popkin (n 15) 599.

statutory interpretation commentator, Richard A Posner, would probably describe the notions of context and purpose as 'rhetorical', meaning that they are cited to explain how courts approach extrinsic materials, but do not explain what the courts are actually doing. This is evident in the case law, which provides little evidence of transparency and system in the choice of one type of material over another, and about how those materials are evaluated in the interpretative task. The wider context in which a statute is made necessarily includes 'the law-making process.'[18] Consequently, evaluation and explanation would seem to require an understanding of the role and function of those materials in the legislative process, something which the context principle cannot guide.

The notion of purpose may offer some little more guidance. But there is confusion there too. As discussed in the previous section of this chapter, extrinsic materials cannot reveal the purpose of Parliament in the formalistic sense used in statutory interpretation, but only the purpose of those involved in the legislative process. The principle that we can look to extrinsic materials for evidence of purpose, but that the purpose must ultimately be found in the statute might implicitly recognize that the purpose of the statute authored by Parliament and the purpose of the material employed by someone or some group other than Parliament are inherently different. But a clear explanation of this difference lies in understanding extrinsic materials in the context of the legislative process, not in notions of purpose or context.

(b) Issues of intent

One 'central issue' for extrinsic materials in statutory interpretation 'is the significance of discoverable attitudes of legislators about what they adopted.'[19] Chapter Two spoke of the historical reluctance to have regard to parliamentary and executive materials on the basis that they provided evidence of the executive, not parliamentary, intent. This reluctance to engage with executive intent continues to be manifested in the caution displayed towards executive statements in extrinsic materials where those statements purport to explain the meaning or intended effect of the statutory text.[20] As explained in Chapter Three, there is judicial authority at superior court level that a distinction should be made between statements in extrinsic materials made by the executive about the purpose or policy behind a statute, which

[18] Amy Coney Barrett, 'Congressional Insiders and Outsiders' (2017) 84 *The University of Chicago Law Review* 2193. identifies this recognition with a 'process based' approach as opposed to the textualist approach.
[19] Kent Greenawalt, 'Are Mental States Relevant for Statutory and Constitutional Interpretation' (2000) 85(6) *Cornell Law Review* 1609, 1610.
[20] See Chapter Three [3.4](b).

is relevant and probative, and statements made by the same actor that purport to explain the meaning of a proposed statute or its intended operation or effect, which will 'rarely'[21] assist.

Knowledge about the formation of a Bill suggests a resolution to this issue. As evident from Chapter Six, the executive government is the primary driver behind the formulation of government Bills. When a government Bill is introduced into Parliament, the intent behind the statute is executive government intent. So, while statements made by members of the executive, such as the Minister in a second reading speech or in the speech in reply, might be read as statements of opinion by the individual, that individual represents the executive position and the culmination of the extensive drafting process within the executive. From this, it is not unreasonable to infer that statements by individual members of Parliament representing the government in relation to a government Bill are statements that represent the government agenda. And if the executive is (subject to amendments during parliamentary passage) the original author, its intent or conceptions about meaning remain relevant for the subsequently enacted statute.[22] As well, many executive documents such as second reading speeches, speeches during parliamentary debates and other statements by executive members recorded in Hansard or made as a media statement are the subject of some level of executive approval. This further reinforces that the material reflects the aspirations of an individual as the representative of the executive.

To be clear, this is not to suggest that executive statements of intent or meaning by actors involved in the legislative process should be automatically equated with the meaning of the statutory text. The judiciary are not *bound* by statements in executive or parliamentary material. Like any interpretative aid, it needs to be evaluated for its probative value in the context of whatever other relevant interpretative aids are available to the court.

Giving weight to executive statements about meaning and effect is not a radical proposition. The law of statutory interpretation in the United Kingdom places much greater restrictions on access to extrinsic materials by courts than does Australian law. But when a second reading speech is accessible under English law, one of the key reasons for looking at that material is for clear executive statements about the intent or meaning of the statute.[23] Further, this

[21] *Harrison v Melhem* (2008) 72 NSWLR 380, 384 [12] (Spigelman CJ).
[22] Unless it is the rare instance of a non-government Bill, in which case it will reflect the intent of the sponsor, albeit it is formally given the stamp of authority by parliament.
[23] *Pepper v Hart* [1993] AC 593, 633, 640 (Lord Browne-Wilkinson, Lord Keith, Lord Bridge, Lord Ackner and Lord Oliver agreeing). See also 617 (Lord Griffiths).

approach has the merit of consistency with the plain reading of s 15AB ('determine the meaning') and the original intent behind its enactment in 1984.

(c) Co-existing statutory and common law authorities

As explained in Chapters Two and Three, the law with respect to extrinsic materials is, notionally at least, governed by both statutory principle, s 15AB for federal legislation, and the common law. But the relationship between these two quite different authorities is not clear. The empirical research of Chapter Five shows that the common law principles are cited for access to materials more frequently than the statutory authorities. But the research also shows that in the majority of cases neither the common law nor statutory authority is cited.[24]

One explanation for the uncertainty surrounding the relationship is that recourse to extrinsic materials has become so routine and well established that the courts do not consider it necessary to cite authority for that recourse. Another may lie in the doctrine of separation of powers. The High Court has stated numerous times that it is Parliament's duty to make legislation and it is the courts' emphatic and exclusive duty[25] to interpret that legislation. A court's duty to interpret legislation includes deciding *how* (i.e., according to what rules and principles) that interpretation should be undertaken. Consequently, whilst the Court cannot ignore Parliament's statutory provisions in the Interpretation Acts regarding purpose and extrinsic materials, it arguably has developed its own principles to inform and reflect those statutory provisions in a manner that has largely subsumed the statutory law with respect to the use of extrinsic materials.

The tension between the approach to extrinsic materials at common law, expressed through the rhetoric of language as authored by Parliament, and the institutional elements evident in the court's use of extrinsic material cannot offer a resolution to the uncertainty about the relationship but it does offer a further possible explanation. The tension revealed in the law may be reflective of the discord between the historical impetus behind s 15AB and the common law approach. The historical analysis of Chapter Two shows the institutional underpinning to the enactment of s 15AB. It had a plan, and that was to enable access to material from the legislative process showing, among other things, executive intent. This plan

[24] See Chapter Five [5.4](b).
[25] *Brown v Tasmania* (2017) 261 CLR 328, 480 [486], 486 [506] (Edelman J in dissent, but not as to principle) citing *Marbury v Madison* 5 US 137, 177 (Marshall CJ) (1803), *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35 (Brennan J) and *R v Holmes; Ex parte Altona Petrochemical Co Ltd* (1972) 126 CLR 529, 562 (Windeyer J).

recognised the statute as usually being a tool of government policy.[26] But once the common law overtook the statutory provisions, another rationale dominated that is inconsistent with the original purpose of s 15AB. That linguistic rationale has muddied, if not diluted, the original objective of the statutory changes. So, the lack of clarity over the relationship between the two gateways may not be capable of resolution for the simple reason that they are fundamentally different in approach.

8.4 Implications of an Institutional Perspective

If we accept that an institutional perspective provides a legitimate approach to the courts' use of extrinsic materials and embrace that perspective, there are significant dividends. From a pragmatic perspective – and statutory interpretation is after all a practical endeavour – understanding the legislative process provides useful information for the interpretative task. It permits identification of potentially relevant materials and provides the basis for suggesting criteria to assess the probative value of the materials. At a more conceptual level, the knowledge acquired from understanding the legislative process provides material for a deeper consideration of the High Court's characterisation of statutory interpretation as the reflection of rules known and accepted by the various arms of government.

(a) Pragmatic suggestions

American scholar Abbe Gluck has observed that statutory interpretation 'often seems like a doctrinal and jurisprudential abyss.'[27] When it comes to the use of extrinsic materials in interpretation in Australia this description can seem apt. As discussed in the previous section, application of the concepts of context do not provide much framework for the evaluation of extrinsic materials. The interpreter can be left in the dark as to the reasons for the weight given to one piece of extrinsic material over another, or why one piece is favoured over another. This is not to suggest that judges are not cognizant of the legislative process and its impact on the use of materials, but that there is little evidence of a systematic approach in the law. Use may be an exercise rooted in a deep understanding of the legislative process that is not evident in the reasoning or it may, on the contrary, be a case of courts exercising the wide discretion permitted by the contextual principle and 'looking over a crowd and picking out

[26] See Guy Aitken, 'Division of Constitutional Power and Responsibilities and Coherence in the Interpretation of Statutes' in Jeffrey Barnes (ed), *The Coherence of Statutory Interpretation* (Federation Press, 2019) 22, 23 who says the plan has not been a success.
[27] Abbe R Gluck, 'Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan' (2015) 129 *Harvard Law Review* 62, 62.

your friends'[28].

It was observed in the historical analysis in Chapter Two that the possibility of expressing evaluative criteria for the use of extrinsic materials was considered at the 1983 symposium that addressed extrinsic materials. As observed in Chapter Two, it was also considered by the committee considering Victoria's draft statutory provision on use of extrinsic materials.[29] Ultimately, the only reference to weight included in the statutory reforms was s 15AB(3). It will be recalled that s 15AB(3) suggested the desirability of relying on the ordinary meaning and the avoidance of prolonged legal proceedings as factors relevant to weight.[30] This provision has been largely neglected by the courts since its enactment and, in any event, is expressed in very broad terms.

However, a robust institutional perspective does suggest some factors on which to base a more methodical approach, both in relation to the identification of extrinsic materials and the evaluation of their probative value.

First, the analysis of the legislative process in Chapters Six and Seven identifies materials that are worthy of consideration. As mentioned earlier, there is a diverse range in typology of materials. Chapter Five provided evidence that courts refer to a range of types of materials, and have 'favourites', such as the explanatory memorandum and the second reading speech. The legislative process produces other materials that are potentially of probative feature but appear far less frequently in the findings. As identified in Chapter Seven, the drafting manuals stand out as significant. Commonwealth drafting manuals and directions, prepared by arguably the most independent actor in the preparation of government Bills, the Office of Parliamentary Counsel, contain a wealth of information about the drafting of a federal statute. Yet the empirical evidence in Chapter Five suggests that value has yet to be recognised. These documents operate at the very coalface of statute making, and reflect norms and standards adopted for translating government policy into legislative form. The assumptions made by drafters when preparing statutes are central to an institutional understanding.[31]

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[28] Patricia M. Wald, 'Some Observations on the Use of Legislative History in the 1981 Supreme Court Term' (1983) 68(2) *Iowa Law Review* 195, 214 which Justice Wald attributes to her late colleague Justice Harold Leventhal.
[29] See [2.5].
[30] Chapter Three [3.4].
[31] To borrow the phrase used Basten, 'Choosing Principles of Interpretation' (n 14) 882 (discussing assumptions made in the context of the principle of legality).

Other materials that do not feature frequently or at all in the empirical findings on the High Court and Full Court decisions are the reports of parliamentary committees, the official record of decisions made by Parliament, and the Commonwealth Bills Digests, an objective and independently produced document giving background to a Bill and a document which, according to empirical evidence, is actually used by parliamentarians. Many aspects of Hansard, such as the Minister's speech in reply at the end of the second reading debates and comments during the detail stage of the Parliament process, merit particular attention.

Second, understanding the legislative process suggests criteria for systematically assessing the weight and value of executive and parliamentary materials in the interpretative task. At present, the case law does not provide a systematic approach for rationalizing choices. While lawyers may be practiced at assessing the weight of evidence in other contexts, one thing that an analysis of the legislative process reveals is that it is difficult to assess extrinsic materials in an informed manner without being informed about the way in which they are made. Asking courts to evaluate extrinsic materials is not like asking them to evaluate other extrinsic aids, such as case law and other legislation. Case law is governed by established tools of evaluation - stare decisis, precedent, ratio and obiter, and the court hierarchy. Assessment of other legislation as an interpretative asset is at least to some extent determined by jurisdiction and the concept of *in pari materia*.

An institutional perspective clearly reveals that extrinsic materials are diverse in their source, purpose and timing and emerge from a structured, intricate process. This cries out for the articulation of a systematic approach. The research on the legislative process suggests that the relevance and probative value of extrinsic materials is dependent on certain factors.

Authorship and purpose are significant. The explanatory memorandum is a good example. Analysis of this material in an institutional setting reveals some sound justifications for the frequency with which it is referred to. The document is reflective of executive intent, which the legislative process reveals to be the underpinning of nearly all federal statutes. In addition, the availability of resources and guidelines from the Scrutiny Committees to assist government with the preparation of the document, evidence of the author's awareness of the potential scrutiny of parliamentary committees, and the dialogue mode which the Scrutiny of Bills Committee adopts with the responsible Minister and their department all suggest that the final version of the explanatory memorandum may be one of the more well considered executive documents. Consequently, the frequency with which the memorandum is referred to

(as shown from the empirical work in Chapter Five) is justifiable from an institutional perspective. At the same time, authorship and purpose should not be the only criteria.

Timing is a critical factor. It would be imprudent to consider parliamentary materials related to a Bill, including an explanatory memorandum, in isolation from their place in the parliamentary passage of that Bill. Chapter Seven explains that the time of creation or presentation of a document affects the relevance of that material, whether it is an explanatory memorandum, committee report, a debate in Hansard or a proposed amendment, as it alerts the reader to assess what has happened in Parliament to that point.

Parliamentary procedural rules or procedural devices to overcome standing orders during the passage of legislation in Parliament provide valuable context. Like timing, procedural context may give explanatory clues about a Bill's passage and materials generated by that passage. A truncated or extended debate, expedited passage, or other aspects of a Bill's journey, may be the consequence of use of procedural devices, and may help to explain materials.

Finally, understanding the legislative process raises questions about the implicit common law restriction that, to be probative, extrinsic materials must be publicly available or 'known' to Parliament at the time of enactment.[32] From an institutional perspective, it is difficult to see why an interpreter should be prevented from referring to, for example, a Cabinet memorandum approving a legislative proposal that became a statute, should that document become available after the statute's enactment (through expiry of time under the archives legislation or some other means).[33] Under the current legal framework, the document is not permitted to be used as it does not form part of the background assumptions that can be assumed to be 'known' by Parliament when making the statute. But from an institutional perspective, the document, whenever it becomes available, reflects the policy agenda of the executive (which controls the formulation and drafting of the Bill) at the highest level of government and so has potential probative value. Curiously, back in the 1980s when the statutory reforms to the AIA were being considered, then Deputy Leader of the Opposition said presciently:

[32] See Chapter Three [3.3](b).
[33] See Larry Alexander, 'Goldsworthy on Interpretation of Statutes and Constitutions: Public Meaning, Intended Meaning and the Bogey of Aggregation' in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, 2019) 5, 11 who argues a similar point in the context of a debate about objective intentionalism and subjective intentionalism.

> I do not think it would be giving too much away if the information given to Cabinet in its legislation committee were also given to Parliament. It would materially assist people in understanding the intention of the Government and it would certainly help the Parliament in discussing legislation.[34]

(b) Nature of statutory interpretation

It was not the function of this thesis to analyse the current approach to extrinsic materials informed by any particular legal theory of interpretation. Nor was its aim to suggest a legal theory of interpretation that might arise from a rigorous institutional approach. However, the findings of this work do permit some suggestions as to tentative broader implications for Australian statutory interpretation law. Two are highlighted here.

The first goes to the High Court's characterisation of statutory interpretation which was raised in Chapters One and Three. In brief, the Court has explained that the legislative intent of a statute is determined 'by the application of rules of interpretation accepted by all arms of government in the system of representative democracy'.[35] It will be recalled that while the significance of the statements is appreciated at a broad level, their more precise implications remain unclear. More specifically, it is uncertain if the Court was making an empirical or normative statement with respect to the 'accepted' rules of interpretation.

Regardless of whether the statements are empirical or normative, the knowledge acquired by this study of the legislative process and extrinsic materials can inform these statements. If empirical, in that the Court is asserting that the rules of interpretation are actually known by all arms of government, then the knowledge acquired from an understanding of the legislative process provides a basis to test the accuracy of the statements. If normative, in that a shared understanding of the rules of statutory interpretation between arms of government is aspirational, the knowledge acquired from the study of the legislative process contributes to the formation of an actual common understanding between the branches.

One example from the research undertaken in this thesis is the knowledge acquired about the Commonwealth drafting manuals. As discussed in Chapter Six, these materials, which are probably 'soft law', provide authoritative information about the norms, assumptions and standards that inform the drafting of federal statutes by Commonwealth drafters. This would

[34] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 October 1982, 2041 (Mr Bowen).
[35] *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

contribute to a legitimate 'shared frame of reference'[36] between the executive and the judiciary. As explained in Chapter Six, the apparent asymmetry of understanding about drafting practices between the drafters and the judiciary and the need for better understanding has been raised by a number of parliamentary drafters, including Australian Commonwealth parliamentary counsel.[37]

Similarly, the research reveals that the executive arm and the legislative arm have some level of shared understanding about the making of a statute. For example, the pre-legislative process studied in Chapter Six reveals that the executive, including parliamentary counsel, are well informed about the parliamentary scrutiny that a Bill will undergo while in Parliament, including the terms of reference of the parliamentary committees. Government documents highlight to instructing officers the potential interpretative value of routine extrinsic materials, such as the explanatory memorandum, the second reading speech and the statement of compatibility. There are features of the process which are evidence of interaction between the executive and parliamentary actors. For example, the standing legislative scrutiny committees interact on a semi-formal basis with the executive when scrutinizing a Bill.[38] It is reasonable to infer from these features that that there is a certain level of understanding between executive and parliamentary actors about what is to be expected of the other in relation to a statute being made, and some of the materials that may be relevant to that making. In other words, a better understanding of the legislative process allows identification of the extent to which there are commonalities and differences in the assumptions the various arms of government have about the law-making process.

The second point relates to the first. As mentioned, it is not the object of this thesis to suggest an appropriate theory of interpretation. However, the research does support the legitimacy of an institutional approach with respect to extrinsic materials. It is tempting to go so far as to say that an institutional approach, through the exploration of the legislative process, provides a more appropriate rationale for recourse than the current framework. Recourse to extrinsic

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[36] BJ Ard, 'Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation' (2010) 120 *Yale Law Journal* 185, 200.

[37] Chapter Six [6.6] fn 198. The extensive and publicly available drafting manuals discussed in Chapter Six only relate to Commonwealth legislation. But there are signs that the parliamentary counsel offices of other Australian jurisdictions are also becoming more open about their drafting practices. Both the Australian Capital Territory and New South Wales have published some drafting guidance for some time, but more recently have published detailed drafting guides: ACT Government, Parliamentary Counsel's Office, 'Drafting and Publishing' (Webpage) < https://www.pco.act.gov.au/drafting-and-publishing > NSW Legislation, Parliamentary Counsel's Office, NSW Government (Webpage) < https://legislation.nsw.gov.au/information >

[38] See [7.5(b)].

materials inherently involves looking at materials produced by participants in the legislative process (other than Parliament). Further, even if we accept the 'widest context' as a rationale for that recourse, the notions of context and purpose only offer broad guidance for evaluation and use. Judicial doctrine is that extrinsic materials, as part of wider context, should be taken into account to the extent the materials have a rational connection to the quest to understand the meaning of the statutory text.[39] However, beyond a few broad common law principles and axiomatic statements about the need for the material to be relevant, the law leaves it open to judicial discretion to decide what aspects of context to pick and why. Context and purpose in a speech act model offer broad explanations for recourse and use, but they do not offer immediately apparent robust explanations to rationalise the frequency of recourse, or the range of materials cited, nor the reasons why some materials are preferred over others from case to case. Given that extrinsic materials themselves are diverse in type and features, neither 'context' nor 'purpose' offers satisfactory guidance about how the courts use these materials. As discussed earlier in this Chapter, nor do they offer substantial explanation of which extrinsic materials are used.

This state of affairs prompts consideration of statutory interpretation as a whole. It invites an institutional perspective to be considered for statutory interpretation more generally. This is because, even though this thesis focusses on extrinsic materials, the research highlights another perspective for considering statutes. The model of Parliament as author of the written document and the focus on Parliament's purpose as author is placed in a new light. At the broad level of the doctrine of separation of powers, that Parliament makes a statute is undoubtedly true. In our overarching constitutional structure of the executive, Parliament and the judiciary, it is Parliament's role and function to 'make' statutes. But the analysis in Chapters Six and Seven reveals that characterization of 'Parliament' as a single body that 'makes' law is only one, arguably simplistic view, that does not account for the realities of the legislative process. Realities that the courts engage with when they refer to extrinsic materials.

At the least, understanding the legislative process shows us that, to paraphrase American scholar Victoria Nourse, a statute being construed as a piece of written communication is

[39] Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 29, citing Francis Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th ed, 2008) 588–90, 919 and *CIC Insurance Limited v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

'true but incomplete'.[40] Viewing a statute as the product of many actors invites consideration of a more collaborative model between the arms of government for statutory interpretation which, ironically, is the idea that, at least in part, prompted s 15AB in the first place. Improved understanding of the nature of the legislative process encourages us to view the statute and Parliament in a more pragmatic light. Political scientists have explored Parliament in a process-based light for years. Perhaps it is time for the law to incorporate that perspective. There seems to be precedent. An institutional perspective has been legislatively recognized in at least one Australian Interpretation Act. The ACT purports to cover the law relating to a statute's 'life cycle', defined as including its making, notification, commencement, presentation, operation, interpretation, proof, republication, amendment and repeal.[41]

8.5 Conclusion

In statutory interpretation, when courts are permitted to go outside the statute for interpretative assistance, what materials they are permitted to look at and how they are permitted to use them has been unsettled territory for most of the 20th century in Australia. A systematic institutional approach is just a new way (in Australia at least) 'of looking at some very old problems.'[42]

The statutory reforms of the 1980s seemed to herald a new time of clarity. The executive and other actors in the legislative process prompted the judiciary, through legislative change, to accept a broad range of extrinsic materials. The motivations were varied, but one prime impetus was a desire on the part of the executive to enable the judiciary to give weight to the products of the legislative process, most particularly the executive statements. The assumption was that executive policy and intent was the 'sure guide' to the purpose and intent of the statute itself. Within decades, that rationale had been overtaken by developments in the common law, which modernized old and traditional concepts for construing statutes that focussed on linguistic conventions about understanding text and viewed the text as being made by Parliament. The development of the idea of context to encompass the 'widest sense' led to even easier access to materials outside the statute.

[40] Victoria Nourse, 'Elementary Statutory Interpretation: Rethinking Legislative Intent and History' (2014) 55 *Boston College Law Review* 1613, 1614.
[41] *Legislation Act 2001* (ACT) s 3(3).
[42] Victoria Nourse, *Misreading Law, Misreading Democracy* (Harvard University Press, 2016) 62.

The irony is that the common law developments have left the law relating to extrinsic materials once again in a bit of a muddle. The developments have given rise to a state of tension in the law. An institutional perspective brings this tension into the light. It reveals that the law uses the rationale of context to access materials, based on an assumption of Parliament as the author of the statute, but incorporates institutional perspectives when dealing with that material. This perspective does not suggest how to resolve the tension. Perhaps it cannot be solved. In the end, the current law appears to try to juggle different ideas - linguistic concepts with non-linguistic sources. This is a bit like trying to fit the proverbial square in the round hole – they don't quite fit or, at the least, don't quite do the job properly.

In addition, the existence of both statutory and common law gateways has led to a situation where courts refer freely to all types of extrinsic materials. Yet the principles of context and purpose are inadequate to explain how to use the materials as an interpretative aid. Once courts are permitted to go outside the statute and look at a wide range of materials relevant to the legislative process, it is difficult to envisage how institutional elements could not become relevant.

An institutional analysis does offer some constructive guidance that is arguably more helpful than the principles of context and purpose. It permits us to get down 'in the weeds'[43] of the legislative process and so brings out the gaps in the current approach and provides suggestions for filling those gaps, such as practical suggestions for identifying and assessing materials. More broadly, an institutional perspective has conceptual implications. It provides knowledge that might augment, and help legitimize, the High Court's characterisation of statutory interpretation as reflecting assumptions understood by all arms of government. An institutional perspective stimulates thoughts on the nature of statutory interpretation more generally.

In the end, however, what an institutional analysis discloses is that questions about extrinsic materials in statutory interpretation are far from settled. Despite what was thought in the 1980s, and despite what is thought of as the well settled framework of text, context and purpose now adopted by the courts, the role of extrinsic materials remains an unfinished story.

[43] Rebecca M Kysar, 'Interpreting by the Rules' (2021) 99(6) *Texas Law Review* 1115, 1127.

Appendices to Chapters 4 and 5

Appendix A – High Court Study: List of High Court of Australia decisions coded (2016 to 2019)

Case Name	*Case ID*	*Year*
Plaintiff M68/2015 v Minister for Immigration and Border Protection [2016] HCA 1	M68/2015	2016
CGU Insurance Ltd v Blakeley [2016] HCA 2	M221/2015	2016
Aristocrat Technologies v Allam [2016] HCA 3	S169/2012	2016
Tabcorp Holdings Ltd v Victoria [2016] HCA 4	M81/2015	2016
Victoria v Tatts Group Limited [2016] HCA 5	M83/2015	2016
Queen v GW [2016] HCA 6	C13/2015	2016
Moreton Bay Council v Mekpine [2016] HCA 7	B60/2015	2016
R v Independent Broad-based Anti-Corruption Commissioner [2016] HCA 8	M246/2015	2016
Obeid v The Queen [2016] HCA 9	S265/2015	2016
Obeid v The Queen [No 2] [2016] HCA 10	S265/2015	2016
Fischer v Nemeske Pty Ltd [2016] HCA 11	S223/2015	2016
Zaburoni v The Queen [2016] HCA 12	B69/2015	2016
Mok v DPP (NSW) [2016] HCA 13	S246/2015	2016
IMM v The Queen [2016] HCA 14	D12/2015	2016
Coverdale v West Coast [2016] HCA 15	H10/2015	2016
Attwells v Jackson Lalic [2016] HCA 16	S161/2015	2016
Nguyen v The Queen [2016] HCA 17	S271/2015	2016
Badenach v Calvert [2016] HCA 18	H12/2015	2016
Military rehabilitation Compensation Commission v May [2016] HCA 19	S243/2015	2016
Day v Australian Electoral Officer SA [2016] HCA 20	S77/2016 S109/2016	2016
Bell Group N.V. (in liquidation) v WA [2016] HCA 21	S248/2015; P63/2015; P4/2016	2016
Robinson Helicopter Company Inc v McDermott [2016] HCA 22	B61/2015	2016
Hall v Hall [2016] HCA 23	A7/2016	2016
Alqudsi v The Queen [2016] HCA 24	S279/2015	2016

Betts v The Queen [2016] HCA 25	S281/2015	2016
Crown Melbourne Ltd v Cosmo Hotel (Vic) [2016] HCA 26	M253/2015	2016
Graham v The Queen [2016] HCA 27	B14/2016	2016
Paciocco v Australia & NZ Banking Group Ltd [2016] HCA 28	M219/2015 M220/2015	2016
Minister for Immigration and Border Protection v SZSSJ [2016] HCA 29	S75/2016 S76/2016	2016
Miller v The Queen [2016] HCA 30	A28/2015 A22/2015 A17/2015	2016
Deal v Father Pius Kodakkathanath [2016] HCA 31	M252/2015	2016
Sio v The Queen [2016] HCA 32	S83/2016 S241/2015	2016
NH v Director of Public Prosecutions [2016] HCA 33	A14/2016 A15/2016 A16/2016 A19/2016	2016
Maritime Union v Minister for Immigration and Border Protection [2016] HCA 34	S136/2016	2016
The Queen v Baden-Clay [2016] HCA 35	B33/2016	2016
Murphy v Electoral Commissioner [2016] HCA 36	M247/2015	2016
Prince Alfred College Inc v ADC [2016] HCA 37	A20/2016	2016
Lyons v QLD [2016] HCA 38	B16/2016	2016
Cunningham v Commonwealth [2016] HCA 39	S140/2016	2016
Ainsworth v Albrecht [2016] HCA 40	B37/2016	2016
CFMME Union v Director of the Fair Work Building Industry [2016] HCA 41	A37/2016	2016
Blank v Commissioner of Tax [2016] HCA 42	S144/2016	2016
Comcare v Martin [2016] HCA 43	S142/2016	2016
Timbercorp Finance Pty Ltd v Collins [2016] HCA 44	M98/2016 M101/2016	2016
Bywater Investments Ltd v Commissioner of Taxation [2016] HCA 45	S134/2016 S135/2016	2016
Castle v The Queen [2016] HCA 46	A24/2016 A26/2016	2016
Simic v NSW Land Corporation [2016] HCA 47	S136/2016	2016
The Queen v Kilic [2016] HCA 48	M105/2016	2016
ACCC v Flight Centre Travel [2016] HCA 49	B15/2016	2016
NSW Aboriginal Land Council v Minister Administering the Crown Lands Act [2016] HCA 50	S168/2016	2016

ElecNet (Aust) Pty Ltd v Commissioner of Tax [2016] HCA 51	M104/2016	2016
Southern Han Breakfast Point Pty Ltd v Lewence Construction Pty Ltd [2016] HCA 52	S199/2016	2016
RP v The Queen [2016] HCA 53	S193/2016	2016
Mercanti v Mercanti [2017] HCA 1	P63/2016	2017
Re Culleton [2017] HCA 3	C15/2016	2017
Re Culleton [No 2] [2017] HCA 4	C15/2016	2017
Palmer v Ayres [2017] HCA 5	B52/2016 B55/2016	2017
Commissioner of State Revenue v ACN 005 057 349 Pty Ltdv [2017] HCA 6	M88/2016 M89/2016	2017
WA Planning Commission v Southregal Pty Ltd [2017] HCA 7	P47/2016 P48/2016	2017
Bondelmonte v Bondelmonte [2017] HCA 8	S247/2016	2017
Perara-Cathcart v The Queen [2017] HCA 9	A39/2016	2017
Prior v Mole [2017] HCA 10	D5/2016	2017
Minister for Immigration and Border Protection v Kumar [2017] HCA 11	P49/2016	2017
Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd [2017] HCA 12	M143/2016	2017
Kendirjian v Lepore [2017] HCA 13	S170/2016	2017
Re Day [No2] [2017] HCA 14	C14/2016	2017
Talacko v Bennett [2017] HCA 15	M154/2016	2017
Plaintiff M96A v Commonwealth [2017] HCA 16	M96/2016	2017
Pickering v Queen [2017] HCA 17	B68/2016	2017
Aubrey v The Queen [2017] HCA 18	S274/2016	2017
Smith v The Queen [2017] HCA 19	S249/2016 M144/2016	2017
Hughes v The Queen [2017] HCA 20;	S226/2016	2017
Air New Zealand Ltd v ACCC [2017] HCA 21	S245/2016 S248/2016	2017
Rizeq v Western Australia [2017] HCA 23	P55/2016	2017
The Queen v Dickman [2017] HCA 24	M162/2016	2017
GAX v The Queen [2017] HCA 25	B72/2016	2017
Commissioner of Taxation v Jayasinghe [2017] HCA 26	S275/2016	2017
IL v The Queen [2017] HCA 27	S270/2016	2017
Ramsay Health Care Australia Pty Ltd v Compton [2017] HCA 28	S53/2017	2017
Knight v Victoria [2017] HCA 29	M251/2015	2017
Forrest & Forrest Pty Ltd v Wilson [2017] HCA 30	P59/2016	2017
Plaintiff S195/2016 v Minister for Immigration and Border Protection [2017] HCA 31	S195/2016	2017
Transport Accident Commission v Katanas [2017] HCA 32	M160/2016	2017

Graham v Minister for Immigration and Border Protection [2017] HCA 33	M97/2016 P58/2016	2017
SZTAL v Minister for Immigration and Border Protection [2017] HCA 34	S272/2016 S273/2016	2017
The Queen v Holliday [2017] HCA 35	C3/2017	2017
Hamra v The Queen [2017] HCA 38	A14/2017	2017
Queen v Kookheea	M159/2016	2017
Chiro v Queen [2017] HCA 37	A9/2017	2017
Wilkie v Commonwealth [2017] HCA 40	M105 M106/2017	2017
DPP v Dalgliesh [2017] HCA 41	M1/2017	2017
Koani v The Queen [2017] HCA 42	B20/2017	2017
Brown v Tasmania [2017] HCA 43	H3/2016	2017
Re Canavan [2017] HCA 45	C11/2017 & others	2017
Re Barrow [2017] HCA 47	M122/2017	2017
Van Beelen v The Queen [2017] HCA 48	A8/2017	2017
Thorne v Kennedy [2017] HCA 49	B14/2017	2017
Dimitrov v Supreme Court Victoria [2017] HCA 51	S204/2017	2017
Re Nash [No 2] [2017] HCA 52	C17/2017	2017
ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association [2017] HCA 53	M33/2017	2017
Esso Australia Pty Ltd v AWU [2017] HCA 54	M185/2016 M187/2016	2017
Regional Express Holding Ltd v Australian Federation of Air Pilots [2017] HCA 55	M71/2017	2017
The following **2017** High Court decisions were **excluded** from the study on the basis of the coding rules: *DWN042 v The Republic of Nauru* [2017] HCA 56 (appeal from the Supreme Court of Nauru), *HDWN042 v The Republic of Nauru* [2017] HCA 50 (appeal from the Supreme Court of Nauru), *Cecil v Director of Public Prosecutions (Nauru)* [2017] HCA 46 (appeal from the Supreme Court of Nauru), *BRF038 v The Republic of Nauru* [2017] HCA 44 (appeal from the Supreme Court of Nauru), *Re Roberts* [2017] HCA 39 (fact finding), *New South Wales v DC* [2017] HCA 22 (special leave) and *Re Day* [2017] HCA 2 (trial-fact finding).		

Commissioner of Australian Federal Polic v Hart [2018] HCA 1	B21/2017 B22/2017 B23/2017	2018
Falzon v Minister for Immigration and Border Protection [2018] HCA 2	S31/2017	2018
Australian Building and Construction Commissioner v CFME Union [2018] HCA 3	M65/2017	2018
Probuild Construction (Aust) Pty Ltd v Shade Systems [2018] HCA 4	S145/2017	2018

Maxcon Constructions Pty Ltd v Vadasz [2018] HCA 5	A17/2017	2018
Re Lambie [2018] HCA 6	C27/2017	2018
Kalbasi v WA [2018] HCA 7	P21/2017	2018
Irwin v The Queen [2018] HCA 8	B48/2017	2018
Pike v Tighe [2018] HCA 9	B33/2017	2018
Re Kakoschke-Moore [2018] HCA 10	C30/2017	2018
Alley v Gillespie [2018] HCA 11	S190/2017	2018
Clone Pty Ltd v Players Pty Ltd [2018] HCA 12	A22/2017 A23/2017	2018
Craig v The Queen [2018] HCA 13	B24/2017	2018
Burns v Corbett [2018] HCA 15	S183/2017 S185/2017 S186/2017 S187/2017 S188/2017	2018
Plaintiff M174/2016 v Minister for Immigration and Border Protection [2018] HCA 16	M174/2016	2018
Re Gallagher [2018] HCA 17	C32/2017	2018
Collins v The Queen [2018] HCA 18	B68/2017	2018
Amaca Pty Limited v Latz [2018] HCA 22	A8/2018 A7/2018	2018
Rozenblit v Vainer [2018] HCA 23	M114/2017	2018
Trkulja v Google LLC [2018] HCA 25	M88/2017	2018
DL v The Queen [2018] HCA 26	A38/2017	2018
Minogue v Victoria [2018] HCA 27	M2/2017	2018
Lane v Queen [2018] HCA 28	S308/2017	2018
Queen v Falzon [2018] HCA 29	M161/2017	2018
Minister Immigration and Border Protection v SZVFW [2018] HCA 30	S244/2017	2018
Commissioner of Taxation (Cth) v Thomas [2018] HCA 31	B60/2017 B61/2017 B62/2017 B63/2017	2018
DL v Queen [2018] HCA 32	S309/2017	2018
Re Culleton [2018] HCA 33	C15/2016	2018
Hossain v Minister for Immigration and Border Protection [2018] HCA 34	S1/2018	2018
Shrestha v Minister for Immigration and Border Protection [2018] HCA 35	M141/2017 M142/2017 M143/2017	2018
Nobarani v Mariconte [2018] HCA 36	S270/2017	2018
Mighty River International Ltd v Hughes [2018] HCA 38	P7/2018 P8/2018	2018
Pipikos v Trayans [2018] HCA 39	A30/2017	2018

R v Bauer [2018] HCA 40	M1/2018	2018
Ancient Order of Foresters v Lifeplan Australia Friendly Society Ltd [2018] HCA 43	A37/2017	2018
Rodi v WA [2018] HCA 44	P24/2018	2018
UBS AG v Tyne [2018] HCA 45	B54/2017	2018
Johnson v Queen [2018] HCA 48	A9/2018	2018
Nobarani v Mariconte [No 2] [2018] HCA 49	S270/2017	2018
Wehbe v Minister for Home Affairs [2018] HCA 50	S217/2018	2018
Plaintiff S164/2018 v Minister Home Affairs [2018] HCA 51	S229/2018	2018
McPhillamy v The Queen [2018] HCA 52	S121/2018	2018
Strickland v Cth DPP [2018] HCA 53	M168/2017 M174/2017 M175/2017 M176/2017	2018
Comptroller General Customs v Zappia [2018] HCA 54	S91/2018	2018
SAS Trustee Corporation v Miles [2018] HCA 55	S260/2017	2018
Republic Nauru v WET040 [2018] HCA 56	M154/2017	2018
Alford v Parliamentary Joint Committee [2018] HCA 57	B59/2018	2018
AB v CD [2018] HCA 58	M73/2018 M74/2018	2018
Commissioner of State Revenue v Placer Dome Inc [2018] HCA 59	P6/2018	2018
Commissioner Tax v Tomaras [2018] HCA 62	B9/2018	2018
ASIC v Lewski [2018] HCA 63	M79/2018 M80/2018 M81/2018 M82/2018 M83/2018	2018
The following **2018** High Court decisions were **excluded** from the study on the basis of the coding rules as they appeals from Supreme Court of Nauru: *TTY167 v Republic of Nauru* [2018] HCA 61; *The Republic of Nauru v WET040 [No 2]* [2018] HCA 60; *WET052 v The Republic of Nauru* [2018] HCA 47; *ETA067 v The Republic of Nauru* [2018] HCA 46; *QLN146 v Republic of Nauru* [2018] HCA 42; *QLN147 v The Republic of Nauru* [2018] HCA 41; *HFM043 v The Republic of Nauru* [2018] HCA 37; *CRI028 v The Republic of Nauru* [2018] HCA 24; *EMP144 v The Republic of Nauru* [2018] HCA 21; *EMP144 v The Republic of Nauru* [2018] HCA 21; *CRI026 v The Republic of Nauru* [2018] HCA 19; *WET044 v The Republic of Nauru* [2018] HCA 14.		
Unions NSW v State NSW [2019] HCA 1	S36/2018 M75/2018 S135/2018	2019
Work Health Authority v Outback Ballooning Pty Ltd [2019] HCA 2	D4/2018	2019
Minister for Immigration and Border Protection v SZMTA [2019] HCA 3	S36/2018 M75/2018 S135/2018	2019
Williams v Wreck Bay Aboriginal Community Council [2019] HCA 4	C5/2018	2019

McKell v Queen [2019] HCA 5	S223/2018	2019
AB v CD [2019] HCA 6	M73/2018 M74/2018	2019
NT v Griffiths [2019] HCA 7	D1/2018 D2/2018 D3/2018	2019
Grajewski v DPP [2019] HCA 8	S141/2018	2019
DPP Ref No1 of 2017 [2019] HCA 9	M129/2018	2019
OKS v WA [2019] HCA 10	P62/2018	2019
Clubb v Edwards [2019] HCA 11	M46/2018 H2/2018	2019
Tjungarrayi v WA [2019] HCA 12	P37/2018 P38/2018	2019
Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13	S143/2018 S144/2018	2019
Parkes Shire Council v SW Helicopters Pty Ltd [2019] HCA 14	S140/2018	2019
Spence v Queensland [2019] HCA 15	B35/2018	2019
Frugtniet v ASIC [2019] HCA 16	M136/2018	2019
Plaintiff M47 v Minister Home Affairs [2019] HCA 17	M47/2018	2019
ASIC v Kobelt [2019] HCA 18	A32/2018	2019
NT v Griffiths No2 [2019] HCA 19	D1/2018 D2/2018 D3/2018	2019
Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth[2019] HCA 20	M137/2018	2019
Masson v Parsons [2019] HCA 21	S6/2019	2019
Victorian Building Authority v Andriotis [2019] HCA 22	M134/2018	2019
Comcare v Banerji [2019] HCA 23	C12/2018	2019
Palmer v Australian Electoral Commission [2019] HCA 24	B19/2019	2019
NT v Sangare [2019] HCA 25	D11/2018	2019
Glencore International AG v Commissioner of Taxation [2019] HCA 26	S256/2018	2019
Brisbane City Council v Amos [2019] HCA 27	B47/2018	2019
Lee v Lee [2019] HCA 28	B61/2018 B62/2018 B63/2018	2019
Bell Lawyers Pty Ltd v Pentelow [2019] HCA 29	S352/2018	2019
Taylor v Attorney-General (Cth) [2019] HCA 30	M36/2018	2019
Minogue v Victoria [2019] HCA 31	M162/2018	2019
Mann v Paterson Constructions Pty Ltd [2019] HCA 32	M197/2018	2019

Connective Services Pty Ltd v Slea Pty Ltd [2019] HCA 33	M203/2018	2019
BVD17 v Minister for Immigration and Border Protection [2019] HCA 34	S46/2019	2019
R v A2 [2019] HCA 35	S43/2019 S44/2019 S45/2019	2019
Commissioner Tax v Sharpcan Pty Ltd [2019] HCA 36	M52/2019	2019
Fennell v Queen [2019] HCA 37	B20/2019	2019
Vella v Commissioner Police (NSW) [2019] HCA 38	S30/2019	2019
Lordianto v Commissoner of Federal Police [2019] HCA 39	110/2019 P17/2019	2019
HT v The Queen [2019] HCA 40	S123/2019	2019
Bosanac v Commissioner of Taxation [2019] HCA 41	P41/2019	2019
Plaintiff S53/2019 v Minister for Immigration and Border Protection [2019] HCA 42	S53/2019	2019
AWI16 v Minister for Immigration and Border Protection [2019] HCA 43	S81/2019	2019
EBT16 v Minister for Immigration and Border Protection [2019] HCA 44	B37/2019	2019
BMW Australia Ltd v Brewster [2019] HCA 45	S152/2019 S154/2019	2019
NSW v Robinson [2019] HCA 46	S119/2019	2019
DBE17 v Commonwealth [2019] HCA 47	M124/2019	2019
De Silva v Queen [2019] HCA 48	B24/2019	2019
Boensch v Pascoe [2019] HCA 49	S216/2019	2019
CNY17 v Minister for Immigration and Border Protection [2019] HCA 50	M72/2019	2019

Appendices to Chapter 4

Appendix B – FCAFC Study: List of Federal Court of Australia Full Court decisions coded (July 2018 to June 2019)

Case Name	*Case ID*	*Year*
Ellis v Central Land Council [2019] FCAFC 1	VID 874 of 2018	2019
Nichia Corporation v Arrow Electronics Australia Pty Ltd [2019] FCAFC 2	NSD 1638 of 2017	2019
Singh v Minister for Home Affairs [2019] FCAFC 3	NSD 1073 of 2018	2019
Commissioner of Tax v BHP Billiton Ltd [2019] FCAFC 4	QUD 27 of 2018	2019
Commonwealth Director of Public Prosecutions v Christian [2019] FCAFC 5	NSD 1437 of 2018	2019
BIL17 v Minister for Immigration & Border Protection [2019] FCAFC 6	NSD 728 of 2018	2019
Minister for Immigration & Border Protection v Haq [2019] FCAFC 7	NSD 1179 of 2018	2019
Tiger Yacht Management Ltd v Morris [2019] FCAFC 8	NSD 293 of 2018	2019
Minister for Immigration & Border Protection v Gill [2019] FCAFC 9	VID 874 of 2018	2019
DKX17 v Federal Circuit of Australia [2019] FCAFC 10	NSD 247 of 2018	2019
Ellis v Central Land Council (No 2) [2019] FCAFC 11	NTD 15 of 2018	2019
Hocking v Director-General of the National Archives of Australia [2019] FCAFC 12	NSD 530 of 2018	2019
Romanov v Minister for Home Affairs [2019] FCAFC 13	NSD 1971 of 2018	2019
Coshott v Parker [2019] FCAFC 14	NSD 763 of 2018	2019
Australian Meat Group Pty Ltd v JBS Australia Pty Limited (No 2) [2019] FCAFC 15	QUD 720 of 2017	2019
Cigarette & Gift Warehouse Pty Ltd v Whelan [2019] FCAFC 16	QUD 11 of 2018	2019
BVG17 v BVH17 [2019] FCAFC 17	NSD 1313 of 2017	2019
DED16 v Minister for Home Affairs [2019] FCAFC 18	VID 1152 of 2018	2019
Doggett v Commonwealth Bank of Australia [2019] FCAFC 19	VID 1150 of 2017	2019
EVS17 v Minister for Immigration & Border Protection [2019] FCAFC 20	NSD 867 of 2018	2019
Treasury Wine Estates Vintners Limited v Pearson [2019] FCAFC 21	SAD 74 and 197 of 2018	2019

Singh v Minister for Immigration & Border Protection [2019] FCAFC 22	NSD 816 of 2018	2019
Coshott v Burke (No 3) [2019] FCAFC 23	NSD 1137 of 2017	2019
Liu v Stephen Grubits and Associates [2019] FCAFC 24	NSD 783 of 2018	2019
Helicopter Resources Pty Ltd v Commonwealth of Australia [2019] FCAFC 25	NSD 1222 of 2018	2019
Minister for Industrial Relations (Vic) v Esso Australia Pty Ltd [2019] FCAFC 26	VID 981 of 2018	2019
AQM18 v Minister for Immigration & Border Protection [2019] FCAFC 27	VID 829 of 2018	2019
Sanofi-Aventis Deutschland GmbH v Alphapharm Pty Ltd [2019] FCAFC 28	NSD 2398 of 2018	2019
Harding v Commissioner of Taxation [2019] FCAFC 29	QUD 442 of 2018	2019
SZTVU v Minister for Home Affairs [2019] FCAFC 30	NSD 1368 of 2018	2019
Fattah v Minister for Home Affairs [2019] FCAFC 31	NSD 1265 of 2018	2019
Umoona Tjutagku Health Aboriginal Corp v Walsh [2019] FCAFC 32	SAD 305 of 2017	2019
Candemir v Minister for Home Affairs [2019] FCAFC 33	NSD 1856 of 2018	2019
Westpac Banking Corporation v Lenthall [2019] FCAFC 34	NSD 1880 of 2018	2019
ALDI Foods v Shop Distributive and Allied Employees' Association etc [2019] FCAFC 35	NSD 1097 of 2018	2019
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2019] FCAFC 36	VID 1030 of 2018	2019
Rexel Electrical Supplies Pty Ltd v Mentha (No 2) [2019] FCAFC 37	VID 1412 of 2017	2019
ASB17 v Minister for Home Affairs [2019] FCAFC 38	VID 1211 of 2018	2019
Iannuzzi v Commissioner of Taxation [2019] FCAFC 39	NSD 1366 of 2018	2019
Minister for Immigration and Border Protection v CPA16 [2019] FCAFC 40	VID 1324 of 2018	2019
Fahme v Minister Home Affairs [2019] FCAFC 41	NSD 884 of 2018	2019
Liu v Stephen Grubits (No 2) [2019] FCAFC 42	NSD 783 of 2018	2019
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Minister for Home Affairs v CLR15 [2019] FCAFC 45	VID 612 of 2018	2019
CGA15 v Minister for Home Affairs [2019] FCAFC 46	VID 767 of 2018	2019
AKH16 v Minister for Immigration and Border Protection [2019] FCAFC 47	VID 1201 of 2017	2019

AON15 v Minister for Immigration and Border Protection [2019] FCAFC 48	VID 1093 of 2017	2019
Minister for Immigration and Border Protection v Mohammed [2019] FCAFC 49	VID 1405 of 2018	2019
Robinson v Deep Investments Pty Ltd (No 2) [2019] FCAFC 50	NSD 853 of 2018 NSD 855 of 2018 NSD 856 of 2018	2019
Commissioner of Taxation v Resource Capital Fund IV LP [2019] FCAFC 51	NSD 283 of 2018 NSD 285 of 2018	2019
Kraues v Office of Migration Agents Authority [2019] FCAFC 52	NSD 898 of 2018	2019
Kaur v Minister for Immigration and Border Protection [2019] FCAFC 53	VID 167 of 2018	2019
CXXXVIII v Commonwealth [2019] FCAFC 54	SAD 225 of 2018	2019
Hong v Minister for Immigration and Border Protection [2019] FCAFC 55	NSD 1435 of 2018	2019
Parker v Australian Building and Construction Commissioner [2019] FCAFC 56	NSD 2227 of 2017	2019
Commonwealth v Snell [2019] FCAFC 57	QUD 365 of 2018	2019
Minister for Home Affairs v Hunt [2019] FCAFC 58	WAD 497 of 2018	2019
Australian Building and Construction Commissioner v CFMME Union [2019] FCAFC 59	QUD 324 of 2018	2019
Triabunna Investments Pty Ltd v Minister for Environment and Energy [2019] FCAFC 60	TAD 12 of 2018	2019
CQR17 v Minister for Immigration and Border Protection [2019] FCAFC 61	NSD 940 of 2018	2019
Erskine v Gordon Crescent Lane [2019] FCAFC 62	NSD 1493 of 2018	2019
DOB18 v Minister for Home Affairs [2019] FCAFC 63	NSD 2040 of 2018	2019
DFQ17 v Minister for Immigration and Border Protection [2019] FCAFC 64	NSD 369 of 2018	2019
Davies v Lazer Safe Pty Ltd [2019] FCAFC 65	WAD 251 of 2018	2019
United Voice v Wilson Security Pty Ltd [2019] FCAFC 66	ACD 86 of 2018	2019
Degning v Minister for Home Affairs [2019] FCAFC 67	NSD 1591 of 2018	2019
MZAOL v Minister for Immigration and Border Protection [2019] FCAFC 68	VID 900 of 2017	2019
Fair Work Ombudsman v CFMMU [2019] FCAFC 69	NSD 1248 of 2018	2019
CPB Contractors Pty Ltd v CFMMEU [2019] FCAFC 70	NSD 1960 of 2018	2019
Bauer Consumer Media Ltd v Evergreen Television Pty Ltd [2019] FCAFC 71	NSD 808 of 2017 NSD 809 of 2017	2019
MZZGE v Minister for Home Affairs [2019] FCAFC 72	VID 1665 of 2018	2019
Erskine v Gordon Crescent Lane (No 2) [2019] FCAFC 73	NSD 1493 of 2018	2019
Tsvetnenko v US [2019] FCAFC 74	WAD 137 of 2019	2019

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FEZ17 v Minister for Home Affairs [2019] FCAFC 76	NSD 2184 of 2018	2019
Northern Land Council v Quall [2019] FCAFC 77	NTD 30 of 2018	2019
Andrwas v Minister for Home Affairs [2019] FCAFC 78	VID 1621 of 2018	2019
Minister for Home Affairs v G [2019] FCAFC 79	VID 1165 of 2018	2019
Minister for Home Affairs v CSH18 [2019] FCAFC 80	NSD 2277 of 2018; NSD 2278 of 2018	2019
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Zreika v Royal [2019] FCAFC 82	NSD 1793 of 2016; NSD 1794 of 2016; NSD 1798 of 2016; NSD 1799 of 2016; NSD 1801 of 2016; NSD 29 of 2017	2019
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Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union [2019] FCAFC 84	NSD 542 of 2018	2019
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Cristovao v Registrar Trott [2019] FCAFC 88	WAD 508 of 2018	2019
Ibrahim v Minister for Home Affairs [2019] FCAFC 89	SAD 275 of 2018	2019
Israel Discount Bank v ACN 078 272 867 Pty Ltd [2019] FCAFC 90	NSD 1304 of 2018	2019
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Ali v Minister for Home Affairs [2019] FCAFC 93	NSD 2302 of 2018	2019
Kemppi v Adani Mining Pty Ltd [2019] FCAFC 94	QUD 638 of 2018	2019
Phonographic Performance Company of Australia Limited v Copyright Tribunal of Australia [2019] FCAFC 95	NSD 945 of 2016	2019
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Trident Seafoods Corporation v Trident Foods Pty Ltd [2019] FCAFC 100	NSD 1951 of 2018 NSD 2133 of 2018	2019
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Oztech Pty Ltd v Public Trustee Qld [2019] FCAFC 102	NSD 1185 of 2018	2019
Dutta v Telstra Corporation [2019] FCAFC 103	QUD 936 of 2018	2019
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FER17 v Minister for Immigration, Citizenship and Multicultural Affairs [2019] FCAFC 106	SAD 3 of 2019	2019
Klemweb Nominees Pty Ltd v BHP Group Limited [2019] FCAFC 107	VID 58 of 2019 VID 59 of 2019 VID 127 of 2019 VID 169 of 2019	2019
Vo v Minister for Home Affairs [2019] FCAFC 108	WAD 603 of 2018	2019
CFMME Union v Anglo American Australia Limited [2019] FCAFC 109	NSD 2337 of 2018	2019
Russell v Minister for Home Affairs [2019] FCAFC 110	NSD 2403 of 2018	2019
Sowa v Minister for Home Affairs [2019] FCAFC 111	NSD 20 of 2019	2019
BQL15 v Minister for Immigration and Border Protection [2018] FCAFC 104	NSD 1515 of 2017	2018
Homart Pharmaceuticals v Careline Australia [2018] FCAFC 105	NSD 661 of 2017	2018
AHK16 v Minister for Immigration and Border Protection [2018] FCAFC 106	VID 97 of 2018	2018
CFMME Union v BHP Billiton Nickel West Pty Ltd [2018] FCAFC 107	NSD 1644 of 2017	2018
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Minister for Immigration and Border Protection v CQW17 [2018] FCAFC 110	NSD 1848 of 2017	2018
AQU17 v Minister for Immigration and Border Protection [2018] FCAFC 111	VID 86 of 2018	2018
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Minister Immigration and Border Protection v Ly [2018] FCAFC 123	NSD 541 of 2018	2018
QSVS v Minister for Home Affairs [2018] FCAFC 124	NSD 731 of 2018	2018
Forster v Minister for Immigration and Border Protection [2018] FCAFC 125	WAD 623 of 2017	2018
CFMME Union v Australian Building and Construction Commissioner [2018] FCAFC 126	QUD 610 of 2017	2018
Ford v Comcare [2018] FCAFC 127	VID 430 of 2018	2018
ACCC v LG Electronics Australia Pty Ltd (No 2) [2018] FCAFC 128	VID 1043 of 2017	2018
AYF16 v Minister for Immigration and Border Protection [2018] FCAFC 129	NSD 1208 of 2017	2018
Innes v AAL Aviation (No 2) [2018] FCAFC 130	ACD 12 of 2016 ACD 13 of 2016	2018
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Broadspectrum (Aust) Pty Ltd v United Voice [2018] FCAFC 139	WAD 474 of 2017	2018
BUD17 v Minister for Home Affairs [2018] FCAFC 140	WAD 154 of 2018	2018
ASV16 v Minister for Immigration and Border Protection [2018] FCAFC 141	VID 3 of 2018	2018
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SZLPH V Minister for Immigration and Border Protection [2018] FCAFC 145	NSD 251 of 2018	2018
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Aldi Foods Pty Ltd v Moroccanoil Israel Ltd (No 2) [2018] FCAFC 147	NSD 1654 of 2017 NSD 1656 of 2017	2018
Shah v Hagemrad [2018] FCAFC 148	NSD 252 of 2018	2018
Hay v Minister for Home Affairs [2018] FCAFC 149	WAD 87 of 2018	2018
CIT17 v Minister for Immigration and Border Protection [2018] FCAFC 150	NSD 311 of 2018	2018
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Altintas v O'Dea Lawyers [2018] FCAFC 165	SAD 347 of 2017	2018
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Wileypark Pty Ltd v AMP Ltd (No 2) [2018] FCAFC 167	VID 535 of 2018 VID 670 of 2018 VID 680 of 2018 NSD 878 of 2018	2018
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B Cases

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