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Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation

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ABSTRACT

When s 15AB of the *Acts Interpretation Act 1901* (Cth) was enacted over 30 years ago, its purpose was to establish clear and particular rules about when extrinsic materials could be used in the interpretation of Commonwealth legislation. Accordingly, s 15AB stipulates three threshold tests, at least one of which must be satisfied before extrinsic materials can be considered as an aid to interpretation. However, developments in the common law since that enactment have largely overtaken the utility and effect of s 15AB (and its State equivalents). In particular, the development of the 'contextual' approach to statutory interpretation has meant that the common law now permits recourse to extrinsic materials, including parliamentary ones, without the need to pass any gateway test. Consequently, the important emerging issue is, not when such materials can be considered, but how they may be used. This article, using recent High Court cases, examines some of the key threads that have emerged about the 'appropriate use' of parliamentary materials, particularly with respect to identifying the purpose of the statute and as against the weight of the statutory text.

I INTRODUCTION

It was submitted on behalf of the respondents that ... it was permissible ... to look at ... the report of the debates in both chambers ... when the Bill was being debated. It is established by many decisions of the highest authority that material of that kind may not be used as an aid to the construction of a statute. This rule is neither irrational nor outmoded. It is based upon sound practical reasons ... The debates in Parliament would often introduce a new source of argument and confusion, rather than provide a guide to the construction of a statute.¹

There is nostalgic knowing humour in reflecting upon the state of affairs over 30 years ago, when the use of extrinsic materials, especially parliamentary materials, was largely regarded with caution and distrust. In present times, the use of extrinsic materials as a tool in statutory construction is readily accepted. Extrinsic materials are now 'routinely examined'² in an attempt to attribute meaning in accordance with

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¹ *Commissioner for Prices & Consumer Affairs (SA) v Charles Moore* (1977) 139 CLR 449, 461 (Gibbs J). Barwick CJ and Stephen J agreed on this point.

² *Byrnes v Kendle* (2011) 243 CLR 253, 284 [97] (Heydon and Crennan JJ).

legislative objective. A quick search³ of High Court cases in 2012 and 2013 reveals that, in each year, approximately a third referred at one point to parliamentary materials.⁴

The ability to use parliamentary materials began to receive more attention in the 1980s. In 1981 and then again in 1983, the Commonwealth Attorney-General's Department, with bi-partisan support, arranged a gathering of distinguished members of the legal profession⁵ in Canberra to discuss statutory interpretative approaches, including the use of parliamentary materials. There were two important consequences of these symposiums. The first was the enactment of s 15AA of the *Acts Interpretation Act 1901* (Cth) ('*Acts Interpretation Act*'), which mandated a purposive approach to interpretation.⁶ The second was the amendment of the *Acts Interpretation Act* in 1984 to include s 15AB,⁷ the first statutory provision in Australia to provide authority for the use of extrinsic materials in the interpretation of statutory provisions. All States, except South Australia, soon followed by enacting a provision allowing access to extrinsic materials, in many cases in substantially identical terms to s 15AB.⁸

Section 15AB, however, did not contemplate an open door for recourse to extrinsic materials. While it was generally accepted that the *type* of materials that could be considered should not be limited, the symposiums and the subsequent parliamentary debates focussed much discussion on *when* resort should be permitted.⁹ Concern over maintaining the importance of the text, as well as issues such as accessibility and the increased workload that would result from allowing such consideration¹⁰ ultimately

³ The search used the key words of parliamentary debates, second reading speeches and explanatory memorandum. The search engine used was <<http://www.austlii.edu.au/databases.html>>.

⁴ In 2012, of 61 High Court decisions, 24 referred to at least one of these materials. In 2013, of 60 decisions, 19 referred to at least one of these materials.

⁵ Attendees included the High Court Chief Justice and Justices, other judiciary members (including from the UK), members of Parliament, senior counsel, parliamentary drafts people and academic scholars.

⁶ A direct consequence of the first symposium – Attorney-General's Department, *Another Look at Statutory Interpretation*, Canberra, 1981 (Australian Government Publishing Service, 1982). Note that s 15AA was amended by the *Acts Interpretation Amendment Act 2011* (Cth) but still refers to a purposive approach.

⁷ It was the second of the two symposiums that concentrated on the use of extrinsic materials. See Attorney-General's Department, *Symposium on Statutory Interpretation*, Canberra, 5 February 1983 (Australian Government Publishing Service). The first symposium focussed on the purposive approach but also provided some commentary on the use of extrinsic materials.

⁸ States with legislation substantially similar to s 15AB are *Interpretation Act 1987* (NSW) s 34; *Interpretation Act 1987* (NT) s 62B; *Acts Interpretation Act 1954* (Qld) s 14B; *Acts Interpretation Act 1931* (Tas) s 8B and *Interpretation Act 1984* (WA) s 19. Section 35 of the *Interpretation of Legislation Act 1984* (Vic) and s 141 of the *Legislation Act 2001* (ACT) have broader wording with no limitation on the circumstances in which material can be considered. South Australia has no equivalent provision and relies solely on the common law for recourse to parliamentary materials.

⁹ See, eg, *Symposium on Statutory Interpretation 1983*, above n 7, 29, 77–8; Commonwealth, *Parliamentary Debates*, Senate, 8 March 1984, 583 (Senator Gareth Evans) and Commonwealth, *Parliamentary Debates*, Senate, 30 March 1984, 955 (Senator Peter Durack).

¹⁰ *Symposium on Statutory Interpretation 1983*, above n 7, 82–4.

led to the provisions of the now s 15AB(1) specifying only three circumstances in which extrinsic material can be considered.

Developments in the law since 1984, however, have diluted the thresholds in s 15AB(1) to a nullity. The practical reality of applying the section, together with developments in the common law, has left little in the way of hurdles to access such materials.

With parliamentary materials being generally accessible, the next logical consideration is the perhaps more difficult question of their appropriate use. In this respect, there is evidence that the High Court in recent years has made efforts to remind readers of the importance and weight of the statutory text, as opposed to the revelations of parliamentary material.¹¹ Some have suggested that the High Court has gone further, through the 2010 case of *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 (*'Saeed'*) and reverted to restrictions on the use of parliamentary material. This paper argues that *Saeed* was merely a reminder of the cautious approach we should take to using extrinsic materials. Recourse to parliamentary materials is open and regular. But caution about use is clearly reflected in recent High Court cases since *Saeed*.

II WHAT IS MEANT BY 'EXTRINSIC' MATERIALS?

It is worth clarifying first what is meant by 'extrinsic' materials in the field of statutory interpretation. Although the Federal and State interpretation legislation has, over time, expanded on what forms part of an Act,¹² generally speaking, 'extrinsic' refers to anything that it not 'within the four corners of the Act.'¹³ The focus of this article is on parliamentary materials.

It was this type of extrinsic material that was the focus of the 1983 Symposium.¹⁴ Parliamentary materials includes materials produced in the parliamentary process, such as explanatory memoranda, Parliamentary Committee reports, Hansard (second reading speeches and parliamentary debates) and statements of compatibility as well as official reports related to the development of the statute in question (such as law reform commission reports). They are what might be called 'official documents'¹⁵ of

¹¹ It is arguable that *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 (*'Alcan'*) may have been the first indication of a more cautious approach in the High Court. See later in article.

¹² Interpretation legislation provides guidance on what forms part of a statute. See *Acts Interpretation Act 1901* (Cth) s 13; *Legislation Act 2001* (ACT) s 12; *Interpretation Act 1987* (NSW) s 35; *Interpretation Act 1987* (NT) s 55; *Acts Interpretation Act 1954* (Qld) s 14; *Acts Interpretation Act 1915* (SA) s 19; *Acts Interpretation Act 1931* (Tas) s 6; *Interpretation of Legislation Act 1984* (Vic) s 36 and *Interpretation Act 1984* (WA) ss 31, 32.

¹³ S G G Edgar, *Craies on Statute Law* (Sweet & Maxwell, 7th ed, 1971) 98.

¹⁴ International treaties and agreements were discussed at the Symposium and were specifically included in the list in s 15AB(2) of the *Acts Interpretation Act*. However, although there is overlap with use of parliamentary materials, use of international materials in statutory interpretation is subject to separate common law development. It is therefore beyond the scope of this paper. See D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) 79–82.

¹⁵ To borrow a phrase used by Justice Heydon in 'Developing the Common Law' in J T Gleeson and Ruth C A Higgins (eds), *Constituting Law* (Federation Press, 2011) 93, 117 where he discusses the sources of legislative facts.

the legislative process. A list of some of these types of materials is found in s 15AB and equivalent State provisions.¹⁶

It is this category of extrinsic sources which most often gives rise to threshold questions and questions about appropriateness of use. Arguments range from assertions that certain statements made in the legislative chamber 'should be treated as themselves acts of the state personified'¹⁷ to arguments that 'the structure of legislative action ... militates against'¹⁸ use of such material. Practical arguments about such issues as accessibility, usefulness and cost also arise.¹⁹ The debate remains a vocal one in the United States (where use, variable from Federal to State level, is largely permitted) and the United Kingdom (where use is restricted), where the law differentiates between different types of parliamentary material or is questioned on theoretical or practical grounds.²⁰

III RULES ON ACCESS TO PARLIAMENTARY MATERIALS – MORE APPARENT THAN REAL²¹

A Recourse through Statute

1. Background

The law as it presently stands is neither clear nor convincing.²²

Such was the general feeling of attendees at the 1983 Symposium. Despite established authority against the use of parliamentary materials²³, cracks in the

¹⁶ See above n 8. The statement of compatibility is a relatively new type of parliamentary material, now required pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). It is usually attached to the explanatory memorandum.

¹⁷ Ronald Dworkin, *Law's Empire* (Fontana, 3rd ed, 1990) 342-3.

¹⁸ Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 274.

¹⁹ See Stephane Beaulac, 'Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?' (1998) 43 *McGill Law Journal* 287, 315-21 which gives a summary of practical reasons for objecting to the use of parliamentary materials. Compare Patrick Brazil, 'Reform of Statutory Interpretation – the Australian Experience of Use of Extrinsic Materials: With a Postscript on Simpler Drafting' (1988) *Australian Law Journal* 503 where some of the practical concerns, such as longer proceedings, were found not to have eventuated in the early Australian experience.

²⁰ For the United Kingdom generally see Francis Bennion, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 5th ed, 2008) 614-73 and Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) 214-21 for an overview of the law since the seminal UK case of *Pepper (Inspector of Taxes) v Hart* [1993] AC 593. For the United States generally see William N Eskridge Jr, Philip P Frickey and Elizabeth Garrett, *Legislation and Statutory Interpretation* (Foundation Press, 2nd ed, 2006) 303-22. For a contrasting view see Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012) which contains a chapter entitled 'The false notion that committee reports and floor speeches are worthwhile aids in statutory construction' 369-90. For a comparative view see Holger Fleischer, 'Comparative Approaches to the Use of Legislative History in Statutory Interpretation' (2012) 60 *American Journal of Comparative Law* 401 for a comparison of German, US and UK law.

²¹ Paul Lanspeary, 'Statutory Interpretation for Drafters' (Paper 8 presented at 4th Australasian Drafting Conference, Parliament House, Sydney, 3-5 August 2005) 14.

²² Symposium on Statutory Interpretation 1983, above n 7, 81 (Sir Anthony Mason).

prohibitive approach had started to appear in a piecemeal manner by 1983. Some courts, for example, allowed recourse to law reform commission or parliamentary reports,²⁴ but resisted resort to parliamentary debates. Some members of the judiciary considered it legitimate to resort to the Minister's Second Reading Speech (but not other materials) in cases of ambiguity.²⁵ Other judicial authority supported recourse to some material to identify the mischief or defect the Act was trying to remedy but not to identify its intention.²⁶ This ad hoc approach meant that the law had become illogical and inconsistent. It was against this background that the symposiums were held.

The symposium papers contain several acknowledgements of the reality that some judges and practitioners did, whatever the law may say, look at extraneous material, including Hansard, and anyone who thought it didn't happen was 'living in a complete fool's paradise.'²⁷ It was better, therefore, for the process to become explicit so that the materiality of such material could be properly argued.²⁸

With those objectives in mind, various suggestions for laws governing recourse to parliamentary materials were discussed. In summing up at the 1983 Symposium, Sir Anthony Mason stated that, while there appeared to be general agreement that recourse should be permitted, it was also generally agreed that use should be 'cautious' with judicial discretion exercised when it is 'appropriate' to do so. Further, their potential to assist would, he thought, be limited to cases of ambiguity.²⁹

Having the benefit of the symposium discussions, in March 1984 Attorney-General Senator Gareth Evans introduced a Bill to amend the *Acts Interpretation Act*.³⁰

The amendment led to s 15AB in its current form, which provides in s 15AB(1):

'... 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

²³ *Commissioner for Prices & Consumer Affairs (SA) v Charles Moore* (1977) 139 CLR 449; *South Australia v The Commonwealth* (1942) 65 CLR 373; *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200.

²⁴ *Barker v The Queen* (1983) 153 CLR 338, 346 (Mason J).

²⁵ *Commissioner for Prices and Consumer Affairs (SA) v Charles Moore (Aust) Ltd* (1977) 139 CLR 449, 480 (Murphy J).

²⁶ *Wacando v Commonwealth* (1981) 148 CLR 1, 25–6 (Mason J); *Federal Commissioner of Taxation v Whitfords Beach Pty Ltd* (1982) 150 CLR 355, 373–5 (Mason J); *Wacal Developments Pty Ltd v Realty Developments* (1978) 140 CLR 503, 509 (Gibbs J).

²⁷ Symposium on Statutory Interpretation 1983, above n 7, 32 (Dr Gavan Griffiths QC quoting Lord Hailsham LC, *New Law Journal*, 13 August 1981, 841). See also 39 (Murphy J) and 44 (Stephen Mason.) This practical reality is also recognised by Duxbury, above n 20, 219 and Beaulac, above n 19, 320.

²⁸ Symposium on Statutory Interpretation 1983, above n 7, 32.

²⁹ Symposium on Statutory Interpretation 1983, above n 7, 82–4.

³⁰ The bill, the Acts Interpretation Amendment Bill 1984, originated in the Senate.

(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.’

Section 15AB(2) provides a list of the typical materials that might be considered under s 15AB(1)³¹ while s 15AB(3) provides that, in determining whether to consider extrinsic material or what weight to give to the material we must have regard to:

- (a) the desirability of people being able to rely ‘on the ordinary meaning conveyed by the text of the provision’ and
- (b) the ‘need to avoid’ prolonged legal or other proceedings.

The three limbs in s 15AB(1) were seen as a ‘big hurdle’³² to recourse. But the ‘force and utility’³³ of s 15AB(3) and its specific direction³⁴ to the courts were also highlighted in the parliamentary debates. It was regarded as a ‘brake’ on the unfettered use of parliamentary materials. The Parliament, it seems, was trying to strike a balance between a ‘clear lead’ to the court as to the way in which extrinsic materials can best be used, and the desirability of not imposing ‘undue burdens on the users of the legislation or the legal system generally’³⁵ by reminding users that the ordinary meaning of the text must dominate the interpretation process.

Section 15AB was soon followed by similar (though not always identical) provisions in all States, except South Australia.³⁶

2. Applying s 15AB

How, then, was s 15AB(1) intended to work?

The words of the section clearly establish consideration can only be given to parliamentary materials if one of the three thresholds is satisfied.

So, if the meaning is clear on its face, consideration of parliamentary materials is not permitted other than to ‘confirm’ that meaning (s 15AB(1)(a)).³⁷ However, recourse is permitted if the provision is ‘ambiguous’ or ‘obscure’ (s 15AB(1)(b)(i)) or gives rise to an ‘absurd’ or ‘unreasonable’ result (s 15AB(1)(b)(ii)).³⁸

Once one of the three thresholds is met, ‘any material not forming part of the Act’ that is ‘capable of assisting’ in interpretation of meaning can be used.³⁹ Section 15AB(2), as noted above, provides a list, but given that it is ‘[w]ithout limiting the

³¹ The list in s 15AB includes reports of Royal Commissions, Law Reform Commissions, Parliamentary Committee reports, international treaties or agreements, explanatory memoranda, Second Reading Speeches, declared documents and parliamentary debates.

³² Commonwealth, *Parliamentary Debates*, Senate, 30 March 1984, 958 (Senator Gareth Evans).

³³ Ibid, 963 (Senator Gareth Evans).

³⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 May 1984, 1795 (Alan Griffiths).

³⁵ Commonwealth, *Parliamentary Debates*, Senate, 30 March 1984, 963 (Senator Gareth Evans).

³⁶ South Australia has no equivalent provisions and relies solely on the common law for recourse to parliamentary materials.

³⁷ An attempt to explain the rationale behind the ‘confirm’ limb was made by Senator Hill. See Commonwealth, *Parliamentary Debates*, Senate, 30 March 1984, 961 (Senator Robert Hill).

³⁸ See *Saraswati v The Queen* (1991) 172 CLR 1, 22–3 where McHugh J summarises the three limbs in the context of the NSW equivalent of s 15AB.

³⁹ *Acts Interpretation Act 1901* (Cth) s 15AB(1).

generality of subsection (1)' it is not an exhaustive list.⁴⁰ In other words, once one of the limbs in sub-s (1) is satisfied, any material is open to consideration.

Despite the verbosity of sub-ss (1) and (2), it seemed that Parliament's objective was to allow consideration of any extrinsic materials capable of assisting in the ascertainment of the meaning of a provision of the Act. However, s 15AB(1) and (3), working together, were intended to convey that extrinsic materials should not be used 'to overturn the ordinary meaning of a provision conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act unless there is ambiguity or obscurity or the result is manifestly absurd or is unreasonable.'⁴¹ The emphasis on being able to rely on the ordinary meaning was clear.

3. *Difficulties in Practice*

While, in theory, the underlying idea of s 15AB appears logical, in practice the technicalities of the drafting have led to some anomalies and inconsistencies. These have been explained in detail by other writers.⁴² Examination of extrinsic materials is limited to three circumstances, for particular purposes. This means that such material cannot be used in other circumstances.⁴³ For example, the limb in s 15AB(1)(a) only allows an interpreter to access parliamentary materials to 'confirm' a meaning. If reference to the extrinsic material then leads to doubt about whether that meaning is correct, the section would not seem to permit the interpreter to change the meaning. This requires the interpreter to have some sort of 'judicial amnesia'⁴⁴ about what the extrinsic materials have revealed to them should it not be a 'confirmation'. In contrast, for extrinsic material to be available to 'determine' a meaning, the interpretation must be ambiguous or obscure or the result manifestly absurd or unreasonable on its face. That is, before consideration of the parliamentary materials.⁴⁵

As a corollary to this point, the relationship between s 15AA and s 15AB is not clear. Statements in the parliamentary debates indicate that s 15AB was intended to serve the mandatory purposive approach of s 15AA.⁴⁶ However, it is not clear whether the thresholds of s 15AB(1) permit access to extrinsic materials to determine the purpose or object of an Act or provision. As has been pointed out by Pearce and Geddes,⁴⁷ two limbs of s 15AB, being (1)(a) and (b)(ii), seem to assume that the

⁴⁰ Confirmed in *Singh v Commonwealth* (2004) 222 CLR 322, 336 [20] (Gleeson CJ). See also 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'.

⁴¹ Explanatory Memorandum, Acts Interpretation Amendment Bill 1984 (Cth) 3.

⁴² See Matthew T Stubbs, 'From Foreign Circumstances to First Instance Considerations: Extrinsic Material and the Law of Statutory Interpretation' (2006) 34 *Federal Law Review* 103; R S Geddes, 'Purpose and Context in Statutory Interpretation' (2005) 2 *University of New England Law Journal* 5.

⁴³ See Stubbs, above n 42, 111–12 and Brazil, above n 19, 503–4; Pearce and Geddes, above n 14, 84–6; R S Geddes, above n 42, 14–15.

⁴⁴ Stubbs, above n 42, 113. See also the concerns expressed in Brazil, above n 19.

⁴⁵ R S Geddes, above n 42, 14–15; Pearce and Geddes, above n 14, 85–6.

⁴⁶ Commonwealth, *Parliamentary Debates*, Senate, 8 March 1984, 583 (Senator Gareth Evans).

⁴⁷ Pearce and Geddes, above n 14, 86.

purpose or object has already been identified before recourse to outside materials is made.

The High Court has recognised the limitations contained within s 15AB.⁴⁸ Indeed, there are cases, particularly in the early days of the section, where the court determined that none of the limbs were applicable.⁴⁹

If s 15AB had remained as the only gateway to extrinsic material, then no doubt its technical difficulties and impractical implications would have led to more vocal discussions or expressions of concern by the judiciary than have been raised to date. The reason why its anomalies have largely been left untouched by the courts⁵⁰ is, arguably and ironically, due to developments in the common law.

B Recourse through Common Law

1. The CIC Principle

The object of s 15AB was to provide clear principles about consideration of parliamentary materials, predominantly to remedy the unsatisfactory state of the common law. As such, it would have been logical to expect that the section be regarded as a definitive statement of the law of recourse.⁵¹

Despite statutory intervention, the common law continued to develop alongside s 15AB. This culminated in the enunciation in 1997, more than 10 years after the enactment of s 15AB, of a foundational common law principle for statutory interpretation.

The principle, self-titled as the ‘modern approach’ to statutory construction, was stated by the joint judgment of Brennan CJ, Dawson, Toohey and Gummow JJ in *CIC Insurance Limited v Bankstown Football Club Ltd*⁵² (*‘CIC Insurance’*) and is well known:

It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901* (Cth), the court may have regard to the reports of 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 ... one may discern the statute was intended to remedy.

⁴⁸ *Momcilovic v The Queen* (2011) 245 CLR 1, 154 [389] n 692 (Heydon J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 521 [51]–[52] (French CJ); *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112 (McHugh J); *Catlow v Accident Compensation Commission* (1989) 167 CLR 543, 549 (Brennan and Gaudron JJ); *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416, 420 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

⁴⁹ Examples include *Re Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416 and *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85. See also Brazil, above n 19, which contains an examination of cases citing s 15AB or its equivalent in the first few years after its enactment.

⁵⁰ Although note that there has been some academic commentary calling for reform of s 15AB. See R S Geddes, above n 42, 23 and Stubbs, above n 42, 123–4.

⁵¹ Note that s 15AA previously contained subsection (2) which provided that the common law on extrinsic material remained. This subsection was deleted in the same Act enacting s 15AB.

⁵² (1997) 187 CLR 384, 408 (*‘CIC Insurance’*).

This meant that ‘if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance.’⁵³

2. Elements of the CIC Principle

There are three important elements to the majority statement (the ‘CIC Principle’).

First, the CIC Principle operates independently of s 15AB. This parallel operation of s 15AB (and its State equivalents) and the CIC Principle has been confirmed on numerous occasions since 1997⁵⁴ as well as extra judicially.⁵⁵ That is, if resort to extrinsic materials is not available under s 15AB, then they may be available under the CIC Principle.⁵⁶

Secondly, even though *CIC Insurance* itself was about reports of law reform bodies, the concept of context ‘in its widest sense’ has been construed to include parliamentary materials generally as well as the state of the law when the statute was enacted, its defects, the history of the relevant law, parliamentary history of the statute, and historical context.⁵⁷ Indeed, as former Chief Justice Spigelman has noted: ‘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”.’⁵⁸ The concept could conceivably include any relevant material.

Thirdly, neither ambiguity of the statutory text or the satisfaction of any other condition is required before parliamentary materials may be considered pursuant to the CIC Principle. Conversely, context, in an intrinsic and extrinsic sense, is to be considered ‘in the first instance’;⁵⁹ that is, from the start of the statutory construction process, clearly in contrast to the hurdles of s 15AB.

The CIC Principle does, however, have some parameters.

It has been interpreted to allow consideration of extrinsic context for two purposes.⁶⁰ One is to consider the existing state of the law and the history of the statutory provision, including amendments, repealed Acts and state of the common law. The other is to identify the ‘mischief’ of the relevant statutory provision or Act.⁶¹

⁵³ Ibid.

⁵⁴ Examples are *Network Ten Pty Ltd v TCN Channel Nine* (2004) 218 CLR 273, 280 [11] (McHugh ACJ, Gummow and Hayne JJ); *Attorney General v Oates* (1999) 198 CLR 162, 175 [28] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 99, 112 (McHugh J).

⁵⁵ See above n 42.

⁵⁶ For example, see *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 595 [83], 599 [98] (Heydon and Crennan JJ).

⁵⁷ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 230 [124]–[125] (McHugh J); *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 599 [98] (Heydon and Crennan JJ).

⁵⁸ J J Spigelman, ‘The Intolerable Wrestle: Developments in Statutory Interpretation’ (2010) 84 *Australian Law Journal* 822, 827.

⁵⁹ This particular phrase has been referred to in the recent cases of *Monis v The Queen* (2013) 249 CLR 92, 202 [309] (Crennan, Kiefel and Bell JJ) (‘*Monis*’) and *Baini v The Queen* (2012) 246 CLR 469, 484 [42] (Gageler J) (‘*Baini*’).

⁶⁰ Pearce and Geddes, above n 14, 77–8.

⁶¹ *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, 388 [23] (French CJ and Hayne J), 411–12 [88]–[89] (Kiefel J) (‘*Cross*’); *Board of Bendigo*

While the concept of ‘mischief’, as first considered in *Heydon’s Case*⁶², had a rather limited scope,⁶³ the concept has morphed, as will be seen below, into the arguably broader concepts of the ‘purpose’ or ‘object’ or ‘policy’⁶⁴ of an Act or of the particular provision⁶⁵ being considered. In this respect, the CIC Principle both mirrors and provides support for the statutory requirements of s 15AA and its State equivalents to adopt a purposive construction.⁶⁶

C Effect of Statutory and Common Law Gateways

The parallel statutory and common law gateways have meant that, in effect, there is no discernible legal barrier to resorting to parliamentary materials for interpretative purposes. By default, the gateway is wide open. Reasons for this outcome are not difficult to discern.

1. The Ambiguity Avenue

First, while the High Court has, on occasion, expressly stated that it has accessed parliamentary materials to ‘confirm’ meaning of text⁶⁷ or has referred to the absurd or unreasonable limb,⁶⁸ if a basis for using s 15AB or its equivalent is specifically cited, it has most commonly been, not unexpectedly, the ‘ambiguous’ test contained in s 15AB(1)(b)(i).⁶⁹

Regional Institute of Technical and Further Education v Barclay (2012) 248 CLR 500, 516 [41] (French CJ and Crennan J) (*Board of Bendigo*); *Baini* (2012) 246 CLR 469, 484 [42] (Gageler J); *AB v Western Australia* (2011) 244 CLR 390, 398 [10] (French CJ, Gummow, Hayne, Kiefel, Bell JJ); *Alcan* (2009) 239 CLR 27, 31 [4] (French CJ).

⁶² (1584) 3 Co Rep 7a; 76 ER 637.

⁶³ *Ibid*, 7b. It referred to the ‘mischief and defect’ for which the common law did not provide.

⁶⁴ Michael Kirby, ‘Statutory Interpretation: The Meaning of Meaning’ (2011) 35 *Melbourne University Law Review* 113, 127; *Board of Bendigo* (2012) 248 CLR 500, 516 [41], (French CJ and Crennan J); *Cross* (2012) 248 CLR 378, 411–12 [88]–[89] (Kiefel J); *Monis* (2013) 249 CLR 92, 119–120 [36] (French CJ); *Commissioner of Police v Eaton* [2013] HCA 2, [100].

⁶⁵ See Pearce and Geddes, above n 14, 78 which cites numerous cases where reference has been made to parliamentary material to identify the purpose or object of a provision.

⁶⁶ That s 15AA and its State equivalents ‘require’ a purposive approach has been recognised by the High Court on several occasions. See, eg, *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573, 592 [45] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Carr v The State of Western Australia* (2007) 232 CLR 138, 142–3 [5] (Gleeson CJ); *Airlink Pty Ltd v Paterson* (2005) 223 CLR 283, 311 [79] (Kirby J). However a contrary view that the purposive approach is not mandatory has been suggested recently: Justice Michael Barker, ‘First You See It, Then You Don’t – Harry Houdini and the Art of Interpreting Statutes’ (Speech delivered at JCA Colloquium, Fremantle, Western Australia, 5 October 2012) [16] <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-barker/barker-j-20121005>>.

⁶⁷ *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 203 (Gibbs CJ).

⁶⁸ *Saraswati v The Queen* (1991) 172 CLR 1, 22–3 (McHugh J). However, note absurd or unreasonable results of an ordinary meaning are more often used in the context of a consequential argument to assist in choosing between competing constructions, rather than as a means for accessing parliamentary material. See *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78].

⁶⁹ *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 388–9 (Wilson J); *Re Bolton, Ex parte Beane* (1987) 162 CLR 514, 517–18 (Mason CJ, Wilson and Dawson JJ); *Coco v The Queen* (1994) 179 CLR 427, 444 (Mason CJ, Brennan, Gaudron and McHugh JJ); *Crimmins v*

Ambiguity is an 'inevitable condition' of language.⁷⁰ By its nature it is an amorphous concept and, like beauty, is in the mind of the beholder.⁷¹ However, unlike contractual interpretation, ambiguity in statutory construction has not been the subject of much discussion in Australia.⁷² What has been noted confirms that the concept should be regarded as a broad one. Although there has been little observation on its scope by the High Court⁷³, former NSW Supreme Court Chief Justice Spigelman has observed that:

The use of the word 'ambiguity' in the context of statutory interpretation is not restricted to lexical or verbal ambiguity and syntactic or grammatical ambiguity. It extends to circumstances in which the intention of the legislature is, for whatever reason, doubtful.⁷⁴

On the rare occasion when the concept of ambiguity has been addressed, His Honour's comments about the equivalence of ambiguity and doubt have been followed.⁷⁵

2. *The Context Door*

Secondly, the concept of 'context' from *CIC Insurance* is a generous one. If, for whatever reason, the statutory provision is not available, the authority to look at parliamentary materials is available through 'context' without the need to 'surmount a threshold of ambiguity, obscurity or possible absurdity.'⁷⁶ While the contextual approach of *CIC Insurance* is limited to examining the state of the law and the purpose, as a purposive approach is required in all Australian jurisdictions, it is difficult to envisage a situation where the CIC Principle would not catch any material prohibited by s 15AB.

Stevedoring Committee (1999) 200 CLR 1, 68 [192] (Kirby J); *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) 201 ALR 271, 285 [61] (Kirby J); *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, 265 [38] (Kirby J).

70 James C Raymond, 'Saving the Literal — Fundamentalism versus Soft Logic in Statutory Interpretation' in Tom Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age*, Education Monograph 4 (Judicial Commission of NSW, 2007) 177, 213.

71 Symposium on Statutory Interpretation 1981, above n 6, 7 (Dennis Pearce). Professor Leslie Zines made similar comments at the Symposium on Statutory Interpretation 1983, above n 7, 78.

72 For recent contributions to the ambiguity discussion in contractual interpretation see Derek Wong and Brent Michael, 'Western Export Services v Jireh International: Ambiguity as the gateway to surrounding circumstances?' (2012) 86 *Australian Law Journal* 57 and Justice Kenneth Martin 'Contractual Construction: Surrounding Circumstances and the Ambiguity Gateway' (2013) 37 *Australian Bar Review* 118.

73 In *Lacey v Attorney General* (2011) 242 CLR 573, 606 [91], Heydon J said that the fact that the President of the Court of Appeal and six judges of the High Court construed a provision one way and that four judges of the Court of Appeal and McHugh J construed it another was sufficient to show ambiguity. Isaacs ACJ made similar comments many years ago in *Pickard v John Heine & Son* (1924) 35 CLR 1, 9 with respect to the interpretation of an award.

74 *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc* (2000) 48 NSWLR 548, 577–8 [116] (Spigelman J).

75 *Parrett v Secretary, Department of Family and Community Services* (2002) 124 FCR 299, 310 [34] (Madgwick J); *F, BV v Magistrates Court of South Australia* (2013) 115 SASR 232, 240 [10] (Kourakis CJ). See also *Beckwith v The Queen* (1976) 135 CLR 569, 576–7 (Gibbs J); *Catlow v Accident Compensation Commission* (1989) 167 CLR 543, 550 (Brennan and Gaudron JJ).

76 *K-Generation Pty Ltd v Liquor Licensing* (2009) 237 CLR 501, 521 [52] (French CJ).

The practical reality of the generous contextual approach also has a snowball effect. Eskridge likens this to eating potato chips — you can't just eat one. Once one piece of parliamentary material is considered, all of it ultimately gets researched, thereby broadening the scope of the reviewed material.⁷⁷

3. *Open Door But Not Open Use*

With the dual but different avenues available, and the consequent 'free reign' on accessing parliamentary materials, the High Court's attention has turned to the use of or weight to be given to parliamentary materials. In this respect, even before the CIC Principle was enunciated, the High Court was cautioning against giving undue weight to parliamentary materials.⁷⁸ But with the development of the CIC Principle and its broad contextual approach, the High Court has consistently indicated that, despite the ability to look at extrinsic context for purpose, the primacy of the text must prevail.

A well-known case advocating this caution was the 2009 case of *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* ('*Alcan*') where the High Court considered the use of a Second Reading Speech as an aid to the construction of a Northern Territory taxation Act.⁷⁹ While both French CJ and the joint judgment of Hayne, Heydon, Crennan and Kiefel JJ, accepted recourse to the Speech and legislative history, as context 'in its widest sense'⁸⁰ under the CIC Principle, they rejected a strained meaning of the text on the basis of what had been discerned about purpose in such materials with the joint judgment stating that:

Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention.⁸¹

This and other High Court reminders about the importance of the statutory text itself⁸² culminated in the 2010 case of *Saeed v Minister for Immigration and Citizenship* ('*Saeed*').⁸³

⁷⁷ Eskridge, Frickey and Garrett, above n 20, 322.

⁷⁸ *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 517–18 (Mason CJ, Wilson and Dawson JJ).

⁷⁹ *Alcan* (2009) 239 CLR 27.

⁸⁰ *Ibid* 31 [4] (French CJ), 45 [44] (Hayne, Heydon, Crennan and Kiefel JJ).

⁸¹ *Ibid* 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

⁸² See, eg, *Travelex Ltd v Commissioner of Taxation* (2010) 241 CLR 510, 531 [82] (Crennan and Bell JJ); *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, 522 [53] (French CJ). The older case of *Re Bolton; Ex parte Douglas Beane* (1987) 162 CLR 514, 517–18 (Mason CJ, Wilson and Dawson JJ) is also still regularly cited as authority for the importance of the text. There have also been numerous examples of statements about the importance of text at intermediate appellate court level. In New South Wales, for example, see especially *Harrison v Melham* (2008) 72 NSWLR 380 (Spigelman CJ and Mason P). The judgments of Campbell JA in the NSW Court of Appeal (such as in *Amaca Pty Ltd v Novak* [2009] NSWCA 50 [73]–[81]) are also worthy of consideration.

⁸³ (2010) 241 CLR 252 ('*Saeed*').

IV AND THEN THERE WAS SAEED

A Saeed v Minister for Immigration and Citizenship

1. Background

Saeed involved a consideration of s 51A of the *Migration Act 1958* (Cth) ('*Migration Act*'). The appellant was an offshore applicant for a skilled-independent visa. The applicant had to be employed in a skilled occupation for a period prior to application. Ms Saeed provided documents about her previous employment but, after an investigation by immigration officials, the Minister denied the visa.

Under the *Migration Act*, the decision was not subject to review. Ms Saeed sought a declaration and an order for mandamus against the Minister asserting procedural fairness had not been applied in the decision making, as she had not been given an opportunity to deal with the adverse information relevant to the decision to deny her visa.

The decision turned on the statutory construction of s 51A of sub-div AB of pt 2 div 3 of the *Migration Act*. The Minister argued that the words of the subdivision including the section represented an exhaustive statement of the requirements of the natural justice hearing rule in relation to all visa applicants, whether onshore or offshore, and the natural justice hearing rule was excluded.

Ms Saeed argued that the text of s 51A only rendered s 51A an exhaustive statement of the rules of natural justice in relation to onshore applicants, but not offshore applicants.

Section 51A had been inserted by a 2002 amendment to the *Migration Act*. Although neither s 15AB nor *CIC Insurance* were cited,⁸⁴ parliamentary materials relating to the amendment were a pivotal point in the submissions and judgements. Both the Explanatory Memorandum and the Second Reading Speech for the amendment bill made it plain⁸⁵ that s 51A had been inserted into the *Migration Act* in response to a 2001 High Court case,⁸⁶ where a majority of the Court had decided that the previous version of sub-div AB did not exclude the principles of natural justice, including procedural fairness, in the case of an application by an onshore applicant.

The Minister argued that these parliamentary materials made it clear that the object of s 51A was to exclude the natural justice hearing rule and so s 51A should be interpreted accordingly.

Two judgments were delivered, although all members concluded that natural justice requirements were not excluded for offshore visa applicants. While the court acknowledged that the parliamentary materials revealed an objective, that objective did not equate with the objective revealed by the text itself, as the statutory provisions did not address applications by *offshore* visa applicants.⁸⁷

⁸⁴ Although the plurality does note that the section had been noted in other cases as 'difficult' or 'ambiguous or obscure': Ibid 263 [27] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

⁸⁵ For example, see the Second Reading Speech in Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1106-7 (Phillip Ruddock).

⁸⁶ *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.

⁸⁷ *Saeed* (2010) 241 CLR 252, 265-7 [34]-[42], 271 [56] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), 277-8 [73]-[74] (Heydon J).

The plurality stated:

... it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction.⁸⁸

2. *Spillover from Saeed*

It would be an overstatement to say that the line caused a shock among the legal profession, as there are not many who have strong emotional reactions to statements about statutory interpretation. Still, despite the fact that *Alcan* has already emphasised the importance and primacy of the text and that *Saeed* is about a specific, highly political Act, the statement did cause a general disturbance among those interested in interpretation. It led to reflection about whether the High Court was articulating a new threshold test for access to extrinsic materials and whether it had implications for the CIC Principle. Members of the judiciary noted the majority statement. It was suggested that the statement suggests a more 'restrictive approach'⁸⁹ to the use of extrinsic materials, or that it might be a sign of a 'reversion' to literalism and plain meaning⁹⁰ or of a 'black letter' approach to interpretation.⁹¹ Pearce and Geddes noted that *Saeed* might be considered 'to have cast a shadow over' the CIC Principle.⁹² One recent text has even gone so far to say that the statement suggests a requirement 'that ambiguity be identified before recourse to extrinsic material'.⁹³

But High Court cases since *Saeed* have not shown any indication of a reversion to more restrictive access to parliamentary materials. Extrinsic materials continue to be regularly examined, sometimes without clear reference to authority (statutory or common law) and often without any threshold 'hurdle' apparently being considered.⁹⁴

It seems that *Saeed* was more in the nature of an invitation to pause and reflect on the use of parliamentary materials as an interpretative aid. Rather than indicating renewed restrictions on recourse, *Saeed* cautioned about the relevance and weight that we might attribute to extrinsic materials, particularly as against the statutory text.

Since *Saeed*, several High Court judgements have provided guidance on the 'appropriate use' of parliamentary materials. An examination of one recent High Court

⁸⁸ Ibid 265 [33] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

⁸⁹ Spigelman, above n 58, 830.

⁹⁰ Michael Kirby, 'The Never Ending Challenge of Drafting and Interpreting Statutes — A Meditation on the Career of John Finemore QC' (2012) 36 *Melbourne University Law Review* 140, 173.

⁹¹ Justice Nye Perram, 'Context and complexity: Some reflections by a new Judge' [2010] *Federal Journal Scholarship* 19, [24]. However, compare the doubt expressed by Justice Susan Kenny in 'Current Issues in the Interpretation of Federal Legislation' (Speech delivered at the National Commercial Law Seminar Series, Melbourne, 3 September 2013) 8 <<http://www.fedcourt.gov.au/publications/judges-speeches/justice-kenny>>.

⁹² Pearce and Geddes, above n 14, 76.

⁹³ P Herzfeld, T Prince & S Tully, *Interpretation and Use of Legal Sources: The Laws of Australia*, (Thomas Reuters, 2013), 283.

⁹⁴ *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257 (explanatory memorandum); *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 (explanatory memorandum); *Australian Securities and Investment Commission v Hellicar* (2012) 247 CLR 347 (explanatory memorandum); *The Queen v Getachew* (2012) 248 CLR 22 (various); *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 (explanatory memorandum and second reading speech).

decision, *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross*⁹⁵ ('Cross'), illustrates the key threads.

B Certain Lloyd's Underwriters v Cross

1. Background

In January 2001, the Thelanders and Mr Cross were assaulted by security staff at a hotel in New South Wales. They sued Certain Lloyd's Underwriters, the relevant insurers, for trespass claiming damages for intentionally inflicted personal injury. The damages awarded in each case was less than \$100 000, with a declaration made that each respondent's costs for legal services were subject to s 198D of the *Legal Profession Act 1987* (NSW) ('LP Act'). That section capped the maximum costs for legal services provided to a party in connection with a claim for 'personal injury damages' if the amount recovered was less than \$100 000.

Section 198C of the LP Act provided that 'personal injury damages' is to have 'the same meaning as in' the *Civil Liability Act 2002* (NSW) ('CLA'). Section 3 in pt 1⁹⁶ of the CLA provided a definition of 'personal injury damages' that would encompass the injury in question. The CLA limited awards for personal injury damages but contained some specific exceptions. One of these exceptions was in pt 2 s 9(2) which excluded personal injury resulting from intentional acts.

The insurers, seeking to have a cap on legal service costs, argued that 'personal injury damages' in s 198C required reference only to the words of the s 3 definition in the CLA. The Thelanders and Mr Cross submitted that the definition of 'personal injury damages' in s 198C should be construed by reference to the definition and its operation under the CLA. Accordingly, as awards where there was an intentional act were not limited by the CLA because of s 9(2), s 198C excluded intentional acts.

The New South Wales Court of Appeal held unanimously that 'personal injury damages' in s 198C of the LP Act meant personal injury damages *of the kind to which Part 2 of the CLA applied* and, therefore, the capping provisions of the LP Act did not apply. The Thelanders and Mr Cross succeeded.

The insurers appealed to the High Court. They succeeded.

2. Parliamentary Materials

As with most cases involving the construction of legislation, there is rarely one single factor which is decisive. Yet the legislative history to s 198C and, in particular, the parliamentary materials relating to its enactment were key to the Court of Appeal's decision.

Section 198C had been inserted into the LP Act by the CLA when the latter was enacted in 2002. The primary purpose of the CLA was to record the law for recovery of damages for person injury and death, including awards for such damages. Schedule 2

⁹⁵ (2012) 248 CLR 378. This appeal was heard together with *New South Wales v Williamson* (2012) 87 ALJR 154, which involved the same issue, but on later versions of the relevant legislation.

⁹⁶ The relevant sections of the CLA were amended and their location in that Act changed by further amendments in 2002 and some of these substituted provisions are referred to in the judgment. However, those subsequent amendments did not bear on the issue before the court.

of the *CLA* had made changes to the *LP Act*, including the insertion of s 198C. The Court of Appeal⁹⁷ considered various extrinsic materials⁹⁸, but attached considerable weight to the Second Reading speech on the Civil Liability Bill, where then Premier Bob Carr had asserted that the bill was part of ‘stage one’ of the Government’s tort reforms which were ‘vital to the survival of our community’ in order to prevent the ‘damage that the public liability crisis is doing’ to small business, tourism and sporting and cultural activities and that they would also have an impact on insurance premiums.⁹⁹ As part of his speech on the Civil Liability Bill, the Premier turned to the amendments to the *LP Act* and discussed their content.

The Court of Appeal considered that the speech made it clear that the cost-capping provisions in the *LP Act* were seen as part of a ‘single package’ having the same justification as the controls imposed on awards of damages. Basten JA, with whom Hodgson JA agreed, stated that:

There is no basis, either in the language of the Second Reading Speech, or in terms of the policy underlying the legislation, to impose the cost-capping regime on all claims for personal injury damages, however they might arise, without reference to the carefully crafted exclusions in s 9(2) of the *Civil Liability Act* itself.¹⁰⁰

In other words, the Court concluded that the regime for limiting legal costs introduced by the *CLA* into the *LP Act* was part of a broader statutory scheme for limiting the costs of personal injury claims, deciding that the definition meant personal injury damages *of the kind* covered by pt 2 of the *CLA*.

On appeal, the majority of the High Court, French CJ and Hayne jointly, and Kiefel J in a separate judgment, allowed the appeal. Crennan and Bell JJ dismissed the appeal. Discussion about the use of the parliamentary materials was central to all judgments.

V APPROPRIATE USE OF PARLIAMENTARY MATERIALS

A The CIC Principle is Alive and Well

Each member of the Court, consistently with other recent decisions,¹⁰¹ confirmed that, essentially, the interpretative task must begin with the text, which is to be considered in context, having regard to purpose.¹⁰²

⁹⁷ *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136.

⁹⁸ Including a pre-enactment Ministerial Statement and a Commonwealth Committee Report on the law of negligence.

⁹⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 May 2002, 2085–8 (Robert Carr, Premier).

¹⁰⁰ *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 [49].

¹⁰¹ See *Commissioner of Taxation v Unit Trend Services Pty Ltd* [2013] HCA 16 [47] (French CJ, Crennan, Kiefel, Gageler and Keane JJ); *Board of Bendigo* (2012) 248 CLR 500, 516 [41] (French CJ and Crennan JJ); *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, 13 [26] (French CJ, Hayne, Kiefel and Bell JJ); *AB v Western Australia* (2011) 244 CLR 390, 398 [10] (French CJ, Gummow, Hayne, Kiefel and Bell JJ). Of course the seminal case that, arguably, identified a coherent principle is *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 (McHugh, Gummow, Kirby and Hayne JJ).

¹⁰² *Cross* (2012) 248 CLR 378, 388–9 [23]–[24] (French CJ and Hayne JJ), 404–5 [68]–[70] (Crennan and Bell JJ) and 411–12 [88] (Kiefel JJ).

While *Saeed* may have been seen to suggest that the ‘contextual’ aspect of the approach was limited in some way, *Cross* indicates that ‘context’ is a requisite consideration in the interpretative process. Each judgment affirmed the relevance of context, both internal and external, by reference to *CIC Insurance*. French CJ and Hayne J stated that it is ‘not to be doubted’¹⁰³ that statutory provisions must be considered in context. Kiefel J confirmed that a statutory provision must be considered in context, including in the ‘broader sense.’¹⁰⁴ And the minority, Crennan and Bell JJ, affirmed that to determine meaning, due consideration must be given to context and purpose¹⁰⁵ and it was ‘uncontroversial’¹⁰⁶ that this may include recourse to extrinsic materials.

Each of the justices referred to the limited parliamentary materials discussed by the Court of Appeal, either expressly or implicitly relying on the CIC Principle.¹⁰⁷ One judgment, that of Crennan and Bell JJ, contained reference to statutory authority for access to parliamentary materials (s 34 of the *Interpretation Act 1987* (NSW))¹⁰⁸; this was tangential alongside *CIC Insurance* and without reference to which limb was relevant or satisfied.¹⁰⁹

The discussion or lack of it, about restrictions on access to Hansard and the Court’s affirmation of the CIC Principle is consistent with other High Court authorities after *Saeed*. The Court has cited *CIC Insurance* to support a consideration of a wide context, without reference to the need to satisfy any threshold requirements.¹¹⁰ The Court has on numerous occasions referred to parliamentary materials without specifying the basis of such recourse at all.¹¹¹ Accordingly, there is no indication that *Saeed* marked any partial or other restriction on the open door to parliamentary materials. What *Saeed* did alert us to was to *what use* can appropriately be made of them, after they are reviewed.

B Using Parliamentary Materials to Identify Purpose

1. What Purpose?

The Commonwealth s 15AB provision and its State equivalents confine use as stipulated in the three limbs, while the CIC Principle allows consideration of extrinsic contextual materials to identify the contextual law and the purpose of the statute.

¹⁰³ Ibid 391 [28] (French CJ and Hayne J), citing *CIC Insurance*.

¹⁰⁴ Ibid 412 [88] (Kiefel J), citing *CIC Insurance*.

¹⁰⁵ Ibid 404–5 [68]–[69] (Crennan and Bell JJ).

¹⁰⁶ Ibid 405–6 [70], citing *CIC Insurance*.

¹⁰⁷ Ibid 391 [28] (French CJ and Hayne J), 405–6 [70] (Crennan and Bell JJ), 412 [88] (Kiefel J); See also the discussion on the breadth of ‘context’ under the ‘Elements of the CIC Principle’ heading above.

¹⁰⁸ This is substantially equivalent to *Acts Interpretation Act 1901* (Cth) s 15AB.

¹⁰⁹ *Cross* (2012) 248 CLR 378, 406 [70] n 100.

¹¹⁰ *Board of Bendigo* (2012) 248 CLR 500, 516 [41] n 31; *Baini* (2012) 246 CLR 469, 484 [42] (Gageler J); *AB v Western Australia* (2011) 244 CLR 390, 398 [10] (French CJ, Gummow, Hayne, Kiefel & Bell JJ).

¹¹¹ See, eg, *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, 408 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). This includes an explanatory memorandum and second reading speech; *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 633 [45], 636 [57] (French CJ, Kiefel, Bell, Gageler and Keane JJ). The Court respectively refers to the explanatory memorandum and second reading speech.

For all the judges in *Cross*, however, the primary objective of the contextual analysis was to identify purpose. French CJ and Hayne J referred to extrinsic materials as assisting in the determination of purpose,¹¹² as did Kiefel J¹¹³ and Crennan and Bell JJ.¹¹⁴

All judges referred to the broader term ‘policy’ alongside the term ‘purpose’ when identifying the use of extrinsic material. While sometimes used interchangeably,¹¹⁵ there is arguably a distinction between purpose and policy, with the former being a more specific aspect of the latter. However, the use of policy and purpose in one breath in *Cross* is illustrative of the recent vernacular in statutory interpretation¹¹⁶ and confirms the use of parliamentary materials to identify purpose or policy as a legitimate use of such material.

The High Court has stated that purpose or policy refers to the ‘objective’ purpose or policy of the statute which resides in the text and structure of the statute itself, albeit it may be identified by use of other interpretative aids. It is to be distinguished from the ascertainment of legislative intention, referred to as a statement of compliance with the applicable principles of construction, although the two may coincide.¹¹⁷ Exactly where the parameters are drawn between these two concepts is a matter for further inquiry.

2. *Limits of Purpose*

Arguably, the emphasis on parliamentary materials being used for identification of an objective purpose or policy reflects the consistent reluctance of the Court to use parliamentary materials for more specific tasks, such as to contribute directly to determining meaning. Contribution to meaning by identifying purpose or policy is one thing. Contribution to meaning by reference to statements in external documents purporting to explain or opine about meaning are quite another.

Despite the literal wording of s 15AB and its equivalents about ‘confirming’ or ‘determining’ meaning by reference to extrinsic materials, it would seem this ‘confirmation’ or ‘determination’ must only come by reference to what the materials identify about purpose or policy. Appropriate use of parliamentary materials means identifying ‘official statements of purpose’¹¹⁸ rather than, for example, debates about the worth of the bill. Consistent with this approach are that specific statements by a Minister or other parliamentary member in Hansard about the intended meaning of a statutory provision have been given little or no attention,¹¹⁹ even more so if they are made after the enactment of the statutory provision in question.¹²⁰ The rationale behind this is understandable. Statements by members of parliament during the legislative process about intended meaning of the bill or debates over what the bill

¹¹² *Cross* (2012) 248 CLR 378, 388–90 [23]–[25].

¹¹³ *Ibid* 412 [89].

¹¹⁴ *Ibid* 405–6 [70].

¹¹⁵ Kirby, above n 64, 127.

¹¹⁶ See, eg, *Acts Interpretation Act 1954* (Qld) sch 1 (definition of ‘purpose’). ‘Purpose’ includes ‘policy objective’.

¹¹⁷ *Lee v New South Wales Crime Commission* [2013] HCA 39, [45] (French CJ).

¹¹⁸ Dworkin, above n 17, 343. See also 342–5 where Dworkin discusses the basis for a distinction to be made between different types of statements by members of parliament.

¹¹⁹ *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529, 538 [22] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also Pearce and Geddes, above n 14, 91–2.

¹²⁰ *Hunter Resources v Melville* (1988) 164 CLR 234, 241 (Mason CJ and Gaudron J).

should do are, in the end, just that. They are, at best, statements by an individual about intention¹²¹ or worth. They are given little consideration, not because there is no law allowing access to them, but because they have nothing to contribute to the interpretative task. They are evidence of subjective intention, and therefore should have no weight. Statements about purpose, in contrast, as discerned from the available evidence (being the parliamentary materials) go to the 'target' of the legislation.¹²²

The difficulty is to distinguish between statements going to meaning and statements going to purpose. The line may sometimes be hard to discern. This highlights again the problematic nature of attempting to confine the use for which one can have recourse to Hansard. Focus on the assessment of the weight to be given to the material, rather than how it may be used, may yield a more rigorous use of the material.

The more subtle issue raised in *Cross* was about the process by which purpose is identified in parliamentary materials and used to interpret the text. For French CJ and Hayne J, this was a pivotal point in their reasoning. A 'danger that must be avoided' in identifying a statute's purpose 'is the making of some a priori assumption about its purpose.'¹²³ Essentially, an interpreter, they said, must not work 'backwards' from the parliamentary material. One must not construct an idea of purpose or policy derived from the parliamentary material and then use that identified purpose or policy to drive the construction of the statutory text, without proper consideration of the purpose evident from the statute. This answers the question of interpretation 'by reference to the purpose that was initially assumed.'¹²⁴

For French CJ and Hayne J, this was a critical flaw in the Court of Appeal's reasoning. The Court of Appeal derived a policy from the Second Reading Speech which was 'not apparent', in French CJ and Hayne J's view, from the statutory text itself. Instead, they had relied on a purpose evident from the Speech and then attributed that to the statute. In addition, to say, as the Court of Appeal had, that there was 'no basis' in the parliamentary material for imposing the cap on all claims 'is to assume the answer to the question of construction and then ask whether the assumed answer is falsified.'¹²⁵

This is not the first time the High Court has taken to task an intermediate court for what it sees as a court constructing its own idea of policy and then attributing that to the text. In *Australian Education Union v Department of Education*,¹²⁶ the joint judgment of French CJ, Hayne, Kiefel and Bell JJ quietly admonished another Supreme Court for its 'judicially constructed policy at the expense of the requisite consideration of the statutory text.'¹²⁷

¹²¹ See Raymond, above n 70, 204–5. Raymond argues that ambiguity is never cured by an author's commentary about intention as this only indicates what the author wants the text to mean.

¹²² Sir Kenneth Diplock 'The Court as Legislators' in Brian W Harvey (ed), *The Lawyer and Justice* (Sweet and Maxwell, 1978) 263, 274.

¹²³ *Cross* (2012) 248 CLR 378, 390 [26] (French CJ and Hayne J).

¹²⁴ *Ibid* 395 [41].

¹²⁵ *Ibid* 394–5 [40]–[41].

¹²⁶ (2012) 248 CLR 1.

¹²⁷ *Ibid* 14 [28]. See also the comment by the Court about imputing policy in *Newcrest Mining Limited v Thornton* (2012) 248 CLR 555, 588 [93] (Crennan and Kiefel JJ).

All the judges in *Cross* made statements about the importance of the statutory text in identifying purpose. Crennan and Bell JJ noted that, while extrinsic materials can elucidate purpose, 'consideration of extrinsic materials should not displace the clear meaning of the text'¹²⁸ and that the 'clear meaning of the text of a statute ... is the surest guide.'¹²⁹

Kiefel J, in a section entitled 'Approaches to statutory construction', affirmed the legitimacy of resort to parliamentary materials to identify purpose or policy but cautioned that:

An understanding of legislative policy by these means does not provide a warrant for departing from the process of statutory construction and attributing a wider operation to a statute than its language and evident operation permit.¹³⁰

C The Role for Parliamentary Materials – Integral not Decisive

Sackville AJA in the Court of Appeal agreed with the other members of the Court as to the weight of the parliamentary materials, but acknowledged that the 'major countervailing consideration'¹³¹ to his construction was the language of the two statutes. A similar battle was key to the split in the High Court.

All judges acknowledged that there were differences in language used between the two Acts, such as different key terms and different exclusions. In French CJ's and Hayne J's view, their analysis of the differences led them to conclude that the textual indicators 'readily'¹³² yielded the conclusion that the two Acts operated independently and there was 'no textual reason' for the definition of 'personal injury damages' to be interpreted as meaning the broader claims regulated by the *CLA*.¹³³ Further the text of the relevant provisions indicated no contrary purpose.

Considerations of parliamentary materials did not support the conclusion that the object of the two Acts was that they 'are to be read as having coextensive fields of operation.'¹³⁴ The only circumstance of context, in their view, supporting that conclusion was that the relevant provisions were enacted by the same bill at the same time. However, any inference to be drawn from that was not supported by the text of the relevant provisions.¹³⁵

Kiefel J also relied on the textual differences between the two Acts to indicate that they operated in different spheres, but gave more weight to the Second Reading Speech, considering that it had 'identified a wider common purpose'¹³⁶ for the controls effected by the two Acts, being the mitigation of the crisis in the affordability of public liability insurance. However, this identification of a common purpose was not sufficient to conclude that the two statutes formed part of a statutory scheme. The textual indicia of each statute meant that the two statutes operated independently of each other and 'provided no warrant for reading the LP Act by reference to the

¹²⁸ *Cross* (2012) 248 CLR 378, 405 [70].

¹²⁹ *Ibid* citing, among others, *Alcan* (2009) 239 CLR 27.

¹³⁰ *Ibid* 412 [89].

¹³¹ *Cross v Certain Lloyds Underwriters* [2011] NSWCA 136 [76].

¹³² *Cross* (2012) 248 CLR 378, 392–3 [33].

¹³³ *Ibid* 392–4 [33]–[39].

¹³⁴ *Ibid* 394 [38].

¹³⁵ *Ibid* [39].

¹³⁶ *Ibid* 413–4 [95].

[CLA].¹³⁷ This independence was not inconsistent with the broader common purpose – it just meant that the means adopted by each Act to achieve this purpose differed.¹³⁸

Crennan and Bell JJ gave more weight to the parliamentary materials. Acknowledging that context ‘may raise factors that pull in different ways,’¹³⁹ they considered that the parliamentary speech indicated that the object of the bill for both Acts was to remedy a common problem.¹⁴⁰ This suggested to them that the two Acts were to operate as a scheme addressing a common mischief. While accepting some overlap in exclusions between the two Acts¹⁴¹, they considered that ‘consideration of the mischief’ with which the *LP Act* was intended to deal and ‘the express language’ of s198C ‘weighs against interpreting that provision as merely picking up the words of the definition’ in the *CLA*.¹⁴² The text of both Acts, together with the retrospective operation of the Division,¹⁴³ was consistent with a common scheme.

Although they stated that this construction ‘gives full effect to the statutory language’¹⁴⁴ it must be said that the textual analysis in their judgment was less explanatory than in the other judgments.

From all judgments, it emerges that extrinsic contextual considerations are still seen as an integral part of the construction process. Integral, however, does not mean decisive. To paraphrase a gently scathing comment by Justice Heydon, reading the parliamentary materials is usually much less helpful than reading the legislation itself.¹⁴⁵ Extrinsic material, by its nature, can and should only play a supporting role to the text. The Court’s language shows this. References to the parliamentary material in *Cross* being able to ‘support’¹⁴⁶ ‘confirm’¹⁴⁷, ‘identify’¹⁴⁸, to ‘elucidate’¹⁴⁹ ‘suggest’¹⁵⁰ and ‘infer’¹⁵¹ indicate the nature of its role. Similar language has been used in other recent High Court cases.¹⁵² This helps explain why the High Court, and particularly Chief Justice French, often adopts the phrase of using parliamentary materials ‘where

¹³⁷ Ibid 415 [102].

¹³⁸ Ibid [103].

¹³⁹ Ibid 405 [69] citing Francis Bennion, *Statutory Interpretation* (Butterworth, 3rd ed, 1997) 343–4.

¹⁴⁰ Ibid 405–6 [70].

¹⁴¹ Ibid 407–8 [74].

¹⁴² Ibid 407 [73].

¹⁴³ Ibid 405–6 [70].

¹⁴⁴ Ibid 407 [73].

¹⁴⁵ *Saeed* (2010) 241 CLR 252, 277 [74].

¹⁴⁶ *Cross* (2012) 248 CLR 378, 394 [38] (French CJ and Hayne J).

¹⁴⁷ Ibid 413 [94] (Kiefel J).

¹⁴⁸ Ibid 412 [89] (Kiefel J).

¹⁴⁹ Ibid 405–6 [70] (Crennan and Bell JJ).

¹⁵⁰ Ibid.

¹⁵¹ Ibid 413 [94] (Kiefel J).

¹⁵² See, eg, *Baini* (2012) 246 CLR 469, 482 [34]–[35] (French CJ, Hayne, Crennan, Kiefel & Bell JJ); *Construction Forestry Mining & Energy Union v Mammoet Australia* (2013) 248 CLR 619, 633 [45] (Crennan, Kiefel, Bell, Gageler and Keane JJ). See also *Kline v Official Secretary to Governor General* (2013) 249 CLR 645, 664 [48] (French CJ, Kiefel, Crennan and Bell JJ). Their Honours refer to their statutory construction as being ‘fortified’ by resort to secondary materials.

appropriate.¹⁵³ This is not to suggest that sometimes it is not permissible to look at extrinsic materials, but to recognise that the weight and relevance to be attributed to the material is variable. And sometimes, if the material contains no direct consideration of the point in issue, it is not helpful at all.¹⁵⁴

Parliamentary materials inform but do not decide. Nor is examination of such materials 'an end in itself.'¹⁵⁵ Statements in explanatory memoranda or by Ministers must not overcome the need to carefully consider the text to ascertain meaning.¹⁵⁶ Purpose and meaning must reside in the text, even if identified by reference to extrinsic materials.¹⁵⁷ This caution has particular relevance when other interpretative tools are triggered, such as common law presumptions against retrospectivity or abrogation of fundamental rights, which may place an even heavier burden on the text. Indeed, the latter presumption was a relevant consideration for the joint judgment in *Saeed*.¹⁵⁸

The case of *Cross* reflects the use of *Saeed* as a legal authority since 2010. Cases such as *Commissioner of Taxation v BHP Billiton Limited*,¹⁵⁹ *Jemena Asset Management Pty Ltd v Coinvest Limited*,¹⁶⁰ *Momcilovic v The Queen*,¹⁶¹ *Baini v The Queen*¹⁶² and *Kline v Official Secretary to the Governor General*¹⁶³ have referred to *Saeed* as authority for the proposition that whatever is discerned from parliamentary materials must not displace textual analysis. Indeed, in *Cross* itself, Crennan and Bell JJ cited *Saeed* as authority for the principle that consideration of extrinsic materials should not displace the text of a provision.¹⁶⁴

¹⁵³ *Cross* (2012) 248 CLR 378, 389 [25] (French CJ and Hayne JJ). See also 405–6 [70] (Crennan and Bell JJ).

¹⁵⁴ See, eg, *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, 408–10 [71]–[75] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) where extensive reference was made to a 'very large body of extrinsic material' with most of it being unhelpful. Other examples include *Wicks v State Rail Authority of New South* (2010) 241 CLR 60, 75 [41] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) and *Lehman Brothers Holdings Inc v City of Swan* (2010) 240 CLR 509, 526 [49] (French CJ, Gummow, Hayne and Kiefel JJ) and 535 [72] where Heydon J stated that 'there can be few cases in which extrinsic materials have been less useful – a large claim, but a true one.'

¹⁵⁵ *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 293 ALR 257, 269 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

¹⁵⁶ *Saeed* (2010) 241 CLR 252, 264–5 [31] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

¹⁵⁷ See *Momcilovic v The Queen* (2011) 245 CLR 1, 74 [111] (French CJ) referring to *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 591–2 [43]–[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁵⁸ *Saeed* (2010) 241 CLR 252, 271 [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) citing *Coco v The Queen* (1994) 179 CLR 427. The relevance of this presumption, the 'principle of legality' in *Saeed*, was recently noted in *Lee v New South Wales Crime Commission* [2013] HCA 39, [171] (Kiefel J), [312] (Gageler and Keane JJ).

¹⁵⁹ (2011) 244 CLR 325, 340 [47] (French CJ, Heydon, Crennan and Bell JJ).

¹⁶⁰ (2011) 244 CLR 508, 527 [50] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

¹⁶¹ (2011) 245 CLR 1, 43 [31] (French CJ).

¹⁶² (2012) 246 CLR 469, 476 [14] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

¹⁶³ (2013) 249 CLR 645, 659–60 [32] (French CJ, Crennan, Kiefel and Bell JJ).

¹⁶⁴ *Cross* (2012) 248 CLR 378 405–6 [70].

VI CONCLUSION

Former Justice Mason has noted that we 'would fool ourselves if we thought that even sharper rules of statutory interpretation could ... avoid hard choices in statutory construction.'¹⁶⁵

The enactment of s 15AB and its State equivalents, while a pivotal point in the development of the law on the use of parliamentary materials at the time, seems to be an example of a possible delusion. The practical difficulties of the section and developments in the common law have eroded their relevance and use.

Despite the attempts in the statutory provisions to place restrictions on recourse to extrinsic materials, it is well established that statutory text must be considered in its context, which includes consideration of extrinsic context, from the beginning of the construction process. Further, such consideration does not require the satisfaction of any threshold test. An open door, for all practical purposes, prevails. The CIC Principle requires this consideration. The statutory provisions, even when cited, provide no serious barrier to gaining access to parliamentary materials.

In essence, the CIC Principle seems to bring us largely in alignment with the well-known view of former US Supreme Court Justice Frankfurter that 'nothing that is logically relevant should be excluded.'¹⁶⁶ This approach has merit for two reasons.

First, as a matter of practicality, recourse to extrinsic materials for statutory construction is not an area that lends itself to restrictions on what materials should be used or when they can be used. Restrictions on materials will inevitably involve excluding potentially relevant materials or illogically distinguishing between one type and another. Restrictions on when they can be used lead to 'sharp' rules with artificial barriers and technical arguments about eligibility.

Secondly, as a matter of principle, this approach is correct. If we accept that context is important, then it should always be important.¹⁶⁷ The symposium attendees, members of Parliament supporting the enactment of s 15AB and the judiciary since *CIC Insurance* have adopted the philosophy that extrinsic material, including parliamentary materials, has relevance to statutory construction. If one accepts that premise then all such material should be available for consideration. If one does not accept that premise, then we need to consider the alternative course of relying solely on the intrinsic textual aids of the statute itself. There is no logical or persuasive halfway house.

It is the 'appropriate use' that seems to have been the focus of the High Court in their recent discourse on extrinsic materials, with some guiding signposts emerging.

¹⁶⁵ Hon Keith Mason AC, 'Legislators Intent: How judges discern it and what they do if they find it' (Speech delivered at Institute of Advanced Legal Studies, London, 2 November 2006) <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_mason021106>.

¹⁶⁶ Justice Felix Frankfurter, 'Some Reflections on the Reading of Statutes' (1947) 47 *Columbia Law Review* 527, 541.

¹⁶⁷ To paraphrase Kirby J in *R v Lavender* (2005) 222 CLR 67, 102 [109] who said: 'If context is important for statutory construction, why is it not always important?'.

First, the primary use of parliamentary materials is to identify the purpose or policy of the statutory provision or the statute as a whole. While there is nothing to prevent a reader from examining such material for other purposes, such as a Minister's opinion about meaning, this is not their primary relevance.

Secondly, while parliamentary materials may be useful in identifying purpose or policy, ultimately that purpose or policy must be borne from the text itself. Purpose discerned from parliamentary materials is not an 'empty vessel into which particular judges can unrestrainedly pour their own wishes.'¹⁶⁸

Thirdly, and a corollary to the second point, relevant content found in the materials about purpose cannot be used to displace the text. The primary source for interpretation is the text. The flexibility of the text to support an object identified in parliamentary materials is limited. In this respect, the largely forgotten s 15AB(3) of the *Acts Interpretation Act* (and its State equivalents) has probably the most relevant import of the otherwise now largely otiose s 15AB. Its recognition that, despite our ability to look beyond the statute, focus should be on the 'ordinary meaning' of the text is a reminder of the primacy of the text.

Saeed and *Cross* remind us that parliamentary materials have an integral but not decisive role. In the end, they are merely one piece of the puzzle,¹⁶⁹ much like a common law syntactical presumption or a dictionary definition. They may give us a starting point or a clue as to what is intended by the statute, but in the end the statute must tell the story.

It may be argued that the focus on the text and the cautious approach to using materials beyond the text indicates a move by the High Court away from a purposive approach and towards a more textual approach to interpretation.¹⁷⁰ However, the two approaches are not mutually exclusive. As *Cross* shows, the primary reason to consider parliamentary materials is to identify the purpose — a reason clearly aligned with the mandate of s 15AA requiring the choice of the construction that 'best achieves' the purpose. The High Court affirms that we are to adopt a purposive approach but that the identified purpose must ultimately have its roots in the statute itself.

This is as it should be. If one is going to use sources other than the enacted text in the construction process, in particular parliamentary ones, that use 'has to be disciplined.'¹⁷¹ At the end of the day, the statute represents the law as enacted through the parliamentary process of our democratic system. Parliamentary materials may be important indicators, but the written law as such is our legitimate guide.

¹⁶⁸ *Momcilovic v The Queen* (2011) 245 CLR 1, 181 [450] (Heydon J). Heydon J was referring to purpose more broadly in this paragraph but the analogy seems particularly apt here.

¹⁶⁹ Kirby, above n 64, 118.

¹⁷⁰ See, eg, Weinberg JA's discussion in *SM v Director of Public Prosecutions* [2013] VSCA 342, [49]–[56] where his Honour refers to recent High Court discussion on legislative intention and use of extrinsic materials, including in *Cross*, as a 'reversion to text'.

¹⁷¹ Duxbury, above n 20, 214.