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INTRODUCTION TO STATUTORY INTERPRETATION

We live in an exciting time of transition.
The great commons of the common law
are being engulfed by a tsunami of legislation.¹

¹ K Mason, 'The Intent of Legislators: How Judges Discern It and What They Do if They Find It', in *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007) 33 at 44.

Legislation is the predominant source of law applied by judges in the common law world today. This is because, even though the doctrine of precedent allows for the development of law by judges through cases, most areas of law are now set down in statutes, and cases primarily concerning their interpretation. Accordingly, advanced skills in statutory interpretation are essential for all legally trained people. No longer is it adequate to have a vague memory of approaches to interpretation learned during first-year law.

Through legislation, Parliament communicates, to individuals and corporations alike, what it expects them to do and refrain from doing, and what procedures they must follow to effect certain outcomes. Being able to properly advise clients on the way legislation applies to their professional or personal circumstances can reduce the incidence of litigation, and being able to succinctly advocate for a particular interpretation during a court case can reduce the length, and therefore the cost, of hearings.

Statutory interpretation is not just one extra skill for lawyers to have. It is a central, essential skill—an area of law in itself.² James Spigelman, when he was Chief Justice of the Supreme Court of New South Wales, stated that ‘the law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of law are determined entirely by statute. No area of the law has escaped statutory modification’.³ Chief Justice French of the High Court of Australia has said, ‘Today in Australia, we go about our lives under a mountain range of statutory words, imposing obligations and restrictions, creating rights and liabilities and conferring power on an array of regulatory bodies, public authorities and officials ... In the age of statutes the function of judges in interpreting legal texts has become more, rather than less, important’.⁴

Statutes are, however, difficult to interpret. Indeed, they have been referred to as the ‘most repellent form of written expression known to man’.⁵ The written word is an essential but an imprecise means of communication. It is ‘essential’ because it is simply not feasible in a modern society to pass laws down from generation to generation by word of mouth, and it is ‘imprecise’ because words may be interpreted narrowly or broadly, or may have different meanings depending on the context in which they are used. The primary responsibility of the court becomes one of resolving a dispute over the meaning of words.

2 J J Spigelman, ‘The Poet’s Rich Resource: Issues in Statutory Interpretation’ (2001) 21 *Australian Bar Review* 224.

3 J J Spigelman, ‘Statutory Interpretation and Human Rights’, Address to the Pacific Judicial Conference, Vanuatu, 26 July 2005, www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_speech_spigelman260705.

4 R French, ‘The Judicial Function in an Age of Statutes’, 2011 Goldring Memorial Lecture, Wollongong, 18 November 2011, www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj18nov11.pdf, at 15 and 23.

5 C Allen, ‘The Literature of the Law’, *Aspects of Justice*, Stevens & Sons Ltd, 1958 at 284.

Unfortunately for newcomers, this is an ‘inescapably’ complex task which ‘involves an art, not a science’.⁶

The role of the courts in statutory interpretation is limited by the separation of powers doctrine. It can only rule on the legislation as it stands—even if it is in the process of being amended.⁷ A court cannot improve, rewrite or develop a statute. Nor can a court apply the purpose of the legislation in isolation from a statutory provision giving effect to that purpose. As discussed in Chapter 3, a court must interpret the words used in a statute in the light of their context and purpose. A judge must work out what Parliament intended and give effect to it, even if the judge does not personally agree with the statute. The challenge, of course, is that what Parliament wants is not always clear and obvious. If Parliament does not agree with the interpretation a statutory provision is given by the courts, it is open to amend the statute, and to some extent a failure to do so is suggestive of agreement on the courts’ interpretation.

Before proceeding it is worth noting that the words ‘interpretation’ and ‘construction’ are often used interchangeably.⁸ This may be seen, for example, in the text of s 15AA of the *Acts Interpretation Act 1901* (Cth), which refers to ‘interpretation’ although the Explanatory Memorandum about it refers to ‘construction’. Is it necessary to ‘interpret’ every statute, or can a statute in which the meaning is obvious simply be read and applied? This would appear to be the thrust of an extra-judicial comment made by Murray Gleeson, the then Chief Justice of the High Court: ‘Unless the meaning of a legal text of any kind, whether it be a will, a contract, or an Act of Parliament, is self-evident, then the text requires interpretation’.⁹

Perhaps one would best use ‘interpretation’ to work out the meaning of a single word or phrase, and ‘construction’ to construe the meaning of a whole section or provision. Certainly neither term is used in everyday life—at home if we sat down with a good book we would not say we are ‘interpreting’ or ‘construing’ it—and at work we may say we are ‘analysing’ data, ‘reading’ a report, ‘perusing’ a letter or ‘applying’ the terms of a contract, but we would not usually say we were interpreting or construing these documents. Use of those words inherently suggests that what Parliament produces is either unclear (in need of interpretation) or incomplete (such that the meaning has to be constructed based on what is there). Neither flatters Parliament; perhaps in hindsight ‘statutory application’ would have been a more innocuous term, although, as the text unfolds, the reader may come to the conclusion that, more often than not, interpretation is what is called for.

6 M Kirby, ‘Statutory Interpretation: The Meaning of Meaning’ (2011) 35 *Melbourne University Law Review* 113 at 132.

7 D Pearce, ‘Anticipating Legislation’ (2008) 58 *Australian Institute of Administration Law Forum* 8.

8 *Wilson v Anderson* (2002) 213 CLR 401 per Gleeson CJ at [8].

9 M Gleeson, ‘The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights’, Address to Victoria Law Foundation, Melbourne, 31 July 2008.

History and evolution of statutory interpretation

Understanding how statutory interpretation evolved from our English origins assists in our understanding of the matrix of rules we use today, some derived from statute and others from common law cases. It must be borne in mind that, prior to the rise of Parliament in England, the only form of statute was a decree from the monarch. The eleventh-century early beginnings of the common law following the Norman Conquest had almost nothing to do with statutes, and in the following century, during the reign of Henry II, the itinerant justices who travelled the realm dispensing the King's justice were not applying statute law, or even a common law of England, but local customary laws. It was only when Henry II introduced a system of criminal procedures, including the Assize of Clarendon in 1166 and later the Assize of Northampton, followed closely by the writ system, that the beginnings of a coherent body of law could be seen. It would be another 130 years before a Model Parliament was held and a rudimentary system of passing bills through Parliament, followed by Royal Assent, arose.

It was not until the fourteenth century that the notion of parliamentary sovereignty, giving statute law superiority over common law, resulted from the gradual (and in the case of Charles I, brutal) reduction in the power of the monarch, and the dawning realisation by the courts in the 1530s that statutes were binding, and that there needed to be guidelines for interpreting them. Because statutes were seen as an affront to the common law, courts construed them narrowly. The 'literal' approach to statutory interpretation ostensibly flatters the Parliament by saying that the Parliament must mean what it says: if the meaning of the words was clear, then the courts would apply that meaning regardless of the result; but it also protects the common law against excessive incursion by statutes. As long as formalism was the order of the day courts would only apply statutes whose meaning was clear on their face. If they were unclear, then (with regret, they said) it was up to Parliament to enact amendments.

The golden rule and the mischief rule both emerged over time,¹⁰ but it should not be forgotten that courts would only use these rules when the ordinary meaning created an absurdity or repugnancy. The golden rule could only modify the words to the minimum extent necessary to address drafting errors, and the mischief rule allowed consideration of the mischief that was intended to be remedied but only where that mischief was evident from reading the Act as a whole. There was little reference to extrinsic materials, besides the common law.

For the English penal colony that became Australia, the absence of British judges in the early days meant that the beginnings of this Anglo-Saxon system were more military than civilian. And while the Australian legislature took a long time to develop, English

¹⁰ This book assumes readers have an introductory understanding of statutory interpretation. Readers unfamiliar with the golden and mischief rules should refer to Chapter 9.

statutes played a key role from the beginning. To use Paul Finn's expression, 'we were born to statutes'.¹¹

As Blackstone wrote, colonists carried with them as much English law as was applicable to their new situation, including English statutes and the common law rules for their interpretation, as spelt out in the *Australian Courts Act 1828* (Imp). A proper court system was not implemented until Bigge's damning report on Governor Macquarie reached England, prompting passage of the *New South Wales Act 1823* (Imp) establishing the Supreme Court of New South Wales. The task of our first Chief Justice, Sir Francis Forbes—applying colonial practices and customs, without the benefit of colonial legislation, in the light of English statutes and common law 'as far as applicable'—could not have been an easy one.

Australia did not have a representative legislature, as opposed to an appointed Legislative Council, until after the *Australian Constitutions Act (No 1) 1842* (Imp). The independence of our legislature was also very late in blooming, due to the doctrine of repugnancy under which local laws that were inconsistent with English law were struck down by the Supreme Court. The repugnancy doctrine as set out in the *Colonial Laws Validity Act 1865* (Imp) applied right up until 1942 at the Commonwealth level, and until 1986 at the state level.¹² It is unsurprising that the rules of statutory interpretation have only recently, and to a much lesser extent than other areas of law, crystallised into something distinctly Australian.

The passage of interpretation legislation has set us on a path, with relatively little deviation between the Commonwealth, the states and territories, towards a coherent body of law relating to statutory interpretation. This book aims to synthesise that body of law and to present it in a structured manner. However, just as the obvious inconsistency in laws could not be hidden by Blackstone in his early commentaries, nor can obvious inconsistencies in approaches to statutory interpretation in Australia be clad over. Honesty is the best policy, so inconsistencies are identified and recommendations made where relevant. This is the most logical approach and is not intended as a criticism of the judiciary.

What then has been the approach of courts in Australia to interpreting statutes over the past two centuries? For the greater part, indeed right up to the 1980s, courts were highly conservative, literal and focused on replicating what could be expected from an English court. There was extreme deference to interpretations by English courts in analogous fact and statutory situations; English cases were cited as authorities with reverence, and even in 2015 the large majority of High Court decisions refer back to English authorities.

11 P Finn, 'Statutes and the Common Law' (1992) 22 *University of Western Australia Law Review* 7 at 8.

12 *Statute of Westminster Act 1942* (Cth) and *Australia Acts* (1986).

The four options for the treatment of legislation by the courts, set out over a century ago by legal scholar and former Dean of Harvard Law School Roscoe Pound, remain illustrative even now. He said that courts can:

- treat statutes as a superior source of law, applying them fully in rule and in principle, and reasoning from them by analogy;
- treat statutes as being on par with judge-made law, applying them fully and reasoning from them as one would with other judicial decisions;
- give only direct effect to statutes, favouring a liberal, or broad interpretation; or
- give only direct effect to statutes, favouring a strict, or narrow interpretation.

When Pound was writing, courts were positioned well and truly in the fourth category. Although he predicted that there was ‘coming to be a science of legislation’,¹³ he did acknowledge that courts tended to treat the common law as superior to legislation. His comment was that ‘[t]he proposition that statutes in derogation of the common law are to be construed strictly ... assumes that legislation is something to be deprecated’.¹⁴

The role of the judiciary in interpreting legislation

Where have we come since then? In 1992 Paul Finn suggested that ‘judicial treatment of statutes in this country falls into Pound’s third and fourth categories’,¹⁵ and that, while all four have a place, none has ‘exclusive sway’.¹⁶ Over two decades later, we can see that the tide has pushed us very much towards the first category (or the first part of it, at least) in the sense that statutes are treated by the courts as a superior source of law. There are of course exceptions, such as the role of the High Court in determining the validity of legislation, and adjustments, such as the principle of legality whereby courts will presume legislation does not interfere with fundamental rights, except where express words are used. But on the whole it is recognised that legislation is both prolific and prevailing, and that Parliament can use legislation to trample on fundamental rights, provided the boot mark is clear.

As for the second part of the first category, the analogical use of statutes to develop the common law, there is a mixed experience and, as French CJ has stated, it is ‘an area

13 R Pound, ‘Common Law and Legislation’ (1907–8) 21(6) *Harvard Law Review* 383 at 384.

14 *Ibid* at 387.

15 *Above* n 11 at 19.

16 *Ibid* at 20.

not particularly well developed in Australia and subject to ongoing debate'.¹⁷ An example of reasoning by analogy from statutes is in *R v L* (1991) 174 CLR 379 where the High Court established the common law crime of rape in marriage. The High Court reasoned that the notion that:

by reason of marriage there is an irrevocable consent to sexual intercourse ... is out of keeping ... with recent changes in the criminal law of this country made by statute, which draw no distinction between a wife and other women in defining the offence of rape.

The High Court was reasoning by analogy from a statute to support its reasoning for change of a common law rule. It has been suggested that analogical reasoning is a subset of the principle of coherence, and that 'statutes may properly and sometimes necessarily exert a significant "gravitational force" on the ongoing development and application of a coherent common law of Australia'.¹⁸ The relationship between the common law and statutes is further discussed in Chapter 9.

Coming back to Roscoe Pound's four categories, the reality is that there is ongoing inconsistency in the degree to which statutory provisions are applied. It cannot be said that they are applied 'fully' as in approaches 1 and 2, and sometimes they are applied broadly, as in 3, or narrowly, as in 4. The approach taken by different judges varies, depending on each judge's view of their role. Former Chief Justice of the New South Wales Supreme Court, James Spigelman, an active commentator on statutory interpretation, has described it as a 'spectrum of judicial opinion':

It is useful to think of a spectrum of judicial opinion ranging from strict literalism at one end to broadly based purposive interpretation at the other end. That such a spectrum exists, and that it is a wide spectrum, reflects the fact that there are a number of well established principles—like the literal rule, the golden rule and the mischief rule—which do not necessarily point in the same direction. The process of selecting which principle or rule should be given salience in a particular case is a matter of judgement about which reasonable minds can differ.¹⁹

If this were a book on jurimetrics a hundred pages could be dedicated to tracing the judicial reasoning of various High Court judges, showing how their beliefs about the role of a judge in our system of government influences the decisions they make. The shocking decision of *Al-Kateb v Godwin* (2004) 219 CLR 562, where the High Court decided a

17 R French, 'Bending Words: The Fine Art of Interpretation', Speech given at University of Western Australia, 20 March 2014, www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20Mar14.pdf.

18 E Bant, 'Statute and Common Law: Interaction and Influence in the Light of Coherence' (2015) 38(1) *University of New South Wales Law Journal* 367 at 369, taking the expression 'gravitational force' from J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 *Law Quarterly Review* 247 at 259.

19 J J Spigelman, 'The Intolerable Wrestle: Developments in Statutory Interpretation', Address to the Australasian Conference of Planning and Environment Courts and Tribunals, 1 September 2010, 1.

human being could be held indefinitely in executive detention despite having committed no crime, is illustrative. One of the High Court justices has described his own majority judgment as ‘what you may call the inhumane approach’.²⁰ The statutory provision made no clear reference to the predicament of human beings who could not, as bona fide refugees, be sent home, who could not, due to security issues, enter Australia, and who could not find another country willing to take them.²¹ Only Kirby J, in dissent, invoked a presumption in favour of liberty and against indefinite detention as a human right which could only be rebutted by express words.

Known colloquially as ‘The Great Dissenter’ from his time on the High Court, Michael Kirby’s approach stands in stark contrast, for example, to the strongly formalist approach of Justice Bell in *Jemena Gas Networks (NSW) Limited v Mine Subsidence Board* [2011] HCA 19. There, the remainder of the High Court was willing to adjust the ordinary meaning of the words in light of the statutory purpose, but Bell J confined her interpretation to the ordinary grammatical meaning of the provision, saying, effectively, that the unreasonable result was caused by the unreasonable provision.

There are arguments for and against legal formalism and judicial activism, and there are times when each is called for. A strictly formalist approach puts the onus back on Parliament to correct imperfections and injustice in legislation—to do otherwise in solving statutory lacunae, the courts are facilitating Parliament’s abdication of responsibility. There are also arguments about the separation of powers and the role of the courts being to apply, and not make, law. But equally, there is a need, if for no other reason than that the public should have confidence in the court system, to do whatever can be done, within the bounds of statutory interpretation, to do justice. Particularly when values are involved, people often feel they know, intuitively, the ‘right’ outcome to a case. When reading the case exercises in this book, readers are asked to pay close attention to their intuitive response, and try to see how it influences their attempt to apply the rules of statutory interpretation to reach that outcome.

This discussion is not tending towards a suggestion that the rule of law be cast aside and judges reason based on fairness (as is still done in some international commercial disputes). It is simply recognising that judges, due to their inherent beliefs about the role of the judiciary, will tend towards different interpretations of statutory provisions. Where the result is that a case outcome may depend on who is on the bench as much as upon what is in the statute, then the rule of law is not best served. Whether an enduring resolution to this problem can be found, or whether it should be accepted as an inherent part of our system, has long been a matter of argument.

20 ABC Local, ‘Richard Aedy Interview with Justice Dyson Heydon’ (*Sunday Profile*, 15 March 2013), www.abc.net.au/sundayprofile/stories/3716374.htm, referred to in D Burke, ‘Preventing Indefinite Detention: Applying the Principle of Legality to the *Migration Act*’ (2015) 37 *Sydney Law Review* 159 at 159.

21 As of October 2014, there were fifty people in indefinite detention; see Human Rights Watch, *World Report 2015: Australia*, www.hrw.org/world-report/2015/country-chapters/australia.

What would not be acceptable would be presentation of the outcome of an issue of statutory interpretation as if it were the only, right answer, as though statutory interpretation were akin to a mathematical formula:

$$\text{Issue} + \text{Rules} = \text{Outcome,}$$

$$\text{where Rules} = \frac{\langle \text{words/context} \times \text{purpose} \rangle - \text{maxims} + \text{presumptions}}{(\text{extrinsic materials} = \text{history} + \text{debates} + \text{dictionaries})}$$

This would not do for a court and it would not be a satisfactory response in statutory interpretation exercises. It is preferable to state the available approaches using the rules of statutory interpretation and identify which was chosen, and for what reason. This would assist law students and lawyers alike in understanding the modern approach to statutory interpretation being taken by the courts, and would perhaps enable lawyers to engage in more depth with the bench on these matters.

The process of judicial reasoning in statutory interpretation has been described as a ‘hermeneutical circle’. It is a reiterative process in which the provision is considered, and reconsidered, in the light of the remainder of the statute, various extrinsic materials, rules and presumptions, in order to arrive back at the provision with, ideally, a deeper and clearer understanding of it, and maybe a different understanding to one’s own pre-understanding.²²

Is there a way to find stability, predictability and coherence? Stephen Gageler, when Solicitor-General of Australia, said that:²³

‘literal in total context’ is an incomplete explanation of contemporary statutory interpretation in Australia unless ‘context’ is expanded to include the way the statutory text is applied in the courts after the text is enacted ... Over time, the meaning of a statutory text is reformed by the accumulated experience of courts in the application of the law to the facts in a succession of cases.

One may ask, who is funding this grand interpretive adventure, and is the High Court a luxury destination few can afford? It may perhaps be said that a cautious and incremental approach developed across a series of cases is realistic only from the perspective of those who sit behind the bench, or are paid to stand before it.

This raises the question of whether there is precedent in statutory interpretation. On the one hand, pronouncements of the High Court as to the correct approach to be taken, provided there is a modicum of consensus, should be followed by lower courts. Otherwise, the interpretation of other courts is persuasive and the usual rules apply as to the persuasive authority of the decisions of Full Courts as compared to decisions of single judges, and to the circumstances in which an interpretation is considered plainly wrong

22 J Campbell and R Campbell, ‘Why Statutory Interpretation is Done as it is Done’ (2014) 39 *Australian Bar Review* 1.

23 S Gageler, ‘Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process’ (2011) 37(2) *Monash University Law Review* 1 at 1.

and is not followed.²⁴ In most instances for judicial comity and coherence, and especially in national scheme legislation, courts will try to align their interpretation. The same goes for international comity and consistency, in relation to interpretation of international agreements (see Chapter 12).

But the interpretation of a word or phrase in one piece of legislation obviously cannot be used as an authoritative interpretation of another piece of legislation. At each instance, meaning depends not only on the words used, but also the context in which they are used. This is the focus of Chapter 3 of this book. Essentially, the approach the court should take will depend on the statutory provision in question—the clarity of the wording, in its context, and in the light of the statutory purpose. Perhaps, even for conservative judges, the clearer the intention of Parliament and the principle underpinning the statute, the more comfortable they will be in taking an expansive approach, reading where necessary beyond the words, or even reading them as if additional words appeared (this is also considered in Chapter 5).

Unfortunately for the student, although some rules of statutory interpretation are well settled, some of the rules that really matter, like the principle of legality, are presently in a state of flux. If the High Court of Australia cannot reach an outcome without slim majority and multiple individual judgments, it is difficult to expect law students to develop clarity and confidence in applying the rules. This book focuses on what is agreed and, in areas of uncertainty, considers differences in approach and reasoning. What is in agreement across the judiciary is that statutory interpretation is an exercise that encompasses the text, context and purpose of legislation. What makes statutory interpretation so complex, and arguably fascinating, is a combination of the fact that statutory texts rarely have a single, simple meaning, or a single, clearly stated purpose, and that their context includes vast terrain in and beyond the statute, borne from what may be a conflicted, fraught political arena.

Practical outcome of this book

It is intended that those who complete reading this book will understand the rules of statutory interpretation and be able to apply them to any legal scenario in which a statute is involved. The ‘take out’ is the flow diagram in the back cover, which is a ‘ready reckoner’ for undertaking statutory interpretation. It is complemented by the ‘quick reference’ list of the rules of statutory interpretation, in the Statutory Interpretation Index in Chapter 14. Readers have the opportunity to apply the practical methodology to hypothetical case scenarios, as provided in that chapter, as a stepping stone to applying it to real case scenarios upon entering the profession, be it legal practice, in-house counsel, the public service or other workplace environments which operate within a statutory framework.

24 See M Sanson and T Anthony, *Connecting with Law* (Oxford University Press, 3rd edn, 2014), Chapter 10.

The following is a brief introduction to the overall practical process of applying statutory interpretation. The substance of the rules and process is covered in the following twelve chapters, and is then synthesised in Chapter 14. Statutory interpretation involves three key phases: identification, exploration and application. The first phase entails identifying the applicable legislation, and this involves use of legal research skills (reference can be made to Chapter 5 of M Sanson and T Anthony, *Connecting with Law*, Oxford University Press, 3rd edn, 2014). It is important to make sure the legislation actually applies, in the sense that it is in force at the relevant time and in the relevant place. Essentially, we identify the applicable provisions and read them, think about the ordinary meaning of the words, and then move into the exploration phase, which involves consideration of the statute as a whole and extrinsic materials, in order to assess the context and purpose of the legislation. We use these findings when we enter the application phase, returning to interpret the statutory text in the light of its context and purpose, in order to arrive at the legal meaning.

Structure of this book

Having already briefly discussed in this chapter the evolution of statutory interpretation, the approaches taken by the judiciary, and the overall intended outcome for readers, Chapter 2 focuses on the role of the legislature. Understanding how statutes are created helps to get a sense of how the provisions that generate often thought-provoking issues of statutory interpretation came about. There is a discussion of the plain English drafting movement, and a discussion of the pros and cons of comprehensive but incomprehensible legislation versus general vague legislation which is comprehensible but leaves a great deal of discretion in the hands of the judiciary.

Chapter 3 proceeds directly to the applicable legislation on the interpretation of legislation. The discussion focuses on the Commonwealth legislation but notes similarities and differences in the state and territory legislation. Chapter 4 goes to the crux of statutory interpretation—the cornerstone provision of the Interpretation Acts—governing the task of interpreting each statutory provision in the light of its context and purpose. This chapter considers what is included in the context, when it is considered, how to find the purpose, and the reality of unstated purposes, multiple purposes and conflicting purposes. Chapter 5 continues with the related but distinct notion of intent, which, counterintuitively, is an objective phenomenon rather than an investigation into the ‘actual’ intentions of the ‘actual’ Parliament that passed the ‘actual’ statute. Chapter 5 also looks at interpretive techniques which give courts a way to shrink or strain the meaning of statutory provisions in their efforts to give effect to the purpose of the legislation.

Chapter 6 considers all elements of statutory interpretation that can be found within the statute itself. These are referred to as intrinsic materials. They include everything from

preambles, objects clauses, definition sections and syntax through to headings and margin notes. This discussion of the component parts of a statute is followed by discussion of the words themselves in Chapter 7. Chapter 8 then considers all elements of statutory interpretation that are external to the statute. These are referred to as extrinsic materials. Close attention is paid to the relevant legislative provisions, and different kinds of extrinsic materials are examined, along with examples of their use by the courts.

Chapter 9 returns to common law approaches, considering the degree to which the old literal rule, golden rule and mischief rule play a role today, and referring to the ongoing (albeit diminished) use of Latin maxims for interpretation. Chapter 10 focuses on common law statutory presumptions, some of which are strengthening rather than fading in the face of the modern statutory approach. Chapter 11 takes one of those presumptions—that Parliament does not intend to interfere with fundamental rights—described as a component of the principle of legality, which is drawn from constitutional law. This is coupled with consideration of the distinctive legislative development in Victoria and the Australian Capital Territory of statutory bills of rights, whereby statutes provide that other statutes are to be interpreted in the light of applicable human rights standards. Chapter 12 continues the theme to some extent by considering the application of international law in statutory interpretation, in relation both to the presumption that Parliament intends to legislate in conformity with international law and the focus only on treaty law while ignoring other key sources of international law, namely customary international law and general principles of law.

Chapter 13 considers specific instruments, with the interpretation of delegated legislation and other instruments such as guidelines, rulings and so forth by quasi-legislative bodies such as the Australian Securities and Investments Commission (ASIC) as well as the interpretation of codes, and wills, deeds, contracts and agreements.

Chapter 14 brings the findings in the book together in a practical methodology for statutory interpretation. In the first edition, an attempt was made to provide a first iteration of an index to the rules of statutory interpretation, referred to as Statutory Interpretation Index 1 ('SII1'), and the updated version, 'SII2', is provided herein. It goes on to provide the practical methodology for approaching complex questions of statutory interpretation, discussed in the above section. Included is a complete case scenario to which statutory interpretation rules are applied using the methodology. There are also four full practice scenarios, including facts, law, and materials such as second reading speeches and explanatory memoranda. They may be used in law schools that continue to 'embed' statutory interpretation across the curriculum. They are also appropriate for moot activities, with student groups acting for each party, and a further student group acting as judges. An assessment task could involve handing up written submissions ahead of oral argument, with students in the role of judges having to prepare a written judgment that is defended orally. Where these exercises are used in continuing legal education, outcomes reached by independent consideration can be compared with those of colleagues.

Most chapters also include smaller ‘case exercises’ in which major cases on statutory interpretation are dissembled and presented as problem scenarios to the reader. The pedagogy behind this technique is to shift an otherwise passive adult learning method of reading into active learning in which the reader constructs their knowledge through attempting to apply their knowledge of relevant principles of statutory interpretation. Once their mind is made up, the reader is able to compare their interpretation with the interpretation reached in the real decision, seen reassembled often with quotations from the superior court judgments.

Guidelines for interpretation of this book

- No book can be all things to all people. This is a book on statutory interpretation, and while cases relating to substantive areas of law are considered, they should not be treated as entire case summaries. Cases may have three or more key issues, and if only one of these is an issue of statutory interpretation, that is the issue focused upon. Similarly, cases may have numerous facts, and facts not material to the issue of statutory interpretation are excluded.
- Case exercises are designed to illuminate the process of statutory interpretation. Accordingly, fact matrices are presented as being current or recently occurring when in reality, depending on when the case was decided, they may be anywhere up to seventy years old. This is to give a sense of immediacy, and there may be scenarios which present statutory provisions that have since been amended or repealed.
- The focus of this book is on using illustrative examples of the application of the rules of statutory interpretation. It is not an encyclopaedic loose leaf service, so it does not footnote numerous cases on each point or attempt to cover the minutiae of rules which may have been used a hundred years ago by English courts.
- The focus is on statutory interpretation in Australia. Where there is an Australian authority for a rule, it is used in preference to a preceding English authority. Similarly, where a High Court authority is available, it is used in preference to state court authorities. Finally, where a recent illustration of a statutory interpretation principle is available, it is given priority. Also, quotes from cases are given wherever possible and references contained within quotes have been omitted.
- Readers must cast aside any preconceived notions about statutes being tedious and boring, or equating the experience of interpreting statutes to passing time in Siberia clothed in a hair shirt. Statutory interpretation can be fascinating if it is given a chance. Have faith.