

Recent Trends in Statutory Interpretation

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Introduction

1. In recent years, the High Court has emphasized the primacy of the text in determining statutory meaning, and has distanced itself from the more purposive and contextual approach to statutory interpretation taken by the Court in the 1990s. One of the difficulties in identifying the nature of the change in approach is that the court, generally, uses similar language to that used in earlier cases to describe its interpretive function and still cites the earlier cases in support of its current approach. It continues to assert the relevance of context and purpose to interpretation, albeit noting their subordination to text. The shift in approach is closely connected with a reconceptualization of what is meant by legislative intention and purpose. This means that while the changes in the language the court uses to describe its interpretive task are subtle, the change to the way in which it carries out that task is significant.
2. The High Court has decisively rejected the idea that legislative intention is a mental state attributable to legislators, and that legislative purpose is something existing prior to the text. Whilst the High Court has always acknowledged the impossibility of determining the subjective intention of legislators, the Court's disavowal of the proposition that its task is to ascertain the legislature's objective intention, understood to be a construction of the actual policy informing the legislation, is relatively new. In the last five years, the Court has asserted that legislative intention is a fiction, and has recast legislative intention as the result of a process of applying interpretive rules. As Hayne J succinctly put it, "[i]ntention' is a conclusion reached about the proper construction of the law in question and nothing more."² This reductive view of legislative intention is unprecedented. As a result of this prevailing judicial view, the broader context in which a statute came into being has become far less important.

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² *Momcilovic v The Queen* (2011) 245 CLR 1, Hayne J at 141 [341].

High Court's current approach compared to purposive approach

3. The High Court set out its approach to statutory construction in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 ("*Alcan*"). In a passage which has since frequently been referred to with approval by members of the High Court,³ Hayne, Heydon, Crennan and Kiefel JJ said at [47]:

This court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. 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. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. (footnotes omitted)

4. Whilst each sentence, taken in isolation, is unexceptional, this statement in fact heralds a radically different interpretive practice than that adopted by earlier members of the High Court. The difference between the approach the court is advocating here, and the court's earlier interpretive practices, is well illustrated by comparing this passage to some of the court's well-known expositions about statutory interpretation from the 1990s.
5. The plurality's statement in *Alcan* that a consideration of the text is the starting point when interpreting a statute may be contrasted the observations of Brennan CJ, Toohey, Gaudron and Gummow JJ in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 ("*CIC Insurance*") at 408, that context is to "be considered in the first instance". This did not mean that the text should not also be considered in the first instance; but, rather, that the text should be considered in its context from the beginning of the interpretive process. The plurality's immediate disavowal of the relevance of historical considerations and extrinsic materials in *Alcan*, at least where the text is clear, is inconsistent with the idea in *CIC Insurance* that context should be considered at the outset "not merely at some later stage when ambiguity might be thought to arise" (at 408). It is also inconsistent with the court's view in *CIC Insurance* that "inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent" (at 408).
6. The plurality's statement in *Alcan* that the "surest guide" to legislative intention is the "language which has actually been employed in the text of legislation" recalls the language used by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. In that case (at 381 [69]), immediately before emphasizing that context needed to be considered at the beginning

³ See, for example, *Kline v Official Secretary to the Governor-General* (2013) 137 ALD 1; (2013) 304 ALR 116; (2013) 88 ALJR 161; [2013] HCA 52, French CJ, Crennan, Kiefel and Bell JJ at [32]; *Maloney v R* (2013) 298 ALR 308, Hayne J at [61]; *X7 v Australian Crime Commission* (2013) 298 ALR 570, French CJ and Crennan J at [25]; *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, French CJ and Hayne J at 388-390 [23]-[25].

of the interpretive process, their Honours quoted Dixon CJ's comment in *Commissioner for Railways (NSW) v Agalinos* (1955) 92 CLR 39 at 397 that "the context, the general purpose and policy of a provision and its consistency and fairness are *surer guides* to its meaning than the logic with which it is constructed" (my emphasis). In *Alcan*, the emphasis has shifted from context, purpose and policy as determinants of meaning to the statutory language itself (presumably considered only in the context of other statutory provisions, unless the need to consider other materials arises at a later point). Although the plurality in *Alcan* acknowledges that consideration of the context of a provision, including the mischief it seeks to remedy, may inform its meaning, this acknowledgement is made only after the court's emphasis on the centrality of the text and its warning that extrinsic materials cannot displace the text's clear meaning.

7. Ascertaining legislative intention by reference to statutory language has long been the "fundamental object" of statutory interpretation.⁴ However, recent statements by the High Court to the effect that legislative intention is a fiction or metaphor⁵ have fundamentally changed that object. Further, adopting a statement of four members of the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the court has recently described the objective of statutory interpretation as being "to give the words of a statutory provision the meaning that the legislature is *taken to have intended them to have*" (my italics).⁶ By combining this objective with the concept that legislative intention is fictitious, the court's task has changed from ascertaining the legislature's will through the use of principles which help to elucidate it, to constructing meaning (the legislature's deemed intention) through the application of interpretive rules.
8. It may be doubted that, in *Project Blue Sky*, the plurality intended its description of the objective of statutory interpretation to be given the significance the present High Court appears to attribute to it. That is, it appears unlikely that, by referring to the meaning "the legislature is taken to have intended," the court was lending support to an approach to statutory interpretation which disregards (and denies the existence of) actual legislative intention. In *Project Blue Sky*, the observation about the objective of statutory interpretation follows from the court's conclusion as to the literal meaning of a provision, and is followed by a statement that:

The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may

⁴ *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, Mason and Wilson JJ at 320. See also Richard Ekins and Jeffrey Goldsworthy, "The Reality and Indispensability of Legislative Intentions," (2014) 36 *Sydney Law Review* 39 at 39-41.

⁵ *Zheng v Cai* (2009) 239 CLR 436, French CJ, Gummow, Crennan, Kiefel and Bell JJ at 455 [28]; *Lacey v A-G (Old)* (2011) 242 CLR 573, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at 592 [43]; *Momcilovic v The Queen* (2011) 245 CLR 1, Gummow J at 85 [146]; Hayne J at 135 [322].

⁶ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, McHugh, Gummow, Kirby and Hayne JJ at 384 [78]; *Lee v New South Wales Crime Commission* (2013) 302 ALR 363, French CJ at 386 [45]; *Momcilovic v The Queen* (2011) 245 CLR 1, French CJ at 45 [38]; Gummow J at 92 [170]; *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, French CJ and Hayne J at 389 [25]; *Lacey v A-G (Old)* (2011) 242 CLR 573, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at 591 [43].

require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.⁷

In other words, the High Court appears to be saying in *Project Blue Sky* that a contextual approach to interpretation might justify a departure from the literal meaning of the words of a provision in order to arrive at a meaning the court may take the legislature to have intended (and which it is most likely to have intended). By contrast, in more recent cases, the High Court asserts that legislative intention is a construct arrived at by applying established rules and denies that it precedes and may inform the process of construction.

9. The Court considered what is meant by legislative intention in *Zheng v Cai* (2009) 239 CLR 446. French CJ, Gummow, Crennan, Kiefel and Bell JJ said (at 455-456 [28]) that to determine legislative intention was not to attribute “a collective mental state to legislators” but, rather, “judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws.” This statement was not entirely novel, in that Dawson J had acknowledged in *Mills v Meeking* (1990) 169 CLR 214 at 234 that legislative intention was “somewhat of a fiction”⁸. However, it was a significant step in the Court’s departure from a purposive approach to statutory construction and towards embracing a textual approach. Where language is thought to express intention, understood as a mental state (however fictional or artificial), it may be understood purposively. Where, however, “intention” becomes a construct unrelated to a mental state, the result is to change the purpose of interpretation, being no longer to discover what an “other” meant by what he, she or it said. Where the relevant text is a statute, the context of the legislation is no longer so important, because it does not bear upon the formation of a mental state.
10. The questions of the objective of statutory interpretation, and the meaning of legislative intention, were revisited by the High Court in *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573. In that case (at 591-592 [43]), French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ noted that, in *Project Blue Sky*, the objective of statutory construction was defined “as giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have”. Their Honours then said that the concept of legislative intention as “an objective collective mental state” is “a fiction which serves no useful purpose”:

Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts. (footnote omitted)
11. Insofar as the application of the rules of construction involves reference to the purpose of a statute, the joint majority held that such purpose “resides in its text and structure,

⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, McHugh, Gummow, Kirby and Hayne JJ at 384 [78].

⁸ See also *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, McHugh J at 339-340 and Gaudron J at 338-339.

albeit it may be identified by reference to common law and statutory rules of construction" (at 592 [44]). The difficulty with this is that many of the rules of construction are founded on the assumption that Parliament does (really) intend to achieve certain ends through legislation, and that the legislation reflects (real) policy choices.

Implications of the rejection of the reality of legislative intention

12. The rejection of the concept of legislative intention, in the sense of it being the judiciary's best guess at what the legislature *actually* intended, means that the language of statutes is no longer expressing a collective purpose or policy of the legislature, arrived at before the statute was drafted; rather, the statute, as interpreted by the judiciary, creates that purpose or policy. This means that statutory language functions, or is taken to function, differently from language in general; rather than understanding it as a communication which takes its meaning partly from the context in which the communication occurs, it is understood to operate in a vacuum (or, more accurately, only within the "walls" of the statute itself). This gives rise to a danger that a judge will bring assumed contexts to his or her interpretation of the statutory language, without recognising or articulating them. Further, the textual approach to interpretation encourages an assumption (long discredited) that the "text" will have a straightforward meaning and that context is a kind of add-on which might mislead or detract from this plain, obvious meaning; it fails to acknowledge that text and context are interrelated and the text often does not speak clearly and simply. It also denies that we understand language contextually.
13. In favour of the High Court's current theory of legislative intention, it may appear that subscribing to the notion of "actual" legislative intention is naïve, particularly given that the legislature is a group of persons and, in a bicameral legislature, two such groups. Clearly, each person within the group has subjective intentions which differ from the intentions of others and some (who have not paid sufficient attention to the bill under consideration) may have no intention at all. Further, within the "group" of people comprising a House of Parliament, different parties (sub-groups) have different policies, and a bill may be amended to concede something to a minor party, thus meaning the bill is informed by both the policy of the party putting it forward and the, possibly conflicting, policy of the party gaining an amendment. As Gummow J has observed, "statute law may be the result of a compromise between contending factions and interest groups and of accommodations between and within political organisations which are not made public and cannot readily be made apparent to a court".⁹
14. All this may be accepted. However, it does not mean that legislative intentions should be relegated to the status of fiction and metaphor or turned entirely into judicial constructs.
15. Legislatures pass legislation to give effect to policies. There is thus a real, collective intention to change the existing state of the law in a particular way to achieve a desired end when a bill is enacted. This concept is fundamental to representative democracy: citizens vote at elections at least partly on the basis of the policies the major parties put forward. A bill reflects a collective plan or policy to achieve a certain goal or goals, even

⁹ *Wik Peoples v Queensland* (1996) 187 CLR 1, 168–169.

if the overarching policy is modified through the making of amendments to the bill. Richard Ekins and Jeffrey Goldsworthy argue that “the legislature is a complex purposive group — an institution — that forms and acts on intentions, which arise from but are not reducible to the intentions of the members of the group (the individual legislators)” and that the “intention of a group is the plan of action that its members adopt”.¹⁰ This theory of legislative intention is consistent with the community’s expectations of what their elected representatives are doing, and with the way language is understood in every other form of text: as a means of communicating the intentions of the author (whether the author be an individual, an institution or a group of persons).

16. Ascertaining the legislature’s intention will always involve a degree of supposition, and the attribution of a purpose to a legislature after its legislation has been passed will always be partly creative. To that extent, legislative intention, as found by the courts, may properly be described as fiction. However, the notion of a prior, collective intention, as reflecting a real legislative plan, is worth holding on to. McHugh J observed in *Eastman v The Queen* (2000) 203 CLR 1 at 46 [146] that, even if the notion of legislative intent is fictitious, “it serves a useful purpose”. His Honour quoted, with approval, a passage from Professor Popkin’s book:¹¹

The simple act of thinking about the meaning of statutory language in this broader context — which the judge must do — requires judgment about how the text should interact with its past and future. That is why, despite its being an obvious fiction, the judge when engaged in statutory interpretation is unable to do without the concept of legislative intent. Intent is matched with text as an essential aspect of statutory meaning, not because the judge has any confidence that legislative intent is knowable, but because “intent” (or “will”) captures the idea that choices must be made in order to apply a text to facts. Legislative intent is a useful judicial construct because the judge is required to make the choices that best express the statutory text’s meaning.

17. In a similar vein, Professor Jeff Goldsworthy has argued that, “if there is no legislative intention to serve as the lodestar guiding application of the principles of statutory interpretation, then the enterprise is likely to become a kind of game played to reach desired results.”¹² Defining an “objective intention” as “what a reasonable audience would conclude was the author’s ‘subjective’ intention, given all the publicly available evidence of it,” Ekins and Goldsworthy persuasively contend that “the existence of a subjective intention is a crucial presupposition of our attribution of an objective intention to the author of a text.”¹³ It is important, then, to retain the idea that the judiciary’s role is to ascertain, as accurately as possible, what the legislature really meant, or can be taken to have meant, from the best objective evidence available. The primary evidence of this intention is, of course, the text of the legislation, but evidence about the

¹⁰ Richard Ekins and Jeffrey Goldsworthy, “The Reality and Indispensability of Legislative Intentions,” (2014) 36 *Sydney Law Review* 39 at 64.

¹¹ William D Popkin, *Statutes in Court — The History and Theory of Statutory Interpretation*, 1999, at p 211

¹² Jeff Goldsworthy, “Current Issues in Statutory Interpretation,” Federal Court, 2 September 2013, Speaking Notes at <http://www.law.monash.edu.au/centres/commercial-law-group/j-goldsworthy-current-issues-in-the-interpretation-of-federal-legislation.pdf> .

¹³ Ekins and Goldsworthy at 46 and 48.

context in which the legislation was created is also relevant and informs the reader's understanding of the text's meaning.

Interpretation Acts

18. Another reason for questioning the High Court's prevailing approach to statutory interpretation, with its emphasis on the centrality of the text, is that it is not fully reconcilable with the provisions in interpretation statutes requiring courts to prefer an interpretation which would promote the purpose underlying an Act, and allowing courts to have regard to extrinsic materials in certain circumstances. By confining what is meant by "purpose" to something residing in a statute's text and structure, the High Court has effectively been able to describe its approach in a way which could be said to comply with these provisions. However, ironically, if a contextual approach were taken to the interpretation legislation, its context would suggest that the legislation uses the term "purposive" to mean something different.
19. In the 1980s, Australian legislatures promoted a purposive approach to statutory interpretation before Australian courts had fully embraced this. In 1981, following a symposium on the interpretation of legislation convened by the Commonwealth Attorney General's Department, the Commonwealth enacted s 15AA of the *Acts Interpretation Act 1901* (Cth), thus giving legislative sanction to a purposive approach which applied (unlike the common law purposive approach at that time) even in the absence of ambiguity. In 1984, the Commonwealth enacted s 15AB, permitting consideration of extrinsic materials in certain circumstances.¹⁴ Similar provisions were later enacted in New South Wales¹⁵ and in other states and territories. The purpose of such provisions was partly to address "a concern that in some cases the time-honoured strict approach to the interpretation of taxation legislation had been undermining the purpose of the legislation."¹⁶ These provisions sought to effect a departure from the literal approach and mandate greater consideration of the purpose underlying statutes.
20. The High Court rarely refers to the provisions of the interpretation statutes requiring them to promote the purpose underlying an Act. According to my research, the last time the court referred to s 33 of the *Interpretation Act 1987* (NSW) was 2005,¹⁷ and the last time it considered s 15AA of the *Acts Interpretation Act 1901* (Cth) was 2009.¹⁸ However, those provisions would appear to mandate a more contextual approach to the interpretation of legislation than that the High Court is currently favouring.

Applying the textual approach to statutory interpretation: *Certain Lloyd's Underwriters*

21. Despite the unified voices of many members of the High Court in *Alcan, Zheng v Cai* and *Lacey*, differences of approach to statutory interpretation emerged in *Certain Lloyd's*

¹⁴ See RS Geddes, "Purpose and Context in Statutory Interpretation," Judicial Commission of New South Wales at http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph4/07_geddes.pdf .

¹⁵ *Interpretation Act 1987* (NSW), ss 33, 34.

¹⁶ RS Geddes, "Purpose and Context in Statutory Interpretation," Judicial Commission of New South Wales at http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph4/07_geddes.pdf , p 130.

¹⁷ *Palgo Holdings Pty Ltd v Gowans* (2005) 215 ALR 253, Kirby J at [98].

¹⁸ *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* (2009) 255 ALR 1, Heydon J at [101].

Underwriters Subscribing to Contract No IH00AAQS v Cross (2012) 248 CLR 378 (“*Certain Lloyd’s Underwriters*”). In that case, the respondents recovered damages, which were less than \$100,000, for personal injuries inflicted on them intentionally by certain hotel staff members. The judge found that their costs were subject to the limiting provision in s 198D(1) of the *Legal Profession Act 1987* (NSW) (“*Legal Profession Act*”) and that they could therefore only recover \$10,000 in costs from the insurers. This depended on the trial judge finding that the damages were “personal injury damages” within the meaning of that Act.

22. Section 198D(1)(a) of the *Legal Profession Act* provided that, if the amount recovered on a claim for personal injury damages does not exceed \$100,000, the maximum costs for legal services provided to a plaintiff are fixed at 20 per cent of the amount recovered or \$10,000, whichever is greater. The term “personal injury damages” was defined in s 198C(1) as having “the same meaning as in” Part 2 of the *Civil Liability Act 2002* (NSW) (“*Civil Liability Act*”). The *Civil Liability Act* defined “personal injury damages” as “damages that relate to the death of or injury to a person caused by the fault of another person”. Accordingly, on the plain meaning of this definition, “personal injury damages” included damages for intentionally-inflicted injuries.
23. Part 2 of the *Civil Liability Act* limited the amount recoverable as an “award of personal injury damages”. However, Part 2 did not apply to an award of damages for an intentional act that is done with intent to cause injury (*Civil Liability Act*, s 9(2)). In other words, broadly speaking, the Act did not limit personal injury damages where the injury was done intentionally.
24. The issue, then, was whether the expression “personal injury damages” in the *Legal Profession Act* included damages for an intentional act done with intent to cause injury, given that Part 2 of the *Civil Liability Act* did not apply to such damages. The injured persons appealed from the trial judge’s decision that it did (and that they were therefore limited in the costs they could obtain from the insurers).
25. In the New South Wales Court of Appeal, Basten JA (Hodgson JA and Sackville AJA agreeing) held that, when an Act defined a term by reference to its meaning in a “source statute,” it was “not sufficient just to take the words of the definition from the source statute and apply them as they stand, without any regard for their context in the source statute” (at [33]). Having had regard to extrinsic materials, his Honour held that the “cost-capping provisions” in the *Legal Profession Act* “were seen as part of a single package, having the same justification as the controls being imposed on awards of damages” (at [49]). Basten JA concluded that the “preferable view” was that “the definition in s 198C of ‘personal injury damages’ took account of the meaning of that term, not merely in the definition, but also by reference to the application section, of the *Civil Liability Act*” (at [49]). In other words, the cost-capping provisions in the *Legal Profession Act* did not apply to an award of damages for an intentional tort.
26. The High Court, by majority, came to a different view.
27. French CJ and Hayne J took a strictly textual approach to the interpretation of the legislation; Kiefel J also emphasized the importance of the text but was more prepared to

consider context; while the minority, Crennan and Bell JJ, considered the cost-limiting provision in its broader context.

28. French CJ and Hayne J (at 389 [24]) reiterated the joint majority's statement in *Project Blue Sky* that the "primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute" (adding the emphasis on the word "all"). Their Honours also noted (at 389 [25]), citing *Lacey*, that "[t]he purpose of a statute resides in its text and structure." They expressed the view that statutory purpose and intention are produced by statutory construction, and do not exist independently of it (at 390 [25]). As their Honours put it, "[d]etermination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted" (at 389 [25]).
29. Whilst acknowledging that the relevant provisions must be construed in context (at 391 [28]), French CJ and Hayne J held that this is not what the respondents were doing. Rather, the respondents were treating s 198C(1) of the *Legal Profession Act* as providing that "personal injury damages" means personal injury damages of the kind to which Pt 2 of the *Civil Liability Act* applied (at 392 [32]). Thus, their Honours declined "to investigate, in the abstract, the use of 'context' in statutory interpretation" (at 392 [32]).
30. French CJ and Hayne J held that the text "readily yields the construction" advanced by the insurers; that is, "personal injury damages" included damages for intentional torts (at 392 [33]). The reference to what the term "means" in the *Civil Liability Act* was not a reference to the operation or application of that Act (at 392 [33]). Their Honours also expressed the view that considerations of context did not support the proposition that the *Legal Profession Act* and the *Civil Liability Act* had "coextensive fields of operation" (at 394 [38]). The Court of Appeal's reasons in the proceedings below illustrated "the dangers of reasoning from legislative 'intention' that is not based, as it must be, in the text of the relevant legislation" (at 394 [40]).
31. Kiefel J was the third member of the majority. Her Honour identified the process of construction as beginning with "the words of the provision in question read in the context of the statute". Context also included "the general purpose and policy of the legislation, in particular the mischief to which the statute is directed and which the legislature intended to remedy" (at 411-412 [88]). Kiefel J was thus more prepared than French CJ and Hayne J to consider context and the "general purpose and policy of the legislation". However, her Honour warned that an understanding of legislative policy by reference to extrinsic materials does not justify "attributing a wider operation to a statute than its language and evident operation permit" (at [89]).
32. Crennan and Bell JJ, in dissent, also referred in their reasons to the statement about statutory interpretation in *Project Blue Sky* (at 404-405 [68]), but their emphasis was more on the legitimacy of having regard to context. Opining that the text is the surest guide to legislative intention, and that the expression "legislative intention" is used metaphorically, their Honours stated, as Kiefel J did, that "it is uncontroversial that in determining the meaning of the text of a statute or provision a court may take into account the general purpose and policy of a provision and, in particular, the mischief that it is intended to

remedy" (at 405 [70]). However, referring with apparent approval to *CIC Insurance*, their Honours gave "context" a much wider operation than the members of the majority, noting that "the purpose of a provision may be elucidated by appropriate reference" to extrinsic materials (at 405 [70]).

33. The Court of Appeal's reference to extrinsic materials, then, was justified, in their Honours' view (at 406 [70]). The extrinsic materials indicated that the *Civil Liability Act* "was enacted to deal with a perceived problem involving the high cost of *negligence* claims and the impact of such claims on the cost of insurance" (original emphasis) and that Div 5B of Pt 11 of the *Legal Profession Act* was enacted to remedy the same problem (at 406 [70]). Their Honours rejected the insurers' argument that "the presumed legislative intent of Div 5B is the achievement of some wider purpose than restricting recovery of costs in small negligence claims", expressing the view that there could be no "sensible reason" for confining recovery of the scheme to small claims in which damages for personal injury are sought (at 407 [72]).
34. Crennan and Bell JJ also drew textual support for their position (at 407 [73]), noting that s 198C(1) of the *Legal Profession Act* directed attention to the *meaning* of the expression as in Pt 2 of the *Civil Liability Act*, unlike s 198C(2) which referred to a "definition" in another Act.
35. The difference between the majority and the minority lies, principally, in the different emphasis each gave to the importance of context in determining legislative intention. Although the minority described legislative intention as a metaphor, their interpretive practice suggests they were seeking to ascertain, objectively, something close to real intention. For example, by stating a view that the *Civil Liability Act* "was enacted to deal with a perceived problem," they attribute a (real) purpose to the legislature. By asking whether Div 5B of Pt 11 of the *Legal Profession Act* was enacted to remedy the same problem, they again refer to the (real) legislature acting purposively. Thus, their description of legislative intention as metaphorical appears to mean no more than that subjective intention is unknowable; their reasoning assumes the existence and relevance of real legislative purpose, as revealed by the extrinsic materials. On the other hand, French CJ's and Hayne J's warning about "the dangers of reasoning from legislative 'intention' that is not based, as it must be, in the text of the relevant legislation" indicates a more radical scepticism about the reality of legislative purpose independent of the statutory text.

Conclusion

36. The High Court's prevailing approach to statutory interpretation is textual rather than contextual. The court is not engaged in a process of seeking to ascertain the legislature's actual intention or purpose, and so is less likely to give a meaning to the legislation which approximates the real legislative purpose or policy informing the statute in question. The court's current approach also raises questions about the legitimacy of the judiciary's function; if judges are not trying to ascertain legislative intention, because this does not exist, then the theory that judges' role is to give effect to the will of the community's elected representatives is no longer coherent. On present orthodoxy, judges are doing

no more than applying accepted rules to determine or construct legislative meaning, so are operating as a wholly autonomous branch of government when interpreting statutes, rather than effecting the legislature's will.

37. The differences between the textual and contextual approaches to statutory interpretation adopted by the High Court give rise to real differences in the meanings given to statutes, as is apparent from the division of the court in *Certain Lloyd's Underwriters*. The courts are required by interpretation Acts to give effect to the legislature's injunction to prefer a construction that would promote the purpose or object underlying an Act, and the better construction of these provisions in interpretation Acts is that "purpose" refers to something embodied in, but also preceding and informing, legislation. If legislative intention is reduced entirely to something constructed by judges, laws become divorced from the people who made them, and ultimately from the people who elected the legislature. Whilst acknowledging that attributing an intention or purpose to a collective institution such as the legislature will always be partly artificial, there are good reasons to recognise the reality of the collective purposes and policies which drive the creation of the legislation which the judiciary is called upon to interpret.