

How to Interpret a Statute: Description

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Introduction

There is a model for interpreting statutes that is based on a comprehensive analysis of the necessary process. This model serves three purposes:

1. It provides a step-by-step guide for interpreting a statute.
2. It provides much of the structure for setting out a judgment that interprets a statute.
3. It determines the type of information that such a judgment will contain.

At the basis of this model are some simple propositions:

1. Any statute, and any interpretation of a statute, will change the world, either for better or for worse. This book labels the change as an effect.
2. Makers of statutes will generally seek or aim for some effect (or result or outcome) when they enact a statute.
3. Ideally the makers seek to achieve a beneficial effect and possibly even the best effect as they judge it. In some cases, and maybe even many cases, they do this.
4. In some cases, however, the makers will seek an outcome that is not the best effect as they judge it.

This background sets us up for understanding the fundamental rule of interpretation in each of the Australian jurisdictions. This text labels it the purpose and object rule. To apply this rule a court that is interpreting a statute, Statute X, has to do the following:

1. Meanings. It must identify the meanings of the ambiguous provision. These are labelled Meanings 1-n.
2. Purpose and Object. It must ascertain the purpose and object of the statute. The purpose or object of a statute consists of the effect (being a cluster of

specific effects) that the legislators sought to achieve when they enacted the statute. Label this Effect X.

3. ‘What If’ Analysis. It must perform a ‘what if’ analysis for each meaning. To do this, a court asks and answers the following question. If the court were to choose this meaning as the legally correct meaning, what effect would the statute cause? Label these possible effects as Effects 1-n to correspond with Meanings 1-n. That is, Effect 1 is the predicted effect of the statute for Meaning 1, Effect 2 is the predicted effect of the statute for Meaning 2 and so on.

4. Comparison. Now comes the comparison. The aim is to achieve Effect X exactly, or failing that, to come as close to Effect X as possible. Thus the task here is to measure how ‘close’ each of the effects in the set Effects 1-n is to Effect X. In other words, the court seeks to determine to what extent each predicted effect approximates Effect X.

5. Outcomes. There are two possible outcomes from the comparison:

5.1 One of the effects in the set Effects 1-n is identical with Effect X. Assume that Effect 2 is the effect that is identical with Effect X. In this case the meaning that would cause Effect 2 is the legally correct meaning of the ambiguous provision. This meaning is Meaning 2.

5.2 Not one of the effects in the set Effects 1-n is identical with Effect X. In this case there is a further task. The interpreter has to identify which effects in the set Effects 1-n is most similar to or comes closest to Effect X. This can be a complicated task for at least two reasons – there is insufficient data available and there is no simple and obvious measure of similarity or closeness. Once a court has identified this effect as best it can it then identifies the meaning that is predicted to cause this effect. This meaning is the legally correct meaning of the statute.

Before explaining the model for interpreting statutes, it is necessary to explain two preliminary or basic matters. These are:

1. Ambiguity, which generates the need for statutory interpretation.
2. The function of interpretation, which of course is the process for resolving ambiguity.

By explaining these matter at this early stage of discussion the text is able to prepare the reader for following the later discussion.

Ambiguity

Ambiguity begets the need for interpretation. A law is ambiguous when some word or phrase in it has more than one meaning. In consequence, when that part of the law is applied to facts the legal consequences of those facts may not be clear – according to one meaning of the ambiguous provision the law applies,

according to another meaning it does not apply. Consequently, a user of the law such as a citizen, lawyer or government official, will be in doubt about what a provision means, and thus about whether or how the provision applies to a particular set of facts. This means in turn that there is doubt about the person's legal position – for example, in a litigious matter it may not be clear whether the person is liable or not liable to be sued by another.¹

Function of Interpretation

When a law is ambiguous, initially users of the law must decide questions of law for themselves.² Hence, the best that they can do is to try to guess the correct legal meaning. However, if the matter comes to court, the court will resolve this uncertainty by some official interpretation of the ambiguous provision.

Logically, one might think, legislatures should interpret statutes since interpretation is a legislative process, even if on a reduced scale, but conventionally in common law jurisdictions courts interpret statutes.³ Thus, in this area of legislative activity courts wield the power,⁴ more so because of the phenomenal growth of statute law in the regulatory state.⁵

Courts, therefore, must resolve the uncertainty by determining the correct meaning of the ambiguous provision. Interpreting law, as courts do, is a function with important consequences because it determines conclusively which meaning is formally or legally correct (or which meanings are legally correct) and, in consequence, how the statute that contains the ambiguous provision will alight on and affect the subject of the statute, be they a citizen or a government.⁶

In practice, however, we speak of lawyers interpreting law when they advise a client. This is a form of shorthand because lawyers do not interpret law in the final sense of determining authoritatively the correct meaning of an ambiguous provision. Instead a lawyer advising a client tries to predict how the relevant court will interpret the law if and when the question comes up for decision.

1. There is an analysis and catalogue of ambiguity in Christopher Enright (2015) 'Ambiguity in Statute Law and Common Law'.

2. *Re O'Reilly; Ex parte Bayford Wholesale* (1983) 181 CLR 557 per Dawson J

3. Bauman (1989)

4. Easterbrook (1984)

5. Sunstein (1989)

6. See Easterbrook (1984)

Rules for Interpretation

Rules

The model for interpretation draws on, and enables an interpreter to comply with, the two basic statutory rules for interpretation that the Commonwealth has enacted in sections 15AA and 15AB of the *Acts Interpretation Act 1901*. There are similar provisions in all other Australian jurisdictions so discussion of the Commonwealth provisions throughout the text by and large covers these jurisdictions as well.

Outline of Rules

1. Policy: Purpose and Object

In Australia, the principle that a court should interpret a statute enacted by a democratic legislature according to its intent is enshrined in two sets of legal rules. Originally a common law rule called the mischief rule directed a court to interpret a statute by reference to policy. Later the Commonwealth and other jurisdictions enacted a statutory rule, the purpose and object rule that required a court to interpret a statute by reference to its underlying policy, that is, in the words of the statute, its ‘purpose or object’.⁷

2. Sources of Policy: Extrinsic Material

In Australia, there are statutory rules that allow a court, tribunal or official when interpreting a statute to do something that was not allowed or not freely allowed at common law. It allows them to look at material outside the statute. This material is labelled extrinsic material. In some cases at least this would assist these bodies in identifying the purpose and object of the statute.⁸

7. *Acts Interpretation Act 1901* (Cth) s15AA, *Acts Interpretation Act 1954* (Qld) s14A, *Interpretation Act 1987* (NSW) s33, *Interpretation of Legislation Act 1984* (Vic) s35, *Acts Interpretation Act 1915* (SA) s22, *Acts Interpretation Act 1931* (Tas) s8A, *Interpretation Act 1984* (WA) s18, *Legislation Act 2001* (ACT) s138, *Interpretation Act 1979* (NI) s10C, *Interpretation Act* (NT) s62A. Section 22(2) of the *Acts Interpretation Act 1915* (SA) provides that s22 does not operate to create or extend any criminal liability.

8. *Acts Interpretation Act 1901* (Cth) s15AB, *Acts Interpretation Act 1954* (Qld) s14B, *Interpretation Act 1987* (NSW) s34, *Interpretation of Legislation Act 1984* (Vic) s35, *Interpretation Act 1984* (WA) s19, *Acts Interpretation Act 1931* (Tas) s8B, *Interpretation Act* (NT) s62B, *Legislation Act 2001* (ACT) s139, *Interpretation Act 1979* (NI) s10C. There is no express provision in South Australia but judicial decisions have allowed access to extrinsic material to bring South Australia into line with other jurisdictions – see for example *Owen v South Australia* (1996) 66 SASR 251, 255-256 per Cox J and 257 per Prior J.

Vienna Convention

These two sets of statutory rules drew on the provisions for the interpretation of treaties in Section 3, Articles 31 and 32 of the *Vienna Convention on the Law of Treaties (1969)*. These provisions are set out in Appendix 3.

Mischief Rule

According to the mischief rule, as famously stated in *Heydon's Case*, a court must interpret a statute 'according to the intent of the Parliament that made it'.⁹ This will involve nullifying the 'mischief', or the 'harm', or the problem to use a modern word that caused the parliament to enact the statute.¹⁰ In short, the rule requires a court to look at the problem that the statute seeks to solve and to interpret the statute by treating it as the solution to the problem.¹¹

So, the mischief rule requires a court to interpret a statute in a manner that will give effect to the legislature's intention of closing down the mischief that led to the legislature's enacting the statute. It is therefore directed towards the desired effect as distinct from the desired meaning. The mischief rule inspired the statutory purpose and object rule, which has now overtaken it.

Purpose and Object Rule

The Commonwealth parliament inserted s15AA into the *Acts Interpretation Act 1901* in 1981. Section 15AA both authorises and requires a court, tribunal or official to interpret a statute by reference to its purpose or object, that is, the policy of the legislature. It is a statutory version of the mischief rule. This is called here the purpose or object rule or the purpose and object rule. Other Australian jurisdictions – the six states – Queensland, New South Wales, Victoria, Tasmania, South Australia, Western Australia – and three major territories, Norfolk Island, the Northern Territory and the Australian Capital Territory – followed the example of the Commonwealth over the next ten years and have now enacted their own version of the rule, although it takes much the same form and effect in each jurisdiction.¹² Consequently, the purpose and

9. *Heydon's Case* (1584) 3 Co Rep 7a, 7b

10. *Amalgamated Society of Engineers v Adelaide Steamship Co (Engineers' Case)* (1920) 28 CLR 129, 161-162, per Higgins J

11. For a more detailed account of the mischief rule see Christopher Enright *A Method for Interpreting Statutes*, Chapter 6 Purpose and Object Rule.

12. *Acts Interpretation Act 1901* (Cth) s15AA, *Acts Interpretation Act 1954* (Qld) s14A, *Interpretation Act 1987* (NSW) s33, *Interpretation of Legislation Act 1984* (Vic) s35, *Acts Interpretation Act 1915* (SA) s22, *Acts Interpretation Act 1931* (Tas) s8A, *Interpretation Act 1984* (WA) s18, *Legislation Act 2001* (ACT) s138, *Interpretation Act 1979* (NI) s10C,

object rule is now a standard provision for the interpretation of statutes in each jurisdiction.¹³

Text of Section 15AA

Section 15AA of the *Acts Interpretation Act 1901* (Cth) creates the purpose or object rule. In its present form s15AA provides as follows:

15AA Interpretation best achieving Act's purpose or object

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

Section 15AA essentially says that a court should interpret an ambiguous provision in a statute by choosing the meaning that would best achieve or advance the purpose or object of the statute.

Application of Section 15AA

Section 15AA applies to two entities, statutes and instruments.

Statutes

The object and purpose rule is expressed in universal terms – applying to the interpretation ‘of a provision of an Act’ – indicating that it applies to all interpretation of all statutes of the jurisdiction by anyone – court, tribunal or official. It is therefore intended to be comprehensive. So s15AA applies to all Commonwealth statutes.¹⁴ Obviously the reference in the legislation to the provisions of an ‘Act’ is prima facie a reference to a provision of an Act of the enacting jurisdiction. In Commonwealth legislation the word ‘Act’ refers to a Commonwealth Act,¹⁵ while an Act of the United Kingdom is referred to by the term ‘Imperial Act.’¹⁶ This means, therefore, the policy rule in the Commonwealth *Acts Interpretation Act 1901* does not apply to the *Constitution* since it is a statute of the United Kingdom. Nevertheless a court can adopt the object and purpose rule for interpreting the *Constitution* by invoking the common law version of the rule, the mischief rule.¹⁷

Interpretation Act (NT) s62A. Section 22(2) of the *Acts Interpretation Act 1915* (SA) provides that s22 does not operate to create or extend any criminal liability.

13. Appendix 1 Purpose and Object Rule

14. *Acts Interpretation Act 1901* (Cth) s2, s15AA

15. *Acts Interpretation Act 1901* (Cth) s38(1)

16. *Acts Interpretation Act 1901* (Cth) s38(2)

17. Courts have circumvented the fact that s15AA, authorising courts to look at extrinsic material when interpreting statutes, does not apply to the *Constitution*.

Instruments

Section 15AA also applies to legislative instruments as well as to other types of instruments (most obviously executive instruments) made under an Act. In part this is because an instrument made under a statute is in one major sense at least part of its enabling statute. In part this is because there are express statutory provisions to this effect.¹⁸

Mandatory Nature of Section 15AA

The purpose and object rule is not an option – it is mandatory. The various statutory provisions say that a construction promoting the object or purpose underlying the Act ‘is’ to be preferred to each other interpretation. In this way the rule gives a binding direction to a court. Thus, the rule is a ‘statutory injunction to promote the purpose or object underlying [an] Act.’¹⁹

Interpretation

Section 15AA requires the purpose and object of a statute to be used for ‘interpretation’ by preferring the ‘interpretation’ that ‘would best achieve the purpose or object of the Act’ over ‘each other interpretation’. So, there must be two or more interpretations open for the rule to apply.²⁰ In other words the rule applies only in the case where the provision is ambiguous.²¹ This means that the rule applies only to interpretation. It does not, therefore, apply to other tasks such as remaking the text of the statute so that it conforms to the object and purpose for which it was intended.²²

Purpose and Object

Section 15AA directs a court to prefer an interpretation that would best achieve the ‘purpose or object’ underlying the Act. The *Macquarie Dictionary* defines

They have held, eg in *Seamen's Union of Australia v Utah Development* (1978) 22 ALR 291, that when interpreting the Constitution it is permissible to look at parliamentary journals, drafts of bills, and the history of convention debates.

18. *Legislative Instruments Act 2003* (Cth) s13(1) and *Acts Interpretation Act 1901* (Cth) s46(1)

19. *Trevisan v FCT* (1991) 101 ALR 26, 31

20. *R v L* (1994) 122 ALR 464, 468

21. In *Mills v Meeking* (1990) 169 CLR 214, 235 Dawson J makes comment on the purposive rule’s current relation to the literal rule.

22. As the court said in *Trevisan v FCT* (1991) 101 ALR 26, 31, these provisions are ‘not a warrant for redrafting legislation nearer to an assumed desire of the legislature,’ and any meaning that a court gives to a provision in a statute ‘must be found in the words of Parliament.’

object to mean ‘the end towards which effort is directed’, and purpose to mean ‘the object for which anything exists or is done, made, used etc.’ This indicates that the two words mean much the same thing, and in the terminology deployed here, they mean the effect which legislation seeks to achieve. They can also be termed a ‘policy objective’²³ or the elimination of a mischief that a statute seeks.²⁴

The expressions, purpose and object, are found in Article 31(1) of the *Vienna Convention on the Law of Treaties (1969)*. It provides that a ‘treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

In *Heydon’s Case* the court described the mischief rule as requiring that a court interpret a statute ‘according to the intent of the Parliament that made it’²⁵ and according to the true intent of the makers of the Act’, which produced an outcome that was ‘*pro bono publico*’ (for the public good).²⁶ These phrases – ‘the intent of the Parliament’, the ‘true intent of the makers of the Act’ and an outcome that is ‘*pro bono publico*’²⁷ because it is what the legislature intended for the common good – express a notion that is similar to purpose and object.

Function of Section 15AA

Section 15AA requires a court to prefer a construction that would ‘best achieve’ the purpose and object of the Act in preference to ‘each other interpretation’. There are two possibilities:

1. Perfect Outcome. In the simplest case, there will be a meaning of the ambiguous provision that a court predicts will perfectly, fully and exactly achieve the purpose or object of the statute.
2. Best Outcome. However, it is always possible that there is no meaning that will create perfectly, fully and exactly achieve the purpose or object of the statute. This is where the word ‘best’ in the phrase ‘best achieves’ operates. The court chooses as legally correct the meaning that achieves the purpose or object of the statute better than any other possible meaning of the ambiguous provision. The point is simply this: the reference to ‘best achieves’ in s15AA signifies that

23. *Acts Interpretation Act 1954 (Qld)* s36. It defines ‘purpose for an Act’ (ie a Queensland Act), to include ‘policy objective.’

24. *Owen v South Australia* (1996) 66 SASR 251

25. *Heydon’s Case* (1584) 3 Co Rep 7a at 7b

26. *Heydon’s Case* (1584) 3 Co Rep 7a at 7b. Commentary 16.2.

27. *Heydon’s Case* (1584) 3 Co Rep 7a at 7b. Commentary 16.2.

the meaning that the court chooses as legally correct does not have to do the job perfectly but do it better than any of its competitors.²⁸

Ancillary Rules

Western Australia and South Australia have express provisions about the ambiguous Act's intention.²⁹ Although there are no direct equivalents of these in the other jurisdictions the substance of these provisions would apply there by the authority of common law or common sense. These are the provisions:

1. Legislation is considered as speaking at all times.
2. Legislation expressed in the present tense³⁰ shall be applied to the circumstances as they arise.

The purpose of these rules is to enable a court to give effect to every provision of the legislation³¹ according to its spirit,³² intent³³ and meaning.

Rationale of the Purpose and Object Rule

Interpreting statutes by reference to their underlying legislative policy or intent rests on four foundational propositions:

Proposition 1. Statutes and Effects. When a legislature enacts a statute it will cause some outcome or effect. For example a legislature enacts Statute X with the aim of causing Effect X. To emphasise a key concept, the purpose or object of Statute X is to achieve Effect X.

Proposition 2. Rationale for Enacting a Statute. When rational and honest legislators enact a statute they will do so in order to achieve some outcome or effect that they judge is for the public good. To use the phrase legally ordained phrase by s15AA, their 'purpose and object' is to achieve this desirable outcome or effect.³⁴

Proposition 3. Legislative Legitimacy Based on Democracy. When a legislature is elected it can claim some form of legitimacy based on its democratic

28. *Chugg v Pacific Dunlop* (1990) 170 CLR 249, 262 interpreted an earlier version of s15AA when it did not contain the phrase 'best achieve'. There several justices held that it is not permissible to choose a meaning which most accords with the object and purpose but does not fully implement it. See also *Skea v Minister for Immigration* (1994) 51 FCR 82, 85-86.

29. *Acts Interpretation Act 1915* (SA) s21, *Interpretation Act 1984* (WA) s8

30. In South Australia this provision includes legislation in the future tense also.

31. In South Australia it is 'each Act and every provision.'

32. In Western Australia the provision refers to 'true' spirit.

33. In South Australia the provision refers to the 'true' intent.

34. Sections 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth), which are the subjects of this text, use the terms 'purpose' and 'object'.

pedigree. This pedigree also imposes an obligation: since the people elect the legislature, legislators should act in their interest.

Proposition 4. Interpretive Legitimacy Based on Democracy. This requirement to act in the public interest has consequences for interpretation. These consequences are that a court should interpret a statute by reference to its legislative intent. By this means a court achieves legitimacy when it interprets a statute.

So, if a legislature is taken to achieve legitimacy by being elected, a court can logically draw on that legitimacy when it interprets law. In this case the court refrains from exercising its own independent judgment as to the best effect that can be achieved (which would be based on the court's determination of the best outcome founded on a calculation of the net benefit of each option). Instead it yields to legislative intent on the basis that a statute 'should be construed according to the intent of the [legislature] which passed the Act'.³⁵ The court interprets the statute in the way that the legislature wanted it to be interpreted; in doing so the court defers to the judgment of the legislature for determining the most desirable outcome. To emphasise the point, the court abides by the interpretive choice expressly or implicitly revealed by the legislature when enacting the statute. As stated earlier, this approach has a variety of names – consequentialism, originalism (which is popular in constitutional debate),³⁶ intentionalism, purposive interpretation³⁷ and original constructivism.³⁸

Legislative History

Since the Commonwealth Parliament first enacted s15AA it has amended s15AA on two occasions. Appendix 1 to this text sets out formal details of its legislative history.

Sources of Purpose and Object

To interpret a statute by reference to its purpose it is necessary to have access to determine the purpose and object. To do this it is necessary to have adequate sources of purposes and object. Under the current rules, there are two possible sources – internal and external.

35. *Sussex Peerage Case* (1844) 11 Cl&F 85, 143; 8 ER 1034, 1057

36. See Goldsworthy (1997).

37. *Kingston v Keprose* (1987) 11 NSWLR 404

38. Schanck (1990)

Internal Sources

A statute may contain indications of the statute’s purpose and object. There are two major possibilities:

1. There may be an express or explicit statement of its purpose or object.
2. To some extent, although it will vary according to the statute in question and the circumstances, it may be possible to make a reasonable inference from the text of the statute as to its purpose and object. However, such inferences may be limited and the conclusions so obtained may be wrong.

External Sources

At common law courts had only limited access to external or extrinsic sources. This has now changed since s15AB of the *Acts Interpretation Act 1901* and its counterparts in the other jurisdiction now allow some access to extrinsic sources. There is further discussion of s15AB below.

Analysis of the Purpose and Object Rule

Section 15AA is structured in the manner set out in the table below:

Elements	
Element 1. Ambiguity	A provision of an Act is ambiguous in that it has two or more meanings or interpretations. This is implicit in s15AA since it refers to a court ‘interpreting a provision of an Act’. A court is only ever interpreting a provision when it is ambiguous.
Element 2. Interpretation	A court, a tribunal or an official is interpreting this provision of the Act. ³⁹
Element 13. Best Meaning	One of the meanings of the ambiguous provision would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act)
Consequences	
Method of Interpretation	The court must interpret a statute in a manner that will ‘best achieve the purpose or object’ of the statute.
<i>Diagram 1 Analysis of Section 15AA</i>	

Extrinsic Material Rule

Text of Section 15AB

Under the common law rules a court could not generally look at extrinsic material to ascertain the purpose or object of legislation. In 1984 the Commonwealth parliament changed this. To do so it inserted s15AB into the

39. The relevant part of the text says ‘in interpreting a provision of an Act’. This impersonal expression implicitly covers all three agencies that interpret statutes as part of their function, namely courts, tribunals and official. Section 15AB has much the same structure in the equivalent provision.

Acts Interpretation Act 1901. This altered the common law rule by allowing a court, tribunal or official to look at material that was outside the four walls of the statute, extrinsic material as it is called, to help determine the purpose and object of a statute in order to interpret the statute. This text refers to this as the extrinsic material rule. Other Australian jurisdictions, except South Australia, have enacted similar provisions.⁴⁰

Section 7 of *Acts Interpretation Amendment Act 1984* (No 27 of 1984) inserted s15AB into the *Acts interpretation Act 1901*. Section 15AB has not been amended to date. It provides as follows:

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

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

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

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

(i) the provision is ambiguous or obscure; or

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

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

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

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

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

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

40. *Acts Interpretation Act 1901* (Cth) s15AB, *Acts Interpretation Act 1954* (Qld) s14B, *Interpretation Act 1987* (NSW) s34, *Interpretation of Legislation Act 1984* (Vic) s35, *Interpretation Act 1984* (WA) s19, *Acts Interpretation Act 1931* (Tas) s8B, *Interpretation Act* (NT) s62B, *Legislation Act 2001* (ACT) s139, *Interpretation Act 1979* (NI) s10C. There is no express provision in South Australia but judicial decisions have allowed access to extrinsic material to bring South Australia into line with other jurisdictions – see for example *Owen v South Australia* (1996) 66 SASR 251, 255-256 per Cox J and 257 per Prior J.

- (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;
- (f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;
- (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and
- (h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.

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

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

Analysis of the Extrinsic Material Rule

Section 15AB is structured in the manner set out in the table below:

Elements	
Element 1. Interpretation	A court, a tribunal or an official is interpreting the provision of an Act. ⁴¹
Element 2. Material	There is some ‘material’. There are two provisions defining the scope of material:
	2.1. It can fit within the natural meaning of ‘material’.
	2.2. It includes the material listed in s15AB(2)(a)-(h).
Element 3. Nature of Material	The material has two characteristics:
	1. It does not form part of the Act.
	2. It is capable of assisting in the ascertainment of the meaning of the provision. ⁴²

41. The relevant part of the text says ‘in the interpretation of a provision of an Act’. It does not say that it is a court interpreting the statute. It could therefore also be a tribunal or a government official. Section 15AA has much the same structure in the equivalent provision.

42. There is a major ambiguity in this requirement based on these two possible meanings. Meaning 1 is that the material listed in s15AB(2)(a)-(h) is deemed to be ‘capable of assisting in the ascertainment of the meaning of the provision’. Meaning 2 is that material listed in s15AB(2)(a)-(h) is not deemed to be ‘capable of assisting in the ascertainment of the meaning of the provision’. On this basis this attribute -

Element 4. Discretion	Section 15(3) confers on the interpreter a discretion to consider or not to consider the designated material. In determining whether consideration should be given to any material in accordance with s15AB(1), the court shall have regard to each of the following criteria:
	Criterion 1. The desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act. ⁴³
	Criterion 2. The need to avoid prolonging legal or other proceedings without compensating advantage. ⁴⁴
Consequences	
1. Use of Extrinsic Material	The interpreter has a discretion to consider the designated extrinsic material.
2. Weight of Extrinsic Material	In considering the weight to be given to the material, the interpreter shall have regard shall be had to Criterion 1 and 2 that are set out in the analysis of Element 4 Discretion.
<i>Diagram 2 Analysis of Section 15AB</i>	

Problem with Section 15AB

Section 15AB gives express authorisation for courts to use external or extrinsic sources of a statute's purpose and object when interpreting a statute. The requirement is that the 'material' is 'capable of assisting in the ascertainment of the meaning of the provision'; there is, however, no specific mention of ascertaining the purpose or object. This does not square easily with s15AA which refers to interpretation by reference to purpose and object. To tie in directly and visibly with s15AA, s15AB should refer to ascertaining the purpose or effect of a statute or perhaps of a provision with a statute. That said, a liberal construction would see ascertaining the meaning as arising from ascertaining the purpose and object – so by this route s15AB allows access to extrinsic material to detect the purpose and object of a statute. Some obvious major sources are the second reading speech by the member of parliament who is proposing the bill for the statute, and the explanatory memorandum for the statute.

Extrinsic Material

Some obvious major sources are the second reading speech of the member of parliament who is proposing the bill for the statute and the explanatory memorandum for the statute.

being 'capable of assisting in the ascertainment of the meaning of the provision' – needs to be separately established.

43. *Acts Interpretation Act 1901* (Cth) s15AB(3)(a)

44. *Acts Interpretation Act 1901* (Cth) s15AB(3)(b)

Problems with the Rules

There are problems within the major rules of interpretation. In the Commonwealth these rules are in s15AA and s15AB of the *Acts Interpretation Act 1901* (Cth) which respectively provide the purpose and object rule and the extrinsic material rule. As stated, there are equivalents of these rules in the other Australian jurisdictions, which also have the problems.

The table below indicates the section or sections of the *Acts Interpretation Act 1901* (Cth) where the problem occurs and briefly the nature of the problem:

No.	Section	Problem
Problem 1	Sections 15AA and 15AB	Dual Nature of Legislative Intent
Problem 2	Section 15AA	Difficulty in Measuring the Proximities
Problem 3	Section 15AB	Syntactic Ambiguity
Problem 4	Section 15AB	Improper Inclusions
<i>Diagram 3 Problems with the Major Rules of Interpretation</i>		

Considerations of space meant that it is not possible to explain these problems further here, nor to suggest solutions. There is, however, discussion of these problems and their possible solutions in another publication.⁴⁵

Model for Interpretation

Introduction

It would be surprising to a non-lawyer to learn something that there is ‘lack of any agreement’ amongst academics, practitioners and judges about how courts should interpret law.⁴⁶ So much is this the case that judicial and academic silence on the fundamental nature of interpretation, as distinct from partial theories that comment on one aspect of it, would do credit to a Quaker prayer meeting. The analysis of interpretation presented here seeks to rectify this problem by providing a comprehensive, coherent and correct analysis of interpretation. This approach to interpreting law is impounded in a model for interpreting statutes.

Interpretation as Purposive Action

One of the fundamental propositions is that both making and interpreting statute law consists of purposive action, which is essentially reasoning based on

45. Christopher Enright (2015) *A Method for Interpreting Statutes*

46. Kirby in Sheard (2003) p 45

policy.⁴⁷ When a legislature makes law it achieves legitimacy because of its democratic composition. A court, by contrast, potentially has a range of policies, which it can deploy when interpreting a statute. Thus it has to face the question of determining which policy it should use.

It is possible to resolve this question by examining the nature of interpretation. Interpretation completes the text of a statute by deciding that an ambiguous provision has one meaning rather than another. In other words, interpretation is a continuation of the process of enacting a statute. On this basis, a rational way for a court to interpret a statute seems to be by reference to the policy behind the statute. As Justice Higgins put it in the *Engineers Case*, a court should interpret a statute ‘according to the intent of the Parliament that made it.’⁴⁸ In Australia, as it turns out, and as discussed above, this is not only a rational way to proceed, it is the constitutionally decreed way that courts must interpret law because of provisions to that effect in the Interpretation Acts. The rule is labelled the purpose and object rule. A complementary rule, also in the Interpretation Acts, is the extrinsic material rule. True to label this rule allows a court to look at extrinsic material to aid it in the tasks of interpretation.

The Model: A Step-by-Step Method

It is possible to devise a step-by-step method for interpreting a statute according to these rules. It is labelled the model for interpreting statutes. The model describes how a rational interpreter – a lawyer or a court – should carry out the process of interpretation. This model has six steps which are set forth in the following table:

Step 1. Rule	Organising the Rule
Step 2. Issues	Identifying the Issues
Step 3. Meanings and Effects	Identifying the Meanings and Effects
Step 4. Purpose and Object	Identifying the Purpose and Object
Step 5. Correct Meaning	Identifying the Correct Meaning
Step 6. Opinion	Writing the Opinion
<i>Diagram 4 Model for Interpreting Statutes</i>	

The major task for the rest of this book is now clear. It is to flesh out each of the six steps in this model. The point is that this model captures the fundamental logic and the bare bones of the processes involved when interpreting statute law.

47. Christopher Enright (2015) *Legal Reasoning*

48. *Amalgamated Society of Engineers v Adelaide Steamship Co (Engineers' Case)* (1920) 28 CLR 129, 161-162, per Higgins J. See also Evans (2000) p 201.

Readers need to understand and use it in this sense. It does not purport to describe the process in any other sense, for example, in terms of politics or sociology.

To illustrate some of these steps it is necessary to create an example: a legislature has enacted Statute X. The legislature enacts Statute X in order to cause Effect X. Effect X is therefore the purpose and object of Statute X. This diagram sets out these relations:

Statute	Causation	Purpose and Object
Statute X	→	Effect X
<i>Diagram 5 Statute Causing an Effect</i>		

Abstract Illustration of the Model

While there is an account of these steps in the text it will help readers to make an outline here by way of an abstract illustration of the model.⁴⁹ To start, there is some background by way of an illustration. For the purposes or the explanation we assume the following:

1. A legislature has enacted a statute, Statute X.
2. The legislature enacted Statute X. In doing this, the legislature had a purpose and object. This purpose and object is directed to causing some effect. For Statute X the purpose and object is to cause Effect X.
3. A court is now interpreting an ambiguous provision in Statute X.
4. This ambiguous provision has two meanings that are labelled Meaning 1 and Meaning 2.
5. If a court were to choose one of these meaning as the legally correct meaning of the statute it would play a part in causing the total effect of Statute X. However, generally it is possible to know such an effect only as a prediction.

Table 2 sets out these predictions along with some other relevant information. Table 2 enables the following analysis:

1. Purpose and Object. The purpose and object of Statute 1 is to cause Effect X.
2. Effect of Statute X with Meaning 1. If the court determines Meaning 1 to be the legally correct meaning of the ambiguous provision in Statute X, the prediction is that Statute X will cause Effect 1.

49. There is a comprehensive description of this model in Christopher Enright (2014) *A Method for Interpreting Statutes* Maitland Press.

3. Effect of Statute X with Meaning 2. If the court determines Meaning 2 to be the legally correct meaning of the ambiguous provision in Statute X, the prediction is that Statute X will cause Effect 2.

4. Formulating the Question. This now enables the interpreter to ask the key question. Which version of Statute X – the one where Meaning 1 is the correct legal meaning or the one where Meaning 2 is the correct legal meaning – will ‘best achieve’ the purpose and object of Statute X, namely Effect X. The answer to the question is the answer to the issue of interpretation that is before the court.

5. Reformulating the Question. Which of the two possible effects, Effect 1 or Effect 2 is closest to, that is, best achieves, Effect X. If it is Effect 1 then Meaning 1 is the correct legal meaning; if it is Effect 2 then Meaning 2 is the correct legal meaning.

Here is the table:

Statute	→	Purpose and Object of Statute X
Statute X		Effect X
Meanings	→	Predicted Effect of Statute X
Meaning 1		Effect 1
Meaning 2		Effect 2
<i>Diagram 6 Data for a Hypothetical Statute</i>		

Step 1. Rule

Step 1 entails organising the rule that contains the ambiguity by setting out its element and consequences. This illustration assumes that the interpreter has carried out Step 1.

Step 2. Issues

For Step 2 it is necessary to check each element in turn against all of the facts of the case (as best known at this stage) to see if there is a fact that satisfies each element. If an element is ambiguous this will come out as a ‘maybe’ – the fact may or may not satisfy the element depending on which meaning of the ambiguous part of the element is legally correct. This illustration assumes that the interpreter has carried out Step 2. There is an ambiguous provision that has two meanings, labelled Meaning 1 and Meaning 2.

Step 3. Meanings and Effects

Step 3 builds on Step 2. It has two parts. These involve meanings and effects.

Meanings

Step 3 entails identifying the meanings that give rise to the ambiguity. It also entails a prediction for each meaning. These are, as a given, Meaning 1 and Meaning 2.

Effects

Step 3 also entails a prediction based on a what if analysis. To explain this, assume that the ambiguous provision has two meanings that we label Meaning 1 and Meaning 2. Take each meaning in turn. Ask this question: if a court were to choose this meaning as the legally correct meaning of the statute, what total effect would the statute then cause? For identification in later discussion these are the predicted outcomes:

1. With Meaning 1 as the legally correct meaning the prediction is that Statute X would cause an effect that is labelled Effect 1. This is a given.
2. With Meaning 2 as the legally correct meaning the prediction is that Statute X would cause an effect that is labelled Effect 2. This is a given.

‘What If’ Analysis

This step obviously involves a classic ‘what if’ analysis. It is useful to emphasise this because it lies at the core of the reasoning process.

This is what takes place. The court takes each meaning of the ambiguous provision in turn. The court asks and answers this question: what would be the effect for the whole statute if the court were to choose this meaning as the correct legal meaning? The point is that each meaning would play a part but a different part in contributing to the total effect of the statute. In the abstract illustration above the author labelled the predicted effects of the statute as Effect 1 and Effect 2 to correspond with Meaning 1 and Meaning 2 respectively, as this table indicates:

Meanings	Causation	Predicted Effects
Meaning 1	→	Effect 1
Meaning 2	→	Effect 2
<i>Diagram 7 ‘What If’ Analysis</i>		

It is worth stressing one of the key propositions. It is possible to know these effects only as a prediction. To make this prediction the court must perform a ‘what if’ analysis for each meaning. To do this, a court asks and answers the following question. If the court were to choose this meaning as the legally correct meaning, what effect would the statute cause? Here are the results:

1. Effect of Statute X with Meaning 1. If the court determines Meaning 1 to be the legally correct meaning of the ambiguous provision in Statute X, the prediction is that Statute X will cause Effect 1.
2. Effect of Statute X with Meaning 2. If the court determines Meaning 2 to be the legally correct meaning of the ambiguous provision in Statute X, the prediction is that Statute X will cause Effect 2.

Step 4. Purpose and Object

Step 4 consists of identifying the purpose and object of the statute. This is necessary because the basic rule of interpretation in Australian jurisdictions is for courts to choose the meaning that has a predicted effect that comes closest to achieving the effect that constitutes the purpose and object of the legislators who enacted the statute. As indicated above, for the purposes of this explanation we assume that a legislature has enacted Statute X with the purpose and object of causing Effect X. So, achieving Effect X, or as close as possible to it, is the target of this exercise in interpretation.

Step 5. Correct Meaning

Step 5 is to identify the correct meaning of the ambiguous provision. Is it Meaning 1 or is it Meaning 2? The answer to this question depends on examining the predicted effects of Statute X in two situations – when Meaning 1 is correct and when Meaning 2 is correct. In Step 3 we identified these effects as Effect 1 for the case of Meaning 1 being the correct legal meaning and Effect 2 for the case of Meaning 2 being the correct legal meaning. So the question is this. In the language of the statute, which of the two meanings would cause Statute X to ‘best achieve’ Effect X? The answer to these questions is the legally correct meaning of the ambiguous provision. To put this in even plainer language, which of these two effects, Effect 1 and Effect 2, come closest to Effect X?

Step 6. Opinion

After a judge or lawyer has interpreted a statute the write the result in an opinion. A judge will write an opinion in the form of a judgment when it interprets the statute. A lawyer will write an opinion for a client, for another lawyer or for the file on a matter.

Three things are necessary for clear writing. These are structure, structure and structure. The obvious advice is to structure the opinion by reference to the five preceding steps in the model for interpreting a statute.