

How to Detect Ambiguity in Statute Law and Common Law

Christopher Enright



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Sir John Tenniel's illustration of the Caterpillar for Lewis Carroll's book *Alice's Adventures in Wonderland*.

Ambiguity

This is an example of ambiguity in a drawing. The head in the central figure can be viewed in either of two ways:

1. It is a human male's face with a pointed nose and pointy chin.
2. It is the head end of an actual caterpillar where the right three 'true' legs are visible.

List of 'How to' Books

This table sets out a list of books in Sinch's 'How to' series:

| |
|---|
| How to Answer a Problem Question |
| How to Detect Ambiguity in Statute Law and Common Law |
| How to Interpret a Statute |
| How to Organise Law and Litigation |
| How to Prove Facts |
| How to Work with Common Law |
| How to Write Clearly and Write Examinations |
| <i>List of Books in the 'How to' Series</i> |

Preface

Law schools and lawyers in Australia tend to be skills averse. This is probably the reason that legal writers and the law school syllabus have both neglected ambiguity to a very substantial extent. It is probably the reason that the High Court of Australia has struggled so much with its reasoning in finding that some provisions that are not written into the Constitution are somehow implied by the Constitution.

This book describes and illustrates the major types of ambiguity. Of course the whole point to understanding ambiguity is to assist in the task of interpreting a statute. To enable a reader to understand and appreciate this connection, the last chapter of the book provides an outline of a step-by-step model for interpreting a statute.

Christopher Enright
Newcastle
11 November 2015

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|--------------|------------------------------------|
| BCC | Broadcasting Complaints Commission |
| CCC | Colonial Carrying Co |
| Comm | Commission |
| Commonwealth | Commonwealth of Australia |
| DCT | Deputy Commissioner of Taxation |
| FCT | Federal Commissioner of Taxation |
| RDC | Rural District Council |
| VVA | Vietnam Veterans' Association |

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1. In full form this maxim says quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa valere non potest

Summary

The Search for Meanings
Meanings as an Organising Framework
Detecting Meanings
Classifying Meanings
Method for Interpreting Statutes

The Search for Meanings

Detecting and understanding ambiguity is an important part of the process of interpreting law. To explain how this is the case, the starting point consists of the six steps in the author's model for interpreting a statute:¹

| |
|--|
| Step 1. Organising the Rule |
| Step 2. Identifying the Issue |
| Step 3. Identifying the Options |
| Step 4. Identifying the Purpose and Object |
| Step 5. Identifying the Legally Correct Meaning |
| Step 6. Writing the Opinion ² |
| <i>Summary Diagram 1. Model for Interpreting a Statute</i> |

Ambiguity is relevant to Step 3. Identifying the Options. The task is to identify the options before the court. Options for interpreting law have two parts, the meanings of the ambiguous provision and the effect that each meaning will help to cause. This text relates to the first aspect of Step 3. Step 3 entails identifying of all of the meanings of the ambiguous provision.³ If lawyers have some insight into ambiguity, which this text provides, it is likely that they will better perform Step 3.

Meanings as an Organising Framework

It is in some respects a matter of instinct to think that understanding ambiguity will help lawyers in the task of statutory interpretation. That said, it is possible

1. Christopher Enright *A Method for Interpreting Statutes*

2. If the interpreter is a court the court writes the result when it writes its judgment(s). If the interpreter is a lawyer in practice they write the result as an advice to a client or to another lawyer or an opinion or analysis to be put on the relevant file.

3. The effects that meanings can cause are discussed in Christopher Enright *Legal Method* Chapter 15 Effects.

to formulate specific reasons for knowing and understanding the major types of ambiguity:

1. Cause of the Problem. The existence of these two or more meanings is the cause of the problem. It invokes the interpretive function of the court.
2. Assistance to a Lawyer. It assists a lawyer in detecting an issue of interpretation and in framing that issue.
3. Focus of the Arguments. The meanings of the provision are the focus for reasons or arguments addressed to resolve the ambiguity. Stating the obvious, an argument must be directed towards or against a particular meaning.
4. Solution to the Problem. The full range of meanings of the ambiguous provision not only identifies the problem, it furnishes the solution. Because of the literal rule,⁴ the range of every possible meaning of the ambiguous provision both identifies and limits the choices open to a court. A court can choose only one or more of these meanings as the legally correct meaning of the ambiguous provision.⁵

Detecting Meanings

How can a lawyer or a court identify the meanings of an ambiguous provision? There are three basic techniques:

1. Consult a dictionary. A standard English dictionary will at least give the broad sense of a word by indicating a commonly accepted range of meanings. In this regard, dictionary definitions are a useful, almost necessary starting point for interpretation.
2. Use the words in other contexts to see how they fare. Play with them and try to think of common sayings or literary quotations that use the words in question.
3. Refer to a catalogue of ambiguity that classifies meanings. The main subject of this text is a catalogue of this kind.

Classifying Meanings

The text presents a catalogue of meanings. This catalogue consists of a five-fold classification of ambiguity comprising the following. The table below sets out the labels for these types of ambiguity:

| |
|---------------------------------------|
| Lexical ambiguity ⁶ |
| Relational ambiguity ⁷ |
| Ambiguity of implication ⁸ |

-
4. Christopher Enright *Legal Reasoning* Chapter 25 Analysing Ambiguity
 5. *Collector of Customs v Agfa-Gearet* (1996) 141 ALR 59, 66
 6. Chapter 4 Lexical Ambiguity
 7. Chapter 5 Relational Ambiguity

| |
|--|
| Ambiguity of competing versions ⁹ |
| Ambiguity of competing rules ¹⁰ |
| <i>Summary Diagram 2. Types of Ambiguity</i> |

These are not necessarily an exhaustive statement of possibilities but are still useful. The catalogue demonstrates how ambiguity takes different forms and thus provides readers with a catalogue of various types of ambiguity, which can function as a checklist (although it is not necessarily comprehensive). This assists readers in becoming more proficient at detecting ambiguity, understanding its nature and framing arguments to resolve it.

Method for Interpreting Statutes

This text is concerned only with the meanings of the ambiguous provision. Nevertheless to appreciate the role of meanings in the process of statutory interpretation it is helpful for readers to understand the overall process of statutory interpretation. There is a statement of the steps in this process above. There is an description of these steps in the last chapter of this text.

-
8. Chapter 6 Ambiguity of Ambiguity
 9. Chapter 7 Ambiguity of Competing Versions
 10. Chapter 8 Ambiguity of Competing Rules

Labels

Introduction
Describing Items
Listing Items
Diagrams
Probability

Introduction

Discussion in this publication refers to items such as a statute or a meaning of an ambiguous provision. Often these are part of a collection, list, range or set of items. Frequently the text puts them in a diagram where they represent a model or a step on the way to explaining a model. The purpose here is to explain the labelling system used to refer to these items.

Describing Items

Labelling Items

There are several aspects to labelling the items in a set, range, list or collection. These are name, number, letter and designating a set of items.

Name

The name of an item commences with a capital letter. Some examples are Element, Statute and Meaning.

Number

Items in a set, range, list or collection are generally numbered. For example, the elements of a legal rule are labelled Element 1, Element 2, Element 3 and so on. These numbers are ways of identifying elements and distinguishing one from another. They are generally not intended to create any list according to preferences or values.

Letter

Items in a set, range, list or collection can be lettered. For example a list of statutes can be Statute A, Statute B and so on.

Designating a Set of Items

It is useful to designate a set of items with a single and simple tag. Here is an outline. The basic proposition is that a simple and obvious tag has two aspects:

1. Description. Use a written label on the items as a tag or description. Put it in plural form. Thus a tag for a set of statutes would be 'Elements'.

2. Numbers. After the tag add a space then a compound numerical tag consisting of three items:

- 2.1 The number of the first item in the set.
- 2.2 A hyphen.
- 2.3 The number of the last item in the set.

Here are two illustrations:

1. A set of six elements would be Elements 1-6.
2. A set of elements where the number can vary from situation to situation is written as Elements 1-n.

1. Naming the Items

The item has a name, which is usually obvious. For example each statute in a set of statutes would bear the name ‘Statute’, and each elements in a set of elements would be ‘Element’.

2. Numbering the Items

There are two possibilities for the numbering of a set, list or range of items:

1. There can be a fixed number in the set.
2. There can be a variable number in the set.

2.1 Fixed Number in the Set

In a particular instance there may be a specific number of items in a set. For example a particular legal rule might be composed of five elements. In this case the first and last numbers designate the number of items in the set or range. In this example of a set of five elements, one would designate the set as ‘Elements 1-5’.

2.2 Variable Number in the Set

Sometimes the text refers to a set or a list in general terms in cases where the number of items in the set can vary from situation to situation. In this event, the way to go is to number the last item with the symbol ‘n’. To refresh readers, ‘n’ stands for however many there are on a particular occasion. An example would be a general discussion about elements of a legal rule. In this case the possibilities vary from legal rule to legal rule. Thus the designation of this set of items is Elements 1-n.

Null Option

There is a special case with options where one of the options is to do nothing and leave things as they are. This occurs, for example, with the proposed making of a statute where one option is just not to enact a statute. In a case such as this the option is labelled with the symbol for nought, namely ‘0’. Thus the

option not to enact a statute is designated as Statute 0. Statute 0 represents the null option – it is the option for a legislature not to enact a statute on a topic whereas Statutes 1, 2 3 and so on are options for different versions of a statute on a topic (on the basis that there is no form of a statute that can better present conditions). Given this the full set or range of possible statutes for a legislature to enact consists of Statutes 0-n.

Corresponding Items

Sometimes there are sets with corresponding items. This can occur for a number of reasons. Here are two examples:

1. For making and interpreting law, items correspond because of causation. Each version of a statute on a subject and each meaning of an ambiguous provision will cause an effect if a legislature enacts the statute or if a court declares the meaning to be legally correct.
2. In the model for litigation, elements and facts correspond because each element delineates a category of facts so that in a particular case the element is satisfied by a fact that falls within that category. Similarly, facts and evidence correspond because each fact is proved or potentially provable by some evidence.

Single Relationships

Corresponding items are labelled with the same number or letter. Here are some illustrations:

1. Statutes, Meanings and their Predicted Effects. Statute 0 is predicted to cause Effect 0, Statute 1 is predicted to cause Effect 1, Statute 2 is predicted to cause Effect 2 and so on. Meaning 1 is predicted to causes Effect 1, Meaning 2 is predicted to cause Effect 2 and so on. Similarly, Statute X (or Meaning X) is predicted to cause Effect X while Statute Y (or Meaning Y) is predicted to cause Effect Y.
2. Facts Satisfying Elements. Fact 1 is the label given to a fact that fits within or satisfies Element 1, Fact 2 is the label given to a fact that fits within or satisfies Element 2 and so on.
3. Evidence Proving Facts. Evidence 1 is the label given to evidence that might prove or has proved Fact 1, Evidence 2 is the label given to evidence that might prove or has proved Fact 2, and so on.

Collective Relationships

It is possible to use labels of correspondence to make collective statements. Here are some examples: Statutes 0-n are predicted to cause Effects 0-n, while Evidence 1-n is capable of proving Facts 1-n. To construe these collective statements properly it is necessary to apply the maxim *reddendo singula*

singulis. Literally this says that each is rendered on their own. In plainer language, the items are to be taken singularly so the each item in the first list is paired with the corresponding item in the second list. The adverb ‘respectively’ captures this notion.

Two or More Version of an Item

There may be two or more versions of an item. Additional letters or numbers can distinguish the different versions. For example:

1. If Element 2 is ambiguous because it has two meanings, the versions of Element 2 can be designated Element 2A and Element 2B.

2. There can be two versions of a fact. There are two major possibilities:

2.1 In a case there may be two versions of Fact 2 because the plaintiff propounds one and the defendant propounds the other. These can be designated ‘P’ and ‘D’ to signify the plaintiff and defendant’s version. Thus the two versions are Fact 2P and Fact 2D.

2.2 After investigating the facts of a case the defendant may find that there is evidence to support two versions of one of the facts in their case. These are facts that the defendant could use to rebut the plaintiff’s satisfying Element 3. The defendant or the court could designate these as Fact 3D.1 and Fact 3D.2.

Subdivisions of Items

It is possible to designate subdivisions of an item with a numbering system that invokes the form but not the meaning of decimal points. Thus if Element 2 has three sub-elements, one can designate them as Element 2.1, Element 2.2, and Element 2.3. If Element 2.2 has three sub-elements we can designate these as Element 2.2.1, Element 2.2.2 and Element 2.2.3. Obviously this form of numbering adapts to any number of levels of subdivision.

Possibilities: ‘X’, ‘Y’, Etc

Sometimes the text needs to refer to any option, that is, to an option in general terms. Conveniently this is labelled with a capital letter. Commonly, this is the letter X, so that a general option for a legislature wishing to pass a statute is Statute X. Naturally, if there is a need to refer to more than one option additional letters may be used. For example, there could be reference to Statute X and Statute Y; in this case Statute X is one possible statute and Statute Y is another possible statute.

Signifying Relationships

Sometimes it is necessary to signify a relationship between two items. This can be done using standard symbols. This table sets out the major possibilities:

| Symbol | Relationship | Illustration |
|--|-------------------------|--|
| < | Less than | $X < Y$. X is less than Y. |
| > | Greater than | $X > Y$. X is greater than Y. |
| = | Equals | $X = Y$. X equals Y, |
| ≠ | Not Equals | $X \neq Y$. X does not equal Y. |
| ≈ | Approximately Equals | $X \approx Y$. X is approximately equal to Y. |
| ≡ | Congruence Relationship | $X \equiv Y$. X is congruent with Y. |
| ≅ | Isomorphic | $X \cong Y$. X is structurally identical to Y |
| <i>Labels Diagram 1. Symbols for Relationships</i> | | |

Listing Items

Where there is a list, for example a list of the meanings of an ambiguous provision, we can set these out in the text as a series – Meaning 1, Meaning 2 ... Meaning n. In the text, as we have noted, the range can be efficiently represented as Meanings 1-n. In a table they are set out as a list in the following way:

| Meanings |
|---|
| Meaning 1 |
| Meaning 2 |
| Meaning n |
| <i>Labels Diagram 2. List of Meanings</i> |

In this presentation it is not strictly necessary to include Meaning 2. Indeed, it is actually redundant, when $n=2$. However, it usefully emphasises the sense of a list that sets out the range of options or possibilities.

Diagrams

Lists in a table can be connected to become a diagram or figure. This can involve corresponding items. A useful illustration consists of a diagram that has two major columns that match corresponding items. One column sets out the meanings of an ambiguous provision in a statute in Statute X and the other sets out the effect for the whole statute that each meaning is predicted to cause.

Here is the illustration:

| 1 | 2 | 3 | |
|-----------------|---|----------------|----------|
| Meanings | → | Effects | 1 |
| Meaning 1 | | Effect 1 | 2 |

| | | | |
|---|--|----------|----------|
| Meaning 2 | | Effect 2 | 3 |
| Meaning n | | Effect n | 4 |
| <i>Labels Diagram 3. Meanings and Effects</i> | | | |

This diagram functions in the following way:

* Column 1 shows the meanings of the ambiguous provision, being Meanings 1-n.

* Column 3 shows the effect of the statute that each meaning is predicted to cause if a court chooses them as the legally correct meaning of the ambiguous provision. Let us flesh this out. Every statute that is enacted causes a number of outcomes. The author refers to the full collection of outcomes that a statute is predicted to cause as an effect. When a court interprets a statute it is faced with the basic options in terms of the range of meanings of the ambiguous provision that gives rise to the need to interpret the statute. The diagram labels these meanings as Meanings 1-n. If a court decides that Meaning 1 is the legally correct meaning of the ambiguous provision that decision is likely to have an impact on the effect that the whole statute will cause. Column 3, as stated, sets out this effect, the effect of the whole statute, for Meaning 1. In a similar way it sets out the effect for each other meaning of the ambiguous provision. This method of identifying the effects of each meaning caters for the constitutional rule in each Australian jurisdiction that requires a court to interpret a statute in the way that will ‘best achieve’ the purpose and object for which the legislature enacted the statute. Now the purpose or object of a statute is to cause some effect or outcome. Hence the term ‘Effect’ aligns directly with purpose and object (which of course is why the table includes it).

* Column 2 contains an arrow pointing from the Column 1 to Column 3, thereby indicating that each meaning in Column 1 is predicted to cause the statute to have the corresponding effect in Column 3.

* Columns 1-3 indicate meanings and their predicted effects. Assume for the purposes of the explanation that a court is interpreting an ambiguous provision in Statute X that has Meanings 1-3:

1. If a court chooses Meaning 1 as the legally correct meaning the prediction is that Statute X will cause Effect 1.

2. If a court chooses Meaning 2 as the legally correct meaning the prediction is that Statute X will cause Effect 2.

3. If a court chooses Meaning 3 as the legally correct meaning the prediction is that Statute X will cause Effect 3.

Probability

A number of symbols are used for probability. This diagram shows the common symbols and their meanings:

| Symbol | Meaning |
|---|---|
| $P(A)$ | probability that event A occurs |
| $P(B)$ | probability that event B occurs |
| $P(A \cup B)$ | probability that event A or event B occurs (A union B) |
| $P(A \cap B)$ | probability that event A and event B both occur (A intersection B) |
| $P(A')$ | probability that event A does not occur |
| $P(A B)$ | probability that event A occurs given that event B has occurred already (conditional probability) |
| $P(B A)$ | probability that event B occurs given that event A has occurred already (conditional probability) |
| $P(B A')$ | probability that event B occurs given that event A has not occurred already (conditional probability) |
| ϕ | the empty set = an impossible event |
| S | the sample space = an event that is certain to occur |
| <i>Labels Diagram 4. Symbols Used for Probability</i> | |

Chapter 1

Introduction

Introduction

Rules for Interpreting Statutes

Model for Interpreting Statutes

Meaning of Ambiguity

Causes of Ambiguity

Organising Framework

Introduction

[L]anguage can carve up the universe – and ways of experiencing it – in uniquely different ways.¹

Ambiguity is relevant to the task of interpreting statutes. Therefore to understand the importance of ambiguity it is necessary to have a basic understanding of the task of interpreting a statute. There are two aspects – the rules of interpretation and a model for interpretation that translates those rules into a step by step guide for interpreting a statute.

Rules for Interpreting Statutes

There are two basic rules for interpreting a statute that apply in much the same form in all Australian jurisdictions. In the Commonwealth these rules are in 15AA and 15AB of the *Acts Interpretation Act 1901*. These are the rules:

1. Purpose and Object Rule. Section 15AA requires courts, tribunals and officials to interpret Commonwealth statutes by reference to their purpose and object. This is a statutory enactment of the mischief rule written in liberal terms. In plain language the rule says this. When interpreting a statute a court should identify the meaning that will best achieve the purpose and object of the statute then declare this meaning to be the legally correct meaning of the ambiguous provision.²

2. Extrinsic Material Rule. Section 15AB allows a court, tribunal or official when interpreting a statute to do something that was not allowed or not freely

1. Wajnryb (2002)

2. *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), *Interpretation Act s62A* (NT), *Interpretation Act 1979* (NI) s10C. Some writers and judges propound the literal rule as the basic rule. The author argues that this is mistaken. If the literal rule has any plausible function it lays down the rule that any arguable interpretation of a statute must fall reasonably within the compass of the words of the statute – see Christopher Enright *Legal Reasoning* Chapter 25.

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.³

Model for Interpreting Statutes

The author has devised a model for interpreting statutes. For the purpose of describing the model we assume three things:

1. Enacting Statute X. A legislature has enacted a statute that is labelled Statute X.
2. Interpreting Statute X. A court is interpreting an ambiguous provision in Statute X.
3. Two Meanings. The ambiguous provision has two meanings. These are labelled Meaning 1 and Meaning 2.

Explanation of the Model

This model draws on the two basic rules, and guides an interpreter as they perform two important tasks:

1. Identifying the Purpose and Object. The court needs to identify the purpose and object of the statute. There are two major sources:

1.1 The court can use extrinsic material (since the extrinsic material rule allows it) to look at extrinsic material to identify the purpose or object of Statute X.

1.2 The court can look at the statute itself and infer policy from the provisions of the statute.

1.3 Assume for the purposes of the explanation that the interpreter ascertains that Statute X has as its purpose and object to cause or bring about an effect. This effect is labelled Effect X to correspond with Statute X.

2. Purpose and Object Rule. The interpreter can utilise the purpose and object rule for interpretation. To do this the interpreter has to make two predictions:

Prediction 1. If the court chooses Meaning 1 as the legally correct meaning the interpreter has to predicts what outcome or effect Statute X will then cause. Label this predicted effect as Effect 1 to show the correspondence with Meaning 1.

Prediction 2. If the court chooses Meaning 2 as the legally correct meaning the interpreter has to predicts what outcome or effect Statute X will then cause. Label this predicted effect as Effect 2 to show the correspondence with Meaning 2.

3. *Acts Interpretation Act 1901 (Cth) s15AB, Acts Interpretation Act 1954 (Qld) s14B, Interpretation Act 1987 (NSW) s34, Interpretation Act 1984 (WA) s19, Acts Interpretation Act 1931 (Tas) s8B, Interpretation Act (NT) s62B, Legislation Act 2001 (ACT) s139, replacing Interpretation Act 1967 (ACT) s11B, Interpretation Act 1979 (NI) s10D.*

It is possible to put these results in a table or diagram in the following way:

| 1 | 2 | 3 | 4 | |
|------------------|---|---------------------------|---|-----------|
| Statute X | | Purpose and Object | | 1 |
| Statute X | → | Effect X | | 2 |
| | | ?↑? | | 3 |
| | | Effect 1 | | 4 |
| | | ↑ | | 5 |
| Meaning 1 | → | Predicted Effect | | 6 |
| | | | | |
| Meaning 2 | → | Predicted Effect | | 7 |
| | | ↓ | | 8 |
| | | Effect 2 | | 9 |
| | | ?↓? | | 10 |
| Statute X | → | Effect X | | 11 |
| Statute X | | Purpose and Object | | 12 |

Diagram 1.1 Reasoning for Interpreting a Statute

Here is the explanation of the diagram:

- * Rows 2 and 11 have an identical function. They indicate that the purpose and object of Statute X is to achieve Effect X.
- * Rows 4-6 indicate that if the court chooses Meaning 1 as the legally correct meaning of the ambiguous provision, the prediction is that it will cause Effect 1.
- * Rows 7-9 indicate that if the court chooses Meaning 2 as the legally correct meaning of the ambiguous provision, the prediction is that it will cause Effect 2.
- * Rows 2-4 and 9-11 ask the pertinent questions.
- * Rows 2-4 ask this question: How close is Effect 1 to Effect X?
- * Rows 9-11 ask this question: How close is Effect 2 to Effect X?
- * By answering the two questions posed by Rows 2-4 and Rows 9-11 it is possible to determine the legally correct meaning of the ambiguous provision. This involves a further question. Which Effect is closer to Effect X? Is it Effect 1 or Effect 2?
- * If Effect 1 is close then Meaning 1 is the legally correct meaning.
- * If Effect 2 is close then Meaning 2 is the legally correct meaning.

Steps in the Model

The author has encapsulated this reasoning within a step-by-step model that takes the following form:⁴

4. Christopher Enright *Legal Method* Chapter 9 Model for Forming Law

| | |
|---|--------------------------------------|
| 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 1.2 Model for Interpreting a Statute</i> | |

Step 3 is relevant to ambiguity. There are two aspects to Step 3:

1. Identifying the Meanings of the Ambiguous Provision. The discussion of ambiguity in this text is directly relevant to this part of Step 3.
2. Identifying the Effects that Each Meaning will Cause. As the prior discussion indicates, this involves answering the following question: if a court were to choose a meaning, Meaning X, as the legally correct meaning, what would the predicted effect of the whole statute? For a reader to understand how this part of Step 3 operates, and to understand fully the significance of the meanings and effects of the ambiguous provision, it is probably necessary for a reader to understand how the model for interpreting a statute functions. There is a brief account of it in a later chapter,⁵ and there are two other publications of this author that provide a fuller account.⁶

So, ambiguity is relevant to Step 3 Identifying the Meanings and Effects. The task in Step 3 is to identify the meanings of the ambiguous provision that requires interpretation and the effect that each meaning will cause the whole statute to have if a court determines it to be legally correct. This text discusses the first aspect, identification of all of the meanings of the ambiguous provision.

Meanings play a fundamental role in the task of interpreting a statute. The starting point is that a provision in a statute may be ambiguous in that it has two or more meanings. Each meaning will give the statute a different reach or scope or application if the court chooses it to be the legally correct meaning. Thus meanings are from one perspective the principal options because to interpret the ambiguous provision the court chooses one or more of these meanings as the correct legal meaning of the provision. (At a deeper level the real options are the effects that each meaning will cause the statute to have since the official way to interpret a statute is by reference to purpose and object.)

5. Chapter 9 Outline of Statutory Interpretation

6. Christopher Enright (2015) *How to Interpret a Statute*. There is a fuller account in Christopher Enright (2015) *A Method for Interpreting Statutes*.

So, a court interpreting law is faced with a provision in statute or common law that has two or more meanings. The issue for determination is which of these meanings the court should choose as the legally correct meaning or meanings. These meanings, and the choice they provide, can be set out in the following table:

| Meanings |
|-----------------------------|
| Meaning 1 |
| Meaning 2 |
| Meaning n |
| <i>Diagram 1.3 Meanings</i> |

In this table the possible meanings of the ambiguous provision are designated as Meanings 1–n. The court may choose one or any combination of these meanings in the range Meanings 1–n as the formal or correct legal meaning(s) of the ambiguous provision.

Meaning of Ambiguity

*Words mean whatever they are said to mean by a majority of the appellate committee dealing with the case, even though a minority might think otherwise.*⁷ Ambiguity makes interpretation necessary.⁸ However, somewhat ironically, the word ‘ambiguity’ is itself ambiguous (or at least has been rendered so by lawyers) by having both a wide and a narrow meaning. On the wide view, ambiguity is anything that invokes the need for interpretation, while the narrow view or views exclude some forms of ambiguity. This article takes the wide view that there is ambiguity when ‘the intention of the legislature is for whatever reason doubtful’.⁹ There is some uncertainty about its meaning, leading to uncertainty as to whether or not the provision applies to the facts of a case.¹⁰ On one view of the law the provision applies, on another view it does not.

Thus, ambiguity exists when the meaning of a word or phrase is not clear. If one attempts to apply the word or phrase to some facts there is uncertainty. There is a way or a possibility that the word or phrase does apply and a way or a possibility that it does not.

7. *Carter v Bradbeer* [1975] 1 WLR 1204, 1213 per Lord Diplock

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

9. *Repatriation Commission v Vietnam Veteran’s Association* (2000) 171 ALR 523, 550 per Spigelman CJ. This question of the proper scope of ambiguity is discussed in Christopher Enright *A Method for Interpreting Statutes* Chapter 1.

10. This is fully explained and illustrated in Christopher Enright *Legal Method* Chapter 8 Forming Law.

Causes of Ambiguity

The following quotation gets to the core of why ambiguity happens: ‘[I]t is inherent in the nature of language and communication that mismatches, misspeakings and hiccups occur. The process of making our meaning manifest is fraught and fragile.’¹¹

Why is this problem inherent in language? So vast is the universe that no language can describe unequivocally the complex array of things, events, concepts and the many combinations of these, which can and do occur. Consequently, language is not a totally precise instrument of expression so some ambiguity is inevitable. Words are constantly guilty of ‘disorderly conduct’.¹² Each word or phrase, and each sequence of words, is potentially ambiguous. However, some words and sequences are more ambiguous than others, and some contexts reveal the ambiguity of words and phrases more than others.

While the root cause of ambiguity lies in the nature of language, there are other contributing causes:

1. Problems with the Underlying Policy. The policy behind a rule or statute may not be clear, comprehensive, co-ordinated or consistent.

2. Poor Expression. Poor expression in a case or statute may cause unnecessary ambiguity.¹³ One aspect of this has been a tradition of free expression in drafting statutes. Statutes, according to judicial authority,¹⁴ ‘need not be drafted using any particular form of words’.¹⁵ In consequence a drafter can express a provision in any manner that they choose. Sometimes, therefore, the chosen means will cause unnecessary ambiguity.

3. Special Nature of Statutes and Cases. Cases and statutes are a special form of written language for three reasons:

3.1 They are impersonal and they purport to bind everyone, and ‘everyone’ ranges from people who are docile, law-abiding and just, to those who are malicious, corrupt, cunning and oppressed.

3.2 They speak to later generations and may even survive for centuries.

3.3 They communicate without the non-verbal cues, as the psychologists label them, which assist us with our ordinary communication with our fellow human beings.

4. Legislative Compromise. According to Richard Posner, statutes tend to be ambiguous where there is difficulty in having legislation passed. In jurisdictions

11. Wajnryb (2011)

12. This is part of the title to an article by Chafee (1941), the title being ‘The Disorderly Conduct of Words’.

13. Eagleson (1988)

14. *Lord Pitsligo’s Case* (1750) Fost 79 at 83, *Longmead’s Case* (1795) 2 Leach 694, 696

15. Jamieson (1980-81)

where party discipline is not strong, there is a substantial cost in obtaining a majority of legislators to agree to pass the statute. One way to reduce the cost is to 'agree on less'.¹⁶ This is done by the legislature's using words that are broad and open, and for this reason are ambiguous.

There are, therefore, reasons why law might be ambiguous, and in some cases more so than our intimate communications. It is not surprising then that the law reports are made up of cases involving disputes over the interpretation of statutes and the meaning of common law rules.

Organising Framework

Ambiguity actually provides an organising framework for interpretation when a court properly identifies all of the meanings of the ambiguous provision. This has three aspects.

1. The existence of these two or more meanings is the cause of the problem. It invokes the interpretive function of the court.
2. The meanings of the provision are the focus for reasons or arguments addressed to resolve the ambiguity. Stating the obvious, an argument must be directed towards or against a particular meaning. An argument may be addressed to a meaning indirectly by addressing the effect that a meaning causes. Or it may be addressed directly to the actual meaning.
3. The full range of meanings of the ambiguous provision not only identifies the problem, it furnishes the solution. Because of the literal rule,¹⁷ identifying every possible meaning of the ambiguous provision both specifies, and reveals the limits of, the choices open to a court. A court can choose only one or more of these meanings as the legally correct meaning of the ambiguous provision.¹⁸

16. Posner (1992) p 542

17. Christopher Enright *Legal Reasoning* Chapter 25 Analysing Ambiguity

18. *Collector of Customs v Agfa-Gearet* (1996) 141 ALR 59, 66