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WHEN INTERPRETATION ACTS REQUIRE INTERPRETATION: PURPOSIVE STATUTORY INTERPRETATION AND CRIMINAL LIABILITY IN QUEENSLAND

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I INTRODUCTION

When interpreting words or construing provisions[1] in an Act of Parliament, the context in which the words appear and the purpose of the Act can be used to ascertain meaning.[2] The catchcry of text, context and purpose has become a repeated moniker for the High Court of Australia's 'modern approach' to statutory interpretation.[3] In this context, the thought of removing either text,

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1 The *Acts Interpretation Act 1954* (Qld) sch 1 defines the word 'provision' as follows:

> ***provision***, in relation to an Act, means words or other matter that form or forms part of the Act, and includes –
>
> (a) a chapter, part, division, subdivision, section, subsection, paragraph, subparagraph, sub-subparagraph, of the Act apart from a schedule or appendix of the Act; and
>
> (b) a schedule or appendix of the Act or a section, subsection, paragraph, subparagraph, sub-subparagraph, item, column, table or form of or in a schedule or appendix of the Act; and
>
> (c) the long title and any preamble to the Act.

2 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 ('*CIC Insurance*'); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 ('*Project Blue Sky*'); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 ('*Alcan*'); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 ('*Consolidated Media Holdings*').

3 The first Australian case to refer to the 'modern approach' to statutory interpretation was *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315, when Mason J stated:

> Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern

context or purpose as a primary factor to be considered when divining meaning seems unfathomable. Unfortunately, due to the confusing language used in section 14A(2) of the *Acts Interpretation Act 1954* (Qld), this may well be the result in Queensland.[4]

On one view, section 14A(2) is drafted in a way that prevents an interpretation of an Act that will best achieve its purpose, if such an interpretation would create or extend criminal liability for an individual. Put another way, an Act's purpose cannot be used to imbue a word (or phrase) with meaning, if the result would be an increased likelihood of criminal liability for a person. Whilst this outcome might feel intuitively right (criminal liability is serious, so it should not be imposed unless an Act of Parliament is clear), it overlooks the fact that the text, context and purpose of an Act are all necessary to determine whether the meaning of a provision of an Act is clear in the first place.[5]

This article suggests that the meaning of Queensland's section 14A ('Interpretation best achieving Act's purpose') is unclear, primarily due to

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> approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.

This language was repeated in *CIC Insurance* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (citations omitted):

> the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as [reference to reports of law reform bodies], one may discern the statute was intended to remedy.

4 The current wording of s 14A of the *Acts Interpretation Act 1954* (Qld) is:

> **14A Interpretation best achieving Act's purpose**
>
> (1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.
>
> (2) Subsection (1) does not create or extend criminal liability, but applies whether or not the Act's purpose is expressly stated in the Act.
>
> (3) To remove any doubt, it is declared that this section applies to an Act passed after 30 June 1991 despite any presumption or rule of interpretation.
>
> *Example –*
>
> There is judicial authority for a rule of interpretation that taxing legislation is to be interpreted strictly and in a taxpayer's favour (for example, see *Partington v AG* (1869) LR 4 HL 100 at 122). Despite such a possible rule, this section requires a provision imposing taxation to be interpreted in the way that best achieves the Act's purpose, whether or not to do so would be in a taxpayer's favour.

5 Dawson J stated that a statutory requirement to adopt a purposive approach to interpretation 'allows a court to consider the purposes of an Act in determining whether there is more than one possible construction. … [It] requires a court to construe an Act, not to rewrite it, in the light of its purposes': *Mills v Meeking* (1990) 169 CLR 214, 235. See also the extra-curial comments of Justice Michael Barker (Federal Court of Australia):

> Indeed, it is accepted, by reference to both s 15AA and its equivalents and the approach described in *Project Blue Sky*, that context, consequences, purpose and the canons of construction should be considered as part of the process of interpreting a provision at the outset of the process, not merely as a separate exercise to be conducted if, and only if, there is thought to be some ambiguity or doubt about the first blush meaning.

Justice Michael Barker, 'First You See It, Then You Don't – Harry Houdini and the Art of Interpreting Statutes' (Speech delivered at the JCA Colloquium, Fremantle, Western Australia, 5 October 2012) [21].

historical amendments of the section made in an ad hoc fashion.[6] As a result, two competing interpretations exist as to the permitted scope of purposive statutory interpretation in Queensland. One interpretation is that section 14A(2) is declarative in nature, confirming that the effect of section 14A(1) does not create or extend criminal liability. A second interpretation of section 14A(2) is that it prohibits a purposive interpretation of provisions of an Act, if the result would be the creation or extension of criminal liability for an individual. Given the daily importance of statutory interpretation to the judicial role[7] (and to numerous other end users of legislation), this suggested ambiguity is problematic. A shared understanding of the meaning of this section is important, because understanding the scope for purposive legislative interpretation in Queensland is important. The latent ambiguity in the section is also unusual, given that subsection 14A(2) has existed in its current form since 1994. In the time since, no Queensland court or tribunal has dealt with the meaning or application of this subsection, despite it being cited in several judgments.

The purpose of this article, then, is to understand how section 14A of the *Acts Interpretation Act 1954* (Qld) should be read and understood. This is a 'meta' task, involving interpretation of an interpretation Act. The article begins in Part II by considering the history of statutory requirements to interpret legislation in a way that is consistent with the Act's purpose. Part III considers how penal provisions in a statute have been dealt with at common law and under legislation. Part IV looks at cases where section 14A(2) of the *Acts Interpretation Act 1954* (Qld) has been mentioned, but not meaningfully engaged with. Part V discusses the two competing interpretations of section 14A(2) and how each might be justified. A conclusion is reached as to which interpretation best represents the intention of the Queensland Parliament. Part VI concludes that section 14A of the *Acts Interpretation Act 1954* (Qld) needs to be rewritten on the basis that it is not only unclear, but also sits uncomfortably with the High Court's 'modern approach' to statutory interpretation.

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6 This history will be discussed in Part III of the article, noting that s 14A of the Queensland *Acts Interpretation Act 1954* (Qld) was amended by the *Fire Service Legislation Amendment Act 1994* (Qld) s 13. The title of this amending legislation is the first clue that amending the *Acts Interpretation Act* was not the primary purpose of the Parliament.

7 This point has been made numerous times by prominent judges in extra-curial writing and speeches. See, eg, Justice Michael Kirby, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (2003) 24 *Statute Law Review* 95, 95; Justice Keith Mason, 'The Intent of Legislators: How Judges Discern It and What They Do if They Find It' in *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, Education Monograph 4, 2007) 33, 44; Chief Justice Robert French, 'Litigating in a Statutory Universe' (Speech delivered at the Victorian Bar Association 2nd Annual CPD Conference, Melbourne, 18 February 2012); Chief Justice Robert French, 'Bending Words: The Fine Art of Interpretation' (Speech delivered at the Guest Lecture Series, University of Western Australia, 20 March 2014); Chief Justice Robert French, 'Statutory Interpretation in Australia' (Speech delivered at the Australian National University, 24 October 2014).

II LEGISLATIVE APPROACHES TO PURPOSIVE INTERPRETATION GENERALLY

A The Commonwealth Acts Interpretation Act

Section 15AA of the *Acts Interpretation Act 1901* (Cth) was the first piece of Australian legislation that gave direction to courts on how to interpret legislation (and delegated legislation).[8] Section 15AA was inserted by the *Statute Law Revision Act 1981* (Cth) and initially stated:

> **Regard to be had to purpose or object of Act**
>
> (1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
>
> (2) Nothing in sub-section (1) shall be construed as authorizing, in the interpretation of a provision of an Act, the consideration of any matter or document not forming part of the Act for any purpose for which that matter or document could not be considered apart from that sub-section.

This legislatively-enshrined purposive approach to interpretation was enacted by the Commonwealth Parliament to channel courts away from traditional common law approaches to interpretation – the literal rule,[9] the golden rule[10] and the mischief rule.[11] The second reading debates of the Statute Law Revision Bill 1981 (Cth) highlight a Commonwealth Parliament that had become frustrated

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8 Rules of statutory interpretation contained in the *Acts Interpretation Act 1901* (Cth) also apply to delegated legislation by virtue of s 13 of the *Legislation Act 2003* (Cth). In *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184, 195, Dixon J stated that 'subordinate or delegated legislation ... [stands] on the same ground as an Act of Parliament and [is] governed by the same rules of construction'.

9 The literal rule has been stated as follows:

> The fundamental rule of interpretation, to which all others subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129, 161–2 (Higgins J).

10 The golden rule has been stated as follows:

> the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther.

Grey v Pearson (1857) 10 ER 1216, 1234 (Lord Wensleydale).

11 The mischief rule (also known as the purposive approach) was most famously stated in *Heydon's Case* (1584) 76 ER 637. The Court stated at 638:

> for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:
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> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief ... and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

with the strictly literal interpretation of statutes – especially relating to taxation law.[12] The Barwick High Court of the late 1970s and early 1980s was explicitly singled out for its overtly literal reading of provisions of the *Income Taxation Assessment Act 1936* (Cth):

> The obvious attraction of this new [purposive] role of construction is that it must increase the probability that the intention of Parliament will be implemented rather than frustrated by the courts when they interpret Acts of Parliament. … In this context, the rules of statutory interpretation constitute the rules of communication between the legislators, the legislative audience and the citizens affected by it. What could appear more obvious, more self-evidently sensible to ordinary people than a direction to the courts to implement the legislative purpose? Ordinary citizens – for instance, the man on the Bondi tram – might well be amazed that any such direction should be necessary. He might assume, and with fairly good reason, that the primary task of the courts in interpreting statutes is and always has been to ascertain what Parliament intended and to reach the result which best conforms with that intention. The record of the courts in the common law world has been far from consistent, and all who followed the nullifying of clause 260 of the *Income Tax Assessment Act* by the Barwick High Court, will know just how misguided that was. Judicial frustration of the legislative interest through adherence to strict canons of construction is regrettably common. It is to be hoped that this amendment to the *Acts Interpretation Act* will minimise such judicial behaviour in the future.[13]

After section 15AA came into force, it remained to be seen how the provision would affect judicial interpretive and reasoning technique. One concern, expressed by the Law Council of Australia, was that a statutorily-mandated purposive approach would conflict with other rules of interpretation.[14] The example given was the rule that penal statutes are to be construed narrowly.[15] This issue is discussed later in the article. Another issue involved determination of whether section 15AA was simply a restatement of the mischief rule. Whilst the two approaches are very similar, the High Court in *Mills v Meeking*[16] held that statutory purposive approaches have a slightly different effect. Where the mischief rule required ambiguity or inconsistency in an Act before the Act's purpose could be considered, section 15AA (and state equivalents) allowed the

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12 See especially Commonwealth, *Parliamentary Debates*, House of Representatives, 10 June 1981, 3437 (Ralph Jacobi). This is not to suggest that the literal approach to interpretation was the dominant approach of the time. With respect to taxation law, Murphy J had highlighted the perils of strict literal approaches to interpretation in stating:

> In my opinion, strictly literal interpretation of a tax Act is an open invitation to artificial and contrived tax avoidance. Progress towards a free society will not be advanced by attributing to Parliament meanings which no one believes it intended so that income tax becomes optional for the rich while remaining compulsory for most income earners. If strict literalism continues to prevail, the legislature may have no practical alternative but to vest tax officials with more and more discretion. This may well lead to tax laws capable, if unchecked, of great oppression.

Commissioner of Taxation (Cth) v Westraders Pty Ltd (1980) 144 CLR 55, 80.

13 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 June 1981, 3437 (Ralph Jacobi).

14 'Statutory Guidelines for Interpreting Commonwealth Statutes' (1981) 55 *Australian Law Journal* 711, 712, citing Law Council of Australia (Press Release, 3 June 1981).

15 The strength of this statutory presumption had been considered/questioned even before the introduction of s 15AA of the *Acts Interpretation Act 1901* (Cth). In *Beckwith v The Queen* (1976) 135 CLR 569 ('*Beckwith*'), Justice Gibbs referred to the rule as one of 'last resort': at 576.

16 (1990) 169 CLR 214.

courts to consider the purpose or object underlying an Act at first instance, without any ambiguity being required. According to Dawson J (when considering the equivalent provision in the Victorian *Interpretation of Legislation Act 1984* (Vic)):

> The requirement that a court look to the purpose or object of the Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before a court could have regard to purpose. The approach required by s 35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction.[17]

Finally with respect to section 15AA as initially enacted, concern was expressed that the wording used in the section would not achieve its aim. Simply put, section 15AA was designed to allow courts to interpret words and provisions in an Act in a way that would promote the purpose of the Act. During the second reading debate, the Member for Holt, the Hon Mr Duffy, argued that if section 15AA were (ironically) to be interpreted literally, it would have no effect if there were not two possible constructions of a word/provision, at least one of which would not promote the purpose of the Act.[18] Burchett J of the Federal Court certainly recognised this requirement in *Trevisan v Federal Commissioner of Taxation* when his Honour stated:

> Section 15AA requires a court to prefer one construction to another. Such a requirement can only have meaning where two constructions are otherwise open. The section is not a warrant for redrafting legislation nearer to an assumed desire of the legislature.[19]

Additionally, if there were two (or more) interpretations of a word/provision in an Act that *both* promoted the purpose or object underlying the Act, section 15AA (as originally drafted) was silent as to which should be preferred. The High Court in *Chugg v Pacific Dunlop Ltd* noted this problem when they stated:

> The choice directed by s 35(a) of the *Interpretation of Legislation Act* is not as to the construction which 'will best achieve' the object of the Act. Rather, it is a limited choice between 'a construction that would promote the purpose or object [of the Act]' and one 'that would not promote that purpose or object'.[20]

The effect of the above is that by the end of 1990 the purposive approach to statutory interpretation was firmly accepted by Australian courts interpreting Commonwealth legislation. However, in the period spanning 1981–91, potential shortcomings in the wording of section 15AA had created perceived difficulties for courts which were grappling with the scope of the legislated purposive approach to interpretation.[21] This meant that in 1991, when Queensland was

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17 Ibid 235 (citations omitted).

18 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 June 1981, 3439 (Michael Duffy).

19 (1991) 29 FCR 157, 162.

20 (1990) 170 CLR 249, 262 (Dawson, Toohey and Gaudron JJ).

21 The approach to s 15AA adopted by Burchett J in *Trevisan v Federal Commissioner of Taxation* (1991) 29 FCR 157 (mentioned above) can be contrasted with the statement of McHugh JA in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 423:

> In most cases the grammatical meaning of a provision will give effect to the purpose of the legislation. A search for the grammatical meaning still constitutes the starting point. But if the

considering how best to prescribe a purposive approach to interpretation, the State was able to consider and act upon some of the concerns expressed by the High Court and other state and federal courts.

B The Queensland Acts Interpretation Act

At the Queensland level, section 14A of the *Acts Interpretation Act 1954* (Qld) was inserted by the *Acts Interpretation Amendment Act 1991* (Qld). Section 14A was designed to achieve a similar end to section 15AA of the Commonwealth *Acts Interpretation Act 1901* (Cth) – to prefer a purposive approach to legislative interpretation.[22] Queensland, however, adopted different wording to the Commonwealth and other state parliaments:[23]

> **14A Interpretation best achieving Act's purpose**
>
> (1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

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grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act. The *Acts Interpretation Act 1901* (Cth), s 15AA, and the *Interpretation Act 1987* (NSW), s 33, both require this approach to statutory construction.

22 Whether s 15AA of the *Acts Interpretation Act 1901* (Cth) and s 14A of the *Acts Interpretation Act 1954* (Qld) mandate a purposive approach to interpretation, or whether it is an approach to be 'preferred' is a question that has received very little attention from Australian courts. According to Justice Michael Barker (Federal Court of Australia):

> Section 15AA, s 15AB and provisions like it, are not, however, to be understood as mandating the purposive approach and require their own interpretation by courts! The language of s 15AA is that such an interpretation 'is to be preferred' where other interpretations may be open. But such an interpretation is not required.

Barker, above n 5, [16]. On this point, see also Philip P Frickey, 'Structuring Purposive Statutory Interpretation – An American Perspective' in *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, Education Monograph 4, 2007) 159, 169:

> At least standing in isolation, it is possible to read s 15AA as seeking to impose such a purpose-dominated approach. Interestingly, much depends on what one makes of the text stating that a purposive interpretation 'shall be preferred'. If this language is synonymous with 'shall be adopted', s 15AA arguably mandates *purposivism uber alles*. Alternatively, if s 15AA leaves it to the courts to identify the various permissible constructions available for the statute – and to devise judicial methods for developing the determinants of permissibility – the section could be understood as a mere tie breaker at the end of the judicial analysis (all other things being equal, pick a purposive to a non-purposive interpretation).

These comments can be contrasted with a brief statement in the case of *Trevisan v Federal Commissioner of Taxation* (1991) 29 FCR 157, 162, where Burchett J described the effect of s 15AA as a 'statutory injunction to promote the purpose or object underlying the Act'.

23 By the time that the Queensland Parliament was debating the merit and wording of its proposed s 14A, legislation requiring purposive interpretation had already been passed by the Commonwealth Parliament, and the Parliaments of the Australian Capital Territory, Victoria, Western Australia, South Australia and New South Wales. See *Acts Interpretation Act 1901* (Cth) s 15AA, as inserted by *Statute Law Revision Act 1981* (Cth) sch 1 (commenced 12 June 1981); *Interpretation Act 1967* (ACT) s 11A, as inserted by *Interpretation (Amendment) Ordinance 1982* (ACT) s 3 (commenced 25 June 1982), now embodied in *Legislation Act 2001* (ACT) s 139; *Interpretation of Legislation Act 1984* (Vic) s 35(a) (commenced 1 July 1984); *Interpretation Act 1984* (WA) s 18 (commenced 1 July 1984); *Acts Interpretation Act 1915* (SA) s 22, as inserted by *Acts Interpretation Act Amendment Act 1986* (SA) s 4 (commenced 20 March 1986); *Interpretation Act 1987* (NSW) s 33 (commenced 1 September 1987).

> (2) Subsection (1) applies whether or not the purpose is expressly stated in the Act.[24]

It is clear from the second reading speeches that the Queensland Parliament adopted this wording in response to the High Court decision in *Chugg v Pacific Dunlop Ltd* (referred to above).[25] If two interpretations of words/provisions in an Act both promoted the purpose of the Act, then the Queensland legislation required Courts to adopt the interpretation that 'best achieves' the purpose of the Act. Unfortunately, section 14A of the *Acts Interpretation Act 1954* (Qld) was subsequently amended, leading to a situation of ambiguity that has not been acknowledged by Queensland courts and which continues to exist to the current day. Part III of this article will consider how and why Queensland amended section 14A (with reference to a similar provision in South Australian legislation), and will consider the interplay between purposive interpretation and the creation of criminal liability as a result.

III INTERPRETATION OF CRIMINAL PROVISIONS

A Common Law Approach

Historically, rules and principles for the interpretation of criminal or penal statutes[26] were developed by the courts. For example, the '*nullum crimen*' principle[27] holds that no crime (or punishment) exists without a law. This principle has historically been used by courts to justify the reading down of criminal legislation.[28] Where the State is purporting to deny a person their liberty (or life in times past), the onus is upon the State to clearly and unambiguously draft the terms upon which it may do so.[29] This approach is demonstrated by cases such as *Tuck & Sons v Priester* where it was stated:

> If there is a reasonable interpretation which will avoid the penalty in a particular case we must adopt that construction. If there are two reasonable constructions we

24 *Acts Interpretation Act 1954* (Qld) s 14A, as inserted by *Acts Interpretation Amendment Act 1991* (Qld) s 11(1).

25 Queensland, *Parliamentary Debates*, Legislative Assembly, 21 May 1991, 7641–2 (Dean Wells, Attorney-General). See above n 20 and accompanying text.

26 While the concept of penal statutes has been held to extend beyond criminal liability to legislation which imposes civil penalties (see, eg, *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1), the usage of the term in this article will be limited to criminal offences.

27 This is shorthand for a few possible Latin phrases, including *nullum crimen sine lege*, which translates roughly to 'there should be no crime without a law': Ray Finkelstein and David Hamer (eds), *LexisNexis Concise Australian Legal Dictionary* (LexisNexis, 5th ed, 2015) 439. See also Guy Cumes, 'The *Nullum Crimen, Nulla Poena sine Lege* Principle: The Principle of Legality in Australian Criminal Law' (2015) 39 *Criminal Law Journal* 77.

28 See generally Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 367–72 [9.8]–[9.14]; Justice James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 34–5.

29 Cumes, above n 27, 82–3.

> must give the more lenient one. That is the settled rule for the construction of penal sections.[30]

Over time, the presumption that penal provisions will be construed strictly in favour of an accused has diminished. Even though the presumption has been watered down, it still continues to have utility in the modern day. According to Gibbs J in *Beckwith*:

> The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences … The rule is perhaps one of last resort.[31]

Beckwith was decided at a time before parliaments had legislated to prescribe purposive statutory interpretation. Given the advent of statutory direction on how to interpret legislation (criminal or otherwise), these common law presumptions *have* become a rule of last resort, helpful where ambiguity exists after applying 'the ordinary rules of construction'.[32]

B Statutory Direction Regarding the Interpretation of Criminal Provisions

Despite all Australian legislatures prescribing a form of purposive approach to statutory interpretation, only two have included a reference to the interaction between purposive interpretation and criminal liability. In 1986, South Australia inserted a new section 22 into the *Acts Interpretation Act 1915* (SA) which provided for a purposive approach generally, and its impact upon criminal liability:

> **22 Construction that would promote purpose or object of an Act to be preferred**
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> (1) Subject to subsection (2), where a provision of an Act is reasonably open to more than one construction, a construction that would promote the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) must be preferred to a construction that would not promote that purpose or object.
>
> (2) This section does not operate to create or extend any criminal liability.[33]

In 1991, Queensland allowed for a purposive approach to interpretation in section 14A of the *Acts Interpretation Act 1954* (Qld) (see Part II above). The Queensland Parliament made further amendments to section 14A(2) in 1994:

> (2) Subsection (1) does not create or extend criminal liability, but applies whether or not the Act's purpose is expressly stated in the Act.[34]

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30 (1887) 19 QBD 629, 638, quoted with approval in *Ex parte Purcell* (1907) 7 SR (NSW) 432, 434 (Cohen J).

31 (1976) 135 CLR 569, 576 (citations omitted). The issue to be determined in this case was whether the *Customs Act 1901* (Cth) showed an intention that an 'attempt to commit any offence' (under s 237) could apply to the offence of being in possession of a narcotic (under s 233B), ie could a person 'attempt to be in possession?' The High Court unanimously decided that the Act did not reveal that intention.

32 This approach to the construction of penal provisions is consistent with the statements of Kirby J in *R v Lavender* (2005) 222 CLR 67, 97 [94]: 'the principle suggesting a stricter approach to the interpretation of penal legislation may sometimes prove useful when ambiguity seems intractable'.

33 *Acts Interpretation Act Amendment Act 1986* (SA) s 4. The amendment commenced on 20 March, 1986.

Section 14A(2) of the Queensland legislation and section 22(2) of the South Australian legislation will be referred to in this article as the 'criminal liability phrase'. No other Australian jurisdiction has included any similar provisions in their interpretation legislation. This raises questions as to the purpose and ultimate utility of the criminal liability phrase. In addition, the phrase is poorly worded, leading to competing interpretations as to what it actually means.

There are two opposing interpretations of the criminal liability phrase, which are open upon reading the text. First, that a purposive approach is not to be applied in cases where its use would result in the creation or extension of criminal liability – that is, the phrase sets out an exception to the mandated use of the purposive approach. This will be referred to as the 'exception interpretation'. The alternative interpretation is that the phrase simply declares that interpreting a provision in a way that will best achieve the purpose of an Act does not result in the creation or extension of criminal liability. This will be referred to as the 'declarative interpretation'.

Ultimately, the text of any statute must be read in light of its context and purpose – and this applies equally to interpretation statutes. The context and purpose of the criminal liability phrases in South Australia and Queensland will be analysed in the following sections.

C Amending Legislation and Parliamentary Debates

South Australia was the fifth Australian jurisdiction (of nine) to legislate for a purposive approach to statutory interpretation, and was the first to include the criminal liability phrase. However, when this proposed amendment was before Parliament, it was overshadowed by policy debate concerning the (then) contentious issue of whether recourse to extrinsic material should be permitted in the process of interpretation. An initial amendment Bill was introduced in the Legislative Council earlier in 1986[35] but was not passed. A second amendment Bill was presented to the Legislative Council without the contentious sections[36] and was passed by both Houses of Parliament.

There was no debate on the intended meaning of the criminal liability phrase in either of the second reading speeches. The Attorney-General and the opposition member both limited their explanation of the new section 22 to its preference for a purposive approach to legislation.[37] There was no reference to what the purpose of the criminal liability phrase was or why it needed to be included.

The Queensland Parliament moved to legislate for a purposive approach to statutory interpretation in 1991 – the seventh Australian jurisdiction to do so. At this point in time, the South Australian amendment had been in force for five

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34 *Fire Service Legislation Amendment Act 1994* (Qld) ss 13–14. The amendment commenced on 1 December 1994.

35 South Australia, *Parliamentary Debates*, Legislative Council, 18 February 1986, 178–9 (Chris Sumner, Attorney-General).

36 South Australia, *Parliamentary Debates*, Legislative Council, 5 March 1986, 863 (Chris Sumner, Attorney-General).

37 Ibid 864 (Chris Sumner, Attorney-General), 871 (Trevor Griffin).

years, yet Queensland did not adopt the wording of the South Australian legislation (or the wording of any other jurisdiction). The difference was most evident in the words chosen to prescribe a purposive approach, with Queensland using the 'best achieves' approach, while South Australia had implemented the 'preferred construction' approach described in Part II above. It was not until 1994 that Queensland again sought to amend its section 14A, including adding the criminal liability phrase. The amendment Bill's second reading speech made specific reference to South Australia having adopted a similar phrase, but was vague about why Queensland was adopting the phrase.[38]

The inauspicious context in which the criminal liability phrase became part of Queensland law provides some explanation for its current difficulties. The amending legislation which introduced the criminal liability phrase was not focussed on statutory interpretation – it was introduced through the *Fire Service Legislation Amendment Act 1994* (Qld).[39] The primary purpose of this Act was to support rural firefighting by amending the *Fire Service Act 1990* (Qld) to ensure that, as some previously rural areas of the state became more urbanised, all residents were contributing to the cost of a local firefighting service (as opposed to more remote rural areas, where farmers were considered able to assist in fighting fires themselves).[40] However, this amending Act also made consequential changes to two other statutes.

Local government councils had earlier that year been given powers to charge their residents a levy to support their local volunteer rural fire brigade. Some doubt had arisen as to whether the *Local Government Act 1993* (Qld) allowed a council to collect monies and then spend it on services which were not being directly provided by them. An amendment to this Act provided by the *Fire Service Legislation Amendment Act 1994* (Qld) sought to ensure that councils would be so empowered, and made this apply retrospectively, so that councils which had already implemented a levy would not suffer any procedural challenges.

The other statute amended was the *Acts Interpretation Act 1954* (Qld). This was due to the contention raised in interpreting the above-mentioned *Local Government Act*. The second reading speech was not particularly detailed in its explanation of why the amendment was required:

> The proposed amendment of section 14A of the *Acts Interpretation Act* is designed to enhance purposive interpretation. By the existing section 14A(2), the purposive interpretation applies even if the Act's purpose is not expressly stated. The proposed section 14A(2) ensures that purposive interpretation is enhanced without creating or extending criminal liability.[41]

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38 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 October 1994, 9671–3 (Thomas Joseph Burns).

39 *Fire Service Legislation Amendment Act 1994* (Qld) ss 13–14.

40 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 October 1994, 9671–2 (Thomas Joseph Burns).

41 Ibid 9672 (Thomas Joseph Burns).

Whether Mr Burns, the Minister for Emergency Services and for Rural Communities and Consumer Affairs who was responsible for the Bill, (or other members of Parliament), completely understood the amendment is debateable:

> **Mr Littleproud [opposition MP]:** … There also has to be a slight change to the *Acts Interpretation Act*. That is within the Attorney-General's area; **it is a bit heavy for me, but I understand that it has to be done.**
>
> **Mr Burns [Minister]: Me, too. Don't ask me any questions.**[42]

As a whole, the parliamentary debates surrounding the Fire Service Legislation Amendment Bill 1994 (Qld) depict an ad hoc approach to supporting and funding rural fire fighting. An amendment to the *Acts Interpretation Act 1954* (Qld) was said to be required to achieve this end, but the justification for that amendment, the words used in the amendment, and the potentially far-reaching consequences of the amendment were not properly canvassed by the Queensland Parliament.

IV JUDICIAL CONSIDERATION OF THE CRIMINAL LIABILITY PHRASE

The criminal liability phrase has received limited judicial consideration in both Queensland and South Australia. In situations where either section 14A(2) of the *Acts Interpretation Act 1954* (Qld) or section 22(2) of the *Acts Interpretation Act 1915* (SA) has been specifically pleaded by a defendant,[43] the courts have avoided engaging with the section, and instead relied upon common law presumptions regarding strict interpretation of criminal provisions in a statute.

The best example of this phenomenon comes from the Queensland Supreme Court in the case of *The Syndicate Club Pty Ltd v State of Queensland* ('*Syndicate Club Case*').[44] In this case, subscribers to the 'Syndicate Club' paid

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42 Queensland, *Parliamentary Debates*, Legislative Assembly, 22 November 1994, 10601 (Brian Littleproud).

43 This discussion has been limited to cases where the relevant sections of the Acts Interpretation Acts in Queensland (s 14A(2)) and South Australia (s 22(2)) have been meaningfully mentioned in the judgment. There are other instances where a court should have engaged with the criminal liability phrase within the Interpretation Acts, but did not mention the section at all, or the reference was so fleeting as to be unhelpful. For example, the Industrial Court of Queensland noted that the *Workplace Health and Safety Act 1995* (Qld)

> is a penal statute which when read with the *Penalties and Sentences Act 1992* provides for imposition of very heavy penalties upon corporations, without the benefit of a trial by jury, with a diminished doctrine of *mens rea* and with much reversal of proof. It would be wrong to read such legislation expansively. Indeed, s. 14A(2) of the *Acts Interpretation Act 1954* expressly provides that s. 14A(1) (previously cited) does not create or extend criminal liability.

Wesche v Vancrete Pty Ltd (2005) 178 QGIG 150, 150 (President Hall). In the South Australian context, the case of *Byrnes v The Queen* does cite s 22(2) of the *Acts Interpretation Act 1915* (SA), but offers no further insight into the interpretation of the subsection, and whether or not it acts as a limitation upon purposive interpretation when criminal liability is present: (1999) 199 CLR 1, 26 [52] (Gaudron, McHugh, Gummow and Callinan JJ).

44 [2005] 1 Qd R 209.

monies which were then used by the Club to purchase entries in three weekly Lotto draws (Powerball, Gold Lotto and Oz Lotto). The Club offered additional products which went beyond the formation of a syndicate in the ordinary sense of the word. Section 151(1) of the *Lotteries Act 1997* (Qld) is a penal provision that provides:

> (1) Except as authorised under an agency agreement, a person (other than a lottery licensee) must not –
>
> (a) for the person's gain or reward –
>
> (i) induce anyone else to take part in an approved lottery; or
>
> (ii) offer to anyone else an opportunity to take part in an approved lottery ...

The Syndicate Club was seeking a declaration from the Court that its members who participated in its 'Oz Power System' did not 'take part in' an approved lottery within the meaning of section 151(1)(a) of the Act. The argument was based on the fact that members did not buy tickets in one of the three lotteries themselves, and that the words 'take part in' required direct and active participation by the members (such as purchasing the tickets themselves). To support this construction of the provision, the Syndicate Club specifically relied upon section 14A(2) of the *Acts Interpretation Act 1954* (Qld), as well as the common law presumption that penal provisions should be narrowly construed.

To resolve the issue, Philippides J examined the purpose of the *Lotteries Act 1997* (Qld), describing the Act globally as a 'beneficial'[45] one:

> [The Act's purpose is] ensuring that, on balance, the State and the community as a whole benefit from lotteries, and that that balance is achieved by allowing lotteries, subject to a system of 'regulation and control designed to protect players and the community'.[46]

According to her Honour, the Act's use of penal provisions was a necessary means to achieving its overall beneficial purpose. Philippides J identified the conflict between interpreting beneficial statutes liberally and penal provisions strictly.[47] It was decided that the dominant purpose[48] of the Act was beneficial, and therefore a liberal approach could be taken to interpreting the phrase 'take part in' in section 151 of the *Lotteries Act 1997* (Qld).[49]

It is contended that this decision intuitively makes sense and that an interpretation of the provision 'take part in' that best achieves the purpose of the *Lotteries Act* properly reflects the intention of the Queensland Parliament. The difficulty with the decision is that it does not address section 14A(2) of the *Acts Interpretation Act 1954* (Qld). Philippides J did rely upon the purpose of the Act to justify her interpretation of the provision, but the result for the Syndicate Club

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45 Ibid 221.

46 Ibid.

47 Ibid. This conflict is also acknowledged in Pearce and Geddes, above n 28, 365 [9.6].

48 See *Waugh v Kippen* (1986) 160 CLR 156, 164–5 (Gibbs CJ, Mason, Wilson and Dawson JJ); *Trade Practices Commission v Gillette Co [No 1]* (1993) 45 FCR 366, 375–6 (Burchett J); *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 109–10 (McHugh J).

49 *Syndicate Club Case* [2005] 1 Qd R 209, 221.

was that criminal liability was created. If the exception interpretation to section 14A(2) is correct, then using the purpose to create or extend criminal liability for the Syndicate Club in this case was simply not permitted under section 14A(2). If the declarative interpretation is correct, then it would have been of great assistance to have that explained or at least expressed. Perhaps the difficulty in the *Syndicate Club Case* is that common law presumptions relating to remedial/beneficial provisions and penal provisions were engaged immediately, rather than applying 'the ordinary rules of construction' first (including an analysis of the effects of section 14A(2)). As a result, the section was not addressed (despite being specifically pleaded), and a chance to interpret its meaning was missed.

The case of *Filippini v Chief Executive, Department of Tourism, Fair Trading & Wine Industry Development*,[50] is another example of a Queensland judgment where section 14A(2) of the *Acts Interpretation Act 1954* (Qld) was raised by the defendant, but not explicitly dealt with by the appellate judge. Filippini was a real estate agent appealing her conviction under the *Property Agents and Motor Dealers Act 2000* (Qld) for 'obtaining a beneficial interest' in property. According to section 145 of the Act:

> (1) This section applies to property placed by a person ('client') with a real estate agent for sale, but does not apply if section 144 applies.
>
> (2) The real estate agent commits an offence if the agent obtains a beneficial interest in the property.
>
> Maximum penalty – 200 penalty units or three years imprisonment.

Filippini had organised for her client to sell a property to another man, who, a week later, nominated Filippini (under her maiden name) as the transferee of the property. This allegedly contravened the Act. Ms Filippini submitted that because the Act defined 'beneficial interest' as 'purchasing' the property, and her interest had arisen from a transfer *after* the contract of sale had been entered into, she should not be liable. The Commercial and Consumer Tribunal member at first instance thought this view would defeat the purpose of the legislative provisions (designed to prevent a real estate agent taking advantage of their position)[51] and found her in breach of the section. On appeal, Dearden DCJ held that to accept a narrow construction of the phrase 'beneficial interest' would 'allow a Mack truck to be driven through the provisions of the legislation which are designed to protect the sellers of property from real estate agents misusing their position'.[52] It is again contended that the interpretation of the relevant provision ('beneficial interest') in order to best achieve the purpose or design of the *Property Agents and Motor Dealers Act 2000* (Qld) led to a fair result in this case. As with the *Syndicate Club Case* however, the defendant's reliance upon section 14A(2) of the *Acts Interpretation Act 1954* (Qld) was noted, but not dealt with. By adopting a broad interpretation of the relevant provision, on the basis that it was consistent with the purpose(s) of the Act, criminal liability was created for Ms Filippini.

50 [2007] QDC 351.
51 Ibid [17].
52 Ibid [21].

This result arguably offends section 14A(2) of the *Acts Interpretation Act 1954* (Qld).

This reticence to deal with the meaning of the criminal liability phrase in Queensland is also evident in South Australia. In the 1996 decision of *R v Hill*,[53] the Court of Criminal Appeal in South Australia was dealing with an appeal against conviction and sentence regarding the production of methylamphetamine. A section of the relevant Act provided for two different maximum penalties, depending on the quantity of the particular drug involved in an offence. This particular quantity could be prescribed by regulation, however the regulations had not yet done so at the time – leading Hill to creatively argue that no penalty could be imposed. Doyle CJ explicitly adopted a purposive approach to the relevant section, reading words into the legislation so it could have its intended effect (and Hill could be punished). Hill argued that this use of the purposive approach was not permitted in the circumstances, because it would involve the creation or extension of criminal liability, inconsistent with section 22(2) of the *Acts Interpretation Act 1915* (SA). In response, Doyle CJ explained that while the purposive approach was now enshrined in statute, its applicability to a case was not dependent upon statute:

> The purposive approach was adopted as a common law principle of interpretation, and not in reliance upon s 22. To the extent that that renders that provision unnecessary, and its restriction [contained in the criminal liability phrase] inapplicable, that is simply a consequence of the legislative provision lagging behind the common law.[54]

The difficulty and potential danger with this approach is that it allows a judge to completely sidestep restrictions placed upon purposive legislation by the Parliament. By relying upon the common law purposive approach (the mischief rule) to interpret the provision, Doyle CJ did not interpret the meaning of section 22(2), because he was not relying on section 22(1). This case raises broader questions about the appropriateness of relying upon traditional common law approaches to interpretation (ie, the mischief rule) when to do so would frustrate the clear intention of parliament as expressed in the Acts Interpretation Acts.

The most direct treatment of the criminal liability phrase comes from the case of *R v D, WD*.[55] Here the Full Court of the South Australian Supreme Court was dealing with the ability of an appellate court to quash a conviction and substitute a verdict of guilty to a lesser, related offence following a trial by judge alone. With respect to section 22 of the *Acts Interpretation Act 1915* (SA), Nicholson J stated:

> Furthermore, what is not to be forgotten in this context is that s 22(1) of the *Acts Interpretation Act* is to be read 'subject to' and is thereby expressly qualified by s 22(2). Section 22(2) would appear to be a legislative recognition of an aspect of the common law approach to the construction of penal provisions.[56]

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53 [1996] SASC 5975.
54 Ibid [37].
55 (2013) 116 SASR 99.
56 Ibid 117.

Nicholson J was cautious in his analysis of section 22(2) and his hedged language ('would appear to be') again evidences some confusion as to the exact meaning of the criminal liability phrase as used in South Australia and Queensland. His Honour may be correct in signalling that section 22(2) is intended to legislatively recognise the narrow common law approach to construing penal provisions. It is contended, however, that the language of section 14A(2) of the *Acts Interpretation Act 1954* (Qld) and section 22(2) of the *Acts Interpretation Act 1915* (SA) is more direct and controlling in its effect than to simply reflect a common law statutory presumption. Part V of this article will consider the two strongest interpretations of the criminal liability phrase, using the Queensland legislation as an example.

V THE COMPETING INTERPRETATIONS OF SECTION 14A(2)

Several arguments can be advanced to support either the declarative interpretation, or the exception interpretation of section 14A(2) of the Queensland *Acts Interpretation Act 1954* (Qld). For ease of reference, section 14A in its current form has been reproduced again:

> **14A Interpretation best achieving Act's purpose**
>
> (1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.
>
> (2) Subsection (1) does not create or extend criminal liability, but applies whether or not the Act's purpose is expressly stated in the Act.
>
> (3) To remove any doubt, it is declared that this section applies to an Act passed after 30 June 1991 despite any presumption or rule of interpretation.
>
> *Example –*
>
> There is judicial authority for a rule of interpretation that taxing legislation is to be interpreted strictly and in a taxpayer's favour (for example, see *Partington v AG* (1869) LR 4 HL 100 at 122). Despite such a possible rule, this section requires a provision imposing taxation to be interpreted in the way that best achieves the Act's purpose, whether or not to do so would be in a taxpayer's favour.

A Declarative Interpretation

A literal reading of section 14A(2) suggests that it is declarative in nature. The phrase '[s]ubsection (1) does not create or extend criminal liability' may be seen as instructive on exactly what subsection (1) does not do. To state it another way, subsection (2) can be read as saying 'when subsection (1) is applied, its application does not have the effect of creating or extending criminal liability'. This analysis considers what the 'cause' of the creation or extension of criminal liability might be. Such a reading would hold that when a provision is interpreted in a way that best achieves the purpose of an Act, this purposive approach is *not* the 'cause' of the creation or extension of criminal liability. If criminal liability were to attach to an individual for breach of a section of an Act, then this must have been the intention of Parliament. Adopting a purposive approach, then, is not the magic cause of criminal liability; it simply helps the interpreter discover that Parliament had always intended criminal liability to be attached to certain

actions. This can be differentiated from legitimate concerns about courts 'creating' criminal laws where no such intent exists in the legislation.

A second argument supporting the declarative interpretation of section 14A(2) is that the purpose of an Act should always be used to interpret words in an Act. By adopting the exception interpretation to section 14A(2), the result is that an interpretation (of a provision) that best achieves the purpose of an Act cannot be used in certain circumstances. The 'modern approach' to statutory interpretation relies upon a consideration of text, context and purpose when interpreting words/provisions in an Act of parliament.[57] Even if a purposive approach to interpretation would support a conclusion of criminal liability in a particular case, this still needs to be weighed alongside other textual and contextual considerations. To completely remove legislative purpose as an interpretative consideration in certain circumstances is to disrupt the finely balanced interplay of text, context and purpose that leads to more complete and justifiable statutory interpretation.

B Exception Interpretation

The exception interpretation of section 14A(2) is that a purposive approach cannot be used to interpret words/provisions in an Act, if to do so would create or extend criminal liability for an individual. In essence, the subsection would be read as saying, 'subsection (1) cannot be applied if the result would be the creation or extension of criminal liability'. Such a reading would therefore limit the circumstances in which a purposive approach to interpretation could be used. As a prelude to the arguments that follow, it is our contention that the exception interpretation to section 14A(2) best captures the intention of the Queensland Parliament. Whether that interpretation (and its effect) actually represents good law will be discussed in Part VI of this article.

It is acknowledged from the outset that the exception interpretation of section 14A(2) does not accord with a strict literal reading of the subsection. For the subsection to have the effect that we contend it does, words need to be read into the subsection.[58] This technique of 'reading in' words to a section of an Act has

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57 For cases that have spelt out this modern approach to interpretation, see *CIC Insurance* (1997) 187 CLR 384; *Project Blue Sky* (1998) 194 CLR 355; *Alcan* (2009) 239 CLR 27; *Consolidated Media Holdings* (2012) 250 CLR 503. This approach to statutory interpretation has also been considered extra-curially by a number of justices. Some examples include: Michael Kirby 'Statutory Interpretation: The Meaning of Meaning' (2011) 35 *Melbourne University Law Review* 113; Chief Justice J J Spigelman, 'The Intolerable Wrestle: Developments in Statutory Interpretation' (2010) 84 *Australian Law Journal* 822.

58 The technique of reading words in to a piece of legislation will not be used lightly when addressing a drafting error or parliamentary oversight. According to McHugh J in *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 113 (citations omitted), certain preconditions need to be met:

> [O]n rare occasions a court may be justified in treating a provision as containing additional words if those additional words will give effect to the legislative purpose. In *Jones v Wrotham Park Estates*, Lord Diplock said that three conditions must be met before a court can read words into legislation. First, the court must know the mischief with which the statute was dealing. Second, the court must be satisfied that by inadvertence Parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. Third, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.

been endorsed by McHugh J in *Newcastle City Council v GIO General Ltd*[59] and was well explained by Spigelman CJ in the New South Wales decision of *R v Young*:

> If a court can construe the words actually used by the parliament to carry into effect the parliamentary intention, it will do so notwithstanding that the specific construction is not the literal construction and even if it is a strained construction. The process of construction will, for example, sometimes cause the court to read down general words, or to give the words used an ambulatory operation. So long as the court confines itself to the range of possible meanings or of operation of the text – using consequences to determine which meaning should be selected – then the process remains one of construction.
>
> The construction reached in this way will often be more clearly expressed by way of the addition of words to the words actually used in the legislation. The references in the authorities to the court 'supplying omitted words' should be understood as a means of expressing the court's conclusion with clarity, rather than as a description of the actual reasoning process which the court has conducted. In all cases, what the court has done is to construe the words actually used in their total context.[60]

More recently, the High Court has clarified when 'reading in' words to a statute might be appropriate. In *Taylor v The Owners – Strata Plan No 11564*, the majority stated:

> The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills 'gaps disclosed in legislation' or makes an insertion which is 'too big, or too much at variance with the language in fact used by the legislature'.[61]

Therefore, the first argument we offer supporting the exception interpretation is text-based, relating to the grammar used in the subsection. The word 'but' is used in the second part of the sentence:

> Subsection (1) does not create or extend criminal liability, *but* applies whether or not the Act's purpose is expressly stated in the Act.[62]

The use of the word 'but' here is a grammatical coordinating conjunction, contrasting the second part of the subsection with the first. If subsection (1) does apply whether or not the Act's purpose is expressly stated, then implicitly it does not apply if criminal liability were to be created or extended. As a point of

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In the more recent case of *DPP (Vic) v Leys* (2012) 44 VR 1, 34 [96]–[97], the Victorian Court of Appeal stated that when reading words into a statute:

> the process of construction is not construction 'of the words used', but rather the process of determining whether the modified construction is reasonably open having regard to the statutory scheme, set against the background that Lord Diplock's three conditions have been met.
>
> Whether a relevant statutory provision is 'open to such a construction' involves two considerations. First, whether the words used in the statutory provision can accommodate the words to be read in, or implied, without giving to the provision an unnatural, incongruous or unreasonable construction. Second, the provision as modified must conform with the statutory scheme.

59 (1997) 191 CLR 85, 113.

60 (1999) 46 NSWLR 681, 687–8.

61 (2014) 253 CLR 531, 548 (French CJ, Crennan and Bell JJ) (citations omitted).

62 *Acts Interpretation Act 1954* (Qld) s 14A(2) (emphasis added).

contrast, if the word 'and' were to be used instead of the word 'but' in this subsection, the change in syntax would lead to a change in meaning, which would promote a declarative interpretation of section 14A(2).

The second argument in favour of the exception interpretation, is that the context and intended purpose of the amendments to section 14A(2) suggest that it was meant to curtail the purposive interpretation approach in certain circumstances. The Australian High Court continues to highlight the importance of text, context and purpose to the modern approach of statutory interpretation. Starting with *CIC Insurance*[63] in 1997 and *Project Blue Sky*[64] in 1998 and more recently *Alcan*[65] and *Consolidated Media Holdings*,[66] the High Court has used careful (and repeated) language to explain the interplay between text, context and purpose when interpreting statutes.[67]

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63 (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (citations omitted):

> the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses '"context"' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.

64 (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted):

> the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

65 (2009) 239 CLR 27. See especially at 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ) (citations omitted):

> 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.

66 (2012) 250 CLR 503. See at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) (citations omitted):

> 'This court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.

67 It is worth noting that some authors have queried whether the articulation of the modern approach to statutory interpretation outlined in *Alcan* and *Consolidated Media Holdings* is consistent with the earlier description in *CIC Insurance* and *Project Blue Sky*. According to these authors, the later decisions represent a shift or recalibration towards a more text-focused approach. See Mark Moshinsky, 'Current Issues in the Interpretation of Federal Legislation' (Speech delivered at the National Commercial Law Seminar Series, 3 September 2013); Juliet Lucy, 'Recent Trends in Statutory Interpretation' (13th Floor St James Hall, May 2014) <http://13stjames.net.au/wp-content/uploads/2014/05/Recent-Trends-in-Statutory-Interpretation.pdf>.

Consistent with *Alcan* and *Consolidated Media Holdings*, the task of statutory interpretation 'must begin with a consideration of the [statutory] text'.[68] As stated above, the first part of subsection (2) appears to be declarative in nature ('subsection (1) does not create or extend criminal liability'), but this interpretation is confused through the grammatical use of the word 'but' in the second part of the subsection. The statutory text must however, be considered in its context, and this context includes 'the general purpose and policy of a provision, in particular the mischief it is seeking to remedy'.[69] This means that legislative history and extrinsic materials are important pieces of legislative context.[70]

The explanatory notes accompanying the Fire Service Legislation Amendment Bill 1994 (Qld) state that:

> Existing section 14A(1) endorses a purposive approach to interpretation where the interpretation that would best promote the purpose of an Act is preferred to any other interpretation. By existing section 14A(2), the purposive interpretation applies even if the Act's purpose is not expressly stated.
>
> The proposed amendment of section 14A is designed to enhance purposive interpretation.
>
> Proposed section 14A(2) ensures that purposive interpretation is enhanced without creating or extending criminal liability. South Australia has an equivalent safeguard in its purposive interpretation provision – *Acts Interpretation Act 1915* (SA), section 22. The proposed subsection also remakes existing section 14A(2).
>
> Proposed section 14A(3) is a declaration intended to remove any doubt about uncertainties in interpretation similar to those that have resulted in the proposed amendment of the *Local Government Act 1993* by Part 3 of this Bill. If legislation is made after 30 June 1991, a purposive interpretation applies despite any presumption or rule of interpretation.[71]

These explanatory notes explain that the purpose of the amendments to section 14A was to enhance purposive legislative interpretation (via section 14A(3)), but to make sure that criminal liability was not created or extended as a result (section 14A(2)). Reference is made to an equivalent 'safeguard' in the South Australian *Acts Interpretation Act*, and it is argued that the use of the word 'safeguard' reveals (in part) the Queensland Parliament's intention regarding section 14A(2). A safeguard is 'something serving as a protection or defence'.[72] By mandating a purposive approach to legislation and stating that it would trump any common law presumption or rule of interpretation, the Queensland Parliament was concerned about something. Our contention is that they were worried about the purpose of an Act being used to create or extend criminal liability for a person, when the section(s) of an Act did not make such liability completely clear. Section 14A(2) was therefore a safeguard against the harsh

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68 *Consolidated Media Holdings* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ). See also *Alcan* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

69 *Alcan* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

70 *Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

71 Explanatory Note, Fire Service Legislation Amendment Bill 1994 (Qld) pt 4.

72 *The Macquarie Dictionary Online* (Macmillan Publishers Australia, 2017) (definition of 'safeguard') <https://www.macquariedictionary.com.au/>.

consequences of criminal liability being established through 'back door means' (relying on purposive interpretation). Sanson captures the sentiment well when she states:

> given the imbalance of resources and power between the individual and the state, a person should not be subject to deprivation of personal liberty or the payment of a significant fine on the basis of an unclear legislative requirement to that effect.[73]

To conclude this part, arguments can be made for and against the declarative interpretation and the exception interpretation to section 14A(2). The text and grammar used in the section must be the starting point for ascertaining meaning, but the statutory text of 14A(2) must also be considered in its context (where context includes material both intrinsic and extrinsic to the Act).[74] The explanatory notes suggest that Parliament did not want the purposive approach to interpretation to be used, if to do so would create or extend criminal liability for a person. The reality is that section 14A(2) has been poorly drafted and that words would need to be 'read in' to the subsection to give it the effect Parliament intended. Section 14A(2) should be read as saying 'subsection (1) cannot be applied to create or extend criminal liability'. Such a reading is permissible, because the current wording of section 14A(2) is reasonably open to such an interpretation, even though these exact words are not used. To return to the judgment of Spigelman CJ in *R v Young*:

> The court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based.[75]

VI HOW SHOULD THE SECTION BE REDRAFTED (OR SHOULD IT JUST BE REMOVED)?

If the intention of the Queensland Parliament was to create an exception to purposive interpretation where criminal liability may be created or extended, then this intention is not clearly expressed. To make this intention clear, the following drafting could have been adopted:

> **14A Interpretation best achieving Act's purpose**
>
> (1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.
>
> (2) Subsection (1) applies whether or not the Act's purpose is expressly stated in the Act.
>
> (3) Subsection (1) cannot be applied to create or extend criminal liability.
>
> (4) …

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73 Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2nd ed, 2016) 236.

74 *Alcan* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

75 (1999) 46 NSWLR 681, 687.

This redrafted section would make it clear that there are exceptions to purposive statutory interpretation in Queensland. The benefit of expressing this intention in a separate sub-section is that it does not deal with two separate ideas in the same sentence. Existing section 14A(2) deals with the application of 14A(1) whether the purpose of the Act is explicitly stated or not, and if criminal liability is created. Separating these ideas out enhances the clarity and readability of section 14A.

If the intention of the Queensland Parliament was to simply declare that purposive interpretation (in and of itself) does not create or extend criminal liability (or in other words, there are no categories of exception to the purposive approach), then it is arguable that section 14A(2) should not have been amended at all in the *Fire Service Legislation Amendment Act 1994* (Qld). A modern day drafting of section 14A that supports this approach might look like this:

> **14A Interpretation best achieving Act's purpose**
>
> (1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.
>
> (2) Subsection (1) applies whether or not the Act's purpose is expressly stated in the Act.
>
> (3) To remove any doubt, it is declared that this section applies to an Act passed after 30 June 1991 despite any presumption or rule of interpretation.
>
> *Example –*
>
> There is judicial authority for a rule of interpretation that taxing legislation is to be interpreted strictly and in a taxpayer's favour (for example, see *Partington v AG* (1869) LR 4 HL 100 at 122). Despite such a possible rule, this section requires a provision imposing taxation to be interpreted in the way that best achieves the Act's purpose, whether or not to do so would be in a taxpayer's favour.

Such a section places no restriction upon the operation of subsection 14A(1) and further makes clear that in the event of a conflict between subsection 14A(1) and certain statutory presumptions (ie penal provisions are strictly construed, beneficial provisions are broadly construed), the purposive approach should prevail.

Regardless of the intention of the Queensland Parliament with respect to section 14A(2), there remains a normative question as to what the law *should* say on this issue. This article has argued that the current section 14A(2) should be read as restricting purposive interpretation in certain circumstances. It is contended however that this interpretation is not good law, and sits uncomfortably with the modern approach to interpretation expounded in cases like *Project Blue Sky* and *Alcan*. To explain, modern courts, civil or criminal, state or federal, are tasked with ascertaining and giving effect to the will of parliament when interpreting statutes.[76] This will is determined through the 'key integers'[77] of statutory text, context and purpose. *Alcan* states that the interpretative function must begin with the text itself, but the meaning of this text 'may require consideration of the context, which includes the general purpose

76 See *Wilson v Anderson* (2002) 213 CLR 401, 418 [8] (Gleeson CJ).

77 *Commissioner of the Australian Federal Police v Courtenay Investments Ltd [No 2]* (2014) 283 FLR 59, 62 [14] (Edelman J).

and policy of a provision, in particular the mischief it is seeking to remedy'.[78] The purpose of an Act is therefore vital for understanding what a word, phrase or section means *in the first instance*. Any restriction, then, on the use of the purpose of an Act lessens an interpreter's ability to ascertain the will of parliament and the actual meaning of words.

The Queensland Parliament made its amendments to section 14A(2) on the basis that a safeguard was necessary against unchecked purposive interpretation. Our assertion above was that the Parliament was worried about the purpose of an Act being used to create or extend criminal liability for a person, when the section(s) of an Act did not make such liability completely clear. If this assertion is correct, then it ignores the fact that the purpose of an Act is one of the interpretative tools that helps make criminal liability in a section clear (or not) in the first place. This is in no way intended as a criticism of the Queensland legislature who made the amendments to section 14A(2) in 1994, well before the 'modern approach' to statutory interpretation was outlined in cases like *Project Blue Sky* and *Alcan.*

With respect to provisions in Queensland legislation that involve criminal liability and sanctions, Queensland courts should interpret these sections in a way that best promotes the purpose of the Act. They should do so, even if criminal liability is created or extended. To achieve this result, the *Acts Interpretation Act 1954* (Qld) section 14A needs to be amended. The modern day safeguard to ensure that purposive interpretation is not used untrammelled is the case law from the High Court of Australia that espouses the interplay between text, context and purpose in the divination of meaning. Purposive interpretation cannot govern the meaning of words and provisions itself, if the text and context of those words/provisions might indicate a different meaning. If text, context and purpose can be aligned in an interpretative task, then this is the surest guide to meaning and imputed legislative intention. If text, context and purpose pull in different directions, then *Project Blue Sky* acts as a reminder that the 'consequences of a literal or grammatical construction' and the 'canons of construction' can also be relied upon to ascertain meaning.[79] The Queensland Parliament does not need a safeguard against purposive interpretation in cases that involve criminal liability, because consideration of all the factors relevant to 'modern' interpretation (text, context, purpose, consequences, canons of interpretation) is the only safeguarding that is needed.

Our ultimate suggestion is that section 14A of the *Acts Interpretation Act 1954* (Qld) be amended as follows:

> **14A 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.

This is exactly the same wording as the current section 15AA of the *Acts Interpretation Act 1901* (Cth). Such drafting removes any confusion around the

78 (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

79 *Project Blue Sky* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

phrase 'does not create or extend criminal liability' because the phrase is simply not present. As a result, there would be no restrictions upon when the purpose of an Act can be used to interpret the meaning of words. Subsection 14A(3) is also deleted, because if after consideration of text, context and purpose, the meaning of words in a section is still unclear, then common law presumptions (penal provisions are strictly construed) have utility as a rule of last resort.[80] Finally, as this drafting is consistent with the Commonwealth provision, Queensland courts would benefit from the jurisprudence of the Full Court of the Federal Court and the High Court of Australia when discussing and applying the section.

VII CONCLUSION

This article has highlighted the ambiguity that exists in section 14A of the *Acts Interpretation Act 1954* (Qld). Recognising the existence of this ambiguity is important, because it has not yet been acknowledged by the Queensland courts. A shared understanding of the meaning of this section matters, because understanding the scope for purposive legislative interpretation in Queensland matters.

Whilst it has been suggested that the Queensland Parliament intended section 14A(2) to operate as a restriction upon purposive interpretation when criminal liability would be created/extended, the section no longer reflects the modern approach to statutory interpretation which requires the synergy and symbiosis of text, context and purpose. Given the careful articulation of this modern approach to interpretation in cases like *Alcan* and *Consolidated Media Holdings*, an unrestricted use of legislative purpose to create criminal liability through 'back door' means is simply not realistic. Frankfurter's comments in 1947 hold just as true today when he stated '[w]hile courts are no longer confined to the language [of the statute], they are still confined by it'.[81] Some cases involving statutory interpretation are plain difficult. To derive meaning from a section in such cases involves an 'intellectual scrap', where you grab whatever you can (permissibly) to help justify an interpretation. Legislative purpose should always be a part of that scrap because '[o]bjective discernment of statutory purpose is integral to contextual construction'.[82]

80 See, eg, *R v Lavender* (2005) 222 CLR 67, 96–7 [93]–[94] (Kirby J).

81 Felix Frankfurter, 'Some Reflections on the Reading of Statutes' (1947) 47 *Columbia Law Review* 527, 543.

82 *Thiess v Collector of Customs* (2014) 250 CLR 664, 672 [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).