



**Taxation Institute of
Australia**

**11 March 2009
Doltone House, Pyrmont,
Sydney**

24TH NATIONAL CONVENTION – SYDNEY

Justice Hill Memorial Lecture

Statutory Interpretation

Written by/Presented by:

Murray Gleeson

© The Honourable Murray Gleeson AC 2009

Disclaimer: The material in this paper is published on the basis that the opinions expressed are not to be regarded as the official opinions of the Taxation Institute of Australia. The material should not be used or treated as professional advice and readers should rely on their own enquiries in making any decisions concerning their own interests.

The late Justice Graham Hill and I were friends, and exact contemporaries, as undergraduates at Sydney University, where we studied Arts and Law. After graduating with first class honours and the University Medal, Graham Hill went on to post-graduate study in the United Kingdom. Upon his return to Australia, he practised for several years as a solicitor, and later went to the New South Wales Bar. He was appointed to the Federal Court of Australia, where he served with distinction until his untimely death. Apart from his work as a practitioner and a judge, he made a notable contribution to revenue law through his involvement, as a teacher, in post-graduate courses at Sydney University. His areas of particular expertise were income tax and stamp duties. He collaborated closely with the late Professor Ross Parsons.

The importance of the work of Ross Parsons and Graham Hill needs to be understood in a context that is now largely forgotten, partly in consequence of their success. In the mid-twentieth century, revenue law was treated as a practical subject, as it is, but there was not much interest in its jurisprudential foundations. It has, of course, always been statute-based, but the legal and accounting professions were concerned principally with the way the statutes were administered rather than the theories upon which they proceeded. Legal education virtually ignored the topic, probably because few people saw it as more than an exposition of black letter rules, regulations, and administrative practice. In our undergraduate course, Graham Hill and I received only two lectures on income tax: one on the difference between capital and income; the other on s 260 of the *Income Tax Assessment Act 1936*. What Ross Parsons, Graham Hill and some others did was to foster an appreciation, by the University and the professions, of revenue law as a legitimate and challenging subject of legal education. They analysed and expounded it as a social science. Because they did that so well, and so successfully, people have come to forget why it was

necessary in the first place. It is a pleasure to participate in an occasion which honours the memory of the late Justice Hill.

I have chosen to speak on statutory interpretation. It also is a topic that, until recently, was neglected in most law schools. Most of the work of modern courts consists of applying and, where necessary, interpreting Acts of Parliament. Modern parliaments legislate on a host of topics previously left to the common law. Their output is vast. Revenue law has always been found in statutes, but the bulk and complexity of the statutes has increased enormously. It is sufficient to compare the size of the *Income Tax Assessment Act* in 1936 with the current legislation to see the change in Parliament's approach to its law-making responsibilities. The reasons for the change are complex. Not everybody accepts that the system is made fairer or more efficient by constantly increasing the number of rules. The trend, however, seems irreversible.

Much of the structure of our legislation employs concepts of common law and equity as building blocks. The income tax legislation is a good example. The term "income tax" describes a tax upon gains of a certain kind. The distinction between gains on capital account and gains on revenue account, or income, was originally, and remains, of importance in trust law. In the administration of a settled estate, entitlements of life tenants and remaindermen turn upon that distinction. The distinction was taken up, in the United Kingdom, and in Australia, as a method of identifying a kind of gain that would attract certain fiscal consequences. The distinction can be difficult to apply. In recent years, Parliament has extended its taxing ambitions, but the difference between income and capital gains is still there. Similarly, many provisions within the Act turn upon established legal or equitable concepts. A simple example is Div 6 of Pt III of the 1936 Act, dealing with trust income. Section 96 says that, except as provided in the Act, a trustee shall not be liable as trustee to pay income tax upon the

income of the trust estate. Where there is a beneficiary of a trust estate who is not under any legal disability and is presently entitled, s 97 provides that the beneficiary's share of the income of the trust estate is part of the assessable income of the beneficiary. Later provisions deal with various circumstances in which the trustee will be liable to pay income tax on the income of the trust estate. The application of this part of the Act depends upon an understanding of concepts of trust law. Fiscal consequences are to be worked out by applying the words of the Act to the legal rights and obligations that have emerged from the facts of the case and the conduct of the taxpayer and any other relevant party.¹ An accurate analysis of the facts, and the legal rights and obligations upon which the Act is to operate, is an essential first step in applying the law expressed in the statute.

Subject to a qualification to which I will return, income tax legislation takes the factual and legal circumstances of the case as it finds them. In general, people are taxed by reference to the income they have, in fact and in law, derived; and the expenses they have, in fact and in law, incurred. This elementary point is a contextual matter of pervasive importance in the interpretation of the 1936 and 1997 Acts ("the Acts").

I will return to the significance of context in all legal interpretation, including statutory interpretation. For the present, it is sufficient to note the particular matter of context to which I have referred, that is, that the Acts impose fiscal consequences upon a factual and legal state of affairs which is generally established outside the statute, and is anterior to its operation. For instance the Acts provide for the deduction of losses and outgoings necessarily incurred in

¹ See, for example, *Commissioner of Taxation v Linter Textiles Australia Ltd (In Liquidation)* [2005] HCA 20, (2005) 220 CLR 592; *Raftland Pty Ltd v Federal Commissioner of Taxation* [2008] HCA 21; (2008) 82 ALJR 934.

carrying on a business for the purpose of gaining or producing assessable income. This raises a question of interpretation the answer to which we now take for granted. But both the question and the answer are fundamental. The meaning of “necessarily” varies according to context. Sometimes it means “unavoidably”. In a given context, to describe an expense as necessary may mean that it was essential or unavoidable. In the context of the Acts, its meaning is different. The reason for this goes to the essence of income tax law. The revenue authorities do not tell a taxpayer how to run a business. A business expense incurred as a matter of fact and law does not cease to be an allowable deduction because a more efficient operation would have avoided, or reduced, the expense. The expense does not have to be necessary in the sense in which an efficiency expert may use the term. The High Court, in 1949, said that in the context of the 1936 Act the word “necessarily” is intended to mean no more than “clearly appropriate or adapted”.² The relevant passage in the Court’s judgement referred to an earlier case.³ That was a case about the interpretation of an Act that created a regulation-making power. The Executive was empowered to make regulations necessary for the purpose of carrying out a legislative scheme. In such a context, it was clearly not intended that the validity of a regulation would depend upon showing that it was essential or unavoidable. It is sufficient to show that it is reasonably appropriate and adapted, bearing in mind that it is for the Executive, not the courts, to determine regulatory policy. Just as it is for Parliament, within the limits of the Constitution, to determine legislative policy, and for the Executive within the limits of an Act, to determine regulatory policy, so, within the limits of the tax Acts, it is for a taxpayer, not the Tax Office or the courts, to determine business policy.

² *Ronpibon Tin NL & Tongkah Compound NL v Federal Commissioner of Taxation* [1949] HCA 15; (1949) 78 CLR 47

³ *Commonwealth v Progress Advertising & Press Agency Company Pty Ltd* [1910 HCA 28; (1910) 10 CLR 457

This basic example of the need for interpretation of statutory language also illustrates an abiding problem: the interpretation itself is rendered in words that could have different shades of meaning. What exactly does it mean to say that a regulation is clearly appropriate or adapted to a purpose stated in the Act that confers power to make the regulation? What exactly does it mean to say that an expense is clearly appropriate or adapted to the pursuit of a business purpose? Understood in one way, the phrase might merely re-state the original problem. The phrase signifies a relationship between ends and means. Something must be capable of being regarded as a means to an end, but within the bounds of legitimate possibility, the choice of means is left, in the case of tax law, to the taxpayer. We speak of plain language, and we all agree on its value. Yet the clearest method of communicating an idea depends upon the idea itself. A mismatch between the simplicity of language and the complexity of an idea may result, not in plain speech, but in confusion. It is an interesting exercise to ask how you might better state, in a brief general formula, the test for deciding what business expenditure would be an allowable deduction. Language is an imperfect instrument of communication, and we have to live with that imperfection.

I said that I would return to a qualification to the proposition that the Act operates upon the legal and factual circumstances of a case as it finds them. The general anti-avoidance provisions of the 1936 Act in Pt IVA, and more specific anti-avoidance provisions elsewhere, limit the generality of that proposition. It is not my present purpose to discuss either the policy or the form of anti-avoidance provisions. Some of them involve their own complexities of interpretation. One point, however, should be made. In an important sense the presence in the Act of those provisions, and the specificity with which they attempt to describe the circumstances in which the Act operates upon a legal situation different from that

created by a taxpayer, reinforces the general proposition. The Australian response to the problem of tax avoidance has not been to rely on doctrines such as fiscal nullity, or attempts to misapply the concept of sham (which has a reasonably precise legal meaning) by employing it as a descriptor of a transaction intended to have a legal effect designed to attract fiscal consequences. A sham transaction is one that is not intended to have legal effect according to its tenor; the word does not apply to all transactions designed to produce a favourable tax result. If the word sham had the latter meaning, Pt IVA would be unnecessary, and its scheme would be undermined.⁴

Before referring to some principles of statutory interpretation and their relevance to revenue law, it is convenient to mention, in order to put it to one side, an approach that once was fashionable, but no longer commands judicial acceptance. It is possible to find in some judicial statements of former times, and even as recently as the third quarter of the 20th century, the proposition that a taxing Act interferes with rights of property, and therefore should be construed narrowly and in favour of the taxpayer. That proposition was normally qualified by a disavowal of some special rule for revenue laws, but it reflected what Lord Devlin, writing extra-judicially, described as a judicial philosophy that was “highly suspicious of taxation”.⁵ For example, in 1945, in *Scott v Russell*,⁶ Viscount Simon in the House of Lords said that the language of a certain United Kingdom rule was obscure and difficult to expound and “the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected”. That passage was cited with approval by the Privy Council in a 1964 case.⁷ Viscount Simon averred that he

⁴ See *Raftland Pty Ltd v Federal Commissioner of Taxation* [2008] HCA 21; (2008) 82 ALJR 934.

⁵ Devlin, “Judges and Lawmakers” (1976) 39 *Modern Law Review* 1 at 13-14.

⁶ (1945) 3 T.C. 375 at 424.

⁷ *Naranjee v Income Tax Commissioner* [1964] AC 1238 at 1250-1251.

was not seeking to apply any different principle of construction to a revenue Act, but that must be because he treated a revenue Act as an example of a law interfering with existing rights of property. In 1980, in the High Court of Australia, Barwick CJ said:⁸

“It is for the Parliament to specify, and to do so, in my opinion, as far as language will permit with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax”.

The idea that, unless Parliament has specified, with unambiguous clarity, that a certain set of circumstances will give rise to a liability to tax, then no liability exists, does not reflect the modern approach to interpretation. Not long after Barwick CJ’s statements two other members of the High Court said that, in revenue statutes as in other cases, the courts must “ascertain the legislative intention from the terms of the instrument viewed as a whole.”⁹ It should be added that s 15AA of the *Acts Interpretation Act 1901 (Cth)* applies to taxing Acts as well as others. It provides:

“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”.

It will be necessary to return to the matter of purposive construction. My present point is that the days when, as a matter of principle, taxing Acts were narrowly construed in favour of the taxpayer have gone. Furthermore, judicial references to what Lord Tomlin described in the *Duke of Westminster’s Case*¹⁰ in 1935 as the entitlement of every man to order his affairs so as to attract the least tax are

⁸ *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55 at [2], [1980] HCA 24.

⁹ *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297.

¹⁰ *Inland Revenue Commissioners v Westminster (Duke)* [1936] AC 1 at 19.

now harder to find. To state the obvious, any such entitlement is subject to Pt IVA. At the same time, it should be said that Lord Tomlin made his remarks in the course of rejecting an attempt to treat judicial disapproval of a taxpayer's conduct as a substitute for applying the language of the Act. It is to be hoped that such an attempt would be as unsuccessful today as it would have been in the past. Liability to tax is not determined by judicial discretion. The rule of law applies both to revenue authorities and to taxpayers, regardless of whether in a particular case it comes down on one side or the other.

The task of interpreting any legal instrument, including an Act of Parliament, involves a search for the meaning of a text. It is instructive to consider the constitutional background to that function. The legislative power of the Commonwealth, exercised by Parliament, and the judicial power of the Commonwealth, exercised by courts, are conferred, and controlled, by the Constitution. The promulgation of the text of an Act is the manner in which Parliament exercises its legislative power. The power is exercised in the form of a verbal command. It is the meaning of the words used by Parliament, that is the meaning of the command, which binds courts and citizens. There is a parliamentary process by which the verbal command comes to be formulated, and there is no single individual whose personal will or intention is to be obeyed. The formulation of the text may involve negotiation, compromise, and on occasions, misunderstanding or ambiguity, whether accidental or deliberate. What matters is the meaning of what Parliament has said, not the mental state, even if it can be discovered, of whoever may have contributed to the choice of language. References to "legislative intention" are useful as reflecting the relationship between Parliament and the courts, but they need to be understood against that constitutional background.¹¹ The process is one of elucidating the

¹¹ *Singh v The Commonwealth* (2004) 222 CLR 321 at 331-337.

meaning of a text, not psychoanalysing some person who played a part in formulating the text.

Modern courts place much emphasis on purposive construction. This emphasis is reflected in s 15AA of the *Acts Interpretation Act* set out above. Again, the concept of purpose must be understood against the constitutional background I have described. It was this that led to a judicial controversy in the United Kingdom about the proper use, in the interpretation of statutes, of ministerial statements made in the course of the parliamentary process. The controversy, still perhaps unresolved, came to a head in a 1993 tax case: *Pepper v Hart*.¹² The argument advanced by the revenue authorities in that case was contrary to an answer given in Parliament by the responsible Minister as to the intended reach of the legislation. The House of Lords held that the text of the legislation was ambiguous and the Minister's statement could be used to resolve the ambiguity in favour of the taxpayer. The decision was not universally applauded. It was pointed out that the subjective view of an individual member of Parliament, even the responsible Minister, or for that matter the subjective view of all members of Parliament, about what a text meant, is constitutionally irrelevant. It also was noted that it could be dangerous to create a precedent whereby Ministers can amplify the scope of legislation by dropping appropriate statements into parliamentary speeches. On the other hand, it has always been legitimate to construe an Act of Parliament by reference to the mischief which it sought to remedy, if that is known. In *McDonnell v Christian Brothers Trustees*¹³, Lord Steyn said:

“It is permissible to use Hansard to identify the mischief at which a statute is aimed. It is, therefore, unobjectionable to use ministerial and other promoters' statements to identify the objective background to legislation.

¹² [1993] AC 593.

¹³ [2004] 1 AC 1101 at 1116-1117.

To the extent that *Pepper v Hart* permits such use of Hansard the point is uncontroversial. A difficulty has, however, arisen about the true ratio of *Pepper v Hart*. It is certainly at least authority for the proposition that a categorical assurance given by the Government in debates as to the meaning of the legislation may preclude the Government vis-à-vis an individual from contending to the contrary. This may be seen as an estoppel or simply a principle of fairness . . . There is, however, a possible broader interpretation of *Pepper v Hart*, viz that it may be possible to treat the intention of the Government revealed in debates as reflecting the will of Parliament. This interpretation gives rise to serious conceptual and constitutional difficulties.”

In Australia, s 15AB of the *Acts Interpretation Act* provides that consideration may be given to extrinsic material, if it is capable of assisting in the ascertainment of the meaning of a provision, when the provision is ambiguous or obscure or the ordinary meaning conveyed by the text, taking into account purpose and context, leads to a result that is manifestly absurd or unreasonable. Extrinsic material may also be used to confirm that the meaning is the ordinary meaning conveyed by the text, taking into account purpose and context. Extrinsic materials include Ministerial speeches and explanatory memoranda. The statutory condition is that the material is capable of assisting in finding the meaning of the text. It is the text, understood in context and in the light of the purpose of the enactment, that is controlling. Whether, for example, an explanatory memorandum or a Ministerial speech fulfils that condition is a question of logic and common sense. Often, the reason why legislation is ambiguous or obscure is that the particular problem that arises for decision has not been foreseen and addressed. Furthermore, explanatory memoranda and parliamentary speeches are themselves not always models of clarity. The essential point is that the task is to find the meaning of the language of the statute, not to work out what the Government, or the Parliament, (and it should not be forgotten that they are two different entities), thought the language meant, assuming they thought at all about the particular issue that the court has to decide.

One practical consequence of the modern approach to the use of extrinsic material as an aid to interpretation is that modern courts now expect counsel to have investigated potentially useful material. Courts now ask whether reports, or explanatory memoranda, or Ministerial speeches, throw light on a problem of construction. They expect this kind of research to be undertaken as a routine part of preparation for a hearing.

The language of S 15AB reflects the paramount importance, in the modern approach to statutory interpretation, of purpose and context. Regard to these considerations does not depend upon first finding some ambiguity in the text. At the same time, the use that is made of them must be related to the object of the exercise, which is to understand the meaning of the text.

In order that the purpose of a legislative provision may be used rationally to elucidate the meaning of the provision, it may be necessary to identify a purpose accurately and at an appropriate level of specificity. At one level, it may be correct to say that the purpose of an income tax Act is to raise revenue for the government. Such an observation would not advance an understanding of a particular provision because, in truth, the purpose is more precise. It is to raise revenue for the government, not by all means possible but in accordance with a detailed and complex plan of fiscal policy. If a dispute arises as to the meaning of a section of the Act, or a word or phrase in a section, the relevant purpose, if there is one to be found, will be the purpose of the particular aspect of the fiscal plan in which the provision is to be found.

Much legislation, including revenue legislation, involves compromise. Parliaments rarely pursue a single purpose at all costs. The problem of interpretation may be to decide how far Parliament has gone. Its general purpose may be clear enough, but the dispute may be as to the extent to which

it has pursued that purpose. In such a case, to identify the general purpose may not be of assistance in finding the point at which a balance has been struck or a political compromise reached.¹⁴ Again, some legislation, including income tax legislation, pursues inconsistent purposes. In the case of a complex statute that has been amended many times, and is the work of dozens of differently constituted legislatures, this is highly likely.

An example of such a problem in the Act may arise when it is necessary to relate general anti-avoidance provisions to provisions that have been inserted for a purpose of encouraging taxpayers to pursue a certain course of action by attaching to such action a fiscal advantage. It has long since been established that it is perfectly constitutional for Parliament to use revenue laws to encourage certain forms of investment or business activity. A law may have the character of a law with respect to taxation, and so be within the competence of the Federal Parliament, even if it is also a law with respect to the promotion of the Australian film industry, or the advancement of primary production. When the Parliament holds out a tax advantage as an inducement to some form of conduct, some people will engage in that conduct who would not have done so but for the tax advantage. If it were not so, the inducement would be pointless. Some people, by leveraging or otherwise, might contrive to magnify their advantage beyond what was foreseen or intended by the policy-makers.

A taxing Act will rarely be a seamless robe, and identifying a legislative purpose with sufficient confidence and precision to solve a problem of the meaning of the text may be difficult.

¹⁴ See, for example, in the area of criminal law, *Kelly v The Queen* (2004) 218 CLR 216.

A recent example of judicial consideration of legislative purpose, illuminated by parliamentary history, is *W R Carpenter Holdings Pty Ltd v Commissioner of Taxation*¹⁵, where the High Court rejected a submission that Div 13 of the 1936 Act was to be read as confined to international arrangements having tax avoidance as their primary object. The criteria for the application of the provisions in question were not expressed to include a requirement of a tax avoidance motive and the High Court's appreciation of the purpose of Div 13 led it to reject an attempt to read such a requirement into those criteria. It should be acknowledged, however, that discussing legislative purpose at a level which throws light on a problem of interpretation is not a purely mechanical task, and there are occasions when the relevant purpose of an enactment is no more evident than the meaning of the words in which it has been expressed. In most cases, if the purpose of legislation were clear there would be no room for argument about what it meant. Even so, the modern insistence upon purposive construction is important in that it denies the literalism as a sufficient method of expounding the meaning of a statutory text.

There is an aspect of purposive statutory interpretation which has a wider importance affecting relations between courts and the Parliament. Words such as the "will" or the "intention" of the legislature, or the "purpose" of legislation, provided their objectivity is understood, reflect the constitutional imperative that a court is to apply statute law as enacted by Parliament. A deliberate failure or refusal by a court to do so would be an infringement of basic principle. But, of course, it may happen that a court will interpret an Act of Parliament in a way that Parliament believes misunderstands the purpose or intent of what Parliament has enacted. In such a case, it is always open to Parliament to amend the legislation. This is an important safety net for the courts. The

¹⁵ [2008] HCA 33; (2008) 82 ALJR 1211.

legitimacy of the judicial power to interpret an Act of Parliament is sustained by the capacity of the Parliament to amend its own legislation, and, in the last resort, re-express its true will by clarifying or altering the language it has used. It is difficult to accuse judges of usurping legislative power in the exercise of statutory interpretation where, behind the entire process, there remains the power for the Parliament itself to correct what is claimed to be a misinterpretation.

Of course, the practical and political reality is that doubts about the meaning of statutes may arise because the problem that confronts a court is one on which there never was any relevant intention, perhaps because the problem was overlooked, or perhaps because it was politically inexpedient to deal with it clearly. Furthermore, issues of statutory construction may involve competing policy considerations such that it is politically difficult to reverse a judicial decision. Even so, if there is a question about what an Act of Parliament means, the ultimate authority and, therefore, the ultimate responsibility, is with Parliament. If Parliament has been misunderstood, it can correct the misunderstanding by exercising its power of amendment.

It should also be remembered that the power of Parliament to re-express a legislative purpose by amending an Act is unconfined by the range of choices that originally confronted a court. When a court faces a problem of interpretation, the range of possibilities logically available usually will be limited. The text, and the context, will control the competing choices. If Parliament comes to reconsider the matter, it is, at least in theory, capable of working out a clean slate. Of course, political and other realities may intrude, but at the level of constitutional power, making or amending an Act, and interpreting the Act, are functions of a different order. In considering the legitimacy of an exercise of

judicial power, it is necessary to keep in mind all aspects of that difference, including the power of Parliament to override judicial interpretation.

Before leaving the subject of legislative purpose, I should refer to a more particular matter which is often of significance for the interpretation of revenue legislation, including amending legislation. One of the oldest and most venerable rules of construction is that uncertainty in the meaning of the text may be resolved by considering the mischief which the statute set out to remedy. In the case of amending legislation, that mischief may be found in a previous application of the law which Parliament set out to alter. The specific purpose may be clear from previous decisions of courts, or the parliamentary history of the legislation, or both.

I turn now to the matter of context. Keeping always in mind the primacy of the text, and the constitutional responsibility of a court to confine itself to its proper role of interpreting what Parliament has said, the meaning of language is commonly controlled by context. Both text and context should be understood widely. Individual words and phrases are only part of a text. By context, I mean not only the immediate provision, or set of provisions, of which the disputed text is a part, but the entire Act, the constitutional powers or limitations controlling its enactment, the background of previous law, and any other matter that could rationally assist an understanding of the meaning of the text.¹⁶ In ordinary communication, it is commonplace for words, phrases, sentences, or paragraphs to take their meaning from their context. Earlier, I gave an example of the meaning of the phrase “necessarily incurred” in s 51 of the 1936 Act. In many contexts it has a meaning different from that it was given in *Ronpibon Tin*. Even the judicial explanation of its meaning in s 51 needs to be read in context. It expressed the idea that such questions are not totally unconfined, and that the

¹⁶ Bennion, *Bennion on Statutory Interpretation*, (London, Lexis Nexus 2008) at 588-589, 919.

word “necessarily” adds something to the word “incurred”. But it does not mean that a deduction can be disallowed because somebody thinks expenditure was wasteful or ill-advised.

An example of historical context throwing light on the interpretation of the Act in its application to a specific, and basic, question concerns a particular aspect of allowable deductions, that is, the cost of travelling between home and a taxpayer’s principal place of work. This topic was considered by the High Court in 2001 in *Commissioner of Taxation v Payne*.¹⁷ The Court declined to depart from the approach earlier taken in *Lunney v Commissioner of Taxation*,¹⁸ a case which, in turn, stressed the historical context in which the question fell to be decided.

The historical context was explained by Denning LJ in the English Court of Appeal in *Newson v Robertson (Inspector of Taxes)*.¹⁹ Speaking in 1956, his Lordship said:

“In the days when income tax was introduced, nearly 150 years ago, most people lived and worked in the same place. The tradesman lived over the shop, the doctor over the surgery, and the barrister over his chambers, or, at any rate, close enough to walk to them or ride on his horse to them. There were no travelling expenses of getting to the place of work. Later, as means of transport quickened, those who could afford it began to live at a distance from their work and to travel each day by railway into and out of London. So long as people had a choice in the matter – whether to live over their work or not – those who chose to live out of London did so for the purposes of their home life, because they preferred living in the country to living in London. The cost of travelling to and fro was then obviously not incurred for the purpose of their trade or profession.”

¹⁷ (2001) 202 CLR 93; [2001] HCA 3.

¹⁸ (1958) 100 CLR 478; [1958] HCA 5.

¹⁹ [1953] 1 Ch 7 at 15.

That, his Lordship explained, is why, from the earliest days of income tax legislation, this elementary question was resolved on the basis that the cost of travelling from home to the taxpayer's principal place of work was treated "as a living expense as distinct from a business expense". The precise statutory language has changed a little over the years. In Australia the question is whether an outgoing is incurred in gaining or producing assessable income. The force of the preposition "in", and the required relationship between outgoing and income, was most recently considered by the High Court last year in *Federal Commissioner of Taxation v Day*.²⁰ The point about travelling expenses is that the legislation was enacted in a well-understood historical and decisional context, which has had a powerful influence on its interpretation and application to a very old question. If the problem arose for fresh consideration, divorced from that context, it is, to say the least, not obvious that the same answer would be given. But Parliament has legislated, and its legislation has been administered, on the faith of an understanding which has now become controlling. This is part of the context in which the statutory language, repeated in the 1997 Act, is to be read.

The standard English text on statutory interpretation describes this as "informed interpretation".²¹ I have already referred to the importance, in understanding the phrase "necessarily incurred" in provisions as to allowable deductions, of the fact that it appears in the context of an Act about assessing liability to tax rather than an Act about measuring efficiency, or an Act prohibiting wasteful expenditure. Last year, in *W R Carpenter Holdings Pty Limited v Federal Commissioner of Taxation*²², the High Court had to construe provisions of the 1936 Act to decide

²⁰ [2008] HCA 531, (2008) 83 ALJR 68.

²¹ Bennion, *Bennion on Statutory Interpretation*, 5th ed (London Lexis Nexis, 2008) at 589.

²² [2008] HCA 33 at [9]; (2008) 82 ALJR 1211.

the scope of certain powers conferred on the Commissioner. The constitutional context in which those powers were to be understood was vital. The Court pointed out that the constitutional validity of the statutory provisions conferring the powers depended upon certain propositions:

“First, for an impost to satisfy the description of taxation in s 51(ii) of the Constitution it must be possible to distinguish it from an arbitrary exaction. Secondly, it must be possible to point to the criteria by which the Parliament imposes liability to pay the tax; but this does not deny that the incidence of a tax may be made dependent upon the formation of an opinion by the Commissioner. Thirdly, the application of the criteria of liability must not involve the imposition of liability in an arbitrary or capricious manner; that is to say, the law must not purport to deny to the taxpayer ‘all right to resist an assessment by proving in the courts that the criteria of liability were not satisfied in his case’.”

In brief, an informed understanding of extent of the powers conferred upon the Commissioner required an appreciation of the constitutional limits on Parliament’s capacity to confer such powers. It is reasonable for a court to expect that Parliament would understand and respect those limits, and it is reasonable for Parliament to expect that a court would interpret its language in that light.

Context, of course, may be narrower and more specific. It is commonplace for a statutory text to take its meaning from its immediate context, which may be a related provision, or the Part or Division of an Act in which the text is included. Latin maxims are no longer fashionable; it is enough to say that words, like people, may be judged according to the company they keep.

A more difficult conceptual problem may arise where the words of an enactment, understood in a wider or narrower context of the kind I have described, have a certain meaning, the words remain unaltered, but the context later changes. The answer to the problem in a given case may depend upon the nature and

purpose of the statute. A consideration that may be relevant in the case of a taxing Act is that taxpayers may order their affairs upon a certain understanding of the meaning of a certain text, and it may be unjust to defeat that understanding upon the basis, not of an amendment of the text itself, but of an alteration of some other text, or contextual matter.

It used to be said that there is no equity in a tax; that taxation is an exercise of power to obtain revenue for the business of government; that such power almost always involves some form of discrimination between potential contributors to the revenue; and that courts should simply let the cards lie where they fall. That was said, however, in the days when courts construed taxing laws narrowly. The modern emphasis on purposive construction, and full regard to context in its broadest sense, may cut both ways. It protects the revenue authorities against obstructive liberalism, but may also protect taxpayers against over-reaching.

In the practical application of the general principles I have discussed, more specific problems arise, many of which are the subject of long-established rules of construction. Furthermore, the *Acts Interpretation Act* of the Commonwealth (like its counterparts in the States and Territories) contains provisions which, subject to a contrary intention appearing in an Act, direct courts in interpreting legislation. Some of those provisions, like the interpretation provisions in a contract, aim to provide a shorthand to relieve a drafter of tedious elaboration or repetition. Legislation is drafted on the footing that an Act will be read in the knowledge of the interpretation Acts and judicially established rules of construction.

Drafting income tax legislation is a difficult and thankless task. During my time at the Bar I had some brief and marginal involvement in the process and I had a glimpse of its complexity. The constraints within which drafters work are not

sufficiently appreciated, and I have no time for the asperity that is sometimes directed towards their work. But I have a practical suggestion to make. As Chief Justice I sought to encourage the Universities and the professions to increase their level of interest in statutory interpretation as a topic of formal study. It would advance that purpose if people who draft legislation, most of whom are employed within government, were invited to share with teachers, practitioners and students their experiences and technical skills. Parliamentary counsel and their assistants, who generally are lawyers of the highest skill, have a lot of corporate knowledge, and law teachers and the professions would find it very useful to draw on that knowledge. Judges, too, may benefit from a closer understanding of the process of production of the legislation they have to interpret.

In a perfect world, the corollary of the rule of law would be that all reasonably educated citizens could discover their rights and responsibilities from the plain words of Acts of Parliament. Yet we cannot even agree on the meaning of the Ten Commandments. What hope is there for the *Income Tax Assessment Act*? It requires interpretation. The principles and techniques of statutory interpretation are an important field of study for tax professionals, and for all lawyers and accountants.