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Presentation Title: "How Far can Hansard Help? The use of Parliamentary Materials in Fixing Ambiguity in Legislation."

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OUTLINE OF POINTS FOR PRESENTATION

Introduction

1. During the course of a bill being introduced and enacted in Parliament, numerous written materials are produced, including explanatory memoranda, the sponsor's Second Reading Speech, records of parliamentary debates and committee reports. Such materials are an integral component of the legislative process. They are also important once the statute is in force. This is because readers of statutes, including the courts, are generally permitted to refer to this material when determining the meaning of ambiguous text in a statute.

2. But recourse to this material is not a panacea for resolving all statutory ambiguities. There are legal parameters as to the use of these materials as interpretative aids. Further, the context and diversity of such materials means that there are practical considerations to consider when assessing the value and reliability of these materials.

3. This presentation will discuss some of the issues to be considered when using parliamentary materials as an aid when interpreting statutes.

Three Fundamental Concepts

4. The interpretation of statutes is often regarded as being the domain primarily of lawyers and judges. However, reading and understanding legislation is an activity beyond that province. It is integral to the work of all sorts of government officials, including Members of Parliament, policy advisors, agency officials and others who implement legislation.
5. There are three fundamental concepts to be borne in mind in the context of the interpretation of statutes.

6. The first is the doctrine of parliamentary sovereignty. This was explained back in the 1800s by AV Dicey:

> "The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament...has...the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."[1]

7. While the precise parameters of this concept have been, and continue to be, the subject of debate,[2] the doctrine has generally been regarded as being a "fundamental part of the law for a long time."[3]

8. The second fundamental concept is the principle of separation of powers. This states that "legislative power is ordinarily vested separately in the Parliament, executive power is vested separately in the Executive...and judicial power is vested separately in the Courts."[4] This is specifically recognized in the Australian Constitution[5] and "to a lesser extent"[6] in the Constitutions of the Australian States. While this separation is by no means absolute or pure,[7] (and indeed is sometimes treated with "a degree of popular cynicism"[8] in Australia) the separation of the legislature from the independent judiciary is generally regarded as a central and integral tenet of our legal system.

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[1] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1st ed, 1885; 10th ed, 1959) cited in George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law & Theory* (Federation Press, 6th ed, 2014) 63.
[2] For a brief summary of the debate issues, see P. Gerangelos, HP Lee, N Aroney, S Evans, S Murray and P Emerton, *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (LawBook Co., 3rd ed, 2013) 143-144. For a wider discussion see Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010).
[3] Goldsworthy, ibid, 226.
[4] Gerangelos, Lee, Aroney, Evans, Murray and Emerton, above n2, 6.
[5] Justice Gageler in *North Australian Aboriginal Justice Agency Limited v Northern Territory* [2015] HCA 41, [104] states that the "doctrine of separation of powers enshrined in Ch III of the Constitution has its principal textual anchor in the opening words of s 71" of the Australian Constitution. See also s1.
[6] Gerangelos, Lee, Aroney, Evans, Murray and Emerton, above n2, 6.
[7] A clear example of this is given in Williams, Brennan and Lynch, above n1, 25, where they note that the executive and legislature overlap by the requirement that Ministers responsible for a government department must be a Member of Parliament.
[8] Hon. Wayne Martin AC, "Parliament and the Courts: A Contemporary Assessment of the Ethic of Mutual Respect" (2015) 30(2) *Australasian Parliamentary Review* 80, 81.

9. Further, even if one accepts that there are some questions about the validity of the separation of powers principle in Australia, there is, as Chief Justice Wayne Martin observes, an "ethic of mutual respect" in that:

> ""By tradition, the practical operation of those structures has been facilitated by the respect which each of the legislative and judicial branches has shown for the responsibilities and actions of the other, and the mutual desire to avoid situations in which one branch might be thought to be trespassing upon, or even usurping the legitimate responsibilities of the other."[9]

10. In a recent speech, the Chief Justice of the High Court observed that "[m]aintenance of the independence of the Australian judiciary is a continuing priority" of the judiciary and is generally "accepted by Commonwealth and State Governments and the wider Australian community."[10]

11. If we accept that the role of the legislature is to make legislation and the role of the judiciary is to interpret legislation to enable its enforcement, then we must determine how the judiciary goes about performing its role. This presentation considers that role in the context of statutory interpretation. This leads to a third fundamental concept relevant to this presentation, which is the concept of "legislative intent." It is well accepted in Australia that the aim of the judiciary when engaging in its role as interpreter of legislation, is to discern the "legislative intent" of the Parliament in relation to the particular statute.

12. The phrase "legislative intent" is somewhat of a misnomer. Although the word "intent" implies the need to identify what the Parliament *actually* intended, it has been emphasised many times by the High Court of Australia that the phrase is a "fiction"[11] or a "metaphor"[12] that does not involve discovery of an objective, collective mental state[13] of members of Parliament.

13. Instead, "legislative intent" is stated to be an objective concept[14] referring to what a reader *attributes* to the legislature as a result of the statutory construction process. It is the intention as revealed *by what is actually said* in the statute.[15] To put it another way, it is what the

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[9] Ibid.
[10] Hon. Chief Justice Robert French AC, "The State of the Australian Judicature," (Speech, Law Council of Australia and Australian Bar Association, 29 April 2016, Hobart, Tasmania), 3. http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac
[11] *Mills v Meeking* (1990) 169 CLR 214, 234.
[12] *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, [25].
[13] *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, [43] citing *Zheng v Cai* (2009) 239 CLR 446, [28]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, [45].
[14] There is academic commentary that challenges this view of "legislative intent" but it is beyond the scope of this presentation to discuss those arguments. See, for example, Richard Ekins and Jeffrey Goldsworthy, "Reality and Indispensability of Legislative Intentions" (2014) 36 *Sydney Law Review* 39.
[15] *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, [23]-[25].

legislature is *taken to have* intended the words of the statute to mean[16] based on well accepted statutory and common law rules of construction.[17]

14. This concept of "legislative intent" is intended to express the constitutional relationship between the arms of government, as represented by the principles of separation of powers and parliamentary sovereignty, with respect to the making, interpretation and application of laws.[18]

Fundamental Concepts and Statutory Construction

15. Of course, the "inherent uncertainties associated with the use of language" means written documents, including statutes, are an "imperfect means of communication."[19] Accordingly, doubts about the meaning of words in a statute sometimes arise. If that statute ultimately ends up before a court, then it is the obligation of the court to give that statute meaning. Even with legislation that does not find itself the subject of judicial scrutiny, there will be numerous other persons seeking to determine meaning, including government officials implementing the law, lawyers reading the law on behalf of clients, private organisations seeking compliance and the layperson attempting to be a law abiding citizen.

16. In Australia, the framework to come to a conclusion about legislative intent is to consider "the ordinary and grammatical meaning of **the words** of the provision having regard to their **context** and legislative **purpose**."[20] Within this framework, the myriad statutory and common law rules, presumptions and principles of statutory construction are engaged.

17. Within that framework, there are a number of strands connecting the three fundamental concepts.

    a. The concept of parliamentary sovereignty and the 'mutual respect' between the legislature and the judiciary in relation to their respective roles, means that the emphasis of the judiciary when interpreting ambiguous statutory text is to find the "legislative intent;"

    b. The limits of the judicial role, to interpret the statute, means that the courts must "abstain from any course which might have the appearance of judicial legislation";[21]

    c. To adhere to the idea of 'legislative intent' and the separation of powers, the words of the statute are paramount - the meaning must be one that is reasonably open on the statutory text;[22]

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[16] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [78].
[17] *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573, [43].
[18] *Zheng v Cai* [2009] HCA 52, [28].
[19] DC Pearce & RS Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) 4.
[20] *Australian Education Union v Department of Education & Children's Services* (2012) 248 CLR 1, [26].
[21] *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, [9] citing Lord Nicholls of Birkenhead in *Inco Europe Ltd v First Choice Distribution [*2000] 1 WLR 586, 592.

d. One of the components making up the sum equalling the 'legislative intent' is the purpose of the statute or statutory provision; [23]

e. Reading words in their 'context' is understood as not just referring to the context of the words within the walls of the statute but also the "wider context," which includes the historical background to the Act and extrinsic materials[24] including parliamentary materials.

f. While the application of the rules of construction require a conclusion about purpose, a purposive construction "that departs too far from the statutory text ... may violate the separation of powers."[25]

18. These strands are pertinent to the relevance and use of extrinsic materials, including Hansard.

Extrinsic Materials

19. Recourse to extrinsic materials began on a regular basis following the enactment of s15AB of the *Acts Interpretation Act 1901* (Cth) in 1984 ("AIA").[26] Much of the momentum behind the bipartisan political effort to enact that section seemed to be driven by a recognition that the common law on the use of extrinsic materials at that point was fragmented and unclear. The Courts had also often rejected recourse to Hansard where they may have permitted it to other parliamentary materials, such as a committee report.[27] The emphasis on the importance of purpose, which had been enshrined in the AIA two years earlier,[28] was also an impetus. If a reader must identify the purpose of a statute, Hansard is a logical place to look.

20. Following the enactment of s15AB and then similar provisions in all State interpretation legislation (except South Australia), the common law also eventually developed its own,

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[22] *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320; *IW v City of Perth* (1997) 191 CLR 1, 12 (referring to what the text is "capable" of).
[23] *Acts Interpretation Act 1901* (Cth) ("AIA") s15AA; *Interpretation Act 1984* (WA) s18; *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1987* (NSW) s 33; *Interpretation Act* (NT) s 62A; *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation of Legislation Act 1984* (Vic) s 35(a).
[24] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.
[25] *Taylor v The Owners - Strata Plan No 11564* (2014) 253 CLR 531, [40].
[26] *Acts Interpretation Amendment Act 1984* (Cth).
[27] Pearce and Geddes, above n19, 89-91.
[28] Section 15AA of the AIA, which requires construction to be consistent with purpose, had been inserted in 1981 by the *Statute Law Revision Act 1981* (Cth). State interpretation legislation has similar provisions. For background to the enactment of s15AB, see: Attorney General's Department, Extrinsic Aids to Statutory Interpretation, Policy Discussion Paper, 1982 (Australian Government Publishing Service, Canberra, 1982), and Attorney General's Department, *Symposium on Statutory Interpretation*, Canberra, 5 February 1983 (Australian Government Publishing Service).

separate principle about recourse to such materials. In a pivotal decision in 1997,[29] the High Court endorsed the consideration of the "extrinsic context" in statutory interpretation, which has since been taken to encompass historical context and parliamentary and other extrinsic materials.[30] Indeed, the common law in one respect went further than s15AB by not requiring any ambiguity or other threshold to be satisfied before extrinsic materials could be considered.[31]

21. The AIA and other interpretation legislation provisions give courts a discretion as to whether to consider extrinsic material or not. The common law suggests that context, including the wider context, must be considered from the outset of the interpretation task.

22. While there are numerous types of material extrinsic to a statute that may be a potential interpretative aid, the material produced during the course of a statute being enacted, often categorized as 'parliamentary and executive material' is often the material that attracts the most controversy. In the United States, the appropriateness of using "legislative history" (as it is called in the US) is the subject of ongoing debate. It is this material, in particular, Hansard, that is the subject of the remainder of this presentation.

Using Hansard – what the Courts Say

23. Since the legislative and common law developments referred to above, recourse to extrinsic materials, especially parliamentary materials, has been a regular exercise for lawyers and judges.[32] At one point in fact, there was some concern expressed that the importance of purpose as discerned from the "wider" context had resulted in the flexibility being given to the text by some intermediate courts as having "gone too far".[33]

24. In recent years, the High Court of Australia has made it clear that while purpose is an integral component of the statutory interpretative task, ultimately the primacy of the text is paramount.[34] Following are some guiding themes evident from High Court decisions, relevant to the use of parliamentary materials.

One – The text is the surest guide

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[29] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384.
[30] *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 230 [124]-[125].
[31] Section 15AB has three gateways to extrinsic materials, one of which must be satisfied before access is permitted. Section 18 of the *Interpretation Act 1984* (WA) is identical. Compare the principle stated in *CIC Insurance* (above n24) that states that context is to be considered in the first instance without any ambiguity threshold.
[32] *Byrnes v Kendle* (2011) 243 CLR 253, [97] where Heydon and Crennan JJ refer to extrinsic materials being "routinely examined."
[33] Hon. JJ Spigelman AC, "The Intolerable Wrestle: Developments in Statutory Interpretation: (2010) 84 *Australian Law Journal* 822, 827.
[34] *Kline v Official Secretary to the Governor General* (2013) 249 CLR 645, [32], *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, [40]-[41], *Saeed v Minister for Immigration and Citizenship* (2010) 242 CLR 253, [31]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 47 [47].

"The language which has actually been employed in the text of legislation is the surest guide to legislative intention..." *Alcan (NT) Alumina Pty Ltd v Commr of Territory Revenue (NT)* (2009) 239 CLR 27, [47].

Two – We are not to derive ideas about purpose or policy from parliamentary materials and then impute them to the statutory text

"In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose." (*Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, [28]).[35]

Three – The utility of parliamentary materials is to inform not decide

"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*." (emphasis added) *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, [39])

Four – While parliamentary materials might help to identify deficiencies in the statute, they cannot, by themselves, fix that deficiency in the text

If the intent of Parliament cannot be discerned in the provisions of the Act, "... the second reading speech of the responsible Minister cannot supply the deficiency." (*R v Bolton (ex parte Beane)* (1987) 162 CLR 514, 532.)

Five - Courts will give parliamentary materials less weight when the ambiguous statutory provision is affecting a 'fundamental right'

"...courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language." (*Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, [19].)

Six – Statements made by a MP may be useful to identify purpose, but they will virtually never be useful if they comprise an individual view about linguistic meaning

"Statements in Parliament, even by ministers during the second reading debate, will however seldom be available to elucidate the meaning of the later-enacted text. Identification of mischief and purpose is one thing, statement of meaning is another." (*Harrison v Melhem* (2008) 72 NSWLR 380, [162] (Mason P).[36]

[35] See also *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, [28].
[36] For a High Court example, see *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529, 538 [22]. However, note the criticism of this distinction in *Shorten v David Hurst Constructions Pty Ltd* [2008]

Seven – The timing and author of the parliamentary material may be relevant to the weight that courts will give to that material.

Examples:

- An expression of opinion about what existing legislation means (i.e. statement after legislation enacted) has no weight [37]
- Being cautious not to rely on statements made about a bill where the provisions were later amended[38]
- The speech of a member of Parliament other than that of the Minister moving the second reading of a Bill is likely to carry less weight[39]

Eight – Even if parliamentary materials, together with the Act provisions, indicate that a mistake in drafting has been made in a statute, the court is only permitted to remedy such mistakes (such as through implication) in very limited circumstances

"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. The judgment is readily answered in favour ...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 ...is "too big, or too much at variance with the language in fact used..."[40] [footnotes omitted]

Using Hansard - Practical Considerations

25. In Australia, prior to the legislative amendments in the early 1980s to the AIA, the High Court had stated on numerous occasions that, while other extrinsic materials remained open, recourse to parliamentary materials, in particular speeches and debates, was not to be permitted.[41]

"Reports of speeches in Parliament are also irrelevant and inadmissible. There are two Houses of Parliament in the Commonwealth. They consist of one hundred and ten voting members belonging to different parties or to no parties. Members of Parliament frequently have differing opinions, not only as to the merits and real objects of Bills presented, but as to their meaning. Neither the validity nor the interpretation of a statute passed by Parliament

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NSWCA 134, [27] by Basten JA. Also note that the Australian situation is different from the position in the United Kingdom under *Pepper (Inspector of Taxes (UK)) v Hart* [1993] AC 593. (See also Pearce & Geddes, above n19, 116-117 and Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles: The Laws of Australia* (Lawbook Co., 2014) 224.)

[37] *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, [33].

[38] *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59, [81].

[39] *Mills v Meeking* (1990) 169 CLR 214, 236 (Dawson J).

[40] *Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9, [38].

[41] *Commissioner for Prices & Consumer Affairs (SA) v Charles Moore (Aust) Ltd* (1977) 139 CLR 449 (Barwick CJ and Gibbs J).

can be allowed to depend upon what members, whether Ministers or not, choose to say in parliamentary debate. The Court takes the words of Parliament itself, formally enacted in the statute, as expressing the intention of Parliament."[42]

26. The rationale behind allowing recourse to parliamentary debates and materials through s15AB was, ironically, a desire to more closely achieve what Parliament wanted – to hit the legislative "target."[43] It was increasingly seen that to ignore clear evidence of the target of the statute was to be inconsistent with the notion of parliamentary sovereignty and the role of the legislature. To paraphrase a Judge in the United States, allowing recourse to such materials is part of the court "respecting" the work product of Parliament.[44]

27. The enactment of s15AB and the development of the "widest context" approach of the common law as stated in *CIC Insurance*, clearly indicate that the policy of the day is to allow us to consider parliamentary materials as an interpretative aid. As well as the limitations on the use of such that can be discerned from judicial decisions, there are practical considerations which warrant caution as to how we expect such parliamentary materials to be used by lawyers, judges and other interpreters of legislation.

28. While it is tempting to look at parliamentary material as the means to overcome uncertainty in statutory text, there is merit in considering the practical realities of the context in which such material is produced.

Volume and Cherry picking

29. One of the major concerns expressed at the 1984 Symposium on extrinsic materials was the concern about the volume about such materials and accessibility.[45] Of particular concern was that accessing vast quantities of materials beyond the text would add to the costs and lengths of legal proceedings. The ubiquitous internet and the availability of online resources have made the accessibility issue of far less importance in 2016. In addition, emerging artificial intelligence technology is only likely to make searching these quantities of materials less and less burdensome.[46]

30. This does not necessarily mitigate the concern that this might lead to a situation akin to, as has been famously coined, "looking over a crowd and picking out your friends."[47] That is,

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[42] *South Australia v Commonwealth ("First Uniform Tax case")* (1942) 65 CLR 373, 410.
[43] Hon. Sir Kenneth Diplock 'The Court as Legislators' in Brian W Harvey (ed), *The Lawyer and Justice* (Sweet and Maxwell, 1978) 263, 274.
[44] Robert A. Katzmann, *Judging Statutes* (Oxford UP, 2014) 29.
[45] See the background materials above n28.
[46] For example, note the increasing acceptance of 'predictive coding' artificial intelligence software to search large volumes of materials in a discovery in litigation: Nick Rudge, Duncan Travis, Kate Austin and Emily Giblin (Allens law firm) "Predictive coding: the future of electronic document production?" 25 February 2016 https://www.allens.com.au/pubs/ldr/foldr25feb16.htm
[47] Justice Patricia M. Wald, "Some Observations on the Use of Legislative History in the 1981 Supreme Court Term) (1982) 68 *Iowa Law Review* 195, 214 citing former US Circuit Judge Harold Leventhal.

due to the amount of extrinsic material available, the interpreter must be wary of "cherry picking" to support their preferred construction.

Equivocal Nature

31. Antonin Scalia, a former Justice of the United States Supreme Court, who was a well-known sceptic on the use of parliamentary materials on practical and theoretical grounds,[48] purportedly referred to most parliamentary materials as a tool for statutory interpretation as "garbage."[49] Similar, though more measured, sentiments have sometimes been expressed in Australia.[50]

32. Perhaps the real point to be taken from these reservations is that while parliamentary material is an integral component of the legislative process of making a statute, to paraphrase Aristotle, the "whole" (the statute) is greater than the sum of its parts (the materials and process leading to it being made). We cannot and should not "slice and dice the legislative record as if it were a judicial opinion, which it most definitely is not."[51]

33. Materials produced during the passage of a statute through Parliament are sometimes "murky, ambiguous, and contradictory."[52]

34. Additionally we must remember that parliamentary materials are produced as a result of a democratic system with separate arms of government but that that system is also a political one. Accordingly, the parliamentary materials may reflect a political compromise.[53] In most Australian jurisdictions, explanatory memoranda and second reading speeches are not drafted by parliamentary counsel but by departmental or policy officials.[54] It has also been argued that members of parliament may be aware of the potential value as an interpretative

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[48] For some of the major objections see Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Text* (Thomson/West, 2012) 369-390.
[49] Richard A. Posner, *Reflections on Judging* (Harvard UP, 2013) 185 citing a transcript of a Thomson Reuters interview with Antonin Scalia and Bryan A Garner.
[50] Notably, former High Court Justice Heydon has made comments to this affect. For examples, see *Lehman Brothers Holdings Inc v City of Swan* (2010) 240 CLR 509, 535 [72]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [74]; *Byrnes v Kendle* (2011) 243 CLR 253, [97] (where the joint judgement of Heydon and Crennan JJ refers to the recourse to extrinsic materials as a "usually unprofitable course."); and JD Heydon, "The 'Objective' Approach to Statutory Construction" (Current Legal Issues Seminar Series, Speech, Banco Court, Supreme Court of Queensland, 8 May 2104) 8, where Mr Heydon refers to the "wisdom" of legal developments that have allowed recourse to extrinsic materials as "debateable."
[51] Victoria Nourse, "Misunderstanding Congress: Statutory interpretation, the Supermajoritarian Difficulty, and the Separation of Powers" (2011) 99 *Georgetown Law Journal* 1119, 1176.
[52] *Exxon Mobil Corp. v Allapattah Services Inc* (2005) 545 US 546, 568-569 (Kennedy J).
[53] That statutory text is often the result of a political compromise was recognized in *Carr v The State of Western Australia* (2007) 232 CLR 138, [7] (Gleeson CJ), [112] (Kirby J).
[54] Hilary Penfold*, The Genesis of Laws*, Paper prepared for "Courts in a Representative Democracy" conference by JIJA, the LCA and the CCF, Canberra, November 1994, [40] – [51]. Available at https://www.opc.gov.au/plain/docs.htm

aid of their statements recorded in Hansard and so view that as an opportunity to influence any subsequent judicial analysis of the statute.[55]

Diversity and Reliability

35. Even the most ardent advocates of the value of being able to resort to parliamentary materials acknowledge that not all parliamentary materials are created equal. Leaving aside cherry picking, the volume of materials means that an interpreter examining parliamentary documents must be able to identify the materials that are relevant and reliable. Even then "[O]ne or another may be decisive in one set of circumstances, while of little value elsewhere."[56]

36. As was stated during the symposium papers prior to the enactment of s15AB, ultimately parliamentary materials should only be used where "clear and convincing guidance can be derived from them."[57]

37. In the United States, there is a growing body of scholarship acknowledging that, in order to assess the nature of that guidance, it assists to know that different types of parliamentary materials have different "vices and virtues"[58] and that much of that assessment requires an understanding of the legislative process.[59] For example, in the United States commentary, the "standard hierarchy" of legislative materials ranks committee reports as number one in respect of reliability.[60]

38. In Australia, the value of assessing the weight of different parliamentary materials was given attention during the 1984 Symposium and some criteria were even suggested.[61] And, as was seen above, some guiding principles can be discerned from judicial reasoning.

39. Consistent with the suggestions in recent United States scholarship and as suggested by some UK statutory interpretation scholars,[62] it is arguable that a greater "appreciation" of how our Parliament "actually functions" [63] is important to understanding how courts and

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[55] See, for example, the reference in Scalia and Garner, above n48, 377, to US Congressional legislators engaging in floor 'colloquies' with the view to inducing courts to accept their views about how the statute works.

[56] Felix Frankfurter, "Some Reflections in the Reading of Statutes" (1947) 47 *Columbia Law Review* 527, 543.

[57] Attorney General's Department, Extrinsic Aids to Statutory Interpretation, Policy Discussion Paper, above n28, 20.

[58] Victoria F. Nourse "Elementary Statutory Interpretation: Rethinking Legislative Intent and History" (2014) 55 *Boston College Law Review* 1613, 1655.

[59] Some US commentators who have recently published research related to this theme include Victoria F. Nourse, James J Brudney, Abbe R Gluck, Lisa Schultz Bressman, Glen Staszewski and Jarrod Shrobe.

[60] William N. Eskridge Jr., Abbe R. Gluck and Victoria F. Nourse, *Statutes, Regulation, and Interpretation* (West Academic Publishing, 2014) 631.

[61] Attorney General's Department, Extrinsic Aids to Statutory Interpretation, Policy Discussion Paper, above n28, 20.

[62] For example, see Daniel Greenberg, "Hansard, the Whole Hansard and Nothing but the Hansard" (2008) 124 *Law Quarterly Review* 181.

[63] Robert A. Katzmann "Statutes" (2012) 87 *New York University Law Review* 637, 645.

other interpreters of legislation should use parliamentary materials during the interpretative task. One US academic likens this to a "reverse engineering" of statutory text.[64]

40. It is this theme of the relationship between the legislative process and the use of extrinsic materials that is the subject of a current research project by the presenter. That research explores the idea that much can be learned about the range and use of extrinsic sources, particularly parliamentary materials, from the lawmaking process.

Conclusion

41. The question postulated by this presentation is about the value of parliamentary materials as extrinsic materials in the task of statutory interpretation. This presentation puts forward the suggestion that while there is certainly the potential for them to have value, we must be cautious about unthinking use of, and generalisations about, these materials.

42. There are three reasons for this. First, the principles about the use of parliamentary materials that can be discerned from judicial reasoning indicate that there are legal limits about the use of these materials.

43. Second, even leaving those principles aside, there are arguably valid practical reasons. The volume, diversity and political nature of parliamentary materials suggest that we should approach them with caution. Or, at least, we should approach an assessment of their reliability and weight with an understanding of the legislative process from which they were produced.

44. Finally, it is useful to keep the principles about the separation between the legislature and the judiciary in mind. It is true that arguments both for and against the use of extrinsic materials can be made on the basis of parliamentary sovereignty and the separation of powers. However, statutes are the product of a source of power and processes enshrined in the Federal and State constitutional and legal frameworks and derive their legitimacy and authority from those sources. The same cannot be said of the legitimacy and authority of parliamentary documents.

45. The Australian approach requiring a reader of a statute to attribute a meaning that is consistent with, or best achieves, the purpose of the Act means that parliamentary materials are likely to continue to be a potentially important aid to construction. But they are not a homogeneous group of materials, nor do they have a common genesis. Accordingly, a careful assessment of their value and reliability on each occasion that they are considered is prudent to ensure that they are used in a reliable and persuasive way.

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[64] Nourse, above n58, 1618.