

STATUTORY INTERPRETATION: THE MEANING OF MEANING

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[Statutory interpretation has replaced the analysis of judicial reasons about the common law as the most important task ordinarily performed by Australian lawyers. This was inevitable as the amount of law made by, or under; legislation increased and the room for the residual common law narrowed. The development has, or should have, important consequences for legal education and professional training. The basic principles governing statutory interpretation are repeatedly stated, without apparent disagreement, in decisions of the High Court of Australia. According to the author, they involve deriving meaning from close consideration of the text, context and purpose (policy) of any contested provisions. But the process is an art and not a science, as illustrated by reference to the divided decision of the High Court in Carr v Western Australia. The author accepts Professor James Raymond's challenge that judges should 'dig deeper' in explaining their real reasons for preferring one available interpretation over another. Without venturing into 'pop psychology', the author considers that deep-lying legal values can often be revealed and that any reversion to the former error of textual literalism needs to be resisted.]

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I THE MAIN TASK OF MODERN LAWYERS

The distinctive feature of contemporary Australian law derives from the overwhelming importance of the laws made by or under Parliament. I refer to statutes, regulations, by-laws, executive instruments, rules of court and all the other ways in which the written law now manifests itself. In my youth, the statutory law of the State of New South Wales was collected in 12 manageable volumes, supplemented by a three-volume index.¹ These books included many important statutes, arranged alphabetically according to their short titles, commencing in the colonial period, some of which, like the *Crimes Act 1900* (NSW), still apply today.

The volumes also included notes on important case law and various annotations. The legislation of Parliament was expressed more briefly in those days, leaving more space for judges to expound and apply the principles of the common law as derived from their forebears in England. Even in my early days in the law, some judges regarded statutory law as an unpleasant intrusion on the judge-made law. When I attended law school in the 1950s and early 1960s, most of the time was spent learning how to analyse binding judicial pronouncements on the law (the *ratio decidendi*) and to apply such pronouncements to the facts of any new problem.

Today there is nothing modest about the output of federal, state and territory legislation. Every year it is contained in multiple volumes of printed paper. Happily, it is now more readily accessible because of the advances that have occurred in electronic technology. The shift in the expression of law from judge-made expositions to statutory and other rules has led to a number of changes in how statutory interpretation is undertaken.

First, by the mid 20th century, it was generally appreciated that the words of judges, written in their opinions, should not be subjected to the precise analysis appropriate to statutory and similar texts. Deriving the *ratio decidendi* of judicial holdings was recognised to be an art. Yet it was still commonly thought that securing the meaning of legislation was more of a science.

The explosion in the variety, detail and complexity of legislation has sorely tested this 'scientific' theory. It has undermined the view that legislation has but one accurate meaning, which those bound by it only need to search long and hard enough to find. The growth in the quantity of the written law has led to demands for plain English expression.² However, it has also resulted in an appreciation that deriving the meaning of such laws presents 'leeways for choice',³ which

¹ R J McKay (ed), *The Public Acts of New South Wales 1824–1957* (Law Book, 1958) vols 1–15. For the Victorian equivalent, see *The Victorian Statutes: The General Public Acts of Victoria* (Government Printer, 1958) vols 1–8 and the accompanying annotations in Jean Malor (ed), *The Victorian Statutes: The General Public Acts of Victoria* (Law Book, 1960) vol 9.

² See generally D C Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis, 6th ed, 2006) 63–5.

³ Julius Stone, *Legal System and Lawyers' Reasonings* (Maitland Publications, 1964) 304. See also Julius Stone, *Social Dimensions of Law and Justice* (Maitland Publications, 1966) 649, citing K N Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) 49 *Yale Law Journal* 1355, 1377–83.

courts, lawyers and others need to make in a transparent, consistent and principled manner.

Secondly, the growth in the size and importance of the laws made by and under Parliament has also led to changes in the rules applicable in Australia to the performance of statutory construction. Some of those rules have been enacted by Parliament itself. Examples include federal, state and territory statutory provisions requiring preference for a construction that promotes the purpose of legislation over one that does not,⁴ and the authorisation of access by the interpreter to a wider range of extrinsic materials to assist him or her in this endeavour.⁵ These statutory provisions effectively endorse moves that were already afoot in the judiciary of the common law both in England⁶ and Australia.⁷

II SOME BASIC RULES OF APPROACH

In addition to the encouragement of a purposive interpretation, legislative provisions have been enacted to promote the interpretation of legislation in ways consistent with basic civil and human rights.⁸ In this respect too, Parliaments in Australia have followed a long line of common law authority favouring the expression of the law in a way that upholds traditional common law principles over one that would diminish basic rights.⁹

⁴ See, eg, *Acts Interpretation Act 1901* (Cth) s 15AA; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Interpretation Act 1978* (NT) s 62A.

⁵ See, eg, *Acts Interpretation Act 1901* (Cth) s 15AB; *Interpretation of Legislation Act 1984* (Vic) s 35(b); *Interpretation Act 1978* (NT) s 62B.

⁶ See, eg, *A-G (UK) v Prince Ernest Augustus of Hanover* [1957] AC 436, 461 (Viscount Simonds); *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 272 (Lord Wilberforce); *Pepper v Hart* [1993] AC 593, 617 (Lord Griffiths).

⁷ See, eg, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 99 (Toohey, Gaudron and Gummow JJ), 112 (McHugh J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ). See the discussion in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 421–4 (McHugh JA), cited in *Bropho v Western Australia* (1990) 171 CLR 1, 20 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁸ *Human Rights Act 2004* (ACT) s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1) ('*Charter*'). See also *Human Rights Act 1998* (UK) c 42, s 3(1): 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' See Lord Lester, Lord Pannick and Javan Herberg (eds), *Human Rights Law and Practice* (LexisNexis, 3rd ed, 2009) 42 [2.3.1]. See also *R v Momcilovic* (2010) 25 VR 436, which is currently awaiting judgment by the High Court.

⁹ See, eg, *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J); *Bropho v Western Australia* (1990) 171 CLR 1, 17–18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 130 (Lord Steyn). In the Symposium at which an earlier version of this article was discussed, an important point was made by the Chief Parliamentary Counsel of Victoria, Ms Gemma Varley, that the enactment of the *Charter* in Victoria had encouraged drafting instructions and the drafts of legislation to conform, as far as possible, to the provisions of the *Charter*, so as to avoid possible later inconsistencies and litigation on such points.

During the past decade or so, the High Court of Australia has unanimously endorsed other principles as necessary to the accurate reading of legislation. Amongst the most important of these principles have been:

- that where the applicable law is expressed in legislation the correct starting point for analysis is the text of the legislation and not judicial statements of the common law or even judicial elaborations of the statute;¹⁰
- that the overall objective of statutory construction is to give effect to the purpose of Parliament as expressed in the text of the statutory provisions;¹¹ and
- that in deriving meaning from the text, so as to fulfil the purpose of Parliament, it is a mistake to consider statutory words in isolation. The proper approach demands the derivation of the meaning of words from the legislative context in which those words appear. Specifically, it requires the interpreter to examine at the very least the sentence, often the paragraph, and preferably the immediately surrounding provisions (if not a wider review of the entire statutory context) to identify the meaning of the words in the context in which they are used.¹²

These and other explanations of the contemporary understanding of statutory interpretation have increasingly taken courts in Australia away from the previous ‘literal’, or so-called ‘objective’ or ‘plain meaning’, approach to interpretation. The notion that a word of the English language has a single, objective and scientific meaning that has only to be discovered has gradually given way to a more candid recognition of the choices that face those who interpret the written law and the way in which values and policy considerations can influence the making of those choices.¹³ That realisation presents the third element in contemporary statutory interpretation in Australia. Today, that task requires a combined exercise involving analysis of the *text*, *context* and *purpose* (or *policy*) of the statute in question.

The foregoing developments have begun to influence legal education, including in Australia. In the 19th century, it was the Harvard Law School in the United

¹⁰ Some of the cases stating this principle are collected in *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1, 10 n 35 (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also *Australian Finance Direct Ltd v Director of Consumer Affairs (Vic)* (2007) 234 CLR 96, 111–12 [34] (Kirby J); *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52, 83 [96] (Kirby J).

¹¹ See, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ). Cf Justice Michael Kirby, ‘Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts’ (2003) 24 *Statute Law Review* 95, 99.

¹² *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 396–7 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ), quoting *R v Brown* [1996] 1 AC 543, 561 (Lord Hoffmann); *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, 36 [109] (Kirby J); *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 91 [88] (Kirby J).

¹³ Justice Michael Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (Sweet & Maxwell, 2004) 31–2; Pearce and Geddes, above n 2, 59–61 [2.35]. The large contribution of Professor Julius Stone to Australian juristic developments (and to my own thinking) is referred to in various chapters in Helen Irving, Jacqueline Mowbray and Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press, 2010): see, eg, at 2–4, 29–33, 46, 93–5, 119–20.

States of America that pioneered the use of the case book method to teach law to its students. That method spread throughout North America and greatly influenced the teaching of law to 20th century students in Australian law schools. Law was often taught from books containing lengthy extracts from judicial explanations of the principles of the common law or of the *Constitution* as well as of important or illustrative legislation. The judicial utterances were attractive to teachers and law students alike because they often contained elaborations and expositions; illustrations and examples; descriptions of the relevant historical background; and occasional discussion of the statutory policy and purposes. All of this was undertaken with the rationality and persuasiveness that the judges typically manifested, at least to the eyes of most members of the legal profession. These were virtues not always perceived in Parliaments, nor in their output: legislation.

However, with the growing dominance of legislation as a source of contemporary law, a new technique had to be adopted in legal education. In 2006, when Elena Kagan was Dean, the Harvard Law School modified the case book method of teaching law to law school beginners. Out of recognition of the significant increase in legislation in the United States, as much as in other common law countries, a new means was adopted for teaching the syllabus. This is based on a close analysis of the techniques of statutory interpretation as expressed by the legislature or approved by the higher courts.¹⁴ This change in approach is now gaining support in Australia, but slowly.

To this time, statutory interpretation has not been given the importance in Australian law schools that its significance for the daily practice of the law demands. True, particular statutes, of necessity, require close examination, with attention to the leading decisions on the meaning of their texts. This is obviously true of constitutional law which, in the Australian federal context, requires the closest possible examination of the text of the *Constitution* and of the decisions of the High Court of Australia and other courts upon it. But several important subjects in the law school curriculum likewise demand instruction in the law as stated in parliamentary enactments. So it is in federal taxation law, trade practices, and court practice and procedure; and likewise for evidence law, where the former common law and statutory rules have now been replaced in most Australian jurisdictions by the operation of the uniform *Evidence Acts*.

Out of a recognition of this trend towards the substitution of statutes for the common law in Australia, the Council of Australian Law Deans has lately considered a proposal to add to the core curriculum to be taught in all Australian law schools a specific subject on statutory interpretation.¹⁵ The proposal has

¹⁴ See Jonathan D Glater, 'Harvard Law Decides to Steep Students in 21st-Century Issues', *The New York Times* (New York), 7 October 2006, 10.

¹⁵ Jill McKeough, 'Council of Australian Law Deans' [2011] (1) *ALTA Newsletter* 33. The proposal was one of several possibilities suggested in Law Admissions Consultative Committee, 'Approaches to Interpretation' (Discussion Paper, 2009) 2 <http://www.lawcouncil.asn.au/lacc/documents/discussion_papers.cfm>.

attracted much discussion.¹⁶ However, agreement is yet to be achieved over the detail of what a national curriculum subject on statutory interpretation should contain, and how the topic should be taught to prepare lawyers for the task that will occupy most of them over the course of their professional lives. At least at this stage it seems that the Australian law schools, or most of them, prefer to teach statutory interpretation in the context of particular subjects. This is a mistake. It overlooks the common themes and shared techniques and skills that now permeate virtually every aspect of Australian law.

III DIGGING DEEPER FOR MEANING

The task of construing statutory language is notorious for generating opposing answers, no one of which is indisputably correct.¹⁷ That makes statutory interpretation an activity that is challenging, interesting and important for the content, application and future of the law. The fascination of its puzzles extends far beyond appellate judges. Because of its character, legislation affects all those who are bound by its commands.

Nevertheless, because in a rule of law society it is ultimately the responsibility of the judges to decide and explain the validity and meaning of contested or ambiguous legislation, it is natural that judges should give much attention to what they are doing. This is especially so where (as often happens in appellate courts) there are divisions of opinion about the meaning of a statute or of the *Constitution*. In every such case, the judge must try to explain how his or her mind has arrived at a result different from that favoured by colleagues who, by definition, have been trained in the same discipline, apply the same statutory instructions for interpretation and have generally endorsed the same injunctions about the basic approach that is to be taken in discharging the task.

Reflecting upon such differences, judges who are in disagreement must necessarily dig into their conscious minds to endeavour to reach concurrence if they can and, if this proves impossible, to explain why they cannot. In undertaking these tasks, judges are now assisted by courses and training in judicial reasoning that encourage them to confront the sources of their disagreements and to explain these in the most persuasive language they can offer.

Professor James Raymond, a well-known teacher who engages in judicial education about good writing techniques both in North America and Australasia, has recently attempted to identify what led several judges of the High Court of Australia to their sharply divided opinions in *Kartinyeri v Commonwealth*.¹⁸ That decision related to the meaning and ambit of the 'races' power in s 51(xxvi) of the *Australian Constitution*. Specifically, the case considered whether

¹⁶ See, eg. Australian Law Students' Association, Submission to Law Admissions Consultative Committee, *Approaches to Interpretation*, 8 July 2009 <<http://www.alsa.net.au/education/submissions>>.

¹⁷ *Al-Kateb v Godwin* (2004) 219 CLR 562, 630 [191] (Kirby J), citing *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 580 [42] (McHugh J).

¹⁸ (1998) 195 CLR 337, discussed in James C Raymond, 'Saving the Literal' in Tom Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007) 177, 187–95.

s 51(xxvi), as amended by referendum in 1967,¹⁹ should be interpreted as limited to the making of beneficial legislation *for* the people of any ‘race’ in the sense of being beneficially favourable to such people, or whether it should be interpreted to permit the making of any laws that are in respect of people of that ‘race’, with no requirement that those laws be of a beneficial character.

By a dissection of the majority and minority views in the case, Professor Raymond concludes that it is essential to go *behind* the given reasons of the High Court judges in order to try to understand the considerations that led them to their respective conclusions. He finishes his analysis of the case on the rather sombre note that ‘the canons and rules of interpretation are soft logic, persuasive only to people who prefer the result they support or at least have no reason to resist them.’²⁰

It is this suggestion by Professor Raymond, that we should attempt to dig as deeply as we can in order to identify the *real* reasons for disagreement over statutory interpretation, that I address in the balance of this article. I will do so by reference to *Carr v Western Australia* (‘*Carr*’),²¹ a case in which I participated in the High Court of Australia. It was a case of divided conclusions. In it, I dissented from the majority interpretation.

By the convention of our judiciary, judges, in or out of office, do not add to what they have written in explaining their opinions in a particular case. What is written, is written. For good or for bad, whether persuasive or unpersuasive, my reasons for the orders I favoured in *Carr* are those that I expressed in the published decision of the High Court. They are not elaborated by any second thoughts that I have had in these later words.

Nevertheless, there is a useful point in Professor Raymond’s observations that we should recognise and respect, whether we are lawyers, judges or academics. I want to apply his injunction to myself. This requires me to dig just a little deeper in searching for the reasons for disagreement in the case that I have selected. Doing so obliges me to face up to the ultimate quandary that arises in all cases of statutory interpretation. What is the meaning of meaning? How far can, and should, judges explore their conscious and even subconscious minds to explain why they prefer one approach or conclusion to the meaning of contested words over another? How can judges accept Professor Raymond’s appeal that they should be as candid and transparent as possible in providing their reasons, without delving into pop psychology? Is it useful, or simply distracting and irrelevant, for judges to attempt to identify the really ‘deep-lying’ considerations that lead them to conclusions that differ from their colleagues?

I will explore these intriguing questions by reference to the decision in *Carr*. That case helps to bring out a few useful themes.

¹⁹ *Constitution Alteration (Aboriginals) 1967* (Cth).

²⁰ Raymond, above n 18, 195.

²¹ (2007) 232 CLR 138.

IV A BANK ROBBERY AND *CARR'S CASE*A *The Facts*

The decision in *Carr* concerned the meaning of ss 570(1) and 570D of *The Criminal Code* (WA).²² The provisions in question related to the reception of the evidence of police in criminal trials concerning confessions or admissions allegedly made to them by a criminal accused.

The facts of the case were straightforward. On 8 April 2003, an armed robbery was committed at the South Perth branch of the Commonwealth Bank of Australia. On 30 July 2003, police went to a home in Perth where Mr Michael Carr lived with his mother and sister. They searched the premises. A video film of the search was recorded. Mr Carr made no admissions. No incriminating evidence was found at the home to implicate Mr Carr in the bank robbery.

Mr Carr was then taken to the Kensington Police Station in Perth to be questioned by police officers. For this purpose, he was escorted into a room described on its door as 'the interview room'. There a conversation took place which, in accordance with s 570D(2)(a) of the Code, was recorded on videotape. As the record of the conversation showed, it began at 6.57 pm. It concluded at 7.26 pm, the times of the beginning and end being precisely noted. The lead detective told Mr Carr that he and his colleague were 'here to interview you'²³ in relation to any knowledge of a bank robbery. The questioning did not proceed far before Mr Carr indicated that he did not wish to say anything 'without my lawyer present anyway pretty much.'²⁴ The police officer accepted this request ('[n]o dramas').²⁵ The questioning continued for a little while. However, it soon ground to a halt in order to permit Mr Carr to consult a lawyer.

At the end of this recorded interview, Mr Carr was taken to another room, described as the 'lockup', where the detectives had to 'process' him. Unbeknown to Mr Carr, the lockup was under constant surveillance by video cameras and sound recording. The detectives knew that these facilities were in place.

The detectives began engaging Mr Carr in informal conversation. This included chitchat and ultimately strong swearing by a detective, the very antithesis of official language. Mr Carr entered into similarly informal banter. The ensuing conversation was in sharp contrast to the formal and polite exchanges that had taken place in the recorded interview in the 'interview room'. Mr Carr started to boast. In answer to a police question, he described what he had allegedly said to bank officers at the time of the robbery. The detectives knew that Mr Carr had been a heroin addict in 1996–97 and that he was participating in a methadone programme. At a certain point in the lockup conversation, one of the detectives

²² *Criminal Code Act Compilation Act 1913* (WA) sch ('*The Criminal Code*'). Sections 570(1) and 570D have been repealed by *Criminal Investigation (Consequential Provisions) Act 2006* (WA) s 26.

²³ *Carr* (2007) 232 CLR 138, 165 [87] (Kirby J).

²⁴ *Ibid* 166 [87].

²⁵ *Ibid*.

approached the camera and recording device and said quietly words indicating that Mr Carr did not know of the fact that he was being recorded.

At the end of this conversation, Mr Carr was arrested and charged with the offence of bank robbery. In a pre-trial hearing, Mr Carr unsuccessfully sought to have the lockup recording excluded from the evidence at his trial on, amongst others, discretionary grounds. Subsequently, in the trial, a repeated objection to the recording was overruled. The recorded conversation was placed before the jury. Inferentially, Mr Carr's given excuse, that he was simply 'teasing' the police,²⁶ was rejected by the jury. Unsurprisingly, in the face of the evidence, Mr Carr was found guilty. He was convicted and sentenced.

B *The Decisions of the Courts*

The Court of Appeal of Western Australia dismissed Mr Carr's appeal against his conviction.²⁷ The Court held that there was no offence to the language or purpose of s 570D of the Code which, it declared, was 'to prohibit, subject to the exceptions [in s 570D(2)], the reception at trial of unrecorded admissions by an accused to the police.'²⁸ The Court held that the word 'interview' was to be construed broadly. It was not confined to a formal interrogation. Accordingly, the recording of what had been said in the lockup was admissible. The Court sustained the jury's verdict and Mr Carr's conviction.

The High Court of Australia granted Mr Carr special leave to appeal. However, by a majority (Gleeson CJ, Gummow, Heydon and Crennan JJ; myself dissenting), his further appeal was dismissed.²⁹ The conviction was confirmed.

The majority judges in the High Court held that the word 'interview' in s 570D of the Code encompassed *any* conversation between a member of the police force and a suspect, including an informal conversation such as had occurred between Mr Carr and the police in the lockup room. The majority also held that the lack of consent by Mr Carr to the videotaping of his admissions was no bar to their admissibility. Because, in the High Court, Mr Carr did not persist with his arguments that the evidence should have been otherwise rejected on discretionary grounds, the result was that his conviction was sustained. Gummow, Heydon and Crennan JJ, in joint reasons, held that, once there was an admissible 'videotape' of an 'interview' in which the accused made an 'admission', the requirements of s 570D of the Code were satisfied. Their Honours therefore held that there was no need to consider arguments concerning the presence or lack of consent of the accused person.³⁰ The existence of an admissible videotape was sufficient and conclusive.

It should be noted that both the majority and minority reasons in the High Court recorded details of the facts surrounding the 'admissions' by Mr Carr. In my own reasons, I emphasised the need for a fuller understanding of those facts.

²⁶ Ibid 171 [98].

²⁷ *Carr v Western Australia* (2006) 166 A Crim R 1.

²⁸ Ibid 17 [38] (Buss JA).

²⁹ *Carr* (2007) 232 CLR 138.

³⁰ Ibid 160–61 [69]–[70].

In the application of the law to a given situation, it is sometimes very useful to have a detailed statement of the facts. In a sense, the mind plays on that factual detail, repeatedly asking itself whether the law in question was intended to operate on such facts in the ways contended by the opposing parties. A fuller statement of the facts ‘may be tedious’.³¹ But in Mr Carr’s case, without them, his arguments could not be fully understood.³²

It was for that reason that I extracted further factual detail, including the bravado and swearing that were evident in the conversation in the lockup. That could then be contrasted with the much more formal, professional and official character of the interview in the ‘interview room’ that had preceded it. If an element of formality was inherent in the statutory notion of an ‘interview’, it was certainly present in the recording in the ‘interview room’. But it was absent from the conversation recorded in the lockup. The interplay between legal meanings and factual circumstances has been noted in several contexts.³³ Factual evidence is sometimes useful to an appreciation of the meaning and application of the law.³⁴

From the precision of the commencing and concluding times of the recording in the ‘interview room’, the detectives apparently assumed that the ‘interview’ process they were then conducting had a clear beginning and a clear end. It demanded the observance of a high degree of formality and precision. The sotto voce exclamation to the camera by one of them reinforced this understanding. Of course, the detectives could have been wrong in their understanding. Obviously, the title of the room where the ‘interview’ was first conducted could not alone be determinative of the legal character of the conversations that followed there and elsewhere. But, for me, the course of events in the police station could throw some light on the mutual understanding amongst the participants about the ‘interview’, whose character the courts were asked to define in the course of deciding whether or not the resulting recorded conversations objectively satisfied the statute and were admissible.

C *The Applicable Statutory Provisions*

The statutory provisions applicable to Mr Carr’s case were contained in ch LXA of *The Criminal Code*. In that chapter, the governing obligation was found in s 570D(2), which said:

On the trial of an accused person for a serious offence, evidence of any admission by the accused person shall not be admissible unless —

- (a) the evidence is a videotape on which is a recording of the admission ...

³¹ Ibid 165 [86] (Kirby J).

³² Ibid.

³³ See, eg, *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 74–5 [226]–[230] (Kirby J); *Wurridjal v Commonwealth* (2009) 237 CLR 309, 415–16 [279] (Kirby J).

³⁴ See, eg, *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 566 [138] (Kirby J).

There were other immaterial exceptions and exclusions. However, that stated in para (a) was the only one on which the prosecution succeeded. The others can be ignored for present purposes.

In s 570D(1) of the Code, the word ‘admission’ was defined to mean, relevantly, ‘an admission made by a suspect to a member of the Police Force’. The phrase ‘serious offence’ was defined to mean ‘an indictable offence of such a nature that ... it can not be dealt with summarily’. Armed robbery was such an offence. Accordingly, the ‘serious offence’ requirements of the Code applied to the admissibility of any admission made by Mr Carr to the relevant members of the Western Australian police. This was not contested.

The requirement that the evidence be ‘a videotape’ enlivened a further special definition contained in the Code, namely in s 570(1). There, ‘videotape’ was defined for these purposes to mean ‘any videotape on which is recorded an interview’. Thus, the requirement that the evidence of an admission of a suspect in a serious criminal offence must be recorded on ‘videotape’ imported the requirement that the admission had to be recorded in the particular form of an ‘interview’. It followed that the outcome in Mr Carr’s appeal turned primarily on the meaning of the word ‘interview’ in the factual context. It was on that issue, substantially, that the High Court divided.

The view of the statutory language which the majority adopted is, with respect, an available one. The word ‘interview’ was not itself defined in the Code. It is not, as such, otherwise a scientific or technical word or one that, in a legal context or otherwise, invariably has a single fixed meaning. So what considerations, apart from the evidentiary ones that I have mentioned, led me to the conclusion that the preconditions of the Code had not been fulfilled? Obviously, one could not feel full of sympathy for Mr Carr. I did not approach his arguments with the view that he was a person who was possibly innocent of any criminal offence and had been trapped into his predicament by police-led misconduct. At the end of my reasons, I disclaimed any such considerations:

It is an undeniably uncongenial outcome to discharge a prisoner, evidence of whose guilt is seemingly established by his own words. Such an order is not made with enthusiasm. I can understand the tendency of human minds to resist such an outcome. ... [Mr Carr] was a smart alec for whom it is hard to feel much sympathy.³⁵

However, when I applied to the legislative text the considerations earlier mentioned,³⁶ which are now standard for the ascertainment of meaning, they led me to a conclusion that an important requirement laid down by the Code had not been fulfilled in Mr Carr’s case. The conversation with police was not in the form of an ‘interview’. It followed that his objection to the admissibility of the incriminating evidence of his admission, secretly recorded, had to be upheld and the evidence excluded. The chief considerations leading me to that result were the text, context, and the apparent policy (or purpose) of the legislation.

³⁵ *Carr* (2007) 232 CLR 138, 187–8 [168], [170].

³⁶ See above Part II.

V TEXT, CONTEXT AND PURPOSE IN *CARR*A *The Text*

As to the *text*, the question that was first raised was the meaning of the word 'interview'. Did that word itself, without more, ordinarily import a notion of formality? Or was that not required, as the majority concluded?

To answer this question, I started in the usual way by examining dictionary meanings of the word 'interview'. This is a common, although somewhat banal and occasionally confusing, first port of call in discovering the meaning of an undefined word. When I looked at the dictionaries, they uniformly provided a primary meaning of 'interview' that imported a requirement of an element of formality. Thus, the first definition in the *Macquarie Dictionary*, which is the one to which Australian courts now ordinarily first resort, is: 'a meeting of persons face to face, especially for formal conference in business, etc, or for radio and television entertainment, etc.'³⁷ Formality is likewise included in the primary definition contained in the *Oxford English Dictionary* ('[a] meeting ... sought or arranged for the purpose of formal conference on some point').³⁸ There are similar references to formality in other dictionaries which I quoted.³⁹

These dictionary definitions could not, of course, be conclusive as to the meaning of 'interview' in the context of the Code. However, insofar as the *text* is the anchor for the ascertainment of the purpose or intention of Parliament in a legal enactment, the use of the word 'interview' was a point in favour of Mr Carr's submissions. For this reason, I remarked:

This Court can, as it pleases, dismiss the argument that 'interview' when used in the Code involves an element of formality and structure with mutuality between the participants in the communication in question. However, it must realise that it does so in the face of the unanimous opinion of the great dictionaries of the English language.⁴⁰

Furthermore, insofar as courts in other jurisdictions had grappled with the implications of the use of the word 'interview' in such a context, their reasoning also lent support to the requirement of formality.⁴¹ The *textual* analysis therefore appeared to favour Mr Carr. But what about the context and policy?

³⁷ C Yallop et al (eds), *Macquarie Dictionary* (4th ed, 2005) 743, quoted in *Carr* (2007) 232 CLR 138, 176 [120] (Kirby J).

³⁸ J A Simpson and E S C Weiner (eds), *The Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989) vol 8, 3, quoted in *Carr* (2007) 232 CLR 138, 176 n 104 (Kirby J).

³⁹ See *Carr* (2007) 232 CLR 138, 176 [120]. In fact, if one goes back to Samuel Johnson's *Dictionary of the English Language* of 1755, it too refers to 'a formal and appointed meeting or conference': Samuel Johnson, *A Dictionary of the English Language* (1755) vol 1.

⁴⁰ *Carr* (2007) 232 CLR 138, 176 [121].

⁴¹ See, eg, *R v McKenzie* [1999] TASSC 36 (31 March 1999) [14] (Wright J), quoted in *ibid* 177 [122] (Kirby J).

B The Context

The next question that followed became whether the *context* threw a different light on the meaning of the requirement that the videotape should be in the form of an ‘interview’. There are great dangers in taking the word ‘interview’, or virtually any word, out of context. The issue was not whether the word, as such, imported a requirement of formality and mutual interchange. It was whether it did so in the particular circumstances of the Western Australian *Criminal Code*.

My reasons in *Carr* therefore turned to address a number of contextual considerations. When I considered them, they lent additional support, and certainly did not undermine, the attribution to the word, in this context, of the primary meaning earlier explained:⁴²

- 1 In statutes in other jurisdictions where provisions had been adopted for the recording of admissions to police, statutory formulae were used that avoided the requirement of ‘interview’. Commonly, such words contemplated conversations of a less formal character. Thus, in Tasmanian legislation for a similar general purpose, the phrase used in the law was ‘official questioning’,⁴³ a phrase arguably neutral to the formality of the exchange. Moreover, in the South Australian legislation, in force before the applicable provisions of the Western Australian *Criminal Code* commenced, a special definition of ‘interview’ was provided by Parliament. This extended the ordinary meaning of the word, with its notions of formality, to apply to ‘(a) a conversation; or (b) part of a conversation; or (c) a series of conversations’.⁴⁴ Had such an extended definition been repeated in the Western Australian Code, it would have put paid to Mr Carr’s submission. The failure to follow the South Australian definition, which was available to the Western Australian drafter, gave Mr Carr’s submission further contextual force.
- 2 Additional force was afforded by the fact that the chapter in which s 570D of the Code appears was titled ‘Videotaped interviews’. This heading suggested that the existence of a videotape (or secure recording) was of itself not sufficient. More was required, namely that the videotape should be in an ‘interview’ form.
- 3 Other Australian legislation in which the word ‘interview’ had been used was likewise examined. Such legislation lent further support for the suggestion that, if particular persons were in a vulnerable situation, the legislature used the word ‘interview’. Inferentially, the word was used to mandate the formal character of the interchange that was to take place.

It followed that contextual factors lent weight to Mr Carr’s argument that the use of the word ‘interview’ by the Code was deliberate. The combined requirements of ‘videotaping’ an ‘interview’ were designed to address a dual problem

⁴² See *Carr* (2007) 232 CLR 138, 177–9 [125]–[129].

⁴³ *Criminal Law (Detention and Interrogation) Act 1995* (Tas) ss 8(1)–(2), as repealed by *Evidence (Consequential Amendments) Act 2001* (Tas) sch 1.

⁴⁴ *Summary Offences Act 1953* (SA) s 74C.

faced by persons in police custody undergoing official interrogation: the *integrity* of the record and the *acceptability* of the way in which the admissions to persons in authority were procured for the record. Adopting the submissions of the prosecution in *Carr* meant that the requirement of *integrity* predominated to the exclusion of the requirement of *acceptability* or fairness that was arguably imported by the obligation that the videotape should be in the form of an 'interview'.

Also against the prosecution's submission was a long line of common law authority, including in the High Court itself, recognising the psychological disadvantages that accused persons suffer when undergoing official interrogation. Perhaps the clearest statement of such disadvantages appears in the reasons of the Court in *R v Lee*:

The uneducated — perhaps semi-illiterate — man who has a 'record' and is suspected of some offence may be practically helpless in the hands of an overzealous police officer. ... Such persons stand often in grave need of that protection which only an extremely vigilant court can give them. They provide the real justification for the Judges' Rules in England and the Chief Commissioner's Standing Orders in Victoria, and they provide ... a justification for the existence of an ultimate discretion as to the admission of confessional evidence.⁴⁵

Similar words were later expressed by McHugh J in *Pollard v The Queen*.⁴⁶

Given that the requirement in s 570D of the Code for the videotaping of admissions was limited to *serious* indictable offences, an interpretation requiring a degree of formality in the conduct of the interrogation by way of 'interview' was arguably justified to meet the problem of the power imbalance to which judges and others⁴⁷ have often referred.

Accordingly, as my reasons in *Carr* sought to explain, Mr Carr succeeded in his arguments both on the tests of *text* and *context*. But what of the purpose or policy of the legislation? Should the broader view that was adopted by the majority be preferred on the footing that Mr Carr's interpretation was unduly narrow and technical, such as to defeat the really important *purposes* of the Code? Those purposes, so it was suggested, were to overcome the evil of police 'verbals' and to ensure the integrity of the record of interview, which was adequately satisfied by the accurate recording available in Mr Carr's case. They were not to secure the acquittal of a confessed serious criminal whose admissions were recorded in circumstances assuring their integrity and who had abandoned an earlier suggestion that they could be excluded for serious unfairness or oppression.

⁴⁵ (1950) 82 CLR 133, 159 (Latham CJ, McTiernan, Webb, Fullagar and Kitto JJ), quoted in *Carr* (2007) 232 CLR 138, 180 [136] (Kirby J).

⁴⁶ (1992) 176 CLR 177, 235, quoted in *Carr* (2007) 232 CLR 138, 179 [133] (Kirby J).

⁴⁷ See, eg, David Dixon, 'Regulating Police Interrogation' in Tom Williamson (ed), *Investigative Interviewing: Rights, Research and Regulation* (Willan Publishing, 2006) 318, 323–4.

C The Purpose or Policy

When the purpose or policy of the legislation was considered, however, it arguably included not only that of ensuring the *integrity* of the record but also the objective of controlling the interchange of questions and answers in such a way as to neutralise, or at least reduce, the ‘psychological disadvantages for the interviewee.’⁴⁸

Legislation such as the provisions of the Code in question here followed more than 20 years of law reform reports and judicial decisions demanding sound and video recording of confessions or admissions to police as an assurance that such admissions might be accepted in the trial process as a safe foundation for the conviction of an accused.⁴⁹ It was accepted that a judicial discretion existed to exclude an admission that was secured involuntarily, unfairly or in a manner otherwise contrary to public policy. This remained in place to supplement the express requirements of the Code. However, the Code provisions were stated in strong language. Although confined in their application to serious indictable offences, the provisions did not leave exclusion of the damaging evidence to a judicial discretion. It provided for exclusion in plain legislative terms. In this respect, it clearly reflected a strong resolve on the part of the Western Australian Parliament. At least arguably that resolve was addressed not only to the *integrity* of the record, but also to the *acceptability* of the interview.

The provision for an ‘interview’ format was thus a reinforcement for the discretionary exclusion of unfairly obtained admissions. It was apparently enacted to achieve high legislative purposes. If Parliament required a conversation of police officers to proceed, in defined cases, with the formality of an ‘interview’, it was not for police officers to ignore or circumvent that requirement. As public officers, they were obliged to conform to the law. This was especially so where an accused person had exercised their ordinary entitlement to decline to answer official questioning, or where that person had sought to have the advice of a lawyer before proceeding, a request that was acknowledged and apparently carried into effect. Mr Carr’s entitlement to such advice had been recognised, and accepted, by the police in the way they terminated the ‘formal interview’. But they then effectively tricked him into continuing a conversation, although they knew (as he did not) that his answers were being recorded.

In such circumstances, it was reasonable to ask whether this was the way in which the provisions of the Code, viewed as a whole, were intended to operate. It seemed unlikely to me that it was. It would reduce the careful statutory procedures for recording the interview to something approaching a charade. Police could begin, and apparently conclude, a formal ‘interview’ in the ‘interview room’ and then immediately take the accused into another room and proceed to engage in informal questioning there, with banter and swear words, designed to deceive the accused into making admissions that would be recorded but contrary to the accused’s asserted ‘right to silence’.

⁴⁸ *Carr* (2007) 232 CLR 138, 182 [142] (Kirby J).

⁴⁹ *Ibid* 164 [82].

The State's contention can be measured against the possibility that what happened on this occasion might become a common practice. In that event, police officers, frustrated by the irksome insistence of the suspect on the legal right to silence and the request for access to a lawyer, would simply lead him or her from the formal interview, conducted in the interview room, into the lockup or a tea room or some other facility monitored by surveillance devices, perhaps a bar or a public park, and there engage in banter, informal conversation and apparently innocent questioning. The psychological dynamic of the 'interview', where, by the strictures of law, the power relationship between interviewer and interviewee is to some degree equalised, would be completely changed. The offence to basic principle would not be cured by the mere fact that the conversation was recorded reliably. This is not a discretionary determination. It is concerned with the fundamental character and requirements of the statutory 'interview' for which s 570D of the Code provides.⁵⁰

So if I reflect upon the injunction of Professor Raymond, set out above,⁵¹ that judges and other decision-makers should honestly reveal the considerations (including policy considerations) that they take into account in preferring one interpretation of legislation over another, can I be accused of hiding or disguising any important consideration that played a part in my thinking in *Carr*? I think not. Have I resorted to a purely verbal or linguistic explanation of my interpretive preference in order to avoid the accusations of formalists that I had exceeded the bounds of judicial legitimacy or impermissibly permitted congenial policy considerations to influence my decision instead of 'sticking to the text'? Certainly not. Have I, on the other hand, fallen into the trap of indulging in amateur psychology whilst searching the crevasses of my mind and memory to explain the factors that led me to my decision? In short, in explaining my dissenting view in *Carr*, have I given reasons that adequately respond to the judicial obligation to explain a differing view about the meaning of the statutory text in question?

VI DIGGING FURTHER FOR 'DEEP-LYING' CONSIDERATIONS

It is for others to answer the last question. However, I suggest that my opinion in *Carr* does reveal the 'deep-lying' considerations that brought me to my conclusion, which I will now discuss.

A Constitutional Bedrock

The task of a judge in interpreting statutory, constitutional or subordinate legislation is fundamentally a textual one. It is impermissible to stray too far from the text by importing considerations of context and policy. The text is the anchor for the judicial task, as it is for the task of any lawyer or citizen called upon to interpret and apply legislation.⁵² Obedience to the text has a constitutional foundation. It is based on the respect demanded of courts towards the

⁵⁰ *Carr* (2007) 232 CLR 138, 187 [165] (Kirby J) (citations omitted).

⁵¹ See above Part III.

⁵² *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019, 1029 [66]–[69] (Kirby J).

democratic character of the parliamentary lawmaker, speaking to the courts in the words which the lawmaker has formally adopted.

This is why all members of the High Court in *Carr* gave a great deal of attention to the ordinary meaning of the word ‘interview’, leading in my case to the conclusion that the word imported notions of formality. The ‘interviews’ that judges perform for their personal staff certainly usually observe that requirement, being structured conversations observing certain rules of discourse. In the facts of *Carr*, the parties too reflected this view of what an ‘interview’ was. What they did in the ‘interview room’ observed the preconditions of such a conversation. The interchange in the lockup was of an entirely different character. It did not fit comfortably within the required statutory precondition of a videotaped ‘interview’. Thus, in a sense, the text was conclusive of the answer to be given to the statutory puzzle. Yet there was more; and it reinforced the same conclusion.

B *History and Law Reform*

When the contextual history was taken into account, it lent support to the foregoing view of the text. Of particular relevance was the history of problems that the administration of criminal justice in Australia had faced in relation to the abuse of official power when suspects allegedly made admissions to people in authority. This problem had bedevilled trials and the reputation of public officials, especially police, for more than 30 years before law reform bodies, courts and legislatures successively sought to introduce requirements for oral and visual recordings of communications between officials and suspects. In the Law Reform Commission, I had myself taken part in proposals urging the recording of such conversations.⁵³ I had witnessed the opposition by police commissioners, police associations and some politicians to the Commission’s proposals. I always believed that, if secure and acceptable recordings were introduced, they would not only restore the reputation of police. They would also provide to the prosecution a powerful forensic tool to secure the conviction of accused persons based on reliable confessions and admissions which the decision-maker could see and hear directly. The usefulness of this history was not limited to the reliability of the admissions thus recorded. It was also concerned with the acceptability of the admissions because of frequent allegations of oppressive conduct, trickery and violence on the part of the interrogating officials. No doubt my awareness of (and involvement in) some of the background events that led to legislation such as that in the Code would have influenced my conception of what the Code was getting at. That influence was acknowledged by me in my reasons.⁵⁴

C *Accusatorial Trial*

Another ‘deep-lying’ consideration represented a recurring theme in a number of opinions that I wrote in criminal appeals. I refer to the peculiar nature of the

⁵³ Law Reform Commission, *Criminal Investigation*, Report No 2 (1975) 64 [145], 71–2 [156]–[159].

⁵⁴ *Carr* (2007) 232 CLR 138, 164 [82].

accusatorial criminal trial, as it is observed in Australian trial practice.⁵⁵ The accusatorial trial is not always understood by the general public, nor even among trained lawyers; yet it is crucial for the character of our society and for maintaining proper controls over the intrusion of the organised state into the lives of individuals. The purpose of a criminal trial is not, as such, to discover whether an accused person is innocent or guilty. The purpose is defined by the obligation of the state and its officials to prove the accused's guilt beyond reasonable doubt. That obligation places an important check on the intrusion of public officials into the lives of individuals who may be suspected of a crime. Doubtless, on occasions the limitations are intensely frustrating to officials. But such frustrations must be borne because they safeguard important attributes of freedom by controlling the state and its officials. The police in *Carr* correctly acknowledged the suspect's desire not to speak further until he had seen a lawyer. If the prosecution's submissions were correct, the observance of the accused's 'right to silence' could be easily circumvented by tricking the accused into abandoning his entitlements, and by involving him or her in an unstructured conversation which was designed to overcome the impediment presented by the invocation of the accusatorial character of the process. Parliament may modify, and perhaps even abolish, the accusatorial trial of criminal charges. However, against the important protective features of that system and its history, any such modification would have to be made by very clear laws. At the very least, in Mr Carr's case, the language of s 570D of the Code fell far short of a clear departure from the accusatorial trial which, on the contrary, Parliament seemed rather intent on protecting and reinforcing.

D Policy and Public Officials

Still, in the end was it acceptable to have the accused walk free although he had been captured on videotape and sound recordings effectively acknowledging his involvement in a serious crime of bank robbery? Would such an outcome be an affront to decent members of society? Should particular provisions of the Code not be read so as to avoid such a result? Would the Australian community reject the idea of an accused person escaping justice on a technicality? In *Carr*, I acknowledged that such considerations would be in the back of the mind of many observers of the arguments advanced in the appeal. However, what had been done to lead Mr Carr into his unsuspected admission was done by public officials bound to uphold the law. As I stated in *Carr*:

the order [of acquittal] is not made only for the [accused] but as an assurance of the adherence of our institutions to the rule of law; to steadfast observance of the requirements of the accusatorial system of criminal justice hitherto followed in Australia; and to the neutral judicial application of the requirements laid down by Parliament in s 570D of the Code.

⁵⁵ See *RPS v The Queen* (2000) 199 CLR 620, 630–3 [22]–[30] (Gaudron ACJ, Gummow, Kirby and Hayne JJ); *Em v The Queen* (2007) 232 CLR 67, 134–5 [227]–[231] (Kirby J); *R v Swaffield* (1998) 192 CLR 159, 198–202 [80]–[92] (Toohey, Gaudron and Gummow JJ).

Section 570D is a strict and unusual provision. It was enacted to deal with a large and endemic problem. We do the law no service by failing to observe the requirements that appear in the provisions of s 570D of the Code because the [accused], who claims their benefit, becomes their uncongenial beneficiary. ...

He was a smart alec for whom it is hard to feel much sympathy. But the police were public officials bound to comply with the law. We should uphold the [accused's] rights because doing so is an obligation that is precious for everyone. It is cases like this that test this Court. It is no real test to afford the protection of the law to the clearly innocent, the powerful and the acclaimed.⁵⁶

If Mr Carr had been a 'white-collar' criminal, dealt with on summons and escorted by his lawyer to the Kensington Police Station, can it be seriously suggested that the police would have respected his rights in the interview room but then engaged him in an unsuspected, but recorded, conversation in the lockup aimed to secure admissions? To adapt the words of Tobriner J in *People v Dorado*,⁵⁷ the Code's protections are not withdrawn from accused persons who are 'stupid' and 'ignorant'. To do that would be 'to favor the defendant whose sophistication or status had fortuitously' made the need for protection unnecessary (or less necessary).⁵⁸ A true commitment to equality before the law required that Mr Carr's argument be given credence. Lawyers in their ceremonies repeatedly assert that the law is there for everyone; that it must be upheld though the heavens may fall; and that their heroes (like Thomas More) were exemplars of this tradition.⁵⁹ This is why a case like *Carr* tests lawyers, judges and courts in their loyalty to the rule of law.

VII THE CHALLENGE OF EXPLANATION AND PERSUASION

None of the foregoing really expands upon the reasons that I expressed in my minority opinion in *Carr*. However, the 'deep-lying' considerations that I have mentioned in this article help perhaps to identify why the task of statutory interpretation is at once complex, contestable and fascinating.

In the place of the approach of earlier times, that lawyers should search for judicial opinions on analogous common law questions, today's practitioners are normally tied closely to statutory texts. Finding the relevant law obliges contemporary lawyers to examine and define the critical words in those texts by reference to the language and context of the statutory provisions. However, the modern approach to interpretation also obliges today's lawyers to endeavour (so far as the text permits) to give effect to the purpose or policy apparent in the statutory language.

⁵⁶ *Carr* (2007) 232 CLR 138, 187–8 [168]–[170] (citations omitted).

⁵⁷ 398 P 2d 361, 369–70 (Tobriner J for Traynor CJ, Tobriner, Peters and Peek JJ) (Cal, 1965).

⁵⁸ Ibid 370, quoted in *Miranda v Arizona*, 384 US 436, 471 (Warren CJ for Warren CJ, Black, Douglas, Brennan and Fortas JJ) (1966).

⁵⁹ Thus the contest tests two of the 'reference points' for considering the state of the judiciary in Australia at any time. These are that the judiciary is 'impartial, independent ... and fearless' and, at the same time, enjoys the 'confidence of the people, without which it loses its authority and thereby loses its ability to perform its functions': Chief Justice R S French, 'State of the Australian Judicature' (2010) 84 *Australian Law Journal* 310, 311, quoting Sir Gerard Brennan, 'The State of the Judicature' (1998) 72 *Australian Law Journal* 33, 33–4.

As in *Carr*, this approach will require the interpreter to dig more deeply so as to understand not only how the text works, viewed in its entirety, but, so far as possible, how its objects may be upheld. Today, there is no satisfaction for a court (as there sometimes appeared to be in earlier times) in holding that the enacted text has failed to hit its obviously intended mark.⁶⁰ So far as they can, judges now endeavour to interpret the enacted law so as to achieve its objects. But finding what those objects are is sometimes elusive, as the differences within the High Court in *Carr* demonstrate.

One judge's examination of text, context and policy will appear to some expert commentators to exceed the bounds of judicial legitimacy or to amount to an example of impermissible judicial activism⁶¹ or false judicial heroism.⁶² Yet another judge's definition of (and approach to) judicial problems may appear to other expert commentators to be a deliberate frustration of remedial legislation and an activism of a different sort on the part of the judge, impermissible because it is designed to defeat the intention of Parliament.⁶³

In *Carr*, was the requirement of the Code enacted solely to secure the *integrity* of the recorded admissions? Or was it also to ensure the *acceptability* of the circumstances in which the admissions came to be made? If the latter, did that conclusion reinforce an interpretation of the word 'interview' as requiring a measure of formality of discourse that was plainly missing from the interchange in the lockup? Or was it sufficient that the conversation should be recorded, removing any doubt that it contained admissions actually made by the accused?

The value of *Carr* and cases like it is that they show the way judges and other lawyers experienced in interpretation can differ over seemingly simple statutory language. When that happens, they are normally obliged to explain, and to attempt to justify, their differences. Doing so tests not only their intellect, but also their inclination to candour and their willingness to explore and reveal the considerations that have truly led them to their respective conclusions.

What words mean in life and in the law is often a puzzle. I agree with Professor Raymond that the exposition of meaning will be more convincing if it moves beyond purely linguistic explanations. It is when the interpreter explores the context of the words and their apparent purposes and discloses any 'deep-lying' responses to a linguistic problem that he or she will truly explain why the conclusion stated was reached, with explanations that persuade the reader to the same conclusion and the outcome. Inescapably, the task of interpretation is a complex one. It involves an art, not a science. It is nuanced and occasionally

⁶⁰ Sir Kenneth Diplock, 'The Courts as Legislators' in Brian W Harvey (ed), *The Lawyer and Justice* (Sweet & Maxwell, 1978) 263, 274, cited in *Kingston v Keoprose Pty Ltd* (1987) 11 NSWLR 404, 424 (McHugh JA).

⁶¹ Justice J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110. Cf Justice Michael Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 *Melbourne University Law Review* 576.

⁶² John Gava, 'The Rise of the Hero Judge' (2001) 24 *University of New South Wales Law Journal* 747.

⁶³ Margaret Thornton, 'Disabling Discrimination Legislation: The High Court and Judicial Activism' (2009) 15 *Australian Journal of Human Rights* 1.

presents what some participants will find to be an ‘intolerable wrestle’ of an intellectual kind.⁶⁴ The basic principles that are now to be applied in Australia are not generally in dispute. But as *Carr* and many other decisions, earlier and later, show,⁶⁵ there remains much room for judicial difference of opinion. It would be a misfortune if Australian law were ever to drift back to the formalism of textual literalism, as if the repeated incantation of the words of legislation themselves will yield their own meaning. Text, context and purpose (policy) these three. But the greatest of these is text. Yet context and purpose are often also needed to throw a satisfactory light on the text itself, which, viewed without them, may lead the legal traveller into error.⁶⁶

⁶⁴ Chief Justice J J Spigelman, ‘The Intolerable Wrestle: Developments in Statutory Interpretation’ (2010) 84 *Australian Law Journal* 822. The title to this article contains an allusion to T S Eliot’s *The Four Quartets*: at 822, 831–2.

⁶⁵ *Ibid* 828–31, citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642.

⁶⁶ *H Jones and Co Pty Ltd v Municipality of Kingborough* (1950) 82 CLR 282, 317–19 (Dixon J).