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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

LEGISLATION (STATUTORY INTERPRETATION) AMENDMENT BILL 2003

EXPLANATORY STATEMENT

Circulated by the authority of
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Legislation (Statutory Interpretation) Amendment Bill 2003

General Outline

Purpose

1 The Legislation (Statutory Interpretation) Amendment Bill 2003 completes the process of updating and clarifying provisions brought over to the *Legislation Act 2001* from the *Interpretation Act 1967* (repealed). It restates the provisions in chapter 14 (which relate to statutory interpretation) to make the law clearer and more coherent.

2 Proposed chapter 14 is designed to reflect significant developments in the common law of statutory interpretation since the existing provisions in chapter 14 were included in the Interpretation Act some 20 years ago—

- in 1982 (s 11A (Regard to be had to purpose or object of Act)); and
- in 1985 (s 11B (Use of extrinsic material in interpreting an Act)).

3 In fact, this is the only legislative statement, or restatement, in Australia since the mid-1980s of some of the fundamental rules of statutory interpretation. However, the proposed new provisions do not represent a dramatic change in the rules of statutory interpretation.

4 The direction in which the common law has been moving, as reflected by the proposed restatement in the Bill, is as follows:

- towards the consolidation of a purposive approach to the interpretation of legislation (proposed s 139 (Interpretation best achieving Act's purpose))
- towards an increasing stress on the importance of provisions of an Act being read in the total context of the statute (proposed s 140 (Legislative context))
- towards more liberal access to non-legislative material (also known as 'extrinsic material') for the purpose of statutory interpretation than under the existing statutory arrangements (proposed s 141 (Non-legislative context generally), s 142 (Non-legislative context—material that may be considered) and s 143 (Law stating material for consideration in working out meaning)).

Background

5 When the Legislation Act was enacted, its provisions superseded the following:

- much of the *Interpretation Act 1967*
- the *Subordinate Laws Act 1989* and the *Legislation (Republication) Act 1996.*
- the provisions of the *Evidence Act 1971* about legislation

6 The *Statute Law Amendment Act 2001* subsequently transferred most of the remaining provisions of the Interpretation Act to the Legislation Act. The Subordinate Laws Act and Legislation (Republication) Act were repealed by the *Legislation (Consequential Provisions) Act 2001*.

7 The Legislation Amendment Bill 2002 was proposed as the final stage of transferring provisions from the Interpretation Act to the Legislation Act, and therefore provided for the repeal of the Interpretation Act. As part of this proposal, a new chapter 14 (Interpretation of Acts and statutory instruments) was to be inserted into the Legislation Act to restate in an updated form Interpretation Act, sections 11A and 11B.

8 However, the Standing Committee on Legal Affairs when performing the duties of a scrutiny of bills and subordinate legislation committee (the ***Scrutiny Committee***) raised concerns about some of the new provisions to be included in chapter 14 (see *Scrutiny Reports* No 4 (5 March) and No 9 (7 May) of 2002). These concerns were echoed, and a number of others raised, by the ACT Bar Association (the ***Bar Association***) in a submission to members of the Legislative Assembly dated 13 May 2002 (see ***Concerns addressed*** below).

9 As a result of these concerns, the Attorney-General proposed amendments to the Bill with the effect of preserving in Legislation Act, chapter 14 the current form of Interpretation Act, sections 11A and 11B. Those amendments to the Bill were passed, and the *Legislation Amendment Act 2002* was notified on 21 May 2002 with the content of those Interpretation Act provisions relocated to chapter 14.

10 In presenting the amendments, the Attorney-General foreshadowed that further consultation would take place with the Bar Association with a view to revising chapter 14 along lines similar to those originally proposed, but addressing the concerns raised by the Scrutiny Committee and the Bar Association in relation to the previously proposed chapter 14. The views of the Scrutiny Committee have been carefully considered in redrafting chapter 14, and the Bar Association has now agreed on the provisions of a

proposed new chapter 14 (Interpretation of Acts and statutory instruments), to be inserted into the Legislation Act by the current Bill.

Concerns addressed

11 The main concerns expressed by the Scrutiny Committee and the Bar Association in relation to chapter 14, as originally proposed, may be summarised as follows:

- ***Access to law***—would the revised non-legislative material provisions tend to make the law less accessible and more costly?
- ***Separation of powers***—would the mandate given by the revised provisions to consult a wide range of non-legislative material give the courts too much leeway to 'mould' the law in a way that trespasses on the doctrine of separation of powers?
- ***Presumptions of common law***—would the 'best purpose' rule, as drafted in proposed section 139, extinguish common law presumptions regarding the interpretation of legislation?

Access to law and cost of litigation

12 The Scrutiny Committee and the Bar Association expressed the view that by including a reference to a broader class of non-legislative material in the examples to then-proposed section 142 (2), and without a provision like the current section 139 (3) (Interpretation Act, s 11B (3)) (see below), courts and advocates would be obliged to consult too large a range of materials in considering the interpretation of legislation. This would have the undesirable effects of making legislation difficult to understand on its face, particularly for a non-lawyer, and of unduly increasing the costs of litigation (see *Scrutiny Report* No 4, pp 6-8 and *Bar Association Submission* pp 9-11).

13 In particular, the Bar Association expressed concern that courts or tribunals would be permitted to consider material not normally available to the public, such as a constituent letter to a member of the Legislative Assembly or drafting instructions for new legislation (see *Bar Association Submission*, p 9).

14 Legislation Act, section 139 (3), currently provides:

> (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to the material, regard shall be had, in addition to any other relevant matters, to—

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

15 To address the concerns of the Scrutiny Committee and the Bar Association, this provision has been continued in proposed section 141 (2) (a) and (b). Indeed, it has been strengthened by the addition (in proposed s 141 (2) (c)) of a requirement for the court to take into account 'the accessibility of the material to the public'. Reflecting the new, central role of the legislation register in the provision of access to legislative materials in the Territory, proposed section 141 (4) declares that material on the register is taken to be accessible to the public.

16 The approach adopted in proposed sections 141 to 143 is intended as a safeguard against the use of inappropriate material to work out the meaning of an Act. In the Federal Court case of *Commissioner of Taxation vs Murray* ((1990) 21 FCR 436) a private letter to a Minister, an internal departmental minute and correspondence between Ministers (among other documents) were tendered in evidence on a point of statutory interpretation. Justice Hill rejected the material. He held (and Sheppard J agreed) that the test applying under the Commonwealth version of existing Legislation Act, section 139 was whether non-legislative material is 'capable of assisting in the ascertainment of the meaning of [the relevant] provision' (at 449), and that in the case before him they were 'of no assistance' (at 448).

17 The test that will apply under proposed section 141 will be essentially the same: whether the material is capable of assisting in 'working out the meaning of the Act'. It can be expected that a court or tribunal considering the same question would come to the same conclusion as the Federal Court in that case, particularly in the light of the additional protection provided by the proposed new factor of public accessibility to be weighed up in deciding questions of admissibility of non-legislative material.

18 As in existing section 139 (2), proposed section 142 lists a range of documents that may be used to work out the meaning of an Act or statutory instrument. While the list is not exhaustive, it gives a clear indication of the type of material that it is envisaged should properly be relevant to the interpretation of legislation and statutory instruments.

19 As revised in consultation with the Bar Association, the proposed provisions relating to non-legislative material strike an appropriate balance. On the one hand, the potential for the use of the material is clarified and updated to reflect developments in the common law. On the other hand, existing criteria are retained by reference to which limits may be placed on recourse to non-legislative material, together with a new requirement to take into account its accessibility.

Separation of powers

20 The Scrutiny Committee expressed a concern in relation to chapter 14, as previously proposed, that too much power was being offered to the courts to 'mould' the law and become 'part of the legislative process' in offering less restricted access to non-legislative material than before (see *Scrutiny Report* No 4, p 7).

21 The committee's concerns are addressed by the express provision in proposed section 141 (2) (a)—continuing the effect of existing section 139 (3) (a)—that when considering the relevance of non-legislative material to the interpretation of an Act or statutory instrument, a court must take into account the desirability of being able to rely on the ordinary meaning of the words of the law-maker as used in the relevant law, in the overall context of the law. This provision confirms a limit on the degree to which non-legislative material may be used to find a meaning in an Act that is not evident from the language of the Act.

Presumptions of common law

22 Proposed section 139 (1) provides for interpretations that 'would best achieve the purpose of the Act' to be 'preferred to any other interpretation'. The equivalent provision in the Legislation Amendment Bill 2002, as originally proposed, was section 140. Section 140 (2) provided as follows:

> (2) This section applies—
>
> (a) whether or not the Act's purpose is expressly stated in the Act; and
>
> (b) despite any presumption or rule of interpretation.

23 The Bar Association objected to section 140 (2) (b) on the basis that this paragraph appeared to extinguish well-established common law presumptions of statutory interpretation, for example the presumption that the common law is not over-ridden, the presumption against interference with the liberty of a citizen, the presumption against

conferring a right to invade private property, the presumption against the retrospective operation of legislation and the presumption of conformity with international law (see *Bar Association Submission*, p 6).

24 This effect was not intended. As explained in more detail in the clause notes below, proposed section 139 (the equivalent section in the current Bill) has the more modest aim of establishing a rule of priority in any particular case.

25 To remove any suggestion that previously proposed section 140 (2) (b) might have had the absolute effect argued for, the paragraph is not included in section 139 as proposed in the Bill (the effect of previously proposed section 140 (2) (a) is continued in proposed section 139 (2), however). This change to the section as originally proposed is designed to address any concern about inadvertent (or inappropriate) displacement of the common law in this context.

26 Common law presumptions of statutory interpretation will continue to apply where appropriate (see the clause notes below for more detail). This is expressly sanctioned by proposed section 137 (2), which declares that the chapter 'is not intended to be a comprehensive statement of the law of interpretation applying to Acts'.

27 Moreover, proposed section 137 (3) provides that 'in particular, this chapter assumes that the rules and presumptions of common law operate in conjunction with this chapter.'. In the form originally proposed, this subsection also provided for the operation of common law rules or presumptions to be subject to any inconsistency with the chapter, or the Act. This additional provision has been omitted, for the same reason as the change reflected in section 139 in its current form.

Notes on clauses

Clause 1

28 This clause provides for the Act's name.

Clause 2

29 This clause provides for the Act's commencement on the day after the day it is notified under the Legislation Act.

Clause 3

30 The Act is expressed to amend the *Legislation Act 2001*.

Clause 4

31 This clause inserts a new chapter 14 into the Legislation Act.

Proposed chapter 14

Introduction

32 As part of the process of relocating provisions from the Interpretation Act to the Legislation Act, the enacted law relating to statutory interpretation has been restated to make it clearer and more coherent. The new provisions also take account of recent court decisions about statutory interpretation.

33 To place these provisions in context it may be helpful to say something about the respective roles of the courts and the Legislative Assembly in the area of statutory interpretation.

34 Under our system of government and law it is not only the role but also the constitutional duty of the courts to decide the meaning of legislation; in the words of Chief Justice Marshall of the United States Supreme Court, 'to say what the law is' (*Marbury v Madison* (1803) 1 Cranch 136 at p 177 [5 US 87 at p 111], mentioned with approval in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at p 35 per Brennan J).

35 However, it has long been accepted that a Parliament can make rules about the interpretation of its statute book. Interpretation Acts have had a long history in Anglo-Australian law and in some cases their rules have negated common law rules (see Pearce and Geddes, *Statutory Interpretation in Australia* 5th ed (2001), par 6.14).

36 From time to time it has been asked whether Parliament might do more to ensure that the words of its legislation are understood in the way it intended. In the 1980s, most Australian jurisdictions, including the ACT (in Interpretation Act, section 11A) laid down rules clarifying the status of a purposive construction, requiring it to prevail over a construction that did not promote the statutory purpose or object. A few years later, most Australian jurisdictions, again including the ACT (in Interpretation Act, section 11B), introduced more liberal rules about the use of non-legislative material.

37 Even where legislation seeks to confirm an existing common law rule, enactment of a rule in interpretation legislation can play a useful educative role. It can send a strong message to statute users that legislation is drafted with this assumption particularly in mind.

Proposed section 136 Meaning of *Act* in ch 14

38 Chapter 14, as its heading indicates, applies to the interpretation of both Acts and statutory instruments. To simplify the language of the chapter as far as possible, proposed section 136 defines 'Act' to include a statutory instrument.

Proposed section 137 Purpose and scope of ch 14

39 Proposed section 137 (1) states that the purpose of chapter 14 is to provide guidance about the interpretation of Acts (and statutory instruments). Proposed section 137 (2) and (3) makes it clear that chapter 14 complements the common law. There are, for example, many common law presumptions (or legal assumptions) relevant to statutory interpretation. These include:

- the presumption that when general matters are referred to in conjunction with a number of specific matters of a particular kind, the general matters are limited to things similar to the specific matters (*ejusdem generis*—see Pearce and Geddes, paragraphs 4.19 – 4.25)
- the presumption that an express reference to a particular matter indicates that other matters are excluded (*expressio unius est exclusio alterius*—see Pearce and Geddes, paragraphs 4.26 – 4.27)
- the presumption that legislation does not alter common law rights (see Pearce and Geddes, paragraphs 5.21 – 5.27)
- other presumptions mentioned above (***Concerns addressed***—Presumptions of common law)

40 Proposed section 137 (4) emphasises that statutory provisions are to operate alongside the common law as it continues to evolve. Proposed section 137 does not change the common law. It is merely a procedural or clarifying provision.

Proposed part 14.2 Key principles of interpretation

Introduction

41 The heading to proposed part 14.2 emphasises the significance of its provisions by describing them as 'key' principles of interpretation. These are dealt with as follows:

- proposed section 139, which deals with the *purposive approach* to the interpretation of legislation;

- proposed section 140, which deals with legislation being read in the *context* of all of its provisions;
- proposed sections 141 to 143, which deal with the use of *non-legislative material* in the interpretation of legislation.

Proposed section 138 Meaning of *working out the meaning of an Act*

42 The substantive provisions of part 14.2 are each expressed to operate '[i]n working out the meaning of an Act'. Proposed section 138 defines what this phrase means. It provides a statement, in plain terms, of what is to be understood by the notion of 'interpretation' of legislation.

43 The purpose of proposed section 138 is to indicate that the principles of statutory interpretation are to have the broadest operation. For example, they may be applied to confirm or displace an apparent meaning whether or not there is any ambiguity or uncertainty on the face of the provision being interpreted. As may be seen from the discussion about the relevant interpretative principles below, in most respects this broad operation reflects the position at common law.

44 In one respect the application of proposed section 138 to proposed sections 141 to 143 may go further than the existing common law. The cases mentioned below in relation to these sections only allow recourse to non-legislative material for the purpose of finding out the 'mischief' that the statute being interpreted was intended to cure. This restriction is not present in current Legislation Act, section 139, and will not apply to proposed sections 141 to 143, which are to replace the current provision.

45 The result is that recourse to non-legislative materials may be permitted, not only to find out the mischief of a statute, but also for other reasons. For example, non-legislative materials may be relevant to working out the parliamentary history behind the passage of the law in question, or an amendment to the law. This may not always be able to be characterised as finding out the mischief, but is an acknowledged aspect of statutory interpretation—'working out the meaning of an Act'—at common law. So this approach does not represent a particularly significant extension of the law. It has the advantage that it avoids overly technical distinctions by rationalising and simplifying the operation of the chapter as a whole.

Proposed section 139 Interpretation best achieving Act's purpose

46 Proposed section 139 restates existing Legislation Act, section 138 (previously, Interpretation Act, s 11A) and in the process makes changes to take account of subsequent judicial interpretation. Existing section 138 provides:

> **138 Regard to be had to purpose or object of Act**
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

47 In 1990 a majority of the High Court found that the Victorian equivalent of this provision did not require an interpretation that would *best* achieve the object of the Act; '[r]ather it is a limited choice between 'a construction that would promote the purpose or object [of the Act]' and one 'that would not promote that purpose or object' ' (quoting the Victorian provision, which is in precisely the same terms as existing Legislation Act, s 138—*Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 262 per Dawson, Toohey and Gaudron JJ). To remedy this deficiency, the proposed section indicates that the interpretation that would *best* achieve the purpose of an Act is to be preferred to *any other interpretation*. A provision similar to proposed section 139 has been in existence in the *Acts Interpretation Act 1954* (Qld), section 14A for a number of years.

48 In applying proposed section 139, a number of considerations are relevant:

- *First*, regard must be had to the purpose of the Act in deciding whether there are any alternative interpretations of the provision in question (see *Mills v Meeking* (1990) 91 ALR 16 at 30-31, per Dawson J, discussing the Cwlth equivalent of existing Legislation Act, s 138).
- *Second*, if a number of alternative interpretations are available, the interpretation to be given priority is that which *best* achieves the purpose of the Act. This is an implication from the common law purpose rule, as noted in *Nimmo v Alexander Cowan & Sons Pty Ltd* [1968] AC 107, at 122, per Guest LJ (cited in the judgment of the majority of the High Court in *Chugg* at 261).
- *Third*, to qualify in the competition for 'best achieving' the purpose of a law, an interpretation must be 'otherwise open' (*Trevison v FCT* (1991) 101 ALR 26 at 31, per Burchett J, noted in Pearce and Geddes, par 2.9). By this is meant 'open' through

a reasonable construction of the words of the Act in context (see proposed s 140) by reference to any relevant non-legislative material (see proposed ss 141-143).

49 Proposed section 139 will not always apply, however. It will not apply if there is no interpretation that will 'best achieve' the purpose of the relevant law, whether because no such interpretation is 'reasonably open', or, conceivably, a number of interpretations are found to *equally* achieve the purpose. In these circumstances, any relevant common law presumptions about interpretation may readily be applied, by virtue of the operation of proposed section 137 (3) ('this chapter [14] assumes that common law presumptions operate in conjunction with this chapter'). See comments above (***Concerns addressed***, Presumptions of common law) about the concerns the Bar Association raised in relation to the previously proposed version of section 139.

50 A further aspect of proposed section 139 is that it does not distinguish between different kinds of statutes, and is consistent with the approach adopted by the courts in recent times in dealing with revenue and penal statutes. For example, Gibbs J (as he then was) in *Beckwith v R* (1976) 135 CLR 569 explained the modern approach to the interpretation of penal statutes as follows:

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

51 Proposed section 139 provides one of 'the ordinary rules of construction' that must be applied in the interpretation of revenue and penal statutes. However, the common law presumptions may still be applied if there is no application for such 'ordinary' rules.

Proposed section 140 Legislative context

52 Proposed section 140 addresses the vice of reading statutory words and provisions in isolation. Statutory words and provisions need to be read in context (see Pearce and Geddes, par 4.2). The courts have frequently recognised that statutory words (like all words) derive their 'colour and content' from their context (eg *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461 per Viscount Simonds). It is now

axiomatic that, under the common law, Acts must be read as a whole (see *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384).

53 However, the common law has, at least in the past, maintained obstacles in the way of interpreters taking account of certain provisions of Acts. Provisions of Acts that, on the traditional view, were not to be taken account of in the absence of ambiguity in the provision concerned included the long title to the Act (see Pearce and Geddes, par 4.37), any preamble to the Act (see Pearce and Geddes, par 4.39), headings (see Pearce and Geddes, par 4.41-4.42) and punctuation (see Pearce and Geddes, par 4.44). To this might be added objects clauses (see *Leask v Commonwealth of Australia* (1996) 187 CLR 579 at 591 per Brennan CJ).

54 In 1997 the High Court made it clear that such limitations in relation to particular provisions of an Act, to the extent that they still existed, no longer applied. In *CIC Insurance Ltd*, 4 members of the court held as follows:

> It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901* (Cwlth), the court may have regard to reports of law reform bodies to ascertain the mischief that a statute is intended to cure. Moreover, *the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise*, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy: (*Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461, cited in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, 315). Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd* ((1986) 6 NSWLR 363 at 388), if the apparently plain words of a provision are read in the light of the mischief that the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent: *Cooper Brookes (Wollongong) Pty Ltd v FCT* ((1981) 147 CLR 297 at 320-1.)

(at 408, per Brennan CJ, Dawson, Toohey and Gummow JJ, with whom Gaudron J generally agreed. Emphasis added.)

55 In this case and others the High Court has made it clear that even *non-legislative* material may be considered and may have an effect on interpretation without there being an ambiguity in the provision concerned.

56 Proposed section 140 will not, then, alter the common law. It is consistent with the ruling that 'context be considered in the first instance'. Nevertheless, by its inclusion amongst other 'key principles' in the Legislation Act, the Legislative Assembly is highlighting the particular importance of reading statutory provisions in the context of the whole Act in which they are contained.

57 Another feature of the proposed section is the way in which it clarifies *what is* the legislative context that must be considered. Because the obligation in section 140 is limited to consideration of 'the Act', the provision gives clear guidance to statute users. Legislation Act, section 126 declares certain material to be part of an Act (including headings, examples, schedules etc.) and section 127 declares other material not to form part of an Act (notes, tables of contents etc.).

58 The fact that material forming part of an Act must be considered does not mean, of course, that all material forming part of the Act has equal weight. Courts are accustomed to weighing the indications of meaning provided by different parts of an Act. Thus, for instance, a heading can generally be expected to be given less weight than a substantive provision (see Pearce and Geddes, par 4.41-4.42).

Proposed sections 141, 142 and 143 Non-legislative context

General

59 The proposed sections re-enact existing Legislation Act, section 139 (formerly Interpretation Act, s 11B) with some changes. This section deals with the use of non-legislative material in the interpretation of legislation. Non-legislative material (also known as 'extrinsic material') is material not forming part of the legislation being interpreted, for example, a Minister's presentation speech, or the report of an Assembly Committee, or of a royal commission cited in debates in the Legislative Assembly.

Redundancy of existing section 139 (1)
Proposed s 141 (1)

60 Legislation Act, section 139 (1) currently provides, as does similar legislation in most Australian jurisdictions:

> (1) … in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to the material—
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) to determine the meaning of the provision when—
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

61 The application of this provision has been held to be subject to significant restrictions. A majority of the High Court has stated in relation to the Commonwealth equivalent to existing section 139 (1) (*Acts Interpretation Act 1901* (Cwlth), s 15AB):

> Reliance is also placed [by counsel arguing the case] on a sentence in the second-reading speech of the Minister when introducing the Consequential Provisions Act, but that reliance is misplaced. Section 15AB of the *Acts Interpretation Act 1901* (Cwlth), as amended, does not permit recourse to that speech for the purpose of departing from the ordinary meaning of the text unless either the meaning of the provision to be construed is ambiguous or obscure or in its ordinary meaning leads to a result that is manifestly absurd or is unreasonable.

(*Re Australian Federation of Construction Contractors; ex parte Billing* (1986) 68 ALR 416 at 420, per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ)

62 Existing section 139 is, however, now largely redundant because of changes to the common law made by the High Court in several recent cases. Beginning with *CIC Insurance Ltd*, the High Court made it clear that no ambiguity or obscurity was necessary for a court to take account of non-legislative material such as a law reform report. Further, and importantly, consideration of this material helped the court in interpreting the provision in a way that departed from its ordinary (or apparent) meaning.

63 Then, in *Newcastle City Council v GIO General Ltd* ((1997) 191 CLR 85), the High Court had regard to an explanatory statement as well as a law reform report in similar circumstances. In this case the court made it clear that, even though the conditions in Acts Interpretation Act, s 15AB (Cwlth) were *not* satisfied, the common law independently authorised recourse to the material concerned. Toohey, Gaudron and Gummow JJ held that:

> In the interpretation of s 40, the Court may consider the Explanatory Memorandum relating to the Insurance Contracts Bill 1984 which was laid before the House of Representatives by the responsible Minister. The common law, *independently of s 15AB* of the *Acts Interpretation Act 1901* (Cwth), permits the Court to do so in order to ascertain the mischief that the statute was intended to cure.

((1997) 191 CLR 85 at 99 (Emphasis added) (McHugh J similarly held in a separate judgment ((1997) 191 CLR 85 at 112).)

64 In *Attorney-General v Oates* ((1999) 198 CLR 162 at 175), the High Court held that at common law, irrespective of the statutory conditions laid down in the relevant non-legislative material provisions, the 'legislative history' could be considered to find out 'the mischief'. In this case the court considered various materials including a presentation speech made by a Minister (at 176-177).

65 In each of these cases, the High Court has said that, independently of statutory provisions such as existing section 139, the common law authorises recourse to material that is evidence of 'the mischief'. The court has explained that 'the mischief' refers to 'the problems for the resolution of which a statute is enacted' (*North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595 at 614n, followed in *Oates*).

Relevant matters to be considered
Proposed s 141 (2) & (3)

66 As discussed above (see ***Concerns addressed***, Access to law and cost of litigation), in response to issues raised by the Scrutiny Committee and the Bar Association, proposed section 141 (1) will permit non-legislative material to be considered for 'working out the meaning of an Act', but proposed section 141 (2) will expressly require courts to consider three criteria in deciding whether to consider non-legislative material and the weight to be given to it:

- the desirability of people being able to rely on the ordinary meaning of the Act (s 141 (2) (a))
- the need not to prolong litigation (s 141 (2) (b)).
- the public accessibility of the material (s 141 (2) (c)).

67 The first 2 of these essentially reflect existing section 139 (3). The criterion of accessibility has been added to include a clear statement of the government's commitment to the policy of access to law. Section 141 (3) provides that the list of

criteria is not exhaustive: other matters may be found by a court to be relevant for the purposes of assessing whether, and how, to use non-legislative material in interpreting an Act or statutory instrument.

Non-legislative material on the legislation register
Proposed s 141 (4)-(7)

68 Proposed section 141 (2) (c) provides that the accessibility of material to the public is a matter to be weighed in deciding whether, and how, to consider non-legislative material in interpreting legislation. Proposed section 141 (4) declares that material on the legislation register (www.legislation.act.gov.au) 'is taken to be accessible to the public'. Thus inclusion on the register is a certain method for ensuring that non-legislative material relevant to statutory interpretation is made publicly accessible.

69 Section 141 (5) and (6) are proposed to avoid the need for technical proof of non-legislative material—for example, an explanatory statement such as this one—that is included on the legislation register. Proof is not required if the material is authorised by the parliamentary counsel (proposed s 141 (5)). Proposed section 141 (6) provides that authorisation is presumed, unless the contrary is proved, if the material purports to be authorised (for example, if there is a statement to that effect on the website).

70 Proposed section 141 (7) is included to make it clear that other laws may provide a method different from that set out in section 141 (6) for deciding how courts or tribunals are to inform themselves about non-legislative material for proposed section 141.

Indicative list of non-legislative material
Proposed s 142

71 Like existing Legislation Act, section 139 (2), proposed section 142 is intended to give assistance in deciding the range of non-legislative material that may be relevant to working out the meaning of an Act. It reflects the types of material that have, in Australia in recent years, been considered in the process of statutory interpretation. Proposed section 142 (3), as does existing section 139 (2), also provides that the material that may be considered is not limited to that listed in the table.

72 The Scrutiny Committee expressed concern about previously proposed section 141, example 7, which set out circumstances in which an international agreement to which Australia is a party (in the example, the *Universal Declaration of Human Rights*) might be considered by a court or tribunal in working out the meaning of an Act, even though

the Act does not mention the agreement. Proposed section 142 would likewise permit consideration of such agreements (see table 1, item 7). However, as discussed in more detail above (***Concerns addressed***, Access to law; Separation of powers), reasonable constraints on whether and how to consider any non-legislative material are effectively continued by the inclusion, in proposed section 141 (2), of the criteria in existing section 139 (3).

Express provision authorising consideration of non-legislative material
Proposed s 143

73 Section 143 will apply if there is an express provision of an Act providing that particular non-legislative material may be considered (of the type mentioned in existing Legislation Act, s 139 (2) (i)) in interpreting that Act or another Act. Section 143 provides that this does not in itself prevent other non-legislative material (whether of the same or similar kind) from being used in interpreting the Act or another Act.

Summary
Proposed ss 141-143

74 In summary, proposed sections 141 to 143 complement proposed section 140. Under section 140 the provisions of an Act *must* be read in the context of the Act as a whole in working out the meaning of the Act. There are no restrictions on the kinds of provisions that may be considered or the purposes for which they may be considered. Under section 141 any material not forming part of the Act *may* be considered in working out the meaning of an Act.

75 Proposed section 142 provides an indicative list of the types of non-legislative material that may be relevant, but the list is not exhaustive. There are no categorical restrictions on the kinds of non-legislative material that may be considered or the purposes for which they may be considered. Similarly, proposed section 143 provides that the existence of express provisions in an Act permitting access to particular non-legislative material does not prevent access to other materials for working out the meaning of the Act. However, proposed section 141 will require a court or tribunal to consider relevant criteria, including those relating to ordinary meaning, cost and accessibility, in deciding whether to permit non-legislative material to be used at all, or in assessing the weight to be given to it.