

DRAFTING STATUTES AND STATUTORY INTERPRETATION: EXPRESS OR ASSUMED RULES?

JACINTA DHARMANANDA*

The High Court describes legislative intent as the outcome of ‘accepted’ rules of statutory interpretation ‘assumed’ by the judiciary, Parliament and the executive. The drafters of statutes, the parliamentary counsel, have been included as key players who work on the basis of these ‘accepted’ rules. But their work proceeds on explicit, not assumed, rules. At the federal level at least, there is publicly available material revealing principles actually adopted by the Commonwealth parliamentary counsel when drafting statutes. This article examines these materials and argues for the merit in considering them as an extrinsic interpretative aid. Knowing and understanding them will have implications for the ‘accepted’ rules of statutory interpretation and the notion of legislative intent.

I INTRODUCTION

In a High Court decision in 2005, counsel was making submissions to the Court about whether, as a matter of statutory construction, a statutory body was bound by certain legislation. One of the questions was whether the relevant Act was drafted with an understanding of a previous judicial interpretation of a related Act.¹ In the course of a party making a submission that it had been, Hayne J noted that ‘it would be necessary, I would have thought, to take account of any legitimate extrinsic material to which one might properly have resort’,² to which Gleeson CJ added, ‘[l]ike a drafting manual’.³

Despite the perspicacious words of the former Chief Justice, the use of

* Assistant Professor, Law School, University of Western Australia; PhD Candidate, College of Law, Australian National University. The research reflected in this article is supported by an Australian Government Research Training Program (RTP) Scholarship. ORCID ID 0000-0001-5163-3340. I am grateful for the valuable comments of Professor Peter Cane and Professor Dennis Pearce on earlier drafts of this article and also for the comments from the two anonymous reviewers.

1 Transcript of Proceedings, *McNamara (McGrath) v Consumer Trader and Tenancy Tribunal* [2005] HCATrans 348, 100–7 (*McNamara*).

2 Ibid 1156–7.

3 Ibid 1159.

drafting manuals as aids in statutory interpretation has, in Australia, received little attention. This is one of the few references made in Australian case law, Commonwealth or state, to drafting manuals as potentially relevant extrinsic material.⁴ They are not, it would seem, material that is readily thought of as such an aid in statutory interpretation.

While the reasons for this absence are no doubt varied, for Commonwealth statutes this situation seems at odds with the material available. Manuals and directions written predominantly by the Commonwealth Office of Parliamentary Counsel ('OPC') for its parliamentary counsel to use when drafting statutes are extensive and are publicly and readily available.

This article explores the merit of considering these drafting materials as interpretative aids in the interpretation of federal statutes. It does so by focusing on key concepts that are central to the interpretative task in Australia. It is worth noting at this point that this article does not address Commonwealth legislative instruments. These are largely subject to separate OPC drafting materials to the extent that they are drafted by the OPC.⁵ This apparent demarcation between the drafting of primary legislation and delegated legislation raises interesting and distinct issues in the context of interpretation. It is therefore the subject of separate research and is beyond the scope of this article.

Part II provides an overview of the material that purportedly guides the Commonwealth parliamentary drafter when drafting federal government statutes. This part also addresses the legal basis for recourse to these documents as interpretative aids under Australian law.

Part III explores what we might learn about the formation of a statute from these documents. This is the most substantial section of the article. It addresses their value by reference to the three central concepts of statutory interpretation: text, context and purpose. Having done that, it then explores the notion that use of the knowledge contained in these materials during the interpretative exercise would contribute to the legitimacy of the High Court's notion of legislative intent. Legislative intent, expressed to be the outcome of 'accepted' rules of interpretation between the judiciary, the legislature and the executive, is the ultimate objective of the application of the three central concepts. This article argues that the knowledge within the OPC drafting guides has the potential to

4 Apart from *McNamara* (n 1), as at 19 April 2019, a search of the Austlii Classic Australian case law database using the terms 'drafting manual', 'drafting direction' and 'drafting guide' revealed only two judicial decisions referring to these documents in a legislative drafting context: see *Re Seoud and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2011) 126 ALD 593, 597 [13] (Fergie DP); *Eckett v Eckett* (2010) 237 FLR 324, 336 [73] (Coleman, Warnick and Thackray JJ) ('*Eckett*').

5 The OPC website contains materials relevant to the drafting of legislative instruments: see, eg, Office of Parliamentary Counsel (Cth), *Instruments Handbook* (Document Release No 3.5, May 2019) <www.opc.gov.au/publications/opc-instruments-handbook>; Office of Parliamentary Counsel (Cth), *Subordinate Legislation* (Drafting Direction No 3.8, July 2017) <www.opc.gov.au/drafting-resources/drafting-directions> ('*Subordinate Legislation*').

contribute to the legitimacy of those so called ‘accepted’ understandings.

In Part IV, I address the limitations of the material. Like all extrinsic materials, its utility must be considered in the context of the particular interpretative question and the attributes of that material. This part provides some factors to consider when assessing the weight and value.

II NATURE AND AVAILABILITY OF OPC DRAFTING MATERIALS

A Overview of the Drafting Materials

The OPC is the statutory agency established to draft, among other things, Commonwealth government Bills to be introduced into Parliament, and amendments made in Parliament.⁶ OPC drafters, all of whom have legal qualifications, are a centralised group of specialist legislative counsel located in Canberra.⁷ Generally, they are the only people permitted to do the drafting of government Bills and government amendments.⁸ Their ‘core function’ is to ‘draft legally effective, [and] clearly expressed legislation that best achieves the [government’s] policy intentions’.⁹

The OPC is a part of the executive arm of government. It may be instructed by any federal government department but sees its ‘client’ as ‘the Government as a whole’.¹⁰ It is, arguably, the most ‘independent player’ in the Bill making process.¹¹

To guide the drafting process, the OPC has written an extensive collection of material about its own drafting. A summary follows.

- The *OPC Drafting Manual*: this provides an ‘overview’ of drafting and is intended as a ‘starting point’, highlighting main points and referring to other documents that deal with various matters in greater detail.¹² Despite its self-identified object as an overview, it contains some directives to drafters.

6 *Parliamentary Counsel Act 1970* (Cth) ss 2–3 (*‘Parliamentary Counsel Act’*).

7 Office of Parliamentary Counsel (Cth), *OPC’s Drafting Services: A Guide for Clients* (Guide, 6th ed, July 2016) 7 [16] <www.opc.gov.au/drafting-resources/drafting-manuals> (*‘A Guide for Clients’*).

8 *Legal Services Directions 2017* (Cth) sch 1 para 2.1, app A para 3 (*‘Legal Services Directions’*). This is known as ‘tied’ work: at app A para 3A. Under para 3B of app A of the *Legal Services Directions* (n 8), the ‘Attorney-General may give approval for a legal services provider other than [the OPC] to undertake tied work’. More on this in Part IV below.

9 Peter Quiggin, ‘Training and Development of Legislative Drafters’ [2007] (2) *The Loophole* 14, 15 [3] (*‘Training and Development of Legislative Drafters’*).

10 Office of Parliamentary Counsel (Cth), *OPC Drafting Manual* (Manual, 3.2 ed, July 2019) 21 [149] <www.opc.gov.au/drafting-resources/drafting-manuals> (*‘OPC Drafting Manual’*).

11 *Ibid* 25 [184].

12 *Ibid* 5 [1]–[2].

- Drafting directions: these are a series of over 30 ‘authoritative’ pronouncements on a range of drafting matters which are issued by the First Parliamentary Counsel (‘FPC’)¹³ ‘after consultation with all drafters and the editorial staff’.¹⁴ OPC drafters are required to comply with these directions.¹⁵ Drafting directions are divided into four categories on the OPC website: ‘[p]resentation and form of legislation’, English ‘[u]sage’, ‘[c]ontent’ and ‘[p]rocedural matters’ (although there is overlap between these categories, especially the first three).¹⁶ Some are ‘general’ and some ‘only deal with one issue’.¹⁷
- The *Plain English Manual*:¹⁸ this manual is the foundation of the ‘plain language’ drafting style of the OPC (more on this later).¹⁹ This document has the status of a drafting direction, which, as noted above, means that OPC drafters must comply with it.²⁰ To the extent that it is inconsistent with a drafting direction or a word note (see below), the latter documents prevail.²¹
- The *Amending Forms Manual*: this manual ‘sets out the amending forms that OPC drafters use in amending Bills and instruments, and in amendments to Bills before Parliament’.²² Again, all drafters are required to follow this document.²³
- Word notes: these are a select group of notes that ‘contain detailed rules about the formatting of documents and preparation of Bills’.²⁴ Drafters ‘need to be very familiar with the matters covered by Word Notes’²⁵ as the format of

13 The FPC is the head of the OPC and is a statutory appointment under s 2 of the *Parliamentary Counsel Act* (n 6).

14 *OPC Drafting Manual* (n 10) 5 [3].

15 *Ibid*; Quiggin, ‘Training and Development of Legislative Drafters’ (n 9) 20 [54].

16 These categories reflect the *OPC Drafting Directions Index*: Office of Parliamentary Counsel (Cth), *Drafting Directions Index* (Index, 21 August 2019) <www.opc.gov.au/drafting-resources/drafting-directions>.

17 Quiggin, ‘Training and Development of Legislative Drafters’ (n 9) 20 [54].

18 Office of Parliamentary Counsel (Cth), *Plain English Manual* (Manual, 1 August 2016) <www.opc.gov.au/drafting-resources/drafting-manuals> (*‘Plain English Manual’*).

19 Carmel Meiklejohn, *Fitting the Bill: A History of Commonwealth Parliamentary Drafting* (Office of Parliamentary Counsel (Cth), 2012) 230–2. This used to be called ‘plain English’ but the OPC now uses the term ‘plain language’: see *OPC Drafting Manual* (n 10) 13 [89]–[90].

20 *Plain English Manual* (n 18) 1 note 2; Office of Parliamentary Counsel (Cth), *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (Drafting Direction No 2.1, 1 March 2016) 2 [1] <www.opc.gov.au/drafting-resources/drafting-directions> (*‘English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling’*).

21 *Plain English Manual* (n 18) 1 note 2.

22 Office of Parliamentary Counsel (Cth), *Amending Forms Manual* (Manual, 15th ed, May 2019) (*‘Amending Forms Manual’*). Description of the *Amending Forms Manual* (n 22) is from the OPC website: Office of Parliamentary Counsel (Cth), *Drafting Manuals* (Web Page) <www.opc.gov.au/drafting-resources/drafting-manuals> (*‘OPC Drafting Manuals Web Page’*).

23 *OPC Drafting Manuals Web Page* (n 22); *OPC Drafting Manual* (n 10) 10 [55]–[57].

24 Quiggin, ‘Training and Development of Legislative Drafters’ (n 9) 21 [56]. Selected notes available at: Office of Parliamentary Counsel (Cth), *Word Notes* (Web Page) <www.opc.gov.au/drafting-resources/word-notes>.

25 *OPC Drafting Manual* (n 10) 21 [146].

federal legislation, including amending legislation, is ‘strictly controlled’.²⁶

- Two other documents: the *OPC’s Drafting Services: A Guide for Clients*,²⁷ and the OPC’s guide to *Reducing Complexity in Legislation*.²⁸

All the above documents are, at the time of writing (April 2019), publicly available on the OPC website.²⁹

A number of these materials in turn refer to one other key document, also publicly available but not drafted by the OPC. This is *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* prepared by the Criminal Justice Division of the Attorney-General’s Department (*AGD Offences Guide*).³⁰ The purpose of the *AGD Offences Guide* is to ‘assist officers in Australian Government departments to frame criminal offences, infringement notices, and enforcement provisions’.³¹ The *AGD Offences Guide* appears to have been prepared in response to an overhaul of Commonwealth criminal offences in the 1990s which culminated in the *Criminal Code Act 1995* (Cth). The ‘new framework ... [of the Code] led to an intense examination of the method of drafting Commonwealth offences, which eventually resulted in standardised drafting practices’.³² Although not written by the OPC, OPC drafters should refer to the *AGD Offences Guide* when drafting provisions dealing with matters covered by the Guide.³³

The above listed OPC authored documents and the *AGD Offences Guide* (‘OPC Drafting Materials’) appear to be the primary documents that guide the OPC. There are other documents mentioned in the OPC Drafting Materials. Many appear to deal primarily with administrative, editing, or process matters.³⁴ Others, such

26 Ibid 6 [16], 10 [55].

27 *A Guide for Clients* (n 7).

28 Office of Parliamentary Counsel (Cth), *Reducing Complexity in Legislation* Guide, Document Release No 2.1, June 2016) <www.opc.gov.au/sites/default/files/reducingcomplexity_0.pdf> (*Reducing Complexity in Legislation*).

29 Office of Parliamentary Counsel (Cth), *Drafting Resources* (Web Page) <www.opc.gov.au/drafting-resources>. A perusal of the websites for other Australian parliamentary counsel offices (states and territories) reveals varying degrees of publicly available drafting manuals and guides. None, however, at the time of writing are as extensive and comprehensive as those made publicly available by the Commonwealth OPC.

30 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide, September 2011) <www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx> (*AGD Offences Guide*).

31 Ibid 5 [1.1].

32 Daniel Lovric, ‘Legislative Counsel and the Judiciary: Divergences in Statutory Interpretation?’ [2015] (2) *The Loophole* 42, 49 (‘Legislative Counsel and the Judiciary’).

33 *OPC Drafting Manual* (n 10) 16 [112].

34 For brief descriptions of these documents see *ibid* 20–1 [141]–[147].

as the Drafting Notes and FPC emails, appear more relevant to drafting.³⁵ But, as these documents are neither publicly available (and so are not easily accessible as potential interpretative aids) nor have the authority of drafting directions,³⁶ they are not addressed in this article.³⁷

B Authority and Reliability of the OPC Drafting Materials

The most immediately notable feature of the OPC Drafting Materials in terms of their potential utility as interpretative aids is that, with the exception of the *AGD Offences Guide*, they are authored by the very people who draft federal government Bills.³⁸ In this sense, they are a direct source of information about choices made by the drafter.

Second, the information in the OPC Drafting Materials represents a standard or benchmark for government statutes. One of the objectives of having these documents is for the OPC to have ‘consistency in the presentation and form of legislation’ in order to provide ‘a coherent statute book’.³⁹ To this end, the OPC Drafting Materials contain ‘a substantial number of rules which must be followed when drafting legislation’.⁴⁰ As noted in one of the few judicial decisions that have referred to them, the OPC drafting manuals contain prescribed policies which are intended to be ‘reflected in all legislation of the Commonwealth Parliament’.⁴¹ Many of the documents appear to be regularly revised.⁴²

Drafting directions are of particular importance. They are an ‘authoritative series of pronouncements’⁴³ which means that they ‘contain rules that should be followed by drafters unless they obtain an exemption in a particular case from [the] FPC’.⁴⁴ As previously noted, the *Plain English Manual* and the word notes have a similar status.

Accordingly, it seems reasonable to view these materials as objectively constructed principles, practices, and policies governing the consistent drafting

35 Drafting Notes are notes prepared by individual OPC drafters ‘more in the nature of essays’: Quiggin, ‘Training and Development of Legislative Drafters’ (n 9) 21 [55]. FPC emails are emails from the First Parliamentary Counsel (‘FPC’) to drafters about drafting matters: *OPC Drafting Manual* (n 10) 5 [11].

36 *OPC Drafting Manual* (n 10) 5–6 [6]–[13].

37 Given its high level of generality, also not addressed is the Attorney-General’s Department (Cth), *Australian Administrative Law Policy Guide* (Guide, 2011), produced by the administrative law section of the Attorney-General’s Department and referred to in the OPC Drafting Materials.

38 One exception may be where a government Bill is amended in Parliament by a private Member. See also the reference to ‘outsourcing’ in Part VI below.

39 *OPC Drafting Manual* (n 10) 6 [14].

40 *Ibid.*

41 *Eckett* (n 4) 336 [73] (Coleman, Warnick and Thackray JJ).

42 A perusal of the documents shows that most are recent editions.

43 *OPC Drafting Manual* (n 10) 5 [3].

44 *Ibid* 5 [5].

of federal government Bills that, in the absence of an exception, OPC legislative counsel are expected to follow.

It might therefore be argued that these drafting manuals are ‘akin to other general reference sources that are used in statutory interpretation, such as dictionaries and grammar books, because they contain guidelines for the use of language and grammar in writing’.⁴⁵ This is one perspective. Arguably, as has been noted in the United States (‘US’), they have greater potential utility than such reference guides.⁴⁶ Dictionaries and grammar books, while useful as a starting point for ‘ordinary’ meaning, are sources generic to language, but have no inherent or rational link to *statutory* language either generally or for a particular jurisdiction. The OPC Drafting Materials are relevant not just to statutory language, but to statutes generated for a particular jurisdiction by a particular body. Consequently, they would seem to fall on the spectrum of external materials somewhere between generic sources (like dictionaries) and sources unique to the creation of a particular statute (such as a second reading speech).

These features may place the OPC Drafting Materials in the genre of ‘soft law’.⁴⁷ Soft law ‘means different things to different people’⁴⁸ and possibly occupies ‘a broad section of the spectrum between unstructured discretion and legislation’.⁴⁹ But a ‘distinguishing feature of soft law is that it is intended to influence behaviour’.⁵⁰ Content, rather than label, is key.⁵¹

Empirically, of course, there is always the question of the extent to which exceptions are sought from the standards or principles in these documents, or indeed the extent to which the documents are followed at all. Currently, there is no available empirical evidence about the extent of OPC drafters’ actual use of

45 Grace E Hart, ‘State Legislative Drafting Manuals and Statutory Interpretation’ (2016) 126(2) *Yale Law Journal* 438, 468.

46 Hart argues that such materials ‘shed light on the shared understandings of the bill drafters’: *ibid.*

47 I am grateful to my doctorate supervisor, Professor Peter Cane, for this idea. See also DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 2 [1.1].

48 Greg Weeks, ‘The Use and Enforcement of Soft Law by Australian Public Authorities’ (2014) 42(1) *Federal Law Review* 181, 182.

49 *Ibid.*, citing Michelle Cini, ‘From Soft Law to Hard Law?: Discretion and Rule-Making in the Commission’s State Aid Regime’ (Working Paper, Robert Schuman Centre for Advanced Studies European Forum, January 2000) 4.

50 Robin Creyke and John McMillan, ‘Soft Law v Hard Law’ in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 377, 379.

51 *Ibid.* 380.

the materials.⁵² Even so, it is not unreasonable to make a working assumption that OPC drafting behaviour is at the least influenced by the directives in these materials. Given their source, detail and self-proclaimed authoritative status, they arguably provide a presumptive position about the drafting choices in OPC federal government Bills.

The *AGD Offences Guide* is in a slightly different category to other OPC Drafting Materials. If an OPC drafter is required to draft provisions for criminal offences, infringement notices, or enforcement provisions then the drafter must ‘have regard to’ the *AGD Offences Guide*, but it is ‘neither binding nor conclusive’.⁵³ It might also be noted that the current *AGD Offences Guide* edition (2011) is several years old. Despite this, it appears that the *AGD Offences Guide* is still regularly cited. The OPC has continued to refer to it in its revised editions of drafting directions (which, as noted, are authoritative documents).⁵⁴ It also continues to be cited in explanatory memoranda and scrutiny committee reports for federal Bills.⁵⁵ So, even accepting an arguably softer status, the *AGD Offences Guide* should be considered a document of influence in the drafting of Commonwealth offence legislation.

C Legal Authority to Access

Assuming that the reliability and authority of the OPC Drafting Materials means they are potentially useful, the next threshold question is whether we are permitted by statutory interpretation law to consider them.

It is not contentious that recourse to extrinsic materials for federal legislation is

- 52 Some empirical work has been done on drafting in the US: Abbe R Gluck and Lisa Schultz Bressman, ‘Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I’ (2013) 65(5) *Stanford Law Review* 901 (‘Statutory Interpretation from the Inside: Part I’); Lisa Schultz Bressman and Abbe R Gluck, ‘Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II’ (2014) 66(4) *Stanford Law Review* 725 (‘Statutory Interpretation from the Inside: Part II’); Victoria F Nourse and Jane S Schacter, ‘The Politics of Legislative Drafting: A Congressional Case Study’ (2002) 77(3) *New York University Law Review* 575. In Australia, there is some empirical research on ‘plain English’ drafting but not specifically on drafting manuals: Jeffrey Barnes, ‘The Plain Language Movement and Legislation: Does Plain Language Work?’ (PhD Thesis, La Trobe University, 2013).
- 53 Office of Parliamentary Counsel (Cth), *Offences, Penalties, Self-Incrimination, Secrecy Provisions and Enforcement Powers* (Drafting Direction No 3.5, 13 February 2013) 3 [1]–[2] (‘*Offences, Penalties, Self-Incrimination, Secrecy Provisions and Enforcement Powers*’).
- 54 See, eg, *ibid* pt 1; Office of Parliamentary Counsel (Cth), *Legislation Approval Process* (Drafting Direction No 4.6, June 2019) 8 [35]; Office of Parliamentary Counsel (Cth), *Referral of Drafts to Agencies* (Drafting Direction No 4.2, February 2019) 11–12, 14–15 (‘*Referral of Drafts to Agencies*’).
- 55 See, eg, Explanatory Memorandum, Underwater Cultural Heritage Bill 2018 (Cth) 7, 13; Explanatory Memorandum, Treasury Laws Amendment (Illicit Tobacco Offences) Bill 2018 (Cth) 14, 15, 24. The Senate Standing Committee for the Scrutiny of Bills has also cited the *AGD Offences Guide* (n 30) in several of its 2018 reports: see, eg, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 8 of 2018, 15 August 2018) 19 [1.56], 25–6 [1.78], 27 [1.82], 40 [2.7], 58 [2.41], 63 [2.52].

governed by both statutory and common law.⁵⁶ Either authority would seem to permit access to the OPC Drafting Materials.

The statutory basis for recourse to extrinsic materials to construe federal legislation is s 15AB(1) of the *Acts Interpretation Act 1901* (Cth) ('*AIA*'). This provision has three alternative threshold 'tests', that stipulate *when* an interpreter may refer to materials that do not form part of the statute.⁵⁷

In contrast, the wording of s 15AB(1) of the *AIA* regarding *what* material may be considered is 'open-ended'.⁵⁸ Section 15AB(1) of the *AIA* expressly provides that 'if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of' a provision, then it may be considered. This is further emphasised by the introductory wording of s 15AB(2) of the *AIA*, which states that the list of materials contained within it are '[w]ithout limiting the generality of subsection (1)'.⁵⁹

Consequently, there is no apparent limitation in s 15AB of the *AIA* on the typology of material that can be considered when interpreting statutes, provided that one of the thresholds in s 15AB(1) is met. This construction is supported by parliamentary materials relating to the Bill introducing s 15AB of the *AIA*.⁵⁹ Judicial and other commentary since then also supports this view.⁶⁰

So, assuming one of the limbs of s 15AB(1) of the *AIA* is satisfied, drafting materials are permissible extrinsic materials under the *AIA* if they are capable of assisting in the ascertainment of meaning.

If s 15AB of the *AIA* is not available, the common law principle governing

56 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 595 [83], 599 [98] (Heydon and Crennan JJ); *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273, 280 [11] (McHugh ACJ, Gummow and Hayne JJ), quoting *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) ('*CIC Insurance*') and *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112 (McHugh J) ('*Newcastle City Council*'); *Burns v Minister for Health* (2012) 45 WAR 276, 284 [27]–[28] (Martin CJ), citing *CIC Insurance Ltd* (n 56) 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) and *Newcastle City Council* (n 56) 112–13 (McHugh J); *NAQF v Minister for Immigration & Multicultural and Indigenous Affairs* (2003) 130 FCR 456, 472 [72] (Lindgren J). See also RS Geddes, 'Purpose and Context in Statutory Interpretation' (2005) 2(1) *University of New England Law Journal* 5, 22–3; Jacinta Dharmananda, 'Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation' (2014) 42(2) *Federal Law Review* 333, 341.

57 *Acts Interpretation Act 1901* (Cth) s 15AB(1) ('*AIA*'). All other Australian jurisdictions, except South Australia, have equivalent legislative provisions, but not all those legislative provisions have the same thresholds: *Legislation Act 2001* (ACT) s 141 ('*Legislation Act ACT*'); *Interpretation Act 1987* (NSW) s 34 ('*Interpretation Act NSW*'); *Interpretation Act 1978* (NT) s 62B ('*Interpretation Act NT*'); *Acts Interpretation Act 1954* (Qld) s 14B ('*Acts Interpretation Act Qld*'); *Acts Interpretation Act 1931* (Tas) s 8B ('*Acts Interpretation Act Tas*'); *Interpretation of Legislation Act 1984* (Vic) s 35 ('*Interpretation of Legislation Act Vic*'); *Interpretation Act 1984* (WA) s 19 ('*Interpretation Act WA*').

58 Geddes (n 56) 23.

59 Explanatory Memorandum, Acts Interpretation Amendment Bill 1984 (Cth) 3 [7]; Commonwealth, *Parliamentary Debates*, Senate, 8 March 1984, 583 (Gareth Evans).

60 *Singh v Commonwealth* (2004) 222 CLR 322, 336 [20] (Gleeson CJ) ('*Singh*'); Pearce and Geddes (n 47) 107 [3.17]; Matthew T Stubbs, 'From Foreign Circumstances to First Instance Considerations: Extrinsic Material and the Law of Statutory Interpretation' (2006) 34(1) *Federal Law Review* 103, 109; Geddes (n 56) 23.

recourse to extrinsic materials has ‘a broader application’.⁶¹ That common law principle is derived from passages in *CIC Insurance Ltd v Bankstown Football Club Ltd* (*‘CIC Insurance’*) which state that statutory text must be construed in ‘context’; that context must be considered from the start of the interpretation task (ambiguity is not required) and ‘uses “context” in its widest sense’.⁶² This principle has ‘been “cited too often to be doubted”’.⁶³

This ‘concept of context extends beyond the rest of the Act and extrinsic material as instanced by s 15AB(2)’.⁶⁴ *CIC Insurance* states that ‘widest sense’ includes ‘the existing state of the law and the mischief which ... one may discern the statute was intended to remedy’.⁶⁵ The idea of ascertaining the ‘mischief’ or purpose seems to have encompassed a broad range of matters. Context has been described as the ‘background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture’.⁶⁶ Familiar examples are parliamentary materials, the pre-existing statutory and common law,⁶⁷ legislative evolution,⁶⁸ statutes *in pari materia*,⁶⁹ international laws,⁷⁰ the *Australian Constitution*,⁷¹ contemporary knowledge and conditions,⁷² and commercial circumstances.⁷³ In other words, ‘any material that may throw light on the meaning that the enacting legislature intended to give to the provision’.⁷⁴

61 Pearce and Geddes (n 47) 39 [2.6].

62 *CIC Insurance* (n 56) 408 (Brennan CJ, Dawson, Toohey and Gummow JJ). A precursor to this passage was Mason J in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315.

63 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 374 [37] (Gageler J) (*‘SZTAL’*), quoting *Federal Commissioner of Taxation v Jayasinghe* (2016) 247 FCR 40, 43 [5], [7] (Allsop CJ). See also *SZTAL* (n 63) 368 [14] (Kiefel CJ, Nettle and Gordon JJ); *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456, 465 [19] (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ) (‘an entirely conventional approach’).

64 Geddes (n 56) 24.

65 *CIC Insurance* (n 56) 408 (Brennan CJ, Dawson, Toohey and Gummow JJ), referring to *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 312, 315.

66 *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 196 (McHugh J). Although dealing with a constitutional issue, McHugh J (in dissent) was making a point for all legal instruments. See also *Singh* (n 60) 332 [12], 336 [19] (Gleeson CJ); *Wilson v Anderson* (2002) 213 CLR 401, 418–19 [9] (Gleeson CJ) (*‘Wilson’*).

67 See, eg, *R v Lavender* (2005) 222 CLR 67, 81–5 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

68 The previous enactment forms of a statute: see James Steele, ‘Statutory Forebears: Legislative Evolution as a Means of Statutory Interpretation’ (2017) 39(3) *Statute Law Review* 303, 309–10.

69 *SZTAL* (n 63) 371 [24] (Kiefel CJ, Nettle and Gordon JJ).

70 *Momcilovic v The Queen* (2011) 245 CLR 1, 36–7 [18] (French CJ) (*‘Momcilovic’*).

71 There is a presumption that the law is constitutional: Pearce and Geddes (n 47) 219 [5.8].

72 See, eg, *Aubrey v The Queen* (2017) 260 CLR 305, 317, 320 [24] (Kiefel CJ, Keane, Nettle and Edelman JJ) (*‘Aubrey’*) (current attitudes as to whether sexually transmitted diseases could constitute the infliction of ‘grievous bodily harm’); *Monis v The Queen* (2013) 249 CLR 92, 131 [66]–[67] (French CJ) (*‘Monis’*) (political context).

73 *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376, 389–91 (French CJ, Kiefel, Bell, Keane and Gordon JJ for the Court).

74 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 230 [124] (McHugh J). See also Murray Gleeson, ‘The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights’ (2009) 20(1) *Public Law Review* 26, 29.

Understanding context may be laborious and time consuming, or straightforward, depending upon the particular statute.⁷⁵ It ‘comes in many forms’.⁷⁶ Ultimately, to be relevant, contextual matter must have a rational connection to the quest to understand the meaning of the statutory text.⁷⁷ In Australian law, that rational connection is sometimes referred to as ‘utility’.⁷⁸

The OPC Drafting Materials may be seen as a reflection of the accepted practices and values that surround the drafting of a government Bill by the OPC. Their contextual value lies in improving our understanding of the nature, meaning and objectives of the language used and the subject matter the target of the language.⁷⁹ The object of considering context in its ‘widest sense’ is to contribute to “‘informed interpretation’”.⁸⁰ As such, there is a strong argument that such materials constitute part of the context ‘in which a statute should be read’.⁸¹

As both statutory and common law therefore leave open the possibility of recourse to drafting manuals as extrinsic aids, the next step is to examine their potential value using key statutory interpretation concepts.

III POTENTIAL VALUE OF THE DRAFTING MATERIALS

Drafting manuals are not of the same nature as many of the extrinsic sources that are regularly referred to by the judiciary. The rational connection of, say, a second reading speech or a parliamentary committee report to a statute is immediately apparent — it is part of the genesis of that particular statute. That connection gives it automatic legitimacy. It is then up to the interpreter to explore the probative value of that speech or report. The identification of purpose is a

75 Justice John Middleton, ‘Statutory Interpretation: Mostly Common Sense?’ (2016) 40(2) *Melbourne University Law Review* 626, 632; John Burrows, ‘The Changing Approach to the Interpretation of Statutes’ (2002) 33(3) *Victoria University of Wellington Law Review* 561, 565–7.

76 John Basten, ‘Statutory Interpretation: Choosing Principles of Interpretation’ (2017) 91(11) *Australian Law Journal* 881, 884 (‘Choosing Principles of Interpretation’).

77 Gleeson (n 74) 29, citing Francis Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th ed, 2008) 588–90, 919 and *CIC Insurance* (n 56) 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

78 *SZTAL* (n 63) 374 [37] (Gageler J), citing *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ), quoting *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

79 To be distinguished from the subjective intent of the drafter, which is not relevant. This distinction has been made in constitutional interpretation with respect to the drafting of Australian Constitutional Convention Debates: see *Singh* (n 60) 337–8 [21]–[22] (Gleeson CJ). See below Part IV.

80 Gleeson (n 74) 29, quoting Bennion (n 77) 589.

81 BJ Ard, ‘Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation’ (2010) 120(1) *Yale Law Journal* 185, 200. See also Hart (n 45) 479. It is also arguable that drafting manuals may be regarded as works of reference, like a dictionary, to which the judiciary will give judicial notice. I am grateful to one of the anonymous reviewers for this point.

value often cited, though it does not seem to be expressed in exclusive terms.⁸² The OPC Drafting Materials in contrast are not linked to any one statute. They relate to federal government statutes. It is reasonable therefore that their potential utility may lie in different attributes. They may be likened to federal interpretation legislation. The *AIA* operates as a manual, guide and dictionary for reading federal legislation. While having legislative force, the *AIA* contains few absolute directives and mostly operates as a presumptive starting point, subject to the text, context and purpose of the statute itself.

Drafting materials, of course, have no legislative status. American literature and commentary by Australian parliamentary counsel suggests a number of ways that drafting manuals may have utility in statutory interpretation. In summary, they may:

- establish the foundations for linguistic conventions, word usage and principles that are used for drafting;⁸³
- contribute to our understanding of the style and structure of statutes which in turn assists a user's understanding of what the statute is communicating;⁸⁴ and
- guide our understanding of the choices made by the drafter.⁸⁵

In an Australian context, these three points can loosely be categorised as points relevant to text, context and purpose respectively. This framework is used to discuss the contribution of the OPC Drafting Materials below. One additional concept is also discussed. That is the implications that the materials have for the concept of legislative intent.

A Conventions and Principles for Text

That the text of a statute is central to statutory interpretation is both self-evident and required as a matter of legal principle. The High Court has reiterated often

82 Use of context for purpose has been couched in non-exclusive or general terms: *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 412 [89] (Kiefel J) (*Certain Lloyd's Underwriters*) ('generally speaking'); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ) (*Alcan (NT) Alumina*) ('context, which includes the general purpose and policy of a provision'). Note William N Eskridge Jr, 'Legislative History Values' (1990) 66(2) *Chicago-Kent Law Review* 365, 367–8 (emphasis omitted): Eskridge identifies three justifications for relying on legislative history — 'authority value', 'purpose value' and 'truth value'.

83 Ard (n 81) 187–94; Hart (n 45) pt II; Amy Coney Barrett, 'Congressional Insiders and Outsiders' (2017) 84 (Special Issue) *University of Chicago Law Review* 2193, 2202. The extent to which drafting manuals should include such contents is addressed in Helen Xanthaki, 'Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?' (2010) 4(2) *Legisprudence* 111.

84 Wim Voermans, 'Styles of Legislation and Their Effects' (2011) 32(1) *Statute Law Review* 38, 39; Ard (n 81) 192.

85 See generally Ard (n 81); Lovric, 'Legislative Counsel and the Judiciary' (n 32); Xanthaki (n 83) 123.

that the task of statutory interpretation must begin with the text.⁸⁶ Common law principle informs us that this means starting with the ‘ordinary and grammatical’ meaning of that text.⁸⁷

The OPC Drafting Materials prescribe standards for, and practices of, language usage. While the *Plain English Manual* and *OPC Drafting Manual* provide the foundation, the drafting directions provide greater detail. Much of the guidance in the OPC Drafting Materials, and particularly the drafting directions, in relation to word use is, it must be said, quite technical and detailed. But there are a number of practically useful aspects.

The first one relates to the idea of the ordinary meaning. As a starting point to determine this, it is not uncommon for a court to refer to a dictionary.⁸⁸ At least one Commonwealth legislative counsel has noted in commentary that they are unlikely to use dictionaries.⁸⁹ But, to the extent they do, the OPC Drafting Materials state that the *Macquarie Dictionary* is the ‘best source of information on current Australian spelling and usage’.⁹⁰ This raises a question about the judiciary’s regular reference to other dictionaries, such as the *Oxford Dictionary*.⁹¹

Second, it is clear from the OPC Drafting Materials, in particular the ‘usage’ category of drafting directions, that there are standard forms of expressions, defined terms and terminology. For example there is standardised terminology for different kinds of commencement provisions,⁹² for application provisions⁹³ and for referencing.⁹⁴ There is a drafting direction to use particular words or expressions

86 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157, 190 [103] (Keane, Nettle and Gordon JJ); *SZTAL* (n 63) 368 [14] (Kiefel CJ, Nettle and Gordon JJ); *Alcan (NT) Alumina* (n 82) 46 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

87 *Australian Education Union v Department of Education and Children’s Services* (2012) 248 CLR 1, 13 [26] (French CJ, Hayne, Kiefel and Bell JJ) (*Australian Education Union*’); *Alcan (NT) Alumina* (n 82) 31 [4] (French CJ).

88 See, eg, *Minister for Immigration and Border Protection v Kumar* (2017) 260 CLR 367, 386 [54] (Nettle J) (*Kumar*’); *R v GW* (2016) 258 CLR 108, 122 [26] (French CJ, Bell, Gageler, Keane and Nettle JJ); *King v Philcox* (2015) 255 CLR 304, 320 [24] (French CJ, Kiefel and Gageler JJ), 328 [48] (Keane J), 347 [118] (Nettle J); *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 23 [42] (French CJ, Hayne, Kiefel and Nettle JJ), 32 [76] (Gageler J); *Monis* (n 72) 126 [56] (French CJ), 156 [154] (Hayne J), 182 [246] (Heydon J).

89 Lovric, ‘Legislative Counsel and the Judiciary’ (n 32) 44.

90 *OPC Drafting Manual* (n 10) 14 [94]; *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (n 20) 6 [33] (on spelling); Office of Parliamentary Counsel (Cth), *Formatting Rules for Legislation and Other Instruments Drafted in OPC* (Word Note No 4.2, June 2019) 30 [174]–[175] (*Formatting Rules for Legislation and Other Instruments Drafted in OPC*’) (on italicisation). The *OPC Drafting Manual* (n 10) also refers to use of ‘the Style Manual’, presumably Commonwealth, *Style Manual* (John Wiley & Sons, 6th rev ed, 2002), a general text about publications; in the event of a conflict, the *Macquarie Dictionary* prevails: *OPC Drafting Manual* (n 10) 14 [94].

91 See above n 88, where most of the examples are use of the *Oxford Dictionary*.

92 Office of Parliamentary Counsel (Cth), *Commencement Provisions* (Drafting Direction No 1.3, May 2019).

93 Office of Parliamentary Counsel (Cth), *Use of Various Expressions in Draft Legislation* (Drafting Direction No 2.2, 21 August 2019) pt 4 (*Use of Various Expressions in Draft Legislation*’).

94 Office of Parliamentary Counsel (Cth), *References to Cases in Notes* (Drafting Direction No 3.13, October 2012); Office of Parliamentary Counsel (Cth), *References to the Parliament* (Drafting Direction No 3.14, October 2012).

when striving to distinguish purpose and result in prohibitions, and details of how to express numbers, percentages and fractions.⁹⁵ Other drafting directions give specific information about how to express concepts about certain subjects such as government (how to refer to Ministers or departments), the financial sector (how to refer to different financial institutions) and family relationships (definitions of ‘child’ and ‘parent’).⁹⁶ Working assumptions are made about the use of particular words (such as ‘reasonable’ and ‘fringe benefit’) where a particular result is desired.⁹⁷ The *Plain English Manual* provides a table of ‘traditional’ expressions that are no longer acceptable (since ‘plain language’ became the style) and their appropriate ‘simple’ replacements.⁹⁸

These guides and expectations about the text to be employed by the drafter are specific and particular. Consequently, they are likely only to be relevant to an interpretative task when text that can be subjected to one of these ‘rules’ is being construed. They generally do not provide guidance as a matter of principle. However, to the extent that an interpretative task touches on such text, the accepted understanding of the drafters of the use of particular terminology as reflected in these documents establishes a norm for that terminology. That norm can operate as a plausible benchmark in statutory interpretation. Consequently, a deviation from those established ‘norms’ might be seen as a deviation from the meaning assumed in the materials.

An example is phrases using variations of the word ‘reasonable,’ used in numerous federal statutes. The relevant drafting direction directs the drafter as to which of these phrases should be regarded as importing a subjective and objective element, despite, as the drafting direction itself explains, there being some discrepancy in case authority about this.⁹⁹ This awareness may assist the court in, for example, reasoning about provisions in the *Migration Act 1958* (Cth).¹⁰⁰

Third, there is a brief but instructive section on punctuation. DC Pearce and RS Geddes have pointed out that, although the traditional view of the courts is to give little regard to punctuation, there has been evidence of a shift in the courts’ approach.¹⁰¹ For some jurisdictions, this common law position about

95 *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (n 20) pts 1, 5.

96 See generally *Use of Various Expressions in Draft Legislation* (n 93).

97 *Ibid* 3–5 [7]–[18]. See also Office of Parliamentary Counsel (Cth), *Definitions* (Drafting Direction No 1.5, May 2019) (‘*Definitions*’).

98 *Plain English Manual* (n 18) app 3.

99 *Use of Various Expressions in Draft Legislation* (n 93) 4–5 [10]–[18].

100 See, eg, *Commonwealth v Okwume* (2018) 160 ALD 515, where the court was required to consider, among other things, the phrase ‘reasonably suspects’ in s 189 of the *Migration Act 1958* (Cth).

101 Pearce and Geddes (n 47) 206–8 [4.59].

the importance of punctuation has been changed by legislation.¹⁰² For federal legislation, the OPC Drafting Materials provide support for the shift in the courts' approach: drafters are instructed that punctuation should be avoided unless it is 'required ... by the rules of grammar' or 'to help convey a provision's meaning'.¹⁰³ In other words, punctuation, where used in federal legislation, has been carefully considered by OPC drafters and is intended to have a role in the text. So if, as Leeming JA has stated, a 'prerequisite to relying on punctuation is being satisfied that it has been used consciously'¹⁰⁴ then the OPC Drafting Materials would seem to provide evidence of such consciousness.

Further, the OPC Drafting Materials contain a high degree of detail about amending Bills. As a large number of Commonwealth Bills passed each year are in fact Bills that amend existing Acts (rather than being principal Bills), this information is practically significant. For the preparation of amending Bills, the OPC drafter is directed to the 148 pages of the *OPC Amending Forms Manual*.¹⁰⁵ This manual, supplemented by other materials,¹⁰⁶ addresses various linguistic and structural aspects of drafting amending legislation. For example, there are numerous directives explaining the language practice for different forms of amendment (repealing, substituting, adding, amending definitions and headings). These provide a strong starting point for understanding the language used for an amending Act. A simple example is the 'rule' that if a new principal Act is to be enacted, any consequential amendments, and any required application, saving or transitional provisions, are to be included in a separate Bill.¹⁰⁷ Understanding this approach would tend to negate any argument that the principal Act itself amends another Act.

All of the above also leads to a broader point. An important rationale behind the existence of the OPC Drafting Materials is to, as noted above, enhance consistency and coherency across the federal statute book. This has implications for the role of consistency in statutory interpretation. As well as the presumption about word consistency within a statute,¹⁰⁸ there is also a presumption that the legislature intends to give the same meaning to a word or phrase in a statute when

102 The interpretation legislation of the Australian Capital Territory, Queensland, South Australia and Victoria expressly refers to the punctuation: *Legislation Act ACT* (n 57) s 126(6); *Acts Interpretation Act Qld* (n 57) s 14(6); *Acts Interpretation Act SA* (n 57) s 19(1)(d); *Interpretation of Legislation Act Vic* (n 57) ss 35(b)(i), 36(3B).

103 *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (n 20) 5 [29].

104 *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633, 659 [105]. Although a contractual interpretation decision, Leeming JA was discussing punctuation in the context of the grammatical meaning of legal texts generally. Pearce and Geddes (n 47) make a similar point on the basis of modern drafting practices: at 207 [4.59].

105 *OPC Drafting Manual* (n 10) 10 [55]–[59].

106 See, eg, *Use of Various Expressions in Draft Legislation* (n 93); *Subordinate Legislation* (n 5) 9 [41]–[43].

107 *Amending Forms Manual* (n 22) 14 [27].

108 *Registrar of Titles (WA) v Franzone* (1975) 132 CLR 611, 618 (Mason J) ('*Franzone*').

used in a subsequent statute in the same jurisdiction.¹⁰⁹ Statutes *in pari materia* can engage this presumption — another way of saying that their text, context and purpose indicate that there should be consistency between the two statutes. Given that there has been ‘little discussion in Australia’ about what constitutes *in pari materia*,¹¹⁰ the OPC Drafting Materials, often being tailored to a particular subject matter, may provide useful support for an analysis of whether consistency is appropriate.

B Understanding Intrinsic Context

As noted earlier, context is a well-established concept in statutory interpretation. Such context includes ‘intrinsic’ context; that is, “‘the instrument viewed as a whole’”.¹¹¹ The totality of the statute is also important for the purpose of the Act, which, it is well established, must ultimately be found in its ‘text and structure’.¹¹² For federal legislation, the ‘whole’ comprises all constituent parts: language, headings, readability aids (such as examples and objects clauses), long title, format, and structure.¹¹³

Understanding the statutory instrument as a whole is likely the area where the OPC Drafting Materials provide the greatest value for interpretation.

The materials guide us about the style of drafting adopted by OPC drafters. Understanding style is important for at least two reasons. First, because ‘[t]he way legislation, as a vehicle of symbolic communication, voices the message (the style of legislation) ... matters. The medium of legislation is in part the message itself’.¹¹⁴

The second more specific reason is that the *AIA* informs us that, where words have changed between earlier and later federal statutes to adopt a ‘clearer style’ then we should not automatically take the changed words to express a new idea.¹¹⁵ An understanding of the evolution of the drafting style of the OPC may assist in assessing changed wording.

109 *Lennox v Gibson & Howes Ltd* (1919) 26 CLR 285, 287 (Lord Shaw), cited in *SZTAL* (n 63) 371 [24] (Kiefel CJ, Nettle and Gordon JJ).

110 Pearce and Geddes (n 47) 129 [3.37].

111 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ) (*‘Project Blue Sky Inc’*), quoting *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ). See also *Certain Lloyd’s Underwriters* (n 82) 389 [24] (French CJ and Hayne J), 411 [88] (Kiefel J).

112 *Certain Lloyd’s Underwriters* (n 82) 389 [25] (French CJ and Hayne J) (emphasis added), citing *Lacey v A-G (Old)* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (*‘Lacey’*).

113 *AIA* (n 57) s 13.

114 Voermans (n 84) 39.

115 *AIA* (n 57) s 15AC; Dennis Pearce, *Interpretation Acts in Australia* (LexisNexis Butterworths, 2018) 90–4 [3.85]–[3.93].

As noted, the OPC refers to its current drafting style as ‘plain language’ drafting.¹¹⁶ It originated in the 1980s under the direction of FPC Ian Turnbull, who initiated a change in style focusing on plain language and readability.¹¹⁷ It was an important departure from the ‘traditional style’ that Australia had inherited from the United Kingdom¹¹⁸ which had become ‘elaborate’ and often ‘unnecessarily complex’.¹¹⁹

Although first published in 1993,¹²⁰ the *Plain English Manual* has been subject to revision and ‘continues to provide the foundation for OPC’s approach to plain language drafting’.¹²¹ Essentially, this manual describes a range of techniques, attempting to strike a balance between precision and simplicity to make laws easier to understand to the extent possible given the complexity of the policy to be addressed.¹²² That ‘foundation’ encourages ‘good’ writing habits (such as well constructed short sentences), rejects most traditional writing habits (such as unnecessarily long expressions and certain phrases) and focuses on structure.¹²³ It also encourages the use of readability aids within the Act to assist readability (such as headings, defined terms, objects clauses, notes, examples and graphs).¹²⁴

Familiarity with the *Plain English Manual* assists in understanding the post-1990s drafting style of the OPC. Conversely, it also means that pre-1990s statutes should be read from a different perspective, given they were not drafted in the ‘plain language’ style. It is also important to be aware of the incremental nature of the development of the current style since the 1990s. Drafters are warned to ‘use your discretion’ and to ‘be alert’ when it comes to using previous Commonwealth legislation as precedent.¹²⁵ The judiciary and other interpreters may be wise to heed this warning when it comes to analysing older statutes or using the principle *in pari materia* for federal statutes. There is the concern that ‘judges may place too high a weight on perceived differences (or similarities) between provisions in various statutes’, especially given the time constraints that drafters often operate

116 *OPC Drafting Manual* (n 10) 13 [90]. To be distinguished from the broader plain language in law movement: see Victorian Law Reform Commission, *Plain English and the Law* (Report, rev ed, 2017) (*‘Plain English and the Law’*).

117 Meiklejohn (n 19) 230–1; IML Turnbull, ‘Clear Legislative Drafting: New Approaches in Australia’ (1990) 11(3) *Statute Law Review* 161, 165.

118 *Plain English Manual* (n 18) 5.

119 Turnbull (n 117) 162.

120 Meiklejohn (n 19) 232.

121 *OPC Drafting Manual* (n 10) 13 [91]. For an explanation of some of the technical drafting changes see Edwin Tanner, ‘Legislating to Communicate: Trends in Drafting Commonwealth Legislation’ (2002) 24(4) *Sydney Law Review* 529.

122 *Plain English Manual* (n 18) 6 [11]; *Reducing Complexity in Legislation* (n 28) 2 [10], 5–6 [32]–[33], 21 [132].

123 *Plain English Manual* (n 18) chs 3, 4; Turnbull (n 117) 166–70.

124 *Plain English Manual* (n 18) 32–4 [154]–[169]. Some examples are given in Turnbull (n 117) 169–72. See also *OPC Drafting Manual* (n 10) Attachment A; Office of Parliamentary Counsel (Cth), *Numbering and Lettering* (Drafting Direction No 1.7, October 2012). Note *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (n 20) 2 [2].

125 *Plain English Manual* (n 18) 5 [9]. Drafters are also warned to be cautious about using legislation from other jurisdictions: *Use of Various Expressions in Draft Legislation* (n 93) 3 [2].

under.¹²⁶

As well as style, much can also be learned about the structure and format of a federal Act.

For federal statutes, format and structure are governed by rules in the word notes. The ‘fundamental reason for these rules is to maintain consistency in the format of Commonwealth legislation’ and to prevent drafters from ‘spend[ing] time trying to decide what is the “best” [formatting] approach’.¹²⁷ Like other authoritative drafting practices, these rules are approved by the FPC and departure requires consultation with the FPC.¹²⁸

The word notes provide templates and rules to be used for formatting and placement of headings, schedules, commencement provisions, notes, examples, formatting of defined terms, formulas, tables, preambles, paragraphing, numbering, lettering, use of italics, capitals, and so on.¹²⁹ A few word notes address Bills covering a particular subject.¹³⁰

Many of the rules are highly technical or mechanical and so are unlikely to be useful to the interpreter. But they do inform the reader about the layout that is generic to all Commonwealth government statutes, or relevant to statutes on a particular subject matter (more on this below). This can have repercussions for interpretation. For example, one of the formatting rules is that if a note is at the end of a provision and the drafter wishes to indicate that the note only relates to one subsection of that provision then the drafter should do so by the inclusion of a reference in a certain place in the note.¹³¹ Not to do so, therefore, indicates that the note applies to the whole provision.

The word notes may also be useful for those readers who have not read a substantial amount of Commonwealth legislation. As the *Amending Manual* does for amending Acts, the word notes provide a ‘short cut’ to knowledge about the expected structure of Commonwealth statutes.

Other documents provide guidance on how drafters use components, particularly

126 This point was made by OPC parliamentary counsel Daniel Lovric in his presentation: Daniel Lovric, ‘Teaching Legislative Drafting and Statutory Interpretation from the Perspective of Legislative Counsel’ (Speech, Symposium, LaTrobe Law School Centre for Legislation, Its Interpretation and Drafting, 26 October 2017) 7.

127 *Formatting Rules for Legislation and Other Instruments Drafted in OPC* (n 90) 1 [3]–[4].

128 *Ibid* 2–3 [11]–[14].

129 Office of Parliamentary Counsel (Cth), *Formulas* (Word Note No 3.6, July 2016); Office of Parliamentary Counsel (Cth), *Tables* (Word Note No 3.4, July 2016); *Formatting Rules for Legislation and Other Instruments Drafted in OPC* (n 90).

130 See, eg, Office of Parliamentary Counsel (Cth), *Formatting Social Security and Veterans’ Affairs Bills* (Word Note No 4.6, July 2016); Office of Parliamentary Counsel (Cth), *Formatting of Excise Tariff Proposals and Bills* (Word Note No 4.4, July 2018).

131 *Formatting Rules for Legislation and Other Instruments Drafted in OPC* (n 90) 26–7 [143]–[144].

readability aids.

One example is the simplified outline, a regular feature of Commonwealth statutes. A drafting direction devoted to this feature explains that the object of the simplified outline is for an ‘educated reader’ to ‘easily gain a general understanding of what the legislation is about’.¹³² Drafters are directed that the writing style of this feature may be less formal¹³³ than the substantive provisions and, while not intended to be comprehensive, should “‘tell a story’”.¹³⁴ The simplified outline must have substantive provisions underlying it and the drafter must strive to ensure that the simplified outline does not conflict with those provisions.¹³⁵ Significantly, the simplified outline is distinguished from ‘objects’ or ‘purpose’ provisions which have a more ‘aspirational’ role.¹³⁶ This knowledge may allow a swift disposal of arguments relying on specific words in a simplified outline,¹³⁷ and supports an approach which distinguishes it from a purpose provision.

A second example is the long title. Long titles have been used at common law as interpretative aids, even before the enactment of s 13 of the *AIA* in its current form.¹³⁸ The OPC clearly considers that long titles should be helpful, an approach consistent with judicial decisions.¹³⁹ It is the umbrella for all matters included in a Bill. Typical to a long title are ‘catch all’ generic words such as ‘for related purposes’ or ‘for other purposes’.¹⁴⁰ Drafters work on the assumption that the latter is wider than the former, but neither will allow a parliamentary amendment that is not within the title or not relevant to the subject matter of the Bill.¹⁴¹

Apart from the assistance in the materials in relation to specific contextual items, there are two aspects of more general application. The first concerns syntactical presumptions.

In Australia, syntactical presumptions are regular sections of statutory

132 Office of Parliamentary Counsel (Cth), *Simplified Outlines* (Drafting Direction No 1.3A, November 2016) 4 [19], where it states that an educated reader may or may not have legal training or specialist knowledge.

133 *Ibid* 7–8 [48]–[50].

134 *Ibid* 5 [24].

135 *Ibid* 5–6 [30].

136 *Ibid* 9 [57]–[59]. The *Plain English Manual* (n 18) also states that an objects clause is to give a ‘bird’s eye view’ of a statute: at 32 [154].

137 See, eg, *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393, 417 (Moore, Kenny and Tracey JJ for the Court).

138 See Pearce and Geddes (n 47) 192–3. Section 13 of the *AIA* (n 57) was enacted in its current form by sch 1 item 22 of the *Acts Interpretation Amendment Act 2011* (Cth).

139 Office of Parliamentary Counsel (Cth), *Long and Short Titles of Bills and References to Proposed Acts* (Drafting Direction No 1.1, May 2019) 4 [19] (*‘Long and Short Titles of Bills and References to Proposed Acts’*). Pearce and Geddes (n 47) 193 [4.48] notes that ‘Members of the High Court regularly call on the long title as an aid to interpretation’.

140 *Long and Short Titles of Bills and References to Proposed Acts* (n 139) 2 [7].

141 See *ibid* 2–3 [2], [7]–[8], citing House of Representatives (Cth), *Standing Orders* (4 December 2017) standing order 150(a).

interpretation textbooks and are not uncommonly engaged by the judiciary.¹⁴² One of the surprising aspects of the OPC Drafting Materials is the lack of express reference to linguistic presumptions. There is little indication among the detail contained in the OPC Drafting Materials that these are used to guide drafting.

Some of the directions in the drafting materials can arguably be ‘matched up’ with known common law linguistic principles, such as:

- the direction to be ‘ruthless in eliminating unnecessary words’¹⁴³ appears reflective of the common law principle that all words have work to do;¹⁴⁴
- the ‘one expression, one meaning’ approach¹⁴⁵ is consistent with the principle that words are assumed to be used consistently across an Act;¹⁴⁶
- the direction to use ‘a short generic word to cover the alternatives’¹⁴⁷ rather than a string of alternative words may be an attempt to engage the *ejusdem generis* presumption;¹⁴⁸ and
- there is an oblique reference to the ‘always speaking’ principle.¹⁴⁹

But these principles are not explicitly identified. This lack of attention is reflected in commentary of former and current legislative counsel which indicates that, although drafters may be ‘well aware’¹⁵⁰ of common law syntactical presumptions, they ‘don’t generally draft in reliance on maxims’.¹⁵¹

Perhaps such principles are relied upon ‘unconsciously’ by the drafter,¹⁵² or they are of limited use.¹⁵³ But the lack of explicit reference must give us pause to question, or at least closely assess, the weight to be given to them when construing

142 See, eg, Pearce and Geddes (n 47) 169–86.

143 *Plain English Manual* (n 18) 15 [57].

144 *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ), cited in *Project Blue Sky Inc* (n 111) 382 [71] (McHugh, Gummow, Kirby and Hayne JJ).

145 *OPC Drafting Manual* (n 10) 11 [67]; *Definitions* (n 97) 3 [5].

146 *IMM v The Queen* (2016) 257 CLR 300, 339 [143] (Nettle and Gordon JJ) (citations omitted); *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645, 660 [32] (French CJ, Crennan, Kiefel and Bell JJ), citing *Franzon* (n 108) 618 (Mason J).

147 *Plain English Manual* (n 18) 15 [57].

148 *R v Regos* (1947) 74 CLR 613, 623 (Latham CJ).

149 *Plain English Manual* (n 18) 21 [84].

150 Eamonn Moran, ‘Principles of Statutory Interpretation’ (2017) 5 *Judicial College of Victoria Journal* 45, 51.

151 Peter Quiggin, ‘Statutory Construction: How to Construct, and Construe, a Statute’ in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 78, 88 (‘How to Construct, and Construe, a Statute’). See also Lovric, ‘Legislative Counsel and the Judiciary’ (n 32) 48 (drafters have a ‘relatively blunt approach’ to use of presumptions); Hilary Penfold, ‘Legislative Drafting and Statutory Interpretation’ (2006) 7(4) *The Judicial Review* 471, 488 (drafters ‘think very hard’ before relying on presumptions).

152 Penfold (n 151) 485.

153 *Ibid* 487.

statutes.¹⁵⁴

A second consideration is the importance of the subject matter of the statute to the drafting of that statute. The modern mantra of text, context and purpose means that we interpret statutes as a generic class of document. Formerly strict approaches to particular genres of statute, such as taxation or penal statutes, have softened.¹⁵⁵ There are still exceptions. Beneficial provisions may attract a liberal interpretation,¹⁵⁶ statutes implementing international treaties have tailored interpretative rules,¹⁵⁷ and provisions abrogating so called ‘fundamental rights’ (if this can be considered one subject) may engage the ‘principle of legality’.¹⁵⁸

For the OPC drafter, however, many linguistic practices and standards are more specifically tailored to a Bill’s, or a provision’s, subject matter. This is reflected in the ‘Content’ category of drafting directions on the OPC website. For example, there are materials specific to constitutional law issues; taxation; maritime or offshore areas; Commonwealth liability; conferral and exercise of powers; criminal offences, penalties and enforcement powers; evidence; governance of Commonwealth bodies; tribunals and other administrative bodies; subordinate legislation; provisions affecting Australian governments (providing one of the few instances where a substantive statutory interpretation presumption is referred to); and provisions that implement international treaties or conventions.¹⁵⁹

All prescribe, to varying degrees, the choice of words and terminology in the context of that subject matter and, in some instances, explain the policy behind that approach.

For example, for a Bill that establishes a new Commonwealth body, the drafting direction on this topic contains numerous standard provisions and precedents for decision making, appointments, remuneration, terminations, disclosure of interests, and powers. These are just some of numerous topics addressed for the

154 Empirical work in the US has suggested that the common law linguistic maxims most used by the courts are the ones least used by the drafters, even though the drafters were aware of those maxims: Gluck and Bressman, ‘Statutory Interpretation from the Inside: Part I’ (n 52) 930. See also Nourse and Schacter (n 52) 600–1.

155 For taxation, see Pearce and Geddes (n 47) 385–96 [9.35]–[9.49]. For penal statutes, see *Alcan (NT) Alumina* (n 82) 49 [57] (Hayne, Heydon, Crennan and Kiefel JJ); cf *Brown v Tasmania* (2017) 261 CLR 328, 496–7 [542] (Edelman J) (*‘Brown’*).

156 Ambiguous remedial or beneficial legislation is ‘to be given a “fair, large and liberal” interpretation’: *AB v Western Australia* (2011) 244 CLR 390, 402 [24] (French CJ, Gummow, Hayne, Kiefel and Bell JJ), citing *IW v City of Perth* (1997) 191 CLR 1, 12.

157 Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles: The Laws of Australia* (Thomson Reuters, 2014) 272–3 [8.110]–[8.120].

158 The presumption that Parliament will not encroach upon ‘fundamental’ rights ‘without expressing its intention with irresistible clearness’: *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ) (*‘North Australian Aboriginal Justice Agency Ltd’*), quoting, among others, *Potter v Minahan* (1908) 7 CLR 277, 304 (O’Connor J).

159 All can be found on the OPC website: Office of Parliamentary Counsel (Cth), *Drafting Directions* (Web Page) <www.opc.gov.au/drafting-resources/drafting-directions>.

drafting of provisions relating to the establishment of statutory, corporate or other bodies.¹⁶⁰

A second example is the drafting direction on provisions relating to existing government bodies. It directly refers to principles of statutory interpretation governing the question of whether ‘a Commonwealth Act binds the Crown’.¹⁶¹ It provides a statement of understanding and suggests the text to be used for a particular desired result.¹⁶²

The importance of subject has particular resonance for criminal legislation. As discussed, legislative counsel ‘drafting provisions dealing with offences, criminal penalties, secrecy provisions and enforcement powers ... should refer to’ the *AGD Offences Guide*.¹⁶³ The *AGD Offences Guide* contains many drafting practices and principles for Commonwealth offences that deserve attention.¹⁶⁴ Drafting practice, such as the practice of clearly distinguishing each physical element of a criminal offence in a provision, may assist in understanding such a provision.¹⁶⁵

I highlight just one here, chosen because of its echoes of the statutory interpretation ‘principle of legality’: the common law principle that purports to identify ‘fundamental values’ of which, according to the judiciary, ‘those who draft legislation ... are aware’.¹⁶⁶

The *AGD Offences Guide* uses the concept of ‘fundamental criminal law principle[s]’.¹⁶⁷ These are policy driven principles to guide the drafting of Commonwealth criminal statutes. The *AGD Offences Guide* also identifies policy approaches that should only be made in ‘exceptional circumstances’.¹⁶⁸ Bills that deviate from the principles and policies in the *AGD Offences Guide* must be referred to the Attorney-General’s Department and in some cases require the approval of the Attorney-General.¹⁶⁹

160 See, generally, Office of Parliamentary Counsel (Cth), *Commonwealth Bodies* (Drafting Direction No 3.6, May 2019).

161 Office of Parliamentary Counsel (Cth), *Legislation that Refers to or Affects Australian Governments or Jurisdictions* (Drafting Direction No 3.10, June 2018) 2 [1].

162 *Ibid* 2–3 [1]–[7].

163 *OPC Drafting Manual* (n 10) 16 [112]; see above n 53.

164 See, eg, *AGD Offences Guide* (n 30) ch 2 (drafting of offences), ch 3 (penalties), ch 4 (defences), ch 5 (evidentiary certificates), ch 6 (infringement notices), ch 7 (coercive powers), ch 8 (entry, search and seizure powers), ch 9 (notices to produce or attend), pt 10.1 (arrest and detention).

165 See Lovric, ‘Legislative Counsel and the Judiciary’ (n 32) 49–51, who discusses drafting practice in the context of comments made by the court in *PJ v R* (2012) 36 VR 402.

166 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 30–1 [42] (French CJ). See also *Brown* (n 155) 498 [544] (Edelman J). It is described as a ‘working hypothesis’: *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

167 *AGD Offences Guide* (n 30) 8 [1.3.2].

168 *Offences, Penalties, Self-Incrimination, Secrecy Provisions and Enforcement Powers* (n 53) 3 [6]; *Referral of Drafts to Agencies* (n 54) 15.

169 *AGD Offences Guide* (n 30) 8 [1.3.2].

The ‘fundamental’ criminal law principles are not defined. They must be identified in a piecemeal fashion by reading through the *AGD Offences Guide*.¹⁷⁰ Some mirror existing normative common law presumptions, such as the position that retrospective criminal liability provisions should be rare,¹⁷¹ that the privilege against self-incrimination may only be overridden where there is clear justification to do so,¹⁷² and that any intended extraterritorial application must be clearly stated.¹⁷³

Other principles are less reflective of interpretation practices and in some cases are very specific. For example, there is a ‘fundamental criminal law principle’ that an individual should only be responsible for their own actions;¹⁷⁴ that matters should only be drafted in a defence in certain circumstances;¹⁷⁵ and that where an Act authorises the creation of an offence in subsidiary legislation, that offence ‘should not enable the creation of offences punishable by imprisonment’.¹⁷⁶ Others relate to the use of lethal force, entry, search and seizure without a warrant and personal searches.¹⁷⁷ These have no express equivalence in statutory interpretation.¹⁷⁸

Given the recent interest in the nature of the ‘principle of legality’, this material deserves consideration.¹⁷⁹ As normative policy directions, they may provide some justification (or not) for the ‘fundamental’ rights identified by the courts, or at least provide some empirical evidence to help guide ‘the High Court’s (developing) jurisprudence in this area’.¹⁸⁰ For example, the requirement of a ‘strong justification’ for provisions granting personal search powers may be seen as support for an argument that the fundamental right of liberty is engaged by such a provision, or even for recognition of a fundamental right to privacy.¹⁸¹

There is a further practical aspect. If a draft Bill does depart from principles set

170 Though some examples are listed in *AGD Offences Guide* (n 30).

171 *Ibid* 15–17 [2.1.3].

172 *Ibid* 94–6 [9.5.1]–[9.5.3].

173 *Ibid* 35–6 [2.5].

174 *Ibid* 32–3 [2.4.2].

175 *Ibid* 50–1 [4.3.1].

176 *Ibid* 44 [3.3].

177 *Ibid* 8 [1.3.2] (use of lethal force), 80 [8.3.4] (use of force to execute search warrant), 85–6 [8.6] (entry and search without warrant), 102–3 [10.3] (personal search powers).

178 Though arguably some principles in the *AGD Offences Guide* (n 30) may be consistent with the recent purported broadening of the scope of the ‘principle of legality’ to the ‘general system of law’: see Stephen McLeish and Olaf Ciolek, ‘The Principle of Legality and “The General System of Law”’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 15.

179 For a summary of major issues, see John Basten, ‘The Principle of Legality: An Unhelpful Label?’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 74.

180 Dan Meagher, ‘The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and the Courts’ (2014) 42(1) *Federal Law Review* 1, 15–16.

181 Provisions about personal search powers are in *AGD Offences Guide* (n 30) 102–3 [10.3]. The fundamental right to personal liberty is recognised in *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518, 520 (Mason CJ, Wilson and Dawson JJ), 523 (Brennan J), 532 (Deane J).

out in the *AGD Offences Guide*, then the instructing department is expected to highlight those issues in the explanatory memorandum that accompanies the Bill when it is presented in Parliament.¹⁸² This means that interpreters can reasonably assume that fundamental principles are followed, unless otherwise noted in the explanatory material.

C Identifying Purpose

One of the most obvious measures for the utility of extrinsic materials is what they reveal about a statutory provision's purpose, a key consideration under federal and other Australian interpretation legislation and the common law.¹⁸³ The relevance of the OPC Drafting Materials to the identification of the purpose of a statutory provision is less obvious than for the concepts of text and context. But there are possibly three ways that the OPC Drafting Materials may assist in determining a statute's purpose.

First, as noted, the purpose of an Act is to be found in its 'text and structure'.¹⁸⁴ The preceding discussion highlights ways in which the materials can aid the reader in understanding the choices and assumptions made by the drafter about the text, format, components and structure of the Act.

Second, also as previously discussed, the court's starting point for interpretation is the 'ordinary and grammatical meaning' of the text.¹⁸⁵ This is often expressed as being normatively desirable, as it supports the 'underlying democratic value'¹⁸⁶ that 'ordinary' people bound by legislative text should be 'generally entitled to rely upon the ordinary sense of the words that Parliament has chosen'.¹⁸⁷ One assumption underlying this approach is that 'ordinary meaning is assumed to be the same for everyone'.¹⁸⁸ The intended audience of the statute does not often appear to be a factor expressly acknowledged.

182 *AGD Offences Guide* (n 30) 6 [1.2].

183 *AIA* (n 57) s 15AA; *Legislation Act ACT* (n 57) s 139; *Interpretation Act NSW* (n 57) s 33; *Interpretation Act NT* (n 57) s 62A; *Acts Interpretation Act Qld* (n 57) s 14A; *Acts Interpretation Act SA* (n 57) s 22; *Acts Interpretation Act Tas* (n 57) s 8A; *Interpretation of Legislation Act Vic* (n 57) s 35(a); *Interpretation Act WA* (n 57) s 18. For common law, see *Project Blue Sky Inc* (n 111) 381 [69], 384 [78] (McHugh, Gummow, Kirby and Hayne JJ). The emphasis on purpose as the utility to be derived from parliamentary materials has been questioned in New South Wales: *Shorten v David Hurst Constructions Pty Ltd* (2008) 72 NSWLR 211, 217 [27] (Basten JA); *Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq) (rec and mgr apptd)* (2017) 93 NSWLR 765, 785 [87] (Ward JA).

184 *Certain Lloyd's Underwriters* (n 82) 389 [25] (French CJ and Hayne J), citing *Lacey* (n 112) 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

185 *Australian Education Union* (n 87) 13 [26] (French CJ, Hayne, Kiefel and Bell JJ); *Alcan (NT) Alumina Pty Ltd* (n 82) 31-2 [4]-[5] (French CJ).

186 Basten, 'Choosing Principles of Interpretation' (n 76) 882.

187 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 349 [42] (French CJ), citing *Interpretation Act NSW* (n 57) s 34(3). This is the New South Wales equivalent provision of *AIA* (n 57) s 15AB(3).

188 Ruth Sullivan, 'Some Implications of Plain Language Drafting' (2001) 22(3) *Statute Law Review* 145, 163.

Yet in drafting literature, understanding the audience of a statute is identified as an important consideration in the drafting process.¹⁸⁹ This is because the intended audience ‘affects not only [the drafter’s] choice of language and appropriate sublanguage or technical dialect, but his estimate of the range of relevant assumptions he can take for granted as already shared by the particular audience’.¹⁹⁰

Recognition of the intended audience was seen as a significant factor when the plain language drafting movement was developing.¹⁹¹ For the OPC drafter too, audience is a more nuanced concept than a homogeneous ‘ordinary’ person. There is no blanket assumption that the audience will be ‘ordinary’. The materials recognise that it is not reasonable to expect that all ‘statutes can be written so that everyone can understand them’.¹⁹² Drafting is to be done with the *target* audience in mind. While recognising the challenge that some statutes have a wide variety of readers,¹⁹³ drafters are informed that striking the right ‘balance between precision and simplicity’ will depend upon ‘who your readers are and why they read the law’.¹⁹⁴ It is specifically acknowledged that, especially for complex subject and policy areas, the audience is not always the general public.¹⁹⁵ Instead, the draftsman should ‘try to write his statute so that it can be understood by those who are supposed to understand it, namely the persons to whom it is directed, the persons who have to administer it and the courts and judges who have to apply it’.¹⁹⁶

Third, there are some references to judicial decisions on specific language in the OPC Drafting Materials.¹⁹⁷ This, at the least, should put the interpreter on notice

189 Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing, 2014) 113-16 (*Art and Technology of Rules for Regulation*); Stephen Laws, ‘Drawing the Line’ in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate, 2008) 19, 24-5; *ibid* 158-60; Reed Dickerson, ‘Statutory Interpretation: The Uses and Anatomy of Context’ (1972) 23(2) *Case Western Reserve Law Review* 353, 366.

190 Dickerson (n 189) 366.

191 Robert D Eagleson, ‘Efficiency in Legal Drafting’ in David St L Kelly (ed), *Essays on Legislative Drafting* (Adelaide Law Review Association, 1988) 13, 15. See also House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Clearer Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth* (Report, September 1993) 92-6; *Plain English and the Law* (n 116) 94-7.

192 *Reducing Complexity in Legislation* (n 28) 1 [6], quoting EA Driedger, ‘Legislative Drafting’ (1949) 27(3) *Canadian Bar Review* 291, 295.

193 *Plain English Manual* (n 18) 13 [50].

194 *Ibid* 13 [48].

195 *Reducing Complexity in Legislation* (n 28) 1 [7].

196 *Ibid* 1 [6], quoting Driedger (n 192) 296.

197 See, eg, *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (n 20) 2 [4]–[7]; *Use of Various Expressions in Draft Legislation* (n 93) 4 [13]–[14], 5 [16]; Office of Parliamentary Counsel (Cth), *Constitutional Law Issues* (Drafting Direction No 3.1, May 2019) (*Constitutional Law Issues*) 3 [6], 4 [11]–[15]; Office of Parliamentary Counsel (Cth), *Conferral and Exercise of Powers (Including by Governor-General)* (Drafting Direction No 3.4, October 2012) 3 [10]–[11], 4 [15]–[16]; *Offences, Penalties, Self-Incrimination, Secrecy Provisions and Enforcement Powers* (n 53) 11–12 [61]–[62].

about the assumed knowledge and object of the drafter for particular language. As lawyers, we assume, and FPC has stated, that drafters ‘are ... aware of the pronouncements of courts about the way that particular sorts of provisions will be interpreted’.¹⁹⁸ Specific references to decisions provide a factual basis for this awareness. In some instances the materials have directed drafters about the wording to use to overcome an uncertainty at common law. For example, drafters are directed to the words to be used to indicate that a provision creates a defeasible, as opposed to indefeasible, statutory right.¹⁹⁹ Another example is the words to indicate whether a provision is intended to operate by reference to a result rather than purpose.²⁰⁰

Interestingly, although drafters are sometimes directed in the OPC Drafting Materials to sections of the *AIA*, s 15AA, the Commonwealth legislation purposive provision, is not a central feature.²⁰¹ Perhaps the relevance of purpose is an unstated working assumption.²⁰²

D Contribution to Legitimacy of ‘Legislative Intent’

The discussion so far has been predominantly focused on practical uses for the OPC Drafting Materials. There is also an argument to be made for their relevance at a higher level of abstraction and that is for the concept of legislative intent, the ‘fundamental object’ of the interpretative process.²⁰³

In the last decade in Australia, there has been debate about the nature of the concept of legislative intent. Briefly, this discourse has focused on whether it reflects a fiction (so is purely an outcome-based label) or an actual intent objectively attributable to Parliament as a body.²⁰⁴ The genesis of the discussion appears to be the oft-cited passage from *Zheng v Cai* (‘*Zheng*’)²⁰⁵ that legislative intention is:

an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. ... reached by the application of rules of interpretation accepted by all arms of government in

198 Quiggin, ‘How to Construct, and Construe, a Statute’ (n 151) 88.

199 *Constitutional Law Issues* (n 181) 3–4 [10]–[16], discussing *AG (NT) v Chaffey* (2007) 231 CLR 651.

200 *English Usage, Gender-Specific and Gender-Neutral Language, Grammar, Punctuation and Spelling* (n 20) 2–3 [4]–[13], discussing *Chew v The Queen* (1992) 173 CLR 626.

201 ‘Objects’ clauses are discussed: see, eg, *Plain English Manual* (n 18) 32–3 [154]–[156]. There are also references to drafters identifying ‘the real purpose of a provision’: *Reducing Complexity in Legislation* (n 28) 11 [64].

202 A description of the policy objectives of a proposed Bill are a ‘core’ aspect of drafting instructions to the OPC: *A Guide for Clients* (n 7) 24 [2.1].

203 *Certain Lloyd’s Underwriters* (n 82) 411–12 [88] (Kiefel J); *Singh* (n 60) 335–6 [19] (Gleeson CJ).

204 The debate was recently addressed by Gageler J in *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 363 ALR 188, 206–7 [74]–[77] (‘*Work Health Authority*’).

205 *Zheng v Cai* (2009) 239 CLR 446 (‘*Zheng*’).

the system of representative democracy.²⁰⁶

Examination of the divergent views about legislative intent is beyond the scope of this article. However, the idea in *Zheng* that statutory interpretation is an expression of a constitutional relationship and so ‘is the field in which Parliament, the executive and the courts interact in the discharge of their respective functions’²⁰⁷ appears well accepted.²⁰⁸ Legislative intent, fiction or otherwise, is to be arrived at ‘not only by reference to the rules of construction, but also consistently with the assumptions on which the rules are based’.²⁰⁹ There are purported ‘collections of presumptions, based on shared understandings or values’²¹⁰ used in statutory interpretation.

Some of these assumptions are about drafting. Drafters have been identified as central to what might be described as this ‘institutional justification’.²¹¹ It has been pointed out that the rules of construction to be applied to determine ‘intent’ are those ‘known to parliamentary drafters and the courts’.²¹² Some of the assumptions made by the judiciary about the work of drafters will be those based on legislative provisions about interpretation, such as the *AIA*. Other assumptions are proclaimed by the courts. To adopt the explanation of Professor Jeffrey Goldsworthy when he spoke about the courts and Parliament, common law principles amount to ‘an attribution by the Courts of a standing commitment to Parliament’, and the drafters.²¹³

A clear example is the common law ‘principle of legality’ — the presumption that the Parliament (and the drafters) do not intend to infringe upon fundamental rights in legislation. This leads the courts to attribute to the legislative branch an intent (actual or as a construct) that an abrogation of those rights must be evidenced by irresistibly clear text in the statute.²¹⁴

206 Ibid 455-6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ). Gleeson CJ used a similar expression earlier in *Wilson* (n 66) 418 [8]. See also *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).

207 Chief Justice Robert French, ‘The Courts and the Parliament’ (2013) 87(12) *Australian Law Journal* 820, 824.

208 For example, Gageler J stated that to reduce legislative intent to a fiction ‘fails to give full expression to “the constitutional relationship between courts and the legislature”’, implying that accepting the reality of intent does: *Work Health Authority* (n 204) 207 [77], quoting *Singh* (n 60) 336 [19] (Gleeson CJ).

209 Justice Susan Kenny, ‘Current Issues in the Interpretation of Federal Legislation’ (Speech, National Commercial Law Seminar Series, 3 September 2013) 4 <www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-kenny/kenny-j-20130903> (emphasis omitted).

210 Pearce and Geddes (n 47) 6 [1.4].

211 To borrow the phrase used by his Honour in Basten, ‘Choosing Principles of Interpretation’ (n 76) 882 (discussing assumptions made in the context of the principle of legality).

212 *Lacey* (n 112) 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), cited in *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 226 [45] (French CJ); *Lacey* (n 112) 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoted in *Akiba v Commonwealth* (2013) 250 CLR 209, 229 [30] (French CJ and Crennan J), *Certain Lloyd’s Underwriters* (n 82) 390 [25] (French CJ and Hayne J) and *Momcilovic* (n 70) 45 [38], 74 [111] (French CJ). See also Gleeson (n 74) 28.

213 Jeffrey Goldsworthy, ‘Parliamentary Sovereignty and Statutory Interpretation’ in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis, 2004) 187, 206.

214 See generally Pearce and Geddes (n 47) 212-14 [5.2].

The interesting point is that what is attributed as understood by the executive (with the parliamentary drafters having been highlighted), the legislature and the courts appears to a large extent to be unilaterally declared by the judiciary. One drafter has referred to this supposed ‘understanding’ as a type of ‘dialogue going on between drafters and the courts’.²¹⁵ But if this is so, it is arguably a conversation where only one party speaks.²¹⁶

Historically, this may be because, subject to a few exceptions,²¹⁷ legislative drafting as a scholarly discipline remains a largely unexplored area of study in Australia. Unlike elsewhere, we have no major treatise on legislative drafting in Australia.²¹⁸ More often, the commentary that does exist is written by legislative drafters for drafters.²¹⁹ As a Canadian drafter and academic has said about his own jurisdiction, drafting remains a ‘relatively obscure discipline’ to those outside the ‘small circle’ of legal specialists called legislative counsel, including for other legal practitioners.²²⁰ It is ‘the equivalent of plumbing. No one thinks about it until it fails and creates a mess’.²²¹

Whatever the reason, knowledge about drafting practices for statutes does not appear to be expressly reflected in the judiciary’s discourse on statutory interpretation.²²² There have been references to assumed drafting techniques or style²²³ and occasional recourse to well-known legislative drafting texts such as Reed Dickerson’s *The Fundamentals of Legal Drafting*²²⁴ and GC Thornton on

215 Moran (n 150) 46. See also *Hughes v The Queen* (2017) 263 CLR 338, 420 [203] (Nettle J).

216 To borrow, but reverse, the statement of Justice Stephen Gageler, ‘Legislative Intention’ (2015) 41(1) *Monash University Law Review* 1, 16.

217 Such as the work of Dr Jeffrey Barnes in the area of plain language drafting. See, eg, Jeffrey Barnes, ‘The Continuing Debate about “Plain Language” Legislation: A Law Reform Conundrum’ (2006) 27(2) *Statute Law Review* 83.

218 For example, the US has Reed Dickerson, the United Kingdom has Garth Thornton, and Canada has Elmer A Driedger. Though I note there have been significant Australian works on legal drafting generally, such as the works of Peter Butt.

219 See, eg, a journal on drafting and legislation produced by the Commonwealth Association of Legislative Counsel: Commonwealth Association of Legislative Counsel, *The Loophole* (Web Page) <www.calc.ngo/publications/loopholes>.

220 John Mark Keyes, ‘Book Review: H Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing: Oxford, 2014)’ [2015] (2) *The Loophole* 52, 52.

221 *Ibid.*

222 More common have been references to the relevance of the drafting of delegated legislation. See, eg, *Anature Inc v Centennial Springvale Pty Ltd* (2017) 95 NSWLR 361, 387 [107] (Leeming JA); *Day v Harness Racing New South Wales* (2014) 88 NSWLR 594, 610 [79] (Leeming JA). See also Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 5th ed, 2017) 491–3.

223 *Wilkie v Commonwealth* (2017) 349 ALR 1, 23 [98]–[99], 25 [107] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ for the Court); *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 599 [39] (Gageler J); *Kumar* (n 88) 376 [20] (Bell, Keane and Gordon JJ); *Aubrey* (n 72) 322 [30] (Kiefel CJ, Keane, Nettle and Edelman JJ). Some references are less sympathetic: *Oreb v Australian Securities and Investments Commission [No 2]* (2017) 247 FCR 323, 337 [54].

224 *Commissioner of Taxation v Energy Resources of Australia Ltd* (2003) 135 FCR 346, 354 [21] (Ryan and Finkelstein JJ), citing Reed Dickerson, *The Fundamentals of Legal Drafting* (Little, Brown and Company, 1965) 116.

Legislative Drafting.²²⁵ But references to any standardised or specific drafting practices of a particular jurisdiction seem almost non-existent.²²⁶

Judges, of course, ‘have to do something to resolve ambiguity’.²²⁷ In the absence of relevant information, making assumptions about the drafting process is a reasonable starting point.

But for Commonwealth statutes, as has been seen, there is information available of direct relevance to the drafting of those statutes. That information, contained in the drafting materials discussed, has the potential to contribute to a more authentic set of assumptions underpinning the attribution of meaning and the identification of legislative intent. If the assumptions of the interpretation Acts and common law principles of interpretation contribute to ‘an assurance of the legitimacy of the judicial interpretative function’,²²⁸ then a more verifiable basis for those assumptions must enhance that legitimacy. As well, common law interpretative aids that are consistent with drafting directions have empirical support for existing practices.²²⁹

The apparent asymmetry of understanding about drafting has been raised by parliamentary drafters, including Australian Commonwealth parliamentary counsel, from time to time.²³⁰ One such drafter has referred to it as a ‘divergence’ of knowledge.²³¹ He goes on to suggest that greater awareness of drafting directions by the courts and the legal profession may have a ‘subtle influence on statutory interpretation’.²³²

There is much merit in his suggestion. The relationship between the judiciary and Parliament requires, as Justice Stephen Gageler has stated, ‘common sense and mutual respect’.²³³ Where information is unavailable, reasonable assumptions need to be made by the judiciary about the drafting process in order for the judiciary to fulfill its role. But where information is readily available about the way drafting occurs, it seems incumbent upon the judiciary, as both logical and respectful, to acquaint itself with that information. Drafting manuals may be

225 *Empire Waste Pty Ltd v District Court of New South Wales* (2013) 86 NSWLR 142, 157 [77] (Bathurst CJ), quoting *R v Secretary of State for Social Security; Ex parte Britnell* [1991] 1 WLR 198, 202 (Lord Keith), quoting GC Thornton, *Legislative Drafting* (Butterworths, 3rd ed, 1987) 319; *O’Callaghan v Custom Credit Corporation Ltd* [1999] WASCA 70, [19], quoting GC Thornton, *Legislative Drafting* (Butterworths, 4th ed, 1996) 98.

226 See above n 4.

227 Nye Perram, ‘Comment on Paper of Peter Quiggin’ in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 95, 97.

228 Gleeson (n 74) 28.

229 See, eg, above nn 144–9.

230 See generally Lovric, ‘Legislative Counsel and the Judiciary’ (n 32); Moran (n 150) 48; Jack Stark, ‘Understanding Statutes by Understanding the Drafters’ (2002) 85(4) *Judicature* 190, 192.

231 Lovric, ‘Legislative Counsel and the Judiciary’ (n 32).

232 *Ibid* 51.

233 Gageler (n 216) 16.

a source of knowledge that contributes to a more legitimate ‘shared frame of reference’.²³⁴

I acknowledge that this argument about the contribution of drafting knowledge to the idea of legislative intent is based on the premise that the High Court’s description of rules ‘accepted’ by all arms of government is, as Justice John Basten has questioned, ‘an empirically justifiable statement’.²³⁵ It is also open to consider it, as his Honour has noted, as ‘a normative statement: that is, being pronounced by ... the High Court ... it *should* be accepted by all arms of government’.²³⁶

But even if the latter is the better view (a discussion for a separate article), the knowledge derived from the OPC Drafting Materials might reasonably be considered a justifiable influence on, or support for, what ‘should’ be taken to be the basis of assumptions by the executive and the judiciary. Either way, the legitimacy of the concept of legislative intent is enhanced.

IV LIMITATIONS

Finally, having raised the potential assistance contained within the OPC Drafting Materials, it is prudent to also be aware of its limitations. Just as with any extrinsic material, there will be factors which affect its probative value in any given interpretative task. At least two weaknesses have been identified in the international literature which are worth addressing here.

The first concerns the authorship of drafting manuals. In the US, congressional Bills, and therefore the manuals about drafting them, can originate from a variety of sources — legislators, their staff, congressional committees, or even individuals or groups outside the legislature.²³⁷ One study has identified 11 different sources of draft Bills!²³⁸ Further, often the ‘manuals are not regularly updated’.²³⁹ These factors lead to questions about their reliability and quality.

For Australian federal legislation, these criticisms are not entirely persuasive.²⁴⁰ First, the OPC Drafting Materials are (except for the *AGD Offences Guide*)

234 Ard (n 81) 200. See also Hart (n 45) 443, 469; *ibid*.

235 Justice John Basten, ‘Constitutional Dimensions of Statutory Interpretation’ (Speech, Constitutional Law Conference 2015, 24 July 2015) 10 <www.supremecourt.justice.nsw.gov.au/Pages/sco2_publications/SCO2_judicialspeeches/sco2_speeches_current_judicialofficers.aspx#basten> (‘Constitutional Dimensions of Statutory Interpretation’).

236 *Ibid* (emphasis added).

237 Ganesh Sitaraman, ‘The Origins of Legislation’ (2015) 91(1) *Notre Dame Law Review* 79, 84; Bressman and Gluck, ‘Statutory Interpretation from the Inside: Part II’ (n 52) 750–2.

238 Sitaraman (n 237) 84, pt II.

239 Jarrod Shobe, ‘Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting’ (2014) 114(4) *Columbia Law Review* 807, 824.

240 As has been argued about the manuals used in the state of Arizona: see Tamara Herrera, ‘Getting the Arizona Courts and Arizona Legislature on the Same (Drafting) Page’ (2015) 47(2) *Arizona State Law Journal* 367.

generated from a single source — the OPC. Second, the OPC itself is a specialised, centralised, highly skilled and, in the political context of the drafting of Bills, independent group of drafters. Moreover, the materials are authoritative, often updated and publicly available.

A further criticism raised is that we should use with caution a document written for drafting for ‘the different purpose of interpreting’.²⁴¹ With respect, the same caution applies to many extrinsic documents. While some may be created with an eye to subsequent interpretation,²⁴² the purpose of, say, a second reading speech or a committee report is far removed from the interpretative task. Understanding the multitude of purposes that an extrinsic document may serve is better considered as part of the assessment of its relevance and reliability.

But other limitations should be noted.

The first one is scope. OPC Drafting Materials are only directly relevant to principal and amending statutes that started life as a government Bill drafted by the OPC. In practical terms, this may have little impact. Nearly every federal Bill that becomes a statute is a government Bill.²⁴³ Nevertheless, the origin should be confirmed if the drafting materials are to be used.²⁴⁴

A recent development may also have consequences for scope. In February 2018, during estimates hearings by the Senate Economics Legislation Committee, it was revealed that the federal government was ‘experimenting now with using some private sector drafters on some pieces of legislation’.²⁴⁵ In other words, private law firms had been engaged as alternative drafters for select Bills. There are numerous broader concerns about such outsourcing,²⁴⁶ but one potential consequence for the relevance of the OPC Drafting Materials is that it may not be clear whether a particular statute has been drafted in accordance with the practices and standards of those materials. Conversely, it might be argued that

241 Ronan Cormacain, ‘An Empirical Study of the Usefulness of Legislative Drafting Manuals’ (2013) 1(2) *Theory and Practice of Legislation* 205, 210.

242 The interpretative value of an explanatory memorandum or a second reading speech is well known by policy makers: see Department of the Prime Minister and Cabinet, *Legislation Handbook* (Handbook, February 2017) 37 [7.2], 46 [7.45]–[7.46].

243 Very few private member Bills are enacted. For statistics, see Parliament of Australia, *House of Representatives Statistics*, (Web Page) <www.aph.gov.au/Parliamentary_Business/Statistics/House_of_Representatives_Statistics>.

244 Although often an OPC drafter is seconded to the Senate to assist private Members with drafting, so in any event the manuals may still have an influence.

245 Evidence to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 28 February 2018, 88 (John Lonsdale). See also Tom McIlroy, ‘Treasury Outsources Legislation Drafting to Law Firms’, *Australian Financial Review* (online, 13 April 2018) <www.afr.com/business/legal/treasury-trial-outsources-legal-drafting-20180409-h0yivw>.

246 See the conclusion of Select Committee on the Constitution, *The Legislative Process: Preparing Legislation for Parliament* (House of Lords Paper No 27, Session 2017–19) 47 [166]–[168]. See also points raised by academic Gabrielle Appleby in Tom McIlroy, ‘Clayton Utz Part of Canberra’s Trial to Outsource Legislative Drafting’, *Australian Financial Review* (online, 3 May 2018) <www.afr.com/news/clayton-utz-part-of-canberras-trial-to-outsource-legislative-drafting-20180501-h0zicg>.

those private drafters should be aware of the OPC Drafting Materials in order to enhance the possibility of consistency of the privately drafted statutes with the bulk of the statute book drafted by the OPC.²⁴⁷

As well, as discussed earlier in this article, it must be borne in mind that the current collection of OPC Drafting Materials only pertain to statutes enacted from the 1990s. This is due to the conversion to ‘plain language drafting’ that the OPC adopted from that time.²⁴⁸

A further issue lies in the possibility that the development of a new drafting practice by the OPC may lag behind its inclusion in a drafting direction. An interpreter has no way of knowing which version of a manual or direction legislative counsel may have referred to when drafting a Bill.²⁴⁹ (Although the same may be said of other reference materials such as dictionaries, which are periodically updated.)

This leads to a limitation point that is inherent in drafting.

The ‘actual task of writing — choosing the words and putting them into effective form — is only a small piece of the drafter’s task.’²⁵⁰ A Bill is the product of an ‘iterative process’,²⁵¹ involving a kaleidoscope of ideas and players.²⁵² Much of the drafting task requires analysis and problem solving before words are even placed on the page.²⁵³ There are also likely to be deviations from the standards in the OPC Drafting Materials from time to time, whether as a result of FPC approval or arising from the discretion that necessarily must at times be exercised by the drafter.²⁵⁴ A drafting office cannot lay down rules for every conceivable situation.²⁵⁵ It would therefore be too simple to consider a manual as always

247 I am grateful to one of the anonymous reviewers for this point.

248 The change may be quite discernable: see Duncan Berry, ‘A Content Analysis of Legal Jargon in Australian Statutes’ (1995) 33 *Clarity* 26, who compares language in pre-1950 statutes with statutes enacted after 1990.

249 As noted, the *Plain English Manual* (n 18) was first published in 1993: see above n 120. Drafting directions have been in existence for many decades: Meiklejohn (n 19) 231–2.

250 Constantin Stefanou, ‘Is Legislative Drafting a Form of Communication?’ (2011) 37(3) *Commonwealth Law Bulletin* 407, 407, quoting Tobias A Dorsey, *Legislative Drafter’s Deskbook: A Practical Guide* (TheCapitol. Net, 2006) 4.

251 Geoffrey Bowman, ‘Sir William Dale Annual Memorial Lecture: The Art of Legislative Drafting’ (2005) 7(1–2) *European Journal of Law Reform* 3, 6.

252 *Ibid*; Quiggin, ‘How to Construct, and Construe, a Statute’ (n 151) 83.

253 Quiggin, ‘How to Construct, and Construe, a Statute’ (n 151) 80–1; see also Quiggin, ‘Training and Development of Legislative Drafters’ (n 9) 15–16.

254 Nick Horn, ‘Legislative Drafting in Australia, New Zealand and Ontario: Notes on an Informal Survey’ [2005] (1) *The Loophole* 55, 87. See generally Cormacain (n 241); Brian Christopher Jones, ‘Drafting Proper Short Bill Titles: Do States Have the Answer?’ (2012) 23(2) *Stanford Law and Policy Review* 455 (compares state and federal use of drafting policies on short titles).

255 Drafters generally agree that there is little that is mechanical about drafting, nor is it possible to provide exhaustive rules: Daniel Greenberg (ed), *Craies on Legislation: A Practitioners’ Guide to the Nature, Process, Effect and Interpretation of Legislation* (Sweet & Maxwell, 10th ed, 2012) 387 [8.1.1]; Xanthaki, *Art and Technology of Rules for Regulation* (n 189) 19–20; Bowman (n 252) 4; Sandra C Markman, ‘Legislative Drafting: Art, Science or Discipline?’ [2011] (4) *The Loophole* 5.

providing an exhaustive or definitive explanation of an aspect of a statute.

Finally, even assuming that we operated in a perfect world where choices made by the legislative counsel were transparent, clear, exhaustive and accessible by reference to the drafting manuals, the High Court has said on many occasions that the task of statutory interpretation is an objective process, and that what ‘was or was not in the minds of those drafting or enacting legislation is not relevant’ to construction.²⁵⁶ It is possible that it may be argued that referring to drafting manuals may be seen as seeking out this subjective intent.

This is a questionable criticism. Understanding and having knowledge of such materials is not to inquire into the subjective mind of the drafter. The value of the materials lies in the information within them about the context in which the statute is drafted. These documents express a set of standards, practices and principles which allow the interpreter to make legitimate assumptions about OPC practices. We are able to use them in the same way that we might use a second reading speech that is taken as evidence of the policy of a statute. We do not inquire into the subjective individual mental state of the minister or backbencher who voted for the Bill as to whether the speech was relevant to their vote. Indeed, for the extrinsic material cynic, the OPC Drafting Materials may be more credible than many parliamentary materials, as they are ‘[I]ess [s]usceptible to [t]ampering’ for political purposes.²⁵⁷

V CONCLUSION

Reading the OPC Drafting Materials is not a panacea for the resolution of interpretative issues for federal government legislation. Like any extrinsic material, it is secondary to the statutory text, must be assessed for its value for a given statute and must be considered as part of the totality of the context of the genesis of that statute.

But there are good reasons for readers of federal legislation, including the judiciary, to be familiar with them.

Leonard Hoffmann has observed that ‘[u]sing language to convey meaning is an activity governed by rules’.²⁵⁸ From a practical perspective, these materials provide genuine, objective, readily available information that assists the reader to understand the ‘rules’ of the language and structure of federal government statutory text. With the exception of the *AGD Offences Guide*, they are produced

²⁵⁶ *Firebird Global Master Fund II Ltd v Nauru* (2015) 258 CLR 31, 56 [69] (French CJ and Kiefel J). See also Middleton (n 75) 630.

²⁵⁷ Ard (n 81) 198, who also argues that parliamentary materials are ‘tangential’ to the legislative process whereas drafting manuals are ‘integral’: at 199.

²⁵⁸ Leonard Hoffmann, ‘Language and Lawyers’ (2018) 134 *Law Quarterly Review* 553, 553.

by the very people who draft those statutes. In this sense they are similar to a professional code of conduct produced by a profession. There is a legitimate expectation of compliance with that code due to the proclamation of the profession itself. Accordingly, they provide objective and authoritative indicators about the drafted text that can be weighed and balanced as part of the text, context and purpose exercise.

Second, at a broader level, these materials form part of the context in which a federal government statute is made. As a type of soft law for the drafting by parliamentary counsel, they constitute part of the ‘surrounding coordinate fund of relevant assumptions that the language vehicle takes into account’.²⁵⁹ This contributes to a more complete and authentic version of the ‘wider context’ that we are obliged to consider as a matter of common law principle.

Finally, if we are to view statutory interpretation as a reflection of the relationship between the arms of government involved in statute making that is based on a shared understanding, and we take that understanding to have some meaningful basis, then improving what is actually understood must be valuable. At present, much of that understanding is driven by judicial pronouncements based on assumptions. But a one-sided or rigid relationship has its ‘awkward moments’.²⁶⁰ One of them is a possible mismatch between the judiciary and the drafter in their understanding about the ‘rules’ of the task.

This is certainly not the first call in Australian commentary for there to be a better understanding of the role of the drafter.²⁶¹ Familiarising ourselves with the OPC Drafting Materials goes some way to answering that call. It may challenge some of the assumptions currently used in statutory interpretation by the judiciary and may confirm others. Either which way, that knowledge must contribute to a more informed or less ‘awkward’ relationship by providing a more authentic basis for any assumed understanding. Certainly, that must be preferable to assumptions, or normative directions, based on little or merely presumed knowledge. Familiarity with these materials would seem only to advance the legitimacy of the interpretative task as explained by the High Court.

259 Reed Dickerson, *The Interpretation and Application of Statutes* (Little, Brown and Company, 1975) 108.

260 Gageler (n 216) 16.

261 Basten, ‘Constitutional Dimensions of Statutory Interpretation’ (n 235) 11: ‘in discussing principles stated to be generally understood and accepted, would not some reference to the institutional role of parliamentary counsel be a relevant consideration?’.