

New meanings, reading in and *Ghaidan* in Australia: perspectives on the operation of rights compatible rules of interpretation in Australian human rights legislation *

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A INTRODUCTION

1. Beginning in the ACT in 2004 and Victoria in 2006, human rights legislation was enacted within Australia.¹ They provide for several innovative features: statements of compatibility with human rights, greater human rights scrutiny by parliamentary committees, testing limitation of rights by proportionality based assessments, and rights compatible rule of statutory interpretation, amongst others.
2. Today, I want to make a few observations about the rights compatible rule of statutory interpretation such as set out in section 32 of the Victorian Charter. Similar rules are set out in legislation in the United Kingdom, New Zealand and the ACT. I will refer to such rules as 'rights compatible rules' but will focus today on the Victorian rule.
3. In particular, I will make two inquiries about the rights compatible rule. My first inquiry is how this rule impacts the ordinary or original meaning of words in legislation being interpreted. In undertaking this inquiry, I will look to history and consider how the development of the existing non-rights rules of statutory interpretation approach ordinary or original meaning of words in legislation being interpreted and what guidance that may provide.
4. The second inquiry is whether techniques of 'reading in' and 'reading down' or 'reading up' are available when applying the rights compatible rule. In undertaking this second inquiry, I will look again to history and consider how the existing non-rights rules of statutory interpretation approach the same and what guidance that may provide.

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¹ *Human Rights Act 2004 (ACT); Charter of Human Rights and Responsibilities Act 2006 (Vic).*

5. I will argue that (i) existing non-rights rules of statutory interpretation permit adding to or departing from the ordinary or original meaning of words in legislation being interpreted and (ii) that the techniques of reading in/ down/ up are available. The new rights compatible rule operates against such a backdrop. And so, as a starting point, the mechanics of operating a rights compatible rule would be expected to provide for no less.

6. Where the rights compatible rule goes further than the existing non-rights oriented rules is in setting down a set of rights which must be taken into regard in giving legislation meaning. The rule, representing an amalgam of common law rights-oriented rules e.g. conforming with international law and the principle of legality – may even go beyond a mere codification of the common law rules. But that is not my focus today. Today, I want to focus on determining if we can learn something about the mechanical operation of the rights compatible rule from the operation of the existing non-rights rules of statutory interpretation. I accept that it is a little bit artificial divorcing the rights themselves from understanding the operation of the rights compatible rule or from not considering common law rights oriented rules of statutory interpretation, but I think the inquiry is one which is worth taking. From an analytical perspective, I think it gets us to an important first step or starting point.

7. Why am I undertaking this inquiry? There are several reasons: (1) Given that rights compatible rules are nascent and generating debate, it helps to understand more about them by considering history of the operation of statutory interpretation rules and the context in which the new rule operates. (2) Statutes are the means by which the parliament imposes its will on the citizen. Statutory interpretation has constitutional implications- it represents the coming together of the sovereign expression of parliament in a statutory form and the rule of law as a filter through which that form is read and given effect. (3). Statutes and secondary legislation play a large part in our lives and increasingly so. In part this is because of their sheer volume. In part this is because of their reach and coverage. This inquiry has implications ‘up the line’ for how they are drafted and ‘down the line’ for how they are understood and applied. It has implications for policy and practice – because policy and practice will, as they often must, take their cues from and be shaped by a given statutory framework. (4) Also,

given the current and heightened interest in human rights, I wanted to talk about a topic that wouldn't get me into trouble.

8. The above inquiries are important because statutory interpretation provides insights into the relationship between court and parliament and in particular between what is judicial interpretation or judicial legislation. In Australia, the interpretive rules must of course be framed and operate within the context of a federal system underpinned by the Commonwealth Constitution. The doctrine of separation of powers and the judicial power of the Commonwealth, must be accommodated. They have impacts on rules of statutory interpretation and their application. If there are constitutional obstacles, obviously they must be observed and, if possible and desirable, overcome.

9. In that regard, I note the view that an interpretive model whether at the Commonwealth level (or seemingly elsewhere in Australia) can provide for a rule of rights-oriented statutory interpretation similar to that found in Victoria.² I, however, don't enter into a debate about the desirability of that feature or enacting legislation with that feature. It would be inappropriate to do so even in a private capacity - the pros and cons of that debate are the subject of present deliberation within government and public comment and that debate remains to be played out at the Commonwealth level.

10. The exploration of my lines of inquiry begins takes me down two paths. The first is to examine the relationship between discovering meaning in the words of legislation when new and different rules of interpretation have to be applied - e.g. the literal or textual rule and the relatively newer and different 'purposive rule' to discover that meaning. In other words, trying to understand how we approach the meaning of words understood by reference to newer rules of interpretation, whether judicially developed or legislatively provided, in circumstances where the words to be interpreted were enacted with a different mindset, against a different backdrop and subject to different rules of interpretation.

² See the Solicitor-General's advice at Appendix E to the National Human Rights Consultation Report 2009. To similar effect is the opinions of, amongst others, former High Court Justices Sir Anthony Mason and Michael McHugh as set out in the 22 April 2009 Roundtable Statement available at: <http://www.hreoc.gov.au/letstalkaboutrights/roundtable.html>.

11. The second path is to examine whether techniques of reading in and reading down/ up are presently available. I take this path to discover what this suggests lessons can be learnt for applying the rights compatible rules.

Learning from the purposive rule's qualification of and departure from earlier outcomes

12. Conventionally, common law statutory interpretation is approached as a search for the intention of the legislature in the legislation that is being interpreted; that intention is objectively ascertained from the words used in the legislation and was historically approached as the literal meaning of the words. I'll call this the literal rule.

13. The purposive rule, understood simply, is to favour a purposive interpretation of legislation unless a contrary intent is evident. It is Parliament which instructs that legislation be interpreted purposively; during the 1980s we started seeing such legislative mandated purposive rules (although, common law rules by that time had arguably reached a similar point).

14. So presently, the primary object of statutory interpretation "is to construe the relevant provision so that it is consistent with the text and purpose of all the provisions of the statute"³; the context of the provision being construed is important and is assessed broadly, having regard to extrinsic materials⁴ ('the purposive rule'). Today, textual, contextual and purposive interpretation is the norm at Commonwealth and state level.⁵

15. I draw attention to the literal rule and the newer purposive rule to illustrate the following proposition. In applying the (now legislatively prescribed)⁶ purposive rule to legislation say which pre-dated the enactment of the purposive rule, parliament's original intent as

³ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69].

⁴ *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

⁵ Pearce and Geddes, *Statutory Interpretation in Australia* (2006) ('Pearce and Geddes'), Ch 2.

⁶ Eg s 15AA *Acts Interpretation Act 1901* (Cth); s 35 *Interpretation of Legislation Act 1984* (Vic).

expressed in the words of legislation being interpreted is a factor to which is added the requirement to interpret purposively (i.e. parliament's intent as expressed in the purposive rule). In relation to applying the purposive rule to legislation which post dates its enactment, parliament is taken to intend application of the purposive rule, unless a contrary intent is evident. Accordingly, applying the purposive rule may allow a different outcome from applying the literal rule.

16. That is because the purposive rule allowed for a change in the rules applicable for searching for the meaning of words. How so? Because regard has to be had to the parliamentary intent in the legislatively prescribed purposive rule. To that extent, the purposive rule tolerates a new meaning being given to a statutory provision by reference to what legislative purpose requires; it allows adding to or departing from a literal meaning of a statutory provision. As Dawson J says in *Mills v Meeking*⁷

...if the literal meaning of a provision is to be modified by reference to the purposes of an Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes and it must be consistent with the wording otherwise adopted by the draftsman.

17. There are limits to judicial interpretation – to which I will return at various points.

18. What's the position overseas? In discussing the relationship in New Zealand between parliamentary intent of an enactment being interpreted and the New Zealand equivalent of (the legislatively prescribed) purposive rule, Elias CJ makes a similar observation that as statutes must apply in conditions which may not have been foreseen at the time of enactment, there is only so far that parliamentary intent can advance the discovery of the meaning of the words being interpreted.⁸

The availability of 'reading in' and 'reading down/ up'

⁷ (1990) 169 CLR 214, 235.

⁸ *Hansen*, 2007 NZSC, [14].

19. I draw attention to these techniques because they illustrate the scope of what can be done pursuant to statutory interpretation at present. Of the techniques, 'reading in' tends to generate greater angst and is the focus of my discussion.

20. Some definitions first. I understand 'reading in' to usually involve a notional writing in by judges of words into a statute similar to implication and, at all events, not a literal rewriting.⁹ I understand 'reading down' to usually involve giving a provision a more specific meaning¹⁰ than the general meaning it can ordinarily bear. (For what it's worth I understand 'reading up' to usually involve giving a provision a more general meaning than the meaning it can ordinarily bear). 'Reading in' and 'reading down/ up' may overlap and produce similar results. For instance, the word 'insulting' could be 'read down' to mean "insult of an unreasonable nature"; 'reading *in*' may permit the word 'insulting' to be understood '*as if unreasonably* insulting' (i.e. the words in italics being notionally implied).

21. Yet the techniques are capable of operating differently. For instance, consider the words 'husband and wife'. Assume those words are ordinarily understood to mean 'man and woman'. Assume that those words appear in remedial legislation providing financial benefits for two people in a relationship, so that it is consistent with the legislation's purposes for the words 'husband and wife' to include a same sex relationship. I do not think 'reading down' the words 'husband and wife' could yield 'man and man' or 'woman and woman'; giving the general meaning of 'husband and wife' a specific meaning (e.g. say a man and man) seems difficult and, in my view, irrespective of the purpose, would be linguistically challenging. 'Reading in' however makes it possible for those words to mean '*as if living as* husband and wife', by notionally implying those words. And why? because it is consistent with legislative purpose and does no violence to the language of the words 'husband and wife'.

22. I think it is a mistake to conflate the techniques of 'reading in' with 'reading down/up'. This is because where either technique is employed that should be made transparent.

⁹ Pearce and Geddes, [2.29].

¹⁰ Pearce and Geddes, [2.31].

Also, if 'reading in' is somehow considered as closer to the forbidden territory of judicial legislation than is 'reading down', then there is all the more reason to identify that it is being employed and justify the reasons for doing so.

23. What then are the conventional rules? Reading down and up are permitted, subject to constraints. For instance, In *Mills*, the majority judges gave [s 49\(1\)\(f\)](#) of the [Road Safety Act 1986](#) (Vic) ("the [Act](#)") a literal interpretation. Dawson J and McHugh J dissented. They thought that the paragraph should be given a purposive construction. Consequently, they read down the literal meaning so as to avoid the injustice that would arise if a motorist could be charged under that paragraph instead of [s 49\(1\)\(b\)](#) in circumstances where the motorist had not been involved in an accident.

24. The more difficult technique is 'reading in'. Classically, the view was taken that *in the absence of clear necessity* 'reading in' was a wrong thing to do (per Lord Mersey in *Thomson v Gould*).¹¹ Three things should be noted about that statement. First, Lord Mersey's statement does not tell us how 'clear necessity' is determined. Second and more importantly, the statement contemplates that 'reading in' is possible. Third, it was the position taken by the Court at the height of Diceyan orthodoxy, at a time when unquestioned deference was shown an Act of Parliament and the common law (at least the public law of common law) was considered to be in something of a slumber; if so, it may be the conditions for 'reading in' in later times or at present would be less constrained.¹²

25. A possible example of 'reading in' under conventional rules of interpretation can be seen in *Adler v George* [1964] 2 QB 7. There, the High Court of England and Wales had to interpret an Act that made it an offence to obstruct a member of the armed forces 'in the vicinity of a prohibited place'. The defendant carried out an obstruction *in the* prohibited place and was charged with an offence. The defendant's defence was that

¹¹ *Thomson v Gould and Co* [1910] AC 409, 420 (Lord Mersey); *Western Australia v Commonwealth* (1975) 134 CLR 201, 251 (Stephen J).

¹² *Jones v Wrotham Park Settled Estates* [1980] AC 74, 105 (Lord Diplock); *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 113.

the Act did not apply because he was *in the* but not *in the vicinity of* the prohibited place. The Court rejected the argument. The Court interpreted the Act as if it read '*in or in the vicinity of a prohibited place*'. In effect, the words *in or* were read in.

26. Accordingly, 'reading in'¹³ and 'reading down/ up'¹⁴ are known, at least subject to some constraints.¹⁵

What then are some of the constraints?

27. Interpretation does not permit giving a meaning to a provision which it cannot bear; obviously the language used places some limits. Similarly, a meaning that is inconsistent with purpose is not permitted.¹⁶ Now, legislative purpose is often not self-evident, despite the practice of setting out one or more purpose(s) in modern statutes. In lengthy and complex statutes, several and sometimes conflicting purposes may be expressed or implied.¹⁷ Further, the specificity, precision or degree with which a purpose is abstracted provides scope to widen or narrow the range of meanings that can be given to the words being interpreted.¹⁸

28. Similarly a constraint on the availability of reading in or down/up techniques is that it's not pressed in the service of judicial rewriting of statutes or judicial legislation.¹⁹

¹³ Pearce and Geddes, [2.29].

¹⁴ Pearce and Geddes, [2.31]; *R v Young* (1999) 46 NSWLR 681, [25]-[31] (Spiegelman CJ)

¹⁵ Pearce and Geddes, Ch 2.

¹⁶ Pearce and Geddes, [2.9].

¹⁷ See for example *Minister for Immigration & Multicultural Affairs v Al Masri* [2003] FCAFC 70, [121] where the court identifies two purposes relevant to one section and gives precedence to the one which is consistent with rights. The court was there applying common law rules of statutory interpretation.

¹⁸ Evans and Evans, [3.33].

¹⁹ Pearce and Geddes, Ch 2.

29. I accept that such constraints are easier to state in the abstract, than apply in practice and when put like that it does not offer much guidance on what is and is not interpretation. Also, reasonable minds will differ in a given case on whether or not an application of one of those techniques remains within the bounds of interpretation or crosses into forbidden territory.

30. I turn next to consider whether the rights compatible rule in Victoria can and does operate in ways similar to that just discussed.

B RIGHTS COMPATIBLE INTERPRETATION

31. Does a rights compatible rule allows adding to or departure from the ordinary meaning of words being interpreted and allows 'reading in' and 'reading down/up'? If history and the operation of the existing rules of interpretation, as discussed earlier is any guide, I argue that the starting point, must be yes. This is not to say rights compatible rules may not go beyond that starting point, and there are very good arguments why they could, but whether, how and why they do or do not is not the focus of today's inquiry.

Relevant clauses in NZ, UK and Victoria human rights legislation

32. For convenience and ease of reference, I set out below the rights compatible rules in HRA, BORA and the Charter.

33. New Zealand, section 6 BORA:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

34. United Kingdom, section 3 HRA:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

35. Victoria

So far as it is possible to do consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

The operation of the rights-compatible rule, parliamentary intent and reading in

36. Through a rights compatible rule, Parliament directs that its legislation should be interpreted in a way which delivers a rights-compatible meaning. Section 32 mandates that this must be 'possible' and be consistent with statutory purpose.

Different outcomes?

37. How then is that instruction to be approached? To my mind, analytically or conceptually the answer is simple. The starting point is to adopt a logic similar to the one discussed earlier in understanding the relationship between the literal rule and Parliament's instruction to apply a purposive rule. That is the broad context in which section 32 is located and there is nothing in the text of section 32 which suggests otherwise.

38. In relation to pre-Charter legislation, to parliament's intent as expressed in a provision must be added parliament's intent as set out in the rights-compatible rule. In relation to post-Charter legislation, parliament is taken to assume the rights-compatible rule is to be apply, almost as it were a standing instruction in each statute. Obviously, parliament remains free to express a contrary intent, but unless and until it does so, the rights compatible rule applies. This is no more than giving effect to parliament's intent as expressed in the rights-compatible rule

39. Again, this is conceptually similar, to the potential for facilitating a different outcome when applying a purposive rule to a statutory provision that was previously interpreted by applying a literal rule – so section 32 permits adding to or departing from the meaning of words as expressed in an enactment being interpreted and can also deliver different outcomes.

40. To be sure, section 32 does not expressly address how parliamentary intent as expressed in an enactment must be addressed. It does however contain a reference to legislative purpose, a matter dealt with below. Before doing so, it helps here to consider the extrinsic aids and the position overseas to determine if and how they assist with this issue.

Extrinsic aids

41. In Victoria, it is legitimate to use extrinsic aids in construing legislation.²⁰ I propose to discuss three aids as set out below, namely the report containing a draft Bill and recommending the adoption of a Charter, the Explanatory Memorandum accompanying the Bill and the Second Reading Speech by the Minister introducing the Bill into Parliament.

42. The interpretive direction set out in clause 32(1) of the draft Bill recommended by the Consultative Committee and from which, for our purposes, section 32 is adopted is in the following terms:

*So far as it is possible to do so consistently with their statutory purpose, all statutory provisions must be read and given effect in a way that is compatible with human rights.*²¹

43. The Committee expressly states that this permits “an interpretation that is not so strained as to disturb the purpose of the legislation in question. This is consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation was favoured.” The Committee quotes with approval the restraints developed in *Ghaidan*, by Lord Nicholls namely consistency with the ‘underlying thrust of the legislation’ and the prohibition by Lord Rodger against changing ‘a provision from one where parliament says that x is to happen into one saying that x is not to happen.’²²

44. The Committee’s observations suggest a power of interpretation consistent with the range of limits set out in *Ghaidan*.

²⁰ S 35(b) *Interpretation of Legislation Act 1984* (Vic); Pearce and Geddes, Ch 3.

²¹ Human Rights Consultative Committee, *Rights, Responsibilities and Respect, The Report of the Human Rights Consultation Committee* (Vic 2006) 1, 22 (‘The Report’).

²² The Report, 83.

45. Clause 32 of the Explanatory Memorandum says as follows:

*The object of this sub-clause is to ensure that courts and tribunals interpret legislation to give effect to human rights. The reference to statutory purpose is to ensure that in doing so courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation.*²³

46. The extract from the Explanatory Memorandum articulates what subjecting the rights compatible rule to legislative purpose is achieving to do, namely, cautioning that parliament's intended *purpose* cannot be displaced by *straining* legislation. While some straining is permissible, interpretation in a way which avoids achieving the object of the legislation being interpreted is not; this appears consistent with the limits placed by *Ghaidan* on section 3 *HRA*, which limits and constraints I will discuss later.

47. Finally, the Second Reading Speech of the Bill's sponsor, the Attorney-General, says as follows:

*Clause 32 of the bill recognises the traditional role for the courts in interpreting legislation passed by Parliament. While this bill will not allow courts to invalidate or strike down legislation, it does provide for courts to interpret statutory provisions in a way which is compatible with the human rights contained in the charter so far as it is possible to do so consistently with their purpose and meaning.*²⁴

48. This acknowledges the court's interpretive role, a traditional judicial function. It also states that right compatible interpretations are to be preferred consistently with the purpose and meaning of an enactment.

49. Unsurprisingly, the extrinsic aids do not identify with any precision how and to what extent parliamentary intent can be added to or be departed from by section 32. They are also silent on the question of 'reading in', except in the sense that *Ghaidan* permits

²³ Explanatory Memorandum (Circulation Print) Charter of Human Rights and Responsibilities Bill 2006, Vic ('Ex Mem') 1, [32].

²⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls) ('Second Reading Speech'), 1293.

it and 'reading in' within the limits of *Ghaidan*, which limits were pivotal to the design of section 32. What the extrinsic aids do is to tether section 32 to legislative purpose and yielding rights compatible meaning. None of the aids provide that the parliamentary intent expressed in a provision being interpreted is paramount or deny that 'reading in' is possible.

The position overseas

50. The operation of section 3 HRA and section 6 BORA suggests that the meaning of words expressed in legislation being interpreted by reference only to that legislation is not paramount. As Elias CJ says in respect of section 6 BORA:

*The "very strong and far reaching" obligation of interpretation under s 6 of the New Zealand Bill of Rights Act may also require a meaning to be given to a provision which was not envisaged at the time of its enactment.*²⁵

51. In the United Kingdom, Lord Nicholls observes the change in the following terms:

*In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the Court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.*²⁶

52. In giving judgment for the Hongkong Court of Final Appeal, Sir Anthony Mason, commenting on section 3 HRA and section 6 BORA, comments on the relationship between the parliamentary intent of the enactment being subjected to the rights compatible rule and those sections. In doing so, His Honour, rightly in my view, draws

²⁵ *Hansen*, [54]. See to similar effect, the comment of Anderson J at [82].

²⁶ *Ghaidan*, 2004 HL, [30].

no distinction between those two sections for the purpose of making the comment about that relationship:

*They authorize or, more accurately, require the courts, in such a situation, to give the statutory provision...even an interpretation that is strained in the sense that it was not an interpretation which the statute was capable of bearing as a matter of ordinary common law interpretation.*²⁷

53. It may be helpful to work through an example from the United Kingdom. A leading case is *Ghaidan*. *Ghaidan* is of particular interest because section 32 of the Victorian Charter was designed to deliver what *Ghaidan* permits. In *Ghaidan*, the House of Lords held that the word ‘spouse’ in landlord and tenancy legislation, which granted succession rights to a surviving ‘spouse’ of a deceased tenant, could be interpreted to include a person in a same sex relationship.²⁸ Their Lordships did so because Parliament mandated in the UK Human Rights Act that legislation be read compatibly with non-discrimination rights. Prior to *Ghaidan*, such succession rights were not available to a same sex couple. In *Ghaidan*, their Lordships applied section 3 HRA to the legislation and ‘read in’ words (in italics) so that if a spouse of a tenant could be treated ‘as *if they were* his husband or wife’ they would benefit.²⁹

First steps in Victoria

54. In *RJE*, the interpretation of the word ‘likely’ was in issue in the Victorian Court of Appeal. Previous decisions of the Court of Appeal and intermediate courts elsewhere in Australia held ‘likely’ could mean ‘less probable than not’. Two judges in the Court of Appeal held that those judicial decisions were wrong and that ‘likely’ meant ‘more probable than not’.

²⁷ *HKSAR v Lam Kwong Wai*, [2007] HKCFA, [65].

²⁸ *Ghaidan*, [1].

²⁹ *Ghaidan*, [121].

55. The third judge, Nettle JA, held that those earlier decisions are not wrong and that parliament *intended* the word 'likely' to mean 'less probably than not'. He stated that "we should not depart from that interpretation without a compelling reason to do so".³⁰ The rights compatible rule is identified as a compelling reason. He then goes on to say candidly

*...it must also be accepted that Parliament's intention at the time of enacting s11 of the Act was that 'likely' need not mean more likely than not. To adopt now the construction which I prefer is to accept that the intention has changed. But that appears to be the way in which the Charter was intended to operate.*³¹

56. I agree. Indeed a change in meaning or outcome is exactly what applying a new rule of statutory interpretation, to words previously understood absent that application, allows. It is also consistent with the extrinsic aids and overseas experience discussed earlier. As Justice Kevin Bell explains in *Kracke*:

*By enacting s 32(1), the Parliament has injected a new intention into the analysis...For legislation enacted before the Charter came into force, it is like that intention is added back and then treated as if it were always there. For legislation post-dating the Charter, it is like it was there from the start. In both cases, the source of the obligation is Parliamentary fiat...*³²

57. In applying the rights compatible rule, Nettle JA found it is consistent with the purpose of the provision and it is possible for the word to be given a rights-compatible meaning so that 'likely' now meant 'more probable than not'. That is so, notwithstanding a previously different meaning of the word. Nettle JA is careful to say this conclusion is

³⁰ *RJE*, 2008, VSCA, [104].

³¹ *RJE*, [114].

³² *Kracke*, 2009, VCAT [219].

within the ambit of interpretation and well short of the forbidden territory of judicial legislation.³³ Nonetheless, it reveals how potent a rights compatible rule can be.

Exploring the Victorian proviso: consistently with statutory purpose

58. In Victoria, the rights compatible rule contains an express reference to statutory purpose. The ACT subsequently introduced a similar requirement. So the application of section 32 must be loyal to that purpose - a rights-compatible meaning must be consistent with the statute's purpose.

59. In my view, that proviso does not appear to alter the conclusion reached about what section 32 permits – it makes obvious that its application must be consistent with that statutory purpose. Recall the earlier discussion about applying the purposive rule – it permits a departure from the literal meaning of words if that is consistent with purpose. So, logically, applying section 32 allows a departure from the ordinary meaning of words to allow a rights compatible meaning of words, so long as this is consistent with statutory purpose. You can see that the statutory purpose caveat is a reminder of the purposive rule. In that way, possibly, this caveat is a nod to Chapter III and Australia's constitutional context.

60. The more interesting question about the statutory purpose proviso is what if anything it adds to or subtracts from the operation of the rights-compatible rule, particularly in comparison with section 3 HRA and section 6 BORA.

61. Section 3 HRA is not legislatively expressed to be subject to statutory purpose; however, interpretation under section 3 HRA is subject to judicially developed restraints such as those set out in *Ghaidan* and *Sheldrake*³⁴. Similarly, section 6 BORA is not expressly legislatively expressed to be subject to purpose; instead interpretation under

³³ *RJE*, [117].

³⁴ *Sheldrake*, 2004, HL [24].

section 6 BORA is said to add and not displace the purposive rule set out in section 5 of the *Interpretation Act 1999* (NZ).³⁵

62. To reiterate, in the United Kingdom, the interaction with statutory purpose was judicially developed and as noted above was influential in framing the text of section 32. Consider for instance *Ghaidan*. There Lord Nicholls argues that, although the language of ‘husband and wife’ appears gender specific, the policy underlying the legislation, namely that the survivor of a cohabiting heterosexual couple has security of tenure, was equally applicable to a cohabiting homosexual couple because they have an equivalent relationship.³⁶ Lord Nicholls identified the purpose of the legislation which then informed the way in which his Lordship interpreted the terms of the legislation. Although, the words in the legislation are ‘husband and wife’ and may literally or ordinarily be understood as gender specific, the legislative purpose was sufficiently flexible to include same-sex couples.

63. So if a rights compatible meaning is consistent with the purpose of the enactment, there appears to be no or little textual difference between the operation of section 3 HRA and section 32. In *Kracke*, Justice Kevin Bell takes the view that the statutory purpose caveat was intended to put into section 32 the approach to s 3(1) adopted by the House of Lords in *Ghaidan*.³⁷

64. The UK decisions indicate section 3 *HRA* allows the judiciary to clarify the meaning and effect of ordinary legislative words, to express legislative words in different language, to read down over-broad legislation and to read in legislative provisions. Section 3, however, excludes the de facto enactment or amendment of legislation. Accordingly, s 3 *cannot* save incompatible legislation if its use would contradict the express or implicit will of Parliament, or alter the fundamental features or underlying thrust of a legislative scheme. The point of allowing courts to make declarations of incompatibility under section 4 *HRA* would be undermined if the position were otherwise.

³⁵ *Hansen*, [11] (Elias CJ); [251]-[252] (McGrath J).

³⁶ *Ghaidan*, [17].

³⁷ *Kracke*, [214].

65. In cases where a rights compatible meaning that is consistent with the purpose of the enactment can not be made, it appears that section 32 does not permit a rights compatible meaning to be given. It is difficult to say with any certainty whether or not section 3 HRA would allow a different result in such circumstances. I suggest a rights compatible meaning is not possible under section 3 HRA. That is because, if a rights compatible meaning is not consistent with the purpose of the enactment, it is also likely to be a meaning not consistent with the “underlying thrust of the legislation” and its “pith and substance”, and so a meaning which can not be given under section 3 HRA. This outcome would also be consistent with the role section 4 HRA is intended to play, which is to permit a declaration of incompatibility to be issued where a rights compatible interpretation pursuant to section 3 is not possible.

66. Nonetheless, it is possible, if only theoretically, that ‘the statutory purpose’ proviso has a narrower field of operation than phrases like ‘underlying thrust of legislation’ and ‘pith and substance’. So if in theory or in practice it remains possible under section 3 HRA to give a meaning that, whilst *inconsistent* with the purpose of the legislation is *consistent* with the underlying thrust of the legislation or pith and substance, then section 3 goes further than section 32. Whether that difference is theoretical, trivial or in practice can deliver by interpretation a different degree of rights protection is difficult to say.

67. At all events, a theoretical or trivial difference between the operation of section 3 HRA and section 32 should not provide grounds for stating that *Ghaidan* has no application in Victoria. Also, it does not follow that any significant difference in operation in any given case does not mean *Ghaidan* has no general application but simply that aspects of *Ghaidan* may not always be applicable or dictate the outcome.³⁸

³⁸ There is obiter dicta which when taken out of context or approached literally may suggest that section 3 HRA can support reading in to change the unambiguous meaning of words (eg, Lord Nicholls, 571). Query to what extent that is open under section 32. Even if it is not open under section 32, it does not follow that the *Ghaidan* and its principles are generally incapable of application.

68. 'Reading in' is available as a technique in the United Kingdom³⁹. It appears to be available in New Zealand.⁴⁰ The earlier discussion suggests that it is available as part of the current and ordinary rules of interpretation in Australia. If so, the starting point should, if not must, be that it could be deployed in the context of applying section 32.

69. The question of 'reading in' did not arise in *RJE*. Instead, Nettle JA left open whether section 32 goes as far as section 3 HRA in permitting courts to 'read in' words which change the meaning of the enacted legislation. That statement left open by Nettle JA contains two elements which should not be conflated. First, it refers to the availability of 'reading in' under section 32. Second, it refers to whether section 32 goes so far as to allow changes to the meaning of the enacted legislation, which is a legitimate inquiry in and of itself.

70. Here, the first element is easier to address. Nettle JA's reference to *Ghaidan* suggests that he approaches 'reading in', in the sense of notional reading in as discussed earlier today. I have already argued that 'reading in' is permissible in Australia and as a starting point 'reading in' would be permissible in applying section 32. There is nothing in section 32 which would suggest it is not permitted; the committee report which led to the development of section 32 suggests reading in is possible.

71. *Kracke* supports 'reading in'. As Justice Kevin Bell explains in obiter comments:

*"When s 32(1) applies, the court or other interpreter can read in...read down...and read broadly."*⁴¹

³⁹ *Ghaidan*.

⁴⁰ *Hansen*, [283] (McGrath J).

⁴¹ *Kracke*, [230].

72. In *Das*, in giving judgment the Chief Justice of the Victorian Supreme Court appears to endorse a similar outcome,⁴² and notes the submissions that reading in is possible by both parties before the Court.⁴³

Changing the meaning of legislation?

73. The second element referred to by Nettle JA leaves open the question of changing the meaning of legislation being interpreted.

74. In conventional interpretation, we have already seen that the operation of the purposive rule discussed earlier suggests there are ways in which the meaning of legislation can change when a new rule of interpretation is applied. So too, in the context of section 32, logic and text suggest that provided the changed meaning is consistent with an enactment's purpose and is linguistically possible.

75. The sense in which the meaning of the phrase 'changing the meaning of legislation' is understood is important and needs attention. If Nettle JA is suggesting, (and I do not believe His Honour is), that Lord Nicholls statement in *Ghaidan* supports a proposition that the rights compatible rule permits changing the meaning of enacted legislation contrary to statutory purpose and language, then that statement in *Ghaidan* should not be followed in Victoria. I do not understand Lord Nicholls to be endorsing such a proposition. I would argue that such a proposition would and should not be accepted in the United Kingdom either. While it may be correct in a sense to say a rights compatible rule permits change, it is the sense in which change is permitted that is very important. Section 32 permits change at least in an analogous sense that the purposive rule allowed change in the meaning vis a vis the literal meaning. Whether the difference that section 32 facilitates, namely requiring regard be had to fundamental human rights, allows, in addition, section 32 to go further remains to be seen.

⁴² *Das*, 2009, VSC, [171]: "...this implication is the most appropriate means of ensuring the right against self-incrimination is protected and that a fair hearing is guaranteed."

⁴³ *Das*, [165] – [166] eg, the parties submitted that derivative use immunity may be read into the Act. This may include implying words into the Act if necessary.

76. If, as is more likely, Lord Nicholls statement in *Ghaidan* stands for the proposition that the original meaning of the enactment being interpreted can be added to or departed from in applying the rights compatible rule, and so a changed meaning can be given to the enactment, then that is precisely what the rights compatible rule permits. Indeed, in my view, it is what Nettle JA does in *RJE* and expressly notes as what section 32 permits.⁴⁴ It is precisely this which Justice Bell says is within section 32 in *Kracke*.⁴⁵ In *Das*, the Chief Justice leaves open for another day the further proposition whether reading in to change the unambiguous meaning of words is possible.

Wider constraints and limitations

77. As I indicated upon earlier, and possibly at the risk of repetition, there are limitations to the interpretive process authorised by provisions such as s.3 *HRA* and section 32. Lord Bingham of Cornhill summarized these limitations and the effect of the provision, albeit non-exhaustively, in *Sheldrake* at 303G-304B, in a passage which is as follows :

“... First, the interpretative obligation under section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility under section 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention-compliant interpretation is not possible, such limit being illustrated by *R(Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 and *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467. In explaining why a Convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (paras 33, 49, 110-113, 116). All of these expressions, as I respectfully think, yield valuable insights ...”

78. Similar statements are made in *Kracke*. In the Australian context, Chapter III and the separation of powers doctrine may operate to reinforce those constraints. It is not

⁴⁴ *RJE*, [114]- [115], Nettle JA agrees with a four step approach to rights compatible interpretation set out by Lord Woolf in *Poplar*. The second step expressly notes modifying the meaning of legislation.

⁴⁵

immediately apparent how they may operate to substantially and differentially augment those constraints.

79. Those are not the kind of constraints, however, which commend themselves as sufficiently restrictive to an Australian judge, according to Spiegelman CJ.⁴⁶ Writing extra-judicially His Honour states that the statutory purpose proviso is sufficient to ensure that what is regarded as interpretation under section 3 HRA should not be so in Australia.

80. So there are those who find aspects of *Ghaidan* difficult – In particular, there are those who point to interpretive aspects of *Ghaidan* and argue those aspects should not be followed in Australia. Equally, there are those who see little difficulty with *Ghaidan*. As discussed earlier, the possibility of *Ghaidan* applying in Victoria has been endorsed in Victoria, at least implicitly, by the Victorian Parliament and seemingly explicitly by the judiciary (e.g. *Kracke*).

81. The discussion earlier presents some difficulties in accepting the opinion that *Ghaidan* should not be followed in Victoria. That is, adding to or subtracting from the parliamentary intent evident in the ordinary meaning of words (by reference to the parliamentary intent of a subsequent instruction), ‘reading in’ as a technique to give meaning to a provision, and the general approach taken in *Ghaidan* are, in my view, precisely what section 32 was designed to and can deliver. I accept there are obiter dicta in some cases which when literally approached or taken out of context invite caution – but that is a different proposition from not following the substance of what *Ghaidan* stands for and provides. Moreover, they should not be used to overstate or exaggerate arguments about the operation and reach of rights compatible rules.

82. I accept it is difficult to identify with precision the nature of what would be identified as the outer limits of section 32 (and how that might differ from what is permitted by section 3 HRA). Similarly, it is difficult to identify in the abstract whether restraints, actual or

⁴⁶ Spiegelman, First Lecture, 2008, 28; Spiegelman, Third Lecture, 2008, 16. See also *Raytheon* [2008] ACT AAT 19, [78].

perceived, emanating from Chapter III may yield different results, whether at the margins or in terms of judicial approach and mentality. Possibly, in this context of attempting to identify differences between the reach of section 3 HRA and section 32, the presence of Chapter III and an entrenched constitutional framework may operate on the Australian judiciary in an immeasurable way on approach and mentality which the absence of an equivalent would not the United Kingdom judiciary. A similar proposition may be made about the tug of the European Convention on Human Rights on the United Kingdom judiciary's approach and mentality in a way in which the ICCPR may not (at least as yet) tug.

83. Likewise it is not easy to identify what if anything about some of the early high watermark cases or obiter dicta in the United Kingdom cases which are thought to exemplify or exceed those outer limits. That difficulty is compounded because of the risk of descending into a futile 'I say judicial interpretation' and 'You say judicial legislation' debate. And as discussed earlier, applications of existing and non-rights rules of interpretation are subjected to similar debates.

Explanation for judicial role in applying different and rights oriented rules of interpretation?

84. Before I conclude, I digress briefly to outline an explanation for the judicial role in relation to interpretation. Obviously, an orthodox explanation for how an earlier and later parliament's different intents are reconciled may yet be approached in terms of judges as agents of the Parliament applying the different instructions of parliament as expressed in statutes. Some would say, the Constitution mandates this role to judges. That is elementary.

85. However, that explanation may not be complete. That explanation may also be an impoverished descriptor of why judges prefer or should prefer parliament's intent as expressed in a rights-compatible rule.

86. A complementary explanation would recognise that where the court's function of protecting human rights is being discharged, a court is freer in applying the rights compatible rule to prefer, the intention of parliament which sets out the rights compatible rule. One reason is because parliament itself has said so and as a partner in a collaborative project to protect and promote rights. Another reason is that the

applying the purposive rule expressly invites consideration of at least legislative policy. It may well be that another reason is that giving effect to human rights can legitimate a role for judicial policy, especially if one takes the view that the courts have an independent role, as guardians of the rule of law, consistent with the separation of powers, to protect and promote rights.

87. I note here a further strand. The rights oriented common law rules of statutory interpretation and presumptions, which operate to protect the statutory infringement of rights absent express words or necessary implication.⁴⁷ For present purposes, my interest is the fact that common law judges developed such rules. That shows the potential in *existing* common law method and approach which allow judges to be partners rather than agents when interpreting legislation.⁴⁸ The legislatively provided rights compatible rules represent an amalgam of common law rights oriented rules and presumptions, and give effect to international law human rights obligations. The statutory rights compatible rules may well go further than their common law kin. At all events, they are now buttressed by a democratic mandate and may provide scope for suggesting that these rules represent a new dynamic.

88. Certainly, a more dynamic model of statutory interpretation which acknowledges the different streams of democratic mandate, common law heritage, legislative policy and judicial policy and their contribution to matters of human rights related statutory interpretation may have greater explanatory power of why it is that the rights compatible rules are special and capable of operating powerfully to deliver rights-compatible meanings.

89. Perspectives of the proper boundaries of interpretation, the role of judges in statutory interpretation and rights protection, the relationship with parliament, and underlying theories of rights based judicial review will colour the approach and mentality taken to the rights compatible rule, as they do in relation to the ordinary rules of statutory interpretation. Ultimately, it may not be possible to divorce such matters from a

⁴⁷ Pearce and Geddes, Ch 5.

⁴⁸ J Bell and G Engles *Cross on Statutory Interpretation* (1995), 166; Pearce and Geddes, Ch 5.

meaningful understanding of the scope and application of rights compatible rules. These wider aspects are a subject for another day.

C CONCLUSION

90. Consideration of the current or ordinary rules of statutory interpretation reveals that the ordinary meaning of the words of a statute can be added to or departed from in applying the purposive rule. Why? Because the courts, with the express endorsement of parliament, must prefer legislative purpose, unless a contrary intent is evident. The current rules also suggest that 'reading down/up' and 'reading in' are available.

91. I undertook this inquiry to try and understand what the current position reveals by way of analogy or guidance for the relationship between rights compatible rules and the parliamentary intent evident in the meaning of a statutory provision and the techniques of reading down/up and in. I argued that a starting point is that when applying a new rule of interpretation in ascertaining meaning one is not limited to a prior interpretation. I argued that reading down, up and in are possible. That is consistent with the background to section 32, its overseas heritage and the first steps being taken by Victorian courts. So section 32 tolerates a powerful reading of legislation. And even then, there are constraints internal to the Charter (e.g. the text of section 32, the availability of section 36) and external to it (e.g. Chapter III) applicable to statutory interpretation which must continue to apply.

92. Now, I should not be taken to say that section 32 may not go further than existing rules of interpretation or that the mechanics are identical. I should not be taken to say that adding a list of rights standards does not make a difference. I simply want to make the point that the rights compatible rules are not the first time in Australia that a legislative instruction to interpret legislation in a particular way causes different outcomes for words being interpreted to be realised.

93. I identified several reasons for undertaking this inquiry and at the start of this discussion. I want to return to my first reason. This inquiry is worth undertaking to

better understand the mechanics of the rights compatible rule and how different or not it is to the current rules of statutory interpretation. Second, understanding the mechanics of the current, especially non-rights, rules of statutory interpretation and techniques they permit, allow us to focus on the key points of difference that statutory rights compatible rules trigger – namely the application of the rights themselves. But in a discussion and debate about rights, what is simplistic is not distinguishing between what the current rules make possible in changing outcomes and to point to exactly the same mechanics under a rights compatible rule and object to those mechanics merely because changed outcomes are delivered in operating a rights compatible rule.

94. To point to what the rights compatible rule yields and then say ‘oh look, this results in different outcomes because it allows changing the ordinary words of meaning and reading down’ is not enough. It is true – section 32 allows that. But changing the meaning of words and reading down/ in or up are also available by applying the current rules of statutory interpretation. To my mind, the real discussion and debate about rights compatible rules are not that they allow what is currently possible but that they can do so by reference to rights based standards and about the extent to which the rights compatible rules may allow going beyond what is currently possible.
