
What Parliament *Didn't* Say: The Effect of Silence during Legislative Scrutiny on Statutory Interpretation*

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Abstract: When interpreting legislation, it has become routine for courts and other readers to refer to related Hansard and other parliamentary materials to help determine what the legislation means. Most of the time that parliamentary record is used for what it says about the proposed legislation. However, it is also possible to use Hansard for what it *doesn't* say. In American statutory interpretation law, this is called the 'dog that did not bark' canon, named after a Sherlock Holmes story, where a watchdog that failed to bark was a critical clue. In Australia, there is no statutory interpretation canon or presumption with this colourful moniker. But there is evidence from Australian case law that interpreters of legislation can use silence in parliamentary deliberations on proposed legislation to infer something about the meaning of that legislation. This article demonstrates how silence in legislative scrutiny deliberations can influence statutory meaning in Australia and identifies some implications of that use for both law makers and interpreters.

INTRODUCTION

In 1982, Harvard Law School Professor Lawrence H. Tribe wrote a paper about construing 'the sounds of Congressional and Constitutional silence'.² In that paper, he wrote that the 'arts of silence and inaction are no strangers to lawmakers'.³ To support this statement, he quoted a tale about an American state politician, Reid Lefevre, apparently a giant of the Vermont legislature of the 1960s. Professor Tribe wrote that at one point this giant of a politician, apparently nicknamed King Reid, was arguing against a proposal to dock state legislators' pay for the days when they were away from parliament. 'As I look around this chamber,' so-called

¹ This article has its origins in a presentation given at the Australia-New Zealand Scrutiny of Legislation Conference, Parliament House, Melbourne, 4 December 2024.

² Laurence H. Tribe, 'Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence'. *Indiana Law Journal* 57(4) 1982, 515-535.

³ Tribe, 'Toward a Syntax of the Unsaid', p. 516.

King Reid purportedly said, ‘it occurs to me that many of our members make their greatest contribution to the legislative process on days when they *aren’t* here.’⁴

What the story repeated by Professor Tribe speaks to is the power of silence. More specifically, the power of silence in materials that form part of the legislative record produced during the passage of a Bill through parliament (like second reading speeches, explanatory memoranda, committee reports and other Hansard records) when it comes to the next stage of life of that statute: its interpretation.

Parliamentary materials are often used to assist in statutory interpretation. But they are typically used for what they *do* say. For example, a second reading speech might explain the policy behind a statute, an explanatory memorandum might give an example of a provision’s operation, or a committee report might indicate the defect intended to be fixed by the statute.⁵ But Australian courts can also place value on what has *not* been said in the parliamentary record.

This article demonstrates how a court might use silence in legislative scrutiny deliberations for statutory interpretation. It then addresses how the use of that silence might be rationalised in statutory interpretation law. It does so by drawing on the well-established ‘text, context, purpose’ framework of the current law, and then focussing on the relevance of the notion of ‘context’ and its relationship to language conventions. The article then highlights some implications for both law makers and interpreters.

TYPE OF SILENCE

The notion of silence as a relevant evidentiary factor in the law is not novel.⁶ Nor is its use novel in statutory interpretation law. For example, an inference might be drawn by a court about the meaning of a statutory provision where the statute itself is silent on a particular matter.⁷

⁴ Tribe, ‘Toward a Syntax of the Unsaid’, p. 516 (emphasis added).

⁵ For example, in *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818; [2020] HCA 29, 827-28 [31]-[32] Kiefel CJ, Nettle and Gordon J relied on examples of the intended operation of a provision given in the Explanatory Memorandum.

⁶ See, e.g. Peter Tiersma, ‘The Language of Silence’. *Rutgers Law Review* 48(1) 1995, pp. 1-100 which addresses some legal contexts where a person’s failure to speak may be significant.

⁷ See, e.g. discussion in *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 253 CLR 284, [2013] HCA 50, 302 [19], 318 [47], 319 [49] (French CJ); 343 [138] (Hayne J). See also Harry Sanderson, ‘Sounding Out a Presumption

The focus of this article is on silence in the legislative record of parliamentary proceedings. When there is no comment by participants in the legislative process about a particular matter when parliament is considering a Bill, an inference may be drawn about the intent behind that proposed law from that silence.

In the United States, the principle that permits probative value to be given to silence in the Congressional record is referred to as the ‘dog that didn’t bark’ canon⁸ or, perhaps less colourfully, the ‘canon of canine silence’.⁹ This moniker is derived from the ‘curious incident of the dog in the night-time’ in Sir Arthur Conan Doyle’s Sherlock Holmes short story *Silver Blaze*, about the theft of a racehorse.¹⁰ The ‘curious incident’ identified by detective Holmes was that the dog did not bark. The silence of the dog provided a critical clue as to the identity of the thief, in that it revealed that the thief must have been known to the dog.¹¹ The rationale in the United States for the principle is that if the Bill had been intended to significantly change the state of the law, then it would be expected that some sort of comment would have been made in parliament during its legislative scrutiny.¹²

In Australia, there is no distinct label for use of this kind of silence in statutory interpretation. Yet despite this lack of express recognition, there is evidence in Australian case law that courts may use silence in parliamentary materials to infer something about statutory meaning. For the purposes of this article, I draw on High Court of Australia decisions as examples.

USES OF SILENCE IN PARLIAMENTARY MATERIALS

In the Sherlock Holmes story, detective Holmes refers to the silence of the dog as having ‘one true inference.’¹³ However, unlike with the dog’s silence, different inferences can be drawn from silence in parliamentary materials in different contexts. This is not to suggest that silence

from Silence’. *Australian Law Journal* 98(11) 2024, pp.939-949 which discusses inferences arising from parliamentary inaction (i.e. no amendment) following a judicial decision.

⁸ Valerie C Brannon, *Statutory Interpretation: Theories, Tools, and Trends*. USA: Congressional Research Service, No R45153, version 2, 5 April 2018, p. 60.

⁹ Brannon, *Statutory Interpretation*, p. 60, fn 612.

¹⁰ See, eg, *Church of Scientology of California v Internal Revenue Service* (1987) 484 U.S. 9, pp.17-18.

¹¹ Sir Arthur Conan Doyle, ‘Silver Blaze’ in *Sherlock Holmes: The Complete Novels and Stories (Volume 1)*. New York: Bantam Classics, 2003, pp. 521-546, p. 540, which in turn led to discovery about a murder. The relevance of the dog’s silence is at p. 544.

¹² Anita S. Krishnakumar, ‘The Sherlock Holmes Canon’. *The George Washington Law Review* 84(1) 2016, pp.1 – 54, pp. 2-3.

¹³ Arthur Conan Doyle, ‘Silver Blaze’, p. 544.

on its own will be the ‘magic bullet’ for determining statutory meaning or even that it is a dominant factor. Statutory interpretation is a ‘multi-factorial assessment’ that involves evaluation of all relevant principles and criteria to come to a view, after balancing those considerations, about construction.¹⁴ Silence in parliamentary materials might be one of those factors to consider.

The following categories are employed as tools to reveal the different ways courts engage with the concept of parliamentary silence. Arguably, there may be some overlap between them.

Silence is Telling

The first situation is where the lack of any mention in the legislative record is pointed out as being significant and relevant to the outcome for the interpretative issue. That significance varies from case to case. It may be noteworthy that the legislative record shows nothing inconsistent with, or conversely supports, the construction suggested by other interpretative factors (such as purpose or natural meaning), or the silence is used to positively support a conclusion that one of the choices of construction could not have been intended. For these cases I adopt, though use slightly differently, the description used by an American scholar that the ‘silence is telling’.¹⁵

One example is *Van Beelen v The Queen*.¹⁶ In that case, the appellant had been convicted of murder. A subsequent appeal had been unsuccessful. Nearly two decades later, the appellant sought a second appeal under section 353A of the *Criminal Law Consolidation Act 1935* (SA). One of the bases of this further appeal was that developments in the field of forensic pathology since his conviction about determining the time of death were ‘fresh and compelling evidence’ that allowed an appellate court to hear a second appeal.¹⁷ Section 353A(6)(b) of the SA Act provided that fresh evidence is ‘compelling’ if ‘reliable’ ‘substantial’ and ‘highly probative in the context of the issues in dispute at the trial.’ In analysing the scope of section 353A, the Court stated that:

¹⁴ See Jeffrey Barnes, Jacinta Dharmananda and Eamonn Moran, *Modern Statutory Interpretation: Framework, Principles and Practice*. Cambridge: Cambridge University Press, 2023, pp. 118-120, 130-135, 140-144.

¹⁵ Krishnakumar, ‘The Sherlock Holmes Canon’, pp. 9-14 uses this label in a more specific manner, dividing cases between ‘no mention’ cases and ‘silence is telling’ cases, but such a distinction was difficult to identify for the examples of Australian High Court decisions chosen for this article.

¹⁶ *Van Beelen v The Queen* (2017) 91 ALJR 1244; [2017] HCA 48.

¹⁷ *Van Beelen v The Queen*, 1247-1248 [14]-[16] (the Court).

Nothing in the scheme of the CLCA or the extrinsic material [citing South Australia, Legislative Council Hansard] provides support for a construction of the words 'reliable', 'substantial' and 'highly probative' in other than their ordinary meaning. Understood in this way, each of the three limbs of subs 6(b) has work to do...¹⁸

Silence in parliamentary materials was used in a similar manner in *Bell Lawyers Pty Ltd v Pentelow*.¹⁹ In deciding whether section 98(1) of the *Civil Procedure Act 2005* (NSW) about 'costs' that could be recovered by lawyers was qualified by a common law principle relating to lawyers acting on their own behalf, then Gageler J noted that the legislative history 'contains nothing to suggest legislative endorsement' of the common law exception.²⁰ Similarly, in another High Court decision it was noted that there was 'nothing in any of the extrinsic materials, or in the long policy debates' to suggest any rationale for the construction argued by one party about an extension of time provision in the *Patents Act 1990* (Cth).²¹

The more recent criminal case of *Director of Public Prosecutions (Vic) v Smith*²² expresses the relevance of silence even more clearly. The High Court was construing the *Criminal Procedure Act 2009* (Vic). One of the issues was the scope of section 389E(1) which provided that the court may make or vary any direction 'for the fair and efficient conduct' of a ground rules hearing. The respondent had been charged with sexual offences. In accordance with a direction purportedly made under section 389E(1), the judge met with the complainant on the day before the hearing to introduce herself. The meeting was attended by the judge, the complainant, and defence and prosecution counsel, but not the accused.²³ One of the issues before the High Court was whether the meeting was authorised by section 389E.

Justice Edelman (in dissent as to whether section 389E authorised the meeting, but not as to outcome) considered the second reading speech, which included a statement of compatibility, given when the Bill to introduce section 389E(1) was before the Victorian Parliament. The Attorney-General gave the required statement of compatibility about whether the Bill was compatible with the *Charter for Human Rights and Responsibilities Act 2006* (Vic). His Honour noted that the Attorney-General gave some examples of the impact of the *Charter*, but 'made no mention of the possibility of a private meeting prior to trial from which an accused person

¹⁸ *Van Beelen v The Queen*, 1250 [28] (the Court).

¹⁹ *Bell Lawyers Pty Ltd v Pentelow* (2019) 269 CLR 333; [2019] HCA 29.

²⁰ *Bell Lawyers Pty Ltd v Pentelow*, 357 [67].

²¹ *Alphapharm Pty Ltd v H Lundbeck A/S* (2014) 254 CLR 247, 274; [2014] HCA 42, [71] (Crennan, Bell and Gageler JJ).

²² (2024) 98 ALJR 1163; [2024] HCA 32.

²³ *Director of Public Prosecutions (Vic) v Smith*, 1169 [4]-[5], 1176 [51][57], 1185 [103].

was excluded...without even access by audiovisual link.²⁴ That omission, His Honour said, ‘is telling.’²⁵ The omission comprised one of the matters that led to his Honour’s view that section 389E(1) could not empower such a meeting as such a direction would have the effect of unfairness or inefficiency in the conduct of the proceeding.²⁶

Silence in the parliamentary materials was similarly relied on in *Coverdale v West Coast Council*.²⁷ The decision concerned the meaning of ‘Crown lands’ in section 11 of the *Valuation of Land Act 2001* (Tas). The issue was whether the phrase had the meaning given to that term in the *Crown Lands Act 1976* (Tas), which defined it to include land covered by the sea and other waters. The issue would determine whether farming leases over parts of the seabed and harbour waters were liable to be valued and rated by the Council under the *Valuation of Land Act 2001* (Tas). One of the arguments of the Valuer-General, which had declined to value the leases, was that that an amendment to the *Valuation of Land Act 2001* in 2007 made drafting changes to section 11 that revealed that ‘Crown lands’ was to be understood as excluding Crown land under the sea.²⁸ The Court, in a unanimous decision, rejected that submission, stating that there was no suggestion in the amending legislation ‘or in any relevant extrinsic materials’ (citing the Tasmania House of Assembly Hansard and the Bill’s Clause Notes²⁹) of a purpose of confining the meaning of ‘Crown land’ in that way.³⁰

Opportunity Silence

The probative value of absence of comment in parliamentary materials might be strengthened when the legislative history of a statute reveals a particular state of the law that has been long accepted, such as long standing legal principles or a pattern of legislation. In those instances, the ‘silence’ may be more compelling as an interpretative factor because of that historical

²⁴ *Director of Public Prosecutions (Vic) v Smith*, 1197 [161].

²⁵ *Director of Public Prosecutions (Vic) v Smith*, 1197 [161].

²⁶ *Director of Public Prosecutions (Vic) v Smith*, 1197 [162]. Despite this view on s 389E Justice Edelman went on to hold that while the direction was irregular, it was not a fundamental irregularity at common law that might taint the evidence of the complainant.

²⁷ (2016) 259 CLR 164; [2016] HCA 15.

²⁸ *Coverdale v West Coast Council*, 176 [39].

²⁹ Similar to an explanatory memorandum.

³⁰ *Coverdale v West Coast Council*, 177 [40].

context. This is because Parliament can be seen as being squarely presented with an opportunity to alter the previous state of affairs but is silent during legislative scrutiny.

An example is *Frugtniet v Australian Securities and Investments Commission*.³¹ The Australian Securities and Investments Commission ('ASIC') had made an order banning Mr Frugtniet from engaging in credit activities pursuant to section 80(1)(f) of the *National Consumer Credit Protection Act 2009* (Cth). For the purposes of the banning order, ASIC was required under section 80(2) to have regard to criminal convictions but, under the *Crimes Act 1914* (Cth), was not permitted to have regard to any spent convictions. The *Crimes Act 1914* (Cth) further provided that the exception for spent convictions did not apply to a court or tribunal.³² Mr Frugtniet applied to the Administrative Appeals Tribunal for review of ASIC's decision. In affirming ASIC's decision, the Tribunal took into account the spent convictions.

The Court noted the long-standing principle underpinning merits review that the jurisdiction of the reviewing body, here the Tribunal, was to 'stand in the shoes of the decision-maker'³³, in this case ASIC, and so exercised the same powers as that decision maker. In their joint judgment, Kiefel CJ, Keane and Nettle JJ observed that the construction of section 80(2) to incorporate the exception in the *Crimes Act* for courts and tribunals 'needs to be assessed against the background of the long-standing principles concerning the function of an administrative review tribunal in the conduct of merits review of administrative decisions, to which reference has been made'.³⁴

Not only, said that joint judgment, was such an 'obscure implication' improbable against that background, but more:

*A fortiori where, as in the case of s 80(2), there is not a word to suggest in any of the extrinsic materials, including the Explanatory Memorandum and Second Reading Speech, a parliamentary intent to the effect that the AAT was to exercise a function other than the function exercised by ASIC. In light of such a tenuous implication, it is more probable that Parliament did not have an intention of changing the nature of administrative merits review of ASIC's decisions in the way contended for by the respondent.*³⁵

³¹ (2019) 266 CLR 250; [2019] HCA 16.

³² *Frugtniet v Australian Securities and Investments Commission*, 254-5 [1]-[10].

³³ *Frugtniet v Australian Securities and Investments Commission*, 271 [51] (Bell, Gageler, Gordon and Edelman JJ). See also 257 [14] (Kiefel CJ, Keane and Nettle JJ).

³⁴ *Frugtniet v Australian Securities and Investments Commission*, 259 [21].

³⁵ *Frugtniet v Australian Securities and Investments Commission*, 259 [21].

In concluding, they observed that the better view was that such a profound change to the nature of merits review was not intended by parliament.³⁶

Similarly, in *Flaherty v Girgis*,³⁷ the High Court referred to the long-established case law that gave relevant provisions of the *Service of Execution of Process Act 1901* (Cth) a construction that meant those provisions were supplemental to, rather than supplanting of, State laws. One of the arguments was that the statute was silent on the relationship between Commonwealth and State laws. The joint judgment of Mason ACJ, Wilson and Dawson JJ stated:

*Reference to the Parliamentary Debates of the time... does not lead to any contrary conclusion. ... One would expect that if State laws relating to service out of the jurisdiction were to be cut down in important respects, there would be some reference to the fact.*³⁸

Another type of squarely presented ‘opportunity’ is where there is a new version of an Act before parliament against a background of legislative antecedents, previous amendments, or predecessor Acts, which seem to have maintained or accepted a particular construction of a provision. An amendment Act provides parliament with the opportunity to change that construction, so silence gives rise to the inference that no change was intended.

One example is *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union*.³⁹ One of the issues that the High Court was required to determine was whether section 545(1) of the *Fair Work Act 2009* (Cth) (*‘Fair Work Act’*) permitted a Court to impose penal orders.⁴⁰ The Federal Court, as a consequence of a contravention by a union and one of its officials, had imposed a penal order that the trade union must not indemnify its officials. Section 545(1) of the *Fair Work Act* had an extensive legislative evolution, including

³⁶ *Frugniet v Australian Securities and Investments Commission* 266 [32]. The joint judgment of Bell, Gageler, Gordon and Edelman JJ came to the same view on construction, but without relying on a similar use of parliamentary materials.

³⁷ (1987) 162 CLR 574.

³⁸ *Flaherty v Girgis*, 591. The joint judgment went on to note that the second reading speech, in particular, was equivocal: at p. 592.

³⁹ (2018) 262 CLR 157; [2018] HCA 3.

⁴⁰ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union*, 177 [60]. There was a separate statutory interpretation issue about whether there was an implied power in separate s 546: 177 [61].

predecessor Acts and previous versions of section 545.⁴¹ The joint judgment of Keane, Nettle and Gordon JJ noted that section 545 had been re-drafted since those legislative antecedents, but agreed with comments of Jessup J in the appellate court (from which the appeal arose) that ‘since the change in form had not been the subject of commentary in the parliamentary materials, it was inescapable that the change was one only of drafting and not reflective of a legislative intent to alter the substance of the pre-existing law.’⁴²

A different kind of ‘opportunity silence’ can arise where parliamentary amendments are made. In *Harvey v Minister for Primary Industry and Resources*⁴³ one of the interpretative issues before the Court was the construction of the definition of ‘infrastructure facility’ in the *Native Title Act 1993* (Cth). The Full Court had determined that the definition was exhaustive and so confined to the types of facility listed in the definition.

The High Court rejected this construction, holding that the definition was non-exhaustive and so ‘infrastructure facility’ was not confined by reference to the list but also bore its ordinary meaning. One of the reasons for coming to this view was the contents of parliamentary material. The Court considered the Explanatory Memorandum (the ‘1997 Memorandum’) that accompanied the originally introduced Native Title Amendment Bill 1997 and noted that the 1997 Memorandum expressly addressed the term ‘infrastructure facility’ and stated that it was to bear its ordinary meaning.⁴⁴

That Bill was the subject of substantial amendments following its introduction into parliament. Consequently, a Supplementary Memorandum was produced. One of the amendments related to the definition of ‘infrastructure facility’. The joint judgment observed:

It is true that after [the Explanatory Memorandum] was written in 1997 a great many more amendments were made to what was then the Native Title Amendment Bill 1997 (Cth) (which subsequently became the Native Title Amendment Act 1998 (Cth)). ...However, nothing is said in the Supplementary EM that followed which contradicts what was said in the 1997 Explanatory Memorandum. If Parliament had

⁴¹ See *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2016) 247 FCR 339, 347-349 [37]-[45] (Jessup J).

⁴² *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union*, 187 [91] (Keane, Nettle and Gordon JJ) referring to Jessup J’s observations in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* CFMEU (2016) 247 FCR 339, which the joint judgment expressly agrees with at: 192 [107].

⁴³ (2024) 98 ALJR 168; [2024] HCA 1.

⁴⁴ *Harvey v Minister for Primary Industry and Resources*, 177 [32] (Gageler CJ, Gordon, Steward and Gleeson JJ), 191 [103] (Edelman J).

wanted to reverse its earlier explanation of the meaning of the term ‘infrastructure facility’ it could easily have done so.⁴⁵

Justice Edelman in a separate judgment (agreeing as to outcome on this point) similarly noted that ‘the Supplementary Explanatory Memorandum that was produced after this amendment [to the application of the definition] did not suggest that there had been any intention to change the meaning of ‘infrastructure facility’’.⁴⁶

Re-enactment Silence

Building on the above scenarios, silence in parliamentary materials is a relevant indicator for the so-called re-enactment presumption in statutory interpretation. This is a common law presumption that assumes that where Parliament repeats words in a statute that have been judicially construed, ‘it can be taken to have intended the words to bear the meaning already judicially attributed to them’.⁴⁷ In other words, if the words of a statute have been given a meaning by a superior court and that attribution forms part of the reasoning of the court regarding the final outcome, then if a parliament (the same or another parliament) re-enacts those words given judicial meaning in another statute, that parliament might be taken to have ‘approved’ the meaning given to those words in the prior decision, and therefore it is presumed that they bear that judicial meaning.

The presumption has been described as ‘artificial’, and certainly its weight in the contemporary Australian legal system (where parliaments routinely amend statutes and so the possibility of re-enacting the same words is high) is questionable.⁴⁸ However, the application of this presumption has, it has been judicially noted, become ‘more discerning’ as parliamentary processes have become more available for courts to examine.⁴⁹ That is, since the legislative and common law developments of the 1980s and 1990s (more on this shortly) that led to relaxations in access to, and broadening of the range of, parliamentary materials for

⁴⁵ *Harvey v Minister for Primary Industry and Resources*, 186 [75] (Gageler CJ, Gordon, Steward and Gleeson JJ).

⁴⁶ *Harvey v Minister for Primary Industry and Resources*, 191 [104].

⁴⁷ *Director of Public Prosecutions Reference No 1 of 2019* (2021) 95 ALJR 741, 754; [2021] HCA 26, [51] (Gageler, Gordon and Steward JJ). See also 746 [10] (Kiefel CJ, Keane and Gleeson JJ, dissenting but not as to this principle). Both judgments cite *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106.

⁴⁸ *R v Reynhoudt* (1962) 107 CLR 381, 388 (Dixon CJ) .

⁴⁹ *Director of Public Prosecutions Reference No 1 of 2019* (2021) 95 ALJR 741, 754; [2021] HCA 26, [51] (Gageler, Gordon and Steward JJ) citing *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310, 329.

interpretation, parliamentary evidence can be more readily used to assess whether an inference that parliament ‘approved’ a judicially attributed meaning of statutory text can be plausibly drawn.

The presumption may be ‘strengthened by the legislative history of the statute’⁵⁰, including parliamentary materials, if the material contains evidence that indicate parliament can be inferred to be ‘aware’ of a prior judicial interpretation. For example, in *Vella v Commissioner of Police (NSW)*, Kiefel CJ noted that it was evident from the second reading debates for a Bill that parliament was aware of a particular decision on a statute on which the Bill was modelled.⁵¹ The joint judgment similarly noted that it was evident from the parliamentary debates that the New South Wales Parliament could be taken to have been aware of the prior judicial interpretation.⁵²

Conversely, the *absence* of evidence in parliamentary materials may mean it is easier to rebut the re-enactment presumption. In a 2024 High Court case, Edelman J explained, agreeing with the majority judgment, that the ‘force of this re-enactment or amendment principle of interpretation depends wholly upon context’ and that will ‘depend upon a number of factors including ... the extent to which extrinsic materials to the re-enactment or amendment make express or implied reference to the decision.’⁵³ In relation to the matter before the Court, his Honour went on to say that the presumption ‘has no force when the decision said to have been entrenched by the amendments is the obiter dicta, *unmentioned in any extrinsic materials*, of a single judge who was addressing a different point in an unreported decision ... nearly two decades before the first amendment.’⁵⁴ In other words, the absence in the parliamentary materials of evidence of parliamentary approval of the prior decision is a factor that is relevant to the weight of the presumption.⁵⁵ Or, as the majority judgment in the decision pithily explained: ‘[o]ne judicial swallow does not make a legislative summer.’⁵⁶

⁵⁰ *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 233-4; [2019] HCA 38, [19] (Kiefel CJ).

⁵¹ *Vella v Commissioner of Police (NSW)*, 233 [19].

⁵² *Vella v Commissioner of Police (NSW)* [52] (Bell, Keane, Nettle and Edelman JJ).

⁵³ *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* (2024) 98 ALJR 828, 856; [2024] HCA 21, [148].

⁵⁴ *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* 856 [149] (emphasis added).

⁵⁵ See also *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* 835-6 [38] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

⁵⁶ *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd*, 836 [38].

RATIONALE FOR USE OF SILENCE IN PARLIAMENTARY MATERIALS

The examples above demonstrate that a court can use absence of comment in the record of legislative scrutiny as a factor to determine the meaning of words in a statute. Given this, the next question is how to understand this practice in the context of the current law.

In Australia, as noted earlier, it is well established that the framework for statutory interpretation is to consider the text, in its context, and having regard to its purpose.⁵⁷ The interpretation Acts of each Australian jurisdiction contain a provision requiring consideration of the purpose of a statute. For example, section 15AA of the *Acts Interpretation Act 1901* (Cth) ('AIA') requires an interpretation that would 'best achieve' the purpose of an Act. These statutory instructions reflect the common law.⁵⁸

Recourse to extrinsic materials, including parliamentary materials, is also governed by both statutory and common law in Australia, but in somewhat different ways. The interpretation Acts of each Australian jurisdiction contain a provision, of varying restrictions, permitting access to materials outside the statutory text for the interpretative task.⁵⁹ The Commonwealth led this legislative development with the enactment of section 15AB in the AIA in 1984, a seismic shift in statutory interpretation law at the time.

Section 15AB was, at least in part, a reaction to the state of the common law that governed recourse to extrinsic materials, regarded as 'neither clear nor convincing.'⁶⁰ Within the next decade, all States and Territories, except South Australia (which relied entirely on the common law until 2021), enacted a provision on recourse to extrinsic materials in their respective

⁵⁷ *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368; [2017] HCA 34 [14] (Kiefel CJ, Nettle and Gordon JJ). In New Zealand, this tripartite approach is embodied in legislation: *Legislation Act 2019* (NZ) s 10.

⁵⁸ *Thiess v Collector of Customs* (2014) 250 CLR 664, 672; [2014] HCA 12, [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

⁵⁹ *Acts Interpretation Act 1901* (Cth) s 15AB; *Legislation Act 2001* (ACT) s 141; *Interpretation Act 1987* (NSW) s 34; *Interpretation Act 1978* (NT) s 62B; *Acts Interpretation Act 1954* (Qld) s 14B; *Legislation Interpretation Act 2021* (SA) s 16; *Acts Interpretation Act 1931* (Tas) s 8B; *Interpretation of Legislation Act 1984* (Vic) s 35(b); *Interpretation Act 1984* (WA) s 19.

⁶⁰ Symposium, *Symposium on Statutory Interpretation*. Canberra: Attorney-General's Department, 5 February 1983, p. 81 (Sir Anthony Mason).

interpretation Acts. Most jurisdictions, except Victoria, enacted a provision that mirrored, or was substantially similar to, section 15AB of the AIA.⁶¹

Soon after section 15AB was enacted it was judicially acknowledged that the section ‘has its limits’.⁶² The section provides that it is discretionary for interpreters to refer to extrinsic sources, but only permits them to do so if at least one of three circumstances is satisfied: to ‘confirm that the meaning of the provision is the ordinary meaning’ (s 15AB(1)(a)), or to ‘determine the meaning’ of a provision when ‘the provision is ambiguous or obscure’ (s 15AB(1)(b)(i)), or to ‘determine’ meaning when the ‘ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable’ (s 15AB(1)(b)(ii)).

While it might have been thought that a legislative statement on the circumstances in which interpreters, including judges, could use parliamentary materials would have been the final word on the matter, the common law continued to develop. In 1997, the ‘modern approach’ to statutory interpretation was formulated.⁶³ The following statement from the 2017 High Court decision of *SZTAL v Minister for Immigration and Border Protection*⁶⁴ is often cited to summarise this ‘modern’ approach’.

*The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense.*⁶⁵

The ‘widest sense’ includes the statute’s legislative history of which parliamentary material is one component.⁶⁶ No ambiguity in the provision being construed is required before an interpreter can consider the wider context, including parliamentary materials. Indeed, regard to the wider context is considered an inherent part of the interpretative task. This common law approach is now well established, and its development has meant that, to a large extent, it,

⁶¹ For key historical developments regarding extrinsic materials, see Barnes, Dharmananda and Moran, *Modern Statutory Interpretation*, pp. 17-35.

⁶² *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, 112 (McHugh J).

⁶³ *CIC Insurance Limited v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

⁶⁴ (2017) 262 CLR 362, 368; [2017] HCA 34.

⁶⁵ *SZTAL v Minister for Immigration and Border Protection*, 368, [14] (Kiefel CJ, Nettle and Gordon JJ) (citations omitted). See also 374-5 [36]-[37] (Gageler J, dissenting but not as to this principle).

⁶⁶ *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 96 ALJR 56, 71; [2021] HCA 39, [87] (the Court).

rather than the interpretation Act provisions, have come to dominate the law about access to, and use of, extrinsic materials.⁶⁷

But while it is well accepted that the common law ‘text, context, purpose’ framework is the lynchpin behind current statutory interpretation, the rationale behind that framework is less clear. On this point, the High Court has been less forthcoming. But, to the extent a rationale has been clearly articulated, it seems to be based in a linguistic rationale. That is, given that a statute is a written document and a tool of communication, its meaning is governed by the conventions of language. In linguistic terms, the statute might be called a ‘speech act’ or ‘language act’ - an utterance for the purpose of communication – a concept central to a philosophy of language theory developed by American philosopher John Searle⁶⁸ (who drew on the work of philosopher John Austin). As Edelman J has said, the common law ‘modern approach’ of text, context and purpose ‘generally aligns the techniques for interpretation of statutes with the techniques for interpretation of ordinary speech.’⁶⁹

Using this paradigm, the Parliament is the ‘speaker’ and the ‘speech act’ is the statute. As with ordinary speech, the meaning of ‘utterances’ are inevitably affected by their context, including ‘the general fabric of basic knowledge and assumptions, express or tacit, that are shared by the users of the language’.⁷⁰ This linguistic model in the context of lawmaking bodies is explained by linguistic philosophers such as Scott Soames as follows:

*What [lawmakers] assert is what a reasonable, informed audience that understands the text’s linguistic meaning (including special legal meanings if any), the relevant publicly available facts and aspects of the lawmaking history, and the area of existing law into which the new law is expected to fit would rationally take the lawmakers to intend to assert or stipulate.*⁷¹

For statutes, those ‘relevant publicly available facts and aspects of the lawmaking history’ include parliamentary materials. As, again, Edelman J has explained:

⁶⁷ See Jacinta Dharmananda, ‘Sliding Doors: Harvey and the Dual Legal Gateways to Extrinsic Materials.’ *Public Law Review* 35(2) 2024, pp.105-111.

⁶⁸ John Searle, ‘What Is a Speech Act’ in Max Black (ed), *Philosophy in America*. New York: Routledge, 2013, p. 221, pp.221-222.

⁶⁹ *Harvey v Minister for Primary Industry and Resources* (2024) 98 ALJR 168, 193; [2024] HCA 1, [111].

⁷⁰ Reed Dickerson, ‘Statutory Interpretation: The Uses and Anatomy of Context’. *Case Western Reserve Law Review* 23 1972, pp. 353-373, p. 356 (emphasis omitted).

⁷¹ Scott Soames, ‘Meanings, Speech Acts, and Legal Contents Produced by Plural Lawmaking Bodies’. *The Journal of Contemporary Legal Issues* 24(1) 2024, pp. 203-231, p.210 (emphasis omitted).

The duty of courts is to give effect to the meaning of statutory words as intended by Parliament. In common with how all speech acts are understood, the meaning is that which a reasonable person would understand to have been intended by the words used in their context.⁷²

If we accept this linguistic basis for the common law ‘text, context, purpose’ approach, which requires consideration of relevant parliamentary materials as part of ‘context’, then the next question is how silence in those materials is justified as an interpretative factor by that linguistic framework. It is one thing to use a communication paradigm when the evidence includes *positive* statements that form the background to the enacted law. But it is another to understand how that linguistic prism explains use of the *absence of a statement* (as part of the extrinsic context of the speech act) to indicate something about what was *said* (the statute).

Even without being conversant in the ‘highly developed, complex and sophisticated body of linguistic knowledge’ comprising speech act theory,⁷³ we can appreciate that silence can be meaningful. It is easy to imagine a scenario where silence during ordinary communication means something. Take this simple example which I have adapted from one example given by a linguistic scholar⁷⁴:

A brother comes home, and his sister is sitting at the kitchen table. The brother looks in the cupboard, and then asks his sister ‘Who ate all the chocolate biscuits?’

His sister is silent.

The brother says, ‘I knew you did!’

Even just a brief perusal of the literature related to the philosophy of language, including speech act theory, reveals that silence has been studied extensively in linguistic analysis and communication. Briefly, what that literature indicates is that, in communication, uses of silence are ‘well-nigh inexhaustible.’⁷⁵ Indeed, silence has been described as ‘a highly ambiguous form

⁷² *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818, 838; [2020] HCA 29, [95].

⁷³ Haig Khatchadourian, *How To Do Things with Silence (Philosophical Analysis Series, Vol 63)*. Germany: Walter de Gruyter GmbH, 2015, p.12.

⁷⁴ A Jaworski, ‘Silence’ in Keith Brown (ed), *Encyclopedia of Language & Linguistics*. Amsterdam: Elsevier Ltd, 2nd ed, 2006, p.377, p.378.

⁷⁵ Khatchadourian, *How To Do Things with Silence*, p. 8.

of communication.⁷⁶ Most importantly, the inference about the communication that can be drawn from silence is ‘fundamentally and inescapably contextual.’⁷⁷

If we accept that the meaning given to silence in linguistic theory is highly dependent on context, that seems to accord with the common law interpretation framework for statutory interpretation. The silence in the parliamentary record forms part of the wider context of the speech act: the statute. The relevance of the silence will be highly dependent not only on the speech act (the statute), but on other contextual factors such as historical background, legislative antecedents, and previous common law decisions. Context also includes other parliamentary material. For example, the content of a parliamentary committee report, a Minister’s speech in reply or a statement of compatibility with respect to human rights may help contextualise silence in, say, a second reading speech.⁷⁸

IMPLICATIONS FOR LEGISLATIVE SCRUTINY

The use and potential relevance of silence in the legislative record for helping to determine statutory text meaning has some important implications, both practically and theoretically. I highlight three key points.

First, there are practical implications for law makers. Parliamentary materials consist of materials written by ministers, members of parliament, departments, parliamentary staff and minister’s staff.⁷⁹ In light of the potential for inferences to be made from silences during legislative scrutiny, as reflected in those materials, for statutory interpretation, it would be wise for those participants to be aware, when preparing the materials, of that potential use.⁸⁰

Second, there are practical ramifications for interpreters. If silence can be relevant to the communicative content of a statute, as the cases reveal, and that relevance is heavily context dependent, then it is incumbent upon interpreters, courts and lawyers, to understand that

⁷⁶ A Jaworski, *The Power of Silence: Social and Pragmatic Perspectives*. USA: SAGE Publications, Incorporated, 1992, p. 85.

⁷⁷ Khatchadourian, *How To Do Things with Silence*, p.9. See also p.15.

⁷⁸ Thank you to the anonymous reviewer for suggesting that the relationship between different parliamentary materials be highlighted.

⁷⁹ *Acts Interpretation Act 1901* (Cth) s 15AB(2) identifies some types of parliamentary materials that may be used in statutory interpretation but s 15AB(2) is not exhaustive.

⁸⁰ Krishnakumar, ‘The Sherlock Holmes Canon’, pp. 22-28 identifies ‘legislative process problems’ in the American context with the canon.

context. The notion of ‘context’ is a broad umbrella when it comes to grappling with a complex process like the parliamentary process. As others have pointed out, the fundamental principles of ‘text, context and purpose’ are expressed at a ‘high level of generality’ and so do not offer universal or even clear guidance in relation to legislative scrutiny.⁸¹ Context might rationalise how the courts can consider parliamentary materials, including any lack of comment within them, but it provides little guidance when it comes to the assessment and weighing of the probative value of contextual material. Evaluation of the weight and relevance of what is not said (or said) requires something different – an understanding of the legislative process, something which the context principle does little to guide.

I have argued elsewhere, more generally, about the merit of understanding the parliamentary process for statutory interpretation, particularly when it comes to the evaluation of parliamentary materials.⁸² That merit is magnified when it comes to assessing what parliamentary materials don’t say for statutory interpretation. To take a simple example, understanding procedural rules may be relevant. In Federal Parliament, like other Australian parliaments, the standing orders in the House of Representatives and Senate are drafted so that a Bill will be considered over several days, at the minimum. But a variety of procedures may be used to suspend or overcome those requirements to expedite the passage of a Bill. To curtail debate on a Bill, measures that may be used include motions of ‘closure’ of the member (a motion that a member who is speaking no longer be heard),⁸³ a ‘gag’ motion (that the question in issue, such as a second reading motion, be put without further debate)⁸⁴ a ‘guillotine’ motion (a motion that the Bill be considered urgent which imposes limits on debate for all stages of the Bill)⁸⁵ or a contingent notice.⁸⁶ In the Senate, there is also the procedural mechanism of progressing a Bill ‘without formalities’, suspending the requirement for debate

⁸¹ Justice John Basten, ‘Statutory Interpretation: Choosing Principles of Interpretation’. *Australian Law Journal* 91 2017, pp. 881-885, p.881.

⁸² Jacinta Dharmananda, ‘Using Parliamentary Materials in Interpretation: Insights from Parliamentary Process’. *University of New South Wales Law Journal* 41(1) 2018, pp 4-39.

⁸³ House of Representatives, *House of Representatives Standing Orders*. Canberra: Department of the House of Representatives, 7th ed, 2018 (*‘House SO’*), O 80. There is no equivalent ‘closure’ motion in the Senate.

⁸⁴ *House SO*, O 81; Senate, *Standing Orders and Other Orders of the Senate*. Canberra: Department of the Senate, October 2022 (*‘Senate SO’*) O 199.

⁸⁵ *House SO*, OO 82–5; *Senate SO*, O 142.

⁸⁶ A notice stating that, if a certain event happens, then a motion will be moved to suspend certain standing orders.

to be undertaken over certain days.⁸⁷ Any of these procedures can limit what is said in the parliamentary record and therefore provide another reason for lack of comment.

The third point is about perspective. The perspective of the current law emphasises the statute as a single point in time instrument of communication. But once we go outside the statute for interpretation, we are looking at a diversity of non-legislative types of parliamentary materials, with different authors and purposes and subject to different procedures and timing. In other words, once an interpreter engages with parliamentary materials, they are, arguably, no longer looking at the statute as a single point in time instrument of communication, but as a policy tool that forms one piece of the complex, pluralist, political process of which it is a part. In other words, we are looking at it as part of an institutional process. This institutional perspective, I suggest, offers a more enlightening and systematic approach to evaluating parliamentary (and other) materials, including silence in those materials, than the broad concept of 'context'.

CONCLUSION

While not wishing to overstate its significance, absence of comment in parliamentary materials can be a relevant interpretative factor. This has implications for lawmakers and interpreters. Participants in law making should be aware of this potential when preparing parliamentary materials. Interpreters should pay attention to the legislative process to meaningfully assess those materials. Finally, this discussion invites courts and other interpreters to think more carefully about what lawmakers already well understand – the institutional, rather than purely communicative, role of a statute because of the implications of what may even be unsaid.

⁸⁷ *Senate SO*, O 113(2)(a).