NEGLECTFUL STATUTORY INTERPRETATION? A commentary on *Goldie v Minister for Immigration and Multicultural and Indigenous Affairs*

Oliver R Jones*

Introduction

In *Goldie v Minister for Immigration and Multicultural and Indigenous Affairs*[1] ('*Goldie v MIMIA*'), the Full Court of the Federal Court was faced with two issues of statutory interpretation. On the one hand, it had to ascertain the meaning of the term 'notification', in s 42A(8) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), while, on the other, it had to resolve the scope of the term 'error', in s 42A(10) of that Act. In the process, the Full Court had to negotiate an applicant with an extensive record of litigation, relevant decisions by previous Full Courts and the tension between the text of legislation, its purpose and its extrinsic materials. The decision that emerged is worth examining, not only to understand the conclusions that the Full Court reached, but also to evaluate how far those conclusions accord with the law relating to statutory interpretation generally.

Background

Mr Goldie as a litigant

After travelling from the United Kingdom to Australia, in 1992, Brian Gerald James Goldie became a prolific, and consistently successful, litigant in Australian courts. There were several strands to Mr Goldie's litigation. First, there was a series of proceedings before the Administrative Appeals Tribunal (AAT), single judges of the Federal Court and the High Court, and the Full Court of the Federal Court, in relation to the refusal of a Transitional (Permanent) Visa.[2] Second, there was a similar series of proceedings in the AAT, the Federal Court and the High Court, concerning a bridging visa.[3]

Another strand to Mr Goldie's litigation involved claims in tort against the Commonwealth, which arose out of advice to him regarding bridging visas and his placement in immigration detention.[4] Moreover, there were Mr Goldie's proceedings in the Supreme Court of Western Australia and the District Court of that State, as well as before a single judge of the Federal Court, in relation to criminal charges of stealing as a servant.[5] Finally, to facilitate much of the above, Mr Goldie brought proceedings against the Minister for Immigration, seeking reasonable facilities for the purposes of prosecuting legal action in relation to his immigration status.[6]

Throughout the litigation, Mr Goldie regularly represented himself, but he was also often represented by counsel. Either way, he was generally unsuccessful before the AAT, Western Australian courts and single judges of the Federal Court and the High Court. However, he had several significant victories in the Full Court of the Federal Court. One such victory recently resulted in Mr Goldie, on remittal from the Full Court to a single judge of the Federal Court, being awarded $22 000 in damages, against the Commonwealth, for wrongful arrest and imprisonment.[7] Yet, it is another, and lesser, of Mr Goldie's Full Court victories that is the subject of this paper: *Goldie v MIMIA*.[8]

Events leading to Goldie v MIMIA[9]

This case marked the final point in the series of proceedings concerning the Transitional (Permanent) Visa. As such, its background was as follows. On 29 May 1997, a delegate of the Minister for Immigration decided to refuse Mr Goldie a Transitional (Permanent) Visa. Mr Goldie applied to the AAT for review of the delegate's decision, but the AAT affirmed the decision.[10] Mr Goldie appealed to a single judge of the Federal Court from the AAT's decision, but that judge, Cooper J, dismissed the appeal.[11] Mr Goldie then appealed, from Cooper J's judgment, to the Full Court of the Federal Court, constituted by Spender, Drummond and Mansfield JJ. Their Honours allowed the appeal, set aside the orders of Cooper J and the AAT, and remitted the matter to that tribunal.[12]

It was on the remittal that the events critical to *Goldie v MIMIA*[13] began. The matter was listed for hearing by the AAT on 16 and 17 December 1999. On 16 December 1999, Mr Goldie appeared at the hearing, by counsel, but was not personally present. Under instructions, Mr Goldie's counsel applied for an adjournment. The AAT, constituted by Deputy President Gerber, granted an adjournment, until the following day.[14] On that occasion, Mr Goldie again appeared by counsel, without being personally present. Mr Goldie's counsel made another application for an adjournment. Deputy President Gerber refused to grant the adjournment. Mr Goldie's counsel then indicated that, apart from the adjournment application, he had no instructions to act in the matter at the hearing. Accordingly, with the leave of the Deputy President, Mr Goldie's counsel withdrew.[15]

Once this had occurred, Deputy President Gerber took the view that Mr Goldie had failed to appear in person, or by a representative, at the hearing and dismissed Mr Goldie's application, without proceeding to review the decision to which it related, being the refusal of the Transitional (Permanent) Visa.[16] In doing so, the Deputy President was acting under s 42A(2) of the AAT Act, which relevantly states:

> **42A Discontinuance, dismissal, reinstatement etc. of application**
>
> …
>
> (2) If a party to a proceeding before the Tribunal in respect of an application for the review of a decision (not being the person who made the decision) fails either to appear in person or to appear by a representative … at the hearing of the proceeding, the Tribunal may:
>
> (a) if the person who failed to appear is the applicant—dismiss the application without proceeding to review the decision; …
>
> …

However, s 42A(2) of the AAT Act is subject to s 42A(8)–(10) of that Act, which are in the following terms:

> (8) If the Tribunal, under subsection (2), has dismissed an application (other than an application in respect of a proceeding in which an order has been made under subsection 41(2)), the person who made the application may, within 28 days after receiving notification that the application has been dismissed, apply to the Tribunal for reinstatement of the application.
>
> (9) If it considers it appropriate to do so, the Tribunal may reinstate the application and give such directions as appear to it to be appropriate in the circumstances.
>
> (10) If it appears to the Tribunal that an application has been dismissed in error, the Tribunal may, on the application of a party to the proceeding or on its own initiative, reinstate the application and give such directions as appear to it to be appropriate in the circumstances.

Thus, Mr Goldie, having been informed of the dismissal by his counsel orally, on 17 December 1999, made an application, dated 24 March 2000, for the reinstatement of his application, under s 42A(8)–(9) and s 42A(10) of the AAT Act.[17] Then, apparently on 9 May

2000, Mr Goldie applied for an extension of time within which to make a fresh application for review of the refusal of the Transitional (Permanent) Visa, under s 29(7) of the AAT Act.[18]

Both the application for reinstatement and the application for the extension of time were determined by the AAT, constituted by Deputy President Hotop, on 11 June 2001.[19] The Deputy President held that he had no power to act under s 42A(9) and 42A(10) of the AAT Act and, accordingly, dismissed Mr Goldie's application for reinstatement.[20] The Deputy President also indicated that, while the dismissal of the application for reinstatement would not have prevented him from granting the application for an extension of time, under s 29(7) of the AAT Act, he had decided to dismiss that application as well.[21]

Mr Goldie applied to a single judge of the High Court, Kirby J, for an order nisi for constitutional writs and other relief to be issued in relation to the refusal of the Transitional (Permanent) Visa, but that application was refused.[22] In those circumstances, Mr Goldie applied to the Federal Court for an extension of time within which to appeal from Deputy President Hotop's decision, under s 44(2A)(a) of the AAT Act. Mr Goldie's application was, apparently, referred to the Full Court of the Federal Court, under s 44(3)(b)(ii) of the AAT Act, constituted by Wilcox, Downes and Carr JJ.[23]

Before the Full Court, Mr Goldie's counsel argued the application for extension of time by reference to the proposed grounds of Mr Goldie's appeal from Deputy President Hotop's decision. Those grounds concerned the application for reinstatement, rather than the application for an extension of time within which to apply to the AAT, under s 29(7) of the AAT Act. Accordingly, the principal issue before the Full Court was whether Deputy President Hotop was correct in holding that he had no power to reinstate Mr Goldie's application under s 42A(9) and 42A(10) of the AAT Act.[24]

The decision

Deputy President Hotop's reasoning

As indicated, s 42A(9) of the AAT Act enabled the Tribunal to reinstate an application dismissed under s 42A(2) of that Act, so long as the person who made the application had, within 28 days after receiving notification of the dismissal of the application, applied for the reinstatement under s 42A(8) of the AAT Act. In Mr Goldie's case, his counsel informed him of the dismissal orally, on the day it took place, being 17 December 1999. There was no documentary evidence that the Tribunal had given Mr Goldie written notification of the dismissal. However, Deputy President Hotop felt able to infer that Mr Goldie had received the written notification shortly after the dismissal.[25]

It was unnecessary, therefore, for the Deputy President to decide whether oral communication of a dismissal, by counsel, as opposed to its written communication, by the Tribunal, constituted notification, for the purposes of s 42A(8) of the AAT Act. Rather, given the inference of the written notification, Deputy President Hotop was able to conclude that Mr Goldie's application for reinstatement, dated 24 March 2000, had been out of time. As a result, in the absence of any ability to extend the 28 day requirement imposed by s 42A(8) of the AAT Act, the Tribunal had no power of reinstatement under s 42A(9) of the AAT Act.[26]

This left for consideration s 42A(10) of the AAT Act, which enabled the AAT to reinstate the application, where it had been dismissed in error. In Mr Goldie's submission, there had been a dismissal in error, on the basis that the AAT had made various errors of law.[27] Accordingly, Deputy President Hotop had to decide whether an error, within the meaning of s 42A(10) of the AAT Act, consisted of administrative errors only or, rather, extended to errors of law.

The Deputy President held that s 42A(10) of the AAT Act was limited to administrative errors. In doing so, the Deputy President referred to statements made by the Full Court of the Federal Court in *Brehoi v Minister for Immigration and Multicultural Affairs*[28] ('*Brehoi*').[29] In that case, the Full Court, consisting of Whitlam, Moore and Katz JJ, had indicated that the term 'error', for the purposes of s 42A(10) of the AAT Act, appeared to mean administrative error only.[30]

The principal basis for their Honours' conclusion was the legislative history to s 42A(10) of the AAT Act, which had taken the following form. It had been inserted into the AAT Act by the *Administrative Appeals Tribunal Amendment Act 1993* (AAT Amendment Act). The Attorney-General had clearly indicated in, for example, the Explanatory Memorandum relevant to the AAT Amendment Act, that s 42A(10) of the AAT Act was intended to give effect to the *Report of the Review of the Administrative Appeals Tribunal*.[31] The Report had, in turn, recommended the enactment of a provision that would enable the vacation of dismissals by administrative error.[32]

In reaching their conclusion, Whitlam, Moore and Katz JJ were also influenced by the fact that the Explanatory Memorandum discussed the operation of s 42A(10) of the AAT Act, in a manner that conformed to the Report's recommendation.[33]

After referring to *Brehoi*,[34] Deputy President Hotop mentioned s 15AA of the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act),[35] which states:

> **Regard to be had to purpose or object of Act**
>
> (1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Deputy President Hotop accepted that the purpose or object underlying s 42A(10) of the AAT Act was as articulated by the Full Court in *Brehoi*,[36] adding that '[t]here was no suggestion that s 42A(10) was intended by the legislature to provide a means of correction by the Tribunal of errors of law made by it in dismissing an application for review'.[37] On this basis, the Deputy President felt obliged, under s 15AA of the Acts Interpretation Act, to interpret s 42A(10) of the AAT Act as being limited to administrative errors.[38] In circumstances where Mr Goldie's submissions related to dismissal through errors of law, and there was no evidence of any relevant administrative errors, it followed that the AAT lacked the power to reinstate Mr Goldie's application, under s 42A(10) of the AAT Act.[39]

The response of Wilcox and Downes JJ

In relation to s 42A(9) of the AAT Act, Wilcox and Downes JJ reached the same result as Deputy President Hotop, but came to it by a different route. With reference to decisions of previous Full Courts on similar provisions of the *Migration Act 1958* (Cth), *Long v Minister for Immigration, Local Government and Ethnic Affairs*[40] ('*Long*'), and *WACA v Minister for Immigration and Multicultural Affairs*[41] ('*WACA*'), Wilcox and Downes JJ held that notification, for the purposes of s 42A(8) of the AAT Act, may be oral. Accordingly, given the communications by Mr Goldie's counsel, their Honours accepted that Mr Goldie's application for reinstatement had been out of time, with the result that Deputy President Hotop had not had any power of reinstatement, under s 42A(9) of the AAT Act.[42]

Their Honours took a different attitude to the Deputy President's conclusion regarding s 42A(10) of the AAT Act. In essence, Wilcox and Downes JJ held that the term error, in s 42A(10) of the AAT Act, appeared without any qualification or limitation. In other words, to their Honours, error, within the meaning of s 42A(10) of the AAT Act, necessarily meant error

of any kind. It could not, in the absence of an express qualification or limitation, be confined to administrative errors.[43]

Under this approach, Wilcox and Downes JJ refused to follow the statements of Whitlam, Moore and Katz JJ in *Brehoi*.[44] In the first place, their Honours observed that those statements were obiter dictum,[45] presumably leaving them without the substantial weight accorded decisions of previous Full Courts.[46] Further, to Wilcox and Downes JJ, the statements of the Full Court in *Brehoi*[47] were not correct, since, according to their Honours, the qualification or limitation relating to administrative matters could not be read into s 42A(10) of the AAT Act, irrespective of the legislative intent or extrinsic materials.[48]

Wilcox and Downes JJ also referred to a number of additional factors, which they considered to support, or be consistent with, their interpretation of s 42A(10) of the AAT Act. In particular, their Honours suggested that if errors, for the purposes of s 42A(10) of the AAT Act, were limited to administrative errors, that provision would become imprecise.[49] Further, their Honours indicated that, while their interpretation might have the consequence that one member of the AAT could, in effect, sit in judgment on orders made by another member, there was nothing remiss in that consequence.[50]

Finally, Wilcox and Downes JJ held that there was no necessary inconsistency between their interpretation of s 42A(10) of the AAT Act and s 44 of that Act, which provided for appeals on questions of law, from AAT decisions, to the Federal Court. This appeared to be for the reason that s 42A(10) of the AAT Act was limited to default dismissals, under s 42A(2) of the AAT Act, while s 44 of that Act, although it covered such dismissals, also extended to decisions following review.[51]

As a result, Wilcox and Downes JJ concluded that Deputy President Hotop had erred in holding that the AAT had no power to grant Mr Goldie's application for reinstatement under s 42A(10) of the AAT Act.[52] Yet, their Honours nonetheless decided that there was no material before the Deputy President that would have justified an exercise of s 42A(10) of the AAT Act in Mr Goldie's favour. Wilcox and Downes JJ, therefore, ordered that Mr Goldie's application for an extension of time within which to appeal to the Federal Court, from the Deputy President's decision, be dismissed.[53]

Carr J's dissent

Carr J dissented from those orders, since his Honour thought it clearly arguable that Deputy President Hotop should have exercised s 42A(10) of the AAT Act in Mr Goldie's favour.[54] Even so, his Honour's interpretation of s 42A(8) and 42A(10) of the AAT Act was consistent with that of Wilcox and Downes JJ. In relation to s 42A(8) of the AAT Act, Carr J concluded that the relevant notification could be oral,[55] for the reasons given in *Long*[56] and *WACA*.[57] As to s 42A(10) of the AAT Act, Carr J reached the same conclusion as Wilcox and Downes JJ, under different reasoning. His Honour accepted that the ordinary meaning of the term error, in s 42A(10) of the AAT Act, was error of any kind.[58]

Further, Carr J did not feel compelled to depart from that ordinary meaning, by virtue of s 15AA of the Acts Interpretation Act. Although his Honour appeared to accept that error, in this context, could be construed as being limited to administrative errors, he considered that the provision of a power of reinstatement, in the event of administrative error, was merely one of the purposes of s 42A(10) of the AAT Act. As a result, s 15AA of the Acts Interpretation Act did not require any relevant limitation of the term error, in s 42A(10) of the AAT Act. Nonetheless, Carr J did not discuss the material that had led him to conclude that s 42A(10) of the AAT Act had more than one purpose, nor did his Honour reveal what the purposes of that provision, apart from reinstatement for administrative error, were.[59]

Carr J went on to refer to a number of other matters that, in his view, supported his interpretation of s 42A(10) of the AAT Act. In particular, like Wilcox and Downes JJ, Carr J did not consider the observations in *Brehoi*[60] to be anything more than obiter dictum,[61] nor did his Honour see any difficulties with s 42A(10) of the AAT Act being exercised by one member of the AAT to overturn a dismissal by another member.[62]

Further, his Honour was influenced by s 15AB(3) of the Acts Interpretation Act, which states:

> 15AB Use of extrinsic material in the interpretation of an Act
> …
> (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:
>
> (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
>
> (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

Given this provision, Carr J apparently felt that the Explanatory Memorandum referred to by the Full Court in *Brehoi*[63] did not, any more than s 15AA of the Acts Interpretation Act, compel him to depart from the ordinary meaning of the term error, in s 42A(10) of the AAT Act. In particular, Carr J indicated that, for the purposes of para 15AB(3)(a) of the Acts Interpretation Act, there was a significant degree of desirability to persons being able to rely on that ordinary meaning. Further, Carr J believed that, under his interpretation, s 42A(10) of the AAT Act would, in the widest possible range of situations, provide a convenient, prompt and inexpensive procedure for the correction of dismissals made in error. As such, the provision would, in accordance with para 15AB(3)(b) of the Acts Interpretation Act, avoid prolonging legal or other proceedings without compensating advantage.[64]

It should be noted, in passing, that Carr J's statements regarding s 15AB(3) of the Acts Interpretation Act may well be incorrect. It could just as easily be said that any interpretation to the effect that the term error, in s 42A(10) of the AAT Act, is limited to administrative error would also give effect to the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision, taking into account its context in the Act, and what is at least one of the purposes or objects underlying the Act, within the meaning of para 15AB(3)(a) of the Acts Interpretation Act.

Further, Carr J appears to have understood para 15AB(3)(b) of the Acts Interpretation Act as referring to the consequences of a particular interpretation. In other words, if an interpretation would produce the result of avoiding unnecessary prolonging of legal or other proceedings, then, according to Carr J, para 15AB(3)(b) of the Acts Interpretation Act would support the adoption of that interpretation, over an interpretation based on extrinsic materials. It is probably instead the case that para 15AB(3)(b) of the Acts Interpretation Act refers to the proceedings relating to interpretation itself, rather than any proceedings that emerge under the interpretation so established.

Status of the full court's reasoning

Clearly, in *Goldie v MIMIA*,[65] the more contentious issue of statutory interpretation was the meaning of the term error, in s 42A(10) of the AAT Act. In these circumstances, it is important to understand how the Full Court's reasoning on s 42A(10) of the AAT Act interacts with general principles of construction, as they exist under the Acts Interpretation Act, and at common law.

Section 15AA of the Acts Interpretation Act

As indicated, s 15AA of the Acts Interpretation Act requires a court, in interpreting a provision of an Act, to prefer a construction that would promote the purpose or object underlying that Act. There are two conditions precedent to the application of s 15AA of the Acts Interpretation Act. The first condition precedent is that the provision being interpreted needs, at one point or another, to be susceptible to more than one construction,[66] while the second is that the purpose or object underlying the Act must be ascertainable.[67] If those conditions precedent are satisfied, then it appears that the court has no choice in the matter, but is, instead, obliged to adopt the construction favouring the legislative intent.[68]

The question, then, is: did the Full Court in *Goldie v MIMIA*[69] adhere to s 15AA of the Acts Interpretation Act, so understood? Wilcox and Downes JJ did not expressly address the application of that provision in relation to s 42A(10) of the Acts Interpretation Act. However, as indicated, the lynchpin of their Honour's conclusion regarding s 42A(10) of the AAT Act was that the term error, in the absence of any express qualification or limitation, necessarily meant error of any kind. If this were correct, then it would follow that s 15AA of the Acts Interpretation Act would not have applied, as one of its conditions precedent, being the availability of more than one construction, would not have been satisfied.

Yet, can it be said that the term error, for the purposes of s 42A(10) of the AAT Act, can *only* mean error of any kind? In determining whether a statutory word or phrase is amenable to more than one construction, within the framework of s 15AA of the Acts Interpretation Act, it is necessary to consider the context in which that word or phrase appears.[70] In this respect, as indicated, s 44 of the AAT Act would permit appeals on questions of law to the Federal Court, in relation to dismissals under s 42A(2) of the AAT Act. As such, there is an independent procedure for the correction of dismissals, under s 42A(2) of the AAT Act, involving errors of law. It must follow that the term error, in s 42A(10) of the AAT Act, when read in the context of s 44 of that Act, could be construed as meaning error of an administrative kind, rather than error of law.

This is not to suggest that Wilcox and Downes JJ were wrong in holding that their construction of the term error, in s 42A(10) of the AAT Act, was not inconsistent with s 44 of the AAT Act. It is simply to say that the presence of s 44 of the AAT Act reveals another credible construction of that term.[71] If this point is reached and if, as Wilcox and Downes JJ apparently accepted, *Brehoi*[72]is taken correctly to express the purpose of s 42A(10) of the AAT Act, then, much as Deputy President Hotop recognised, the term error, in s 42A(10) of the AAT Act, must, under s 15AA of the Acts Interpretation Act, be limited to administrative errors.

Perhaps, though, the application of s 15AA of the Acts Interpretation Act is not quite this simple. In *Brehoi*,[73] Whitlam, Moore and Katz JJ had, in essence, gleaned the purpose of s 42A(10) of the AAT Act from the relevant Explanatory Memorandum, which incorporated, by reference, the *Report of the Review of the Administrative Appeals Tribunal*.[74] In other words, their Honours had ascertained the purpose of s 42A(10) of the AAT Act by reference to extrinsic materials. The question is whether such an approach satisfies the second condition precedent to the application of s 15AA of the Acts Interpretation Act, namely that the purpose or object underlying the Act be ascertainable.

It is submitted that this condition precedent does not mean that the relevant purpose or object must be capable of being ascertained, in any way. Rather, it requires that the relevant purpose or object be amenable to ascertainment, *in accordance with s 15AA of the Acts Interpretation Act*. In this respect, in *NAQF v Minister for Immigration and Multicultural and Indigenous Affairs*,[75] ('*NAQF*') Lindgren J said the following:

> It is questionable whether it is permissible to ascertain the underlying purpose or object for the purpose of s 15AA from extrinsic materials; cf *Federal Commissioner of Taxation v Trustees of the Lisa Marie Walsh Trust* (1983) 48 ALR 253 at 260 per McGregor J, 278 per Fitzgerald J. ... I do not think s 15AB provides authority for doing so. Moreover, s 15AA was inserted by the *Statute Law Revision Act 1981* (Cth), whereas s 15AB was inserted later by the *Acts Interpretation Amendment Act 1984* (Cth), and s 15AA was therefore at least intended to be capable of having effect without reference to extrinsic materials. But it may be appropriate to consider the Explanatory Memorandum and the Second Reading Speech for the purpose of identifying the mischief which s 357A was intended to address, as part of the general law purposive approach to statutory interpretation, and in the course of doing so to identify the purpose or object underlying the Act for the purposes of s 15AA; cf *Saraswati v R* (1991) 172 CLR 1 at 21 per McHugh J.[76]

The suggestion that extrinsic materials cannot be utilised to ascertain purpose, in relation to s 15AA of the Acts Interpretation Act, while arguable, may not be correct. It is probable that, read in isolation, s 15AA of the Acts Interpretation Act is, subject to certain modifications, meant to operate in conjunction with the principles comprising the common law of statutory interpretation, as they exist from time to time, including on the question of gleaning legislative purpose from extrinsic materials.[77]

Further, it does not seem right to say that this position should be altered by the presence of s 15AB of the Acts Interpretation Act. Apart from anything else, s 15AB of the Acts Interpretation Act does not displace the common law regarding extrinsic materials, in its application generally,[78] making it unlikely that s 15AB of the Acts Interpretation Act would do otherwise, so far as the relevant common law is engaged by s 15AA of the Acts Interpretation Act. This approach is supported by the recognition that s 15AB of the Acts Interpretation Act is supplementary to s 15AA of that Act. That is, it only applies once interpretation under s 15AA of the Acts Interpretation Act, whatever that requires, has taken place.[79]

Finally, in *North Australian Aboriginal Legal Aid Service Inc v Bradley*,[80] McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ proceeded, without elaboration, on the footing that extrinsic materials could be used to ascertain purpose when applying s 62A of the *Interpretation Act* (NT), independently of s 62B of that Act.[81] These provisions are materially identical to ss 15AA and 15AB of the Acts Interpretation Act.

Accordingly, this paper will assume that the purpose of s 42A(10) of the AAT Act, as gleaned from extrinsic materials in *Brehoi*,[82] may be utilised in the context of s 15AA of the Acts Interpretation Act, with the result that the term error, in s 42A(10) of the AAT Act, must be limited to administrative errors.

However, could this conclusion, irrespective of *NAQF*,[83] still misunderstand s 15AA of the Acts Interpretation Act? In *Chugg v Pacific Dunlop Pty Ltd*,[84] Dawson, Toohey and Gaudron JJ, with the general agreement of Brennan J[85] and Deane J,[86] made the following comments about the Victorian equivalent to s 15AA of the Acts Interpretation Act:

> The choice directed by s 35(a) of the *Interpretation of Legislation Act* is not as to the construction which 'will best achieve' the object of the Act. Rather, it is a limited choice between 'a construction that would promote the purpose or object [of the Act]' and one 'that would not promote that purpose or object'.[87]

It follows from their Honours' comments that, if a statutory provision is amenable to two constructions, both of which promote the purpose or object underlying the provision, to different degrees, then the obligation in s 15AA of the Acts Interpretation Act does not apply. Sub-section 42A(10) of the AAT Act may fall into this category. That is, if its purpose or object, as expressed in *Brehoi*,[88] is to provide a procedure for overturning dismissals made through administrative error, then that purpose or object might be fulfilled regardless of whether its term error was limited to errors of an administrative kind or extended to errors of

any kind. It is just that, in the latter event, the purpose or object underlying s 42A(10) of the AAT Act would also be exceeded.

Yet, while the foregoing is superficially attractive, it probably fails to comprehend the purpose or object underlying s 42A(10) of the AAT Act, in full. As Deputy President Hotop largely indicated, it is more likely than not that the relevant purpose or object is the provision for a procedure for overturning dismissals made through administrative error, *to the exclusion of errors of law*.[89] On this basis, the competing interpretations of the term error, in s 42A(10) of the AAT Act, would not promote the purpose or object underlying that provision, to varying degrees, thus excluding s 15AA of the Acts Interpretation Act. Rather, only the interpretation that would limit error, within the meaning of s 42A(10) of the AAT Act, to administrative errors, would promote the relevant purpose or object, with the result that its adoption would, under s 15AA of the Acts Interpretation Act, be required.

As a final point, it is worth noting that it is unclear whether Carr J's reasoning is preferable to that of Wilcox and Downes JJ, so far as s 15AA of the Acts Interpretation Act is concerned. Unlike Wilcox and Downes JJ, his Honour did refer to that provision and appeared to concede that the term error, in s 42A(10) of the AAT Act, was open to more than one construction. Further, Carr J did seem to overcome any effect that s 15AA of the Acts Interpretation Act might have by characterising s 42A(10) of the AAT Act as a provision of multiple purposes, only one of which was permitting the vacation of dismissals made through administrative error. However, Carr J's conclusion is not obviously correct, and it is weakened by his Honour's failure to indicate the factors that had led him to it, or to explain what the additional purposes of s 42A(10) of the AAT Act were.

Statutory interpretation at common law

The courts, notwithstanding s 15AA of the Acts Interpretation Act, continue to draw upon the principles of statutory interpretation, as they exist at common law. Thus, even if s 15AA of the Acts Interpretation Act required Wilcox, Downes and Carr JJ, in *Goldie v MIMIA*,[90] to take a particular course, their Honours' reasoning should also be assessed against the common law.[91] At the time *Goldie v MIMIA*[92] was decided, Brennan CJ, Dawson, Toohey and Gummow JJ, when interpreting the *Insurance Contracts Act 1984* (Cth), in *CIC Insurance Ltd v Bankstown Football Club Ltd*[93] ('*CIC Insurance*'), had said the following:

> It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901* (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.[94]

This passage was, prior to *Goldie v MIMIA*,[95] extended to cover explanatory memoranda by Toohey, Gaudron and Gummow JJ, and McHugh J, in *Newcastle City Council v GIO General Ltd*.[96] It was also, more recently, approved by McHugh ACJ, Gummow and Hayne JJ, in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd*.[97]

The reasoning of Wilcox and Downes JJ is not directly inconsistent with the principles enunciated in *CIC Insurance*.[98] Their Honours, when analysing *Brehoi*,[99] did consider the mischief to which s 42A(10) of the AAT Act was directed, in light of extrinsic materials. So,

too, did Wilcox and Downes JJ apparently consider whether the relevant interpretations of error, for the purposes of s 42A(10) of the AAT Act, would carry inconvenience or improbability of result.

However, on balance, the *CIC Insurance*[100] approach more easily accommodates the conclusion that the term error, for the purposes of s 42A(10) of the AAT Act, is limited to administrative errors. In the first place, under *CIC Insurance*,[101] it would have been unproblematic if, as Wilcox and Downes JJ believed, error, for the purposes of s 42A(10) of the AAT Act, necessarily meant error of any kind. The term could, despite its lack of ambiguity, be considered in light of its context. Then, at this point, the existing state of the law, presumably including s 44 of the AAT Act, and the mischief to which s 42A(10) of the AAT Act is directed, as expressed in the relevant Explanatory Memorandum and the *Report of the Review of the Administrative Appeals Tribunal*[102], would favour error, as a general word, being constrained by its context, to become error of an administrative kind.

It should be added that Carr J's reasoning is in much the same position, vis-à-vis *CIC Insurance*,[103] as it was in relation to s 15AA of the Acts Interpretation Act. Like Wilcox and Downes JJ, his Honour's approach to s 42A(10) of the AAT Act does not plainly contradict *CIC Insurance*.[104] Further, Carr J's views on the multiple purposes of s 42A(10) of the AAT Act could be applied to prevent *CIC Insurance*[105] from undermining his Honour's conclusion regarding the meaning of that provision. However, as indicated, Carr J's view that s 42A(10) of the AAT Act has more than one purpose is not free from doubt.

Conclusion

Despite a complex history, and the presence of several issues of statutory interpretation, *Goldie v MIMIA*[106] basically came down to the meaning of s 42A(10) of the AAT Act. Although the Full Court, consisting of Wilcox, Downes and Carr JJ, split on the orders to be made, their Honours were in agreement on the interpretation to be accorded the term error, in that provision. That is, the term referred to errors of any kind, as opposed to administrative errors only. In order to reach their conclusion, Wilcox, Downes and Carr JJ departed from an interpretation of s 42A(10) of the AAT Act suggested by an earlier Full Court, comprising Whitlam, Moore and Katz JJ, in *Brehoi*.[107]

The reasoning of Wilcox and Downes JJ, in *Goldie v MIMIA*,[108] is not convincing. While their Honours did not expressly consider the provision, it is probable that s 15AA of the Acts Interpretation Act requires that the term error, in s 42A(10) of the AAT Act, be limited to administrative errors. This is because, contrary to the views of Wilcox and Downes JJ, that term, when read in light of s 44 of the AAT Act, is susceptible to more than one construction, thus satisfying the first condition precedent to s 15AA of the Acts Interpretation Act.

Further, notwithstanding *NAQF*,[109] this paper has proceeded on the basis that the purpose of s 42A(10) of the AAT Act, as gleaned from extrinsic materials in *Brehoi*,[110] may be utilised in relation to s 15AA of the Acts Interpretation Act, thereby satisfying its other condition precedent. Finally, it is probable that s 42A(10) of the AAT Act was intended to exclude errors of law, with the result that the approach of Wilcox and Downes JJ does not, to any degree, promote the purpose or object underlying that provision.

Similarly, while the reasoning of Wilcox and Downes JJ is not directly inconsistent with the common law principles of statutory interpretation, as enunciated in *CIC Insurance*,[111] those principles do, on balance, favour the limitation of the term error, in s 42A(10) of the AAT Act, to administrative errors.

The judgment of Carr J is no more defensible than that of Wilcox and Downes JJ. If his Honour's characterisation of s 42A(10) of the AAT Act as having multiple purposes is

correct, then his extension of the term error, in that provision, to errors of any kind might withstand s 15AA of the Acts Interpretation Act and the common law principles of statutory interpretation. However, it is not immediately apparent that s 42A(10) of the AAT Act does have more than one purpose, and Carr J's conclusion to that effect is weakened by his Honour's failure to articulate it comprehensively.

Overall, though, whatever should be the interpretation of error, for the purposes of s 42A(10) of the AAT Act, it is unfortunate that the Full Court, in *Goldie v MIMIA*,[112] went about its task without a more detailed consideration of the law relating to statutory construction, under s 15AA of the Acts Interpretation Act, and at common law.

Endnotes

1 (2002) 121 FCR 383.
2 *Goldie v Minister for Immigration and Multicultural Affairs* [1998] AATA 95 (Unreported, Forgie D-P, 18 February 1998); *Goldie v Minister for Immigration and Multicultural Affairs* [1999] FCA 349 (Unreported, Cooper J, 31 March 1999); *Goldie v Minister for Immigration and Multicultural Affairs* (1999) 56 ALD 321; *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Goldie* (Unreported, High Court of Australia, Kirby J, 3 September 2001); *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AAT 513 (Unreported, Hotop D-P, 12 June 2001); *Goldie v MIMIA* (2002) 121 FCR 383. See also *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Goldie* (2004) 206 ALR 380.
3 *Goldie v Minister for Immigration and Multicultural Affairs* [2000] AATA 467 (Unreported, Barnett D-P, 12 June 2000); *Goldie v Minister for Immigration and Multicultural Affairs* [2000] FCA 1922 (Unreported, French J, 22 December 2000); *Re Minister for Immigration and Multicultural Affairs; Ex parte Goldie* (unreported, High Court of Australia, Kirby J, 3 September 2001); *Goldie v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 378. See also *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Goldie* (2004) 206 ALR 380.
4 *Goldie v Commonwealth* (unreported, Federal Court of Australia, Cooper J, 31 July 1998); *Goldie v Commonwealth* (2000) 180 ALR 609; *Goldie v Commonwealth* (2002) 117 FCR 566; *Goldie v Commonwealth (No 2)* [2004] FCA 156 (Unreported, French J, 27 February 2004).
5 *Goldie v R* [2001] WASC 153 (Unreported, Roberts-Smith J, 16 May 2001); *R v Goldie* (2001) 26 SR (WA) 348; *Goldie v Commonwealth* [2002] FCA 261 (Unreported, French J, 18 March 2002).
6 *Goldie v Minister for Immigration and Multicultural Affairs* [2002] FCA 687 (Unreported, Nicholson J, 31 May 2002).
7 *Goldie v Commonwealth (No 2)* [2004] FCA 156 (Unreported, French J, 27 February 2004). See also *Goldie v Commonwealth* [2004] FCA 973 (Unreported, Carr J, 23 July 2004).
8 (2002) 121 FCR 383.
9 Ibid.
10 *Goldie v Minister for Immigration and Multicultural Affairs* [1998] AATA 95 (Unreported, Forgie D-P, 18 February 1998).
11 *Goldie v Minister for Immigration and Multicultural Affairs* [1999] FCA 349 (Unreported, Cooper J, 31 March 1999).
12 *Goldie v Minister for Immigration and Multicultural Affairs* (1999) 56 ALD 321.
13 (2002) 121 FCR 383.
14 Ibid 384 (Wilcox and Downes JJ).
15 Ibid 385 (Wilcox and Downes JJ).
16 Ibid 385 (Wilcox and Downes JJ).
17 Ibid 386 (Wilcox and Downes JJ). Mr Goldie's application for reinstatement, though dated 24 March 2000, was received on 6 April 2000: ibid, 393 (Carr J). See also *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [39].
18 *Goldie v MIMIA* (2002) 121 FCR 383, 393 (Carr J). See also *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [45]. Compare *Goldie v MIMIA* (2002) 121 FCR 383, 386 (Wilcox and Downes JJ).
19 *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001).
20 Ibid [39], [44].
21 Ibid [49], [56].
22 *Re Minister for Immigration and Multicultural Affairs; Ex parte Goldie* (unreported, High Court of Australia, Kirby J, 3 September 2001). See also *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Goldie* (2004) 206 ALR 380.
23 *Goldie v MIMIA* (2002) 121 FCR 383, 386 (Wilcox and Downes JJ).
24 Ibid 386–387 (Wilcox and Downes JJ).

25 *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [39].
26 Ibid [38]–[39].
27 Ibid [37].
28 (1999) 58 ALD 385 ('*Brehoi*').
29 *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [40].
30 *Brehoi* (1999) 58 ALD 385, 392.
31 Administrative Appeals Tribunal, *Report of the Review of the Administrative Appeals Tribunal* (1991).
32 *Brehoi* (1999) 58 ALD 385, 389–390.
33 Ibid 390.
34 (1999) 58 ALD 385.
35 *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [41].
36 (1999) 58 ALD 385.
37 *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [42].
38 Ibid [43].
39 Ibid [44].
40 (1996) 65 FCR 164.
41 (2002) 121 FCR 463.
42 *Goldie v MIMIA* (2002) 121 FCR 383, 388.
43 Ibid 388–390.
44 (1999) 58 ALD 385.
45 *Goldie v MIMIA* (2002) 121 FCR 383, 389.
46 See, eg, *Telstra Corp v Treloar* (2000) 102 FCR 595, 602–603 (Branson and Finkelstein JJ). Compare the application of *Goldie v MIMIA* (2002) 121 FCR 383 by Wilcox J in *Guo v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1585 ('Guo') at [33], [38].
47 (1999) 58 ALD 385.
48 *Goldie v MIMIA* (2002) 121 FCR 383, 389–390.
49 Ibid 388–389.
50 Ibid 389.
51 Ibid. See also, generally, *Director-General of Social Services v Chaney* (1980) 31 ALR 571.
52 *Goldie v MIMIA* (2002) 121 FCR 383, 390.
53 Ibid 391-392.
54 Ibid 399.
55 Ibid 401.
56 (1996) 65 FCR 164.
57 (2002) 121 FCR 463.
58 *Goldie v MIMIA* (2002) 121 FCR 383, 398.
59 Ibid 397.
60 (1999) 58 ALD 385.
61 *Goldie v MIMIA* (2002) 121 FCR 383, 396.
62 Ibid 398–399.
63 (1999) 58 ALD 385.
64 *Goldie v MIMIA* (2002) 121 FCR 383, 398.
65 (2002) 121 FCR 383.
66 See, eg, *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J).
67 See, eg, *Whittaker v Comcare* (1998) 86 FCR 532, 544 (Drummond, Cooper and Finkelstein JJ).
68 See, eg, *Vanit v The Queen* (1997) 190 CLR 378, 386 (Brennan CJ and Gaudron J).
69 (2002) 121 FCR 383.
70 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–382 (McHugh, Gummow, Kirby and Hayne JJ).
71 Compare *Rieson v SST Consulting Services Pty Ltd* [2005] FCAFC 6 ('*Rieson*'), [20] (Wilcox and Finn JJ), [71] (Sackville J).
72 (1999) 58 ALD 385.
73 (1999) 58 ALD 385.
74 Administrative Appeals Tribunal, *Report of the Review of the Administrative Appeals Tribunal* (1991).
75 (2003) 130 FCR 456 ('*NAQF*').
76 Ibid, 472.
77 As to the common law on the question, see, eg, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 ('*CIC Insurance*'), 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).
78 Ibid.
79 See *NAQF* (2003) 130 FCR 456, 471-472.
80 (2004) 206 ALR 315.
81 Ibid, 331-332. See also *Rieson* [2005] FCAFC 6, [18]-[20] (Wilcox and Finn JJ), [71] (Sackville J).
82 (1999) 58 ALD 385.

83 (2003) 130 FCR 456.
84 (1990) 170 CLR 249.
85 Ibid 251.
86 Ibid 253.
87 Ibid 262.
88 (1999) 58 ALD 385.
89 *Goldie v Minister for Immigration and Multicultural Affairs* [2001] AATA 513 (Unreported, Hotop D-P, 12 June 2001), [42]. See also *Guo* [2004] FCA 1585 at [23]-[25], [31]-[42] (Wilcox J).
90 (2002) 121 FCR 383.
91 As to the extent to which, in substance, they differ, see *Rieson* [2005] FCAFC 6, [19] (Wilcox and Finn JJ), [71] (Sackville J).
92 (2002) 121 FCR 383.
93 (1997) 187 CLR 384.
94 Ibid 408 (footnotes omitted).
95 (2002) 121 FCR 383.
96 (1997) 191 CLR 85, 99 (Toohey, Gaudron and Gummow JJ), 112-113 (McHugh J).
97 (2004) 205 ALR 1, 4. See also, generally, *Rieson* [2005] FCAFC 6, [20] (Wilcox and Finn JJ), [71] (Sackville J).
98 (1997) 187 CLR 384.
99 (1999) 58 ALD 385.
100 (1997) 187 CLR 384.
101 Ibid.
102 Administrative Appeals Tribunal, *Report of the Review of the Administrative Appeals Tribunal* (1991).
103 (1997) 187 CLR 384.
104 Ibid.
105 Ibid.
106 (2002) 121 FCR 383.
107 (1999) 58 ALD 385.
108 (2002) 121 FCR 383.
109 (2003) 130 FCR 456.
110 (1999) 58 ALD 385.
111 (1997) 187 CLR 384.
112 (2002) 121 FCR 383

** LLB (Hons) BA (Int'l Studies) (UTS), BCL Candidate and British Chevening Scholar, Oriel College, Oxford University. Formerly Counsel, Office of General Counsel, Australian Government Solicitor (AGS), Canberra. This commentary is based on a paper given by the author as part of the AGS National Administrative Law Forum 2004. The views expressed by the Author do not necessarily represent those of any person or body with whom he is associated.*