HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CRENNAN JJ

AUSTRALIAN FINANCE DIRECT LIMITED APPELLANT

AND

DIRECTOR OF CONSUMER AFFAIRS VICTORIA RESPONDENT

Australian Finance Direct Limited v Director of Consumer Affairs Victoria
[2007] HCA 57
12 December 2007
M53/2007

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation

A C Archibald QC with P W Lithgow for the appellant (instructed by Dibbs Abbott Stillman)

D J O'Callaghan SC with J A Redwood for the respondent (instructed by Director of Consumer Affairs Victoria)

CATCHWORDS

Australian Finance Direct Limited v Director of Consumer Affairs Victoria

Consumer credit – Precontractual disclosure – Contracts regulated by the *Consumer Credit (Victoria) Code* ("the Code") – Loans to consumers for payment of seminar fees – "Holdback" arrangement between the credit provider and seminar suppliers by which the credit provider retained for itself a portion of the moneys advanced – Whether, for the purposes of s 15(B)(a)(ii) of the Code, the holdbacks were part of "the amount of credit" and "amounts payable", and whether the credit provider was one of the "persons, bodies or agents (including the credit provider)" to whom the amount of credit was to be paid – Relevance of the legislative purpose of providing information to debtors – Relevance of "truth in lending" considerations.

Statutes – Interpretation – Purposive interpretation – Ascertaining legislative purpose.

Words and phrases – "amount of credit", "holdback", "precontractual disclosure", "truth in lending".

Consumer Credit (Victoria) Code (Vic), s 15.

1 GLEESON CJ, GUMMOW, HAYNE AND CRENNAN JJ. The appellant, Australian Finance Direct Limited ("AFD"), is a credit provider within the meaning of the *Consumer Credit (Victoria) Code* (Vic) ("the Code"). Following proceedings in the Victorian Civil and Administrative Tribunal[1], and an appeal to a single judge (Kaye J) of the Supreme Court of Victoria[2], there was a further appeal to the Court of Appeal of the Supreme Court of Victoria. The Court of Appeal, by majority (Ashley and Neave JJA, Maxwell P dissenting), held that a form of credit contract used by AFD in certain transactions contravened the disclosure requirements in s 15(B) of the Code[3]. In an appeal, by special leave, to this Court, AFD challenges that conclusion.

The disclosure requirements

2 Section 5 of the *Consumer Credit (Victoria) Act* 1995 (Vic) provides that the Consumer Credit Code, set out in the Appendix to the *Consumer Credit (Queensland) Act* 1994 (Q) as in force for the time being, applies as a law of the State of Victoria, and, as so applying, may be referred to as the *Consumer Credit (Victoria) Code*. Neave JA described the Code as the culmination of more than 30 years of attempts to reform and modernise consumer credit laws and to apply a uniform approach to credit transactions across Australia. It applies to the provision of credit for "personal, domestic or household purposes"[4].

3 Section 12 of the Code provides that a credit contract must be in the form of a written document signed by the debtor and the credit provider or a written contract document signed by the credit provider and accepted according to its terms by the debtor. Section 14 deals with "precontractual disclosure". A credit provider must not enter into a credit contract unless the credit provider has given the debtor a precontractual statement setting out the matters required by s 15 to be included in the contract document and an information statement in a certain form (s 14(1)). The precontractual statement may be the proposed contract document or a separate document or documents (s 14(5)).

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1 *Director of Consumer Affairs Victoria v Australian Finance Direct Ltd* (2004) ASC ¶155-067.

2 *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* (2005) ASC ¶155-073.

3 *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* [2006] VSCA 245.

4 The Code, s 6(1)(b).

4 Section 15 provides:

"**Matters that must be in contract document**

The contract document must contain the following matters –

(A) **Credit provider's name.**

The credit provider's name.

(B) **Amount of credit.**

(a) If the amount of credit to be provided is ascertainable –

(i) that amount; and

(ii) the persons, bodies or agents (including the credit provider) to whom it is to be paid and the amounts payable to each of them, but only if both the person, body or agent and the amount are ascertainable.

(b) If the amount of the credit to be provided is not ascertainable, the maximum amount of credit agreed to be provided, or the credit limit under the contract, if any.

(c) If the credit is provided by the supplier for a sale of land or goods by instalments, a description of the land and its price or of the goods and their cash price.

(C) **Annual percentage rate or rates.**

(a) The annual percentage rate or rates under the contract.

(b) If there is more th[a]n one rate, how each rate applies.

(c) If an annual percentage rate under the contract is determined by referring to a reference rate –

(i) the name of the rate or a description of it; and

(ii) the margin or margins (if any) above or below the reference rate to be applied to determine the annual percentage rate or rates; and

(iii) where and when the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and

(iv) the current annual percentage rate or rates.

(D) **Calculation of interest charges.**

The method of calculation of the interest charges payable under the contract and the frequency with which interest charges are to be debited under the contract.

(E) **Total amount of interest charges payable.**

The total amount of interest charges payable under the contract, if ascertainable (but only if the contract would, on the assumptions under sections 158 and 160, be paid out within 7 years of the date on which credit is first provided under the contract).

(F) **Repayments.**

(a) If more than one repayment is to be made –

(i) the amount of the repayments or the method of calculating the amount; and

(ii) if ascertainable, the number of the repayments; and

(iia) if ascertainable, the total amount of the repayments, but only if the contract would, on the assumptions under sections 158 and 160, be paid out within 7 years of the date on which credit is first provided under the contract; and

(iii) when the first repayment is to be paid, if ascertainable, and the frequency of payment of repayments.

(b) If the contract provides for a minimum repayment, the amount of that repayment, if ascertainable, but, if not, the method of calculation of the minimum repayment.

Paragraph (a) does not apply to minimum repayments under a continuing credit contract.

(G) **Credit fees and charges.**

(a) A statement of the credit fees and charges that are, or may become, payable under the contract, and when each such fee or charge is payable, if ascertainable.

(b) The amount of any such fee or charge if ascertainable, but, if not, the method of calculation of the fee or charge, if ascertainable.

(c) The total amount of credit fees and charges payable under the contract to the extent that it is ascertainable.

(H) **Changes affecting interest and credit fees and charges.**

If the annual percentage rate or rates or the amount or frequency of payment of a credit fee or charge or instalment payable under the contract may be changed, or a new credit fee or charge may be imposed, a statement or statements to that effect and of the means by which the debtor will be informed of the change or the new fee or charge.

(I) **Statements of account.**

The frequency with which statements of account are to be provided to the debtor (except in the case of a credit contract for which the annual percentage rate is fixed for the whole term of the contract and under which there is no provision for varying the rate).

(J) **Default rate.**

(a) If the contract is a contract under which a default rate of interest may be charged when payments are in default – a statement to that effect and the default rate and how it is to be applied.

(b) If the default rate under the contract is determined by referring to a reference rate –

(i) the name of the rate or a description of it; and

(ii) the margin or margins (if any) above or below the reference rate to be applied to determine the default rate; and

(iii) when and where the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and

(iv) the current default rate.

(K) **Enforcement expenses.**

A statement that enforcement expenses may become payable under the credit contract or mortgage (if any) in the event of a breach.

(L) **Mortgage or guarantee.**

(a) If any mortgage or guarantee is to be or has been taken by the credit provider, a statement to that effect.

(b) In the case of a mortgage, a description of the property subject to, or proposed to be subject to, the mortgage, to the extent to which it is ascertainable.

(M) **Commission.**

If a commission is to be paid by or to the credit provider for the introduction of credit business or business financed by the contract –

(a) a statement of that fact; and

(b) the person by whom the commission is payable; and

(c) the person to whom the commission is payable; and

(d) the amount if ascertainable.

Commission does not include fees payable by a supplier under a merchant service agreement with a credit provider, an amount payable in connection with a credit-related insurance contract or commission paid to employees of the credit provider.

(N) **Insurance financed by contract.**

If the credit provider knows that the debtor is to enter into a credit-related insurance contract and that the insurance is to be financed under the credit contract –

(a) the name of the insurer; and

(b) the amount payable to the insurer or, if it is not ascertainable, how it is calculated; and

(c) the kind of insurance and any other particulars that may be prescribed by the regulations; and

(d) if the credit provider knows of any commission to be paid by the insurer for the introduction of the insurance business – a statement that it is to be paid and, if ascertainable, the amount of the commission expressed either as a monetary amount or as a proportion of the premium.

In the case of consumer credit insurance that includes a contract of general insurance within the meaning of the *Insurance Contracts Act 1984* (Cwlth) –

(i) it is sufficient compliance with paragraphs (a) and (b) if the contract document contains the name of the general insurer and the total amount payable to the insurers (or, if it is not ascertainable, how it is calculated); and

(ii) it is sufficient compliance with paragraph (d) relating to the amount of commission if the contract document contains the total amount of commission (expressed as a monetary amount or as a proportion of the premium) to be paid by the insurers.

(O) **Other information.**

Any information or warning required by the regulations."

5 It is s 15(B)(a)(ii) that is of present concern. An object of s 15(B)(a) is to ensure that, in a case where the provision of credit takes the form of payment by the credit provider to a supplier of goods or services to the debtor (as commonly occurs), the debtor is fully and accurately informed of the amount of the deferred debt incurred by the debtor, the details of the person or persons to whom the credit provider is to pay the advance, and the amounts payable to each such person. There was some disagreement between the parties as to the reason for that requirement, but for present purposes it is sufficient to note that, where the credit takes the form of a deferred debt incurred in consequence of a payment by the credit provider for goods or services supplied by a third party or third parties to the debtor, the contract document must state the persons to whom the amount of credit is to be paid and the amounts payable to each of them. The question to be decided is whether, in the circumstances outlined below, there was a failure to comply with that requirement.

The credit contract

6 The transactions in question concerned loans to people who wished to attend seminars but who did not wish (or were unable) to pay the fees for the seminars in cash. The purpose of the credit was to enable them to defer payment. The seminars were provided by National Investment Institute Pty Ltd ("NII") and two companies related to NII, Capital Holdings Group (NSW) Pty Ltd and Capital Holdings Group (Vic) Pty Ltd, which, for convenience, were together referred to as "Capital". AFD extended credit for the purpose of funding the fees charged by NII and Capital. Where a person wishing to attend such seminars desired funding from AFD, the procedure was as follows. When such a person signed the seminar enrolment form he or she would also sign an AFD loan contract offer, a loan application and associated documentation. The documentation was sent to AFD. If the loan was approved, AFD would advise NII or Capital. The amount of the loan, as identified in the credit contract, was the amount of the seminar fee charged by NII or Capital to the borrower together with an establishment fee charged by AFD in the case of credit contracts made after February 2003. The credit contract identified the supplier (of services) as NII or Capital. The credit contract described as the amount payable to the supplier an amount equivalent to the seminar fee charged by NII or Capital.

7 Included in the evidence was an example of a form of contract from December 2002 used as a precontractual statement which contained, so far as presently relevant, the following information. There was a "Financial Table"

which was said to set out "key financial information which applies to the proposed contract." Under the heading: "Total loan and interest", the amount of the loan was $15,340 (which was NII's published seminar fee). The "[t]otal amount of interest charges payable" was $4781.12. The "[t]otal amount of repayments" was $20,121.12, payable by 48 monthly amounts of $419.19. The annual percentage rate of interest was shown. There then followed:

> "Who we will pay your loan to:
>
> Name of Supplier ... [NII]
>
> Amount payable to Supplier $15,340"

8 The case for the respondent is that the amount payable by AFD to NII was not $15,340; it was that sum less an amount, described as a "holdback", which, under an "arrangement" between AFD and NII, AFD was entitled to retain. The "holdback" was not disclosed to the borrower. According to the respondent, the statement of the amount payable to the supplier was incorrect.

The "holdback"

9 It is convenient for present purposes to adopt Maxwell P's description of the "holdback" system. He referred to the supplier of seminar services as N, the person who wanted to attend the seminars as C, and AFD as A. He said (reference omitted):

> "The facts of the typical case are straightforward. C wished to attend one of N's seminars. C entered an agreement with N (constituted by the seminar enrolment form) under which C promised to pay the fee in return for N's promise to provide the seminar. (This will be referred to as 'the seminar contract').
>
> C was offered a number of alternative methods of paying the seminar fee, including cash, cheque, credit card and loan. C decided to borrow the amount of the seminar fee. At the same time as C signed the seminar enrolment form, he/she also signed a loan application form addressed to A. Acceptance by A created a loan agreement between A and C, under which A agreed to lend to C the amount of the seminar fee. The agreement specified the interest rate (if any), the term of the loan, and the number and amount of the repayments which C undertook to make. (This is referred to as 'the credit contract').
>
> Ordinarily, in circumstances such as these, a credit provider would pay to the supplier the full price of the goods or services acquired by the

consumer. (In the present case, that would have meant A paying N the full amount of the seminar fee.) By this means, the customer's debt to the supplier would be discharged. The customer would instead be indebted to the credit provider.

The distinctive feature of the dealings in the present case is that A did not pay N the full amount of the seminar fee. A retained a proportion of the fee for itself. This was known as a 'holdback'. The holdback was retained by A in accordance with 'an arrangement or understanding' which the Tribunal found existed between A and N. The function of the holdback was to enable A to lend on more favourable terms (that is, at a lower rate of interest) than it would otherwise have been prepared to lend and, in some cases, to lend to customers who did not meet the normal credit criteria and would otherwise not have been able to borrow at all.

There were two types of holdback. The first was an 'interest free holdback' or 'standard holdback'. In these cases, the arrangement between A and N was that the loan made by [A] to C would either be interest free or at a lower rate of interest than that which would ordinarily be charged by A to a borrower. The second was a 'high risk holdback', which was retained in addition to the standard holdback. In these cases, the arrangement between A and N was that the loan application would be approved even though the loan application would ordinarily have been declined by A because of the higher than usual risk of default. The function of the high risk holdback was to compensate A for the higher risk of default.

The standard holdback was typically 10% of the loan amount; the high risk holdback was typically 40% of the loan amount. The holdback was credited by A to an unearned income account and, each month during the term of the loan, a pro rata amount was debited to A's unearned income account and credited to A's income account.

C was unaware of the holdback. The credit contract itself did not disclose that A was retaining a proportion of the loan funds."

10 In its written submissions, AFD explained the commercial rationale of the "holdback" as follows:

"There were two kinds of holdback: a 'standard holdback' (or 'interest free holdback') and a 'high-risk holdback'. The standard holdback was most commonly 10% of the amount of credit, although it varied throughout the relevant period. It applied where AFD lent (unsecured) to the supplier's customer at a lower rate of interest than it would otherwise

> charge for that kind of lending. On occasions, the rate was zero. All of the relevant loans involved a standard holdback. The high-risk holdback (which concerned only transactions with purchasers introduced by NII) was calculated as 40% of the amount of credit after deducting any establishment fee, and was in addition to the standard holdback. It applied where AFD lent to an NII customer who did not meet AFD's normal credit criteria."

11 In the particular example given, if there were both a standard holdback and a high-risk holdback, then the amount received by NII would have been, not $15,340, but $7,670. If there had been only a standard holdback, the amount received by NII would have been $13,806.

12 Two further aspects of these transactions should be mentioned. First, although the Tribunal referred to an "arrangement or understanding" between NII and Capital, on the one hand, and AFD on the other, that seems to be an equivocation. There is no suggestion that AFD was not legally entitled to the holdback, and the plain inference is that its entitlement was contractual. AFD did not appear to contend otherwise. The holdback was for valuable consideration, being AFD's financing of the customer. Secondly, the nature of the credit provision was that the credit was provided for a specific purpose, and the application of the credit amount was controlled by AFD. There was never any question of AFD's providing a cash sum to the borrower, which the borrower would have been able to use as he or she saw fit. In argument, the dealings between AFD and NII or Capital were characterised as discrete from the credit contract. Whether that is true depends on what is meant by discrete. As Maxwell P acknowledged, the dealings between AFD and NII or Capital, and the dealings between AFD and the debtor, were closely related. The provision of credit was for the purpose, and for the purpose only, of the borrower's attendance at seminars, and that purpose was achieved by paying NII or Capital for attendance. The holdback was in consideration for AFD's providing credit to the person who would attend the seminars, that is, NII's or Capital's customer.

13 Section 15(B) of the Code required disclosure, in respect of the amount of credit, of the persons, bodies or agents (including the credit provider) to whom it was to be paid and the amounts payable to each of them. To return to the particular example given above, the case for AFD depends upon the propositions that the amount of credit to be provided was $15,340 (which was true) and that the amount of $15,340 was payable to NII only, and would be paid by AFD to NII (which is in dispute).

The arguments

14 The argument for AFD was that a holdback is not a component of the amount of credit and is not required to be stated in the credit contract. It was contended that the contract between AFD and the debtor, that is, the credit contract, was separate from any contract between AFD and NII or Capital, that the obligation of AFD under the credit contract was to advance the amount of credit to the debtor by paying it to the relevant supplier, and that s 15(B)(a)(ii) operated upon that obligation, to which the holdback was irrelevant. The amount paid to NII or Capital was described in argument as a "net remittance". The Code, it was said, was "not concerned with the transaction between the consumer and the supplier but rather with the provision of information about the terms of the lending transaction ... Still less is the Code concerned with any transaction between the lender and the supplier."

15 The respondent placed much emphasis upon the legislative purpose of securing "truth in lending", but on AFD's argument the question is: truth about what? If, as AFD contends, and Maxwell P held, s 15(B)(a)(ii) is concerned only with the credit contract and if, upon its true construction, in its application to the present case, the full amount of credit provided (eg $15,340) was payable to the service supplier (eg NII), then AFD told the borrower the truth.

16 The inclusion, in s 15(B)(a)(ii), of the credit provider as a possible recipient of "the amount of credit to be provided" was not seen by AFD as an embarrassment. This reference, it was said, covers only such matters as the re-financing of prior debts and the imposition of fees, such as establishment fees.

17 The respondent submits that the argument for AFD proceeds upon too narrow a view of s 15(B)(a), and depends upon reading into the provision words, limiting its operation, which are not there. It is said, in particular, that the statutory reference to "amounts payable" cannot be read, in a case such as the present, so as to confine attention to the obligations of the credit provider and borrower under the credit contract to the exclusion of contractual arrangements between the credit provider and the supplier of services which govern legal entitlements to receive the amount of credit provided.

Conclusion

18 The argument for the respondent, which was accepted by the majority in the Court of Appeal, is to be preferred.

19 Section 14 requires precontractual disclosure by a credit provider, and, by virtue of s 14(5), the precontractual statement may be the proposed contract

document itself. The provisions of s 15, which require the contract document to contain certain matters, regulate not only certain aspects of the contract between the credit provider and the debtor but also the information which is to be furnished to the debtor. Much of the argument for AFD appears to ignore what might be described as the informational aspect of s 15(B). Thus, AFD says of the statement in the particular example given above that $15,340 was payable to NII, that this was a stipulation in the credit contract and that, as far as the credit contract went, it was true. There are two reasons why this is incorrect. First, it was not contended that AFD's payment to NII of less than $15,340 (ie either $13,806 or $7,670) was a breach of AFD's contractual obligations to the debtor. Yet this seems to be the corollary of the proposition that the credit contract required payment of the full amount to NII. Secondly, the statement of the amount payable to NII was to fulfil the statutory requirement of providing the debtor with information. The purpose of imposing such a requirement was to enable the debtor to see how the amount of credit was to be disbursed in a case, such as the present, where it was not to be paid by way of loan to a borrower. It is this specific legislative purpose, evident from the text of s 15(B) as well as the wider statutory context, that is of present relevance. Wider considerations of "truth in lending" are not to be disregarded, but they tend to divert the argument into unproductive speculation about the importance, or possible importance, to the debtors of knowledge of the holdback. Whatever use the debtors might have made of information about the holdbacks, it was information AFD and NII and Capital kept to themselves. Whether AFD was merely being economical with the truth, or was in breach of its statutory obligation, is to be decided by applying the terms of s 15(B).

20 AFD's case was that s 15(B) is concerned only with the credit contract; the contract relating to the holdbacks was irrelevant. Yet, to return to the example, AFD did not intend to pay $15,340 to NII; NII never expected to receive that amount; it is not said that the holdback constituted a breach by AFD of the credit contract; and, regarded as factual information, the statement that $15,340 was payable, and was to be paid, to NII was incorrect. Part of the amount was to be paid to NII and part was to be retained by AFD.

21 Maxwell P gave weight to an argument of economic equivalence. The holdback, he said, was equivalent to a payment to AFD at the direction of the seminar provider. It was the same as if the whole amount (eg $15,340) was payable to NII or Capital, and received by NII or Capital, and then the amount of the holdback was then paid to AFD. Three comments may be made. First, the task is to apply the terms of s 15(B) to this case, and not to consider how they would apply to a different case. Secondly, although it is unnecessary to decide the question, it is far from clear that AFD would be in a better position had it contracted, with NII or Capital, for a payment to AFD, rather than a holdback.

Thirdly, Kaye J mentioned in his reasons that NII is in liquidation and that an administrator and receiver was appointed to Capital. The possibility of insolvency dictates the form of many commercial transactions, and for good reason. The risk that NII or Capital might become insolvent may explain why the holdback method was preferred to a different method of securing the intended commercial objective. At least it would highlight the danger of assuming the equivalence postulated.

22 The credit contracts of AFD did not comply with the requirements of s 15(B)(a)(ii). Because of the non-disclosure of the holdbacks, they did not identify the persons (including the credit provider) to whom the amount of credit was to be paid, or the amounts payable to each of them.

23 The appeal should be dismissed with costs.

24 KIRBY J. This appeal comes from a divided decision of the Court of Appeal of the Supreme Court of Victoria[5]. It concerns the meaning and application of a disclosure requirement in the *Consumer Credit (Victoria) Code* (Vic) ("the Code").

25 The Code represents the adoption in Victoria[6] of the *Consumer Credit Code*[7], which was enacted as a template for substantially uniform credit laws throughout the Commonwealth. It gives effect to the Australian Uniform Credit Laws Agreement[8]. There are precedents for procuring such uniform laws[9]. The validity of the legislative device was not challenged. It is comparatively rare because of the independent prerogatives of the State Parliaments under the Constitution, the differing legislative settings in which uniform laws must operate, and the cumbersome arrangements that are needed to secure agreement on such laws and to keep them up to date once enacted.

26 Where laws of this kind are enacted and valid, it behoves the courts to give them full force and effect. But the questions remain: What does the law mean? How is it to be applied?

The proper approach to resolution of the appeal

27 *Truth in lending laws*: I agree with the orders proposed in the reasons of Gleeson CJ, Gummow, Hayne and Crennan JJ ("the joint reasons"). The appeal by Australian Finance Direct Limited ("AFD"), challenging the successive decisions of the Victorian Civil and Administrative Tribunal[10], the single judge of the Supreme Court of Victoria (Kaye J[11]) and the Court of Appeal, must fail.

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5 *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* [2006] VSCA 245.

6 See *Consumer Credit (Victoria) Act* 1995 (Vic), s 5.

7 The Code comprises an appendix to the *Consumer Credit (Queensland) Act* 1994 (Q).

8 Duggan and Lanyon, *Consumer Credit Law*, (1999) at 22-23.

9 The former *Companies Code* was an earlier manifestation. See *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 333.

10 *Director of Consumer Affairs Victoria v Australian Finance Direct Ltd* (2004) ASC ¶155-067.

11 *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* (2005) ASC ¶155-073.

The respondent, the Director of Consumer Affairs Victoria ("the Director"), has advanced the preferable, and thus the correct, interpretation of the Code.

28 Respectfully, however, I disagree with the somewhat narrow basis on which the joint reasons explain their conclusion. Those reasons advert to the "specific legislative purpose" of s 15(B) of the Code, which is stated to be "to enable [a] debtor to see how [an] amount of credit [is] to be disbursed in a case … such as the present"[12]. This purpose is said to be "evident from the text of s 15(B) as well as the wider statutory context"[13]. The joint reasons remark that "[w]ider considerations of 'truth in lending' are not to be disregarded", but state that such considerations "tend to divert the argument into unproductive speculation about the importance, or possible importance, to the debtors of knowledge of the holdback" that is in issue[14].

29 I see in this approach an unwarranted constriction of the purposive approach to the interpretation of statutes. I do not agree in it. It runs counter to this Court's acceptance, in recent times, that the meaning of contestable legislative language is best resolved through a thorough investigation of the purpose of the provision or provisions concerned. In a case such as this, where the language of a statute is capable of bearing more than one meaning and there has been a legitimate division of opinion on the issue in an intermediate court, it does not suffice to point to the "informational aspect" evident on the face of a provision such as s 15(B)[15] as though it supplies the measure of that provision's practical effectiveness. It would be rare, at this level, for the elucidation of the purpose of a law to be so straightforward. Instead, the Court must endeavour to give effect to the principles of purposive construction that it has elaborated in a long series of cases that have gone before. This entails reference to such extrinsic materials as are necessary and available to ensure that the objectives that lie behind a particular piece of legislation are given their full and proper weight. It does not entail dismissing such materials as liable to lead to "unproductive speculation".

30 To confine oneself to the text of a disputed legislative provision to the exclusion of its context is to risk lapsing back into a literalistic approach to the interpretation of statutes[16]. The purposive approach, properly understood,

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12 Joint reasons at [19].

13 Joint reasons at [19].

14 Joint reasons at [19].

15 Joint reasons at [19].

16 cf *Chang v Laidley Shire Council* (2007) 81 ALJR 1598 at 1606 [33], 1608 [43]; 237 ALR 482 at 490-491, 493.

supports the conclusion arrived at in the joint reasons. But it affords a more convincing means of reaching that conclusion. It assists judges in performing their function of interpreting statutes in a manner consonant with their constitutional duties. It is to give effect to these differing views on approach, and out of respect for each of the divergent opinions expressed in the Court of Appeal, that I write separately.

31 *The facts and legislation*: The facts of the dispute[17], the disclosure requirements of the Code and other relevant legislative provisions[18] and the arguments of the parties[19] are all explained in the joint reasons.

Purposive interpretation

32 *Purposive construction*: Isolating the point of difference as to the interpretative task requires an examination of what this Court has said about the proper approach to elucidating the meaning of contested legislative language, such as that of s 15(B)(a)(ii) of the Code. The correct approach demands (as the judges below recognised) an appreciation of relevant historical and other materials that cast light on the purpose of the Victorian Parliament in adopting, and giving effect to, the Code.

33 When this purpose is understood, the resolution of the competing contentions in the appeal becomes relatively simple. Those of the Director are consonant with the statutory language and conform to the central objects of the Code, and should therefore be preferred. Those of AFD, even if arguably compatible with one reading of the words of the Code, would frustrate the attainment of those objects. They should be rejected.

34 *Starting with the text*: The starting point for statutory interpretation is always the text of the written law[20]. It is in that text that the legislature expresses its purpose or "intention". It is a mistake for courts to begin their search for the meaning of the law with judicial elaborations, ministerial statements or historical considerations[21]. Moreover, in performing its functions, a court should never

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17 Joint reasons at [6]-[13].

18 Joint reasons at [2]-[5].

19 Joint reasons at [14]-[17].

20 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Chang* (2007) 81 ALJR 1598 at 1611 [59]; 237 ALR 482 at 496-497.

21 See *Combet v The Commonwealth* (2005) 224 CLR 494 at 567 [135] where relevant authorities are collected.

stray too far from the text, for it constitutes the authentic voice of the constitutionally legitimate lawmaker[22].

35 *Reasons for purposive interpretation*: Nevertheless, especially in recent decades, courts of high authority[23], including in Australia[24], have moved away from a literal or semantic approach to statutory construction and towards a contextual and purposive approach. The reasons for this development, which has occurred at the same time in many countries of the common law, are several and complex. They include:

- Judicial recognition of the constitutional advance of universal suffrage and the respect that is therefore to be accorded to the "will" of Parliament, once it is ascertained[25];

- Judicial appreciation of the growing complexities of government in an age of detailed legal regulation[26];

- The growing understanding of the function of context and purpose in all human communication[27];

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22 cf *Trust Co of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]-[69]; 197 ALR 297 at 310-311.

23 See eg the House of Lords in *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 272, 275, 280, 291.

24 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423-424 approved *Bropho v Western Australia* (1990) 171 CLR 1 at 20; cf *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 144-146 [79]-[82].

25 *R v Lavender* (2005) 222 CLR 67 at 97 [94].

26 cf *White v Director of Military Prosecutions* (2007) 81 ALJR 1259 at 1273 [48]; 235 ALR 455 at 468-469.

27 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397 applying *R v Brown* [1996] AC 543 at 561.

- The impetus given by numerous general[28] and particular[29] statutory provisions requiring courts to prefer a construction that promotes the purpose and object of legislation to one that merely gives effect to its grammatical words; and

- Judicial recognition of the pragmatic truth that one price of simplification and concision in the enacted law is an increased need for courts to strive to give effect to the purpose of the lawmaker rather than resorting to the judicial lament that "the target of Parliamentary legislation … has been missed"[30].

36 The acceptance of the purposive approach to the interpretation of legislation therefore represents one of the most important doctrinal shifts in the reasoning of this Court in recent times. Statutory interpretation is now a principal function of appellate and trial courts around the world[31]. The decisions of this Court provide guidance for intermediate and trial courts throughout Australia. It must therefore take care to maintain a consistent approach. It would be unfortunate if, by its approach to particular proceedings, this Court were to suggest a return to literalism, or sympathy for the view that considerations of context and purpose are now to have less attention.

37 An important lesson of the past 20 years has been that statutory language better yields its meaning when its purpose is ascertained and taken into account in performing the task of interpretation. Normally, this obliges attention to the statutory context in which the contested "terms" of the legislation appear and some consideration of the objectives that stimulated the making of the contested law. Of course, the purpose to be ascertained is that of the particular provision viewed in the context of the entire statute[32]. Where the legislature has not spelt

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

29 The Code, Sched 2, cl 7 cited [2006] VSCA 245 at [170]; cf *Companies and Securities (Interpretation and Miscellaneous Provisions) (New South Wales) Code*, s 5A considered in *Yuill* (1991) 172 CLR 319 at 343-344, 348.

30 Diplock, "The Courts as Legislators", in Harvey (ed), *The Lawyer and Justice*, (1978) 263 at 274 cited *Kingston* (1987) 11 NSWLR 404 at 424.

31 Frickey, "Structuring Purposive Statutory Interpretation – An American Perspective", in Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age*, (2007) 159 at 159.

32 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224

(Footnote continues on next page)

out this purpose in unmistakable terms, it is the responsibility of the decision-maker to use all available resources to discover it.

38 *Rejection of the former approach*: In the past, courts stating the general common law rule proposed that the literal or grammatical construction of words was to be preferred unless it would produce some ambiguity or apparent anomaly or injustice, such as to justify a broader inquiry into the statutory purpose[33].

39 This Court has now rejected such preconditions. In *CIC Insurance Ltd v Bankstown Football Club Ltd*[34], four members of the Court said:

> "[T]he 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 … one may discern the statute was intended to remedy[35]. 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*[36], 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[37]."

CLR 193 at 206-208 [30]-[34]; *Carr v Western Australia* (2007) 239 ALR 415 at 417-418 [5]-[7].

33 cf *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189 at 191; *Jones v Director of Public Prosecutions* [1962] AC 635 at 662 per Lord Reid; *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 234-235, 237, 238; [1978] 1 All ER 948 at 951-952, 954, 955.

34 (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

35 *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461 cited in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, 315.

36 (1986) 6 NSWLR 363 at 388.

37 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321.

40 This explanation of the approach to be taken to a problem of construction has been cited, restated and applied in this Court so many times that it should be uncontroversial[38]. Some judges have not been sympathetic to the purposive approach[39]. Some have clearly yearned for a return to the perceived simplicities of literalism[40], either generally or in particular fields of law. On the whole, however, this Court has adhered to the doctrinal shift with a fair degree of consistency. In my view, there is a need for such consistency. We should avoid opportunistic reversions to the old approach of literalism which the legal mind sometimes finds congenial[41].

41 Obviously, a balance must be struck between, on the one hand, an exclusive focus on the text of legislation and, on the other, reference to extrinsic information that assists to explain its purpose. Those bound by the law will often have no access to such information. Cases do arise where the legal prescription is relatively clear on the face of the written law. To the extent that external inquiries are necessary, they obviously add to marginal costs and can sometimes occasion disputes and uncertainty which the words of the law alone would not have produced.

42 *Finding the preferable construction*: In the present case, the text of the Code was not absolutely clear. So much is demonstrated by the conflicting reasons in the Court of Appeal. If Maxwell P concluded that AFD had not breached the disclosure requirements of the Code, and if special leave was

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38 See eg *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112-113; *Project Blue Sky* (1998) 194 CLR 355 at 381 [69], 384 [78]; *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at 620 [47] per Gummow J; *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 82 [74]; *Wilson v Anderson* (2002) 213 CLR 401 at 438 [71] per Gaudron, Gummow and Hayne JJ; *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 328-329 [22] per McHugh J, 368 [140] per Heydon J; *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd (In liq)* (2003) 214 CLR 514 at 531-532 [31]-[32] per McHugh, Kirby and Callinan JJ; *AssetInsure Pty Ltd v New Cap Reinsurance Corporation Ltd (In liq)* (2006) 225 CLR 331 at 361-362 [87] per Kirby and Hayne JJ.

39 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 99-101 [146]-[149] per Callinan J.

40 As expressed eg in *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at 251 per Kitto J.

41 *Ryan* (2000) 201 CLR 109 at 145-146 [82]; *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 285 [113]; *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194 at 226-227 [88]-[89].

granted to permit this Court to resolve the difference that thus arose in the intermediate court, it can scarcely be said that the text is so clear that it was unnecessary to go much beyond "applying the terms of s 15(B)"[42].

43 The Director did not go so far as to argue that Maxwell P had embraced an interpretation that was absurd or unavailable on the face of the Code. Instead, it was the Director's submission that the preferable construction of the disputed Code provision was that adopted by the Tribunal, the primary judge and the majority of the Court of Appeal. An important element in this contention was the submission that such an interpretation better carried into effect the Code's ascertained purpose.

Disclosure to the borrower of "holdbacks"

44 *The issue of disclosure*: In the Court of Appeal, Maxwell P took the view that the "holdbacks" were equivalent to a payment to AFD at the direction of NII/Capital[43]:

> "More accurately, it [was] equivalent to a payment by [AFD] (in its capacity as lender) to [AFD] (in its own right) at [NII/Capital]'s direction. … [NII/Capital] might have directed [AFD] to pay some proportion of the seminar fee to one or more of [NII/Capital]'s trade creditors. In compliance with that direction, [AFD] would have paid that part of the loan amount not to [NII/Capital] but to the nominated trade creditor(s). This would be an example of funds owing, and payable, to [NII/Capital] being diverted to a third party at [NII/Capital]'s direction."

This allowed his Honour to find that the "holdbacks" were nothing more than a "shortcut" for effecting a transaction that was separate from, and extrinsic to, the credit agreement between AFD and individual debtors[44]:

> "[T]he critical matter is that the full amount of the seminar fee was payable to [NII/Capital]. [NII/Capital] alone had the power to decide whether any, and if so what, part of the seminar fee would in fact be received by some other person."

I accept that, particularly viewed in isolation, this was an available construction of the Code.

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42 Joint reasons at [19].

43 [2006] VSCA 245 at [18] per Maxwell P.

44 [2006] VSCA 245 at [20].

45 The majority in the Court of Appeal questioned whether it was open, in an appellate process limited to the correction of errors of law, to make a finding about the nature of the "holdbacks" that differed from that of the Tribunal[45]. The Deputy President of the Tribunal had specifically concluded[46]:

> "that the holdbacks were retained by AFD, not paid by NII or Capital. I am not satisfied that there was any independent clear arrangement applying throughout the relevant period under which NII or Capital incurred an obligation to pay these holdbacks to AFD."

46 Even if the Tribunal's characterisation of the "holdbacks" involved a question of law, the majority in the Court of Appeal disagreed with Maxwell P's analysis of the arrangements and with his characterisation of them. Neave JA pointed out[47]:

> "The holdback fee was retained by the credit provider. It was never contemplated by AFD or NII/Capital that the holdback fee should be paid to the latter. There is a clear distinction between this situation and the situation in which the parties make an arrangement under which a credit provider holds an amount on behalf of the supplier of goods and services (in this case NII/Capital), which can then direct disposal of that amount. In my view it is wrong to regard the holdback arrangement as a payment by AFD to itself at NII/Capital's direction, or to equate the arrangement to a situation in which AFD set aside an amount for NII/Capital and then paid part of that amount to NII/Capital's trade creditors."

47 In affirming the characterisation of the "holdbacks" adopted by the Tribunal (and the primary judge) the majority in the Court of Appeal placed considerable emphasis on the stated and apparent purposes of the Code, as well as its background and history. Thus, Neave JA said[48]:

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45 See [2006] VSCA 245 at [77]-[82] per Ashley JA, [143]-[152] per Neave JA; cf at [4]-[5] per Maxwell P.

46 (2004) ASC ¶155-067 at 201,239 [59] per McKenzie DP. See also [2006] VSCA 245 at [83]-[87] per Ashley JA and at [143] per Neave JA.

47 [2006] VSCA 245 at [160].

48 [2006] VSCA 245 at [164]. See also at [123] per Ashley JA.

> "The legislative history and policy goals of the Code[49], the text of the provision itself and the legislative context in which it appears[50] support an interpretation of s 15(B)(a)(ii) which requires disclosure of the amount of the holdback to the borrower."

48 With respect to those who may think otherwise, it is my opinion that this represented the correct approach. It was one conformable with the authority of this Court. Indeed, although he reached a different conclusion, Maxwell P did not question the need to uphold "the manifest purpose of the Code, being to ensure that there was 'truth in lending'"[51]. His Honour simply viewed that objective more narrowly, seeing it as giving rise to a requirement of disclosure "relat[ing] to the *lending* transaction itself"[52]. His was thus a view of the disclosure objectives of the Code that the majority in the Court of Appeal regarded as too narrow, as inconsistent with the history of the Code and its purpose, and as requiring (as the majority put it) insertion of words in the critical sub-paragraph of the Code that had appeared in the previous legislation but had been omitted from the Code[53].

49 *Background to the Code*: As Neave JA described it[54], the Code was "the culmination of more than 30 years of attempts to reform and modernise consumer credit laws and to apply a uniform approach to credit transactions across Australia".

50 Distinctive consumer credit arrangements were developed in the United Kingdom, Australia and elsewhere in the late nineteenth and early twentieth centuries, principally to facilitate the acquisition of consumer durables[55]. During the twentieth century, developments in the variety and significance of consumer credit contracts led to instances of abuse, obfuscation and unfairness, demands for amendments, public inquiries and reforming legislation.

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49 *Interpretation of Legislation Act* 1984 (Vic), s 35.

50 cf *Stingel v Clark* (2006) 226 CLR 442 at 473-474 [89].

51 [2006] VSCA 245 at [42].

52 [2006] VSCA 245 at [42] (emphasis in original).

53 [2006] VSCA 245 at [179]-[190] per Neave JA; see also at [108]-[109] per Ashley JA.

54 [2006] VSCA 245 at [165] (citations omitted).

55 See [2006] VSCA 245 at [171].

51 Early hire purchase and money-lenders legislation required disclosure to debtors of the amount of interest and the charges that would be incurred in consequence of such transactions[56]. Because consumer credit was a transnational phenomenon, it was not surprising that protective legal changes adopted overseas came to influence the law in Australia. In the United States of America, Congress enacted the *Truth in Lending Act* 1968 (US)[57]. That Act stimulated the establishment in South Australia of a committee chaired by Professor (later Judge) Arthur Rogerson. That committee reported in 1969[58]. In 1971, the Crowther Committee completed a major review of consumer credit legislation in England[59]. Its report identified several deficiencies in consumer credit laws as they had developed in the United Kingdom. Some of its criticisms were also apposite in the Australian context.

52 In 1972, a committee of the Law Council of Australia chaired by Mr T Molomby published a report detailing its investigations into the state of the law in Australia, and making recommendations for reform[60]. The report was formally presented to the Victorian Attorney-General. In 1973, the Standing Committee of Attorneys-General agreed to the formation of a Credit Laws Committee to develop model consumer credit legislation for all jurisdictions in Australia[61].

53 *The "linchpin" of credit disclosure*: The work of the Credit Laws Committee ultimately led to the enactment of the *Credit Act* 1984 (Vic) and

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56 See eg *Money-lenders and Infants Loans Act* 1941 (NSW), s 22(2).

57 One purpose of that Act is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him": 15 USC §1601(a). See eg *Walker v Wallace Auto Sales Inc* 155 F 3d 927 at 930 (7th Cir, 1998).

58 *Report to the Standing Committee of State and Commonwealth Attorneys-General on The Law relating to Consumer Credit and Moneylending*, (1969) ("the Rogerson Report"); cf White, *Fair Dealing with Consumers*, (1975).

59 *Consumer Credit: Report of the Committee*, (1971) Cmnd 4596.

60 Law Council of Australia, *Report on Fair Consumer Credit Laws*, (1972) ("the Molomby Report").

61 See Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 March 1984 at 3403; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 May 1984 at 171-172.

counterpart legislation in other jurisdictions ("the 1984 Acts")[62]. Each statute gave effect to the principle of "truth in lending", adapted from United States and British models and accepted as a central policy objective by all of the Australian inquiries. The 1984 Acts came under the attention of the appellate courts of the jurisdictions concerned. Thus, the *Credit Act* 1984 (NSW) was considered by the New South Wales Court of Appeal in *Canham v Australian Guarantee Corporation Ltd*[63]. Expressing the substantially unanimous opinion of that Court, I observed[64]:

> "The philosophy of disclosure … runs through the reports which have accompanied and occasioned the reform of consumer credit legislation in Australia. The obligation of disclosure did not begin with the *Truth in Lending Act* in the United States. There were provisions in earlier … Acts to require disclosure to debtors of the amount of interest and charges … *But disclosure and truth in lending was the very linchpin of the new Credit Act.* To discourage non-disclosure, whether deliberate or accidental, drastic consequences were provided by s 42."

54 In *Australia and New Zealand Banking Group Ltd v R & D Bollas*[65], Ormiston JA considered the provision of the *Credit Act* 1984 (Vic) requiring disclosure of information relevant to the costs and other incidents of the credit transaction to borrowers in a similar manner. His Honour said that the relevant provision should be[66]:

> "given an interpretation appropriate to its use in this context and not one which would have enabled credit providers to create artificial transactions in order to deny their obligation to make disclosure".

55 In *Canham*, I mentioned two extrinsic considerations that tended to support such a purposive construction of the disclosure provisions of the 1984 Acts. One was the report of the Australian Law Reform Commission, published just before the enactment of the 1984 Acts, on an analogous problem that had

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62 Counterpart legislation was enacted in New South Wales, Western Australia, the Australian Capital Territory and Queensland: Duggan and Lanyon, *Consumer Credit Law*, (1999) at 21.

63 (1993) 31 NSWLR 246.

64 (1993) 31 NSWLR 246 at 253 (emphasis added).

65 (1999) ASC ¶155-301 at 200,163 [8]-[9].

66 (1999) ASC ¶155-301 at 200,163 [8].

arisen in the context of consumer transactions involving insurance brokers[67]. The Commission's research had[68]:

> "disclosed secret commissions, or payments in the nature of commissions, passing between insurers and such intermediaries … The … Commission report explored various options. It concluded that the best way to prevent secret commissions and to promote informed decisions by consumers was to impose upon brokers the obligation to disclose to their clients, in each case, the amount earned by way of commission and other rewards received from the insurer".

56 *The object of truth in lending*: The Commission explained the purpose of imposing such obligations in terms which, as I recognised in *Canham*, also underpinned the analogous disclosure requirements of the 1984 Acts[69]:

> "Disclosure would also encourage and promote informed assessment and, perhaps, questioning by the client of the cost of the services of an insurance broker. It might well lead to a client comparing the cost of the services of different brokers. There are limited opportunities for inquiry and comparison when the client is not told of the amount paid to his broker … The market forces which operate in favour of competition can be most effective when the consumer is made aware of the cost of services rendered on his behalf."

57 The second consideration mentioned in *Canham* was the controversy that had followed the Commission's recommendation for full disclosure to consumers of commissions and other rewards derived by the credit provider from the consumer's payments for the services provided[70]:

> "One argument put to the Commission was that a client is no more entitled to that information from a broker than he would be from a salesman if he bought, say, a refrigerator or a pair of shoes. His sole concern, it is said, is with the price charged by the insurer, a price which, it is argued, remains the same whether insurance is bought direct or through a broker."

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67 Australian Law Reform Commission, *Insurance Agents and Brokers*, Report No 16, (1980) ("ALRC 16").

68 *Canham* (1993) 31 NSWLR 246 at 252-253.

69 ALRC 16 at 51 [82] cited *Canham* (1993) 31 NSWLR 246 at 253.

70 ALRC 16 at 51 [83] cited *Canham* (1993) 31 NSWLR 246 at 253-254.

58 This argument bears a similarity to the submission that AFD advanced in the present case. As I pointed out in *Canham*, the argument was rejected by the Law Reform Commission[71]:

> "First, there is the world of difference between the position of an insurance broker and a salesman. A salesman is the employee or agent of the seller of goods. … An insurance broker, however, is the agent of the purchaser and is answerable to his client in all respects. He should not be allowed to conceal from his client the remuneration received from a third party. Secondly, the client is not necessarily interested solely in the cost of the insurance. He may also be interested in the broker-related component of that cost. Armed with that knowledge, he might, in appropriate cases, consider whether to:
>
> - Approach the insurer for direct purchase at a reduced cost
> - Seek rebate from the broker of a part of his commission
> - Seek a total rebate of the commission and either employ the broker on a fee for services basis or (in the case of, eg, a large corporation) employ a risk manager as a salaried officer
> - Employ a different broker or an insurance consultant."

All of these considerations apply equally to the "holdbacks" revealed in the evidence in the present case.

59 *Adopting a purposive approach*: In *Canham*[72], the New South Wales Court of Appeal explained the suitability of adopting a purposive approach to the ascertainment of the meaning of contested provisions of the *Credit Act*:

> "The ultimate theory behind the philosophy of truth in lending in our credit legislation is that disclosure of critical elements in the consumer contract will help to ensure honesty and integrity in the relationship (where one party is normally disadvantaged or even vulnerable); promote informed choices by consumers; and allow the market for financial services to operate effectively. … The policy behind the philosophy must be kept in mind in approaching the application of particular provisions in the Act to particular facts. The modern approach to the interpretation of legislation is, so far as the language of the legislation permits, to ensure

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71 ALRC 16 at 51-52 [83] cited *Canham* (1993) 31 NSWLR 246 at 254.

72 (1993) 31 NSWLR 246 at 254.

that it gives effect to, and does not frustrate the achievement of, the apparent purposes of parliament as disclosed in that language".

60 In support of this last proposition, reference was made to *Kingston v Keprose Pty Ltd*[73]. As I have shown, reference can now also be made to the repeated holdings of this Court, most notably in *Bropho v Western Australia*[74], *CIC Insurance*[75] and *Newcastle City Council v GIO General Ltd*[76].

61 *Ministerial statements of purpose*: When the 1984 Acts were repealed and replaced by the Code, the stated purpose was to enact legislation covering all forms of consumer credit in Australia[77]. Explaining the proposal to enact the Code in Victoria, the State Attorney-General described the difficulties that had arisen in securing uniformity on the basis of the 1984 Acts[78]. Relevantly, she said[79]:

> "A fundamental principle of the [C]ode is that there should be the least possible restrictions on the nature and amount of fees and charges which can be imposed provided that all such fees and charges are adequately disclosed. … The objective is to ensure that before any contract is entered into, the prime financial information is presented in a simple form so that the borrower can assess the true cost of any proposed credit transaction and make meaningful comparisons with competing products on offer.
>
> The principle of full disclosure is carried forward into the contract itself where, again, all fees and charges as well as interest charges must be fully disclosed, if they are to be chargeable at all."

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73 (1987) 11 NSWLR 404 at 423 and cases there cited.

74 (1990) 171 CLR 1 at 20.

75 (1997) 187 CLR 384.

76 (1997) 191 CLR 85 at 112-113.

77 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 August 1994 at 8828.

78 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 1995 at 1233.

79 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 May 1995 at 1234. See [2006] VSCA 245 at [123].

62 A like point was made by the Minister introducing the template for the Code into the Queensland Parliament[80]:

> "One of the key elements of the Consumer Credit Code is to ensure that there is truth in lending. This means that a consumer can make an informed choice between credit providers as to the nature of the credit being offered, as well as the comparative costs between credit providers.
>
> The legislation sets out in some detail the requirements for credit contracts, including such basic matters as precontractual disclosure, the fact that credit contracts must … contain certain key material designed to ensure that truth in lending is given effect to."

63 Against the background of this understanding of the history and purpose of the Code it is easier to understand Neave JA's explanation of the legislative context in which s 15(B)(a)(ii) of the Code must be interpreted[81]:

> "[T]he pre-contractual disclosure requirements in the Code are not confined to matters concerning the contractual relationship between the credit provider and the borrower. For example s 15(L) requires the borrower to be given a statement on the terms of any guarantee or mortgage which is to be or has been taken by the credit provider. The parties to the contract of guarantee will often not be parties to the credit contract. Section 15(M) requires disclosure of the fact that a commission is to be paid *by or to* the credit provider for the introduction of credit business or business financed by the contract; and s 15(N) requires disclosure of the details of any credit-related insurance contract which is to be financed, including any commission which the credit provider is aware is to be paid in relation to the insurance contract. All of these provisions relate to matters which involve a separate contractual relationship between the credit provider and a third party, but which may be relevant to a consumer who is seeking to compare the true costs of different credit arrangements."

64 Such considerations, together with analysis of the language and structure of s 15 and the development of its predecessor provisions and reflection on how the Code was designed to operate so as to achieve its stated purposes, led the majority of the Court of Appeal to their preferred interpretation.

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80 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 August 1994 at 8830.

81 [2006] VSCA 245 at [174] (citation omitted; emphasis in original).

65 *Resulting preferred interpretation*: The reasons of the majority in the Court of Appeal offer the preferable interpretation of the Code. It is textually supported. It involves an harmonious interpretation of the Code, taking into account its drafting history. It is consistent with the achievement of the general purposes of the Code, as apparent on its face and from parliamentary records. It promotes transparency in the dealings between credit providers and borrowers. It is protective of the interests of credit consumers, consistent with the overall objective of the Code. It thus helps to sustain the object of "truth in lending".

66 To the extent that there is any textual ambiguity, this Court should resolve it by endorsing the interpretation favoured by the majority of the Court of Appeal. It should do so because that is the surest way to give effect to the purpose of Parliament as the legislators have repeatedly expressed that purpose. Provided the chosen language sustains the stated purpose, giving it effect furthers the proper relationship between the courts and the lawmaker[82].

Conclusion

67 I come to my conclusion in this appeal unconvinced that the correct answer is derived without recourse to considerations external to the text of s 15(B). The advancement of "truth in lending" being the declared objective of the contested provisions of the Code, it constitutes a proper and useful contextual consideration to take into account in performing the interpretative function in this case. Adopting such an approach does not lead to "unproductive speculation". On the contrary, it involves resolving the problem now before the Court in precisely the way that, in recent years, the Court has repeatedly said such problems should be resolved.

68 Ascertaining and giving effect to the meaning of statutory language is rarely, if ever, a mechanical task. It demands analysis of the relevant text and context, informed by a variety of considerations. Amongst these, the ascertained legislative purpose is extremely important. It is so in virtually every case of contested statutory interpretation by the time it reaches this Court. In the present case, the purpose of the Code militates against the construction urged for AFD and in favour of that argued for the Director. In brief, the purpose helps judges to read the statutory language in the correct way and to appreciate fully what the legislature was intending to say on the particular question in hand. The majority of the Court of Appeal were thus correct, not only in their conclusion but also in

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82 In the United States, the *Truth in Lending Act* has also been interpreted stringently in respect of disclosure requirements. For example, the courts have held that such requirements are not to be circumvented by burying the cost of credit in the price of the goods sold. See eg *Sampler v City Chevrolet Buick Geo Inc* US Dist LEXIS 2322 (ND Ill, 2000) applying *Walker* 155 F 3d 927 (7th Cir, 1998).

their approach. Unless a consistent approach is taken to statutory construction, outcomes may be haphazard and unpredictable. And judges may be suspected of tailoring their approaches in order to produce a desired outcome.

Order

69 The appeal should be dismissed with costs.