

**Letterhead of City University of Hong Kong**

15 May 2000

LC Paper No. CB(2)2063/99-00(01)

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School of Law

By fax & mail

Dear Mr. Allcock:

Thank you for having two members of your staff, Mr. Michael Scott and Mr. Thomas Leung come to the School of Law to discuss the Interpretation and General Clauses (Amendment) Bill 1999. The meeting was attended by Professor Anton Cooray, Professor E.L.G. Tyler, Associate Professor Bryan Bachner, Associate Professor Myrette Fok, Associate Professor D.K. Srivastava, Associate Professor Anthony Upham, Associate Professor John Ho, Assistant Professor Denis Edwards, Mr. Anthony Law, Lecturer, Ms Amy Ang, Lecturer and Acting Dean David Smith.

Professor Cooray and Mr. Law have prepared a brief statement on the draft bill. This statement, which represents the views of Professor Cooray and Mr. Law, is attached.

As far as the views of other members of the teaching staff in attendance are concerned, there was a consensus that the bill should be supported. The bill usefully restates the existing common law on the subject of statutory interpretation but also leaves open the further development and expansion of the common law by the courts.

May I say how much our staff appreciated the opportunity of the briefing and face-to-face discussion with your staff. Perhaps this could happen more often when Bills or Law Reform Commission documents are sent to us for comment.

With best wishes,

Yours sincerely

David Smith  
Acting Dean  
School of Law

Encl.

DNS/sl

## Comments on the Use of Extrinsic Materials in Statutory Interpretation

1. *Pepper v Hart* [1993] 2 WLR 1 authoritatively sets out the principles relating to the use of Parliamentary materials in statutory interpretation. In Australia, the use of extrinsic materials in statutory interpretation has been given statutory force by section 15AB of the Acts Interpretation Act (Commonwealth).
2. All the major criticisms and concerns of the rule in *Pepper v Hart* as well as the use of other extrinsic material have been directed not to the usefulness of the extrinsic materials, but to problems of practice.

The main criticisms of the use of extrinsic materials are:-

- a. cost and time considerations,
- b. lack of clear rules in determining the relevance and weight of extrinsic materials in ascertaining the legislative intention, and,
- c. limits of the use of extrinsic materials.

It appears from an Australian Law Journal article in 1988 by Patrick Brazil that section 15AB has generally worked well with no serious difficulties. There does not appear to be any recent literature in Australia critical of section 15AB.

3. In codifying the common law principles of statutory interpretation two approaches may be available:-
  - (i) Set out the relevant principles as concisely and definitely as possible, with the aim of certainty; or
  - (ii) set out the principles as concisely as possible, but leaving a fair degree of flexibility for the judges to adapt the principles to do justice in the case.

The proposed legislation has adopted the second method, which we believe is the right one. Although section 19AB(5) seem somewhat vague, the advantage of such wording is that judges will be able to determine the applicability of the general principle to the particular circumstances of the case.

4. Codification of the relevant principles, which has worked well in Australia, seems a right decision to make. Whether these rules of interpretation should be extended to the interpretation of the Basic Law is another matter. Since the Interpretation and General Clauses Ordinance is strictly relevant only to the interpretation of Ordinances,
  - (i) a clause might be inserted, out of abundant caution, that the section does not apply to the interpretation of the Basic Law; or
  - (ii) make no mention of the Basic Law.

If the latter approach is adopted, judges will be free to apply or adapt the essentials of the principle in the interpretation of the Basic Law.

By Professor M.J.A. Cooray and Lecturer Anthony MW Law, City University of Hong Kong