WAS DOYLE CJ CORRECT TO READ WORDS INTO THE *CONTROLLED SUBSTANCES ACT 1984* IN *R v DI MARIA*?

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I INTRODUCTION AND OUTLINE

In *R v Di Maria*,[1] Chief Justice Doyle of the Supreme Court of South Australia read words into a penal statute. The appellants had been convicted under s 32(1)(a) of the *Controlled Substances Act 1984* (SA) with manufacturing a drug of dependence and a prohibited substance. The offence was created under s 32(5), which imposed a two-tired level of penalty, based on the quantity of the drug or substance involved. In the original version of the Act a higher penalty was imposed if the quantity involved was greater than or equal to the 'prescribed amount', and a lower maximum penalty where the quantity was lower than the prescribed amount or in any other case. After amendments to the Act, however, the words 'in any other case' were removed, leaving the appellants in *Di Maria* to challenge their sentence on the basis that no amount had been prescribed for the relevant drug or substance, therefore no penalty could apply to them. A literal reading of the words of the Act, without 'in any other case' included therein, supported this argument. However, Doyle CJ took a purposive approach to interpretation and came to the conclusion that the Act should be read as if the words 'in any other case' were contained in the provision and the lower maximum penalty should apply to the appellants.

This paper will argue that Doyle CJ was correct in his approach to statutory interpretation. Section II will have regard to the relevant law. Section III will outline the main criticisms of *Di Maria*. Section IV will rebut in detail these criticisms. Section V will draw conclusions and examine the implications of the case.

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[1] *R v Di Maria* (1996) 67 SASR 466 per Doyle CJ with whom Prior and Nyland JJ agreed, ("*Di Maria*").

II THE RELEVANT LAW

The crux of Doyle CJ's decision was that the court could read s 32(5)B(b) as though the words 'in any other case' were written there. He held that, (at 467):

> (4) …(a) taking into account the current form of s 35(5), and the legislative history of s 32(5)B(b), it was clear that there had been an unintended departure from the original scheme. There was no other rational explanation for the departure and a literal interpretation of the provision would cause the legislative intent to fail, leaving what is clearly regarded as a serious offence by Parliament, unpunished;
> (b) Parliament did not intend to penalise manufacture *only if* the Executive prescribed an amount in respect of a given drug or prohibited substance;
> (c) when the provision was amended, Parliament must be taken to have overlooked the significance of removing the words 'in any other case'. The omission was a mere oversight;
> (d) such omission should be remedied by construing the statute on the footing that the lesser maximum penalty was intended to be the relevant maximum in this case, thus promoting the object of the section.

In an oft-cited passage Lord Diplock said:

> I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purpose of the Act. But in doing so the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it.[2]

Implying words into the text of an Act which contains obvious drafting errors is an uncontroversial activity for a court, as that text does not represent the actual intentions of Parliament.[3] However, it is contentious for a court to imply words into any Act when, even though the intention of the legislators has been fulfilled, the text still does not give

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[2] *Wentworth Securities Ltd and Another v Jones* [1980] AC 74 at 105.

[3] The 'golden rule' of interpretation: Lord Wensleydale said in *Grey v Pearson* (1857) 10 ER 1216 at 1234 that "the grammatical and ordinary sense of the words may be modified, so as to avoid [some] absurdity and inconsistency, but no farther".

effect to the purpose or object of the Act. Lord Mersey expressed this by saying: 'It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do'.[4] This 'clear necessity' test has been taken up by the High Court in several cases. Gibbs J commented:

> [I]f the words of the sub-section are unambiguous we must give effect to the intention which they reveal and it is for the legislature and not for the courts to fill any gap that may unintentionally have been left in the statute.[5]

However, with the purposive approach to statutory interpretation being given statutory pre-eminence,[6] McHugh JA put forward an approach which would emphasise the purposive approach to interpretation:

> To give effect to the purpose of the legislation, a court may read words into a legislative provision if by inadvertence Parliament has failed to deal with an eventuality required to be dealt with if the purpose of the Act is to be achieved.[7]

As enunciated by Lord Diplock, reading words into an Act by taking a purposive approach would only be possible if certain conditions were satisfied, where:

> First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsmen and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsmen and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless the third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed.[8]

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[4] *Thompson v Goold & Co* [1910] AC 409 at 420.
[5] *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1 at 12.
[6] *Acts Interpretation Act 1901* (Cth) s 15AA.
[7] *Bermingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292 at 302.
[8] *Wentworth Securities Ltd and Another v Jones*, above n 2, at 105-6.

Lord Diplock's approach was repeated by McHugh JA in *Bermingham*.[9]

There have been several other cases both pre-dating and following *Di Maria* in which the courts have used the same technique as that of Doyle CJ. To give but two examples, in *Tokyo Mart v Campbell*, Mahoney JA found that the purpose of the *Pure Food Act* 1908 would not be achieved by allowing food in an adulterated, but diluted, form to be sold for consumption. Therefore he found that the omission to deal with the present case would defeat the purpose of the legislation if the omission was not cured.[10] In *Inco Europe* Lord Nicholas said (at 592):

> I freely acknowledge that this interpretation…involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words.

According to Kirby J, Lord Diplock's approach is now the accepted approach that a court should take when it is attempting to read words into an Act

> not only in England, but also in Australia and throughout the common law world. Today, unless driven to the result by unyielding words, no judicial satisfaction is to be derived from concluding that the manifest target of legislation has been missed.[11]

With the state of the case law now in mind, the question becomes whether or not Doyle CJ was justified in *Di Maria* in implying words into the Act.

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[9] *Bermingham v Corrective Services Commission of New South Wales*, above n 7, at 302.
[10] *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 at 283.
[11] *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 82.

III ARGUMENT THAT DOYLE CJ'S DECISION WAS INCORRECT

A *The Literal Approach*

The literal rule of statutory interpretation finds its basis in the separation of powers doctrine: It is for parliament to legislate and for an impartial judiciary to refrain from formulating policy and drafting and enacting legislation giving effect to that policy.[12] According to the literal approach, the words used in a statute must be examined and given their literal and grammatical meaning. In *The Engineer's Case* Higgins J said:

> The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.[13]

In other words, the court must read what the words of the statute say, ascertain their ordinary meaning, and apply them to the facts of a case at hand.[14]

In the leading Australian authority on the literal approach, *Cooper Brookes*,[15] according to Gibbs CJ (at 305):

> If the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust.

However, it followed that if a statutory provision lacked any of those traits, that is, if it was ambiguous, then it must not be given its ordinary and grammatical meaning. Only then could the purposive approach be used at common law.[16]

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[12] *South Australia v Commonwealth* (1942) 65 CLR 373 at 409.
[13] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161.
[14] *Higgon v O'Dea* [1962] WAR 140.
[15] *Cooper Brookes (Wollongong) Pty. Ltd. v. Federal Commissioner of Taxation* (1981) 147 CLR 297.
[16] See below n 29 and accompanying text.

But s 32(5)B(b) *prima facie* appears unambiguous. No amount is prescribed for the purposes of that section in relation to the substances involved in *Di Maria's* case. The appellants argued that no penalty was able to be imposed because, no amount having being prescribed in relation to those substances, it could not be said that the quantity of the drug equaled, excelled or was less than the amount prescribed. No penalty was fixed by the Act.

This literal approach should prevail because there is no ambiguity, therefore the common law does not allow for the purposive approach to apply, and there is only one possible interpretation of the provision of the Act, therefore there is no statutory requirement that the purposive approach take priority over the literal.

B *The correct approach appears not in* Di Maria*, but in* R v Young

Spigelman CJ of the Supreme Court of New South Wales has written several articles on statutory interpretation as well as delivered some important judgements. In *R v Young*,[17] the court declined to accept an argument that a it should give effect to the underlying purpose of several sections of the *Evidence Act 1995* (NSW) by implying or reading into the Act a substantial number of words. Spigelman CJ found that it would be fundamentally inappropriate for the court to read words into an Act:

> The proposition that a court can introduce words into an Act of Parliament offends a fundamental principle of our constitutional law. It is no part of the function of any judge to amend legislation. The task of the courts is to determine what parliament meant by the words it used, not to determine what Parliament intended to say.[18]

He went on to say that the recent cases

> are not authority for the proposition that a court is entitled, upon the satisfaction of the three conditions postulated by Lord Diplock, to perfect the parliamentary intention by inserting

[17] *R v Young* (1999) 46 NSWLR 681.
[18] Ibid, at 686. See also, J J Spigelman, 'The poet's rich resource: Issues in statutory interpretation' (2001) 21 Australian Bar Review 224 at 233, and J J Spigelman, 'Statutory Interpretation: Identifying the Linguistic Register' (1999) Newcastle Law Review 1 at 4.

> words in a statute. The court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based.[19]

On this argument, it could be said that Doyle CJ should not have read words into the *Controlled Substances Act* because this was not a 'text based' construction, it was instead what Spigelman CJ described extra-curially as a 'divination' of parliamentary intent:

> The task of the courts is to interpret the words used by the parliament. It is not to divine the intent of the parliament. …The courts must determine what parliament meant by the words it used. The courts do not determine what parliament intended to say.[20]

As Doyle CJ determined what parliament intended to say, rather than what it did say, his construction was not a text based one, unlike, for example, *Cooper Brookes*,[21] in which Spigelman CJ argues that the High Court's construction was not one of 'reading in' words, but was simply one of 'reading down' the words. That is, that the court construed the words in a way that would avoid a drafting oversight and achieve a result which was consistent with what the court perceived to be the purpose of the Act.

C *Words should not be read into penal statutes*

Doyle CJ should not have read words into a penal Act because such Acts affect the fundamental rights and privileges of individuals. The common law presumes that Parliament would not enact legislation which interferes with the liberty of the subject without making it clear that this was its intention.[22] In the past the courts approached the interpretation of penal statutes with great caution:

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[19] *R v Young*, above n 17, at 687.
[20] J J Spigelman, 'The poet's rich resource: Issues in statutory interpretation' (2001) 21 Australian Bar Review 224 at 225.
[21] *Cooper Brookes (Wollongong) Pty. Ltd. v. Federal Commissioner of Taxation*, above n 15.
[22] *R v Hallstrom (No.2)* [1986] QB 1090 at 1104.

> If there is a reasonable interpretation [of a penal provision] which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one.[23]

Despite the statutory requirement that a purposive approach be used when construing legislation,[24] where the liberty of a person is at stake, the courts have shown that they will not extend a statute to cover a particular situation merely because it appears that the legislature has acted inadvertently.[25] McHugh J adds:

> Still less should a court ignore the clear words of a provision so as to give it a meaning that would or might make it easier to convict an accused if the intention of the legislature is at best a matter of contestable opinion.[26]

With this in mind, it could be argued that Doyle CJ should not have read words into the *Controlled Substances Act* when doing so extended criminal liability which otherwise did not exist.

D *Separation of Powers*

A final criticism of the *Di Maria* decision would be that the court stepped into the role of lawmaker, not law interpreter, thereby violating the constitutionally embodied separation of powers doctrine, where the judicial and the legislative arms of government are separate and that their respective functions and powers are mutually exclusive.[27]

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[23] *Tuck & Sons v Priester* (1887) 19 QB 629 at 638, cited with approval by Cohen J in *Ex parte Purcell* (1907) 7 SR (NSW) 432.
[24] *Acts Interpretation Act 1915* (SA) s 22(1). See below n 31 and accompanying text.
[25] *Ex parte Fitzgerald; Re Gordon* (1945) 45 SR (NSW) 182.
[26] *Krakouer v R* (1998) 194 CLR 202 at 223.
[27] *Boilermakers Case* (1915) 20 CLR 54 at 88.

IV ARGUMENT THAT DOYLE CJ'S DECISION WAS CORRECT

A *The Purposive Approach*

Doyle CJ takes a purposive approach to interpreting the Act, not a literal approach.[28] In the purposive approach, the words of a statute are read in their proper context by reference to the purpose of the statute. Dawson J in *Mills v Meeking* stated that;

> The literal rule of construction, whatever the qualifications with which it is expressed, must give way to a statutory injunction to prefer a construction which would promote the purpose of the Act to one which would not.[29]

The purposive approach was generally only applied when a literal approach gave rise to an ambiguity or an inconsistency, or where it gave rise to more than one meaning, in which cases, the purpose of the Act would be able to give context to the ambiguous words.[30]

The conflict between the competing common law approaches to interpretation was resolved by s 15AA of the *Act Interpretation Act 1901* (Cth) which was enacted in 1982 and followed by the states and territories soon after. Although s 15AA does not require ambiguity in a statutory provision before the purposive approach may be used, the South Australian equivalent may have a more limited operation.[31] It provides that:

> [W]here a provision of an Act is reasonably open to more than one construction, a construction that would promote the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) must be preferred to a construction that would not promote that purpose or object.

Two interpretations of this section are possible. First, is that a construction that would promote the purpose or object of the Act must be preferred only where the provision being interpreted is ambiguous on its face. Secondly, is that s 22(1), like the

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[28] *Di Maria*, above n 1, at 472.
[29] *Mills v Meeking* (1990) 169 CLR 214 at 235.
[30] Ibid.
[31] *Acts Interpretation Act 1915* (SA) s 22(1).

Commonwealth provision, requires the purpose or object of the Act to be taken into account, notwithstanding that the meaning of the words is clear when interpreted in the context of the rest of the Act. Thus, a court may take the purpose or object of an Act into account and use that to decide that a provision is reasonably open to more than one construction.[32] In *Birch v SA*, Cox J said that:

> Section 22 was meant to liberate the common law, not to restrict it. Secondly, the section does not state that the purpose or object of an Act may only be considered where the provision being construed is reasonably open to more than one construction. It simply says what is to be done when that is the case. It would be strange if the mischief rule could not be used where there is no apparent ambiguity but a literal interpretation would lead to inconsistency or injustice. Finally, s 22 says nothing about the way in which the purpose or object of an Act is to be discerned - in particular, whether the interpreter is confined to the Act itself. It merely provides that the interpreter is not restricted to an express statement on the matter in the Act. The section does not…qualify the established practice whereby a court applying the common law mischief rule could have regard to the legislative history of an Act or other relevant material.[33]

Either way, Doyle CJ was correct to take the purpose of the Act into account in interpreting s 32(5)B(b). The provision was ambiguous to start with, because

> Parliament could not have intended that there be a penalty for possession of a drug of dependence or prohibited substance…but no penalty for the more serious offences of possession for sale, manufacture and like offences,[34]

despite this being the result which a literal reading gives. Alternatively the provision did give rise to two possible interpretations: One which, read literally in isolation, would have meant that no penalty was available to be applied to the appellants, or the other, which read in the context of the rest of the Act, would have meant that such a penalty could be applied to them if the words were ready.

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[32] *Birch v SA* (1998) 71 SASR 12 per Cox J at 18-19, Lander J at 26-7, Bleby J at 40.
[33] Ibid, at 18.
[34] *Di Maria*, above n 1, at 471.

B *Doyle CJ's decision is not inconsistent with* R v Young

Spigelman CJ's decision in *R v Young* suggests that any implied meanings derived from a statute must be closely based on the text of the statute and that the courts have a very limited opportunity to remedy drafting oversights. Yet in the author's opinion Doyle CJ's decision in *Di Maria* does fall within Spigelman CJ's strict requirements and the two cases are compatible. Indeed Spigelman CJ cites *Di Maria* as authority for the proposition that '[w]here the words actually used are not reasonably capable of being construed in the manner contended for, they will not be so construed'.[35]

Spigelman CJ states that:

> In order to construe the words actually used by parliament, it is sometimes necessary to give them an effect as if they contained additional words. This is not, however, to introduce words into the Act. This involves the construction of the words actually used.[36]

This is precisely what Doyle CJ did in *Di Maria*. Where the purpose of the Act was to punish criminals for drug offences, s 32(5)B(b) could be read as if the words 'in any other case' were contained within the words of the text. As Doyle CJ states:

> The question which arises is whether the words of [the section] are reasonably open to the construction that they mean 'in any other case', or whether it is reasonably open to the court to read words into the provision… In my opinion it is.[37]

He goes on to acknowledge, in line with Spigelman CJ's opinion that there was a very limited opportunity for the courts to make such a determination, that '[i]t is only rare that a court is at liberty to do so'.[38]

Doyle CJ construed the provision as if the words 'in any other case' appeared in the text because that is the interpretation which best achieves the purpose or object of the Act. This is still consistent with Spigelman CJ, who says that:

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[35] *R v Young*, above n 17, at 687.
[36] Ibid, at 686.
[37] *Di Maria*, above n 1, at 473.
[38] Ibid.

> I acknowledge that…the court may not supply the words omitted by the legislature *per se*. Rather, what a court may do, is to construe the words actually used by the legislature *as if* certain words appeared in the statute. The words are 'included' to reflect in express, and therefore more readily observable, form the true construction of the words actually used.[39]

A literal construction would have produced a result which was capricious and irrational, and so Doyle CJ used Lord Diplock's threefold test to show that it is not in fact he who supplied new words into an Act which he divined to be the intent of the parliament. Instead he merely read the provision as if the words 'in any other case' were included so as to give effect to the purpose or object of the Act.

> I have not, to effect the legislative purpose, made provision for a situation to which Parliament did not direct its mind, relying upon purpose as identified by me to remedy the oversight. I have added words which, I consider, Parliament did intend to add to cover a situation to which it had adverted. Its error was a mere oversight, the omission of the intended words.[40]

C *The Purposive Approach in Penal Statutes*

The common law has in the past required that the courts not interpret a penal statute in a way which would extend criminal liability to a person, but more recently, and especially with the statutory requirements that the purposive approach be used in interpreting all statutes including penal ones, this approach has been superseded. The more common approach used nowadays is that courts must be neither too ready to convict nor to acquit. As stated by Isaacs J:

> Where Parliament has in the public interest thought fit…to restrain private action to a limited extent and penalise a contravention of its directions, …a Court should be specially careful, in the view of the consequences on both sides, to ascertain and enforce the actual commands of the legislature, not weakening them in favour of private persons to the

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[39] J J Spigelman, 'The poet's rich resource: Issues in statutory interpretation', above n 20, at 233.
[40] *Di Maria*, above n 1, at 474.

> detriment of the public welfare, nor enlarging them as against the individuals towards whom they are directed.[41]

The discovery of ambiguity in a penal statute should not necessarily mean that an interpretation favouring the defendant should be used. It is only where the purposive approach fails to provide an unambiguous interpretation of a provision that a penal statute should be interpreted in favour of the defendant. As Gibbs J has said:

> The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences… The rule is perhaps one of last resort.[42]

In *Di Maria* Doyle CJ was able to resolve the ambiguity by use of the purposive approach. As already shown in this Section, he was permitted to do so by the common law purposive approach, by s 22 of the *Acts Interpretation Act*, and he was not constrained by past common law requirements that penal statutes be narrowly interpreted. By taking the context of the Act into account, he was able to determine that although a purposive interpretation would extend criminal liability to the appellants which would not exist if the provision was interpreted literally,

> [g]iving the provision its literal interpretation will cause the legislative intent to fail, because it will leave unpunished…what is clearly regarded by Parliament as a serious offence – the manufacture of a drug of dependence and of a prohibited substance.[43]

The mere fact that a narrow construction of the provision would mean that the appellants were spared criminal liability would clearly not be sufficient reason to refuse to read the words ‘in any other case’ into the provision.

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[41] *Scott v Cawsey* (1907) 5 CLR 132 at 154-5.
[42] *Beckwith v R* (1976) 135 CLR 569 at 576.
[43] *Di Maria*, above n 1, at 474.

D *Judicial Lawmaking and Justice*

1 *Political questions*

It could be argued that by reading words into the Act, Doyle CJ's decision 'offend[s] a fundamental principle of our constitutional law',[44] because of the doctrine of separation of powers. But Lord Diplock reminds us that 'when we talk of the common law we are referring to law which is made by judges'.[45] This 'judge-made' law is inherently different from the law created by legislation because of the very idea that the common law is the unwritten law derived from the traditional law of England as developed by judicial precedence, interpretation, expansion and modification.[46] In the words of Beatson:

> Where the law is changed by a judicial decision, the traditional working assumption upon which the common law proceeds is the declaratory theory of decision-making: the judges declare law but do not make it and the law is regarded as having always been what the judicial decision stated it to be.[47]

This is how Doyle CJ comes to his conclusion about reading words into the Act.[48] First, he examines the Act itself and uses common law principles in order to determine its purpose or object. He then determines that it is open for him to use the purposive approach when interpreting s 32(5)B(b), applies *Cooper Brookes*,[49] satisfies Lord Diplock's threefold test, and finally concludes that the words 'in any other case' may be read into the Act. Doyle CJ has declared that the law in this case allows the words to be read into the Act, and nothing more. He has not breached the separation of powers doctrine.[50]

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[44] J J Spigelman, 'The poet's rich resource: Issues in statutory interpretation', above n 20, at 233.
[45] The Rt. Hon. Sir Kenneth Diplock, 'The Courts as Legislators' in B W Harvey (ed.) *The Lawyer and Justice* (1978), Stewart & Maxwell, London, pg 275.
[46] *Dietrich v R* (1992) 177 CLR 292 at 319-320.
[47] J Beatson, 'Has the Common Law a Future?' (1997) 56 Cambridge Law Journal 291 at 314.
[48] *Di Maria*, above n 1, at 471-475.
[49] See above n 15.
[50] For cases in which the courts have actually been politically influenced, to the extent that they do arguably amount to what in Australia would be a breach of the separation of powers doctrine, see, especially, the Supreme Court of the United States in *United Steel Workers v Weber* 443 US 193.

2 *Justice was done*

If the court had allowed the appeal in *Di Maria*, justice would not have been served. As Doyle CJ said: 'I am satisfied that Parliament intended to punish manufacture of the relevant substances in all cases'.[51] Judicial decisions should further the ends of justice, and thus the courts should strive to avoid adopting a statutory interpretation that leads to injustice.[52] The courts are always concerned to see that there is not a failure of justice,[53] while it is presumed that Parliament intended to act justly and reasonably.[54] It would not have been just, nor would it have been the intention of Parliament, that the existence of an unintended legislative loophole allowed people who had obviously committed an offence under the Act to escape liability for their unlawful actions. The law should serve the public interest,[55] and it would not have been in the public interest for this to have happened.

3 *Justice was* seen *to be done*

In Administrative Laws the apprehension of bias rule is based on the principle that not only should a tribunal be independent and impartial, but that it should also be seen to be those things in the public eye; 'so important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined'.[56] This extends to the judicial system as a whole: Justice should not only be done, but should be *seen* to be done. As far as the public were concerned, the failure of the appeal in *Di Maria* meant that criminals had been properly and duly punished with imprisonment.

Had the existence of the legal loophole created by a literal interpretation of the Act meant that the court allowed the appeal, the appellants would have been unpunished by the law.

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[51] *Di Maria*, above n 1, at 474.
[52] F Bennion, 'Statutory Interpretation' (1997, 3rd Ed.) Butterworths, pg 614.
[53] *R v Ward* (1848) 2 Car & Kir 759.
[54] *IRC v Hinchy* [1960] AC 748 at 768.
[55] *Fender v St John-Mildmay* [1938] AC 1 at 38.
[56] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 345.

The public, the media and the government may have reacted adversely.[57] But Parliament did not react adversely to the decision of *Di Maria*. At the time of this paper, over a decade after the decision was handed down, s 32(5)B(b)(ii) remains unamended from its 1996 form. If Parliament had considered the decision inappropriate or contrary to its intentions, it would be a simple process to amend the provision. That Parliament has not done so speaks strongly in favour of this paper's argument.

V CONCLUSIONS AND IMPLICATIONS

In an age where Parliaments are legislating with an ever increasing frequency, the need for statutory interpretation by judges also escalates. For the reasons set out in this paper, it can be seen that Doyle CJ's decision in *Di Maria* was consistent with the common law as it continues to evolve and as the literal approach dies away. In the words of Kirby J, writing extra-curially:

> As modern legislatures have become more representative, and much more active in lawmaking, the literalist approach to interpretation became more anomalous. The more recent advance of attempts to express legal texts in plain language…has made the rule of literalism even more inappropriate. Purposive construction has generally replaced it.[58]

In the opinion of the present author, the decision in *Di Maria* highlights the problems that exist when courts must interpret black-letter law; that is, legislation that is very specific, detailed, and proscriptive and cannot easily be interpreted with a purposive approach without extensive analysis. Green argues that the text of statutes should move away from black-letter law and instead be broad, conceptual, not too detailed but binding.[59] This would, he argues;

> give our courts room to move around and attack artifice, something black-letter law makes very difficult, but something the courts used to be familiar with… It would encourage our

[57] See especially, *R v Nemer* (2003) 87 SASR 168, which generated great public and media interest, causing the executive to criticise the judiciary. See Doyle CJ's comments at 171, paragraphs 15-20.

[58] Justice Michael Kirby, 'Towards a grand theory of interpretation: The case of statutes and contracts' (2003) 24 Statute Law Review 95 at 105.

[59] J M Green, ' "Fuzzy Law" – a better way to stop "snouts in the trough"?' (1991) 9 Company and securities law journal 144.

> courts to keep moving away from technicalities and towards substance. It would discourage loopholing, because without precise black-letter law, it would be harder. It would focus attention on what was right and wrong.[60]

Although Green is talking about corporations legislation, this concept succinctly illustrates the problems that arise in cases like *Di Maria*, where the words of a statute need to be read differently in order to give effect to the purpose or object of that statute. In *Di Maria* the black-letter provision of s 32(5)B(b)(ii) gave rise to a loophole through which the appellants sought to extricate themselves from criminal liability. Fortunately, Doyle CJ took a purposive approach to interpreting the provision and was able to read words into the statute in order to give effect to its purpose or object, in the same way that Green argues that a court is able to do when presented with 'fuzzy law' provisions.

Although *Di Maria* itself has not received a great amount of attention in the judgements of other courts, nevertheless the nature of the statutory interpretive approach used by Doyle CJ in reading words into the Act is one whose correct use will only become more widespread in the future.

Word Count: 4994

[60] Ibid, at 147.