COUNCIL OF AUSTRALASIAN TRIBUNALS

2018 ANNUAL CONFERENCE

STATUTORY INTERPRETATION REFRESHER

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1. Text, context, purpose, consequence

> "[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."
>
> *Project Blue Sky v ABA* (1998) 194 CLR 355 at [78]

2. General approach to statutory interpretation, *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 at [43]-[44]:

> "The objective of statutory construction was defined in *Project Blue Sky Inc v Australian Broadcasting Authority* as giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have. An example of a canon of construction directed to that objective and given in *Project Blue Sky* is 'the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms and immunities'. That is frequently called the principle of legality. The legislative intention there referred to is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.
>
> …
>
> The application of the rules will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction."

3. Parliamentary "intention"

   a. Be very clear on the limited (and technical) sense in which the concept is used in statutory interpretation.

> "Parliament manifests its intention by the use of language, and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the legislative will …
>
> This is not to say that the exercise is formal and literalistic. On the contrary, common law and statutory principles of construction frequently demand consideration of background,

purpose and object, surrounding circumstances, and other matters which may throw light on the meaning of unclear language. And there are presumptions which may be called in aid to resolve uncertainty."

Wilson v Anderson (2002) 213 CLR 401 at [8]-[9] per Gleeson CJ

"The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation … It is not a question of the actual intention of the legislators, but of the proper inference to be perceived upon a consideration of the document in the light of all its surrounding circumstances."

Sovar v Henry Lane (1967) 116 CLR 397 at 405 per Kitto J

4. Text

"[T]he task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of the legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

Alcan (NT) Alumina v Comm'r of Territory Revenue (2009) 239 CLR 27 at [47]

"'[T]he task of statutory construction must begin with a consideration of the [statutory] text itself.' So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself."

Federal Comm'r of Taxation v Consolidated Media Holdings (2012) 250 CLR 503 at [39]

a. The Court must strive to give meaning to every word of the statutory provision, and should avoid interpretations that leave clauses or sentences superfluous or insignificant: *Project Blue Sky v ABA* (1998) 194 CLR 355 at [71].

b. The function of the Court is construction, not legislation: *Newcastle City Council v GIO General* (1997) 191 CLR 85 at 109 per McHugh J.

c. Ordinary meaning, technical meaning and choosing between competing constructions

"Statutory language, like all language, is capable of an almost infinite gradation of 'register' – ie, it will be used at the semantic level appropriate to the subject matter and to the audience addressed (the man in the street, lawyers, merchants, etc). It is the duty of a court of construction to tune in to such register and so to interpret the statutory language as to give to it the primary meaning which is appropriate in that register (unless it is clear that some other meaning must be given in order to carry out the statutory purpose or to avoid injustice, anomaly, absurdity or contradiction). In other words, statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances."

Maunsell v Olins [1975] AC 373 at 391, approved in *Collector of Customers v Agfa-Gevaert* (1996) 186 CLR 389

"Trade meaning and ordinary meaning do not necessarily stand at opposite extremities of the interpretative register. Professor Glanville Williams has described the distinction between primary (ordinary) meaning and secondary (trade) meaning as a distinction between, on the one hand, the 'most obvious or central meaning' of words, and on the other hand, 'a meaning that can be coaxed out of the words by argument'. Similarly, Professor Driedger describes this distinction as being between "'the first blush" grammatical and ordinary sense … [and] the "less" grammatical and "less" ordinary meaning'."

Collector of Customers v Agfa-Gevaert (1996) 186 CLR 389

[In response to an argument that the Court should not depart from the "plain and ordinary meaning" of a particular expression, "adversely impact", the majority said that it] "is a protean expression capable of a number of meanings according to the context in which it appears. The technique of statutory construction is to choose from among the range of possible meanings the meaning which Parliament should be taken to have intended."

Independent Commission Against Corruption v Cunneen (2015) 256 CLR 1 at [57]

d. Some textual considerations:

   i. ordinary meaning (noting that this cannot be divorced from the context);

   ii. transitional provisions / form of the statutory text at the relevant time;

   iii. defined words;

   iv. effect of the *Acts Interpretation Act* (or similar legislation).

5. Context

   a. The context of a statutory provision is always relevant, not merely when an ambiguity or imprecision is discerned: *CIC Insurance v Bankstown Football Club* (1997) 187 CLR 384 at 408; see also *Project Blue Sky v ABA* (1998) 194 CLR 355 at [69].

   b. A statutory provision must be construed in the context of the statute as a whole: *Project Blue Sky v ABA* (1998) 194 CLR 355 at [69].

   c. Context is used "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": *CIC Insurance v Bankstown Football Club* (1997) 187 CLR 384 at 408.

   d. Extrinsic materials

      i. 2nd reading speeches, explanatory memoranda, ALRC reports, etc

      ii. Statutory authority to have regard to extrinsic materials to confirm the ordinary meaning or to determine the meaning if the provision is ambiguous, obscure, or would lead to a result that is manifestly absurd or is unreasonable:

         Acts Interpretation Act 1901 (Cth), section 15AB

         Interpretation Act 1987 (NSW), section 34

iii. It has always been permissible to have regard to extrinsic materials at common law to ascertain the mischief which a statute is intended to cure: *CIC Insurance v Bankstown Football Club* (1997) 187 CLR 384 at 408.

iv. Limits on the value of extrinsic materials in resolving any given question of interpretation:

> "The minister's words … cannot be substituted for the text of the law, particularly where the minister's intention, not expressed in the law, affects the liberty of the subject"
>
> *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 at [61]; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518
>
> "In many, I suspect most, cases references to Parliamentary materials will not throw any light on the matter. But in a few cases it may emerge that the very question was considered by Parliament in passing the legislation."
>
> *Pepper v Hart* [1993] AC 593 at 634-635 per Lord Browne-Wilkinson
>
> "It is one thing to say that extrinsic materials of some kind may properly be used as an aid to interpretation; it is another thing to say that a particular piece of information is useful in the resolution of a particular problem. This is a context in which the risk of confusing legislative intent with the understanding of an individual is to be kept well in mind."
>
> AM Gleeson, "The Meaning of Legislation", speech delivered to Victoria Law Foundation 31 July 2008

6. Purpose

a. Statutory mandate to consider the purpose of the statute:

> *Acts Interpretation Act* 1901 (Cth), section 15AA
>
> *Interpretation Act* 1987 (NSW), section 33

b. A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals: *Project Blue Sky v ABA* (1998) 194 CLR 355 at [70].

c. Where the purpose of a legislative provision is clear, a court may be justified in giving the provision a "strained construction", provided the construction is neither unreasonable nor unnatural: *Newcastle City Council v GIO General* (1997) 191 CLR 85 at 113 per McHugh J.

d. Purpose is used to construe the words chosen by Parliament, not to replace them:

> "When the express words of a legislative provision are reasonably capable of only one construction and neither the purpose of the provision nor any other provision in the legislation throws doubt on that construction, a court cannot ignore it and substitute a different construction because it furthers the object of the legislation."
>
> *Newcastle City Council v GIO General* (1997) 191 CLR 85 at 109 per McHugh J

> "A … danger that must be avoided in identifying a statute's purpose is the making of some a priori assumption about its purpose. The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions. As Spigelman CJ, writing extra-curially, correctly said: 'Real issues of judicial legitimacy can be raised by judges determining the purpose or purposes of Parliamentary legislation. *It is all too easy for the identification of purpose to be driven by what the particular judge regards as the desirable result in a particular case*.' … And as the plurality said in *Australian Education Union v Department of Education and Children's Services* [(2012) 248 CLR 1 at [28]]: 'In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose.'"
>
> *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [26]

e. Limits on the rule that a construction must promote the perceived purpose of the statute:

> "That general rule of interpretation … may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation"
>
> *Carr v Western Australia* (2007) 232 CLR 138 at [5] per Gleeson CJ
>
> "It is only if some a priori assumption is made about the intended reach of the provision that considering its purpose casts light on the question. To reason in that way begs the question. Rather, it is necessary to consider the words of the provision. It is there that the intended reach of the legislation is to be discerned."
>
> *Minister for Employment v Gribbles Radiology* (2005) 222 CLR 194 at [21]. (See also *Palgo Holdings v Gowans* (2005) 221 CLR 249 at [28].)

f. Where a statute represents a legislative compromise between competing interests:

> "To fix upon one 'purpose' and then bend the terms of the definition to that end risks 'picking a winner' where the legislation has stayed its hand from doing so. In the selection of a sole or dominant 'purpose', there is a risk of unintended consequences, particularly where, as here, the substratum of the legislation is constantly changing technology."
>
> *Stevens v Kabushiki Kaisha Sony* (2005) 224 CLR 193 at [34]

7. Consequence

a. The process of construction must yield for all purposes a single interpretation.

> "The legislature cannot speak with a forked tongue."
>
> *Waugh v Kippen* (1986) 160 CLR 156 at 165.

b. Consider the consequences of a proposed interpretation in practice:

> "Inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which … is reasonably open and more closely conforms to the legislative intent."

CIC Insurance v Bankstown Football Club (1997) 187 CLR 384 at 408

c. Avoid constructions that lead to impractical outcomes: see, eg, *Project Blue Sky v ABA* (1998) 194 CLR 355 at [97].

d. Note the substantive presumptions in statutory construction (such as the presumptions against extraterritoriality, retrospectivity and the abrogation of fundamental rights).

e. Bear in mind the "*Project Blue Sky* inquiry": having discerned non-compliance with a statute, what are the consequences of non-compliance? That is, itself, a question of statutory construction and if the words of the statute do not make express provision, the question must be answered "by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach": *Project Blue Sky v ABA* (1998) 194 CLR 355 at [91]. See also, for example, *PM v The Queen* (2007) 232 CLR 270, especially at [31]ff.

8. Reading words into legislation

a. Where the purpose requires it, it may be appropriate to "read words into" the legislation, but any modified meaning must be consistent with the language in fact used by the legislature. The Court will more readily do so in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. The Court will not do so to "fill gaps disclosed in legislation" or to make an insertion which is "too big, or too much at variance with the language in fact used by the legislature". There are no rigid rules – it involves matters of degree to judge whether reading words into the legislation would be too far-reaching: see *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [37]-[40].

b. There will often be four important considerations, although the Court at [39] stressed they cannot be regarded as rigid rules:

i. It must be possible to identify precisely what the purpose of the legislation is.

ii. It must be apparent that the drafter and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that needed to be dealt with if the purpose of the Act was to be achieved.

iii. It must be possible to state with certainty what were the additional words that would have been inserted by the drafter and approved by Parliament.

iv. The proposed words must be consistent with the wording otherwise adopted in the legislation.

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SAMPLE INTERPRETATION PROBLEMS

Sample situation 1

Sections 58 and 59 of the *Insurance Contracts Act* 1984 provide:

"58(2) Not later than 14 days before the day on which the renewable insurance cover provided under a contract of general insurance (in this section called the **original contract**) expires, the insurer shall give to the insured or a person acting as agent for the insured a notice in writing informing the person to whom the notice is given of the day on which and the time at which the cover will expire and whether the insurer is prepared to negotiate to renew and extend the cover.

(3) Where:

(a) an insurer has failed to comply with subsection (2); and

(b) before the original contract expired, the insured had not obtained from some other insurer insurance cover to replace that provided by the original contract;

then, by force of this section, there exists between the parties to the original contract a contract of insurance that provides insurance cover as provided by the original contract, except that the cover provided by the original contract, except that the cover is in respect of the period that:

(c) commences immediately after the insurance cover provided by the original contract expires; and

(d) expires, unless the contract is sooner cancelled, at:

(i) the expiration of a period equal to the period during which the insurance cover was provided by the original contract; or

(ii) the time when the insured obtains from the original insurer or some other insurer insurance cover to replace that provided by the original contact;

whichever is the earlier.

59(1) An insurer who wishes to exercise a right to cancel a contract of insurance shall give notice in writing of the proposed cancellation to the insured.

(2) The notice has effect to cancel the contract at whichever is the earlier of the following times:

(a) the time when another contract of insurance between the insured and the insurer or some other insurer, being a contract that is intended by the insured to replace the first-mentioned contract, is entered into;

(b) whichever is the latest of the following times:

(i) 4 o'clock in the afternoon of the third business day … after the day on which the notice was given to the insured;

(ii) if a time is specified for the purpose in the contract – that time; and

(iii) if a time is specified in the notice – that time."

Building insurance policy issued on 1 July 2009, due to expire on 30 June 2010.

Building damaged in a fire on 1 January 2010. Insurer alleged fraud and purported to cancel the policy. (Court found, eventually, that there was no fraud and that the purported cancellation had no effect.)

Insurer, regarding the policy as cancelled, did not give any notice before 30 June 2010, as contemplated by section 58.

Building damaged by a second fire on 1 August 2010.

The Act relevantly adopted and enacted law reform proposed by the ALRC. The ALRC Report stated that section 58 had two purposes – first to ensure that the insured knows about any forthcoming expiry of a policy, and second to give any substitute insurer information about the reason why the outgoing insurer declined to renew the policy.

Was there a statutory policy on foot, by reason of section 58, at the time of the second fire?

(Facts taken from *CIC Insurance v Bankstown Football Club* (1997) 187 CLR 384.)

Sample situation 2

Section 33 of the *Racing Administration Act* 1998 (NSW) provides:

> "A person must not, whether in New South Wales or elsewhere, publish a NSW race field unless the person:
>
> (a) is authorised to do so by a race field publication approval and complies with the conditions (if any) to which the approval is subject, or
>
> (b) is authorised to do so by or under the regulation.
>
> Maximum penalty:
>
> (a) in the case of a corporation – 500 penalty units, and
>
> (b) in any other case:
>
> (i) for the first offence – 50 penalty units or imprisonment for 12 months (or both);
>
> (ii) for a second or subsequent offence – 100 penalty units or imprisonment for 2 years (or both)."

Section 33A provided for relevant racing control authorities to grant approvals to publish race fields and to impose conditions, including a condition for the payment of fees.

Section 27 included the following definitions:

> "**NSW race field** means information that identifies, or is capable of identifying, the names or numbers of horses or dogs:
>
> (a) that have been nominated for, or that will otherwise take part in, an intended race to be held at any race meeting on a licensed racecourse in New South Wales, or
>
> (b) that have been scratched or withdrawn from an intended race to be held at any race meeting on a licensed race course in New South Wales.
>
> **publish** means disseminate, exhibit, provide or communicate by oral, visual, written, electronic or other means (for example, by way of newspaper, radio, television or through the use of the Internet, subscription TV or other on-line communications system), and includes cause to be published."

The second reading speech for the amending Act that introduced sections 27 and 33 included the following statements (delivered in similar terms in both Houses of Parliament):

> "The main purpose of the race fields proposal is to address the issue of wagering operators 'free-riding' on New South Wales racing events. Some operators do not contribute to the cost of staging racing events but they use them as a platform for their gambling services from which they profit.
>
> The object of this bill is consistent with the Government's racing policy, which is to encourage the ongoing viability and future economic development of the racing industry and ensure that lawful gambling is conducted with integrity.
>
> …
>
> The obligation to obtain prior approval to publish race fields is directed principally at wagering operators. These are persons who profit from taking wagers on racing events.

> A wagering operator may publish a race field on their betting board when fielding at a race course, while taking bets over the telephone or by way of the operator's Internet site – or some similar form of electronic communication.
>
> …
>
> For obvious reasons, these provisions do not capture circumstances where race fields are published in an exclusively social setting such as in an office sweep or in an authorised manner such as in a newspaper or a magazine.
>
> The bill provides that such circumstances can be exempted by way of regulations. There is no intention to change the status quo except for wagering operators that profit from publishing race fields. From now on they will have to pay a fair price to the owners of that information.
>
> …
>
> It is fair and equitable for wagering operators that profit from using racing as a platform for their gambling services to contribute to the cost of staging a race meeting.
>
> To not contribute is what economists call 'free-riding' – that is, the use of intellectual property to make a profit without paying the owner a fair price.
>
> …
>
> The race fields provisions are an appropriate and lawful way of ensuring that the racing industry secures a reward for their intellectual property and that those persons that are 'free-riding' on the industry pay their way."

A bookmaker wishes to take bets over the phone without obtaining a race fields approval. In the course of taking such bets, the customer will call and say, "I want to put $5 on horse number 1 in today's race." Bookmaker will respond either by saying:

- "Very well, I've recorded your bet for horse number 1 today," or
- "Very well, I've recorded your bet for Pharlap today," or
- "I'm sorry, horse number 1 has been scratched from the race and you can't place a bet on him."

Will the bookmaker contravene section 33 of the Act?

(Facts taken from *Tom & Bill Waterhouse v Racing New South Wales* (2008) 72 NSWLR 577.)

Sample situation 3

Section 51 of the *Liquor Act* 2007 (NSW) relevantly provides:

"(1) This section applies to the following authorisations granted by the Authority under this Act:

(a) an extended trading authorisation,

(b) a drink on-premises authorisation,

(c) any other authorisation that may be granted by the Authority under Part 3 (other than a licence),

(d) a minors area authorisation,

(e) a minors functions authorisation.

(2) An application for an authorisation to which this section applies must:

(a) be in the form and manner approved by the Authority (or, in the case of an application for an extended trading authorisation for a small bar, by the Secretary), and

(b) be accompanied by the fee prescribed by the regulations and such information and particulars as may be prescribed by the regulations, and

(c) if required by the regulations to be advertised—be advertised in accordance with the regulations, and

(d) comply with such other requirements as may be approved by the Authority (or, in the case of an application for an extended trading authorisation for a small bar, by the Secretary) or prescribed by the regulations.

(3) In determining an application for an authorisation, the Authority has the same powers in relation to the application as the Authority has in relation to an application for a licence. The Authority may determine the application whether or not the Secretary has provided a report in relation to the application.

…

(5) Any person may, subject to and in accordance with the regulations, make a submission to the Authority in relation to an application for an authorisation.

(6) If any such submission is made to the Authority, the Authority is to take the submission into consideration before deciding whether or not to grant the authorisation."

Section 3 provides for express objects of the Act:

"(1) The objects of this Act are as follows:

(a) to regulate and control the sale, supply and consumption of liquor in a way that is consistent with the expectations, needs and aspirations of the community,

(b) to facilitate the balanced development, in the public interest, of the liquor industry, through a flexible and practical regulatory system with minimal formality and technicality,

(c) to contribute to the responsible development of related industries such as the live music, entertainment, tourism and hospitality industries.

(2) In order to secure the objects of this Act, each person who exercises functions under this Act (including a licensee) is required to have due regard to the following:

(a) the need to minimise harm associated with misuse and abuse of liquor (including harm arising from violence and other anti-social behaviour),

(b) the need to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor,

(c) the need to ensure that the sale, supply and consumption of liquor contributes to, and does not detract from, the amenity of community life."

Clause 9 of the Liquor Regulation 2008 provides:

"(1) If an application is made to the Authority, a notice relating to the application that is in the form approved by the Authority must, within 2 working days of making the application, be fixed by the applicant to the premises to which the application relates.

(2) The notice must be fixed to the premises until such time as the application is determined by the Authority.

(3) If premises have not been erected, the requirement to fix a notice relating to an application may be satisfied by fixing the notice to a notice board erected on the land on which it is proposed to erect the premises.

(4) A notice is not fixed to premises or land in accordance with this clause unless:

(a) it is fixed to the premises or land in such a position that it is legible to members of the public passing the premises or land, and

(b) if the Authority has directed that it also be fixed in another specified position—it is also fixed in that other position.

(5) This clause applies in relation to a licence-related authorisation only if it is:

(a) an extended trading authorisation, or

(b) a drink on-premises authorisation, or

(c) an authorisation under section 24 (3) of the Act.

(6) This clause does not apply in relation to an application for a limited licence."

A licence holder makes an application for an extended trading authorisation. The Authority determines the application adversely to the licence holder, but denies procedural fairness in its decision. Two months later, the original decision is set aside and the matter remitted to the Authority for further consideration.

Three months after the remitter, the Authority learns that the applicant did not have the notice affixed to its land as required by regulation 9. It turns out that the notice was displayed on the land during the currency of the first notice, but the applicant took it down after the first decision was determined adversely to it. The applicant did not put the notice back up when the first decision had been set asite.

Does the Authority have power to grant the extended trading authorisation on the existing application or is it necessary for the applicant to make a fresh application?

(Facts taken from *Coote v State of NSW* [2016] NSWSC 1492.)