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Statutes as formal literature: choice and constraints in their reading

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When we read literature such as a play, novel or poem, the meaning of the text is inherently fluid. Take as an extreme example the poem by Felicia Hemans about Casabianca, the 13-year-old son of the Admiral of the French fleet, *L'Orient.* During the battle of the Nile Casabianca remained at his post even after the French flagship caught fire. Casabianca died because he obeyed his father's instructions to stay at his station until given permission to leave.

After its original publication in 1826 Heman's poem which begins "The boy stood on the burning deck whence all, but he had fled" was a staple of English schoolboy literature for well over a century.

A creature of heroic blood,
A proud though child-like form.
The flames rolled on—he would not go
Without his Father's word;
That Father, faint in death below,
His voice no longer heard.

Today we lack understanding and empathy for a culture in which fathers were expected to be uncritically obeyed.

The want of common sense in young Casabianca being burnt alive while waiting for his father's word to release him from his duty confounds us. We are likely to conclude that rather than his death being heroic, the boy's death was tragically pointless.

Of course, much that was acclaimed as great art does not speak to us as it did in its time. Casabianca, to the extent it is remembered at all, has become a subject of parody.

But awareness of the sentiments of the different very age in which the poem was first published allows a modern a reader to have some emotional connection to what the young boy understood his duty demanded of him. Likewise, we still

recognise and honour the self-sacrifice of the Anzacs despite knowing that their commanders consigned them to die without any realistic chance of success.

What reading of Casabianca, ironic or profound is correct?

There can be no right answer to such questions. There is no correct reading of Shakespeare's Hamlet.

However the context of Casabianca: including recognising when it was written and discovering the events it was written about will, I suggest, lead a reader interrogating that poem's purpose to conclude that it was not written as a lament of the pointlessness of the boy's obedience to his fatherly orders (although through modern eyes it may read as such) but rather as a tribute to his noble courage in not abandoning his duty even when facing certain death. Knowing that context confirms that there is no reason for its words to be read otherwise than in their ordinary and natural meaning.

You probably are asking: what has this to do with statutory interpretation?

Just as context can reveal much about why a poem was written the context of a statute can either confirm that the words that make up its text have been employed with their ordinary grammatical meanings or suggest otherwise.

However, as with any author the actual intent of Parliament when enacting a statute does not control how the words of the text it has produced will later be read.

Any attempt to isolate with clarity a single intention of the men and women who voted in Parliament is inherently futile.

No doubt there was someone—perhaps a Minister—who came up with the idea that motivated the legislation but then his or her idea will have been given over to discussions with colleagues where the underlying concept may have been modified. Then the task of writing the law will have been handed over to parliamentary counsel. The drafters will strive to give expression to what they understand to be the sponsors' purpose, but they may fail to grasp that purpose or may express it in terms which achieve that object. Then the Bill that has been drafted will be

introduced. It will have to work its way through the parliamentary process before it is enacted. The Bill may or may not be the subject of amendments.

The members of the Parliament who then vote for that law may do so with quite different understandings, or no understanding, of its consequences.

That matters not at all.

A statute in the form it is finally enacted becomes a public document. Citizens and officials are bound by the enacted law—not by what a Minister or members of Parliament may have had in mind when proposing its passage or voting for it.

A statute's meaning is revealed to the world in the words it is expressed.

Thus, when it is said, subject to the Constitution, that the object of statutory interpretation is to give effect to the intention of the Parliament, that is useful shorthand but it necessarily involves a well-meaning fiction. As a tribunal member you can never interrogate the collective Parliamentary mind.

So, the first thing you should do is simply read any statute as you would any other piece of writing by focusing not only on words in dispute but the whole statute as is relevant to provide context to the subject matter.

If a statute is short, you should read it from beginning to end. That is the ideal. Unfortunately, a great number of modern statutes are so long that the ideal is improbable of achievement. I have yet to find anyone who can honestly claim to always have read the tax acts from cover to cover before grappling with the specific words of a section. Nonetheless your first duty even with long and complex legislation is to read all the parts of the statute that are closely associated with the specific p. vision you are concerned with.

In undertaking that task you should make sure you haven't missed any definitions that the statute has specifically provided for. Sometimes there will be general definitions which apply to the whole of an act: on other occasions there may be definitions which apply specifically to only one section or one part.

Definitions are part of the statute. They control the meaning of the words and phrases they refer to. You will need to read those words and phrases with that sense.

The modern penchant for multiple definitions and complex drafting, employed with the object of achieving precision of meaning, regrettably has not eliminated, and perhaps has increased, the challenges of statutory interpretation.

Once you have read the statute with care you then should check if there is any binding judicial authority on the specific provision you have under consideration.

In literary criticism every reader comes anew to a text. There is no canonically 'correct' reading of a novel. Some analogous plasticity exists with a statute but only to a point in time.

In Australia's system of government, the judicial arm has authority and power to declare a statute's true effect.

Once a court of binding authority has made a decision the ratio of which has crystallised a particular reading of the statutory text your work as a tribunal member ends. You are entitled to take the same approach to any 'considered dicta' (carefully stated but non ratio reasoning) expressed by a majority of the High Court of Australia.

As a member of an administrative body, you must apply any binding authority even if you think the reasoning misguided or the result unfair. You can explain your doubts but ultimately you must apply the statute as it has been found to operate by the judicial arm of government.

However, reading a statute before you turn to research whether there is any judicial authority on the words in which it is expressed is the correct order to proceed. Unless you do that, you can easily miss something that distinguishes what a court may have said on the subject and that which you have to determine.

That is also important because it is only the ratio of a case that binds you. Ratio is the essential reasoning of the Court in a case which turned on the meaning of the same the words in the same statute in a context analogous to that which is before you.

Judicial attention given to the exploration of the meaning of a statute made in passing or in circumstances in which the reasoning does not affect the outcome of the case is not binding ratio and does not compel you to reach the same conclusion.

Of course, you may, and often will, find such non-binding judicial reasoning highly persuasive. Equally you may find the reasoning of other decision makers in your own or other tribunals worth following. I am not suggesting you should be overly precious about the distinction. There is a public interest in consistency. If other tribunals have taken a consistent view of the meaning of a provision you are entitled to be cautious about reaching a different view.

But before you adopt anyone else's non-binding reasoning it is always worthwhile to remind yourself that you have been appointed to apply an independent mind to the matters that come before you. If you have a real doubt about what any other decision maker has concluded about the meaning or application of a statutory provision when that reasoning is not strictly binding on you, you are entitled to explore whether you are persuaded of its correctness.

That will require you to go back to the basic principles of statutory interpretation. In ***Project Blue Sky*** *Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355, McHugh, Gummow, Kirby and Hayne JJ explained (at [78])

> …the duty of a court [and, I interpose, equally a tribunal] 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 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 of the canons of construction may require the words of a legislative provision to be read in a way that does not correspond to the literal or grammatical meaning.

In *Lacey v Attorney-General (Qld)* [2011] HCA10; 242 CLR 573 French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ gave attention to what the plurality in *Project Blue Sky* meant by that reasoning as follows:

> 43. …the legislative intention there referred to is not an objective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as 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…
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> 44. 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 that exists outside of the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.

The reference by their Honours to the rules of construction highlight a significant difference in the way we read a statute from the way we can read other literature. There are external guidelines (like a background glossary) that we have to take into account when reading a statute.

When you read a statute, you are entitled to assume, at least as a starting point, that those who enacted it were aware of, and have applied, those external guidelines.

All Australian Parliaments have enacted acts interpretation acts. Those acts have some broad similarities. All provide some basic legislative grammar to assist in reading a statute: thus, all provide that unless the contrary is indicated the singular includes the plural. All define commonly used terms such as what is meant by ‘a day’.

Most also provide guidance akin to the common law ‘mischief rule’ to the effect that a reading which gives effect to the legislative purpose is to be preferred over one which does not. Further identify the extrinsic materials (such as explanatory memorandums etc.) you are entitled to rely on to ascertain a statute’s purpose.

The various state and federal interpretation acts are fairly short. They are important to become familiar with before you plunge into the task of statutory interpretation.

As to the common law 'rules' I commend you Dennis Pearce's magisterial book *Statutory Interpretation in Australia* now in its 9th edition. I have found it an invaluable aid.

However, in some difficult instances even recourse to the statutory and common law rules may not provide you with a persuasive answer to how you should read the text of a particular statute. The rules provided for in the various acts interpretation acts are expressed as yielding to any contrary intention revealed in a specific statute. Similarly the common law 'rules' are not iron-cast statements of law: they too must yield to any contrary explicit or implicit contrary intention that a close reading of the statute in its statutory context reveals.

To explain what is meant by the context of a provision as can assist in reading a statute I can do no better to refer you to what McHugh J said in in *Stevens v Kabushiki Kaisha Sony Computer Entertainment and Others (*2005) 224 CLR 193 at [124]

> …For purposes of statutory construction context includes the state of the law when the statute was enacted, its known or supposed defects at that time and the history of the relevant branch of the law, including the legislative history of the statute itself…

The nature of language as a tool of communication and its limits defies mechanical application of rules.

Nothing is more clearly expressed in the Australian Constitution than that '*trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free'*. Nonetheless our High Court has identified that the words 'absolutely free' still permit the reasonable regulation of such intercourse for reasons of quarantine and public safety.

As Justice Felix Frankfurter of the United States Supreme Court noted in '*Some Reflections on the Reading of Statutes'* (1947) 47 Columbia Law Review 527, 333

> The difficulty is that the legislative ideas which laws embody are both explicit and immanent. And so, the bottom problem is what is below the surface of the words and yet fairly part of them?

Recently in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at [14] Keifel CJ, Nettle and Gordon JJ made a similar point this way:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time regard is had to its context and purpose. Context should be regarded at the first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

That passage gives as good a summary of the role as a tribunal member when he or she is faced with a question of statutory interpretation as I have been able to identify.

The legal meaning of a statute resides in its text and structure.

You have to read the text carefully giving the words in which the provision has been expressed by the Parliament their ordinary and natural meaning. However, from the outset you have to remain mindful that the statutory history and any express statements of the statute's objectives it or as may be found in extrinsic materials identifying the mischief to which the provision is directed to remedying may require you to read the enacted words with a meaning that differs from their ordinary grammatical meaning.

But unless another potential meaning is plausibly revealed by reason of legislative history and context then simply giving effect to the ordinary and natural meaning of the words the Parliament has used is the beginning and the end of your task.

That most often will be the case. But not always.

Despite the effort that parliamentary drafters put into trying to express concepts as straight forwardly as possible there are endless examples of inherent imprecision in statutory language remaining to be resolved in application.

A common arena of dispute arises whenever the Parliament uses words of extension or connection.

Take as an example the problem Senior Member Walsh and I grappled with as members of the Administrative Appeals Tribunal in *ZZGN and Commissioner of Taxation* [2013] AATA 351. What was in issue in that review were expenses the taxpayer was claiming fell within the meaning of expenditure 'involved in or in connection with' its exploration for petroleum.

The taxpayer submitted the phrase 'in connection with exploration' were words of broad connection. The required connection extended to all expenses the taxpayer had incurred before it had determined that it was justified and prudent for it to make a final investment decision.

By contrast the Commissioner submitted that for expenditure to fall within the statutory language there to be a 'substantial relation' between the expenditure and the act of exploration. The required 'connection' was one which had benefitted, assisted, advantaged or facilitated the process of exploration. That more limited reading of the statute excluded some significant expenses the taxpayer had incurred before it made its final investment decision.

The reasoning the Tribunal undertook when weighing the parties' respective contentions appears at [367]-[400].

The correctness of the conclusions the Tribunal came to in ZZGN is immaterial. I refer to that review only to provide an illustrative example of the kind of reasoning that is called for if the words of a statute are inherently ambiguous and there is no prior binding authority. I hope you may find the example useful.

Such problems are far from rare. The English language is never transfixingly precise in its meaning when words of connection or degree have been used: as often they must be. As Davies J observed in *Hadfield v Health Insurance Commission* (1987) 15 FCR 487 at 491;

> Expressions such as 'relating to', 'in relation to', in connection with' and 'in respect of' are commonly found in legislation but invariably raise problems of statutory interpretation. They are terms which fluctuate in operation from statute to statute…The terms may have very wide operation but they do not usually carry the widest possible ambit, for they are subject to the context in which they are used, to the words with which they are associated and to the object or purpose of the statutory provision in which they appear.

Whatever a court or another tribunal may have said about the same or similar words in one statutory context does not control the meaning they might convey in another. It is an error to suppose they can.

Unless there is a binding judicial decision on the specific words as they appear in the identical statutory context you will need to grapple with how such an inherently plastic expression is to be understood having regard to the unique statutory context and history in which they have been specifically enacted.

I return to the notion of statutory text as literature.

The key commonality with all other literature is that while legal text is a particular form of specialised formal writing there is no short cut that permits you to avoid the critical first step of reading the text closely.

Sometimes the text of a statute will only reveal its true legal meaning, or perhaps better expressed, the meaning that the legislature is taken to have intended it to have, once you have carefully read the statute with an awareness of the rules of statutory and common law and the legislative history, extrinsic materials and the history of the provision.

If this paper has led you to despair at the challenge of the task of statutory construction let me now offer some practical consolation. More often than not a

careful reading of a statute will leave you with no real doubt as to the meaning of the particular text you have to construe. A close reading coupled with an appreciation of the purpose of the statute as can be revealed by its history will often allow you quickly to dismiss any stretched and hopeful interpretation a party seeks to rely on.

Moreover, many, if not most, frequently referred to statutes as are the bread and butter of tribunals will have been the subject of repeated judicial attention. You often will find binding authority which has resolved any potential ambiguity of the relevant text.

Even if there is no strictly binding authority you are not unlikely to come across some entirely persuasive reasoning expressed by a court or another tribunal that you can refer to and adopt if you have no real doubt about its correctness.

It probably will be rare that complex analysis from first principles will be called for on your part—but if you encounter such an instance all that can be expected of you is that you do your best to explain, having regard to the guidance the High Court has given, why you have reached the conclusion you come to.

I encourage you do not stress about the possibility of your conclusion being challenged in judicial review.

Assuming you have read the statute carefully and the answer still was not self-evident then that another view of the meaning the text might be plausible will have been equally self-evident to you.

Only the High Court can be 100% confident that it will have the final word on the true legal meaning of any difficult, disputed, text of a statute. Your role as a tribunal member requires you to make decisions with limited time and resources at your disposal.

Just explain your thinking in your reasons. Then cut yourself some slack. You will have done your job.

Get on with the next case in your list.

There will be nothing to be concerned about if a different outcome is reached on judicial review. If the task of statutory interpretation was always easy and without challenges, there would not be so much case law and so much legal literature about it.

For the High Court explained that the task of statutory construction is to give to the words of a statutory provision ‘the meaning which the legislature ‘is taken to have intended them to have’.